ROBERT BRIAN BLACK 7659
GILLIAN SCHEFER KIM 11823
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai`i 96813
brian@publicfirstlaw.org
fellow@publicfirstlaw.org
Telephone: (808) 531-4000
Facsimile: (808) 380-3580

Attorneys for Movant
Civil Beat Law Center for the Public Interest

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

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M. L. FAGARANG
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAI`I

M.K., Plaintiff, vs. S. LAWRENCE SCHLESINGER, MD, FACS, et al., Defendants.	CIVIL NO. 1CCV-19-0002164 GWBC (Other Non-Vehicle Tort) REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION; and CERTIFICATE OF SERVICE <u>NON-HEARING MOTION</u> JUDGE: Honorable Gary W.B. Chang

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

Defendants S. Lawrence Schlesinger, M.D., FACS; Phoenix Group LLC dba The Breast Implant Center of Hawai`i and Mommy Makeover Institute of Hawai`i (collectively Schlesinger) do not contest the basis for reconsideration proffered by Movant Civil Beat Law Center for the Public Interest (Law Center).[1] The only issue contested by Schlesinger is the merit of the Law Center's underlying motion to unseal.

[1] The Law Center is now known as Public First Law Center.

Nothing proffered by Schlesinger in opposition justifies the continued sealing of the docket (which is summarized in the exhibit to Schlesinger's opposition) and the complaint in this case.

I. SCHLESINGER PROVIDES NO SUBSTANTIVE BASIS FOR CONTINUED SEALING.

Nothing in Schlesinger's opposition provides the necessary compelling reasons to overcome the constitutional presumption of access and seal this entire court case from public view. The opposition simply asserts that the status quo should be preserved because the parties agreed to preserve privacy interests through a settlement agreement. Schlesinger cites no authority that justifies the continued sealing here.

"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 v. Trader*, 142 Hawai`i 412, 424, 420 P.3d 343, 355 (2018) (citing *Oahu Publc'ns, Inc. v. Ahn*, 133 Hawai`i 482, 498, 331 P.3d 460, 476 (2014)); *accord Roy v. Gov't Employees Ins. Co.*, 152 Hawai`i 225, 234-35, 524 P.3d 1249, 1258-59 (App. 2023) (applying constitutional right of access to civil complaints), *cert. denied*, 2023 WL 4745977 (July 25, 2023); *see also Courthouse News Serv. v. Planet*, 947 F.3d 581, 590-94 (9th Cir. 2020) (same). That standard is not met here.

A. The Court Has an Obligation to Justify the Continued Sealing of the Complaint and Docket in this Case.

As a threshold procedural issue, although Schlesinger claims that this Court already "correctly ordered" this case sealed in December 2019, it is not apparent that the Court followed the procedural requirements for sealing. Specifically, there is no

indication that the public had notice and an opportunity to be heard regarding the proposed sealing. "[I]f a court contemplates sealing a document or transcript, it must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives." *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485; *accord Grube*, 142 Hawai`i at 423, 420 P.3d at 354 ("motions requesting closure must be docketed a reasonable time before they are acted upon."). There is no indication that any notice was provided to the public prior to sealing the entire case file on December 10, 2019. According to the documents filed with Schlesinger's opposition, the stipulation proposing to seal the case was filed mere hours before the Court ordered the entire case sealed. *Compare* Dkt. 41 at 7 (stipulation filed December 10, 2019, at 1:46 PM), *with* Dkt. 41 at 6 (Court-executed stipulation filed December 10, 2019, at 4:04 PM); *see generally Grube*, 142 Hawai`i at 424, 420 P.3d at 355 (inadequate notice to public when in-court, undocketed request to seal and order to seal occurred on the same day).

Also, to justify sealing a court record, 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. The stipulation and order attached to Schlesinger's opposition does not meet the constitutional standard. *See Grube*, 142 Hawai`i at 424 n.15, 420 P.3d at 355 n.15.

The Court's prior order on sealing did not comply with the constitutionally required procedural safeguards.

