SCPW-24-0000484

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

CIVIL BEAT LAW CENTER FOR THE PUBLIC INTEREST

Petitioner,

v.

THE HONORABLE JAMES S. KAWASHIMA,
Judge of the Circuit Court of the First Circuit, State of Hawaii,
Respondent Judge,

and

M.K.; S. LAWRENCE SCHLESINGER, MD, FACS; PHOENIX GROUP, LLC dba THE BREAST IMPLANT CENTER OF HAWAII and MOMMY MAKEOVER INSTITUTE OF HAWAII

Respondents.

ORIGINAL PROCEEDING
CIV. NO. 1CCV-19-2164

SCPW-24-0000484
PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS
CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI`I

SCPW-24-0000484
RESPONDENTS S. LAWRENCE SCHLESINGER, MD, FACS; PHOENIX GROUP, LLC. DBA THE BREAST IMPLAINT CENTER OF HAWAII AND MOMMY MAKEOVER INSTITUTE OF HAWAII ANSWER TO PETITION

CERTIFICATE OF SERVICE

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAII

The Honorable James S. Kawashima, Circuit Court of the First Circuit State of Hawaii

RESPONDENTS S. LAWRENCE SCHLESINGER, MD, FACS; PHOENIX GROUP, LLC. DBA THE BREAST IMPLAINT CENTER OF HAWAII AND MOMMY MAKEOVER INSTITUTE OF HAWAII ANSWER TO PETITION

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Come now Respondents S. Lawrence Schlesinger, MD, FACS (individually "Respondent"); Phoenix Group LLC dba The Breast Implant Center of Hawaii and Mommy Makeover Institute of Hawaii (collectively "Respondents") by and through their undersigned counsel and hereby submit their Answer to the Petition for Writ of Mandamus and Writ of Prohibition filed herein on July 22, 2024 by Petitioner Civil Beat Law Center for the Public Interest ("Petitioner").

I. INTRODUCTION

Respondents assert Petitioner's application is defective because, having waived its rights of appeal, the instant request for writs of mandamus and prohibition cannot be reached. Moreover, Respondents contend certain case law relied upon by Petitioner is not controlling and Petitioner has failed to assert facts required to overturn the lower court's decision. Conversely, Respondents place before the Court countervailing factors in support of the Honorable Judge W.B. Chang's decision in which he balanced the Constitutional rights of access and rights of privacy in sealing the record in question.

Petitioner seeks a writ of mandamus and writ of prohibition, which are extraordinary remedies, and attempts to circumvent the appellate process which it has presumably waived choosing not to appear at the hearing of its Motion to Unseal. The United States Supreme Court and this Court have ruled that such Writs will not be utilized as a substitute for appeal.

Petitioner relies heavily upon *Oahu Publications Inc. v. Ahn,* 331 P.3d 460, 133 Haw. 482 (2014) and *Grube v. Trader,* 420 P.3d 343 (Haw. 2018) which are distinguishable from the instant case. In this case the complaint was filed during settlement negotiations. Respondents made their final offer to settle (that was ultimately accepted) *prior* to having knowledge of the filing of the complaint. The complaint was neither served nor answered, therefore the case never was at issue. Further, the case was settled by stipulation with confidentiality and sealing provisions. Unlike *Ahn* and *Grube* there was no trial.

Petitioner claims the Circuit Court failed to make specific findings, which is disproven by a review of the May 28th,, 2024 transcript (dkt 14) discussed *infra*. In the relief sought, Petitioner requests a "written order" but provides no legal authority supporting the argument that the court below erred by failing to memorialize its decision from the bench in a "written" form.

No appeal was filed by Petitioner following the Circuit Court's Order.

Petitioner claims the Circuit Court failed to follow the law but fails to demonstrate such

claims, which are claimed errors ordinarily decided on appeal.

Petitioner seeks to publish the unverified complaint without Respondent having filed an answer to dispute the allegations, potentially creating confusion within the viewing public. Civil Beat has made it clear that its dispute is with the Judiciary of the State of Hawai'i for allowing the sealing of court records. Nonetheless, Respondents will be the parties experiencing irreparable damage and injury resulting from such one-sided publication.

Respondents assert that there exist rare and compelling circumstances in this matter which supported - and continue to support - the sealing of at least portions of the record in this matter. As found by the Circuit Court, the complaint contained scandalous allegations which had already been rejected by the Maui County Police Department and Maui County Prosecutor's Office (dkt 14) discussed *infra*.

The Courts of Hawaii have consistently encouraged resolution of lawsuits by settlement. Failure to support the stipulated settlement in this matter would serve as a disincentive to parties and counsel going forward, particularly in the instance where the defending party is not aware of the filing of a complaint and is therefore relying upon the confidentiality agreement among the parties.

II. FACTUAL AND PROCEDURAL HISTORY

This case arises from claims made extra-judicially in 2019 for acts alleged to have occurred from 2015. A settlement of the claims was reached by Agreement dated December 10, 2019. The underlying Complaint in this matter was filed on November 18, 2019 in the First Circuit Court as *MK v. S. Lawrence Schlesinger, MD, FACS, et al*, Civil No. 1CCV-19-0002164 GWBC during the settlement process (CC dkt 1). [i] On November 19, 2019 Plaintiff filed an *ex parte* motion to allow Plaintiff to preserve privacy and anonymity as "MK". (CC dkt 17). The complaint was never served and no Answer to the Complaint was filed. On December 10, 2019 by Stipulated Order, the Court Dismissed the Complaint with Prejudice and ordered the matter sealed. (CC dkt 28). Years later on December 7, 2023, Petitioner filed its Motion to Unseal which was initially denied.

