PAUL H. ACHITOFF (#5279)
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: achitoff@earthjustice.org

GEORGE A. KIMBRELL (*Pro Hac Vice pending*)
SYLVIA SHIH-YAU WU (*Pro Hac Vice pending*)
CENTER FOR FOOD SAFETY
303 Sacramento St., 2nd Floor
San Francisco, California 94111
T: (415) 826-2770 / F: (415) 826-0507
Emails: gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org

Counsel for Proposed Intervenor-Defendants

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

ROBERT ITO FARM, INC., *et al.*, *Plaintiffs*, v. COUNTY OF MAUI, *Defendant*, and THE MOMS ON A MISSION (MOM) HUI, MOLOKA'I MAHI'AI, GERRY ROSS, and CENTER FOR FOOD SAFETY, *Proposed Intervenor-Defendants*.	Case No.: 1:14-cv-00511-BMK MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE BY THE MOMS ON A MISSION (MOM) HUI, MOLOKA'I MAHI'AI, GERRY ROSS, and CENTER FOR FOOD SAFETY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

FEDERAL PUBLISHED CASES

PAGE(S)

FEDERAL PUBLISHED CASES, CONT'D

UNPUBLISHED FEDERAL CASES

PAGE(S)

UNPUBLISHED FEDERAL PUBLISHED CASES, CONT'D

FEDERAL RULES OF CIVIL PROCEDURE

INTERNET CITATIONS

PAGE(S)

INTERNET CITATIONS, CONT'D

OTHER AUTHORITIES

INTRODUCTION AND PROCEDURAL HISTORY

Like the residents of Kaua‘i County and Hawai‘i County before them, the people of Maui County decided they would no longer sit idly by as the State of Hawai'i becomes a "poisoned paradise" of intensive genetically engineered crop production and its intertwined pesticide spraying. Alarmed by the lack of adequate federal or state oversight of these activities, and joining with its sister islands that also sought to protect their families and local communities, on November 4, 2014, Maui County voters passed into law a voter initiative, entitled "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (the GE Initiative or Initiative), the first voter initiative ever passed in the County. *See* Compl. ¶ 1, ECF No. 1. The GE Initiative sought to preserve and protect public health and environmental resources for all current and future generations of Maui residents, by imposing a temporary moratorium on future cultivation and testing of GE organisms within the County until the County completes an Environmental and Public Health Impact Study to assess the numerous environmental and public health impacts of pesticide use and genetically engineered crop cultivation. *See* Compl., Ex. A, §§ 5-7, ECF No. 1-1.

The passage of the GE Initiative was no small victory. The agrichemical industry, which cultivates GE crops on thousands of acres in Maui County, *see* Compl. ¶¶ 7-8, and which are Plaintiffs in the present suit (and also plaintiffs or

members of plaintiffs in lawsuits challenging county ordinances regulating pesticide use and genetically engineered crop production on Kaua‘i and Hawai‘i), reportedly spent nearly $8 million dollars opposing the GE Initiative, making the Initiative the most expensive municipal election in the history of United States.[1] In addition to the deep pockets of the agrichemical industry, the GE Initiative also faced staunch opposition from the Mayor and the majority of the members of the Maui County Council. Despite his role as the County's chief executive, Mayor Alan Arakawa, who has been re-elected to continue in office next term, publicly opposed the GE Initiative, repeatedly questioning its substance and feasibility. He publicly sang the opposition's tune that "there is no evidence of anything wrong with using [genetically engineered] crops,"[2] and warned voters of unsubstantiated financial impacts on the local economy.[3] In the months leading up to the November 4, 2014 election, Mayor Arakawa repeatedly emphasized his—and the County's—unwillingness to implement and enforce the moratorium and other provisions of the GE Initiative, insisting that the GE Initiative's provisions are, in

---

[1] Eileen Chao, *GMOs or No GMOs?*, The Maui News (Nov. 2, 2014), http://www.mauinews.com/page/content.detail/id/591588/GMOs-or-no-GMOs-.html.

[2] Eileen Chao, *Arakawa Says He Believes GMOs Not Harmful*, The Maui News (July 26, 2014), http://www.mauinews.com/page/content.detail/id/587924/Arakawa-says-he-believes-GMOs-not-harmful.html?nav=10.

[3] *Id.*

his view, "almost impossible and impractical to be able to administer."[4] Mayor Arakawa echoed the scare tactics used by the opposition, misleading voters to reject the GE Initiative with exaggerated statements. He told the voters that, in his view, the moratorium would "probably bankrupt Moloka'i,"[5] and would "require the County to become very invasive."[6] The majority of the elected Council Members stated similar opposition or ambivalence towards the GE Initiative.[7]

On the other hand, the GE Initiative received support from a wide range of citizens, businesses, and public interest groups. Support for the GE Initiative drew from a variety of voter bases, each fueled by different concerns they have about the continued operation of genetically engineered crop cultivation and testing—and their accompanying pesticide use—in Maui County. Many of the GE Initiative's supporters were local, organic farmers who are dedicated to promoting local agriculture using organic and sustainable methods, and whose livelihoods are

---

[4] *Id.*

[5] Catherine Cluett, *GE Crop Debate Shakes Molokai*, The Molokai Dispatch (Oct. 22, 2014), http://themolokaidispatch.com/%20ge-crop-debate-shakes-molokai/.

