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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION

SCHULZ FAMILY FARMS LLC, an Oregon limited liability company; **JAMES FRINK, MARILYN FRINK**, individuals; and **FRINK FAMILY TRUST**, an Oregon revocable living trust,

Plaintiffs,

v.

JACKSON COUNTY, an Oregon municipal corporation,

Defendant

and

CHRISTOPHER HARDY, individual; **OSHALA FARM, LLC**, an Oregon limited liability company; **OUR FAMILY FARMS COALITION**, an Oregon non-profit corporation; and **CENTER FOR FOOD SAFETY**, a non-profit corporation,

Proposed Defendants.

Case No. 1:14-cv-01975-CL

MOTION TO INTERVENE AS DEFENDANTS PURSUANT TO FRCP 24(A) AND 24(B)

Oral Argument Requested

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MOTION

Christopher Hardy ("Hardy"), Oshala Farm, LLC ("Oshala Farm"), Our Family Farms Coalition ("OFFC"), and Center for Food Safety ("CFS") (collectively "Proposed Defendants") hereby move to intervene as defendants pursuant to FRCP 24(a) and FRCP 24(b). Pursuant to Local Rule 7.1, undersigned counsel certifies that Proposed Defendants conferred in good faith through counsel with Plaintiffs and Defendants about the subject matter of this Motion. Plaintiffs have indicated they will oppose the Motion. Current defendant Jackson County indicated that it would take no position regarding the Motion.

Proposed Defendants' Motion is supported by the following memorandum and the Declarations of Christopher Hardy, Elise Higley, Dr. Ramon J. Seidler, and George Kimbrell. As required by Federal Rule of Civil Procedure 24, Proposed Defendants are attaching a proposed Answer as Exhibit A.

Proposed Defendants are aware of the Court's December 19, 2014 Order setting a Rule 16 Conference for January 6, 2015. If the Court and the current parties deem it appropriate, counsel for Proposed Defendants are willing and available to participate in that conference, and any preceding Rule 26 conferrals.

MEMORANDUM IN SUPPORT OF MOTION

INTRODUCTION

Jackson County farmers Oshala Farm and Christopher Hardy, Our Family Farms Coalition ("OFFC"), and Center for Food Safety ("CFS") (collectively "Proposed Defendants") seek to intervene pursuant to Federal Rule of Civil Procedure 24 in this case challenging a voter-approved ordinance banning persons from growing genetically engineered crops in Jackson County, Oregon ("the Ordinance"). Proposed Defendants are a local farmer (Christopher Hardy)

and a family farm (Oshala Farm) who grow traditional crops (i.e., crops that are not genetically engineered) that are directly threatened by genetically engineered crops, OFFC, which as an association was the main political action committee that organized the campaign to pass the ballot measure, and CFS, the leading national nonprofit working on the issue of sustainable agriculture and agricultural biotechnology, which provided important technical and legal expertise in drafting the Ordinance and which was actively engaged in working for its passage. All four Proposed Defendants were essential to the Ordinance's successful campaign, and have strong continuing interests in its timely implementation and enforcement. Proposed Defendants' active participation in this case is essential so that they can help defend the Ordinance, approved by a substantial majority of voters in Jackson County, that directly protects the rights and abilities of local family farmers to grow crops that are not genetically engineered without the constant risk of contamination from genetically engineered crops. By its own terms, the Ordinance goes into effect on June 6, 2015; however the County has stipulated to an injunction with Plaintiffs that bars the County from enforcing the Ordinance against anyone until a final judgment is entered in this case. *See* Dkt. #5 (Stipulation to Stay Enforcement of Ordinance by Defendant Jackson County and [Proposed] Order) ("Stipulation").

Plaintiffs' Complaint includes three claims for relief. The first claim includes one count asking this Court to declare the Ordinance invalid because it expressly conflicts with Oregon's Right to Farm and Forest Act ("Right to Farm Act"), and a second count asking the Court to enjoin enforcement of the Ordinance for the same reason. The second and third claims for relief, brought in the alternative to the first claim, seek a ruling that the Ordinance constitutes a taking of Plaintiffs' property for public purposes without payment of just compensation in violation of

the Oregon and U.S. constitutions. Proposed Defendants seek to intervene in all three of Plaintiffs' claims for relief.

This Court should grant Proposed Defendants intervention as of right because they "claim[] an interest relating to the property or transaction that is the subject of the action, and [are] so situated that disposing of the action may as a practical matter impair or impede the movant[s'] ability to protect [their] interest," and the existing parties do not adequately represent the Proposed Defendants' interests. Fed. R. Civ. P. 24(a). All of the Proposed Defendants invested a significant amount of their time, expertise, and financial resources in the successful campaign that led to the approval of the Ordinance. The Ordinance provides direct protection to Oshala Farm's and Hardy's right to farm without the risk of transgenic contamination of their traditional crops. Many of OFFC's and CFS's members are also Jackson County farmers who are growing traditional crops that will be protected from transgenic contamination by the implementation and enforcement of the Ordinance. Proposed Defendants have significant legal and scientific expertise related to genetically engineered crops, gained from decades of public interest work on this issue, as well as years of promoting, and defending, county ordinances similar to the Ordinance at issue in this case. Jackson County does not have this same level of expert or legal resources necessary to vigorously defend the Ordinance. And, several of the County commissioners publicly opposed the Measure, or made statements about the negative impacts that the Ordinance supposedly would have on the County. Defendant Jackson County's inability to adequately represent the more narrow and personal interests of the Proposed Defendants in this case is further underscored by the County's recent stipulation with the Plaintiffs that ties the County's own hands—indefinitely delaying the County's enforcement of a lawful and overwhelmingly voter-approved Ordinance—until this case is resolved. The

protectable rights and settled interests of the Proposed Defendants will be directly and significantly impaired if the County does not begin enforcing the Ordinance on June 6, 2015, as is required by the Ordinance.

At a minimum, this Court should allow Proposed Defendants to permissively intervene in all three claims, because all of the Proposed Defendants "ha[ve] a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Proposed Defendants' efforts to defend the Ordinance would complement those of the County by offering their unique and integral factual and legal expertise regarding this Ordinance and similar laws regulating the cultivation of genetically engineered crops. Plaintiffs would not be unduly prejudiced by Proposed Defendants' participation because Proposed Defendants are represented jointly by counsel and would offer only joint submissions on behalf of all four Proposed Defendants, and Proposed Defendants would seek to coordinate their filings with Defendant Jackson County. Further, rather than delaying these proceedings, the Proposed Defendants, who unlike the County will be directly and adversely impacted if enforcement of the Ordinance is delayed, are motivated to resolve this matter as expeditiously as possible. Ultimately, granting Proposed Defendants' Motion is critical to preserving the voters' confidence that the legality of the Measure they so strongly supported will be vigorously defended before this Court, and to ensure that the County's ability to enforce the Ordinance begins on June 6, 2015. *See, e.g.*, *Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1397-98 (9th Cir. 1995) ("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.").