Thereafter on January 16, 2024 Petitioner filed a motion for reconsideration (CC dkt 36)

which came on regularly for hearing before the Honorable Judge Gary W.B. Chang on May 1, 2024. (dkt 13) Reconsideration was granted and a further hearing on the Motion to Unseal was held on May 28, 2024. Petitioner elected to waive its appearance and was not in court to either cross-examine witness S. Lawrence Schlesinger, to place any argument on the record or to object to Judge Chang's ruling. (dkt 14) Judge Chang made specific findings and conclusions from the bench at the conclusion of the May 28th hearing. (dkt 14).

Judge Chang retired thereafter and the Honorable Judge James S. Kawashima was assigned the case. A final order was issued by Judge Kawashima on June 21, 2024.(CC dkt 73) No appeal was taken from the final order. The current Petition for Writ of Mandamus and a Writ of Prohibition was filed in this Court on July 22, 2024. (dkt 1).

III. ARGUMENT

A. WRITS OF MANDAMUS AND OF PROHIBITION ARE EXTRAORDINARY REMEDIES AND ARE NOT A SUBSTITUTE FOR APPEAL

The case at bar appears to be one of first impression for this Court. Prior caselaw regarding sealing or unsealing judicial records have generally addressed cases where a lawsuit was filed and answered and a trial has been held. In the present case the complaint was never served nor answered. Defendants made the final offer of settlement before they knew a civil complaint had been filed. In essence the case never was at issue in the Circuit Court. *Paxton v. State,* 2 Haw. App. 46, 625 P.2d 1052 (1981) (case was at issue with the filing of the answer). *In re National Audit Defense Network,* 332 B R 896 (Bankr. D Nev 2005) (summary judgment inappropriate at early stage prior to answer being filed).

As noted above, there was no appeal taken from the Circuit Court's final order. Petitioner asserts that the Circuit Court made errors of law by not making specific findings and by not giving the public sufficient advance notice of the request to seal the proceedings. (Dkt 1) at pagea 8-9. Generally a party who believes the Court has erred files a timely appeal of the adverse ruling. Moreover, Petitioner waived its opportunity to add to the record and to request an expanded ruling from the court that Petitioner now argues, after the fact, that it is insufficient.

This Court and the United States Supreme Court have long held that a writ of mandamus and a writ of prohibition are extraordinary remedies and should not be utilized as an alternative to

Appellate Practice.

> The common-law writ of mandamus against a lower court is codified at 28 U. S. C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259-260 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of `jurisdiction,'" *Will v. United States*, 389 U. S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial `usurpation of power,'" ibid., or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy,"

Cheney v. United States Dist. Court for DC, 542 US 367, 380-81 (2004).

The US Supreme Court has also defined the conditions necessary for the issuance of such a writ:

> As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394, 403 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid*.—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, *Fahey, supra*, at 260. Second, the petitioner must satisfy "`the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" *Kerr, supra*, at 403 (*quoting Bankers Life & Casualty Co., supra*, at 384). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra*, at 403 (*citing Schlagenhauf v. Holder*, 379 U.S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru*, 318 U. S. 578, 588 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will, supra*, at 95 (*citing Maryland v. Soper* (No. 1), 270 U.S. 9 (1926))."

Cheney v. United States Dist. Court for DC, id at 380-81

In this matter, Petitioner was denied its motion to unseal by the Circuit Court's final order of June 21, 2024. (CCdkt 73). As the movant for that motion, Petitioner could have—but failed to—file an appeal. Granted, Petitioner was not a named party in the underlying lawsuit, though that complaint was neither served, answered nor litigated before settlement. The only litigation in this matter consisted

of the motions practice Petitioner filed some five years following the settlement and sealing of the case. As such, Petitioner was a litigant aggrieved by the Circuit Court's denial of its motion to unseal and could have moved the court for an interlocutory appeal following the HRCP Rule 23 order entered. The record does not reflect any effort to obtain court authorization for such an interlocutory appeal.

Petitioner cites general law regarding the public's right to know and the First Amendment rights, but fails to meet the burden of demonstrating a "clear and indisputable" right to the requested writ. Finally the third prong of the test requires that the issuance of the writ must be appropriate under the circumstances in the discretion of the issuing court.

Similarly, and consistently, this Hawaii Court has found writs of prohibition to be extraordinary relief:

> Then, too, the writ of prohibition is an extraordinary remedy, and we have repeatedly said that prohibition will not be utilized as a substitute for appeal. *Chung v. Ogata*, 54 Haw. 146, 504 P.2d 868 (1972); *State ex rel. McClung v. Fukushima*, 53 Haw. 295, 492 P.2d 128 (1972). We have deviated from this rule only in rare and exigent circumstances. See, e.g., Sapienza v. Hayashi, 57 Haw. 289, 554 P.2d 1131 (1976). In that case we found the trial court's order to be impermissibly overbroad, and further concluded that to allow the matter to wend its way through the appellate process would not be in the public interest and would work upon the public irreparable harm. We think that the facts and circumstances of this case warrant the exercise of this court's supervisory jurisdiction over the lower courts, as well as the exercise of its discretionary power to issue its writ of prohibition.

