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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF ARIZONA**

11 Grant, et al.,

12 Plaintiffs

13 vs.

14 Ivchenko, et al.,

15 Defendants.

No. 2:21-CV-00108-JJT

**DEFENDANTS' REPLY IN FURTHER
SUPPORT OF DEFENDANTS' MOTION
TO SEAL CASE**

16 Defendants Andrew Ivchenko and Renee Ivchenko (“Defendants”) respectfully
17 submit the following reply brief in further support of their motion to seal this case (the
18 “Motion”). None of the arguments advanced by non-party David S. Gingras (“Mr. Gingras”)
19 in his response (the “Response”) warrant denying the motion. The Motion should be granted
20 and the entire record of this case should be sealed.

21 **I. INTRODUCTION**

22 Mr. Gingras’ opposition begins with the remarkable conclusion that Defendants are
23 asking for relief which is virtually impossible for this Court to grant, even if the Motion was
24 unopposed. (Response at page 1, line 22.) Mr. Gingras further states that his only reason for
25 submitting the Response was to “ensure the record contains a complete and accurate
26 statement of the facts” (Response at page 1, line 23) before launching a veritable fusillade of
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1 rambling ad hominin attacks against Defendants. Nothing could be further from the truth, as
2 Mr. Gingras has strong ulterior motives for preventing this case from being sealed. Mr.
3 Gingras is obsessed with causing Defendants as much harm and embarrassment as possible.
4 Defendants' counsel (and several others) litigated against Mr. Gingras and the Plaintiffs, the
5 Grants, for over two years, which resulted in a crushing defeat for them.¹

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7 Normally, that would be the end. However, this case is different from the not all that
8 uncommon vicious mudslinging that adversary counsel sometimes throws at each other in
9 lawsuits. Mr. Gingras admits that third party websites publish these court filings (Response at
10 page 8, lines 15-16.). However, it is the posting of this information *on the internet* that creates
11 the "chilling effect" he and his clients wanted to use against Defendants and other potential
12 litigants. (Motion at page 8, lines 25-27.) In other words, when someone searches
13 Defendants' names on Google, this case will show up on private and government-owned
14 websites, which then reference the full docket via PACER. (Motion at page 7, footnote 3.)
15 What Mr. Gingras knows, and is not telling this Court, is that ALL of these websites will
16 voluntarily remove content, but only if this court seals the record. Mr. Gingras avoids
17 mentioning this crucial fact, because without that online posting he cannot use this case as
18 leverage against future litigants seeking to assert their rights against his clientele of internet
19 predators such as Plaintiffs. (Motion at page 8, line 27; page 9, lines 1-9.) Other than revenge,
20 this is Mr. Gingras' motivation here, and the Court should reject this effort.
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26 ¹ Mr. Gingras proudly states that he won some battles in these cases. That is not the point –
27 he lost the war, had a complaint filed against him by the Arizona bar, and was sued by the
28 Defendants, and is seeking to mete out some revenge. (Motion at page 8, lines 10-21.)

1 Mr. Gingras does not even attempt to rebut Defendants’ argument that “scorched
2 earth” tactics, vexatious litigation and online harassment are his *modus operandi* when
3 dealing with parties that assert their rights against his clients, mostly predatory internet
4 operators like Plaintiffs. (Motion at pages 8-9.) The overwhelming evidence that Plaintiffs
5 and Mr. Gingras conducted themselves in this manner, as presented in the Motion, is simply
6 impossible for Mr. Gingras to rebut, so he simply ignores it. As further factual predicate for
7 this Motion, throughout his career Mr. Gingras has filed questionable lawsuits against
8 attorneys and parties that have brought suit against his clients. (Motion at page 9, lines 1-9.)
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11 The Grants were notorious mugshot website operators who scraped booking photos
12 and arrest records from law enforcement agencies throughout the country. At their height,
13 they had collected the booking photos and arrest records of “tens of millions” of people in
14 what was arguably the largest mugshot website operation in the country, which caused
15 damage to people’s reputations on an epic scale. (Motion at page 8, lines 17-23.) Throughout
16 this litigation, Plaintiffs and Mr. Gingras did everything in their power to create a chilling
17 effect designed to dissuade other affected parties throughout the country from asserting their
18 rights. (Motion at page 8, lines 25-27.)
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21 Mr. Gingras suffered professional humiliation by pursuing unethical and irrational
22 courses of action in a desperate attempt to save his clients’ mugshot operation, including
23 filing this action. Ultimately, all of Mr. Gingras’ threats, menacing behavior, and scorched
24 earth tactics merely resulted in the closing of his client’s business. Now, without a case and
25 without a client, Mr. Gingras obviously is not done – he seeks to get his revenge by making
26 further unwarranted public attacks against Defendants, while achieving his additional goal of
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1 using this case to create a chilling effect designed to dissuade future litigants from asserting
 2 their rights against any of his clients. The Court should reject this effort, and not reward Mr.
 3 Gingras by allowing him to get away with using this action as “a vehicle for improper
 4 purposes[.]” *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006).