B. Broad Privacy and Settlement Concerns Do Not Justify Sealing the Entire Case from Public View.

Schlesinger's substantive claims also fail. "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. 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.*

Schlesinger seems to identify two apparent interests: privacy and settlement agreement confidentiality. Such concerns do not justify hiding the existence of an entire case file—including its docket, party names, and respective counsel—from the public. *See Roy*, 152 Hawai`i at 234-35, 524 P.3d at 1258-59 (sealing of an entire case would be greater than necessary to protect relevant interests). Moreover, the complaint here was publicly filed and accessible for weeks before the parties settled.[2] As the Hawai`i

[2] "Secrecy is a one-way street: Once information is published, it cannot be made secret again." *United States v. Doe*, 870 F.3d 991, 1002 (9th Cir. 2017); *accord Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again."); *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir.

Supreme Court has explained, restrictions on the constitutional right of public access to court records must be narrowly tailored to the specific compelling interest that would be harmed by disclosure. *E.g.*, *Grube*, 142 Hawai`i at 427-28, 420 P.3d at 358-59.

Broad privacy concerns are not a basis to withhold all information about this case from the public. *Id.* at 425, 420 P.3d at 356 ("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 sufficient justification."); *accord In re Roman Catholic Archbishop*, 661 F.3d 417, 433 (9th Cir. 2011) (affirming decision to disclose discovery documents publicly identifying a Catholic priest accused of sexual abuse because "the public's serious safety concerns" outweighed his right to privacy); *In re McClatchy Newspapers, Inc.*, 288 F.3d 369, 375 (9th Cir. 2002) ("But injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'"); *see also Rudd Equip. Co.. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 591 (6th Cir. 2016) ("Simply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records"); *Doe v. Pub. Citizen*, 749 F.3d 246, 270 (4th Cir. 2014) ("An unsupported claim of reputational harm falls short of a compelling interest sufficient to overcome the strong First Amendment presumptive right of public access."); *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting their vanity or their commercial self-interest simply does not

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2006) (affirming an unsealing order because the information at issue was "already publicly available").

qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal . . ."); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) (harm to a "company's public image" alone cannot rebut the common-law presumption of access).

Medical malpractice and sexual misconduct claims are likewise not justifications to seal cases.[3] *E.g.*, *Doe v. White*, 1CC-05-1-863, Dkt. 107 (Haw. Cir. Ct. Dec. 23, 2022), *as amended*, Dkt. 109 (Dec. 27, 2022) (unsealing docket and court records containing sexual assault allegations); *Doe v. Ibana*, 1CC-12-1-1422, Dkt. 68 (Haw. Cir. Ct. Apr. 21, 2021) (same); *Slivka v. YMCA*, 390 F. Supp. 3d 1283, 1288 (D. Colo. 2019) (denying defendant's motion to seal complaint and other documents containing allegations of workplace sexual harassment and sexual assault); *Doe v. Methacon School Dist.*, 878 F. Supp. 40, 43 (E. D. Pa. 1995) (ordering the unsealing of the entire record of a case involving allegations of sexual assault of a minor student by a teacher); *A.A. v. Glicken*, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020) (declining to seal medical malpractice settlement agreement and rejecting argument that disclosure would chill settlement in future malpractice actions); *Schur v. Berntsen*, No. 2:22-CV-00013, 2024 at *4-6 (D. Utah Jan. 4, 2024) (denying defendants' motion to seal complaint involving allegations of sexual assault after the case was dismissed with prejudice); *Chalmers v. Martin*, No. 21-CV-02468-NRN, 2021 U.S. Dist. LEXIS 247178 at *5-6 (D. Colo. Dec. 28, 2021) ("The

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[3] These specific allegations are mentioned in light of prior allegations against Schlesinger. *Cosmetic Surgeon Hit With Employment Suit*, Honolulu Star-Bull. (Jan. 22, 2003), https://archives.starbulletin.com/2003/01/22/news/briefs.html; Deborah Barayuga, *Maui Woman Wins Lawsuit Over Bad Breast Surgery*, Honolulu Star-Bull. (Aug. 23, 2002), https://archives.starbulletin.com/2002/07/23/news/index3.html.

supposed harm from being the target of a lawsuit alleging sexual abuse is not enough to justify shrouding this case with a veil of secrecy.").