[6] *Maui Mayor: Proposed GMO Moratorium Impractical*, Associated Press, Oct. 3, 2014, *available at* http://www.staradvertiser.com/news/breaking/20141003_Maui_Mayor_proposed_GMO_moratorium_impractical.html.

[7] Wendy Osher, *Maui Council Candidates Reveal GMO Stance at Business Fest*, Maui Now (Oct. 3, 2014), http://mauinow.com/2014/10/03/council-candidates-reveal-gmo-stance-at-business-fest/.

directly injured by pesticide drift and the risk of transgenic contamination from genetically engineered crop operations. *See* Ross Decl. ¶¶ 2, 5-6; Buchanan Decl. ¶¶ 6-18 (filed concurrently). The GE Initiative was also supported by local food producers, such as beekeepers, whose bees—and their businesses—have been impacted by the toxic chemicals used in the cultivation and testing of genetically engineered crops. Buchanan Decl. ¶¶ 6-18. Many concerned mothers and residents of Maui County, including Moloka‘i, where the majority of Plaintiff chemical companies’ operations take place, also supported the moratorium measure due to their concern about pesticide exposure to themselves and to their children and families. Mercy Ritte Decl. ¶¶ 5-10; Davis Decl. ¶¶ 5-9; Ness Decl. ¶¶ 4-12 (filed concurrently). The GE Initiative was also supported by public interest groups dedicated to local regulation of genetically engineered crops and pesticide use. Lukens Decl. ¶¶ 19-22 (filed concurrently).

Despite the wave of unprecedented opposition funding from the chemical industry and opposition from the County government, the citizens of Maui voted to enact the GE initiative, stating their position that the application of toxic chemicals on fields of genetically engineered crops around their communities and local farms

should be halted until it is studied.[8] Unfortunately, like Kaua‘i and Hawai‘i Counties before them, the agrichemical companies that use Hawai‘i for their genetically engineered seed testing ground and commercial production decided to again try trumping the democratic process, filing this lawsuit challenging the validity of the GE Initiative days after the election, and immediately seeking injunctive relief enjoining the County from enforcing or enacting the GE Initiative pending resolution of this case. *See* Pls.' Mot. TRO & Prelim. Inj. (TRO Motion), ECF No. 5.[9] Consistent with its prior disapproval of the GE Initiative, the County once again sided with the opposition, and within two days of Plaintiffs' TRO Motion, stipulated with Plaintiffs to delay enforcement of the GE Initiative for nearly four months, until March 31, 2015. *See* Stipulation Re: Cnty. Maui Ordinance & Order, ECF No. 26.

Accordingly, Proposed Intervenors The Moms on a Mission (MOM) Hui (The MOM Hui), Moloka‘i Mahi‘ai (Moloka‘i Farmers), Gerry Ross, and Center for Food Safety, hereby move to intervene, in order to defend their significant interests in the GE Initiative.

---

[8] Cnty. of Maui, State of Hawai‘i, *General Election 2014: Final Summary Report* 1 (Nov. 4, 2014), http://hawaii.gov/elections/results/2014/general/files/com.pdf

[9] The five petitioners who drafted and submitted the GE Initiative also filed a separate suit in state court, one day prior to the present litigation, asking the court to declare their success valid and enforceable.

ARGUMENT

Proposed Intervenors are entitled to intervene because they fulfill the requirements for intervention as of right under Rule 24(a) of the Federal Rules of Civil Procedure. Proposed Intervenors are mothers on Moloka‘i and residents of Maui who are directly affected by cultivation of genetically engineered crops and pesticide applications near their homes; farmers; beekeepers; and a public interest group that is the national leader on agricultural biotechnology and pesticides, and who actively supported the GE Initiative’s passage, as it has previously worked to uphold other counties’ rights to enact such measures to protect its residents and the environment from their harms. Proposed Intervenors thus have significant protectable interests related to the GE Initiative that have already been injured by Plaintiffs’ legal action, and may be further impaired by the case’s outcome. The Court held that interests closely analogous to these were sufficient to support intervention as of right in *Syngenta Seeds, Inc. v. Cnty. of Kaua‘i,* Civ. No. 14-00014, 2014 WL 1631830, at *4 (D. Haw. Apr. 23, 2014).

It is obvious that Proposed Intervenors’ interests are not adequately represented by the County. The facts supporting intervention in this case are even more compelling than in *Syngenta Seeds*, where the Court granted applicants intervention as of right, since in this case both the County’s executive and legislative branches publicly oppose the initiative, and the County has already

capitulated to the Plaintiffs' request for an injunction without a murmur of opposition. And, as in *Syngenta Seeds*, the intervention applicants here include individual local citizens personally affected, as well as CFS and its directly affected members, all of whom have substantial and personal interests that are separate and apart from those of the County.

In the alternative, should the Court decline to find that Proposed Intervenors are entitled to intervention as of right, Proposed Intervenors also meet the requirements for permissive intervention under Rule 24(b). This motion is timely, will not cause any undue delay or prejudice, and the Proposed Intervenors share common questions of law and fact with the action. Further, Proposed Intervenors will significantly contribute to the Court's understanding and eventual resolution of the issues presented. For these reasons the Court should grant Proposed Intervenors' Motion to Intervene.

I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS OF RIGHT

Rule 24(a) provides:

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The Ninth Circuit "construe[s] the Rule broadly in favor of

proposed intervenors" in an analysis that is guided by "practical and equitable considerations." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (*en banc*) (internal quotation marks omitted).

