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Dkt. 292 REPLY

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 TAXPAYER-APPELLANT BOOKING.COM B.V.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO SEAL FILED NOVEMBER 22, 2024; DECLARATION OF MICHELLE K. CORREIA; EXHIBIT C; CERTIFICATE OF SERVICE Hearing: Date: February 10, 2025 Time: 1:30 p.m. Judge: The Honorable Kevin T. Morikone No trial date has been set.

TAXPAYER-APPELLANT BOOKING.COM B.V.'S REPLY
MEMORANDUM IN SUPPORT OF MOTION TO SEAL FILED NOVEMBER 22, 2024

I. INTRODUCTION

As established in its Motion to Seal (the "Motion"), Taxpayer has satisfied the standard for sealing certain documents filed in this matter and shielding those documents from public view. The protection sought is not arbitrary, but rather narrowly tailored to protect Taxpayer's trade secrets, confidential business information, and/or its tax return information.

In opposing Taxpayer's Motion, Public First misleadingly cites cases in support of the assertions (i) that confidential business information cannot be sealed; (ii) that Taxpayer has not established that any "trade secrets" are at issue; and (iii) that Taxpayer has somehow not established a "compelling interest" in having its trade secrets and confidential business information protected from public view. But those assertions do not withstand scrutiny, as the Motion established that the information for which Taxpayer seeks protection is of the type routinely granted protection by courts throughout the Ninth Circuit. Indeed, Public First does not cite a single example of information of the type at issue here being ordered to be made public where protection of such material was sought.

Public First's Opposition makes clear that there is no basis for denying Taxpayer's Motion, which should be granted by this Court.

II. ARGUMENT

As established in the Motion, Taxpayer seeks the sealing of documents and information of the type that are routinely sealed by courts in Hawaii and throughout the Ninth Circuit. In response, Public First seeks in its opposition to create a standard for sealing that does not exist.

A. Dkt. 110, 167, 189, 190, 191, 207, 208, 210, 211, 212, 213, 214, 215, 224, and 225 Must Be Sealed In Their Entirety

As established in the Motion, the documents identified above require sealing under the standard applied in Hawaii and throughout the Ninth Circuit. [Dkt. 265 at 5.] Courts have made clear that though filed documents are generally accessible to the public, filings can be protected

where circumstances are such that a "compelling" interest for sealing the documents exists. Id., citing Grube v. Trader, 142 Haw. 412, 420 P.3d 343 (2018).) As further established in the Motion, such circumstances for sealing exist here, as the information included in the documents identified above reflects "trade secrets" and confidential business information of Taxpayer that must be protected. [Dkt. 265 at 5-6.] Specifically, the documents – which include various contracts with accommodation providers, accommodation provider contact lists, and hearing transcripts discussing and quoting those contracts and lists[1] – contain trade secrets and confidential business information, and are the type of documents routinely granted protection from public disclosure throughout the Ninth Circuit. [Dkt. 265 at 6 quoting cases.][2]

1. Trade Secrets and Confidential Business Information Are Each Properly Subject to a Motion to Seal Under the "Compelling Interest" Standard

Public First asserts that Hawaii law does not contemplate protection of "confidential business information" to the extent that such information does not qualify as a "trade secret" because the State has adopted the Uniform Trade Secrets Act. [Dkt. 288 at 8.] Public First cites a single case in support of this sweeping assertion – BlueEarth Biofuels, LLC v. Haw. Elec. Co., 123 Haw. 314, 235 P.3d 310 (2010). [Dkt. 288 at 8.] But again, BlueEarth did not involve issues related to the sealing of confidential business information or trade secrets. In fact, it did not involve the sealing of documents at all. Rather, BlueEarth presented the question of what civil remedies, if any, for the misappropriation of a trade secret are preempted by the Hawaii Uniform Trade Secrets Act. BlueEarth, 123 Haw. at 311 and 317-18. In addressing that issue, the Court ruled that the Act "displaces Hawaii's existing statutory and common law causes of

[1] One such contract is the General Delivery Terms applicable to accommodation providers during the time period at issue in the Audit. Public First asserts that contract is published on the Internet for public consumption (Dkt. 288 at 6), but cites the current version of that contract that is not at issue here. Public First does not suggest that the prior versions of the agreement at issue here are, or were, available to the public online. They are not, and never were.