Gannett Pacific Corp. v. Richardson, 580 P. 2d 49, 53 (Haw Supreme Court 1978).

In the case at bar there exist no such extraordinary factors. The Court's final order was not overly broad or defective. Further the Court's Order sealing the record and dismissing the case was by stipulation of the parties. This was not a situation where one party moved for sealing of the record in an opposed motion. The parties settled the case, stipulated that the record be sealed and dismissed the case with prejudice. CCdkt 73 (*Also, see* exhibit 1 to the Petition). A writ of mandamus and writ of prohibition are totally inappropriate in the procedural facts of this matter.

B. THE LAW FAVORS SETTLEMENT AND THE SETTLEMENT HEREIN SHOULD NOT, IN EFFECT, BE SET-ASIDE.

It has long been well-settled that the courts of Hawai'i encourage compromise and settlement of disputed claims in a lawsuit. As a threshold matter, the law favors a settlement. Our Supreme Court in

Amantiad v.Odum, 977 P2d 160, 169-70 (Hawaii 1999) said:

> We particularly note our long-standing support of compromise and settlement. As a general rule, a properly executed settlement precludes future litigation for its parties. *See AIG Hawaii Ins. Co. v. Bateman*, 82 Hawai`i 453, 458-59, 923 P.2d 395, 400-01, *amended in part*, 83 Hawai`i 203, 925 P.2d 373 (1996). Indeed, a settlement agreement is an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith or unliquidated. It is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation. 15A Am.Jur.2d Compromise and Settlement § 1 (1976). "We acknowledge the well-settled rule that the law favors the resolution of controversies through compromise or settlement rather than by litigation. *Dowsett v. Cashman*, 2 Haw.App. 77, 82-83, 625 P.2d 1064, 1068 (1981). **Such alternative to court litigation not only brings finality to the uncertainties of the parties, but is consistent with this court's policy to foster amicable, efficient, and inexpensive resolutions of disputes.** In turn, it is advantageous to judicial administration and thus to government and its citizens as a whole. We agree with the policy and law of settlements which the Supreme Court of Arkansas succinctly sets forth in *Ragland v. Davis*, 301 Ark. 102, 106-107, 782 S.W.2d 560, 562 (1990) (citation omitted)(emphasis added):
>
> Courts should, and do, so far as they can do so legally and properly, support have for their object the amicable settlement of doubtful rights by parties; the consideration for such agreements is not only valuable, but highly meritorious. Because they promote peace, voluntary settlements… must stand and be enforced if intended by the parties to be final, notwithstanding the settlement made might not be that which the court would have decreed if the controversy had been brought before it for decision. Such agreements are binding without regard to which party gets the best of the bargain or whether all the gain is in fact on one side and all the sacrifice on the other."
>
> ....
>
> A compromise or settlement agreement disposes of all issues the parties intended to settle. *In re Estate of Engels*, 10 Kan. App.2d 103, 692 P.2d 400 (1984).

Armantiad, id.

There is no question in the record that the parties to the suit agreed upon a settlement and presented to the Court the stipulation which was approved by Judge Chang and filed December 10, 2019 (CCdkt 28). It is relevant to note that since the complaint had not been served nor had an answer filed, then counsel for Defendants (Respondents herein) necessarily made a Special Appearance to formalize the settlement.

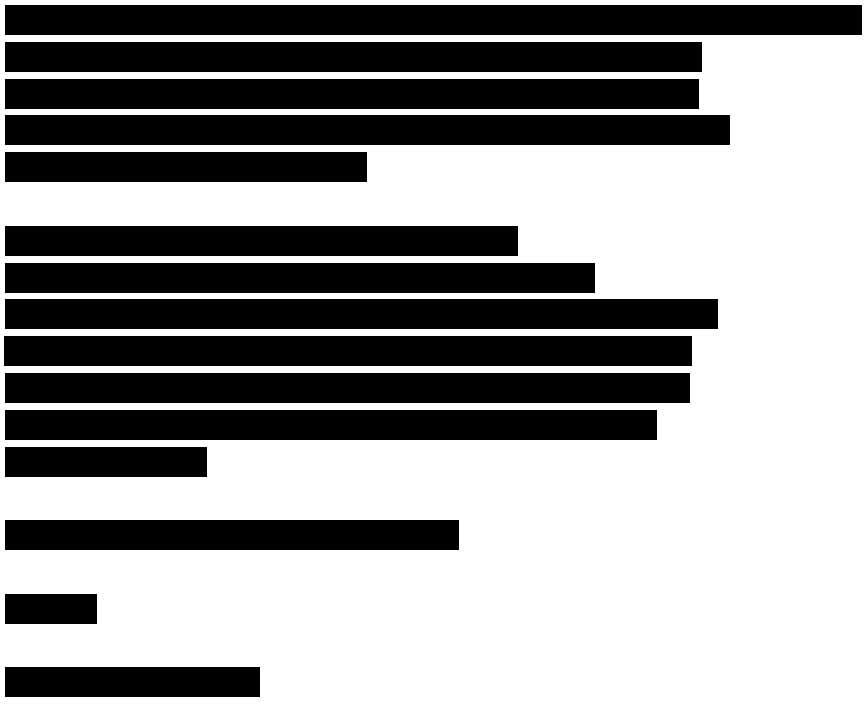
To grant the Petition would work an unfair and unjust result upon the parties. The parties agreed upon very specific factors and terms in the dismissal, specifically setting out the docket

entries to be sealed. Consistent with Hawaii law, the Court agreed to the dismissal and to the sealing of the record thereby honoring the settlement of the parties. To grant the Petition and to unseal the record in this matter could very well work as a disincentive for counsel and parties to amicably settle and dismiss cases in the future. Judicial economy will not be well served and substantive advice to clients may be questionable if the Court's long-standing support and encouragement of settlements is not reliable.

