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**FIRST CIRCUIT**  
**1CTX-21-0001613**  
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**Dkt. 263 REPLY**

Attorneys for Movant  
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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

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

HEARING MOTION

DATE: NOVEMBER 25, 2024

TIME: 1:30 PM

JUDGE: HON. KEVIN T. MORIKONE

TRIAL DATE: NONE

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

In addressing this motion to unseal summary judgment filings, Booking.com B.V. (Booking.com) and the Department of Taxation (DOTAX) simply rely on the blanket stipulated protective order. Dkt. 259 at 2; Dkt. 261 at 2-3, 6-8 (arguing that the fact that Booking.com unilaterally identified the documents as confidential "itself establishes that there is a compelling interest in their nondisclosure to the public").<sup>1</sup> Neither party cites any authority for the proposition that blanket protective orders for

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<sup>1</sup> Pinpoint citations reference the page of the corresponding PDF.



discovery purposes justify sealing court records. That is because the weight of authority overwhelming holds the opposite. Dkt. 252 at 7-8; see *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999) (“[G]rant[ing] a virtual carte blanche to either party to seal whatever portions of the record the party wanted to seal . . . [is] improper.”).

Despite the opportunity to explain what compelling interest would be harmed from disclosure of the sealed summary judgment memoranda and exhibits, Booking.com offers only conclusory references to trade secret concerns and counsel’s assurances that the records are confidential. Dkt. 261 at 6-7, 13 ¶¶ 8-9. As the Hawai‘i Supreme Court has emphasized, it is the court’s independent duty to determine whether court records should be sealed based on “specific facts” that meet the constitutional standards. Dkt. 252 at 5-6. Generic declarations of counsel regarding compelling interest and harm are not evidence from which a court may determine whether a party has met its burden to overcome the public’s presumed right of access. *E.g.*, *Oregonian Publ’g Co. v. U.S. Dist. Ct.*, 920 F.2d 1462, 1467 (9th Cir. 1990) (vague references to a compelling interest and a supporting letter from party’s attorney insufficient evidentiary basis for sealing); *Mendell v. Am. Med. Response, Inc.*, No. 19-CV-1227-BAS-KSC, 2021 U.S. Dist. LEXIS 21251, at \*6-9 (S.D. Cal. Feb. 3, 2021) (declarations of outside counsel regarding purported business harms lack personal knowledge and foundation to justify sealing).

Also, merely citing cases regarding trade secrets or confidential business information does not prove that the records at issue here qualify. *Roy v. GEICO*, 152 Hawai‘i 225, 242-43, 524 P.3d 1249, 1266-67 (App. 2023) (“Conclusory claims such as these are insufficient to establish the existence of a trade secret.”). There are *fact-based* standards for legitimate claims of trade secrets and confidential business information. *E.g.*, HRS § 482B-2 (defining “trade secret” as information that “(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”); *Kukui Nuts, Inc. v. R. Baird & Co.*, 7 Haw. App.

598, 620-21, 789 P.2d 501, 515 (App. 1990) (rejecting trade secret privilege claim for manufacturing processes and sources of capitalization); *Woo v. Fireman's Fund Ins. Co.*, 154 P.3d 236, 239-42 (Wash. App. 2007) (insurance company's claims manuals were not trade secret and thus no compelling interest to seal). Booking.com failed to submit any evidence from which this Court could find that information in the sealed filings properly qualifies as a trade secret or confidential business information.<sup>2</sup> It has not met its burden to justify the continued sealing, and the motion to unseal should be granted.

Even if generic assurances of counsel were sufficient to prove trade secrets – they are not – sealing the *entirety* of certain summary judgment memoranda and exhibits is contrary to the presumption of public access and the mandate for a narrowly tailored solution. Dkt. 252 at 9; *e.g.*, *Terran Biosciences, Inc. v. Compass Pathfinder Ltd.*, Civ. No. ELH-22-1956, 2024 U.S. Dist. LEXIS 80067, at \*28 (D. Md. May 2, 2024) (“the Court does not agree that every term in the [master licensing agreement] is so ‘competitively sensitive’ that it is appropriate to seal ‘the MLA in full’”); *Signify Holding B.V. v. TP-Link Research Am. Corp.*, No. 21-CV-9472 (JGK) (KHP), 2022 U.S. Dist. LEXIS 154240, at \*5-7 (S.D.N.Y. Aug. 26, 2022) (denying motion to seal entire licensing agreement absent proof that portions of the agreement “actually implicate sensitive business