[2] Public First's discussion of the numerous cases cited in the Motion is limited to a single footnote addressing a single case. [Dkt. 288 at 7 n.6.]

action for misappropriation of a trade secret," and that the Act also preempts claims "based upon confidential information which does not rise to the level of a [] trade secret." Id., at 318 and 323. BlueEarth does not address whether confidential business information can be protected from public disclosure; indeed, it did not address what types of documents can be sealed at all.[3]

As established in the Motion, courts in the Ninth Circuit do seal confidential business information that does not rise to the level of a trade secret. Mirroring the Federal Rules of Civil Procedure, Hawaii Rules of Civil Procedure ("HRCP") Rule 26(c)(7), provides that a court may enter protective order which states that "a trade secret **or** other confidential research, development, or commercial information not be revealed or be revealed only a designated way." Haw. R. Civ. P. 26(c)(7) (emphasis added). Citing the equivalent rule in the Federal Rules of Civil Procedure, courts have ruled that "a trial court has broad discretion to permit sealing of court documents for … the protection of trade secret **or other confidential research, development, or commercial information**." FTC v. Qualcomm Inc., Case No. 17-CV-00220, 2019 U.S. Dist. LEXIS 1289, at *10, *15 (N.D. Cal. Jan. 3, 2019) (granting motion to seal, in part, "to the extent that the [] motion seeks to seal information that, if published, may harm [the party's] or third parties' competitive standing and divulges terms of confidential contracts, contract negotiations, or trade secrets") (emphasis added); see also Barnett v. Cass, Case No. 20-00440, 2021 U.S. Dist. LEXIS 263895, *7 (D. Haw. Feb. 19, 2021) (granting a motion to seal and holding that "[a]n entity's interest in keeping proprietary business information confidential can rise to the level of a compelling interest."); Uluwehi Sai v. H&R Block Enters., Case No. 09-00154, 2009 U.S. Dist. LEXIS 119038, *3 (D. Haw. Dec. 21, 2021) (granting motion to seal "confidential and proprietary financial information" where "compelling reasons" existed for doing so). Public First has not cited a single authority that suggests, much less holds, that

[3] Forty-eight states, including Hawaii and every other state within the Ninth Circuit, have enacted the Uniform Trade Secrets Act. See https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792.

Hawaii courts lack the power to protect confidential business information from public disclosure where compelling reasons for doing so exist.

Public First then asserts that "confidential business information does not rise to the level of interest" to overcome the presumption in favor of disclosure, citing Grube and Kondash v. Kia Motors, Inc., 767 Fed. Appx. 635 (6th Cir. 2019). [Dkt. 288 at 8.] But neither opinion includes such a ruling. In Grube, the court examined whether the "compelling interest" standard had been met in the context of a criminal proceeding, and thus, did not address its application to trade secrets or confidential business information. Grube, 142 Haw. at 417. The court applied the "compelling interest" standard in Kondash, holding that the standard is not satisfied where a party fails to show that "disclosure will work a clearly defined and serious injury." Kondash, 767 Fed. Appx. at 639. In so ruling, the court suggested that the standard can be applied to seal "competitively-sensitive financial and negotiating information." Id. Accordingly, neither Grube nor Kondash supports the argument for which Public First cites them.

Public First acknowledges HRCP 26(c)(7) in a footnote, but merely asserts that the rule's "good cause" standard for granting a protective order does not displace the "compelling interest" standard required for sealing a court record. [Dkt. 288 at 8 n.7.] In support of this assertion, Public First cites Roy v. GEICO, 152 Haw. 225, 524 P.3d 1249 (App. 2023), which Public First describes as holding that a "prior court-approved stipulation to seal" is not a basis for continued sealing. [Dkt. 288 at 8 n.7.] However, that language was not part of the court's ruling, but rather merely part of its recitation of the rulings by the circuit court below. Roy, 152 Haw. at 232. The court did confirm the "compelling interest" standard for sealing documents, but did not suggest, much less hold, that confidential business information cannot be sealed. Id. at 233.[4]