BACKGROUND

In May 2014, Jackson County voters passed ballot measure 15-119 ("the Measure"),

enacting an ordinance prohibiting the planting of genetically engineered crops in Jackson County. *See* Dkt. #1-1 Exhibit A ("Complaint") at ¶ 34. The Measure passed through a landslide of bi-partisan support and over 65 percent of voters approving the Measure, despite opposition spending of nearly $1 million. *See* Declaration of Elise Higley ("Higley Dec.") at ¶ 11.[1] Over 150 family farms in Jackson County supported the Measure, with the goal of protecting farmers growing traditional crops from the significant agricultural and economic impacts of genetically engineered crops that can cause damage to agricultural operations far from the fields in which they are planted. Higley Dec. at ¶ 12. The Ordinance was enacted on June 6, 2014. *See* Complaint" at ¶ 34.

All of the Proposed Defendants actively supported the Measure. OFFC was the main political action committee that directed the Measure's successful electoral campaign. Higley Dec. at ¶ 6. Since the election, OFFC has transitioned from a political action committee into an Oregon non-profit corporation. *Id.* at ¶ 6. CFS was actively involved in the election, providing legal, policy, financial and scientific support to the campaign that supported the Measure. Declaration of George Kimbrell ("Kimbrell Dec.") at ¶ 13–14. CFS also assisted Hardy and other Jackson County farmers in drafting the Measure. *Id.* at ¶ 13. The farming operations and economic interests of both Oshala Farm and Hardy, the Chief Petitioner for the Measure, are directly threatened by the cultivation of genetically engineered crops in Jackson County. *See generally,* Higley Dec. and Declaration of Christopher Hardy ("Hardy Dec."). Thus, all

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[1] Some of the world's largest chemical companies, including Monsanto and Syngenta, genetically engineer seeds and then patent the seeds and make farmers buy the patented seeds annually rather than allowing them to save the seeds.. *See* Hardy Dec. at ¶ 34. These companies were the primary opponents funding opposition to the Measure. *See* Yuxing Zheng, GMO measure in Oregon's Jackson County draws big money, raises questions about local control, The Oregonian (May 15, 2014), http://www.oregonlive.com/politics/index.ssf/2014/05/gmo_measure_in_oregons_jackson.html.

Proposed Defendants have interests that would be significantly affected if this Court were to grant Plaintiffs the relief that they seek.

The Ordinance protects Jackson County family farms and farmers like Oshala Farm and Hardy from the economic and agricultural damage caused by the cultivation of genetically engineered crops. One major adverse impact of genetically engineered crops is genetic, or transgenic, contamination—the unintended, undesired presence of transgenic material in traditional crops, as well as wild plants. *See* Declaration of Dr. Ramon J. Seidler ("Seidler Dec.") at 13–19 (explaining how transgenic contamination occurs). As the Ordinance explains, its overarching purpose is to "protect[] the economic security and commercial value of county agricultural enterprises whose products stand to be damaged, or diminished in value due to genetic contamination from genetically engineered crops." J.C.C. 635.01(b). Transgenic contamination of traditional crops can and does happen in various ways, such as through the cross-pollination of traditional crops with pollen from nearby genetically engineered crops, seed mixing, transfer of genetically engineered seeds or pollen from one field to another via the movement of animals or farm equipment, and through fault or negligent containment. *See, e.g., Geertson Seed Farms v. Johanns,* No. C 06–01075 CRB, 2007 WL 518624, at *4 (N.D. Cal. Feb. 13, 2007) ("Biological contamination can occur through pollination of non-genetically engineered plants by genetically engineered plants or by the mixing of genetically engineered seed with natural, or non-genetically engineered seed."); *see also* Seidler Dec. at ¶¶ 14–18. Pollen and seeds from some genetically engineered crops can spread several miles from where they are planted and contaminate traditional crops. *See* Seidler Dec. at ¶¶ 14–18 (discussing how pollen and seed from genetically engineered crops can travel significant distances from the locations where they are planted); *see also Geertson Seed Farms*, 2007 WL 518624, at *2

("Indeed, it is undisputed that insect pollination for alfalfa can occur up to at least two miles from the pollen source.").

Transgenic contamination manifests itself in several ways. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms,* 561 U.S. 139, 155 (2010) (explaining that transgenic contamination harm has both "an environmental as well as economic component"). First, it poses multiple economic threats to farms and farmers growing traditional crops, such as Oshala Farm and Hardy, exposing them to significant legal risk and liability. Both Oshala Farm and Hardy are concerned that pollen from genetically engineered crops planted near their farms will contaminate their traditional seed crops, making their traditional seed crops legally unsellable or unusable under federal patent law. Higley Dec. at ¶ 24, 44; Hardy Dec. at ¶ 34; *see also* Seidler Dec. at ¶23.

In addition to the risks of violating federal patent law, many key domestic and export agricultural markets have strict prohibitions against the purchase of seeds or crops that contain genetically engineered genes. Higley Dec. at ¶ 40 ("[M]any of our primary export markets such as Japan, South Korea, and Europe will not import many genetically engineered crops or seeds since they are unpopular with local buyers or illegal."). These concerns are extremely well founded, since U.S. farmers have lost literally billions of dollars in lost markets in the last decade because of frequent transgenic contamination episodes, in a variety of crops, including, among others, corn, rice, alfalfa, canola, wheat, sugar beets, and soybeans. For example, U.S. farmers are estimated to have lost more than $2 billion in the last year due to China's rejection of U.S. corn, grain, and soybean imports after discovering a strain of Syngenta's genetically engineered crops in crop imports from the United States. Higley Dec. at ¶ 36. U.S. corn growers recently filed suit against Syngenta asserting more than $1 billion in damages from market impacts due to

Syngenta's genetically engineered corn.[2] In 2011, the agrochemical company Bayer agreed to pay U.S. rice farmers $750 million to settle litigation over a transgenic contamination episode.[3] Similarly, earlier this year agrochemical company Monsanto agreed to pay U.S. wheat farmers who sued them over a transgenic contamination episode here in Oregon that shook U.S. wheat exports in summer 2013.[4] A 2008 U.S. Government Accountability Office study analyzed several major transgenic contamination incidences from the past decade and stated that they have caused over a billion dollars in damages, and concluded that "the ease with which genetic material from crops can be spread makes future releases likely."[5] On a more local level, Oshala Farm's and Hardy's customers have made clear that they will not purchase seeds, vegetables, or herbs that have been contaminated with genetically engineered pollen since the consumers do not want to eat genetically engineered foods and crops. Higley Dec. at ¶¶25–27; Hardy Dec. at ¶¶ 17–19. And in 2013, Hardy had to tear up crops that were susceptible to contamination from genetically engineered crops planted less than one-mile way, after his buyer told him that it would not purchase any seeds that had been contaminated. Hardy Dec. at ¶ 24–29.

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[2] *See* Jacob Bunge, Syngenta Faces More Suits Over Viptera Corn Seeds, Wall Street Journal (Oct. 19, 2014), http://www.wsj.com/articles/syngenta-faces-more-suits-over-viptera-corn-seeds-1413743258.

[3] Andrew Harris & David Beasley, *Bayer Agrees to Pay $750 Million to End Lawsuits Over Gene-Modified Rice*, Bloomberg, (July 2, 2011), http://www.bloomberg.com/news/2011-07-01/bayer-to-pay-750-million-to-end-lawsuits-over-genetically-modified-rice.html.

