STEPHEN L. PEVAR
American Civil Liberties Union Foundation
330 Main Street, First Floor
Hartford, Connecticut 06106
(860) 570-9830

DANA L. HANNA
Hanna Law Office, P.C.
816 Sixth St.
P.O. Box 3080
Rapid City, South Dakota 57709
(605) 791-1832

RACHEL E. GOODMAN
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor.
New York, NY 10004
(212) 549-2500

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH DAKOTA

OGLALA SIOUX TRIBE, et al, Plaintiffs, vs. LUANN VAN HUNNIK, et al, Defendants.	Case No. 5:13-cv-05020-JLV PLAINTIFFS' MOTION TO UNSEAL

INTRODUCTION

Plaintiffs recently notified this Court that Plaintiffs have in their possession a document "that strongly suggests that Judge Davis is concealing information prejudicial to his case." *See* Plaintiffs' Reply Brief Re: Motion to Compel (Docket 100) at 2. That

document was attached as Exhibit 6A to Plaintiffs' Motion for Sanctions, which Plaintiffs filed under seal on July 7, 2014. *See* Docket 101.

Presumptively, Plaintiffs' Motion for Sanctions should have been filed on the public record for the same reasons that every other pleading in this case has been filed on the public record. However, as a courtesy to Defendant Hon. Judge Davis, Plaintiffs opted to file the Motion for Sanctions under seal so as to afford Judge Davis an opportunity to notify this Court of whether Exhibit 6A is protected by some claim of privilege warranting the permanent sealing of that document. *See* Docket 100 at 2 n.1 (stating that the Motion for Sanctions was being filed under seal in order "to protect any privilege that Judge Davis could assert, although Plaintiffs fail to see any privilege that could exist here[]").

Counsel for Judge Davis, Roxanne Giedd, recently confirmed to Plaintiffs' counsel, Stephen Pevar, that Judge Davis has no claim of privilege in Exhibit 6A. Mr. Pevar then asked Ms. Giedd to also confirm that the Motion for Sanctions may now be unsealed.

Ms. Giedd responded by stating that Judge Davis refuses to consent to the unsealing of the Motion for Sanctions. Mr. Pevar asked Ms. Giedd to set forth in writing Judge Davis's reason for withholding his consent, explaining to Ms. Giedd that Judge Davis appears to be abusing the courtesy that Plaintiffs had extended to him. Ms. Giedd subsequently sent an email to Mr. Pevar indicating that the Motion for Sanctions should remain sealed because "it subjects the Defendant Judge Davis to unnecessary and unjustified embarrassment and public scandal."

For the reasons explained below, this Court should unseal the Motion for Sanctions. The ground asserted by Judge Davis in support of keeping the Motion sealed is invalid in this context. Specifically, if subjecting a party to "unnecessary and unjustified embarrassment and public scandal" could justify the sealing of pleadings in federal litigation in the manner asserted here, every defendant in every civil case would have the power to seal each plaintiff's complaint and other court filings. Indeed, under Judge Davis's reasoning, Plaintiffs would have been required to seal the two recently filed motions for summary judgment, given that those motions surely have the capacity to embarrass and scandalize Judge Davis.

ARGUMENT

"The mere fact that [a pleading] may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (citing *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003)). "A litigant who might be embarrassed, incriminated, or exposed to litigation through dissemination of materials is not, without more, entitled to the court's protection." *Foltz*, 331 F.3d at 1136 (citation omitted); *see also Oliner v. Kontrabecki*, 745 F.3d 1024, 1025 (9th Cir. 2014) (quoting *Kamakana* on this point); *S.E.C. v. Shanahan*, No. 4:06-MC-546 CAS, 2006 WL 3330972, at *4 (E.D. Mo. Nov. 15, 2006) (same).

Both the Supreme Court and the Eighth Circuit have made it clear that all documents filed in federal court are presumptively open to public inspection. The public has a right of access to court documents that "is grounded in the First Amendment and in

common law." *CBS, Inc. v. United States District Court*, 765 F.2d 823, 835 (9th Cir. 1985); *see also Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990) (quoting *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) ("There is a 'common-law right of access to judicial records.'"). In a democracy such as ours, the public has both a right and a need to know what is occurring in their federal courts. *Nixon*, 435 U.S. at 597; *see also Kelly v. Wengler*, 979 F. Supp. 2d 1243, 1244 (D. Idaho 2013) ("To start with the necessary, if obvious, initial premise, court proceedings and records are generally open to the public."); *Skinner v. Uphoff*, No. 02–CV–033–B, 2005 WL 4089333, at *3 (D. Wyo. Sept. 27, 2005) (citing *Allsop v. Cheyenne Newspapers, Inc.*, 39 P.3d 1092, 1095, 1096 (Wyo. 2002) (rejecting a public official's attempt to seal information related to the operation of a prison, reasoning that "the public has a right, and even a responsibility . . . to monitor the activities and performance of their own government and use this information to implement change if needed[]").

