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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI`I

STATE OF HAWAI`I, by its Department of the Attorney General, Plaintiff, vs. CAREMARKPCS HEATH, L.L.C.; EXPRESS SCRIPTS, INC.; and OPTUMRX, INC., Defendants.	CIVIL NO. 1CCV-23-0001281 MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO FILE UNREDACTED COMPLAINT UNDER SEAL; and CERTIFICATE OF SERVICE JUDGE: Hon. John M. Tonaki TRIAL DATE: NONE

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR LEAVE TO FILE UNREDACTED COMPLAINT UNDER SEAL

Pursuant to the First Amendment to the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution, non-party objector Civil Beat Law Center for the Public Interest (Law Center) opposes the Motion for Leave to File Unredacted Complaint Under Seal filed by Plaintiff State of Hawai`i (State).[1] Once the State alleges that corporate entities have engaged in unfair and deceptive practices against the people of

[1] The State filed the motion as a non-hearing motion. Motions to seal are *not* non-hearing motions. RCCH 7.2(b) & ex. B; *see also Oahu Publc'ns, Inc. v. Ahn*, 133 Hawai`i 482, 507, 331 P.3d 460, 485 (2014) ("If objections are made, a hearing on the objections must be held as soon as possible.").

Hawai`i, the State cannot hide the basis for its claims absent compelling reasons. A protective order related to investigative discovery pursuant to Hawai`i Revised Statutes (HRS) § 480-18 is not a compelling reason to seal the complaint. And generic claims of "privacy, trade secret, or commercial or financial information" are insufficient to justify sealing.[2] *See Roy v. GEICO*, 152 Hawai`i 225, 243, 524 P.3d 1249, 1267 (App. 2023) ("counsel's naked assertions" do not justify sealing civil complaint). The State has not provided grounds to overcome the presumption of public access to civil complaints guaranteed by the federal and state constitutions.

The Law Center respectfully requests that that the Court deny the State's motion to seal.

I. THE PUBLIC'S QUALIFIED CONSTITUTIONAL RIGHT OF ACCESS

The Hawai`i Supreme Court has recognized that the public has the right to access judicial proceedings and records. *Grube v. Trader*, 142 Hawai`i 412, 422, 420 P.3d 343, 353 (2018); *accord Ahn*, 133 Hawai`i at 507, 331 P.3d at 485; *Estate of Campbell*, 106 Hawai`i 453, 462-63, 106 P.3d 1096, 1105 (2005) (observing that the public generally has the right "to inspect and copy public records and documents, including judicial records"); *Roy*, 152 Hawai`i at 232, 524 P.3d at 1257 ("Courts in Hawai`i 'have a long tradition of accessibility by the public.'"). "[T]here is a strong presumption that court proceedings and the records thereof shall be open to the public." *Grube*, 142 Hawai`i at 428, 420 P.3d at 359. And that constitutional presumption of access extends to

[2] Because the State failed to provide a better explanation of the information withheld, the public does not have a "meaningful" opportunity to respond consistent with the constitutional presumptions of access. *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485 ("The hearing should provide a 'meaningful opportunity to address sealing the [records] on the merits, or to discuss with the court viable alternatives.'"); *Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998); *United States v. Brooklier*, 685 F.2d 1162, 1167-68 (9th Cir. 1982) (public "must be afforded a reasonable opportunity to state their objections"). To the extent that the State or others subsequently seek to supplement the record to justify sealing, the State's current motion should be denied without prejudice to provide the public with a "meaningful" opportunity to address any expanded record as made in a new motion to seal.

complaints filed in civil cases. *Roy*, 152 Hawai`i at 233, 524 P.3d at 1257; *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020).

The constitutional right of public access to judicial proceedings is among those rights that, "while not unambiguously enumerated in the very terms of the [First] Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." *Ahn*, 133 Hawai`i at 494, 331 P.3d at 472; *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982). "A major purpose of that Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper*, 457 U.S. at 604; *Ahn*, 133 Hawai`i at 502, 331 P.3d at 480; *accord Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980) (plurality opinion) (the freedoms in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus, to the extent that the constitution guarantees a qualified right of public access, "it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspaper*, 457 U.S. at 605; *Ahn*, 133 Hawai`i at 502, 331 P.3d at 480 ("access promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system"); *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) ("Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.").

