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7659
11823

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED
2023 DEC 18 AM 10:02

M. L. FAGARANG
M. L. FAGARANG
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Attorneys for Movant
Civil Beat Law Center for the Public Interest

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

M.K.
Plaintiff,

v.

S. LAWRENCE SCHLESINGER, M.D.,
FACS et al.,
Defendant.

CIVIL. NO. 1CCV-19-0002164 GWBC
(Other Non-Vehicle Tort)

MOTION FOR RECONSIDERATION;
MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
RECONSIDERATION; DECLARATION
OF GILLIAN SCHEFER KIM; EXHIBIT
1; NOTICE OF MOTION; and
CERTIFICATE OF SERVICE

NON-HEARING MOTION
JUDGE: Hon. Gary W.B. Chang

MOTION FOR RECONSIDERATION

Based on the Notice of Ex Parte Communication (Notice) filed December 8, 2023,
Civil Beat Law Center for the Public Interest (Law Center) respectfully requests that the
Court reconsider its decision not to take any action on the Law Center's Motion to
Unseal (Motion) filed December 7, 2023.

On December 7, pursuant to Hawai'i Court Records Rule (HCRR) 10.10, the Law
Center filed the Motion to request access to the complaint and docket. The Law Center

conventionally filed the 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. As reflected in accompanying exhibit, the Clerk filed the Motion at 9:54 a.m. Because the Law Center is unable to access the docket in this case, it is unaware when the Motion was added to the docket. Also, because the Law Center does not have access to the docket in this case, the Law Center did not know the identity of the parties' counsel and relied on the Clerk—as provided in HCRR 10.10—to “notify all parties of the motion.” On December 15, the Law Center received the Notice via U.S. mail.

The Law Center complied with the HCRR, did not send the Court an ex parte communication, and respectfully requests that the Court consider the Motion on the merits.¹

DATED: Honolulu, Hawai'i, December 18, 2023



ROBERT BRIAN BLACK
GILLIAN SCHEFER KIM

Attorneys for Movant Civil Beat Law Center
for the Public Interest

¹ The Law Center acknowledges that the copies of the filed Motion provided to the Court pursuant to RCCH 7.2(g)(6) were not file-stamped. It apologizes for that error.

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MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
RECONSIDERATION

NON-HEARING MOTION

JUDGE: Hon. Gary W.B. Chang

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

Non-party movant Civil Beat Law Center for the Public Interest (Law Center) moves for reconsideration of this Court's Notice of Ex Parte Communication filed December 8, 2023 (Notice) [Dkt. 38]. The Notice informed the parties that the Court would not take any action on the Law Center's Motion to Unseal (Motion to Unseal) filed December 7, 2023. The Law Center respectfully requests that the Court consider the filed Motion to Unseal on the merits.

I. STATEMENT OF FACTS

On December 6, 2023, the Law Center requested the complaint and docket sheet in this case. Decl. of Gillian Schefer Kim, dated December 18, 2023 (Kim Decl.), ¶ 2. Pursuant to Hawai'i Court Records Rules (HCRR) 10.10, the Clerk issued a Notice of Denied Access that same day.¹ *Id.* ¶ 3. As provided in HCRR 10.10, on December 7, the Law Center timely filed the Motion to Unseal those records. *Id.* ¶ 4. The Motion to Unseal was filed on December 7 at 9:54 a.m. *Id.* Ex. 1. Because the Law Center does not have access to the docket, it does not know when the clerk notified the parties of the Motion to Unseal pursuant to HCRR 10.10. *Id.* ¶ 8. Also, until December 15, the Law Center did not know the identity of all the parties or any of their counsel. *Id.*

Because copies of the Motion to Unseal left for the Court were not file-stamped, it appears that the Court concluded that the Motion to Unseal was “unfiled” and *ex parte*.² Dkt. 38.

II. STANDARD OF REVIEW

“[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier

¹ As relevant here, HCRR 10.10 provides: “No later than 10 days after the Clerk’s denial of a request for a confidential record, the requestor may move for access. The Clerk shall notify all parties of the motion. Within 10 days after notice of the motion for access any party may file opposition to the request.”

² The Law Center acknowledges that error and apologizes to the Court. Kim Decl. ¶ 7.

proceeding.” *State v. Cho*, 115 Hawai`i 373, 384, 168 P.3d 17, 28 (2007). Additionally, a court has inherent authority to “reexamine, modify, vacate, correct and reverse its prior rulings and orders” as long as the court still has jurisdiction. *Chun v. Bd. of Trustees of Employees’ Retirement Sys.*, 92 Hawai`i 432, 441, 992 P.2d 127, 136 (2000).

III. THE LAW CENTER HAS MET THE STANDARD FOR RECONSIDERATION

As detailed in this motion, the Motion to Unseal was properly filed and was not an improper ex parte communication. The Law Center filed its motion. Kim Decl. Ex.