6 **II. DISCUSSION**

7 **A. Mr. Gingras ignores the holding in *Kamakana v. City & Cnty. of Honolulu*, 8 and then applies the wrong law.**

9 In his Response, Mr. Gingras begins with all the familiar legal arguments—courts are
 10 public institutions, embarrassment or reputational harm alone do not suffice to seal court
 11 records, and in order to seal the entire record of the case there must exist a compelling
 12 governmental interest, and such relief must be narrowly tailored to that interest. (Response at
 13 page 3, lines 20-24.) Defendants do not dispute those general legal points. However, Mr.
 14 Gingras then goes on and frames the issue in the Motion as an attempt by Defendants to
 15 avoid *reputational* harm, which he argues cannot be a basis for sealing the record because
 16 “the same information is already contained in other public records, including records of the
 17 Maricopa County Superior Court.” (Response at page 8, lines 1-11.) This is a straw-person
 18 argument that does not accurately reflect the grounds for the relief that Defendants seek.

21 The controlling case here is *Kamakana v. City & Cnty. of Honolulu*, a case which Mr.
 22 Gingras only cites indirectly. (Response at page 4, line 6.) There is good reason why Mr.
 23 Gingras avoids this case – it allows him to reframe the issue by focusing on facts and law that
 24 simply have no bearing on the Motion. Although Defendants are rightfully concerned about
 25 the reputational harm Plaintiffs and Mr. Gingras cause them by filing this case, this does not
 26 open the door for Mr. Gingras to argue reputational harm is the deciding issue here.

1 Instead, the Motion argued that when considering the *totality of the circumstances*
2 Plaintiffs and Mr. Gingras used this action as “a vehicle for improper purposes” and “to
3 gratify private spite, promote public scandal, [and] circulate libelous statements[.]”
4 *Kamekana*, 447 F.3d at 1179. (Motion at page 10, lines 6-14.) As such, there exists
5 substantial “compelling reasons” in this case sufficient to outweigh the public’s limited
6 interest in disclosure. *Id.* Moreover, the Motion alleges that Plaintiffs and Mr. Gingras
7 engaged in abuse of process by filing this complaint. (Motion at pages 10-12.) Mr. Gingras
8 did not even make an attempt to rebut this argument. Abuse of process by Plaintiffs and Mr.
9 Gingras falls squarely within the conduct proscribed by the court in *Kamekana*. 447 F.3d at
10 1179.

11 The strong presumption of access to judicial records applies fully to dispositive
12 pleadings, including motions for summary judgment and related attachments. *Id.* A critical
13 factor in *Kamekana* was that the resolution of a dispute on the merits, whether by trial or
14 summary judgment, ensures the public’s interest in understanding of the judicial process and
15 of significant public events. *Id.* (citations omitted). Here, the case was in its early stages
16 before it was dismissed, and there were no dispositive rulings made by this Court. The only
17 motions made were Defendants’ motions for a more definite statement (Doc 20) and motion
18 to strike (Doc 21). The lack of a resolution of a dispute on the merits further tilts the balance
19 in favor of Defendants’ desire to seal this case. *Kamekana*, 447 F.3d at 1179.

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21 **B. The “facts” provided by Mr. Gingras are either irrelevant or actually support**
22 **Defendants’ Motion.**

23 Mr. Gingras gleefully states that he was in fact not disciplined by the State Bar for
24 conduct relating to Defendants. (Response at page 2, lines 11-12.) This argument is a red
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1 herring, because Defendants explicitly stated the relevant facts in their Motion - that the
2 Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona found that
3 probable cause existed that Mr. Gingras violated the following Rules of the Supreme Court of
4 Arizona: Rule 42, ER 4.2, 4.4, and 8.4(a), and that there was no final deposition of Mr.
5 Gingras' case. (Motion at pages 9-10.) In other words, the Probable Cause Committee,
6 looking at the same information that is before this Court, *unanimously* concluded that
7 probable cause existed and ruled in favor of sanctioning Mr. Gingras. (Motion at Exhibit 3.)
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10 The Motion further stated that any final decision by the State Bar was irrelevant, and
11 that this information was provided as additional validation for everything Defendants are
12 alleging in the Motion; the third party evaluation of Mr. Gingras' conduct by the Arizona bar
13 (including an affidavit from another attorney, Steven Scharboneau, who was involved in a
14 separate case against Plaintiffs), when coupled with the totality of the circumstances as
15 explained in the Motion, shows that Plaintiffs and Mr. Gingras used this action as "a vehicle
16 for improper purposes" and "to gratify private spite, promote public scandal, [and] circulate
17 libelous statements[.]" *Kamekana*, 447 F.3d at 1179. (Motion at page 9, lines 9-21.) The State
18 Bar's evaluation of Mr. Gingras' conduct in these proceedings, and his violation of Rule ER
19 4.4 - Respect for Rights of Others, is particularly relevant here:
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22 (a) In representing a client, a lawyer shall not use means that have no substantial
23 purpose other than to embarrass, delay, or burden any other person, or use methods of
24 obtaining evidence that violate the legal rights of such a person." *Rule ER 4.4 - Respect for
Rights of Others*, Ariz. R. Sup. Ct. ER 4.4.