The Ninth Circuit has a four-part test for intervention as of right:

> (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Id. at 1177 (citation omitted); *see Prete v. Bradbury*, 438 F.3d 949, 954 (9th Cir. 2006). As the Court of Appeals has explained, its "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Wilderness Soc'y*, 630 F.3d at 1179*; see also Syngenta Seeds*, 2014 WL 1631830, at *3; *United States v. City of L.A.*, 288 F.3d 391, 398 (9th Cir. 2002) ("allowing parties with a practical interest in the outcome of [the case] to intervene" reduces and eliminates "future litigation involving related issues[,]" and enables "an additional interested party to express its views before the court"). Proposed Intervenors satisfy each of the requirements.

A. Proposed Intervenors' Motion Is Timely.

The Ninth Circuit evaluates the timeliness of a motion to intervene by applying three criteria: (1) the stage of the proceeding; (2) any potential prejudice

to other parties; and (3) the reason for any delay in moving to intervene. *See, e.g.*, *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836-37 (9th Cir. 1996).

Proposed Intervenors' motion easily satisfies these criteria. This case is still in its initial stage; no substantive briefing, nor a schedule for such briefing, has been set. Plaintiffs filed their Complaint, along with TRO Motion, eight days ago, on November 13, 2014. *See* ECF Nos. 1, 5. Two days later, the County, pursuant to this Court's Order, filed a joint stipulation extending the enforcement and enactment of the GE Initiative until March 31, 2015, which the Court granted. Stipulation Re: Cnty. Maui Ordinance & Order. Thus, no prejudice, delay, or inefficiency will result from allowing Proposed Intervenors to intervene at this time.[10] *See, e.g.*, *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (motion filed "less than three months after the complaint was filed and less than two weeks after the Forest Service filed its answer to the complaint" was timely); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (motion filed "four months after [plaintiff] filed the action" and "before any hearings or rulings on substantive matters" was timely).

B. Proposed Intervenors Have Significantly Protectable Interests.

The requirement that a party seeking intervention as of right have an

[10] To further eliminate any potential for delay or prejudice, Proposed Intervenors submit a Proposed Answer concurrently with this Motion.

"interest" in the subject of the lawsuit is "'primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Wilderness Soc'y,* 630 F.3d at 1179 (quoting *Cnty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). A court's assessment of an intervention applicant's interest must be a "practical, threshold inquiry," *see, e.g.*, *Citizens for Balanced Use*, 647 F.3d at 897 (internal quotation marks omitted), and an applicant has a sufficient interest so long as "'it will suffer a practical impairment of its interests as a result of the pending litigation,'" *Wilderness Soc'y*, 630 F.3d at 1179 (quoting *Cal. ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)). No particular legal, property, or equitable interest is required; rather, an interest is "significantly protectable" so long as it is "'protectable under some law'" and "'there is a relationship between the legally protected interest and the [plaintiffs'] claims.'" *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (quoting *Sierra Club v. U.S. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)).

For example, in *Syngenta Seeds*, this Court found that the proposed intervenors had significant protectable interests in the legality of Kaua'i's Ordinance 960 because the intervention applicants "live and work in close proximity to the agricultural operations of the [p]laintiffs," which were the focus of the ordinance's regulation. 2014 WL 1631830, at *4. Proposed Intervenors here

include Maui County residents whose health and property interests are being impaired by ongoing genetically engineered crop operations of the Plaintiffs. *See* Ross Decl. ¶¶ 5-6; Buchanan Decl. ¶¶ 6-18; Ritte Decl. ¶¶ 2-3; Davis Decl. ¶¶ 1-4; Ness Decl. ¶¶ 5-12. For example, Proposed Intervenor Ross, an organic farmer on Maui dedicated to promoting local, organic agriculture, faces the risk of pesticide damage and transgenic contamination of his organic crops from genetically engineered crop operations on the island. *See* Ross Decl. ¶¶ 5-6. Proposed Intervenor Buchanan is a member of Molokaʻi Mahiʻai, a hui of Molokaʻi farmers and food producers whose property interests and livelihoods are affected by Plaintiffs' genetically engineered crop operations. Buchanan Decl. ¶ 12. Buchanan, a beekeeper, farmer, and award-winning honey maker on Molokaʻi, cannot have his honey certified organic because his apiary is near fields of GE crops from which his bees may forage, and contaminate his hives with pesticide residue, among other injuries. *Id.* ¶¶ 2-11. Other members of Molokaʻi Mahiʻai who grow or plan to grow certified organic crops on their farms likewise face risks and must take costly measures to protect their crops from pesticide drift and transgenic contamination from nearby GE fields. *Id.* ¶¶ 13-19. Members of Proposed Intervenor The MOM Hui reside on Molokaʻi, where much of Plaintiffs' genetically engineered crop operations take place, and their personal health, and the health of their children and families, are threatened by the use of toxic

pesticides on those fields. *See, e.g.*, Ritte Decl. ¶¶ 2-3 (describing health problems her son had after a severe pesticide-laden dust storm); Davis Decl. ¶¶ 3-4 (same). The interests of Proposed Intervenor CFS's members on Maui County are similarly at risk. *See* Ness Decl. ¶¶ 5-10. CFS member Autumn Ness makes a living as a surf instructor, and she has had to turned down clients—and potential income—due to her concern about pesticide runoff from Plaintiff Monsanto Company's fields on Maui. *See id.* ¶¶ 8-10.