[4] The same is true for the remaining cases cited by Public First. In Foltz v. State Farm Mut. Auto Ins. Co., 331 F.3d 1122, 1136-37 (9th Cir. 2003), the court rejected an attempt to seal "confidential financial information, third-party medical records, personnel files, and trade secrets" because the party had failed to establish a "compelling interest" requiring the sealing. In so ruling, the court did not distinguish between confidential financial information and trade

Having argued that confidential business information cannot be sealed, Public First next argues that trade secrets can be sealed only if the basis for doing so is proven by "non-conclusory" evidence." [Dkt. 288 at 7, n.6.] Public First's cases in support of its assertion that Taxpayer has failed to meet the standard for sealing here are unavailing.[5] Public First cites Apple Inc. v. Pystar Corp., 658 F.3d 1150 (9th Cir. 2011), in support of its assertion that "evidence is necessary" in order for "pricing terms" to be sealed. [Dkt. 288 at 7.] But Apple includes no such ruling. Rather, in Apple, the Court overturned a district court order sealing portions of a summary judgment filing because the **district court** had failed to "provide any specific explanation" in granting the motion to seal. Apple, 658 F.3d at 1162 (emphasis added). The Court did not address the evidence offered by the party in support of its motion to seal, much less rule that the evidentiary offering was conclusory or somehow insufficient. Public First's assertion otherwise is false.

Public First also cites Baxter Int'l, Inc. v. Abbott Lab., 297 F.3d 544 (7th Cir. 2002), for the assertion that "evidence is necessary" in order for "pricing terms" to be sealed. [Dkt. 288 at 7 n.6.] But again, Public First's discussion of the case is inaccurate. Baxter involved a situation where the two parties had filed a joint motion to have certain documents sealed, and in doing so, merely included "bald assertions" in the joint motion that disclosure of documents such as

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secrets – it applied the same "compelling interest" standard to both. Id. In Markel Am. Ins. Co. v. Internet Brands, Inc., No. CV-17-2429, 2017 U.S. Dist. LEXIS 224860, * 20 (C.D. Cal. Aug. 2, 2017), the court applied the "compelling interest" standard in denying a request to seal "confidential business information." Thus, Public First's own cases make clear that the "compelling interest" standard applies to determine whether "confidential business information" may be sealed; as such, protection is not limited to merely "trade secrets." In San Jose Mercury News v. U.S. Dist. Ct., 187 F.3d 1096, 1101 (9th Cir. 1999), the court did not itself apply the "compelling interest" standard, much less rule that it did not apply to the sealing of confidential financial information; rather, the court merely stated that the entry of a stipulated protective order was not a basis for denying a third-party's motion to intervene.

[5] None of the cases cited by Public First involves confidential business information such as the contracts with accommodation providers at issue here. Public First does not cite a single case that suggested, much less held, that such agreements are not trade secrets such that they can be disclosed to the public.

licensing agreement "could" harm a party's competitive position. Baxter, 297 F.3d at 547. Here, Taxpayer's Motion is not unsupported by evidence as was the case in Baxter. A declaration from Taxpayer's representative was filed in support of its Motion that details how and why the documents to be sealed are trade secrets. [Dkt. 265 at Halimi-Guez Decl.] As such the type of bald assertions by counsel at issue in Baxter are not at issue here.

Public First further argues that there is a "fact-based" standard for establishing whether information qualifies as a trade secret. [Dkt. 288 at 9.] Citing Roy, Public First asserts that conclusory statements are not sufficient to satisfy the standard. Id. But in Roy, the Court determined that the "compelling interest" standard was not satisfied where a trade secret claim was supported only by the "naked assertions" of counsel. Id. at 243. Here, Taxpayer's Motion does not rely on mere assertions of counsel, but rather is supported by a detailed declaration from a company representative describing (i) the nature of the material sought to be sealed; and (ii) how disclosure of such information would cause harm to Taxpayer.[6] [Dkt. 265 at Halimi-Guez Decl.]

