

**Electronically Filed
FIRST CIRCUIT
1CCV-19-0002164
08-DEC-2023
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Dkt. 34 NTCE**

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

M.K.,) CIVIL NO. 1CCV-19-0002164 GWBC
) (Other Non-Vehicle Tort)
Plaintiff,)
)
vs.) NOTICE OF EX PARTE
) COMMUNICATION; EXHIBIT "A"
S. LAWRENCE SCHLESINGER,)
M.D., FACS; PHOENIX GROUP,) Judge Gary W.B. Chang
LLC dba THE BREAST IMPLANT)
CENTER OF HAWAII and MOMMY)
MAKEOVER INSTITUTE OF HAWAII;)
JOHN DOES 1-10; JANE DOES 1-)
10; DOE PARTNERSHIPS 1-10;)
and DOE CORPORATIONS 1-10,)
)
Defendants.)
)

NOTICE OF EX PARTE COMMUNICATION

YOU ARE HEREBY NOTIFIED that the court received two documents on Thursday, December 7, 2023, at 1:36 p.m. from Gillian Schefer Kim. Both of these documents appear to be unfiled and titled "MOTION TO UNSEAL and MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SEAL" (hereinafter "Unfiled Documents"). The Unfiled Documents are attached hereto as Exhibit "A".

Exhibit "A" appears to be an ex parte communication (a communication by one party to the court to the exclusion of all other parties) regarding the above-referenced matter. By copy of this Notice to Gillian Schefer Kim, she and all parties are advised that an ex parte communication is improper and that the Court is not permitted by law to participate in ex parte communications of this nature. Therefore, the Court will not be taking any action with respect to said ex parte communication.

NOTICE SENT TO:

JAMES J. BICKERTON, ESQ.
STEPHEN M. TANNENBAUM, ESQ.
BICKERTON LAW GROUP, LLLP
and
CHRISTOPHER S. BOUSLOG, ESQ.
ATTORNEYS FOR PLAINTIFF
Via E-filing

TRISHA L. NISHIMOTO, ESQ.
SPECIAL APPEARANCE ATTORNEY FOR DEFENDANTS S.
LAWRENCE SCHLESINGER, M.D., FACS; PHOENIX GROUP,
LLC dba THE BREAST IMPLANT CENTER OF HAWAII and
MOMMY MAKEOVER INSTITUTE OF HAWAII.
Via Conventional Mailing

ROBERT BRIAN BLACK, ESQ.
GILLIAN SCHEFER KIM, ESQ.
ATTORNEYS FOR CIVIL BEAT LAW CENTER FOR THE PUBLIC
INTEREST
Via Conventional Mailing

DATED: HONOLULU, HAWAI`I, December 8, 2023.

/s/ Gary W.B. Chang



JUDGE OF THE ABOVE-ENTITLED COURT

ROBERT BRIAN BLACK 7659
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Civil Beat Law Center for the Public Interest

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M.K.

Plaintiff,

v.

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FACS et al.,

Defendant.

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MOTION TO UNSEAL and
MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO UNSEAL

MOTION TO UNSEAL

Pursuant to the constitutional right of access provided by the First Amendment of the U.S. Constitution, article I, section 4 of the Hawai'i Constitution, and Hawai'i Court Records Rules 10.10, the Civil Beat Law Center for the Public Interest (Law Center) requests access to the complaint filed in this case and the case docket. At present, nothing is publicly accessible regarding this case. eCourt Kōkua does not even identify the names of the parties or the docket entries. Moreover, there is no order to seal, no explanation of the compelling interest that will be irreparably harmed if the

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FIRST JUDICIAL CIRCUIT
STATE OF HAWAII
14TH DIVISION

EXHIBIT "A"

docket is publicly accessible, and no specific findings as to why other alternatives such as redaction cannot inadequately protect the asserted compelling interest.

The public has a constitutional right of access to court proceedings and files. When people submit disputes to the Judiciary, that process is presumptively public. Courts cannot “disappear” a case simply because the parties want to keep it secret. There are established procedural and substantive measures that protect the public’s right of access. None of those protections appear to have been met in this case.

