No. SCPW-25-_____

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

PUBLIC FIRST LAW CENTER, Petitioner, vs. THE HONORABLE KEVIN T. MORIKONE, Tax Appeal Court Judge, Respondent.	ORIGINAL PROCEEDING NO. 1CTX-21-1613 PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS TAX APPEAL COURT, STATE OF HAWAI`I  The Honorable Kevin T. Morikone, Tax Appeal Court, State of Hawai`i

PETITION FOR WRIT OF PROHIBITION AND WRIT OF MANDAMUS

EXHIBIT 1

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Authority

Statutes and Legislative History

Court Rules

Administrative Rules

News Articles

Other Authority

This petition primarily concerns sealing summary judgment exhibits that the parties discussed openly in public court hearings about a global corporation's method for avoiding $20 million in tax liability to the State of Hawai`i. Information that Taxpayer-Appellant-Respondent Booking.com B.V. (Booking.com) willingly recited in public hearings is not a trade secret nor a financially sensitive fact that Booking.com took reasonable precautions to keep confidential. And a conclusory declaration that disclosure of information would result in a competitive disadvantage—without any explanation how—does not provide a basis for "specific findings" that overcome rights of public access under the U.S. and Hawai`i Constitutions.

Contrary to this Court's precedent, the Honorable Kevin T. Morikone (Respondent Judge) relied on generalized assertions of harm that did not meet established standards for protecting trade secrets or confidential business information. The constitutional rights of public access require more. Records cannot be sealed simply because a company in litigation does not want to share. Courts must apply stringent standards that respect the high bar for negating the "strong presumption" of public access to summary judgment proceedings. The broad descriptions of Booking.com's general "business model" and other concerns at issue in this petition bear no resemblance to protecting the secret formula for Coke.

Pursuant to Hawai`i Revised Statutes (HRS) § 602-5(a); Hawai`i Rules of Appellate Procedure 21(a); article 1, section 4 of the Hawai`i Constitution; and the First Amendment of the U.S. Constitution, Petitioner Public First Law Center (Public First) petitions for: (1) A writ of prohibition to the tax appeal court prohibiting enforcement of any order to seal certain exhibits (Tax Dkt. 110-11, 167, 187-91, 203-05, 207, 215, and 225)[1] and portions of legal memoranda referencing those exhibits (Tax Dkt. 108, 166, 183, 202, 224, and 228) and prohibiting any order authorizing the parties to file records

[1] Based on its review of the redacted filings, Public First does not seek to unseal the narrowly tailored redactions and any related briefing discussing Tax Dkt. 109. Also, in light of the discussion during the May 6, 2024 hearing that described Exhibit 22 (Tax Dkt. 207) as representative of other contracts, Public First does not seek to unseal the other contract exhibits, Tax Dkt. 208-13.

under seal without a motion to seal and case-by-case judicial review of the documents in *In re Booking.com B.V.*; and (2) A writ of mandamus ordering the tax appeal court to comply with the constitutional standards set forth in *Oahu Publications Inc. v. Ahn* and *Grube v. Trader*.[2]

I. STATEMENT OF FACTS

Booking.com is a publicly traded Netherlands-based corporation that operates a website where accommodation providers may list properties for rental.[3] *E.g.*, Tax. Dkt. 1 at 3-5; Tax Dkt. 288 at 48-84.[4] Under its business model, Booking.com receives a commission from the provider based on the amount charged a customer—potentially modified by Booking.com services offered to providers for better ranking and visibility. *E.g.*, Tax Dkt. 1 at 3-4; Tax Dkt. 288 at 45, 164. The customer does not pay Booking.com to use its website or to make a reservation; Booking.com receives no compensation from the customer. *E.g.*, Tax Dkt. 1 at 3-4; Tax Dkt. 288 at 164. Under this "agency model," the provider's commission paid to Booking.com is a separate transaction from the customer's reservation. *E.g.*, Tax Dkt. 1 at 4; Tax Dkt. 288 at 54, 65, 80, 87, 164.

On January 18, 2019, Booking.com filed a civil complaint for declaratory judgment against the State of Hawai`i, Department of Taxation (DOTAX) to invalidate HAR § 18-237-29.53-10(a)(3)—the DOTAX rule that identifies what income earned by commissioned agents is sourced to Hawai`i for purposes of general excise taxes (GET). Civ. Dkt. 2 at 9. As part of that litigation, Booking.com answered discovery about its operations and affirmatively disclosed that information publicly. *E.g.*, Civ. Dkt. 73 at 7-17; Civ. Dkt. 204 at 9-11, 31-61; Civ. Dkt. 214 at 10-11, 22-30; Civ. Dkt. 260 at 8-36; Civ. Dkt. 273 at 20, 26-30. Booking.com did not move to seal any discovery responses or

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[2] Contemporaneous with this petition, Public First is ordering transcripts of relevant public hearings for the Court's record.