[4] Carey Gillam, *Monsanto Settles Farmer Lawsuits Over Experimental GMO Wheat*, Reuters (Nov. 12, 2014), http://www.reuters.com/article/2014/11/12/usa-monsanto-wheat-idUSL2N0T22O820141112. Tellingly, the U.S. Department of Agriculture undertook a year-long investigation into how the Oregon wheat contamination occurred and was still unable to figure out how it happened, instead ironically finding a new contamination episode in a different state. Dan Charles, *GMO Wheat Investigation Closed, But Another One Opens*, NPR (Sept. 26, 2014), http://www.npr.org/blogs/thesalt/2014/09/26/351785294/gmo-wheat-investigation-closed-but-another-one-opens.

[5] *See* U.S. Gov't Accountability Office, GAO 09-60, *Genetically Engineered Crops: Agencies Are Proposing Changes to Improve Oversight, But Could Take Additional Steps to Enhance Coordination and Monitoring*, 1, 3, 14–16, & 44 (Nov. 2008), *available at* http://www.gao.gov/new.items/d0960.pdf.

Beyond severe socioeconomic impacts, transgenic contamination is an irreparable harm. Once the contamination occurs, it becomes difficult, if not impossible, to contain it. Unlike standard chemical pollution, transgenic contamination is a living type of pollution that can grow over space and time via gene flow. *See* Seidler Dec. at ¶ 17 ("It is scientifically well accepted that pollen from genetically engineered crops can and does result in the transfer of genes that have been genetically engineered to traditional crops that have not been genetically engineered."); *see also Geertson Seed Farms,* 2007 WL 518624, at *5 ("Once the gene transmission occurs and a farmer's seed crop is contaminated with the Roundup Ready gene, there is no way for the farmer to remove the gene from the crop or control its further spread."). Further, just the constant *risk* of contamination itself creates costly and onerous burdens on farms and businesses who only grow and sell traditional, non-genetically engineered crops and products, such as the need for contamination DNA testing for their products or buffer zones. *See Monsanto,* 561 U.S. at 154–55. Finally, genetically engineered plants can irreparably damage wild plants. *See* Seidler Dec. at ¶ 24 ("Where the genetically engineered crop has wild relatives, or can survive in feral-like alfalfa, canola, sugar beets, flax, Brassica species, grasses, etc, transgenic contamination also causes irreparable environmental harm through the loss of biodiversity."). The State of Oregon, for example, continues the Sisyphean task of trying to find and destroy feral populations of a Monsanto-created genetically engineered grass that escaped experimental field trials in the State over a decade ago.[6]

In the absence of the Ordinance, the only realistic option for farmers growing traditional crops in Jackson County to prevent transgenic contamination is to forgo growing valuable crops

[6] *See, e.g.,* Mitch Lies, *Bentgrass Eradication Plan Unveiled*, Capital Press (June 16, 2011), http://www.capitalpress.com/content/ml-scotts-061711; Mitch Lies, Feds Mum on GMO Spread, Capital Press (Nov. 18, 2010), http://www.capitalpress.com/content/ml-bentgrass-111910#.U9lGp_ldVZo .

that they know are highly susceptible to contamination. *See e.g.,* Higley Dec. at ¶¶ 29–30 (noting that her farm has not planted either chard or table beets due to concern that those crops would be contaminated by genetically engineered sugar beets grown within a half-mile of her farm); *see also e.g.*, *Geertson Seed Farms*, 2007 WL 518624, at *9 ("For those farmers who choose to grow non-genetically engineered alfalfa, the possibility that their crops will be infected with the engineered gene is tantamount to the elimination of all alfalfa; they cannot grow their chosen crop."); *see also Center for Food Safety v. Vilsack*, No. C 08–00484 JSW, 2009 WL 3047227, at *9 (N.D. Cal. Sept. 21, 2009) ("[T]he potential elimination of farmer's choice to grow non-genetically engineered crops, or a consumer's choice to eat non-genetically engineered food, and an action that potentially eliminates or reduces the availability of a particular plant has a significant effect on the human environment."). Thus, in order to protect themselves, their markets, and their communities, the farmers of Jackson County worked together to secure the passage of the Ordinance, joining numerous other counties that have passed similar ordinances in California, Washington, and Hawaii. *See* Kimbrell Dec. at ¶ 12.

ARGUMENT

A. Proposed Defendants Should Be Permitted to Intervene As of Right.

Proposed Defendants satisfy the requirements for intervention as of right in this litigation challenging an ordinance they sponsored and supported, and which directly protects their farming rights and economic interests. Courts 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)(2). 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 quotations omitted). According to the Ninth Circuit, its "liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.*; *see also United States v. City of L.A.,* 288 F.3d 391, 398 (9th Cir. 2002) ("[A]llowing 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.") (internal quotations omitted).

The Ninth Circuit uses a four-part test to determine whether invention as a matter of right is warranted under Rule 24(a):

> (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 the 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.

Wilderness Soc'y, 630 F.3d at 1177 (internal quotations omitted). The party moving to intervene bears the burden of showing that the four elements are met, but "the requirements for intervention are broadly interpreted in favor of intervention." *Prete v. Bradbury,* 438 F.3d 949, 954 (9th Cir. 2006) (internal quotations omitted). As Proposed Defendants satisfy each of these requirements, this Court should permit them to intervene as of right in this litigation.

1. Proposed Defendants' Motion is Timely.

The Ninth Circuit evaluates the timeliness of a motion to intervene under three criteria: (1) the stage of the proceeding; (2) the potential prejudice to other parties; and (3) the reason for any delay in moving to intervene. *See Nw. Forest Res. Council v. Glickman,* 82 F.3d 825, 836–

37 (9th Cir. 1996). Proposed Defendants satisfy all criteria for timely intervention. This case is still in its initial stage. Plaintiffs filed their complaint in Oregon state court on November 18, 2014, and Defendant Jackson County was served on November 19, 2014. Defendant Jackson County removed this case to federal court on December 10, 2014, *see* Dkt. #1 (Notice of Removal), and filed its Answer that same day. *See* Dkt. #4 (Defendants' Answer to Complaint). Thus, as this case was filed less than two months ago, Proposed Defendants have not delayed in filing this Motion. *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).

Proposed Defendants are submitting a Proposed Answer concurrently with this Motion, to ensure there is no delay or prejudice to existing parties. The existing parties have not filed any motions, and the Rule 16 Conference has not yet occurred and, as indicated above, Proposed Defendants are willing to participate in the Rule 16 Conference scheduled for January 6, 2015. Proposed Defendants agree that, should the Court permit them to intervene, they will comply with all existing or future schedules set by this Court. And, Proposed Defendants will consent to the Magistrate Judge's jurisdiction. No prejudice, delay, or inefficiency will result from allowing Proposed Defendants to intervene at this time. *See Idaho Farm Bureau Fed'n v. Babbitt,* 58 F.3d 1392, 1397 (9th Cir. 1995) (motion filed "four months after [plaintiff initiated] action" and "before any hearings or rulings on substantive matters" was timely). Proposed Defendants' Motion is timely.

2. Proposed Defendants Have "Significantly Protectable" Interests Relating to the Property or Transaction Which is the Subject of This Action.