25 Once Defendant Andrew Ivchenko filed a bar complaint against Mr. Gingras, the matter was
26 out of his hands. The nature and extent of any settlement or disposition between Mr. Gingras
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1 and the State Bar has no additional relevance here, which Defendants stated in their brief.
2 (Motion at page 9, line 22.)

3 When coupled with the totality of the circumstances as explained in the Motion, the
4 State Bar's determinations support the allegation that Plaintiffs and Mr. Gingras used this
5 action as "a vehicle for improper purposes" and "to gratify private spite, promote public
6 scandal, [and] circulate libelous statements[.]" *Kamekana*, 447 F.3d at 1179. The evidence of
7 abuse of process and ethical violations here is overwhelming. As such, there are more than
8 enough "compelling reasons" in this case sufficient to outweigh the public's interest in
9 disclosure. *Id.*

10 Mr. Gingras presents additional "facts" that form the basis of several more red herring
11 arguments. First, Mr. Gingras states that because some facts and details of this case have
12 already been publicly disclosed, that factor weighs heavily against sealing this case.
13 (Response at page 8, lines 25-27; page 9, lines 1-9.) As discussed in Section II.A, above, and
14 in the Motion, the justification for sealing the record is that Plaintiffs and Mr. Gingras used
15 this action as "a vehicle for improper purposes" and "to gratify private spite, promote public
16 scandal, [and] circulate libelous statements[.]" *Kamekana*, 447 F.3d at 1179. (Motion at page
17 10 lines 8-14.) Reputational harm to Defendants was presented as a byproduct of Plaintiffs'
18 actions, and another *motivation* for them filing this lawsuit for such ulterior purposes.
19 (Motion at page 8 lines 25-27; page 9, lines 1-5.)

20 Furthermore, Mr. Gingras engages in a sleight of hand by arguing that this case cannot
21 be sealed because the "cat is out of the bag" once Defendant Renee Ivchenko appealed her
22 *civil* case against the police, thereby creating a public record of her arrest. (Response at page
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1 4, lines 9-14.) Mr. Gingras then goes on and cites cases that do not support his position. *In re*
2 *Application to Unseal*, 891 F. Supp. 2d 296, 300 (E.D.N.Y. 2012) involved the publication of
3 information that was previously sealed in a case, and has no application here where the *entire*
4 case was filed for an improper purpose. *Kamekana*, 447 F.3d at 1179. Mr. Gingras' reliance
5 on *Foltz v. State Farm Mut. Auto. Ins. Co.* is equally misguided, as that case was limited to
6 the application of a protective order under Federal Rule of Civil Procedure 26(c). *Foltz v.*
7 *State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

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10 More significantly, Mr. Gingras makes criminal accusations against *both* Defendants
11 in Plaintiffs' amended complaint that have nothing to do with Renee Ivchenko's civil case
12 appeal. (Doc 14). (Response at page 6, lines 5-16.) The unsubstantiated accusations against
13 both Defendants are sufficient reason to seal this case, as this conduct falls within the scope
14 of the court's holding in *Kamekana* in that Plaintiffs' motivation was "to gratify private spite,
15 promote public scandal, [and] circulate libelous statements[.]" 447 F.3d at 1179. Defendant
16 Andrew Ivchenko's status as a licensed attorney makes these unfounded allegations even
17 more egregious.

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20 In addition, and contrary to Mr. Gingras' arguments, courts have sealed records in such
21 circumstances. *See, e.g., State v. R.H.B.*, 821 N.W.2d 817 (Minn. 2012) ("[T]here are
22 certainly inherent disadvantages caused by unproven criminal accusations—such as personal
23 and professional reputational damage—that would be suffered by any expungement
24 petitioner."); *Matter Of Search Warrants Issued On June 11, 1988*, 710 F.Supp. 701 (D.
25 Minn. 1989) ("Significant privacy concerns are implicated in the sealed materials. Several
26 individuals are associated with serious criminal misconduct. Publication of the documents
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1 could inflict serious injury to [people's] reputations and endanger their careers. While some
2 of these people may be guilty of the alleged activities, others may be innocent. It is for this
3 reason that the government is generally required to ... obtain an indictment before making
4 criminal accusations.”).