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<sup>2</sup> Booking.com cites *In re Electronic Arts* for the apparent proposition that “pricing terms” in a licensing agreement, for example, are trade secret as a matter of law. Dkt. 261 at 7 & n.6. Although the Ninth Circuit’s memorandum decision does not recite what evidence the business submitted to prove a trade secret, the Ninth Circuit subsequently clarified that evidence is necessary. *E.g.*, *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (vacating orders sealing summary judgment filings that were based solely on conclusory reference to “technological protection measures and other proprietary technology”); *accord Baxter Int’l, Inc. v. Abbott Lab.*, 297 F.3d 544, 547 (7th Cir. 2002) (rejecting argument for sealing of licensing agreement based on the “bald assertion that confidentiality promotes [the parties’] business interests”). Moreover, *Electronic Arts* relied on a more expansive definition of trade secret than recognized under Hawai’i law. 298 Fed. Appx 568, 569 (9th Cir. 2008) (defining trade secrets under the 1939 Restatement (First) of Torts); *see* Dkt. 261 at 7 n.7. Courts applying the Uniform Trade Secret Act definition – same as HRS § 482B-2 – have rejected the conclusory assertion that “pricing terms” are a trade secret as a matter of law. *E.g.*, *Belo Mgmt. Servs., Inc. v. Click! Network*, 343 P.3d 370, 375-76 (Wash. App. 2014) (holding that pricing terms and non-cash compensation in agreements are not trade secrets).

information”); *Dana-Farber Cancer Inst., Inc. v. Bristol-Myers Squibb, Co.*, No. 19-CV-11380-PBS, 2021 U.S. Dist. LEXIS 262358, at \*8-9 (D. Mass. June 22, 2021) (denying motion to seal provisions of settlement and licensing agreements that were the “core dispute” in the case and largely disclosed in open court).

Even more so when – as here – the parties quoted relevant portions of the exhibits in open court, sealing is improper. Dkt. 252 at 9.

From the sealed licensing agreements:

Whereas . . . Booking.com is the provider of online accommodation reservation systems through which participating accommodations can make their rooms available for reservations and through which guests can make reservations at such accommodations.

...

#### 1.2 No Partnership.

1.2.1 This Agreement is not intended nor should anything herein or in any of the arrangements contemplated herein be construed to create a joint venture or the relationship of partner, partnership, or principal and agent between or among the parties. Unless the parties agree otherwise in writing, none of them shall enter into any contract or a commitment with third parties as agent for or on behalf of the other party, describe or present itself as such an agent, or in any way hold itself out as being such an agent, or act on behalf of or represent the other party in any manner or for any purpose.

...

#### 4.1 General Undertaking

4.1.1 Information provided by the Company for inclusion on the platform shall include information relating to the accommodations, their amenities, services, rooms available, and details of the rates.

4.1.2 That information is going to be true.

4.1.3 That information remains the property of the Company.

...

#### 4.3 Permission

4.3.1 For each reservation made on the platform by the guest for a room, the Company shall pay Booking.com a commission calculated in accordance with clause 4.3.2.

...

#### 4.5 Reservations

4.5.1 When a reservation is made by a guest on the platform, the accommodation shall receive a confirmation. For every reservation made via Booking.com, the confirmation shall include date of arrival, number of nights, room rate, guest name, address, credit card details, and such other specific requests made by the guest.

4.5.2 By making a reservation through the platforms, a direct contract is created solely between the accommodation and the guest.

4.5.3 The accommodation is bound to accept the guest as its contractual party.

Recording May 6, 2024 Hearing at 10:50-10:51 & 10:57-11:00 a.m.<sup>3</sup>

From other sealed exhibits:

**Supplement.** While Taxpayer's contracts with accommodation providers expressly make clear that the parties are not principal and agent under general agency principles, the contracts also make clear that Taxpayer acts on behalf of the accommodation providers insofar as Taxpayer allows travelers to book reservations for accommodations through the platform that the accommodation providers are contractually bound to honor. Taxpayer does not choose which reservations to make available or at what price. As those contracts make clear, Taxpayer at all times remains an intermediary between the accommodation provider and the traveler and is not a party to the direct contract made between the accommodation provider and the traveler when a reservation is booked through the platform.<sup>[4]</sup>

[IFRAC Analysis] Per the OTC cases, decision on March 17, 2015, because OTCs conduct business and other activities in the State, they are subject to GET. Again per the OTC case, Booking.com BV's portion of its gross receipts.

*Id.* at 10:55-10:56 a.m. & 12:28-12:29 p.m.

These quotations only further underscore that the information that Booking.com seeks to keep sealed from the public is not a trade secret or confidential business information. The motion to unseal should be granted.

Separate from the merits of the motion to unseal, the parties make two procedural requests. First, DOTAX requests clarification of the process under the stipulated protective order for filing documents identified by a party as confidential.

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<sup>3</sup> The undersigned transcribed the recording to the extent the parties purported to quote from the referenced document. At times, counsel for Booking.com may have paraphrased the document.