C. THE SETTLEMENT OF THE UNDERLYING CASE WOULD NOT HAVE OCCURRED WITHOUT CONFIDENTIALITY AND SEALING OF THE RECORD.

As discussed *supra*, the case was settled, dismissed, and the record sealed by stipulation of the parties. (CCdkt 28). It was demonstrated to Judge Chang at the May 28, 2024 evidentiary hearing that the confidentiality and sealing of the record were material inducements for the settlement as testified to by Respondent. Respondents negotiated this at a time when the complaint had not been served.

At the evidentiary hearing, Respondent took the witness stand to explain why he was motivated to settle this matter and why sealing the disputed allegations was—and is—a critical factor:



[redacted]

The testimony continued with an explanation of how the scandalous allegations were rejected by the Maui County Police Department and Maui County Prosecutors's Office:

[redacted]

[redacted]

Clearly from the uncontroverted testimony elicited from Respondent, he would not have settled the case but for the sealing of the record, including the scandalous allegations contained in the complaint. Judge Chang found that the allegations complained of were scandalous:

(By the court):

[redacted]

Thus, the Circuit Court was presented with the task of balancing the competing considerations between the acknowledged right of public disclosure and honoring the terms of the settlement to which the parties had stipulated. See CC dkt 28, the order approving the settlement and sealing the record. [ii]

In balancing those competing considerations, Judge Chang judiciously exercised his discretion in rendering his final order, which was issued by Judge Kawashima following Judge Chang's retirement. CCdkt 73.

D. UNSEALING THE SCANDALOUS RECORD WOULD CAUSE PROFESSIONAL HARM AND IRREPARABLE DAMAGE

As discussed *supra*, the complaint was never served or answered. Unsealing the unproven scandalous allegations made within the context of an alleged assault has the strong potential of creating an extremely negative impression in the public regarding Respondent's reputation and practice.

Petitioner has argued that Judge Chang's questioning of Civil Beat's intent in publishing the record in this matter is irrelevant. *See* Petition at page 4 and footnote 9 on that same page. However the law cited by Petitioner, *i.e., Lugosch v. Pyramid Co*, 435 F.3d 110 (2d Cir. 2006) does not stand for that proposition and is distinguishable.[iii]

At the May 1, 2024 hearing on Petitioner's Motion for Reconsideration, Judge Chang inquired of counsel what Petitioner intended to do if the complaint was unsealed. Assertedly, this inquiry was appropriate in order for Judge Chang to ascertain the facts and the interests of the parties.

[redacted]

Given counsel's response to the Court, the unsealed complaint (being the only substantive pleading in the record) would be posted for public purview without the benefit of Respondent's vigorous denial, since no answer was filed. Such a one-sided publication of scandalous allegations clearly would call the Respondent's reputation into question. It is relevant to note that the alleged acts in the complaint occurred ten years ago in 2015, the claims were made and settled over five years ago in 2019, and Petitioner brought its Motion to Unseal the complaint just over one year ago in 2023. CCdkt 1 and 32. Petitioner claims the complaint is available through a commercial CasePortal service. *See* Petition at page 9. *See also* dkt 13, page 9 lines 21-24. Respondent was unable to obtain a copy of the complaint from CasePortal and was informed that the service doesn't cover State circuit court cases. If such be the case then Petitioner's goal of having the case available is, arguably, moot. However, we know Petitioner's goal exceeds mere access but extends, rather, to publication.

While a speculative claim may be insufficient to demonstrate professional harm, here we have a very different situation. Respondent doctor is a plastic surgeon in a practice that is composed primarily of female patients who come to him for improvement and/or correction to various parts of their bodies. Such a practice requires hands-on contact with a patient often on the private parts of the body. As such, trust and confidence between doctor/patient is, arguably, critical to the relationship.

When asked about the effect of allowing scandalous abuse allegations to be published publicly, Dr. Schlesinger testified about the irreparable harm:

[redacted]

[redacted]

[redacted]

