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Attorneys for Movant
Public First Law Center

IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal of

BOOKING.COM B.V.,

Taxpayer-Appellant.

CASE NO. 1CTX-21-0001613

MOTION TO UNSEAL COURT
RECORDS; MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO
UNSEAL COURT RECORDS; NOTICE
OF MOTION; and CERTIFICATE OF
SERVICE

NON-HEARING MOTION
JUDGE: HON. KEVIN T. MORIKONE
TRIAL DATE: NONE

MOTION TO UNSEAL COURT RECORDS

Pursuant to the constitutional right of access provided by the First Amendment to the U.S. Constitution; article I, section 4 of the Hawai`i Constitution; the common law right of access; and Hawai`i Court Records Rule (HCRR) 10.10, the Public First Law

Center respectfully requests that the Court unseal the docket entries numbered 108-111, 166-167, 183, 186-188, 202-208, 210-215, 223-225, and 228.¹

DATED: Honolulu, Hawai`i, September 18, 2024



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¹ HCRR 10.10 provides the parties respond to the motion within 10 days of receiving notice from the Clerk that the motion was filed. Movant conventionally filed and served this motion because, if added as an electronic filer to the case, Movant would have electronic access to the documents that it is seeking to unseal. HCRR 10.4.

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IN THE TAX APPEAL COURT OF THE
STATE OF HAWAII

In the Matter of the Tax Appeal of

BOOKING.COM B.V.,

Taxpayer-Appellant.

CASE NO. 1CTX-21-0001613

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO UNSEAL
COURT RECORDS

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO UNSEAL COURT RECORDS**

Movant Public First Law Center (Public First) moves for public access to the court records identified below, collectively referred to as the "Subject Records." Although Taxpayer-Appellant Booking.com B.V. (Booking.com) and Defendant-Appellee Director, State of Hawai`i Department of Taxation (DOTAX) may have agreed to seal court records, agreement of the parties is not sufficient grounds to override the public's constitutional and common law rights to access court records.

Public First respectfully requests that the Court unseal the following:

- **Dkt. 108, 109, 110, and 111** (3/28/23 DOTAX's second supplemental memorandum in opposition to Booking.com's motion for partial summary judgment and exhibits)
- **Dkt. 166 and 167** (3/8/24 Booking.com's memorandum in opposition to DOTAX's cross-motion for partial summary judgment, declaration of Nathaniel A. Higa, and Exhibit 2)

- **Dkt. 183, 186, 187, and 188** (3/13/24 DOTAX's reply in support of its cross-motion for partial summary judgment, declaration of Mary Bahng Yokota, and Exhibits 12 and 13);
- **Dkt. 202, 203, 204, 205, 206, 207, 208, 210, 211, 212, 213, 214, and 215** (4/5/24 DOTAX's supplemental summary judgment memorandum and Exhibits 18-29);
- **Dkt. 223, 224, and 225** (4/17/24 Booking.com supplemental memoranda)
- **Dkt. 228** (4/26/24 DOTAX's supplemental memorandum)

The parties did not meet the procedural or substantive standards for sealing when they moved to file the Subject Records under seal. Accordingly, Public First asks this Court to unseal the Subject Records.

I. LEGAL STANDARDS

The Hawai'i Supreme Court has recognized that the public has the right to access judicial proceedings and records, including records filed in civil cases. *Grube v. Trader*, 142 Hawai'i 412, 422, 420 P.3d 343, 353 (2018); *accord Oahu Public's, Inc. v. Ahn*, 133 Hawai'i 482, 493 & n.14, 496 & n.18, 507, 331 P.3d 460, 471 & n.14, 474 & n.18, 485 (2014); *Estate of Campbell*, 106 Hawai'i 453, 462-63, 106 P.3d 1096, 1105-06 (2005) (observing that the public generally has the right "to inspect and copy public records and documents, including judicial records"). "[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. 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 safeguard the public's right of access, there are "procedural prerequisites" to closure that must be met in order to preserve the presumption of openness. *Ahn*, 133 Hawai'i at 497-98, 331 P.3d at 475-76; *accord Grube*, 142 Hawai'i at 423, 420 P.3d at 354. First, the public must be provided notice and an opportunity to be heard before closure occurs. *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."). Courts must provide the

public “a meaningful opportunity to object or offer alternatives to the closure.” *Id.* at 424, 420 P.3d at 355.