And as to confidentiality clauses in settlement agreements, while a court may consider a party stipulation, the Hawai`i Supreme Court has recognized that "often parties to the litigation are either indifferent or antipathetic to disclosure requests." *Grube*, 142 Hawai`i at 423, 420 P.3d at 354. Judges serve as independent gatekeepers to protect the public's constitutional right of access to court records. Thus, courts have routinely found that such agreements do not justify the sealing of entire cases from public view. *Roy*, 152 Hawai`i at 232-35, 524 P.3d at 1256-59 (rejecting, as a basis for sealing an entire case, arguments about "promoting judicial settlements"; existence of "spurious allegations" in the complaint and documents that "never should have been 'docketed'"; and sealing as "a vital benefit of the bargain" for the settling parties); *accord, e.g., Bernstein v. Bernstein Litowitz Berger & Grossmann*, 814 F.3d 132 (2nd Cir. 2016) (declining to seal a case after the parties reached a settlement and signed a confidentiality agreement).

Schlesinger's general privacy concerns and reliance on stipulated confidentiality in a settlement agreement do not rise to the level of "compelling interest" under *Grube* to keep the case sealed from public view.

C. The Defendants Have Not Demonstrated That There Are No Less Restrictive Alternatives to Sealing.

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. "Even where denial of access is appropriate, it must be no greater than necessary to protect the interest justifying it." *Id.* "Thus, where a feasible alternative exists that would protect the compelling interest while avoiding or minimizing impairment of the public's constitutional right of access, total sealing is inappropriate." *Id.*

Schlesinger did not address why redaction or any other less restrictive measure would not be an adequate alternative to sealing the entire case.

II. MULTIPLE HEARINGS ARE NOT NECESSARY

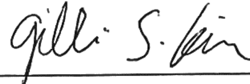
The Law Center does not object to a hearing on the motion to unseal if it would assist the Court. But Schlesinger's request for multiple hearings—first on the Motion for Reconsideration, then the Motion to Unseal—is unwarranted.

In particular, no hearing is necessary for the reconsideration motion because nothing in Schlesinger's opposition addresses the issues raised by that motion (regarding the Court's concern about a potential ex parte communication). Because Schlesinger does not raise any issues of fact or law as to why the Motion for Reconsideration should not be granted, no hearing on that motion should be necessary.

CONCLUSION

The Law Center respectfully requests that this Court grant its Motion for Reconsideration and address its Motion to Unseal on the merits.

DATED: Honolulu, Hawai`i, January 16, 2024.



ROBERT BRIAN BLACK
GILLIAN SCHEFER KIM
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai`i 96813
Tel. (808) 531-4000
brian@publicfirstlaw.org
fellow@publicfirstlaw.org
Attorneys for Movant
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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

M.K., Plaintiff, vs. S. LAWRENCE SCHLESINGER, M.D., FACS et al, Defendant.	CIVIL. NO. 1CCV-19-0002164 GWBC (Other Non-Vehicle Tort) CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Gillian Schefer Kim, certify that on January 16, 2024, I will serve a copy of the foregoing Reply Memorandum in Support of Motion for Reconsideration on the following parties by electronic mail:

James J. Bickerton, Esq.
Stephen M. Tannenbaum, Esq.
bickerton@bsds.com
tannenbaum@bsds.com
Attorneys for Plaintiff

Jeffrey S. Portnoy, Esq.
Trisha L. Nishimoto, Esq.
jportnoy@cades.com
tnishimoto@cades.com
Special Appearance Attorney for Defendants

DATED: Honolulu, Hawai`i, January 16, 2024.

GILLIAN SCHEFER KIM