According to the Ninth Circuit, the requirement that a party seeking intervention as of right have an "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. A court's assessment of an applicant's interest in the case is a "practical, threshold inquiry." *Nw. Forest Res. Council,* 82 F.3d at 837. A party has a sufficient interest for intervention as of right if "it will suffer a practical impairment of its interests as a result of the pending litigation." *Wilderness Soc'y,* 630 F.3d at 1180. No specific legal or equitable interest is required; 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 at issue." *Sw. Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 818 (9th Cir. 2001).

a. Interests of Oshala Farm and Christopher Hardy

Proposed Defendants have significantly protectable interests in the subject of this litigation: the Ordinance prohibiting the growing of genetically engineered crops in Jackson County. Proposed Defendant Christopher Hardy is a vegetable, herb, and seed farmer in Jackson County who helped draft the Measure to enact the Ordinance, and was the chief petitioner for the Measure and one of the principal campaigners in support of the Measure. Hardy Dec. at ¶ 2–3, 6. Hardy is a co-owner of Village Farm in Ashland where he raises over fifty varieties of vegetable and herbs, as well as seeds for a majority of these crops. *Id*. at ¶ 3. Proposed Defendant Oshala Farm is a vegetable, herb, and seed farm on 115 acres in Jackson County's Applegate Valley. Higley Dec. at ¶ 2, 4. One of the owners of Oshala Farm, Elise Higley, was also the director of the primary political action committee that supported the Measure, OFFC,

and was the most visible farmer working to pass the Measure that resulted in enactment of the Ordinance. *Id.* at ¶ 6–11.

Both Hardy and Oshala Farm have significant economic, agricultural, and reputational interests that would be significantly impaired if the Court granted Plaintiffs any of the relief that they seek in this litigation. Hardy and Oshala Farm commercially grow non-genetically engineered vegetables and herbs, as well as seed for many of the crops grown on their farms. Higley Dec. at ¶ 4; Hardy Dec. at ¶ 3. Hardy and Oshala Farm's customers choose to buy their seeds and crops because they do not want to purchase genetically-engineered products. Higley Dec. at ¶ 27; Hardy Dec. at ¶¶ 17–19. Thus, if genetically engineered crops cross-pollinate with their crops, then their customers and contracted purchasers will not purchase their products. Higley Dec. at ¶ 27; Hardy Dec. at ¶¶ 18–19. Moreover, Hardy and Oshala Farm have staked their reputations on growing traditional, non-genetically engineered crops. If their crops become contaminated, then their reputations for growing non-genetically engineered crops will be marred, and existing or future potential customers will purchase their products from other traditional farms. Higley Dec. at ¶ 26; Hardy Dec. at ¶ 18.

Furthermore, even if they wanted to do so, farms and farmers who grow traditional crops, such as Oshala Farm and Hardy, could not legally sell contaminated crops or plant the seeds, because genetically engineered seeds have in almost all cases been patented by the major chemical corporations that developed the seeds. *See* Seidler Dec. at ¶ 23; *see also* Hardy Dec. at ¶ 34. Hardy and Oshala Farms would expose themselves to potential legal liability under U.S. patent law if they attempted to sell or plant the contaminated crops or seeds. Seidler Dec. at ¶ 23; Higley Dec. at ¶ 24; Hardy Dec. at ¶ 34.

Even absent actual contamination, the ever-present threat of contamination directly impacts both Hardy's farm and Oshala Farm's economic interests. Because of the risks of transgenic contamination from locally planted genetically engineered crops, Hardy and Oshala Farm have stopped or refrained from planting profitable crops due to their susceptibility to contamination. Hardy Dec. at ¶¶ 24–32; Higley Dec. at ¶¶ 29–30. In 2013, Hardy was forced to tear out a crop he was growing to fulfill a seed contract because of concerns that his crop would be contaminated by genetically engineered crops being grown nearby. Hardy Dec. at ¶ 24–29. And, because invalidation of the Ordinance would result in Jackson County farmers planting genetically engineered crops in the next growing season and beyond, Hardy would have to remove traditional crops that he already planted on his farm after the Ordinance was approved due to the risk of contamination. *Id*. at ¶ 30–31. Similarly, Oshala Farm would be forced to limit the amount of traditional seed it contracts to produce given the risk that the seed crop could be contaminated by genetically engineered crops grown nearby. Higley Dec. at ¶ 34–35, 38. Higley would also not be able to plant the Swiss chard and table beet seed crops she plans to plant at Oshala Farm next season because of the risk of contamination. *Id.* at ¶ 41–42. Many family farmers depend on their annual seed crop as the seed source for their next years' crop. Hardy Dec. at ¶ 16. The ability to grow usable seed annually is a critical part of operating many family farms. *Id*. Jackson County is a globally recognized area for the cultivation of high-value agricultural seeds and the sale of seed crops provides a significant economic benefit for Jackson County farmers, including Oshala Farm and Hardy. Higley Dec. at ¶ 25.

b. Interests of OFFC and CFS

The organizational Proposed Defendants—OFFC and CFS—also have significant interests sufficient to support their intervention as of right in this case. The Ninth Circuit has

held that "[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." *Syngenta Seeds, Inc. et al. v. County of Kauai,* 2014 WL 1631830, at *8 (Apr. 23, 2014) (citing *Idaho Farm Bureau Fed'n*, 58 F.3d at 1397). Courts in the Ninth Circuit regularly permit organizations that support measures or laws to intervene in lawsuits challenging the validity of those laws. *See e.g., Nw. Forest Res. Council,* 82 F.3d at 837–38 (public interest groups permitted to intervene as of right when groups "were directly involved in the enactment of the law or in the administrative proceedings out of which the litigation arose"); *Jackson v. Abercrombie,* 282 F.R.D. 507, 516–17 (D. Haw. 2012) (a nonprofit organization that actively supported the ratification of a constitutional amendment by spending time and money providing information in a campaign to educate voters had demonstrated a significantly protectable interest warranting intervention as of right); *Tucson Women's Ctr. v. Ariz. Medical Bd.,* No. CV–09–1909–PHX–DGC, 2009 WL 4438933, at *4 (D. Ariz. Nov. 24, 2009) (public interest group that provided testimony in support of the challenged law had a demonstrated significant interest warranting intervention as of right); *Pickup v. Brown,* 2012 WL 6024387, at *1 (E.D. Cal. Dec. 4, 2012) (public interest group that sponsored and lobbied for challenged bill prior to its passage had a significantly protectable interest in case).

As an association, OFFC was the main political action committee that promoted and passed the Ordinance on behalf of more than 150 family farms in Jackson County that supported it. Higley Dec. at ¶¶ 6–12. OFFC raised and spent over $400,000 in support of the Ordinance and managed an unprecedented grassroots campaign to pass the Measure despite close to $ 1 million in opposition spending. *Id.* at ¶¶ 11,13. OFFC's ability to continue to raise the funding critical to support its public interest work supporting family farming in Jackson County would be harmed if the Ordinance were invalidated. *Id.* at ¶ 17. Since the passage of the Ordinance,

OFFC has incorporated as an Oregon non-profit corporation and is continuing its mission to protect family farmers in Jackson County from the impacts of and harms caused by genetically engineered crops. *Id.* at ¶¶ 6–7. More specifically OFFC has a direct and protectable interest in seeing the Ordinance implemented and enforced pursuant to the Ordinance's own terms and timetable.