As a result of the uncontested injunction enjoining enactment of the GE Initiative entered in this case, Proposed Intervenors and their children and families will continue to suffer exposure to toxic pesticides sprayed on Plaintiffs' fields. Proposed Intervenor farmers' crops will also continue be subject to the risks of pesticide drift and transgenic contamination. Ross Decl. ¶¶ 5-6; Buchanan Decl. ¶¶ 6-19. Proposed Intervenors' significant protectable interests in their personal health, property, and the health of their environment have been practically impaired by the preliminary injunction, and may be impaired by the final resolution of this litigation. *See Wilderness Soc'y*, 630 F.3d at 1179 (quoting *Lockyer*, 450 F.3d 436 at 441).

Further, Proposed Intervenor CFS also has significant protectable organizational interests in this case because CFS is the nation's leading public interest group dedicated to addressing the impacts of industrial agriculture, and its

mission includes improving the oversight of agricultural biotechnology at the federal, state, and county level. Lukens Decl. ¶¶ 4-12. For over a decade, CFS has assisted state and local governments in addressing the impacts of genetically engineered crops and pesticides in their communities, across the country. *Id.* ¶¶ 4-12, 15-18. For example, as this Court is aware, CFS has devoted significant staff and resources to working alongside the counties in the State of Hawai‘i, supporting the passage of local ordinances related to protecting the environment, farmers, and families from the impacts of pesticides and genetically engineered crops. *Id.* ¶¶ 15-17. As the Court is also aware, over the past year, CFS, along with co-counsel Earthjustice, also has worked to defend those ordinances from these chemical companies' lawsuits. *Syngenta Seeds*, Civ. No. 14-00014 (D. Haw. 2014), *appeal docketed*, No. 14-16833 (9th Cir. Sept. 24, 2014), *consolidated*; *Haw. Floriculture & Nursery Ass'n v. Cnty. of Hawai‘i*, Civ. No. 14-00267 (D. Haw. filed June 6, 2014). And beyond the context of ongoing litigation and ordinances, CFS's Hawai‘i office in Honolulu has devoted its efforts to public education to raise awareness of the link between genetically engineered crop cultivation and testing and pesticide use in the Islands, as well as the adverse health and environmental impacts of those activities. Lukens Decl. ¶¶ 13-14.

CFS also has significant protectable interests in the outcome of the case because the organization has a direct interest in the GE Initiative's passage. In the

Ninth Circuit, "[a] public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported." *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397; *see also Nw. Forest Res. Council*, 82 F.3d at 837-38 (stating that public interest groups are permitted to intervene as of right when such groups "were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose"); *Sagebrush Rebellion v. Watt*, 713 F.2d 525, 527-28 (9th Cir. 1983) (holding that national wildlife organization had a significant interest in suit challenging the Department of Interior's decision to develop a bird conservation area where the organization had participated in the administrative process prior to the development). In *Syngenta Seeds*, this Court concluded that, based on its similar efforts supporting the challenged Kauaʻi ordinance in that case, CFS was entitled to intervene as of right. 2014 WL 1631830, at *1.

As part of its programmatic mission, CFS devoted significant resources to passing the GE Initiative. CFS supplied pro bono legal assistance to the citizen group that petitioned and submitted the ballot initiative, and directed significant resources towards supporting the ballot initiative's passage. Lukens Decl. ¶¶ 19-22. In the months leading up to the election, CFS formed a broad-based coalition, consisting of Maui-based businesses, organizations, and individuals, as well as national public interest groups and businesses, to support the GE

Initiative's passage. *Id.* ¶¶ 20-22. During the course of the election, the coalition, led and funded by CFS, supported the GE Initiative via advertising through different channels, door-to-door engagement with potential voters, and phoning potential voters—all in an effort to increase support of the GE Initiative. *Id.* For all these reasons, CFS has significant protectable interests in the outcome of the present litigation. *See Syngenta Seeds*, 2014 WL 1631830, at *1.

C. The Outcome of This Case May Impair Proposed Intervenors' Interests.

Where the rights of an applicant may be substantially affected by the disposition of the matter, "he should, as a general rule, be entitled to intervene." *Sw. Ctr. for Biological Diversity*, 268 F.3d at 822 (quoting Fed. R. Civ. P. 24 Advisory Committee Notes). The inquiry into whether an interest is impaired is necessarily tied to the existence of an interest. *See Syngenta Seeds*, 2014 WL 1631830, at *5. Indeed, "after determining that the applicant has a protectable interest, courts have 'little difficulty concluding' that the disposition of the case may affect such interest." *Jackson v. Abercrombie*, 282 F.R.D. 507, 517 (D. Haw. 2012) (quoting *Lockyer*, 450 F.3d at 442); *Syngenta Seeds*, 2014 WL 1631830, at *5 (because this Court found that the intervenors have a significantly protectable interest in the protections afforded by the ordinance relating to pesticides and genetically engineered crops, "it naturally follows that the invalidation of [the ordinance] would impair those interests").