Public First next argues that Taxpayer has failed to establish that any of the information sought to be sealed qualifies as a "trade secret" because Taxpayer has failed to show the information (i) has economic value; and (ii) is, and has been treated as, confidential. Both assertions are incorrect. As established in the Motion, the information sought to be sealed is of a type that is routinely sealed throughout the Ninth Circuit – including customer lists and contracts with third parties. [Dkt. 265 at 6-7.]

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[6] Public First also cites Kukui Nuts, Inc. v. R. Baird & Co., 7 Haw. App. 598, 789 P.2d 501 (App. 1990) in support of this assertion. [Dkt. 288 at 9.] Specifically, Public First asserts that the court in Kukui rejected a trade secret claim "for manufacturing processes and sources of capitalization" because the elements of a trade secret had not been established. Id. But the court merely held that the trial court had not "abused its discretion" in refusing to grant a protective order because a "trial court has broad discretion in determining reasonable protective measures for trade secrets." Kukui, 7 Haw. App. at 620. In contrast, Taxpayer has shown that the information to be sealed meets the compelling interest standard by competent evidence.

In support of its economic value argument, Public First cites Bernier v. Merrill Air Eng'rs, 770 A.2d 97 (Me. 2001), for the assertion that one factor in determining whether information has economic value is "the information's novelty or other concrete value in competition." [Dkt. 288 at 9.] The Bernier court included novelty as one of the five factors to be considered in determining economic value, but Public First cites no authority to suggest that the 5-factor test developed by the Maine Supreme Court in Spottiswoode v. Levine, 730 A.2d 166 (Me. 1999)– and relied upon in Bernier – is applicable under Hawaii law. Indeed, the 5-factor test has never been applied by a Hawaii court, a Washington court, a California court, an Oregon court, or any court located within the Ninth Circuit. But even if the 5-factor test were relevant here, Taxpayer has established that certain information at issue here must be kept confidential in order for Taxpayer to protect and distinguish its proprietary business model from that of its competitors. [Dkt. 265 at Halimi-Guez Decl. at ⁋⁋ 8, 11.]

Public First next cites Imax v. Cinema Techs., Inc., 152 F.3d 1161 (9th Cir. 1998) for the proposition that a trade secret must be "identified with particularity" for information to be sealed. [Dkt. 288 at 9.] However, Imax did not involve the sealing of documents, but rather claims for misappropriation of trade secrets. Imax, 152 F.3d at 1164-65. In that context, the court held that a party "seeking relief for misappropriation of trade secrets must identify the trade secrets and carry the burden that they exist." Id. at 1164. There is no claim for misappropriation of trade secrets in this action. Moreover, Taxpayer has established that the information for which protection is sought all relates to the development and operation of its proprietary business model, including items such as the operation of its online platform, the details of its contractual relationships with accommodation providers, and the nature and method of payment of its commission for its online services. [Dkt. 265, at 7-10.][7]

[7] Public First cites N. Am. Lubricants Co. v. Terry, Case No. CIV S-11-1284, 2011 U.S. Dist. LEXIS 133672 (E.D. Cal, Nov. 18, 2011), for the assertion that boilerplate language such as "business plan" is insufficient to satisfy the standard for sealing. [Dkt. 288 at 9.] But Terry did

Finally, Public First asserts Taxpayer has failed to make efforts to preserve the confidentiality of the information at issue. [Dkt. 288 at 11.] But one of the cases it relies on says otherwise. In Allstate, the court stated: "there is no question that [the party] has made reasonable efforts to maintain the secrecy of the documents at issue" because it refused to produce the information without a protective order and had "taken similar steps in other litigation." Allstate, 204 P.3d at 951. Taxpayer has done the same, as it sought the entry of a protective order in this action, as well as its other action involving the Department, which remains pending before the Intermediate Court of Appeals. See, CAAP-21-0000441. In addition, as established in the Motion, many of the documents at issue include provisions requiring that the documents be maintained confidential. [Dkt. 265 at 8-9.]