A declaration invalidating the Ordinance and an injunction prohibiting the Ordinance from taking effect would significantly harm OFFC's ability to be an effective advocate for family farmers in Jackson County on several fronts. First, OFFC publicly campaigned and based its credibility on the assertion that the Measure, and now the Ordinance, fully complies with the Right to Farm Act. *Id.* at ¶ 14. A judicial finding to the contrary would harm OFFC's credibility, the public's trust in OFFC, and OFFC's ability to continue to be an effective political advocate for protecting family farmers from genetically engineered crops. *Id.* at ¶ 16.

Proposed Defendant CFS, a sustainable agriculture nonprofit, has worked for nearly two decades to ameliorate the adverse impacts that industrial food production has on human and animal health and the environment, and to promote and protect more sustainable forms of agriculture, such as organic systems. Kimbrell Dec. at ¶ 5**.** As part of this program, CFS has assisted numerous states and counties in drafting and passing legislation related to protecting the environment and farmers from the impacts of industrial agriculture. *Id.* at ¶¶ 9V12**.** This work includes assisting numerous counties in passing ordinances such as the Ordinance at issue in this case, which restrict the growing of genetically engineered crops and create areas free from any genetically engineered crops. *Id* at ¶ 12**.**

CFS has many members in Jackson County, including family farmers like Christopher Hardy and Oshala Farm's owner Elise Higley who were active supporters of the Measure.

Kimbrell Dec. at ¶ 19. Jackson County citizens contacted CFS attorney George Kimbrell in March 2012 for help in drafting an ordinance regulating genetically engineered crops. *Id*. at ¶ 13. From that time forward, Kimbrell corresponded with proponents of the ballot measure, answering questions and providing them feedback on the draft ordinance, and serving as a legal expert witness in April 2014 in the state's Citizens Initiative Review process on the Ordinance. *Id***.** Leading up to and during the May 2014 elections, CFS staff worked diligently to support the Ordinance's passage through campaign, media, outreach, and policy efforts. *Id.* at ¶ 13. Thus, CFS has a significant interest in ensuring that the Ordinance remains effective.

CFS also seeks to intervene on behalf of its many members that reside in Jackson County who are personally and directly protected by the Ordinance, including both Hardy and Oshala Farm's owners. *Id.* at ¶ 19; *see also* Higley Dec. at ¶¶ 19–20; Hardy Dec. at ¶ 10. These members do not want to see family farms in their County, including their own, contaminated by genetically engineered plants, and have economic and agricultural interests that are directly related to the successful implementation of the Ordinance. Kimbrell Dec. at ¶ 19. Cultivation of genetically engineered crops and the associated spraying of pesticides also have a negative effect on CFS members' use and enjoyment of their property because the risk of transgenic contamination and pesticide drift compromises the pesticide-free food many of them grow on their property for commercial sales and use. *Id.* at ¶ 20. Ultimately, upholding the Ordinance and ensuring its successful implementation is crucial to CFS's organizational interests and the interests of its members. *Id.* at ¶ 23.

c. Oregon Law Recognizes That The Proposed Defendants Have Significant Protectable Interests in Plaintiffs' Claim for Declaratory Relief.

Oregon state law also recognizes that the Proposed Defendants have significantly protectable interests relating to the property that is the subject of this action and in fact must legally be joined as parties in the Plaintiffs' declaratory judgment claim in order for the claim to proceed. Plaintiffs brought their declaratory judgment claim pursuant to Oregon's Declaratory Judgment Act, which provides that any person whose "rights, status or other legal relations are affected" by an Ordinance "may have determined any question or construction or validity arising under any such … ordinance … and obtain a declaration of rights, status or other legal relations thereunder." O.R.S. § 28.020; *see also* Complaint at ¶ 58. The Declaratory Judgment Act also gives interested parties an unconditional right to participate in declaratory judgment claims:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.

O.R.S. § 28.110. Oregon courts have interpreted this Act to "require joinder of all affected interests in order to yield jurisdiction to enter a declaratory judgment." *Wright v. Hazen Invest., Inc*., 648 P.2d 360, 362 (Or. 1982). As Oregon courts have explained, "[a] plaintiff in a declaratory judgment proceeding must join all parties who claim an interest that would be affected by the declaration" and "courts have no authority to make a declaration unless all persons who have or claim any interest which would be affected by the declaration are parties to the proceeding." *State ex rel. v. Dewberry v. Kulongoski*, 210 P.3d 84, 891–92 (Or. 2009) (internal quotations omitted).[7] A plaintiff's failure to join an interested party pursuant to the

[7] For example, in *State ex rel. Dewberry v. Kulongoski*, the court found that the declaratory judgment statute required that Native American Tribes be parties to a declaratory judgment action challenging the Governor's gaming compact since they had "an interest that would be

Declaratory Judgment Act renders void any declaratory judgment issued by the court. *Nolan v. Jackson Nat'l Life Ins. Co*., 963 P.2d 162, 168 (Or. Ct. App. 1998); *see also* Fed. R. Civ. P. 19(a) (requiring, if feasible, a person to be joined as a party to a lawsuit if the person has an "interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may [] as a practical matter impair or impede the person's ability to protect the interest").

Here, Plaintiffs seek a declaration, pursuant to O.R.S. § 28.020, that the Ordinance is invalid for violating Oregon's Right to Farm Act. And, as described above, all of the Proposed Defendants have interests that would be significantly and directly affected if this Court were to issue such a declaration. Thus, under Oregon's Declaratory Judgment Act, Oregon state courts would be required to permit Proposed Defendants to intervene in this case.

Pursuant to the Oregon statute under which Plaintiffs brought their declaratory judgment claim, Proposed Defendants should be permitted to participate in this lawsuit. The Oregon statute recognizes the significance of Proposed Defendants' interests and is directly relevant here because it demonstrates that, as discussed above, Proposed Defendants do, in fact, have "significantly protectable" interests relating to protecting farmers growing traditional crops in Jackson County from transgenic contamination. A declaration invaliding the Ordinance would affect all of these interests, rendering them "significantly protectable" for purposes of FRCP 24(a). Thus, this Court should find that Proposed Defendants have satisfied the second factor in the test for intervention as of right, at least with regards to Plaintiffs' claim for declaratory relief,

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affected" by the compact. 210 P.3d 884, 891. Similarly, in *Pike v. Allen International, Ltd,* the Court of Appeals remanded a declaratory judgment action regarding the legality of certain types of liquor sales, finding that the Oregon Liquor Control Commission's "interests would be 'affected' by such a declaration" and that it therefore needed to be added as a party to the case pursuant to ORS 28.110. 597 P.2d 804, 807 (Or. 1979).

because of the requirements of Oregon's Declaratory Judgment Act.

3. If this Court Grants Plaintiffs the Relief They Seek, Proposed Defendants Would Not Be Able to Protect Their Interests.

If this Court were to invalidate or enjoin enforcement of the Ordinance, or were to find that the Ordinance resulted in an unconstitutional taking of Plaintiffs' property, the Proposed Defendants would not be able to protect their interests. When evaluating this factor of the intervention-of-right test, courts focus on the "future effect pending litigation will have" on the intervenors' interests. *Syngenta,* 2014 WL 1631830, at *5. The relevant question is whether the disposition of the matter "may impair rights as a practical matter rather than whether the decree will necessarily impair them." *City of L.A.,* 288 F.3d at 401 (internal quotations omitted).