The Court's resolution of this case has already affected, and will continue to directly affect, Proposed Intervenors' ability to protect themselves and their health and property, as well as their interests in protecting Maui County's public health and environment from the detrimental impacts of genetically engineered crop cultivation. *See* Ross Decl.; Ritte Decl.; Davis Decl.; Lukens Decl.; Ness Decl; Buchanan Decl. Plaintiffs seek to have this Court declare the GE Initiative invalid, and has stipulated with the County to delay enforcement and enactment of the GE Initiative until resolution of the merits of the case, which this Court granted. *See* Stipulation Re: Maui Cnty. Ordinance & Order, ECF No. 26. Because of Plaintiffs' and the County's stipulation, the GE Initiative, which could have been in force as early as November 24, 2014, will now not take effect until March 31, 2015, at the earliest, with no administrative process or date in sight for its implementation. *Id.* ¶¶ 2, 6. As a consequence, the protection afforded to Proposed Intervenors by the GE Initiative will be delayed for at least four months. Instead, Proposed Intervenors will be subject to continued exposure to toxic pesticides, and Proposed Intervenors farmers' crops will continue to be threatened by pesticide drift and the risk of transgenic contamination.

Similarly, resolution of the present litigation could impair Proposed Intervenor CFS's mission in the State of Hawai‘i and elsewhere to enact similar laws, on behalf of its members in those places, or threaten the viability of similar

county ordinances that have already been enacted. Lukens Decl. ¶ 29. Accordingly, the Court should grant intervention as of right. *See Jackson*, 282 F.R.D. at 517 (finding that an adverse decision in the case would impair public interest group's interest in preserving the challenged constitutional amendment).

D. The Defendant County Will Not Adequately Represent Proposed Intervenors' Interests.

The last criteria—that the existing parties may not adequately represent the intervention applicants' interests—also is met here. The County's positions, both before the election and in the present lawsuit, make clear that the County does not—and will not—adequately represent Proposed Intervenors' interests.

A court considers the following factors in assessing adequate representation:

> (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

Perry v. Proposition 8 Official Proponents, 587 F.3d 947, 952 (9th Cir. 2009). The burden of showing inadequate representation is minimal, and the applicant need only show that representation of its interests by existing parties "'may be' inadequate." *Sw. Ctr. for Biological Diversity,* 268 F.3d at 823 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *Sagebrush Rebellion*, 713 F.2d at 528 ("[T]he burden of making this showing is minimal.").

Although a general presumption exists that "a state adequately represents its

citizens" when the applicant for intervention shares the same interest, the presumption is rebuttable. *Prete*, 438 F.3d at 956-57; *see Sagebrush Rebellion*, 713 F.2d at 528 (granting intervention where court found defendant Secretary of the Interior might not adequately represent public interest group intervenor's interest). "Any doubt as to whether the existing parties will adequately represent the intervenor should be resolved in favor of intervention." *Cal. Dump Truck Owners Ass'n v. Nichols*, 275 F.R.D. 303, 307 (E.D. Cal. 2011).

1. Maui County's Inadequate Representation of Proposed Intervenors' Interests Is Firmly Established.

The actions of the Maui County government plainly demonstrate that the County is unlikely to make all the arguments in defense of the GE Initiative's validity that Proposed Intervenors can and will make in this case. As noted in the background section *supra*, the County Mayor and the majority of County Council Members publicly opposed the GE Initiative, and have repeatedly indicated their disinclination to enforce and implement the GE Initiative. *See supra* pp. 2-5. Tellingly, rather than defending the validity of the GE Initiative and its enforcement, as required by the Maui County Charter, the County did not even put up a fight, and instead immediately capitulated to the Plaintiffs' TRO motion, stipulating to delaying the enforcement of the GE Initiative until spring of 2015. *See* Stipulation Re: Maui Cnty. Ordinance & Order., ECF No. 26. In light of their public statements of opposition and their very first act in the litigation, neither

Proposed Intervenors nor the Court can have confidence that the County's defense of this suit will be vigorous; indeed, it already has been anything but vigorous. Proposed Intervenors also naturally question whether the County will assert every appropriate argument, where the Mayor remains the County's chief executive, and where the majority of the County Council publicly opposed the GE Initiative, and where the County has again, already declined to make any argument opposing a preliminary injunction. *See supra* pp. 2-5.

The present scenario is akin to cases where courts have found inadequate representation by the government defendant and granted an applicant the right to intervene under Rule 24(a). In *Jackson*, the district court concluded that "there is no doubt that [the defendant government officer] will not represent [applicant public interest group's] interest" where the defendant had issued press statements declining to defend the constitutionality of the challenged amendment and publicly embraced the opposing party's position. *See* 282 F.R.D. at 518. Similarly, in *Lockyer*, where two anti-abortion organizations sought to intervene on behalf of the federal government in litigation brought by the State of California challenging the validity of a federal rider withholding federal funds from state and local governments that required health care providers to provide coverage or referrals for emergency abortion services, the Ninth Circuit found that the federal government did not adequately represent the organizations' interests where the federal

government had already offered a narrower interpretation of the challenged rider in an earlier court filing. *See* 450 F.3d at 444-45.

The County's utter lack of adequate representation in this case is even more egregious than in *Syngenta Seeds*, where this Court granted intervention as of right, holding that the "[Kaua'i Mayor's] antipathy to Ordinance 960 and the County's possible budgetary constraints further support a finding of inadequate representation." 2014 WL 1631830, at *8; *cf. Sagebrush Rebellion*, 713 F.2d at 528 (reversing lower court's denial of intervention even though defendant Department of Interior's counsel was diligently defending the creation of a conservation area, finding that the Department's Secretary's prior association with plaintiff's law firm suggested that the Department's representation may be inadequate).