1. And filing the motion without the Law Center providing notice to the parties is proper under HCRR 10.10 because: (1) the clerk provides notice to the parties pursuant to HCRR 10.10; and (2) the Law Center could not know the identity of all the parties and their counsel when the docket – which the Law Center seeks to unseal – is not publicly accessible. *Id.* ¶ 8; HCRR 10.10 (“The Clerk shall notify all parties of the motion.”).

The Law Center does not have access to the docket to be able to provide the Court with additional information regarding when the clerk provided notice to the parties of the filed Motion to Unseal – presumably on December 7. But in light of the additional information provided, the Law Center would ask the Court to acknowledge that the Motion to Unseal was properly filed and not an improper ex parte communication.

The Law Center thus asks that the Court reconsider the Notice of Ex Parte Communication, Dkt. 38, and consider the merits of the Motion to Unseal.

CONCLUSION

Based on the foregoing, the Law Center respectfully requests that the Court grant its motion for reconsideration and consider its Motion to Unseal on the merits.

DATED: Honolulu, Hawai'i, December 18, 2023



ROBERT BRIAN BLACK
GILLIAN SCHEFER KIM

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Defendant.

CIVIL. NO. 1CCV-19-0002164 GWBC
(Other Non-Vehicle Tort)

DECLARATION OF GILLIAN
SCHEFER KIM

DECLARATION OF GILLIAN SCHEFER KIM

1. I, Gillian Schefer Kim, am a legal fellow for Movant Civil Beat Law Center for the Public Interest (Law Center). I make this declaration in support of the Law Center's Motion for Reconsideration and do so based on personal knowledge, the Law Center's business records, and public records.

2. On December 6, 2023, I submitted a Request to Access Court Records (Request) for the complaint and case docket in this civil action.

3. That day, the clerk of court denied the Request pursuant to Rules 10.4 and 10.10 of the Hawaii Court Records Rules (HCRR).

4. The next day, on December 7, at 9:54 a.m., I conventionally filed the Law Center's Motion to Unseal (Motion to Unseal) pursuant to HCRR Rule 10.10. A true and correct copy of the file-stamped Motion to Unseal is attached as Exhibit 1.

5. As explained in footnote 1 to the Motion to Unseal, the Law Center filed conventionally to comply with HCRR Rule 10.4, which provides that "an attorney shall not use the JIMS/JEFS database to gain access to confidential information under seal in cases in which the attorney is not a party or an attorney of record."

6. When conventionally filing the Motion to Unseal, I requested a file-stamp for the two courtesy copies for the judge. The clerk declined to stamp the courtesy copies, which I believe was based on a miscommunication on my part and not any fault of the clerk.

7. I then left two unstamped courtesy copies of the filed Motion to Unseal for the judge. I apologize for not providing file-stamped copies as specified in RCCH 7.2(g)(6).

8. Because the Law Center does not have access to the docket—which it seeks to unseal—I do not know when the clerk notified the parties of the Motion to Unseal pursuant to HCRR 10.10 and did not know the identity of all the parties or any of their counsel until receiving the Court's Notice of Ex Parte Communication on December 15.

I, Gillian Schefer Kim, declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, December 18, 2023



GILLIAN SCHEFER KIM

Made in USA

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FACS et al.,

Defendant.

CIVIL NO. 1CCV-19-0002164

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

N. ANAYA
CLERK

2023 DEC -7 AM 9:54

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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

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 be 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
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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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Defendant.

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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`ns 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.

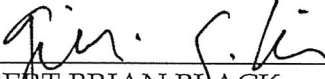
In *Grube*, *Ahn*, and *Takase*, the Hawai`i Supreme Court emphasized that sealing court proceedings from public view must be "narrowly tailored to serve [a compelling government interest]." *Ahn*, 133 Hawai`i at 497, 331 P.3d at 475; *accord Grube*, 142 Hawai`i at 427, 420 P.3d at 358 ("The court should 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



ROBERT BRIAN BLACK
GILLIAN SCHEFER KIM

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(Other Non-Vehicle Tort)

NOTICE OF MOTION


NOTICE OF MOTION

TO: James J. Bickerton, Esq.
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Honolulu, Hawai'i 96813
Special Appearance Attorney for Defendants

NOTICE IS HEREBY GIVEN that the undersigned has filed with the above-entitled court the motion attached hereto. Any response to said motion must be filed and served no later than 10 days after the service date indicated on the Notice of Electronic Filing. Pursuant to Rule 6(e) of the Hawai`i Rules of Civil Procedure, if the motion is served by mail, any response to said motion must be filed and served no later than 12 days after the service date indicated on the attached Certificate of Service.

DATED: Honolulu, Hawai`i, December 18, 2023



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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Gillian Schefer Kim, certify that on December 18, 2023, I will serve a copy of the foregoing Motion for Reconsideration; Memorandum of Law in Support of Motion for Reconsideration; Declaration of Gillian Schefer Kim; Exhibit 1; and Notice of Motion on the following parties by electronic mail:

James J. Bickerton, Esq.
Stephen M. Tannenbaum, Esq.
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Special Appearance Attorney for Defendants

DATED: Honolulu, Hawai`i, December 18, 2023.


GILLIAN SCHEFER KIM