Second, as a prerequisite to sealing, the court must enter an order, and “the reasons supporting closure must be articulated in findings.” *Ahn*, 133 Hawai`i at 497-98, 331 P.3d at 475-76. “Requiring specific findings on the record enables the trial court to address each element necessary for closure and allows an appellate court to review the reasoning of the trial judge to ensure that protection of the public right was adequately considered.” *Id.* at 498, 331 P.3d at 476. The order must provide “findings that ‘the closure is essential to preserve higher values’ and that the closure is ‘narrowly tailored’ to serve that interest.” *Grube*, 142 Hawai`i at 424, 420 P.3d at 355; *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485. The court thus must address specifically 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.

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

Ahn, 133 Hawai`i at 507, 331 P.3d at 485 (emphasis added) (citations omitted).

“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.* 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; *accord Oahu Public`ns Inc. v. Takase*, 139 Hawai`i 236, 246-47, 386 P.3d 873, 883-84 (2016).

Without these procedural protections, the public’s qualified right of access under the First Amendment is an empty guarantee.

The procedural and substantive safeguards of the public’s right of access are not mere punctilios, to be observed when convenient. Those safeguards provide the essential, indeed only, means by which the public’s voice can be heard. All too often, parties to the litigation are either indifferent or antipathetic to disclosure requests. This is to be expected: it is not their charge to represent the rights of others. However, balancing interests cannot be performed in a vacuum. Thus, providing the public notice and an opportunity to be heard ensures that the trial court will have a true opportunity to weigh the legitimate concerns of all those affected by a closure decision. Similarly, entry of specific findings allows fair assessment of the trial judge’s reasoning by the public and the appellate courts, enhancing trust in the judicial process and minimizing fear that justice is being administered clandestinely.

Ahn, 133 Hawai`i at 498, 331 P.3d at 476 (citation and internal quotations omitted) (alterations in original).

II. FACTUAL BACKGROUND

On December 9, 2021, Booking.com appealed DOTAX’s final determination, assessing nearly \$20 million in taxes, penalties, and interest stemming from Booking.com’s failure to pay Hawai`i general excise tax (GET) between the years 2010-2020. Dkt. 1 at 3.¹ Booking.com claimed that it was not subject to GET because it has no physical presence in Hawai`i and operates as an online travel agency. *Id.* at 4.

On January 4, 2023, the Court entered the parties’ proposed stipulated protective order (SPO). Dkt. 88. Paragraph 7 of the SPO provides:

If a party intends to attach or include any Confidential Material in any pleading, motion, memorandum, or other document filed in the Action, the party shall make such filing under seal. No further order of

¹ Pinpoint citations reference the page of the corresponding PDF.

this Court will be required to permit the filing of any of the Confidential Material or any pleading, motion, memorandum, or other document filed in the Action under seal.

Id. at 5 ¶ 7.²

All of the Subject Records – various summary judgment filings – were subsequently filed under seal without a motion to seal or court order with specific findings of fact that justified the sealing. Nevertheless, the parties discussed – and quoted from – the sealed filings in open court during the May 6, 2024 hearing on the summary judgment motions.

On August 27, Public First requested access to the Subject Records. The clerk denied the request on September 9. This motion is timely filed pursuant to HCRR 10.10.

III. Argument

The Subject Records should be unsealed. An agreement of the parties and a blanket protective order are not proper bases to conceal court records. Moreover, the SPO does not justify sealing any records. And, in any event, redaction is a more appropriate method of protecting information than sealing entire documents.

a. An agreement of the parties is not sufficient to justify sealing court records.

A mere stipulation to seal by the parties – the apparent basis for sealing the Subject Records here – is insufficient to rebut the presumption of openness. A stipulation of the parties does not trump the public’s right of access. *E.g.*, *Roy v. Gov't Emp. Ins. Co.*, 152 Hawai'i 225, 232-35, 524 P.3d 1249, 1256-59 (Haw. Ct. App. 2023), (rejecting argument for continued sealing based on a prior “court-approved stipulation to seal”); *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); *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999) (“The

² For the reasons explained below, the Court might consider modifying the SPO to avoid future constitutional violations. Paragraph 7 unconstitutionally circumvents the procedural prerequisites that safeguard the public’s right of access. *E.g.*, *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (order permitting automatic sealing of new filings unconstitutional) (“The effect of the order is a total restraint on the public’s first amendment right of access even though the restraint is limited in time.”).

right of access to court documents belongs to the public, and the Plaintiffs were in no position to bargain that right away.”); *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, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 951 (9th Cir. 1998)). Thus, absent further justification, the court records sealed here on the basis of the parties’ agreement – all of the Subject Records – should be unsealed.

b. Nothing in the SPO justifies closure.