Furthermore, maintaining an open judiciary "serve[s] as a check upon the judicial process—an essential component in our structure of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *see also IDT Corp. v. eBay*, 709 F.3d 1220, 1222 (8th Cir. 2013) (internal quotation marks and citation omitted) ("This right of access bolsters public confidence in the judicial system by allowing citizens to evaluate the reasonableness and fairness of judicial proceedings . . . [and] to keep a watchful eye on the workings of public agencies.").

Therefore, "only the most compelling reasons can justify non-disclosure of judicial records." *In re Neal*, 461 F.3d 1048, 1053 (8th Cir. 2006) (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005)). Although a court must be alert for

deliberate efforts to embarrass and scandalize a party as a litigation tactic, *see Nixon*, 435 U.S. at 598, the mere fact that a party may be embarrassed or scandalized by a pleading will not justify sealing that pleading based on that fact alone. *See In re Neal*, 461 F.3d at 1054 (noting that although a pleading has the capacity to embarrass and scandalize outside parties, the pleading should not be sealed absent proof that it "was filed for an improper purpose, such as to gratify public spite or promote public scandal[]").

Accordingly, a court must identify "[a] compelling governmental interest" that necessitates the sealing of a record, and it must "make[] specific findings regarding the necessity" of sealing that record. *Goff v. Graves*, 362 F.3d 543, 550 (8th Cir. 2004); *see also Kamakana*, 447 F.3d at 1178-79 (citations omitted) (holding that the party seeking to seal a matter "bears the burden of meeting a 'compelling reasons' standard, under which the party must 'articulate compelling reasons supported by factual findings'" that outweigh the "presumed right of access"). Thus, a court may seal a document only after it has articulated particularized and specific findings of a compelling need for secrecy, and the scope of the order must be narrowly tailored to protect that interest. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510-12 (1984).

Judge Davis cannot meet this heavy burden for justifying the continued sealing of Plaintiffs' moving papers. Plaintiffs are not submitting the Motion for Sanctions as a litigation tactic to embarrass or scandalize Judge Davis, but rather because Exhibit 6A on its face indicates that Judge Davis is concealing relevant information. Plaintiffs have a significant interest in obtaining judicial review of any such efforts. Until now, *every* document filed in this litigation has been unsealed, as they should be, despite their potential for embarrassing and scandalizing Defendants. Judge Davis must not be given

the power to place Plaintiffs' evidence under a cloak of secrecy merely because it may place him in a bad light. Even if Judge Davis claims that the public may reach an unfair or unwarranted conclusion regarding his credibility or his competence if they were to read Exhibit 6A, Judge Davis remains free to combat Plaintiffs' evidence with his own evidence. Such is the nature of our adversary system.

The sole ground tendered by Judge Davis for keeping Plaintiffs' Motion for Sanctions sealed is invalid. This is a case of major public importance, involving the fundamental liberty interests and federal statutory rights of every Indian family with children in Pennington County, South Dakota. Judge Davis may not control the public's access to documents filed in federal court merely to protect his sensibilities or his reputation.

Plaintiffs did not file Exhibit 6A (nor now move to unseal it) for the purpose of embarrassing Judge Davis. Rather, Plaintiffs have filed these documents and moved to unseal them in order to ascertain and establish the true facts concerning Defendants' policies and practices involving the removal of Indian children from their families, and to ensure that the public will be fully informed of these developments. Any embarrassment that Exhibit 6A causes on the part of Judge Davis is ancillary to its probative value in this important case of public concern.

CONCLUSION

Judge Davis should not be permitted to capitalize on Plaintiffs' courtesy by compelling this Court to keep Plaintiffs' Motion for Sanctions sealed based on a ground unsupported in the law. Plaintiffs respectfully request that this Court order that Plaintiffs' Motion for Sanctions (including Exhibit 6A) be unsealed.

Respectfully submitted this 21st day of July, 2014.

By: /s/ Stephen L. Pevar
Stephen L. Pevar
Dana L. Hanna
Rachel E. Goodman

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2014, I electronically filed the foregoing Motion with the Clerk of Court using the CM/ECF system, which sent a notice of electronic filing to the following counsel for Defendants:

Sara Frankenstein	sfrankenstein@gpnalaw.com
Roxanne Giedd	Roxanne.giedd@state.sd.us
Ann F. Mines	ann.mines@state.sd.us
Robert L. Morris	bobmorris@westriverlaw.com
Nathan R. Oviatt	noviatt@goodsellquinn.com
J. Crisman Palmer	cpalmer@gpnalaw.com

/s/ Stephen L. Pevar
Stephen L. Pevar