2. Even if the Information Were Not Trade Secrets and/or Confidential Business Information, Documents Containing Taxpayer's Tax Return Information Obtained During Audit Justify Sealing

As established in the Motion, with regards to documents in Dkt. 189, 190, 214, 215, 224 and 225, those documents warrant protection from disclosure as "return information" under Hawaii Revised Statutes ("HRS") 237-34(b) because each qualifies as "tax return information" in accord with 26 U.S. Code § 6103(b)(2). [Dkt. 265 at 12-13.]

Public First does not proffer a competing definition of "return information," but rather asserts that if the definition proffered by Taxpayer is accepted, the Federal provision allowing such information to be disclosed "in a judicial or administrative proceeding pertaining to tax administration" defeats any attempt to seal. [Dkt. 288 at 11.] Not so. Here, the term "return

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not involve an effort to seal; rather, it involved only a request for an entry of a protective order under Rule 26. Terry, 2011 U.S. Dist. LEXIS at **13-14. The same is true of McCallum v. Allstate Prop. & Cas. Ins. Co., 204 P.3d 944, 946-47 (Wash. App. 2009), in which a party challenged the entry of a protective order that limited the use and distribution of information produced in discovery. As to its ruling that conclusory statements were insufficient to establish that information was a "trade secret," the court made clear that the declarants had no personal knowledge of facts to support the statements made. Id. at 947. Here, the declarant has personal knowledge regarding the creation of, and the company's policy regarding the retention of, the information at issue. [Dkt. 265 at Halimi-Guez Decl. at ⁋⁋ 3-4.]

information" is not defined in HRS 237-34(b). When a term is undefined in Hawaii law, one can look to outside sources, especially Federal law, to determine the meaning of that term. Doing so does not somehow incorporate the remaining provisions of the Federal statute in which the definition of the term is found. Hawaii law is clear – tax "return information" cannot be disclosed, and must be kept confidential. The law does not provide an exception for judicial or administrative proceedings, and such an exception would swallow the rule, as every taxpayer would live in fear of its information being disclosed publicly if it cooperated in an audit.

Public First next asserts that protection of tax return information applies only to information "required to be filed," and that much of the material at issue here does not qualify as such. [Dkt. 288 at 13.] But HRS 237-34(b) does not protect only information required to be filed; rather, it also protects "the report of any investigation of the return or of the subject matter of the return." Thus, by its express terms, HRS 237-34(b) extends protection to documents provided during the course of an audit and/or investigation of the taxpayer. That is precisely the type of information at issue here, as the documents for which Taxpayer seeks protection were provided during the course of an audit.

Public First next asserts that even if the documents are protected under HRS 237-34(b), they still should be made public because the Hawaii Constitution demands it. [Dkt. 288 at 13.] But Public First does not cite a single case (or other type of authority) in support of its suggestion that the First Amendment and/or Article I, Section 4 of the Hawaii Constitution can be read as giving the public access to tax return information protected from disclosure by HRS 237-34(b). Regardless, all docket entries that include "tax return information" also constitute confidential business information or trade secrets subject to sealing under the compelling interest standard.

B. Certain Portions of Dkt. 108, 109, 166, 183, 187, 188, 202, 203, 204, 205, 224, 225 and 228 Can Be Redacted

As established in the Motion, redaction of certain documents is the proper and appropriate alternative to the full sealing of the documents. [Dkt. 265 at 18.] However, upon

further review, Taxpayer now withdraws its request to redact portions of certain documents. Specifically, Taxpayer acknowledges that the following universe of documents already in the public record in full can remain so: Dkt. 44, 45, 49, 50, 54, 70, 155, 156, and 168.[8]

III. CONCLUSION

For the reasons set forth in the Memorandum in Support of the Motion and herein, Taxpayer's Motion should be granted by this Court.

DATED: Honolulu, Hawaii, February 5, 2025.

/s/ Nathaniel A. Higa
NATHANIEL A. HIGA
MICHELLE K. CORREIA

of CHUN KERR LLP
a Limited Liability Law Partnership

Attorneys for Taxpayer-Appellant
Booking.com B.V.

[8] Taxpayer maintains its assertion that Dkt. 189 and 190 should be sealed. Taxpayer objected to the public filing of those documents shortly after they were filed and discussed the need to withdraw those documents and refile them under seal with the Department. Correspondence from M. Correia to M. Yokota, dated March, 22, 2024, attached hereto as **Exhibit C**. As such, Taxpayer announced its objection to the public filing of those documents in a timely manner, and cannot be understood to have waived its right to seek protection of those documents.