There is no justification for withholding the Subject Records. The SPO does not require any compelling interest or substantial probability of irreparable harm to that interest before Booking.com designates a document as “Confidential” and thus subject to automatic sealing without further analysis or explanation pursuant to Paragraph 7. The SPO relies solely on Booking.com’s “good faith” belief that a document contains “nonpublic information.” Dkt. 88 at 2 (WHEREAS #1, defining “Confidential Information” most broadly “or is nonpublic information”), and ¶ 1 (allowing Booking.com to designate any discovery document as “Confidential” if “Booking.com in good faith believes that the information therein is or contains Confidential Information”). Any document designated by Booking.com as “Confidential” is “Confidential Material” that is filed under seal automatically. *Id.* at 2-3 ¶ 2 (documents designated as “Confidential” by Booking.com are “Confidential Material”), and 5 ¶ 7 (“Confidential Material” automatically filed under seal without further order).

Booking.com's self-serving identification of "nonpublic information" is not sufficient to override the public's right of access to court records.

Moreover, simply "preserving the comfort or official reputations of the parties is not sufficient justification" for closure. *Grube*, 142 Hawai'i 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); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983) ("Indeed, common sense tells us that the greater the motivation a corporation has to shield its operations, the greater the public's need to know."). The Subject Records should be unsealed.

c. Redaction is a more narrowly tailored solution to any concerns.

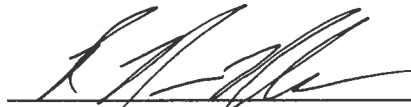
In *Grube*, *Ahn*, and *Takase*, the Hawai'i Supreme Court emphasized that sealing court proceedings from public view must be "narrowly tailored to serve [a compelling government interest]." *Ahn*, 133 Hawai'i at 497, 331 P.3d at 475; *accord Grube*, 142 Hawai'i at 427, 420 P.3d at 358 ("The court should therefore make findings regarding specific alternatives and set forth its reasons for rejecting each."); *Takase*, 139 Hawai'i at 246-47, 386 P.3d at 883-84. In each case, the supreme court emphasized redactions as an appropriate alternative to sealing an entire document.

Currently, there are no redacted copies of any of the sealed documents available for the public, and no explanation from the court as to why the various dockets are sealed. Yet, both parties read portions of the sealed records verbatim into the record and discussed the sealed records during this Court's *public* May 6 hearing on the summary judgment motions. Withholding entire briefs and exhibits from the public record is not a narrowly tailored solution. Even if Booking.com provided sufficient facts to show a compelling interest and substantial probability of harm to that interest—which it has not—redaction would adequately protect that interest while allowing the public to access the currently-sealed summary judgment filings.

IV. CONCLUSION

For the foregoing reasons, Public First respectfully requests that the Court unseal the docket entries numbered 108-111, 166-167, 183, 186-188, 202-208, 210-215, 223-225, and 228.

DATED: Honolulu, Hawai`i, September 18, 2024



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CASE NO. 1CTX-21-0001613

NOTICE OF MOTION

NOTICE OF MOTION

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NOTICE IS HEREBY GIVEN that the undersigned has filed with the above-entitled court the motion attached hereto. Any response to said motion must be filed and served no later than 10 days after the service date indicated on the Notice of

Electronic Filing. Pursuant to Rule 6(e) of the Hawai`i Rules of Civil Procedure, if the motion is served by mail, any response to said motion must be filed and served no later than 12 days after the service date indicated on the attached Certificate of Service.

DATED: Honolulu, Hawai`i, September 18, 2024



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CASE NO. 1CTX-21-0001613
CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I, Robert Brian Black, certify that on September 18, 2024, I will serve a copy of the foregoing Motion to Unseal; Memorandum of Law in Support of Motion to Unseal; and Notice of Motion on the following parties by electronic mail:

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DATED: Honolulu, Hawai`i, September 18, 2024.


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