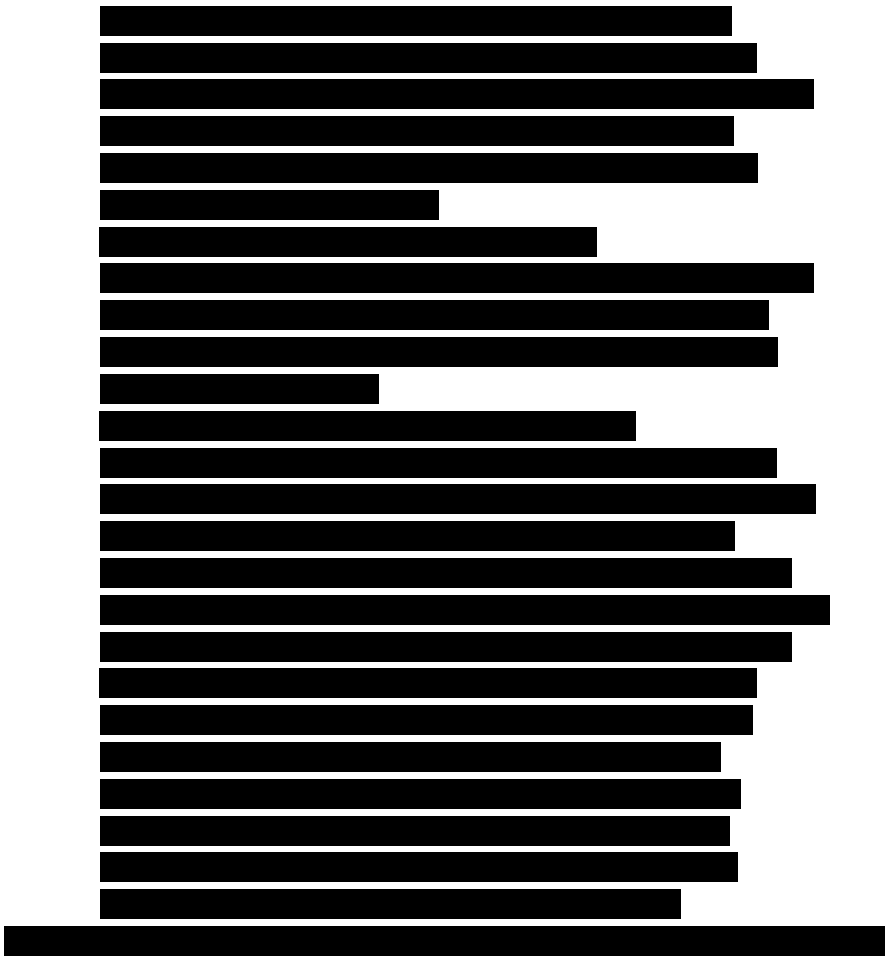
[redacted]

The court followed up with the following examination:

BY THE COURT:

[redacted]

[redacted]



There is no dispute that this Court has long recognized the public's right to access and open trials under both the first amendment to the US and Article 1, §4 of the Hawaii Constitutions. Such right, however, is not absolute and is qualified. There may be "certain rare and compelling circumstances" requiring closed proceedings. *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 238, 580 P.2d 58, 60 (1978).

Even in the case of *Oahu Publ'ns v. Ahn*, 133 Haw. 482, 496-497, 331 P.3d 460, 474-475 (2014), relied upon heavily by Petitioner, this Court recognized that the right to public access "can be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest".

This matter before the Court does, in fact, hold overriding interests. First, fairness to the parties who stipulated to the confidentiality and sealing of the settlement and record. This is not a situation where the sealing of the record was a contested matter. Next, the record in this matter (admittedly the complaint sought by Petitioner to be unsealed) is at once scandalous and

uncontroverted by the Defendants who were not served and, thus, did not have the minimal opportunity to answer.

As is evident from Judge Chang's interrogation of Petitioner's counsel at the May 1, 2024 hearing, Respondent would have little to no opportunity to rebut or vigorously defend against the allegations if Petitioner publishes the "record", *i.e.* the complaint. The potential for the public to be confused and/or misunderstand the civil procedure involved in a complaint which was never served nor answered is great. It is worthy of judicial notice that a sexual assault claim against a physician, who has a surgical practice primarily composed of women, will have a devastating effect on his reputation and livelihood - even if found innocent or not liable.[iv]

As described in the testimony of the Respondent on May 28, 2024, the catastrophic impact upon his plastic surgery practice with more than 27,000 successful surgeries over a forty year period would be immediate and irreparable harm. Judge Chang in balancing the overriding interest of Respondent's reputation and practice with no opportunity to dispute the scandalous allegations of the complaint and the public's right to know, carefully and cautiously decided to maintain the record as sealed.

At bar is a matter that exhibits rare and compelling circumstances and, as such, closure of the record is the only way to preserve the higher interests of truth and fairness, rather than allowing sensational journalism to destroy a business and undermine a stipulated settlement. Plaintiff MK in the case below was allowed to remain anonymous and private through the allowed use of her initials rather than her full name. (CC dkt 17). Respondent should be allowed at least some degree of privacy from the allegations rejected by the Maui County Police and by the Prosecutor; and subsequently found to be scandalous by the Circuit Court. There exists a "substantial probability" that the disclosure will harm the asserted compelling interest. *Press-Enter. Co. v. Superior Court of Cal. For Riverside Cty.* 478 U.S. 1, 15, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (cited in *Grube* at p. 357).

E. THE CIRCUIT COURT MADE SPECIFIC FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Petitioner argues that the Circuit Court failed to make specific findings of fact and conclusions of law as is required under the *Ahn* case, *supra,* and seeks a "written" determination. This Court did not mandate that specific findings and conclusions were required to be in a

"written order." The findings of the Circuit Court are clear in his ruling. dkt 14 at pages 23 to 28. The underlying case was one of—if not the—last case Judge Chang heard before his retirement. The Judge diligently handled the motion to unseal, motion for reconsideration and concluded the evidentiary proceedings while still on the bench rather than burdening another Judge without the case background and knowledge he held. Any criticism of Judge Chang for not making his findings in writing is misplaced and perhaps disingenuous.

> If the district court conscientiously balances the competing interests and articulates compelling reasons supported by specific factual findings, its decision will be reviewed only for an abuse of discretion. *San Jose Mercury News*, 187 F.3d at 1102-03 (reviewing for clear error a district court decision "based on a failure to recognize the existence of a pre-judgment federal common law right of access to civil court documents").