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 DECLARATION OF MICHELLE K. CORREIA

DECLARATION OF MICHELLE K. CORREIA

1. I am MICHELLE K. CORREIA, a partner in the law firm of Chun Kerr LLP, a Limited Liability Law Partnership, one of the counsel for Taxpayer-Appellant BOOKING.COM B.V. ("**Taxpayer**") in the above-captioned action. I am duly licensed to practice law before this Court, and I make this declaration based on personal knowledge.

2. I am fully familiar with the facts of this matter. In connection with my representation, I have reviewed the pertinent documents, including all of the exhibits attached hereto.

3. On or about March 13, 2024, I received via JEFS and reviewed the Department's *Reply In Support of Appellee Director of Taxation, State of Hawaii's Cross Motion for Partial Summary Judgment Filed on February 20, 2024 [Under Seal]*; *Declaration of Randy R. Rivera; Declaration of Mary Bahng Yokota [Under Seal]; Exhibits "12"-"13" [Under Seal]*; *Exhibits "14-"17"; Certificate of Service*, filed March 13, 2024 [Dkt. 183] (the "**Departments' MPSJ Reply**").

4. Attached as **Exhibit C** is a true copy of correspondence I sent to M. Yokota on March 22, 2024 regarding Dkt. 189 and 190, which are Exhibits 14 and 15 to the Department's MPSJ Reply.

I declare under penalty of law that the foregoing statements are true and correct.

DATED: Honolulu, Hawaii, February 5, 2025.

/s/ Michelle K. Correia
MICHELLE K. CORREIA

From:	Michelle Correia
Sent time:	03/22/2024 11:15:11 AM
To:	Nathan Chee (Nathan.S.Chee@hawaii.gov) <nathan.s.chee@hawaii.gov>; Yokota, Mary B <mary.b.yokota@hawaii.gov>
Cc:	Nathaniel Higa
Subject:	In the Matter of the Tax Appeal of Booking.com B.V. - Request for Confidential Designation of Documents
Attachments:	Letter to DOTAX re Confidential Document Designation (00665860xE1647).pdf

Nate and Mary:

Please see attached correspondence and let us know if you'd like to discuss further.

Take care,
Shelly

EXHIBIT C

Letter to DOTAX re Confidential Document Designation (00665860xE1647).pdf

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March 22, 2024

Via Email – nathan.s.chee@hawaii.gov, mary.b.yokota@hawaii.gov

Nathan S. C. Chee, Esq.
Mary H. Y. Bahng Yokota, Esq.
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RE: In the Matter of the Tax Appeal of Booking.com B.V.
Case No. 1CTX-21-0001613

Dear Mr. Chee and Ms. Yokota:

This letter is a request by Booking.com B.V. ("***Booking***"), pursuant to the Stipulated Protective Order dated January 4, 2023 [Dkt. 88] (the "***SPO***"), to designate as "Confidential" certain documents attached as exhibits to Appellee Director of Taxation, State of Hawaii's Reply in Support of Appellee Director of Taxation, State of Hawaii's Cross Motion for Partial Summary Judgment filed on February 29, 2024 (the "***Department's MPSJ Reply***") [Dkt. 183]. Specifically, Booking is seeking to designate as "Confidential" Exhibit 14 [Dkt. 189] (the December 30, 2015 Service Agreement, Dkt. 189) and Exhibit 15 [Dkt. 190] (the September 10, 2013 Service Agreement) to the Department's MPSJ Reply.[1]

Paragraph 4(a) of the SPO states in pertinent part "The designation of documents, … as "Confidential" for purposes of this Stipulated Protective Order shall be made in the following manner by the party seeking protection: a. … or within ten (10) days of production or disclosure of such item in the event the party seeking protection becomes aware of the confidential nature of the item subsequent to the date the item was disclosed or produced[.]" As the Department's MPSJ Reply was filed on March 13, 2024, Booking's request is within the ten (10) day period

[1] These documents were produced by the Department during the course of discovery and are located at Document Nos. 00000177-00000189, 00003930-00003944, 00003947-00003959 and 00003525-00003537.