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6 As much as Mr. Gingras wanted to drag Defendants into the gutter, neither Defendant
7 has been convicted of a crime. (Motion at page 8, lines 1-7.) As Plaintiffs and Mr. Gingras
8 consistently did throughout this litigation, they targeted Defendant Andrew Ivchenko's
9 spouse for *extreme* harassment even after her case against them had resolved. (Motion, at
10 page 9, lines 25-27; page 10, lines 1-5.) Even here, Mr. Gingras cannot help himself, inserting
11 her booking photograph and arrest information in his Response, as he habitually did at every
12 opportunity throughout the litigation. *Id.* This is yet another example of Mr. Gingras'
13 maliciousness and true motivations not only in filing this action, but also by inserting himself
14 into this Motion.
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17 Mr. Gingras' “cat is out of the bag” argument also ignores that this action involves
18 allegations that have absolutely nothing to do with Renee Ivchenko's arrest. The amended
19 complaint (Doc 14) alleges (among other things) that Defendants engaged in abuse of process
20 and malicious prosecution. Piling on, Plaintiffs accused Defendants of violating A.R.S. § 12-
21 3201, which allows a superior court to designate a pro se litigant a vexatious litigant in a
22 noncriminal case. Plaintiffs did not plead a single fact showing that either Defendant ever
23 filed suit against them or anyone else in a pro se capacity. (Doc 14 ¶ 260.) Plaintiffs were
24 blatantly trying to influence the attorney-client relationship Defendant Andrew Ivchenko had
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1 with his clients litigating against them in state court, which lends further credence to
2 Defendants' argument that this case was filed for improper purposes.

3 Grasping for straws, Mr. Gingras makes the preposterous argument that the Motion is
4 asking this Court to force the Maricopa County Superior Court to seal its records, and
5 retroactively purge the Internet of case-related material. (Response at page 10, lines 20-22.)
6 As stated above, the basis for sealing this case is because under the totality of the
7 circumstances Plaintiffs and Mr. Gingras used this action as "a vehicle for improper
8 purposes" and "to gratify private spite, promote public scandal, [and] circulate libelous
9 statements[.]" *Kamekana*, 447 F.3d at 1179. (Motion at page 10, lines 6-14.) Moreover, state
10 court filings are not posted on the internet, and are routinely difficult to access short of doing
11 extensive research and going to the courthouse to get the docket.
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14 Mr. Gingras just keeps replaying his golden oldies hoping that if he just turns up the
15 volume they will start working again. The Court should reject this ploy. The Motion provides
16 voluminous information, including affidavits, that show Mr. Gingras' true motivations in
17 filing this action, and also wanting to prevent it from being sealed. Despite Mr. Gingras' red
18 herring arguments and sleights of hand, embarrassment, including unsubstantiated criminal
19 charges, support the improper motivation here – they are *not* its legal basis, as Mr. Gingras
20 argues. As such, Mr. Gingras' "facts" are either irrelevant in terms of this Motion, or actually
21 support it.
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23 **III. CONCLUSION**

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25 The litigation involving the Plaintiffs and Mr. Gingras was, frankly, brutal. This should
26 come as no surprise, as mugshot website operators are generally not friendly people. Indeed,
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1 the dispute underlying this case is an example of the thankless task awaiting anyone who
2 attempts to assert their rights against online predators in the internet age. Mr. Gingras made
3 matters even worse by utilizing “scorched earth tactics” against his opponents, including
4 opposing counsel. Knowing that his clients are unsympathetic, Mr. Gingras routinely (as he
5 does here) tried to kill the messenger instead.
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7 Mr. Gingras should not be allowed to abuse Defendants and the legal system by using
8 this action as “a vehicle for improper purposes[.]” *Kamakana v. City & Cnty. of Honolulu*,
9 447 F.3d 1172, 1179 (9th Cir. 2006). The legal standard allowing a motion to seal is high, but
10 has been met in this case. Granting this Motion also sends a message that legal process cannot
11 be abused with impunity, and gives opposing counsel a remedy when someone does.
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13 For all of the reasons set forth in the Motion and this Reply, Defendants respectfully
14 request that their Motion to Seal this case be granted.
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16 RESPECTFULLY SUBMITTED this 10th day of October, 2022.

17 ANDREW IVCHENKO PLLC
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19 By: /s/ Andrew Ivchenko
20 Andrew Ivchenko
21 Attorney for Defendants
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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2022, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following:

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