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Attorneys for Plaintiff
KIRK C. FISHER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KIRK C. FISHER,	)	CIVIL NO. 11-00589 ACK/BMK
)	
Plaintiff,)	
	)	PLAINTIFF KIRK C. FISHER'S
vs.	)	RESPONSE IN OPPOSITION TO
	)	DEFENDANTS LOUIS KEALOHA
LOUIS KEALOHA, in his individual	)	AND CITY AND COUNTY OF
capacity and his official capacity as	)	HONOLULU'S MOTION FOR
Honolulu Chief of Police; PAUL	)	LEAVE TO FILE DOCUMENT
PUTZULU, in his individual capacity	)	CONSISTING OF AN
and his official capacity as Honolulu	)	ADDITIONAL EXHIBIT TO
Acting Chief of Police; CITY AND	)	SUPPLEMENT DEFENDANTS
COUNTY OF HONOLULU;	)	LOUIS KEALOHA AND CITY
HONOLULU POLICE DEPARTMENT)	)	AND COUNTY OF HONOLULU'S
and DOE DEFENDANTS 1-50,	)	SEPARATE AND CONCISE
	)	COUNTER-STATEMENT OF
Defendants.	)	FACTS IN OPPOSITION TO
	)	PLAINTIFF'S MOTION FOR

) **SUMMARY JUDGMENT FILED**
) **JULY 22, 2013; CERTIFICATE OF**
) **SERVICE**
)
) **Hearing:**
) **Date: August 12, 2013**
) **Time: 10:00 a.m.**
) **Judge: The Honorable Alan C. Kay**
)
) **No Trial Week**

**PLAINTIFF KIRK C. FISHER'S RESPONSE IN OPPOSITION TO
DEFENDANTS LOUIS KEALOHA AND CITY AND COUNTY OF
HONOLULU'S MOTION FOR LEAVE TO FILE DOCUMENT
CONSISTING OF AN ADDITIONAL EXHIBIT TO SUPPLEMENT
DEFENDANTS LOUIS KEALOHA AND CITY AND COUNTY OF
HONOLULU'S SEPARATE AND CONCISE COUNTER-STATEMENT OF
FACTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT FILED JULY 22, 2013**

On July 22, 2013, Defendants filed a Memorandum in Opposition to the Motion for Summary Judgment and Motion for Permanent Injunction filed by Plaintiff Kirk C. Fisher. Also on July 22, 2013, Defendants filed a Separate and Concise Counter-Statement of Facts in Opposition to Plaintiff's Motion for Summary Judgment.

On July 29, 2013, Plaintiff timely filed his Reply to Defendants' Memorandum in Opposition to the Motion for Summary Judgment and Motion for Permanent Injunction filed by Plaintiff Kirk C. Fisher

On August 8, 2013, at 3:08 p.m., Defendants filed the instant Motion, requesting leave to file an additional exhibit to support Defendants' Separate and

Concise Counter-Statement of Facts in Opposition to Plaintiff's Motion for Summary Judgment. This Motion, the Declaration of Counsel, and attached exhibits, should be denied and stricken for the following reasons.

LR 7.4 states that "[n]o further or supplemental briefing shall be submitted without leave of court."

First, although Defendants have titled the August 8, 2013, filing "Motion for Leave to File Document Consisting of an Additional Exhibit...", they have submitted the supplemental exhibit as well as supplemental argument attacking Plaintiff's Reply Memorandum. This supplementation prior to Court approval, pursuant to LR 7.4, is inappropriate and should be stricken.

Second, Defendants file the instant Motion less than two business days prior to the scheduled hearing, leaving Plaintiff virtually no time to respond to Defendants legal argument regarding "facts underlying [a] criminal conviction." In fact, similar to their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and Motion for Permanent Injunction, Defendants' contentions in their Motion for Leave to File Document are factually and/or legally incorrect. As such, Plaintiff will be prejudiced by this late addition.

Defendants continue to stress the facts underlying Mr. Fisher's **arrest** and not the facts underlying Mr. Fisher's **conviction**. The facts underlying Mr. Fisher's arrest are irrelevant. The reliable judicial records that exist regarding

facts underlying his conviction for Harassment under H.R.S. §711-1106(1)(a) do not support that Mr. Fisher was ever convicted of a crime of violence.

As discussed in Plaintiff's Reply Memorandum, filed July 29, 2013, under the modified categorical approach the analysis is limited to "the [(1)]statutory definition, [(2)]charging document, [(3)]written plea agreement, [(4)]transcript of plea colloquy, and [(5)]any explicit finding by the trial judge to which the defendant assented." Shepard v. United States, 544 U.S. 13, 16 (2005). The Court is permitted to look beyond the statute of conviction and consult "**reliable judicial records**". United State v. Hayes, 526 F.3d 674, 676 (10th Cir. 2008).

Contrary to Defendants' contentions, Mr. Fisher's deposition transcript does not somehow convert the police reports regarding his arrest into a reliable judicial record, as defined above. See Shepard v. U.S., 544 U.S. 13 (2005); U.S. v. Hayes, 526 F.3d 674 (10th Cir. 2008).

Finally, Defendants took Mr. Fisher's deposition in April 2013. Defendants had ample opportunity to present the Court with the transcript prior to August 8, 2013. They certainly could have attached it to their Separate and Concise Counter-Statement of Facts, filed July 22, 2013.

Based on the foregoing, and the records and files in this case, Plaintiff respectfully requests (1) that Defendants' Motion for Leave to File Document Consisting of an Additional Exhibit, filed August 8, 2013 be **DENIED**; (2) any

argument contained in Defendants' Motion and/or the Declaration of Counsel, filed August 8, 2013, regarding Plaintiff's Reply Memorandum, filed July 29, 2013, be **STRICKEN**; and the exhibit attached to Defendants' Motion, filed August 8, 2013, be **STRICKEN**.

Dated: Honolulu, Hawaii, August 9, 2013.

/s/ Te-Hina Ickes
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