Letter to DOTAX re Confidential Document Designation (00665860xE1647).pdf

contemplated by the SPO. Thus, please "claw back" Exhibits 14 and 15 of the Department's MPSJ Reply, mark as "Confidential" and re-file under seal.

Additionally, other documents produced by the Department during the course of this litigation[2] are likewise confidential and Booking would like to so designate them. These documents are as follows:

- **Booking's commission revenue breakdown for 2012 to 2020:** Document nos. 00000017, 00000190, 00003516, 00003960, 00004117, and 00004122;
- **Booking's Notice of Proposed Assessment:** Document nos. 00000099-00000114, and 00004015-00004029;
- **Booking's schedule of proposed assessments:** Document Nos. 00000123-00000124, and 00004054-00004056;
- **The Department's Supplement to Tax Auditor's Report:** Document Nos. 00000125-00000151;
- **The Department's Field Audit Branch Notes:** Document Nos. 00000153-00000163;
- **Booking's Power of Attorney:** Document Nos. 00000165-00000166, 00000215-00000216, 00000381-00000382, 00000438-00000439, 00003381-00003382, and 00003422-00003423;
- **Document entitled "Summary: General Delivery Terms" and/or Booking's General Delivery Terms:** Document Nos. 00000212-00000213, 00000217-00000240, 00000407-00000433, 00003426-00003452, 00003538-00003562, 00004198-00004224, 00004352-00004376, and 00004379-00004380;
- **Booking's response to the Department's subpoena:** Document Nos. 00000261-00000266, 00000457-00000462, 00003489-00003494, 00003519-00003524, 00003564-00003569, 00004289-00004294, and 00004301-00004306;
- **November 2, 2021 email re: Booking's commission revenue breakdown for 2012 to 2020:** Document Nos. 00003916 and 0000351;
- **November 9, 2021 email re: Booking's commission revenue breakdown for 2013 and 2014:** Document Nos. 00003517 and 00004123;
- **Booking's tax filings:** Document Nos. 00003595-00003690; and
- **March 21, 2021 Booking memo to Jason Lai re: General Delivery Terms:** Document Nos. 00004253-00004254, and 00004259-00004260.

While these documents were produced outside the ten (10) day timeframe contemplated by Paragraph 4(a) of the SPO, Booking would appreciate the Department willingness to agree to Booking's request to designate these documents as "Confidential" without the need for Booking

[2] The Department's document productions are dated April 14, 2022; January 9, 2023; April 5, 2023; May 31, 2023; August 23, 2023; and October 6, 2023.

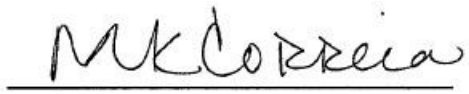
to seek intervention by the Court in enforcing and/or modifying the SPO per Paragraph 14. Additionally, the Department has been aware of Booking's concern of potential disclosure of confidential and/or proprietary information and documents provided during the course of the audit and litigation, thus Booking's current request for "Confidential" designation of documents containing such information – in order to ensure that no further information enters the public realm – should not come as a surprise to the Department. Please advise whether the Department is agreeable to this request.

Also, in reliance on Section IV of the Department's "Taxpayer Bill of Rights", Booking believed that all interactions between Booking and the Department, including information and documents shared during the course of the audit, would be kept confidential and not disclosed in any public fashion. Thus, the Department's disclosure of certain confidential information as part of public filings, despite the Department's confidentiality assurance in its "Taxpayer Bill of Rights", bolsters Booking's concerns and the validity of its request to designate all aforementioned documents as "Confidential".

Should you have any questions or would like to discuss further, please do not hesitate to contact the undersigned.

Kind regards,

CHUN KERR, LLP,
a Limited Liability Law Partnership



Nathaniel A. Higa, Esq.
Michelle K. Correia, Esq.

cc: Dan Rygorsky, Esq.

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 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing document was duly served on the party identified below via the Judiciary Electronic Filing System (JEFS) on this date as follows:

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