"By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper*, 457 U.S. at 604. "[Openness] gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569 (plurality); *Ahn*, 133 Hawai`i at 494, 331 P.3d at 472; *accord Press-Enter. Co. v. Superior Ct.*, 464 U.S. 501, 508 (1984) [*Press-Enter. I*] ("[T]he sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.").

"The presumption of access to judicial proceedings flows from an 'unbroken, uncontradicted history' rooted in the common law notion that 'justice must satisfy the appearance of justice.'" *Courthouse News Serv.*, 947 F.3d at 589; *Ahn*, 133 Hawai`i at 494-95, 331 P.3d at 472-73 ("Open courts are a fundamental component of our system of law."). "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." *Richmond Newspapers*, 448 U.S. at 571 (plurality); *Press-Enter. I*, 464 U.S. at 508 ("Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."). "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." *Richmond Newspapers*, 448 U.S. at 572 (plurality).

To preserve the societal values reflected in the First Amendment, the U.S. Supreme Court held that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Press-Enter. I*, 464 U.S. at 509. "The presumption of openness may 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." *Id.* at 510; *Grube*, 142 Hawai`i at 424, 420 P.3d at 355; *Ahn*, 133 Hawai`i at 498, 331 P.3d at 476; *accord Globe Newspaper*, 457 U.S. at 606-07.

II. LEGAL STANDARDS

The proponent of sealing has the burden to overcome this presumption of access. *Oregonian Publ'g Co. v. U.S. Dist. Court*, 920 F.2d 1462, 1467 (9th Cir. 1990). To justify sealing, the Hawai`i Supreme Court has proscribed specific substantive requirements. The court must consider in its findings whether: "(1) the closure serves a compelling interest; (2) there is a substantial probability that, in the absence of closure, this compelling interest would be harmed; and (3) there are no alternatives to closure that would adequately protect the compelling interest." *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. 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.* "[S]imply preserving the comfort or official reputations of the parties is not sufficient justification [for closure]." *Id.* at 425, 420 P.3d at 356; *accord In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 676 (3d Cir. 2019) (concern about a company's public image, embarrassment, or reputational injury, without more, is insufficient to rebut the presumption of public access).

Protective orders for discovery or the parties' stipulation to seal are not compelling reasons to seal documents. *Roy*, 152 Hawai`i at 232-35, 524 P.3d at 1256-59 (rejecting parties' stipulation as basis for sealing); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) ("Unlike private materials unearthed during discovery, judicial records are public documents almost by definition, and the public is entitled to access by default."); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (common law presumption of public access is not rebutted by a stipulated protective order); *Markel Am. Ins. Co. v. Internet Brands, Inc.*, 2017 U.S. Dist. LEXIS 224860, *20-21 (C.D. Cal. Aug. 2, 2017) ("A similar issue arises where the parties have agreed that certain discovery material should be treated as confidential pursuant to a protective order. The issue of sealing discovery is not the same as sealing adjudicatory materials - an issue governed by the Ninth Circuit authorities cited above, and ultimately the First Amendment."); *accord State v. Tangalin*, 66 Haw. 100, 100-01, 657 P.2d 1025, 1026 (1983) ("It is well established that matters affecting the public interest

cannot be made the subject of stipulation so as to control the court's action with respect thereto."); *LC v. MG*, 143 Hawai`i 302, 320, 430 P.3d 400, 418 (2018) (party agreement as to a question of law is not binding on courts). As the Hawai`i Supreme Court has observed, "often parties to the litigation are either indifferent or antipathetic to disclosure requests." *Grube*, 142 Hawai`i at 423, 420 P.3d at 354 (citing *Phoenix Newspapers*, 156 F.3d at 951; *accord San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999) ("The right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away.").

To justify sealing, this Court must make "specific findings" regarding each element of the substantive standards established by the Hawai`i Supreme Court. *Ahn*, 133 Hawai`i at 507; 331 P.3d at 485; *Grube*, 142 Hawai`i at 424-25, 420 P.3d at 355-56. In rejecting a trial court's bare reference to a generic concern in *Grube*, the Hawai`i Supreme Court emphasized the need for facts and evidence.

> The trial court may not rely on generalized concerns, but must indicate facts demonstrating compelling interest justifying the continued sealing of the documents. Additionally, the court must specifically explain the necessary connection between unsealing the transcript and the infliction of irreparable damage resulting to the compelling interest.