The Law Center respectfully requests that the Court unseal the complaint filed in this case and the case docket.¹

DATED: Honolulu, Hawai‘i, December 7, 2023



ROBERT BRIAN BLACK
GILLIAN SCHEFER KIM

Attorneys for Movant Civil Beat Law Center
for the Public Interest

¹ The Law Center conventionally filed this motion because, if added as an electronic filer to the case, the Law Center would gain electronic access to the documents that it is seeking to unseal.

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MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO UNSEAL

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO UNSEAL

The Civil Beat Law Center for the Public Interest (Law Center) respectfully requests access to the complaint filed in this case and the case docket. No compelling interest justifies the wholesale removal of an entire civil case from the public record. On December 6, 2023, pursuant to HCRR Rule 10.10, the Law Center requested and was denied access to the case docket and complaint filed in this matter.

1. The Constitutional Standard for Sealing Court Records

The Hawai`i Supreme Court has recognized that the public has a constitutional right of access to judicial proceedings, including court records. *Grube v. Trader*, 142 Hawai`i 412, 422, 420 P.3d 343, 353 (2018); *accord Oahu Public`ns, Inc. v. Ahn*, 133 Hawai`i 482, 507, 331 P.3d 460, 485 (2014).² “[T]here is a strong presumption that court

² Although *Grube* and *Ahn* concerned criminal proceedings, the same principles apply to civil cases. *Ahn*, 133 Hawai`i at 493 n.14, 496 n.18, 508 n.36, 331 P.3d at 471 n.14, 474

proceedings and the records thereof shall be open to the public.” *Grube*, 142 Hawai`i at 428, 420 P.3d at 359.

Hawai`i has a long tradition of open access to judicial proceedings. In *Gannett Pacific Corp. v. Richardson*, the Hawai`i Supreme Court explained that “[b]ecause of our natural suspicion and traditional aversion as a people to secret proceedings, suggestions of unfairness, discrimination, undue leniency, favoritism, and incompetence are more easily entertained when access by the public to judicial proceedings are unduly restricted.” 59 Haw. 224, 230, 580 P.2d 49, 55 (1978); accord *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion) (“A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.”).

In dispelling such suggestions of unfairness, “openness . . . serves to enhance public trust and confidence in the integrity of the judicial process.” *Gannett*, 59 Haw. at 230, 580 P.2d at 55; accord *Grube*, 142 Hawai`i at 422, 420 P.3d at 353 (“The right of access thus functions not only to protect the public’s ability to gain information – a requisite to the enjoyment of other First Amendment rights – but also as a safeguard of the integrity of the courts.”); see also *Richmond Newspapers*, 448 U.S. at 572 (plurality opinion) (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”). “The efficiency,

n.18, 486 n.36; accord *Roy v. GEICO*, 152 Hawai`i 225, 233, 524 P.3d 1249, 1257 (App. 2023), cert. denied, 2023 WL 4745977 (July 25, 2023).

competence, and fairness of our judicial system are matters of legitimate interest and concern to our citizenry, and free access to our courtrooms is essential to their proper understanding of the nature and quality of the judicial process.” *Gannett*, 59 Haw. at 230, 580 P.2d at 55.

“The right of access protected by the First Amendment and article I, section 4 of the Hawai`i Constitution can only be overcome by findings that ‘the closure is essential to preserve higher values’ and that the closure is ‘narrowly tailored’ to serve that interest.” *Grube*, 142 Hawai`i at 424, 420 P.3d at 355 (citing *Ahn*, 133 Hawai`i at 498, 331 P.3d at 476). To justify keeping a court record sealed, a court must “make specific findings demonstrating a compelling interest, a substantial probability that the compelling interest would be harmed, and there is no alternative to [sealing the record] that would adequately protect the compelling interest.” *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485; accord *Grube*, 142 Hawai`i at 424, 420 P.3d at 355.

“To qualify as compelling, the interest must be of such gravity as to overcome the strong presumption in favor of openness. . . . [T]he asserted interest must be of such consequence as to outweigh both the right of access of individual members of the public and the general benefits to public administration afforded by open trials.” *Grube*, 142 Hawai`i 425-26, 420 P.3d at 356-57. “Although privacy rights may in some instances rise to the level of compelling, simply preserving the comfort or official reputations of the parties is not a sufficient justification.” *Id.* at 425, 420 P.3d at 356.