Moreover, the inquiry into whether an interest is impaired is necessarily tied to the existence of an interest. *See Syngenta,* 2014 WL 1631830, at *5 (finding that because intervenors had a significantly protectable interest in the protections afforded by the ordinance relating to pesticides and genetically modified organisms, "it naturally follows that the invalidation of [the ordinance] would impair those interests"). 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,* 282 F.R.D. at 517 (internal quotations omitted); *see also Robert Ito Farm, Inc., et al. v. County of Maui,* Civ. No. 14–00511 BMK, 2014 WL 7148741, at *4 (D. Haw. Dec. 15, 2014) (finding, with almost no discussion, that because the proposed intervenors had "significantly protectable interests in the subject of th[e] action, it follows that the invalidation of the Ordinance would impair those interests").

As discussed above, Proposed Defendants plainly have significantly protectable interests in the subject of this litigation: the Ordinance prohibiting the growing of genetically engineered crops in Jackson County. And these interests will be protected by the implementation and

enforcement of the Ordinance prohibiting the growing of genetically engineered crops in Jackson County. If this Court were to declare the Ordinance invalid, or order a permanent injunction enjoining enforcement of the Ordinance, Jackson County farmers would be permitted to continue growing genetically engineered crops. Proposed Defendants would not be able to prevent Jackson County farmers from growing genetically engineered crops. Oshala Farm's owners, Hardy, and other family farmers who grow traditional crops and whom are members of both OFFC and CFS, would be deprived of any remedy to protect their economic, reputational, and health interests from the risks from genetically engineered crops.[8]

Proposed Defendants' interests would also not be able to protect their interests if this Court granted Plaintiffs' alternative claims for relief—finding that Ordinance results in the taking of private property without just compensation in violation of the Oregon and federal constitutions. If this Court were to grant Plaintiffs' requested relief in full, the County would have to pay $4,205,000 to Plaintiffs. *See* Complaint at ¶ 92. While Plaintiffs' claims are unjustified, having to pay even a smaller amount would likely have a significant impact on Jackson County's budget. Higley Dec. at ¶ 54. Furthermore, were Plaintiffs' claims successful, this would likely lead to at least some additional claims for similar payments from other farmers seeking similar relief, further stressing the County's limited financial resources. *Id.* If this Court were to find that the Ordinance did, in fact, result in an unconstitutional taking, whether pursuant to the Oregon or federal constitutions, or both, it is likely that the County would decide to

[8] Plaintiffs would also not be able to protect their interests if the Court enjoined the Ordinance but did not declare the Ordinance invalid. Plaintiffs ask for "preliminary and permanent injunctive relief barring the County from taking any action to implement or enforce the Ordinance." *See* Complaint at ¶ 63. Thus, a decision to grant Plaintiffs the injunctive relief that they are seeking would be, practically speaking, tantamount to declaring the Ordinance invalid, as in both situations the Ordinance would not be implemented or enforced, farmers could continue to grow genetically engineered crops in Jackson County, and the Proposed Defendants' interests would not be afforded the protections offered by the Ordinance.

overturn the Ordinance in exchange for relief from a judgment. Higley Dec. at ¶ 54; *see also e.g., First English Evangelical Lutheran Church of Glendale v. L.A. County, Cal.,* 482 U.S. 304, 321 (1987) (noting that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain"). Plaintiffs could thus, ultimately, achieve the same outcome they are seeking through their first claim for relief—the Ordinance not being implemented or enforced. And, as described above, Proposed Defendants have significant interests that are protected by this Ordinance, interests that they will not be able to protect if the Ordinance is invalidated or not implemented or enforced. Thus, this Court should find that Proposed Defendants have satisfied the third factor of the intervention-of-right test.

4. Defendant Jackson County Cannot Adequately Represent the Interests of Proposed Defendants.

The final prong of the four-part test for intervention of right is that "the applicant's interest must be inadequately represented by the parties to the action." *Wilderness Soc'y*, 630 F.3d at 1177 (internal quotations omitted). When evaluating whether an existing party will adequately represent a proposed intervenor, courts ask (1) whether the existing party will undoubtedly make all of the intervenor's arguments; (2) whether the existing party is capable of and willing to make those arguments; and (3) whether the proposed intervenor offers a necessary element to the proceedings that would otherwise be neglected. *Prete v. Bradbury,* 438 F.3d at 956. In general, the burden of showing inadequate representation is minimal, and the applicant need only show that "representation of his interest may be inadequate." *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 n. 10 (1972) (internal quotations omitted).

Despite the Supreme Court's admonition that an applicant's burden to show inadequate representation should be minimal, the Ninth Circuit has found that when a proposed intervenor

and a party to the lawsuit share the same "ultimate objective," a presumption of adequate representation arises. *Freedom from Religion Found., Inc. v. Geithner,* 644 F.3d 836, 841 (9th Cir. 2011). However, an applicant seeking intervention can overcome the presumption by demonstrating "more narrow, parochial interests than existing parties." *Syngenta,* 2014 WL 1631830, at *6 (internal quotations omitted); *see also Bark v. Northrop,* No. 3:13–cv–01267–HZ, 2013 WL 6576306, at *4 (D. Or. 2013) (proposed intervenor can overcome presumption of adequate representation if the intervenor can show that their "interests are narrower than that of the government and therefore may not be adequately represented"). The Ninth Circuit has held that "[i]nadequate representation is most likely to be found when the applicant asserts a personal interest that does not belong to the general public." *Forest Conservation Council v. U.S. Forest Serv.,* 66 F.3d, 1489, 1499 (9th Cir. 1995), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011).

This line of Ninth Circuit case law is seemingly inconsistent with the low bar for intervention established by the Supreme Court in *Trbovich.* In that case, the Supreme Court found that the Secretary of Labor's representation of a union member *may be inadequate* because the Secretary was responsible for both representing the specific interests of union member and the broader interests of the public in maintaining democratic union elections. 404 U.S. at 539. And thus, because these different functions "may not always dictate precisely the same approach to the conduct of litigation," the Court found that the union member could intervene. *Id.* As *Trbovich* is still good law and controlling precedent, the Ninth Circuit case law must be read in light of the *Trbovich* decision. Hence, even in cases where a presumption of adequate representation arises because the existing party and the proposed intervenors share the same ultimate objective, the intervenors' burden in rebutting that presumption must be minimal.

Here, all Proposed Defendants easily satisfy this minimal burden. Jackson County and the Proposed Defendants do not share the same ultimate objective. But, even if they did, Proposed Defendants can rebut the presumption of adequate representation that would arise in such a situation, because they have a narrow, more parochial interest than that of Jackson County.

a. Jackson County and the Proposed Defendants Do Not Share the Same Ultimate Objective, and Proposed Defendants Can Rebut Any Presumption of Adequate Representation.