Foltz v. State Farm Mut. Auto. Ins. Co., 331 F. 3d 1122, 1135 (9th Circuit 2003).

F. PETITIONER'S CASELAW ARE DISTINGUISHABLE FROM THE FACTS HERE

Granted the cases relied upon by Petitioner protect and preserve the First Amendment public rights to access to judicial proceedings. The cases of *Oahu Publications Inc. v. Ahn,* 331 P.3d 460, 133 Haw. 482 (2014) ("*Ahn*") and *Grube v. Trader,* 420 P.3d 343 (Haw. 2018) ("*Grube*") are distinguishable on multiple points.

Both *Ahn* and *Grube* were criminal cases which went to full trials. It is clear that this Court noted that the first amendment rights were compelling in civil cases as well. *See Ahn, supra,* footnotes 17 and 36. Allowing public access to court proceedings is meritorious and constitutionally protected. However, the present case never came to issue, let alone trial.

The *Ahn* case involved the trial court's closure of court and the sealing of transcripts in a criminal murder trial concerning an inquiry into potential juror misconduct. Once a mistrial was declared as the result of a hung jury and the potential negative effect upon a fair and impartial jury deliberation, there was no need to further seal the transcripts of proceedings. This Court found that the public-not necessarily the news media-had a qualified right to attend court proceedings. That qualified right to public access is subject to denial based upon a compelling interest.

In this case, no trial and no hearings held, other than those which were the result of Petitioner's motions, many years after the case was dismissed with prejudice. The stipulation to dismiss and seal the record was submitted to and approved by the court without hearing or any

sealed proceeding. In fact, there were no transcripts of proceedings to seal prior to the Motion to Unseal filed by Petitioner. Unlike the situation in *Ahn* where the compelling interest abated, here, the compelling interests in confidentiality, *i.e.*, removing scandalous allegations and the privacy of the parties has not ended.

In *Grube*, this Court was faced with a situation where there was public interest as a police officer and his girlfriend were charged with drug-related offenses. This Court reiterated the sealing procedures to be followed by the trial court, as were established in *Ahn* in granting the petition for mandamus. The court did mention the one year delay in *Grube* bringing his motion to unseal and did note the need for notice to the public of the intended sealing to "provide members of the public with contemporary information about matters of current public interest". *Grube, id*, at footnote 21.

In the present matter, there was no public interest as the complaint had never been served nor answered and the matter was settled before it became at issue. Further, the request to unseal the record (consisting at that time of basically a complaint and a dismissal) came approximately five years after the settlement. The Ninth Circuit recently noted: "The peculiar value of news is in the spreading of it while it is fresh." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235, 39 S.Ct. 68, 63 L.Ed. 211 (1918), *abrogated on other grounds by Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)." *Courthouse News Service v. Planet*, 947 F. 3d 581, 584 (Court of Appeals, 9th Circuit 2020).

Also distinguishing from the *Grube* case is the fact that the sealing was not the result of a contested motion to seal. It was by Stipulation of the parties in the dismissal of the unserved lawsuit, as testified to by Respondent.

The *Grube* decision also speaks to the lack of narrow tailoring to protect both the First Amendment rights of the public and to preserve the compelling interest sought by sealing. *Grube, id.* at 358. Here, during the motions practice by Petitioner counsel for Respondents below offered redaction of the scandalous portions of the complaint as a proposed alternative to keeping the entire complaint sealed. (CCdkt 51). Redaction as ordered by Judge Chang was part of the balancing he performed in response to the motion to unseal.[v]

The decisions in both *Ahn* and *Grube* acknowledge that the public's access to court proceedings and documents is not absolute. Similarly, the United States Supreme Court has long held that First Amendment access is not absolute:

> It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." *In re Caswel*l, 18 R. I. 835, 836, 29 A. 259 (1893). *Accord, e. g., C. v. C.*, 320 A. 2d 717, 723, 727 (Del. 1974). *See also King v. King*, 25 Wyo. 275, 168 P. 730 (1917). Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N. W. 731, 734-735 (1888); *see Cowley v. Pulsifer*, 137 Mass. 392, 395 (1884) (*per Holmes, J.); Munzer v. Blaisdell*, 268 App. Div. 9, 11, 48 N. Y. S. 2d 355, 356 (1944); *see also Sanford v. Boston Herald-Traveler Corp*., 318 Mass. 156, 158, 61 N. E. 2d 5, 6 (1945), or as sources of business information that might harm a litigant's competitive standing, *see, e. g., Schmedding v. May*, 85 Mich. 1, 5-6, 48 N. W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A. 2d 799, 800 (N. J. Ch. 1945).

Nixon v. Warner Communications, Inc., 435 US 589, at 598 (1978).

The 9th Circuit Court of Appeals as well has ruled that the public access right is not absolute and is subject to being overridden when there exist sufficient compelling reasons.