If a compelling interest exists, “a court must find that disclosure is sufficiently likely to result in irreparable damage to the identified compelling interest.” *Ahn*, 133

Hawai`i at 507, 331 P.3d at 485. “It is not enough that damage could possibly result from disclosure, nor even that there is a ‘reasonable likelihood’ that the compelling interest will be impeded; there must be a ‘substantial probability’ that disclosure will harm the asserted interest.” *Grube*, 142 Hawai`i at 426, 420 P.3d at 357. The harm “must be irreparable in nature.” *Id.*

If there is a compelling interest that would be irreparably harmed by disclosure, redaction is an adequate alternative to concealing an entire document from the public. *Ahn*, 133 Hawai`i at 507-08, 331 P.3d at 485-86 (“redacting personal identifiers or replacing any identifying information with a juror-number generally strikes the quintessential balance between preserving juror privacy and allowing public access to review trial proceedings for fairness and impartiality”); accord *Oahu Public’s Inc. v. Takase*, 139 Hawai`i 236, 246-47, 386 P.3d 873, 883-84 (2016). Any denial of public access must be narrowly tailored so that it is “no greater than necessary to protect the interest justifying it.” *Grube*, 142 Hawai`i at 427, 420 P.3d at 358.

2. The public record lacks sufficient information about the proceedings and the need for sealing.

The public record offers no explanation for why this entire case is sealed. There is no accessible motion to seal, nor any indication that the parties submitted facts or that the Court made specific findings sufficient to justify closure. Without any information about what happened, the Law Center does not have “a *meaningful* opportunity to address sealing the [documents] on the merits, or to discuss with the court viable alternatives.” *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485 (emphasis added).

Complaints are generally public records. “[T]he fact of filing a complaint, whatever its veracity, is a significant matter of record.” *Bernstein v. Bernstein Litovitz Berger & Grossmann LLP*, 814 F.3d 132, 140 (2d Cir. 2016); *accord Roy*, 152 Hawai‘i at 234-35, 524 P.3d at 1258-59; *Courthouse News Serv. v. Planet*, 947 F.3d 581, 590-94 (9th Cir. 2020) (affirming the public’s right to access civil complaints); *Vassiliades v. Israely*, 714 F. Supp. 604, 606 (D. Conn. 1989) (refusing request to file complaint under seal because party consent, concerns about “adverse publicity,” and potential for early settlement do not justify sealing a complaint).

The hidden docket exacerbates the issue. Absent proof of a compelling higher interest, courts cannot maintain secret case dockets. Courts recognize that sealed dockets (other than for grand jury proceedings) violate the First Amendment because secrecy makes it impossible to exercise the public’s constitutional right of access to judicial records. *E.g., Company Doe v. Public Citizen*, 749 F.3d 246, 268-71 (4th Cir. 2014); *Hartford Courant Co. v. Pellegrino*, 371 F.3d 49, 62-63 (2d Cir. 2004); *United States v. Valenti*, 987 F.2d 708, 715 (11th Cir. 1993); *In re Search Warrant*, 855 F.2d 569, 575 (8th Cir. 1988); *accord Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 508-09 (1st Cir. 1989) (holding statute unconstitutional that sealed entire criminal proceedings, including the docket, without individualized findings); *see In re Sealed Case*, 199 F.3d 522 (D.C. Cir. 2000) (affirming the unique nature of grand jury proceedings and the need for secrecy).

There is no justification for hiding this entire case file from public view.

3. Redaction is a more narrowly tailored solution to any concerns.

In *Grube*, *Ahn*, and *Takase*, the Hawai`i Supreme Court emphasized that sealing court proceedings from public view must be “narrowly tailored to serve [a compelling government interest].” *Ahn*, 133 Hawai`i at 497, 331 P.3d at 475; *accord Grube*, 142 Hawai`i at 427, 420 P.3d at 358 (“The court should therefore make findings regarding specific alternatives and set forth its reasons for rejecting each.”); *Takase*, 139 Hawai`i at 246-47, 386 P.3d at 883-84. In each case, the supreme court emphasized redactions as an appropriate alternative to sealing an entire document.

But this Court withheld everything, even the docket. That is not a narrowly tailored solution.

CONCLUSION

The Law Center respectfully requests that this Court unseal the complaint filed in this case and the case docket.

DATED: Honolulu, Hawai`i, December 7, 2023



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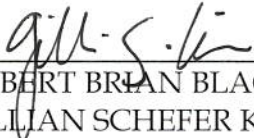
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