<sup>4</sup> This sealed supplemental response concerned Booking.com's amended response to Request for Admission No. 14. The original discovery response was not sealed. Dkt. 155 at 11.

Dkt. 259 at 3. As reflected in case law, a blanket stipulated protective order for discovery purposes is not a sufficient basis for overriding the public’s presumed right of access to court records when documents are filed for consideration by this Court on the merits. Dkt. 252 at 7-8. Also, automatic sealing without an opportunity for the public to be heard and without specific judicial findings to justify sealing is a constitutionally deficient process. *Id.* at 8 n.2; *cf. Civil Beat Law Ctr. for the Pub. Interest, Inc. v. Maile*, 117 F.4th 1200, 1210-11 (9th Cir. 2024) (categorical authority to file “medical records” under seal without individualized determination and findings by the judge before sealing is unconstitutional). If Paragraph 7 of the stipulated protective order were stricken, the parties would be required to follow the default (constitutional) procedure of making a properly supported motion to seal if an allegedly confidential document will be filed in the court record.<sup>5</sup>

Second, Booking.com requests that the Court excuse its failure to justify sealing over two dozen documents by ordering further delays for another round of briefing. Booking.com argues that it relied on the practice of this Court regarding sealing and its good faith agreement to seal as the basis to continue the sealing now. Dkt. 261 at 8-10. Those are the same arguments expressly rejected in *Roy v. GEICO*. 152 Hawai`i at 232-35, 524 P.3d at 1256-59 (parties negotiated settlement agreement premised on court ordering case sealed; “GEICO maintains that its reliance interest ‘outweighs any right of public access to the long-sealed and long-settled judicial records’; “[GEICO] offered no cogent explanation below, and offers none on appeal, as to why sealing the entire case file was necessary to protect its asserted interests.”). After *Roy*, the arguments proffered

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<sup>5</sup> The form order in federal court provides further clarity for the parties.

No party or non-party shall file or submit for filing as part of the court record any documents under seal without first obtaining leave of court. Notwithstanding any agreement among the parties, the party seeking to file a paper under seal bears the burden of overcoming the presumption in favor of public access to papers filed in court.

U.S. Dist. Court for Dist. of Haw., Form – Stipulated Protective Order, *available at* <https://www.hid.uscourts.gov/reqrmts/MJ/FormStipulatedProtectiveOrder.pdf>.

by Booking.com are frivolous. Booking.com knew well that it needed to address the motion to unseal on the merits, and it presented nothing.<sup>6</sup>

There is no basis to continue denying the public's access to the summary judgment filings in this case. Booking.com made no effort to explain what additional information it would present after a continuance and why it could not have presented that information in a timely manner. Booking.com had two months to prepare a good faith response to the motion to unseal. Instead, it rehashed arguments contradicted by well-settled principles stated in *Ahn, Grube, Roy*, and other cases. Booking.com is wasting time at the expense of the public's constitutional rights. *Grube v. Trader*, 142 Hawai'i 412, 428 n.21, 420 P.3d 343, 359 n.21 (2018) ("Because the right of public access exists to provide members of the public with contemporary information about matters of current public interest so that they may effectively exercise their First Amendment rights, the belated release of records to which the public is rightfully entitled is not an adequate remedy."). The motion to unseal should be granted.<sup>7</sup>

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<sup>6</sup> Booking.com claims that the motion to unseal "should be treated as a motion to vacate the SPO." Dkt. 261 at 10. Public First requested that the court unseal specific documents. Dkt. 252 at 1-2. The SPO addresses the initial sealing, but says nothing about requests to unseal. As clear from the case law, a blanket protective order such as the SPO is irrelevant to the public's right of access and thus irrelevant to Public First's motion. Booking.com cites no authority to redefine the pending motion as something that it clearly is not.

<sup>7</sup> Public First has no objection if the Court ordered the unsealing delayed for 10 days to permit Booking.com to move for reconsideration before disclosure. If Booking.com has a good faith basis for claiming "newly discovered evidence," it can present that information in the motion for reconsideration. Alternatively, the delay would provide Booking.com with the opportunity to petition the Hawai'i Supreme Court for a writ challenging the grant of public access. HCR 10.15 ("A person or entity may seek review or a denial or grant of access to a record by petitioning the supreme court, in accordance with Rule 21 of the Hawai'i Rules of Appellate Procedure.").

**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, November 20, 2024



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

**CERTIFICATE OF SERVICE**

I, Robert Brian Black, certify that on November 20, 2024, I will serve a copy of the foregoing Reply Memorandum of Law in Support of Motion to Unseal on the following parties by electronic mail:

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DATED: Honolulu, Hawai`i, November 20, 2024.

  
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