> In this circuit, we start with a strong presumption in favor of access to court records. *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir.1995) (recognizing strong presumption in context of civil trial); *accord United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir.1982) (same in context of criminal trial); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir.1981) (same). The common law right of access, however, is not absolute and can be overridden given sufficiently compelling reasons for doing so. *San Jose Mercury News*, 187 F.3d at 1102. In making the determination, courts should consider all relevant factors, including: the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.... After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture. Hagestad, 49 F.3d at 1434 (internal citations and quotations omitted). This process allows for meaningful "appellate review of whether relevant factors were considered and given appropriate weight." Id. **If the district court conscientiously balances the competing interests and articulates compelling reasons supported by specific factual findings, its decision will be reviewed only for an abuse of discretion**. *San Jose Mercury New*s, 187 F.3d at 1102-03 (reviewing for clear error a district court decision "based on a failure to recognize the existence of a pre-judgment federal common law right of access to civil court documents").

Foltz v. State Farm Mut. Auto. Ins. Co., 331 F. 3d 1122, 1135 (9th Circuit 2003)(emphasis added)

As discussed *supra*, the circuit court in this case carried out a careful balancing test when denying the Motion to Unseal. The compelling reasons supporting keeping the record—or much of it—sealed involved the parties intent in settling the case below. The matter would not have settled without providing for confidentiality and the sealing of the scandalous allegations. The irreparable harm to the professional practice is another major factor presented to Judge Chang. The Plaintiff ("MK") below was able to protect and preserve her privacy by using initials rather than her legal name. By unsealing the complaint, Plaintiff's privacy is maintained, but Respondent's identity of the physician as well as the practice would be published to certain detriment. Additionally, having never been served, the complaint stands alone without contravention or denial.

Judge Chang laid out his balancing test and orally announced his findings. Now, some nearly five years following the settlement, the current Petition seeks to unseal what is basically an old complaint which would defame the professional reputation of Respondents as well as crush his business. The Court may inquire: Why does Civil Beat want to unearth a misleading complaint years after the matter was dismissed? Is there some sensational purpose to wanting to publish the uncontroverted scandalous allegations?[vi]

This Court touched upon the negative aspect of publication upon a party in *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978):

> Further, while publicity in legal proceedings is favored by the law, it has always been with the qualification that no injustice to the persons immediately concerned would be occasioned thereby. *See* 2 Cooley, Constitutional Limitations 931-32, *quoted in Estes v. Texas, supra*, 381 U.S. at 542, 85 S.Ct. 1628.

Gannett, id. at p. 66.

Judge Chang was in the best position to determine whether there was a compelling reason to maintain the sealing. The 9th Circuit Court of Appeals echoed this perspective in *Center for Auto Safety v. Chrysler Group*, LLC, 809 F. 3d 1092, 1096-97 (9th Circuit 2016) as follows:

> Accordingly, "[a] party seeking to seal a judicial record then bears the burden of overcoming this strong presumption by meeting the `compelling reasons' standard." *Kamakana*, 447 F.3d at 1178. Under this stringent standard, a court may seal records only when it finds "a compelling reason and articulate[s] the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.* at 1179. The court must then "conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret." *Id. (quoting Foltz*, 331 F.3d at 1135) (alteration in original) (internal quotation marks

> omitted). **What constitutes a "compelling reason" is "best left to the sound discretion of the trial court."** *Nixon,* 435 U.S. at 599, 98 S.Ct. 1306**. Examples include when a court record might be used to "gratify private spite or promote public scandal," to circulate "libelous" statements, or "as sources of business information that might harm a litigant's competitive standing."** *Id.* at 598-99, 98 S.Ct. 1306.

Center for Auto Safety, id. at 1096-1097(emphasis added.)

In the testimony of Respondent at the May 28, 2024 hearing, the impact of the mere mention of improprieties by a physician—especially a plastic surgeon—would be devastating to not only personal reputation, but to the viability of the business and even the licensure of the professional. It is simply a matter of common sense that patients would be reluctant to see a physician who has had abuse allegations published against him. The loss of a business has been held to be irreparable harm:

> "Irreparable harm" is an injury that is not remote or speculative but actual and imminent, and "for which a monetary award cannot be adequate compensation." *Jackson Dairy*, 596 F.2d at 72. We have found irreparable harm where a party is threatened with the loss of a business. In *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir.1970), a father-and-son car dealership was threatened with termination of its franchise by the manufacturer. We affirmed a finding of irreparable injury on the grounds that termination of the franchise would "obliterate" the dealership and that the right to continue a business "is not measurable entirely in monetary terms." *Id*. at 1205; *see also Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co*., 749 F.2d 124, 125-26 (2d Cir.1984) (*per curiam*) (finding irreparable harm from loss of "ongoing business representing many years of effort and the livelihood of its husband and wife owners"). We have also found irreparable harm in the loss of a relatively unique product. *In Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904, 908-09 (2d Cir.1990), a supplier of foreign news pictures threatened to stop providing those pictures to a wire service. We overturned a finding of no irreparable injury because the wire service had demonstrated that some customers would cease dealing with it for news from any source if it was unable to continue supplying those particular foreign news pictures. *Id.; see also Jacobson & Co. v. Armstrong Cork Co.*, 548 F.2d 438, 445 (2d Cir.1977) (affirming finding of irreparable harm because plaintiff "presented ample evidence to show a threatened loss of good will and customers, both present and potential, neither of which could be rectified by monetary damages"); *Interphoto Corp. v. Minolta Corp*., 417 F.2d 621, 622 (2d Cir. 1969) (*per curiam*) (affirming finding of irreparable harm because plaintiff "would be unable to calculate its damages since it would suffer not merely loss of profits with respect to [defendant's] goods but loss of good will from the lack of a `full line'").
>
> On the other hand, we have reversed a finding of irreparable harm where the facts demonstrate no loss of goodwill, but only provable monetary damages from the

> loss of a profitable line of business. *See Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 763 (2d Cir.1979) (no irreparable harm where piano manufacturer attempted to terminate its dealership contract with a retail seller that sold many brands of musical instruments)."

Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F. 3d 27, 37-38 (2nd Cir. 1995).

In this particular fact situation below, the impact of publishing such scandalous allegations upon a plastic surgery practice is not recoverable. "Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm." *Stuhlbarg Intl. Sales v. John D. Brush & Co.*, 240 F. 3d 832, 841 (Court of Appeals, 9th Cir. 2001). In his sworn testimony, Respondent placed this evidence before Judge Chang. Petitioner, by his non-appearance, waived the opportunity to cross examine and to challenge the veracity of Respodent's testimony.

Petitioner cites cases which support granting mandamus in the public's interest although many such cases are also distinguishable. Civil Beat is an online publication, it is not to the best of Respondent's understanding a television news station. Petitioner cites to *State v. Nilsawit*, 139 Haw. 86 384 P.3d 862 (2016) in support of its position. In *Nilsawit* the court was confronted with a contemporaneous challenge to an order denying "extended television news coverage" was sought by the television media pursuant to RSCH Rule 5.1. In this case, there is no contemporary television extended coverage being sought by Petitioner and the decision in *Nilsawit* is not instructive. While Petitioner was not a named party in the underlying case, it became the major litigant in the case through its motions practice and hearings. Here there is nothing in the very thin record indicating that Petitioner sought leave to file an interlocutory appeal rather than resorting to Writs some years down the road.

Respondent also points the Court to its decision in *Kema v. Gaddis*, 91 Haw. 200, 982 P. 2d 334 (1999), regarding the standards for a writ of mandamus. Interestingly though, in *Kema*, this Court granted the petition for writs against the media considering the impact of disclosure and publication upon underlying parties rather than the media's public right to access.

> "Because the cases are so interrelated and release of information would be harmful to Peter Boy's siblings, granting the Advertiser access to the family court's record is not in their best interest. Inasmuch as the redactions do not delete all information related to the other children, we conclude that Judge Gaddis's ruling violated the applicable legal standard in allowing access to even a redacted version of the old file."

Kema, id. at p 340.

In the case at Bar, the impact upon Respondents' their businesses and the personal lives of his wife, his child and himself, in a settled case from years ago, would work an injurious injustice upon

them.

IV. CONCLUSION

The instant case presents the Court with a somewhat new and unique situation where an online media company seeks to publish sensational, scandalous and incomplete judicial records which in all probability will be confusing to or misleading of the public. Additionally, insofar as Petitioner waived its appearance at the May 28, 2024 hearing and then elected not to appeal puts into question whether it has standing to now pursue the imposition of writs.

In addressing the merits of this application, this is not a matter where there is some contemporaneous public interest based upon media coverage of a contested criminal case. Since the events complained of occurred more than five years ago, releasing the complaint can arguably be characterized as stale and not newsworthy. The aspect that Petitioner seeks to spotlight, under these circumstances, is the Judiciary's practice of sealing. If such be the case, fundamental fairness calls into question why only the Respondents will be harmed. Neither the plaintiff nor the Judiciary will experience any particular injury. If Petitioner is seeking to reform the Judiciary, why are they not proceeding in a forum that will accomplish this goal?

Allowing the publication of a five year old unserved, unanswered, dismissed complaint will not serve the public right to access. The somewhat unique facts of this matter, the complaint filed during settlement negotiations, the reliance of the settling parties upon confidentiality and sealing as well as the substantial probability of harm to Respondent's personal life, reputation and business militate against unsealing and publication.

Footnotes

[i] References to the Circuit Court docket are stated as "CCdkt". References to the Supreme Court docket are stated as "dkt"

[ii] It is notable that Petitioner waived an appearance at the May 28th hearing of its Motion to Unseal.

[iii] In *Lugosch v. Pyramid Co*, 435 F.3d 110 (2d Cir. 2006) the District Court was considering whether the exhibits to a motion for summary judgment should be unsealed. Within that context, the *Lugosch* court said the intention of the party seeking access was not relevant. *Id.* at 123. The issue at bar was whether documents filed in a motion for summary judgment should be accessible to the public. Here we have a situation where there has been no opportunity to contradict the unverified, unserved and unanswered complaint in a case which never was at issue. There was no contested proceeding similarly to a motion for summary judgment. More importantly, the *Lugosch* court acknowledged "documents

may be kept under seal if 'countervailing factors'…so demand." *Id*, at 126.

[iv] The disastrous impact of alleged improprieties has been noted in an article from the Faculty of Medicine organization and website as the one thing which can break a doctor's practice. See: https://forum.facmedicine.com/threads/the-one-thing-that-can-make-or-break-a-doctors-practice.30227/.

[v] The redactions ordered by Judge Chang did not address all the scandalous allegations and language in the captions or headings of some of the counts in the complaint.

[vi] A cursory review of the Civil Beat website (www.civilbeat.org) searching for the terms "sealing court records" reveals pages of articles in which Petitioner criticizes the Hawaii judiciary generally and particularly any sealing of any court records irrespective of the reasons therefor.

Dated: Kailua-Kona, Hawaii, February 28, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date, a true and correct copy of the foregoing document was served via the court's judiciary website ("JEFS") on the parties listed below:

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