Grube, 142 Hawai`i at 424-25, 420 P.3d at 355-56; *accord Roy*, 152 Hawai`i at 342, 524 P.3d at 1267 (rejecting "[c]onclusory claims" as a basis for sealing). "In the absence of such details, there is nothing by which the court could have determined that the asserted interest was of sufficient gravity to displace the strong presumption in favor of openness." *Grube*, 142 Hawai`i at 426, 420 P.3d at 357.

III. THERE IS NO EVIDENCE OF COMPELLING INTEREST

None of the grounds asserted by the State meet the constitutional standard for sealing. The State cites to a statutory provision regarding acquisition of documents during investigative discovery. Dkt. 8 at 2 ¶ 3. The statute provides that the Attorney General cannot permit unauthorized individuals access to documents obtained in response to an investigative demand without consent of the producing party (*e.g.*, the documents cannot be released in response to a public records request without consent). HRS § 480-18(j) ("While in the possession of the custodian, no such evidence so

produced shall be available for examination, without the consent of the person who produced the evidence, by any individual other than a duly authorized representative of the office of the attorney general."). But the statute provides a different standard once the Attorney General initiates court proceedings. At that point, the producing party has no control over information that has been placed in the court record. *Id.* § 480-18(k) ("Upon the conclusion of any such case or proceeding, the attorney shall return to the custodian any documentary evidence so withdrawn *which has not passed into the control of court or grand jury through the introduction thereof into the record of the case or proceeding*." (emphasis added)); *id.* § 480-18(*l*) ("Upon the completion of the investigation for which any documentary evidence was produced under this section, and any case or proceeding arising from the investigation, the custodian shall return to the person who produced the evidence all the evidence (other than copies thereof made by the attorney general or the attorney general's representative pursuant to subsection (j) of this section) *which has not passed into the control of any court or grand jury through the introduction thereof into the record of the case or proceeding*." (emphasis added)). The Hawai`i Legislature did not give entities investigated for unfair and deceptive practices a blank check to hide from the public all incriminating evidence introduced in court.

The State also references a confidentiality agreement with the investigated entities, which as explained above is insufficient. Dkt. 8 at 2 ¶ 4.

And the State makes a generic reference to "privacy, trade secret, or commercial or financial information" concerns, which as explained above is insufficient. *Id.*

Under the State's proposed redactions, the complaint is a 46-page criticism of pharmacy benefit managers generally. The Defendants are identified as pharmacy benefit managers, but any information that would show that Defendants engaged in unfair and deceptive practices has been redacted. Whether the State has flimsy grounds to connect Defendants to the ills of pharmacy benefit managers generally or whether the allegations raise serious questions about Defendants' specific conduct, the public should have access to assess the information to better understand and be able to discuss

why the State has invoked the jurisdiction of this Court on behalf of the people of Hawai`i.[3]

CONCLUSION

Based on the foregoing, the Law Center respectfully requests that that the Court deny the State's motion to seal.

DATED: Honolulu, Hawai`i, October 6, 2023

/s/ Robert Brian Black
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[3] The motion to seal also should be denied because the redacted complaint is not properly redacted; the State simply placed black boxes over the text. As a consequence, the information is readily recoverable and thus already in the public domain. "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) (quoting *In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008)); *accord Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) ("appeals seeking to restrain 'further dissemination of publicly disclosed information' are moot"); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("But however confidential it may have been beforehand, subsequent to publication it was confidential no longer."); *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006) (affirming an unsealing order because the information at issue was "already publicly available"); *cf. Phoenix Newspapers v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998) ("if a document becomes part of the public record, the public has access to it, and the press may report its contents."); *MD Spa Shop LLC v. Med-Aesthetic Sols, Inc.*, No. 21-CV-1050 TWR (LL), 2021 U.S. Dist. LEXIS 210552, at *18-19 (S.D. Cal. Oct. 29, 2021) ("A request to seal information that was publicly disclosed involves 'an inherent logical dilemma' in that 'information that has already entered the public domain cannot in any meaningful way be later removed from the public domain.'").

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STATE OF HAWAI`I, by its Department of the Attorney General, Plaintiff, vs. CAREMARKPCS HEATH, L.L.C.; EXPRESS SCRIPTS, INC.; and OPTUMRX, INC., Defendants.	CIVIL NO. 1CCV-23-0001281 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

On October 6, 2023, I will serve a copy of the foregoing Memorandum of Law on the following parties by electronic mail:

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DATED: Honolulu, Hawai`i, October 6, 2023

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