Maui County's chief executive and its legislative body have expressed interests and views that are directly antithetical to those of the Proposed Intervenors. The County's actions to this point in the litigation demonstrate that the Mayor's lack of support for the GE Initiative will continue to hobble the County's defense; at a bare minimum, the County's representation "'may be' inadequate," and that is all that is required. *See Trbovich*, 404 U.S. at 538 n.10; *Citizens for Balanced Use*, 647 F.3d at 900 ("We stress that intervention of right does not require an absolute certainty that a party's interests will be impaired or

that existing parties will not adequately represent its interests. Rule 24(a) is invoked when the disposition of the action 'may' practically impair a party's ability to protect their interest . . . ."). The Court should grant Proposed Intervenors intervention as of right.

2. The County's Interests Are Not the Same as Proposed Intervenors' Interests.

The presumption of adequate representation can also be overcome where the applicant's interests are different, such as here, where the applicant for intervention has "more narrow, parochial interests" than existing parties. *Syngenta Seeds*, 2014 WL 1631830, at *6 (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995), *abrogated on other grounds*, *Wilderness Soc'y*, 630 F.3d at 1173)); *Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Dist.*, No. 1:07-cv-0820 LJO DLB, 2007 WL 2757995, at *4 (E.D. Cal. Sept. 21, 2007) (quoting *Lockyer*, 450 F.3d at 444); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) ("[B]ecause the employment interests of [intervenor]'s members were potentially more narrow and parochial than the interests of the public at large, [intervenor] demonstrated that the representation of its interests by the [defendant state agencies] may have been inadequate.").

First, Proposed Intervenors have a narrower, more parochial interest than that of the County. The County must represent the entire county and all its varied

interests, including business and economic interests of Monsanto Company and the other Plaintiffs. In contrast, Proposed Intervenors are mothers, farmers, residents, and a public interest organization—all of whom have specific, personal, and organizational interests in protection against pesticides and in improving the oversight of genetically engineered crops. *See supra* pp. 10-16. This is very different from the County's general duty to defend its laws.

As discussed *supra*, Proposed Intervenors and their members are residents of Maui County, including Moloka'i, who live and farm on the island, and are personally subject to the risk of pesticide exposure and transgenic contamination; they have their own narrower personal property interests in ensuring that the GE Initiative is upheld. Proposed Intervenors include farmers who are concerned about injuries to their reputation and markets if they were contaminated by genetically engineered crops, and whose ability to grow and sell crops without pesticide applications is threatened by pesticide drift from genetically engineered crop operations. Ross Decl. ¶¶ 5-6; Buchanan Decl. ¶¶ 6-18. They are uniquely injured even by the risk of transgenic contamination and pesticide exposure, because it forces them to take onerous and costly measures to try to avoid contamination and pesticide exposure, such as testing, avoiding growing certain crops, or reducing their farming acreage through protective buffer zones. Buchanan Decl. ¶¶ 6-18. As local growers, the GE Initiative offers them a

protected, GE-free market and the economic opportunity to foster sustainable agricultural practices, local food security, and seed diversity, without transgenic contamination and pesticide exposure. *See* GE Initiative §§ 2, 4. As this Court recognized in *Sygenta Seeds*, these personal interests of Proposed Intervenors are sufficiently distinct from the County's general interests. *See Syngenta Seeds*, 2014 WL 1631830, at *6-7 (holding that "proposed [i]ntervenors are, or represent, individuals directly affected by the activities of the [p]laintiffs and by the restrictions on those activities encompassed by [the ordinance]" and are the direct recipients of the benefits of the ordinance, and, as a result, "[t]heir interests in upholding the law are decidedly more palpable than the County's generalized interest").

Courts similarly have found the presumption of adequate representation rebutted where the proposed intervenors had narrower interests than those of the defendant government agency's general duty to uphold challenged laws. *See, e.g.*, *National Ass'n of Home Builders*, 2007 WL 2757995, at *4-5 ([w]hile [p]roposed [i]ntervenors and the [d]istrict share a general interest in public health, the [d]istrict has a much broader interest in balancing the need for regulations with economic considerations . . . ."); *Golden Gate Restaurant Ass'n v. City & Cnty. of S.F.*, No. C 06-06997 JSW, 2007 WL 1052820, at *4 (N.D. Cal. Apr. 5, 2007) (in suit challenging validity of city ordinance requiring businesses to contribute to

employees' health care expenses, finding that "the [u]nions' members here have a personal interest in the enforcement of the [o]rdinance that is more narrow than the [c]ity's general interest because they would be among the employees directly affected by the injunction of the [o]rdinance."); *Sierra Club v. Glickman*, 82 F.3d 106, 110 (5th Cir. 1996) (holding that because the government must represent the broader public interest, the interest of the defendant agency and the proposed intervenor industry group "will not necessarily coincide" even if they may share some "common ground").

Second, not only are Proposed Intervenors and their members' interests different because they are narrower and more specific than that of the County, but, at the same time, they are also broader than the County's interests. Proposed Intervenor CFS has over one half-million members across the country who are closely watching this case and have a significant stake in its outcome. Lukens Decl. ¶¶ 3, 29. For those CFS members, an adverse decision by this Court could affect their own ability to in the future enact ordinances creating zones free of genetically engineered organisms, like in Maui County. Other CFS members live in counties that have already passed ordinances regulating genetically engineered crops, such as counties in California, Oregon, and Washington. *Id.* ¶¶ 10, 18. Those members also have distinct interests, as an adverse decision in this case could erode their own hard-won protections. The Defendant Maui County does not

represent these broader interests.