Jackson County and Proposed Defendants do not share the same ultimate objective. The recent stipulation between Jackson County and Plaintiffs demonstrates that this is the case. While Jackson County's ultimate objective is to defend its laws and regulations in order to maintain the rule of law, because of its limited resources and broader responsibilities, it is willing to indefinitely delay its enforcement of the Ordinance. *See* Dkt. #5 (Stipulation). In contrast Proposed Defendants' narrower, ultimate objective is to have the Ordinance fully implemented and enforced beginning on June 6, 2015, as approved by the voters. Only such immediate and complete implementation of the Ordinance beginning on June 6 will fully protect the livelihoods and interests of farmers growing traditional crops in Jackson County by eliminating the threat of having their crops contaminated by genetically engineered crops. Plainly, Proposed Defendants' ultimate objective is different, and much more narrow and specific, than that of Jackson County.

But, even if Jackson County and Proposed Defendants did share the same ultimate objective, Proposed Defendants can easily rebut the presumption of adequate representation because they have a narrow, more parochial interest than that of Jackson County, an interest that Jackson County will not be able to adequately represent in this litigation. *See Forest Conservation Council,* 66 F.3d at 1499 (finding that the Forest Service may not adequately

represent proposed intervenor's asserted interests in defending against the issue of a preliminary injunction because the "government must protect the broad public interest, not just the economic concerns of the timber industry"). The County's interest is in defending its laws and regulations, regardless of the substance of those laws and regulations. Essentially, the County's interest in defending the Ordinance is divorced from the substance of the Ordinance and its immediate enforcement, and from the protections that the Ordinance would afford its citizens beginning on June 6, 2015. Moreover, the County must consider all of its citizens' interests, including the business and economic interests of Plaintiffs.

In contrast, Proposed Defendants are a family farmer, a family farm, a public interest organization dedicated to the specific issue of the Ordinance, and the successor in interest to the primary political action committee that led the campaign in support of the Ordinance—all of whom have specific and personal interests in the Ordinance's protections, as discussed above. Oshala Farm and Christopher Hardy's interests are directly related to their own, personal livelihoods, which are dependent on their being able to grow and sell traditional crops and seeds without fear or risk that these crops and seeds may become contaminated by genetically engineered plants. *See e.g.,* Higley Dec. at ¶ 47 ("With virtually no state or federal protections for farmers that are effective in protecting farmers growing traditional crops from genetically engineered crops, I believe the Ordinance is critical for protecting the short and long-term viability of my farm from contamination by genetically engineered crops."); Hardy Dec. at ¶ 14 ("I know that transgenic contamination of my crops by genetically engineered pollen or seed would have major economic impacts on my ability to farm and would seriously damage my farm's reputation for high-quality produce."). There can be no interest more personal than having a safe, healthy, and economically secure future for a person and their family. And OFFC

and CFS have similar interests, because these organizations are comprised of farmers who grow traditional crops, like Hardy and Oshala Farm's owners, and thus these organizations are dedicated to protecting those farmers' interests. *See e.g.,* Higley Dec. at ¶¶ 6–7; Kimbrell Dec. at ¶¶ 7–16, 23 (discussing CFS's organizational interests and concluding that "upholding Ordinance 635 and ensuring the Ordinance's successful implementation is crucial to CFS's organizational interests and the interests of its members").

b. Recent Case Law in Other Jurisdictions Support Proposed Defendants' Motion to Intervene in This Case.

Recent case law in Hawaii demonstrates what Proposed Defendants need to show in order to establish that Jackson County will not adequately represent their interests, and that they have shown it. In *Syngenta,* a Hawaii district court granted CFS's motion to intervene in a case challenging a county ordinance requiring, among other things, mandatory buffer zones and disclosures for the use of pesticides and genetically engineered plants. *Syngenta,* 2014 WL 1631830, at *1–2. The court found that CFS had made a compelling showing that Kauai County may not adequately represent its interests, enough to overcome the presumption of adequate representation that arose because CFS and the County shared the same objective, because proposed intervenors represented individuals who benefited directly from the challenged county ordinance, and thus "[t]heir interests in upholding the law are decidedly more palpable than the County's generalized interest." *Id.* at *7. The court also considered the fact that the mayor of the county had vetoed the ordinance, but that the County Council had later overrode the veto. *Id.* at *2, 8.

Similarly, just a few weeks ago, in *Robert Ito Farm, Inc. v. County of Maui*, the district court granted a motion to intervene by an organization and several individuals who had campaigned for a county ordinance, approved by a voter referendum, that banned genetically

engineered crops. The applicants were allowed to intervene in a case challenging the legality of that ordinance and filed against the County of Maui. The district court, stressing the minimal burden standard from *Trbovich,* found that the County of Maui might not adequately represent the applicants' interests because their "personal interests are sufficiently distinct from the County's general interests" and "the Mayor and County Council [had] expressed views that are directly antithetical to those of the [proposed intervenors]." 2014 WL 7148741, at *5. It is noteworthy that the County of Maui also had stipulated to delay enforcement of the ordinance at issue in that case.[9]

In contrast to *Syngenta* and *Robert Ito Farm*, in *Hawai'i Floriculture and Nursery Ass'n et al. v. County of Hawai'i,* the same district court denied a motion to intervene by a group of proposed defendants, including local farmers and farm businesspeople who grew organic or natural, non-genetically engineered crops in Hawai'i County, seeking to defend a county ordinance aimed at ensuring the prevention of transgenic contamination. Civ. No. 14–00267 BMK, 2014 WL 4199342 (D. Haw. Aug. 22, 2014). The Court found that the proposed intervenors could not show that their interests would not be adequately represented by the County, distinguishing its decision from that in *Syngenta* because in *Syngenta,* "the ordinance was not yet in effect, the mayor had vetoed the challenged ordinance, and the County had budgetary constraints for securing legal representation." *Id.* at *2.

Here, the situation is much more similar to that in *Syngenta* and *Robert Ito Farm* than *Hawai'i Floriculture*, and the result in *Syngenta* and *Robert Ito Farms* is much more consistent

[9] A second group of proposed intervenors, including CFS, was denied intervention, but only because the district court found that the first group of intervenors would adequately represent the interests of both of the groups seeking to intervene, not because the county would represent their interests. Rather the court specifically found that the defendant county would not adequately represent the interests of the group of proposed intervenors that included CFS. 2014 WL 7148741, at *5–6.

with the minimal burden standard from *Trbovich*. First, although implementation and enforcement of the Ordinance by the County should begin on June 6, 2015, the County here also has *voluntarily stipulated* to not enforce the Ordinance until the case is resolved. *See* Dkt. #5 (Stipulation). Also, like the political situations in both Hawaii cases where intervention was allowed, all three current Jackson County Commissioners opposed or criticized the Measure. Commissioner Jon Rachor was the commissioner most visibly opposed to the Measure; he appeared in a television ad opposing the Measure. *See* Higley Dec. at ¶ 51. Commissioner Doug Breidenthal was highly critical of the Measure and gave a number of talks about problems with the Ordinance, while still maintaining his neutrality towards the Measure. *Id*. Commissioner Don Skundrick also has stated that he opposed the Measure. *Id.* It is not realistic to expect the Commissioners who opposed the Measure to now vigorously defend the Ordinance. The recent stipulation delaying the County's enforcement of the Ordinance further underscores the County government's unwillingness or inability to fully defend the voters' wishes.[10]

c. Jackson County Does Not Have Sufficient Resources To Defend the Ordinance, and Proposed Defendants Do.

Jackson County has limited staff and financial resources to devote to defending the Measure. The County has a very competent, but small legal staff of only four attorneys, and those attorneys are already spread thin representing the County in many other litigation matters.