3. Proposed Intervenors Will Offer Necessary Elements Otherwise Neglected.

Finally, a further indication that representation may be inadequate is "whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *Perry*, 587 F.3d at 952 (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

Proposed Intervenors will offer unique elements to the present litigation not shared with—and in fact neglected by—the existing parties. Namely, Proposed Intervenors, their counsel, and their members have singular legal, scientific, and policy expertise regarding genetically engineered crops, their impacts, and their oversight. Lukens Decl. ¶¶ 6-12. Defending the GE Initiative as a valid exercise of the County's authority to protect the health of its citizens and its natural resources requires knowledge of the public health and environmental harms associated with genetically engineered crop cultivation. As in *Syngenta Seeds*, Proposed Intervenors can and will use this significant expertise to provide the Court with the most well-versed and complete briefing possible in defense of the GE Initiative.

In sum, Proposed Intervenors have made a compelling showing that their interests, at a minimum, "may" not be adequately represented. Accordingly, they meet all of the requirements for intervention as of right under Rule 24(a) of the

Federal Rules of Civil Procedure.

E. The Other Applicants Do Not Adequately Represent Proposed Intervenors' Unique Interests

As made clear above, Proposed Intervenors' interests are also separate and distinct from the interests of Applicants' Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement (collectively SHAKA). *See* SHAKA's Mot. Intervene & Mem. Supp. Mot. Intervene, ECF Nos. 37, 37-1. In their Motion and accompanying Memorandum, Applicants SHAKA put forth significant protectable interests in the outcome of the present litigation as Maui County residents who drafted the GE Initiative, and as plaintiffs who are seeking a ruling in a previously-filed state court action converse to the relief requested by Plaintiffs in this case.

In contrast, Proposed Intervenors here represent interests distinctly different from SHAKA's concerns. Proposed Intervenors represent narrower, personal interests of mothers, farmers, and beekeepers who live and farm on the island of Moloka'i, where Plaintiffs' genetically engineered crop operations are concentrated. *See* Pls.' Compl. ¶¶ 7-8 (Monsanto farms 2,296 acres of farmland on Moloka'i, as compared to 784 acres on Maui island, while Agrigenetics only operates on Moloka'i). Proposed Intervenors The MOM Hui and Moloka'i Mahi'ai have suffered personal health and property injuries that are unique to specific field operations near their residences and farms. *See supra* pp. 10-13.

Equally distinct from Applicant SHAKA's interests is Proposed Intervenor CFS's broader interest in the legality of the GE Initiative as an integral part of CFS's longstanding, programmatic sustainable agriculture work, both in the State of Hawai‘i and around the nation: namely, to promote and protect local oversight over genetically engineered crop operations and their associated pesticide use. *See supra* pp. 13-16. As such, Proposed Intervenors offer unique and necessary elements to the present proceeding that all parties, including SHAKA, may neglect; hence Proposed Intervenors' interests also is not adequately represented by SHAKA. *See Trbovich*, 404 U.S. at 538 n.10; *Sagebrush Rebellion*, 713 F.2d at 528 ("[T]he burden of making this showing is minimal.").

II. AT A MINIMUM, THE COURT SHOULD GRANT PERMISSIVE INTERVENTION

Proposed Intervenors also satisfy the requirements for permissive intervention under Fed. R. Civ. P. 24(b). As with intervention as of right, under Rule 24(b), "the Ninth Circuit upholds a liberal policy in favor of intervention." *Nw. Envtl. Advocates v. U.S. EPA*, No. 3:12-cv-01751-AC, 2014 WL 1094981, at *2 (D. Or. Mar. 19, 2014); *see, e.g.*, *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004) ("In determining whether intervention is appropriate, courts are guided primarily by practical and equitable considerations, and the requirements for intervention are broadly interpreted in favor of intervention."); *accord Wilderness Soc'y*, 630 F.3d at 1179; *City of L.A.*, 288 F.3d at 397. This

liberal policy favoring intervention allows for "both efficient resolution of issues and broadened access to the courts." *City of L.A.*, 288 F.3d at 397-98.

Permissive intervention is appropriate where there is "(1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." *Blum v. Merrill Lynch Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013) (quoting *Beckman Indus. Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)). Courts also consider whether intervention would cause undue delay or prejudice. *See* Fed. R. Civ. P. 24(b)(3). Importantly, under Rule 24(b), a proposed intervenor need not demonstrate inadequate representation, or a direct interest in the subject matter of the challenged action. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002), *abrogated on other grounds*, *Wilderness Soc'y*, 630 F.3d at 1173, 1178.

Proposed Intervenors meet the permissive intervention criteria. First, this Court has "an independent ground for jurisdiction" over Proposed Intervenors' arguments in defense of the GE Initiative. *See Blum*, 712 F.3d at 1353. In the Ninth Circuit, an independent jurisdictional ground for permissive intervention exists where an applicant "assert[s] an interest" in the challenged law by presenting defenses and arguments that "squarely respond to the challenges made by plaintiffs in the main action." *Kootenai Tribe*, 313 F.3d at 1110-11.