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[10] Commissioners Skundrick and Rachor are retiring at the end of 2014, and are being replaced by Rick Dyer and Colleen Roberts. Higley Dec. at ¶ 52. Dyer has never explicitly state his position on the Measure, but he has taken a significant amount of money from sponsors of Senate Bill 633, dubbed Oregon's "Monsanto Protection Act," a law eventually passed by the Oregon legislature which prevents local governments from enacting or enforcing any measures that regulate agricultural, flower, nursery, and vegetable seeds or their products. *Id*. This law is directly contrary to the spirit and intent of the Ordinance and would have prohibited the Ordinance from being enacted, but for the state legislature writing an exemption into the Monsanto Protection Act for the Measure. *Id*. Thus, starting in January 2014, it is likely that two out of three County Commissioners (Breidenthal and Dyer) will be hostile towards the Ordinance, and will not support expending limited County resources on either enforcing the Ordinance or defending it in this litigation. *Id.* at ¶ 53.

Thus, the County would benefit from the additional legal manpower that Proposed Defendants can provide in order to adequately defend the Ordinance. Similarly, the County has limited financial resources. The County cannot afford to go out and hire a team of lawyers with expertise litigating the complex mix of environmental agricultural, and constitutional laws that are relevant to this case. In contrast, Plaintiffs' legal challenge is almost certainly being backed by some or all of the corporations that spent the record-breaking amount of almost $1 million to oppose the Measure. *See* Higley Dec. at ¶ 55.[11] These corporations, including Monsanto, Syngenta and Bayer Crop Sciences, certainly have the potential to invest similarly large amounts of resources into the instant legal case. *Id.* There is every reason to believe that the magnitude of legal resources that these companies will pour into this litigation will seriously stretch, if not exceed, Jackson County's ability to vigorously defend the Ordinance.

Allowing Proposed Defendants to intervene would bring both legal and expert resources to bear in defending against Plaintiffs' claims. For example, CFS's staff includes some of the most experienced litigators in the country on local laws related to controlling genetically engineered crops. *See* Kimbrell Dec. at ¶ 15, n.6 (listing lawsuits CFS has been involved in to address the impacts of genetically engineered crops on health and the environment). CFS staff are intimately familiar with the scientific, agricultural, and economic issues that are directly relevant to Plaintiffs' taking claims. *See id* at ¶¶ 5–16. In addition, if the Court permits Proposed Defendants to intervene in this case, Dr. Ramon Seidler has agreed to serve as an expert witness for Proposed Defendants. Seidler Dec. at ¶ 26. Dr. Seidler has more than 25 years of experience working on issues relevant and related to genetic engineering, both at the

[11] *See also* Lawsuit seeks to overturn Jackson County's GMO ban or net $4.2 million for farms, Medford Mail Tribune (Nov. 18, 2014), http://www.mailtribune.com/article/20141118/News/141119622.

U.S. Environmental Protection Agency—where he was the first researcher tasked with evaluating the impact of genetically engineered crops—and as a Professor of Microbiology at Oregon State University. *Id.* at ¶¶ 2–6. Furthermore, OFFC and CFS have direct and extensive contacts with Jackson County farmers, including farmers that grow traditional crops and have grown genetically engineered crops, who have extensive local experience and expertise relevant to Plaintiffs' claims. OFFC already has identified multiple farmers, including local alfalfa growers, who are likely willing to serve as expert witnesses on issues such as the extent of damages claimed by Plaintiffs, the economic and agricultural harms posed by genetically engineered crops, and the agricultural process of transitioning from genetically engineered alfalfa back to traditional alfalfa. Higley Dec. at ¶ 18.

B. Alternatively, Proposed Defendants Can Permissively Intervene in This Case.

As explained above, Proposed Defendants qualify for intervention of right in the instant lawsuit. However, if this Court finds that Proposed Defendants do not satisfy all of the factors necessary for intervention of right, than this Court should grant Proposed Defendants leave to permissively intervene in this case.

Pursuant to Federal Rule of Civil Procedure 24(b), "[o]n a timely motion, the court may permit anyone to intervene who … has a claim or defense that shares with the main action a common question of law or fact." Similarly to intervention of right, under Rule 24(b) "the Ninth Circuit upholds a liberal policy in favor of intervention." *Nw. Envtl. Advocates v. U.S. Envtl. Prot. Agency,* No. 3:12–cv–01751–AC, 2014 WL 1094981, at *2 (D. Or. Mar. 19, 2014). Moreover, "[i]n 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." *United States v. Alisal Water Corp.,* 370 F.3d 915, 919 (9th

Cir. 2004). 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). 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 by Wilderness Soc'y v. U.S. Forest Serv.,* 630 F.3d 1173 (9th Cir. 2011).

Here, Proposed Intervenors plainly meet the requirements for permissive intervention. Firstly, as explained above, Proposed Defendants' motion is timely. Secondly, an independent jurisdictional basis for permissive intervention exists where the intervenor "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. Again, as described above, all Proposed Defendants have asserted interests in the Ordinance. Once granted intervention, Proposed Defendants will vigorously defend against Plaintiffs' arguments that the Ordinance is contrary to law and should be invalidated and enjoined, and that the Ordinance has resulted an unconstitutional taking of Plaintiffs' private property. Thus, an independent ground for jurisdiction exists. Finally, there are common questions of law between Proposed Defendants' defense of the Ordinance, and the main action. Those questions are whether the Ordinance violates Oregon's Right to Farm Act, and whether the Ordinance results

in an unconstitutional taking of Plaintiffs' private property. Further, by intervening, Proposed Defendants will significantly contribute to the Court's ability to effectively and efficiently understand and resolve this case.

As explained, Proposed Defendant CFS is a recognized national expert on agricultural biotechnology, and will thus provide this Court with a valuable and unique legal and practical perspective, as well as the expertise necessary to fully and correctly adjudicate sensitive and complex issues and local regulation of food production. Kimbrell Dec. at ¶¶ 5–16; *see also Ctr. for Biological Diversity v. Kelly,* No. 1:13–CV–00427–EJL–CWD, 2014 WL 3445733, at *8 (D. Idaho July 11, 2014) (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). Similarly, OFFC has already devoted considerable time researching and explaining how and why the Ordinance is consistent with state and federal laws. Finally, Proposed Intervenors Oshala Farm and Hardy have personal experience in the practical consequences of allowing the growing of genetically engineered crops, and will be able to provide perspective that otherwise is likely to be absent from the presentation of issues to the Court.

As explained above, allowing Proposed Defendants to intervene in this case would not cause undue delay or prejudice any of the existing parties. Proposed Defendants are seeking intervention very early in the proceeding, will abide by the existing deadlines, and will participate in any scheduling conferences while this Motion is pending, if the Court deems it appropriate. Moreover, because Proposed Defendants want to see the Ordinance enforced as scheduled, they are motivated to have Plaintiffs' claims resolved by this Court as soon as possible.

CONCLUSION

For the reasons above, Proposed Defendants respectfully request that this Court grant their Motion to Intervene and order that Oshala Farm, LLC, Christopher Hardy, OFFC, Inc., and CFS be added as defendants for all of Plaintiffs' claims for relief.

DATED this 31st day of December 2014.

Respectfully submitted,

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