As explained in detail *supra*, Proposed Intervenors have "asserted an interest in" the challenged legislation, *supra* pp. 10-16, interests that are sufficient to establish an independent basis for jurisdiction for the purpose of permissive intervention. Proposed Intervenors are local farmers and residents that will be individually harmed by the exposure to toxic pesticides, risk of transgenic contamination, and other consequences of growing genetically engineered crops. They support the protections the GE Initiative provides in imposing a moratorium on the cultivation of genetically engineered crops until the County completes an assessment of their potential harms to the local farm economy, community health, and Maui County's unique environment. Proposed Intervenor CFS has long been the national and state leader on this issue, working on it in many counties, and has an entire program dedicated to improving the oversight of genetically engineered crops and ameliorating their adverse impacts. Lukens Decl. ¶¶ 5-12. Proposed Intervenors have devoted significant resources, staffing, and time to defending the right of counties in this State to enact local ordinances that regulate genetically engineered crop production and their associated pesticide use. Proposed Intervenor CFS's programmatic mission and its members' personal economic, health, and environmental interests, and the interests of the other Proposed Intervenors, are at the heart of the GE Initiative's purpose. *See City of L.A.*, 288 F.3d at 404 ("[T]he idea of 'streamlining' the litigation . . . should not be accomplished at the risk of

marginalizing those . . . who have some of the strongest interests in the outcome.").

Moreover, "[w]here the proposed intervenor in a federal-question case brings no new claims, the jurisdictional concern drops away." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011); *accord* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1917 (3d ed. 2010) ("In federal-question cases there should be no problem of jurisdiction with regard to an intervening defendant . . . ."). Here, Plaintiffs assert federal-question jurisdiction, Pls.' Compl. ¶ 14, and Proposed Intervenors do not seek to bring counterclaims or cross-claims. The first criterion for permissive intervention plainly is met.

Second, as explained above, Proposed Intervenors' Motion for Leave to Intervene is timely, *see Blum*, 712 F.3d at 1353, because this case is still in its initial stage, given that Plaintiffs filed their complaint only last week, *see supra*; *see, e.g.*, *Ctr. for Biological Diversity v. Kelly*, No. 1:13-CV-00427-EJL-CWD, 2014 WL 3445733, at *7-8 (D. Idaho July 11, 2014) (intervention "timely" where applicants moved to intervene nearly ninety days after commencement of action); *Schmidt v. Coldwell Banker Residential Brokerage*, No. 5:13-cv-00986 EJD, 2013 WL 2085161, at *2 (N.D. Cal. May 14, 2013) (intervention "timely" where applicants moved to intervene two months after commencement of action).

Finally, Proposed Intervenors undeniably share "a common question of law

and fact . . . [with] the main action," *Blum*, 712 F.3d at 1353 (quoting *Beckman Indus.,* 966 F.2d at 473), because they seek to address precisely the legal and factual issues raised in Plaintiffs' Complaint, and to assist the County in its defense of the GE Initiative against Plaintiffs' attacks, *see* Fed. R. Civ. P. 24(b)(1)(B) (permissive intervention is appropriate where an applicant "has a claim or defense that shares with the main action a common question of law or fact").

In so doing, Proposed Intervenors will significantly contribute to the Court's ability to effectively and efficiently understand and resolve this case. As explained, Proposed Intervenor CFS is a recognized national expert on genetic engineering, transgenic contamination, pesticides, and other agricultural issues, and will thus provide this Court with valuable and singular legal and practical perspective, as well as the expertise necessary for fully and correctly adjudicating sensitive and complex issues about local regulation of food production, particularly as applied in the State of Hawai'i. Lukens Decl. ¶¶ 6-12, 15-18; *see Ctr. for Biological Diversity*, 2014 WL 3445733, at *7 (finding permissive intervention "appropriate" where proposed intervenors "represent large and varied interests whose unique perspectives would aid the Court in reaching an equitable resolution in this proceeding") (internal quotations omitted); *accord Kootenai Tribe*, 313 F.3d at 1111. Similarly, Proposed Intervenors who are farmers and citizens have personal experience in the practical consequences of allowing cultivation of

genetically engineered crops, and will be able to provide a perspective that otherwise is likely to be absent from the presentation of the issues to the Court. Ross Decl. ¶¶ 5-6; Buchanan Decl. ¶¶ 6-18. Accordingly, Proposed Intervenors also meet the third criterion for permissive intervention.

In sum, Proposed Intervenors' substantial interests in the GE Initiative, and in genetically engineered crop oversight broadly, are directly threatened by an adverse ruling in this case. *See* Fed. R. Civ. P. 24, Advisory Committee Notes 1966 Amendment ("If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene . . . ."). Therefore, if this Court denies Proposed Intervenors intervention as of right under Rule 24(a), it should grant them permissive intervention under Rule 24(b).

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully request that the Court grant leave to intervene as of right pursuant to Rule 24(a). In the alternative, Proposed Intervenors, and each of them, request that the Court grant permissive intervention pursuant to Rule 24(b).

DATED: Honolulu, Hawai‘i, November 21, 2014.

Respectfully submitted,

/s/ Paul H. Achitoff

PAUL H. ACHITOFF (#5279)
EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai‘i 96813
Telephone No.: (808) 599-2436
Fax No.: (808) 521-6841
Email: achitoff@earthjustice.org

GEORGE A. KIMBRELL (*Pro Hac Vice pending*)
SYLVIA SHIH-YAU WU (*Pro Hac Vice pending*)
Center for Food Safety
303 Sacramento St., 2nd Floor
San Francisco, California 94111
T: (415) 826-2770 / F: (415) 826-0507
Emails: gkimbrell@centerforfoodsafety.org
swu@centerforfoodsafety.org

Counsel for Proposed Intervenor-Defendants