[3] During some taxable years, Booking.com also allowed travel-related service providers to list services for reservation. *E.g.*, Dkt. 1 at 4.

[4] "Civ. Dkt." refers to filings in *Booking.com B.V. v. Takayama*, No. 1CC191000107; "Tax Dkt." refers to filings in *In re Booking.com B.V.*, No. 1CTX-21-1613. Pinpoint citations reference the corresponding pages of the PDF

operational information in its civil proceeding. On June 13, 2022, the circuit court granted DOTAX's motion to dismiss the declaratory action without prejudice for Booking.com to raise its arguments in a then-pending tax appeal. Civ. Dkt. 291 at 2. On May 7, 2025, the ICA affirmed that dismissal order. *Booking.com B.V. v. Suganuma*, No. CAAP-22-441, 2025 Haw. App. LEXIS 199, at *4-7 (May 7, 2025) (attached per HRAP 35(c)(2)) (holding that Booking.com's "disingenuous[]" argument—that its challenge to the DOTAX GET sourcing rule was not a tax dispute (to avoid a jurisdictional exemption under HRS § 631-1)—precluded jurisdiction because Booking.com consequently was not an "interested person" under HRS § 91-7).

On November 10, 2021, DOTAX assessed Booking.com nearly $20 million in unpaid GET, penalties, and interest based on $210 million in commissions, sourced to Hawai`i according to the DOTAX rule, for tax years 2010 to 2020. Tax Dkt. 1 at 9-23. During the taxable years, Booking.com did not own or operate accommodations in Hawai`i, have any physical presence in Hawai`i, have any employees who resided or worked in Hawai`i, or have any assets in Hawai`i. Tax Dkt. 1 at 4-5. On December 9, Booking.com appealed that assessment to the tax appeal court. Tax Dkt. 1.

On January 4, 2023, the tax appeal court entered a stipulated protective order (SPO). Tax Dkt. 88. The SPO defines "Confidential Information" to broadly include any "nonpublic information." *Id.* at 2. Booking.com determines whether information is confidential. *Id.* ¶ 1. If Booking.com claims confidentiality under the SPO for a document or information in a document, it must designate the document as confidential

> by affixing the legend "CONFIDENTIAL – SUBJECT TO STIPULATED PROTECTIVE ORDER" to each page containing any Confidential Material, at the time such item is produced or disclosed, 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.

Id. at 3 ¶ 4(a). The SPO requires Booking.com and DOTAX to file any confidential information under seal without a motion to seal or judicial review. *Id.* at 5 ¶ 7 ("No further order of 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.").

Numerous "confidential" documents filed or produced by Booking.com did not have the "legend" required by the SPO. *E.g.*, Tax Dkt. 187, 188, 189, 190, 203, 204, 205, 224, 225.[5] When DOTAX filed two documents publicly that Booking.com had not marked with the legend—but nonetheless considered "confidential" (Tax Dkt. 189, 190)—Booking.com promptly notified DOTAX, but took no other steps to secure the publicly filed documents. *See* Tax Dkt. 292 at 15. Instead of requesting a temporary seal from the clerk,[6] Booking.com waited more than eight months to even file a motion to seal. *See* Tax Dkt. 265. The documents were not ordered sealed until over a year after filing, allowing Public First and any number of other members of the public to access the records. Tax Dkt. 311 at 38. And, notwithstanding the April 22, 2025 order to seal those docket entries, Booking.com has taken no steps to confirm the records are sealed; the documents remain publicly accessible as of the date of this petition.

The tax appeal court held multiple hearings on motions for summary judgment by DOTAX and Booking.com. Tax Dkt. 57 (September 19, 2022); Tax Dkt. 74 (October 17, 2022); Tax Dkt. 118 (April 10, 2023); Tax Dkt. 120 (April 17, 2023); Tax Dkt. 195-96 (March 18, 2024); Tax Dkt. 232-33 (May 6, 2024). Those proceedings were open to the public and discussed at length Booking.com's "business model" and contract language.

Moreover, Booking.com currently publishes its standard contract terms on the Internet. Its General Delivery Terms with accommodation providers are available on the website. Tax Dkt. 288 at 19-46. But Booking.com has insisted that the General Delivery Terms filed in the tax appeal must be sealed. Tax Dkt. 224. Its terms of service

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[5] In most instances, Booking.com expressly stated that confidential information was not being disclosed in the document. *E.g.*, Tax Dkt. 187 at 5 ¶ 8; Tax Dkt. 188 at 5 ¶ 8; Tax Dkt. 203 at 5 ¶ 8, 12 ¶ 8; Tax Dkt. 204 at 5 ¶ 8, 12 ¶ 8; Tax Dkt. 205 at 5 ¶ 8.

[6] *See Oahu Publc'ns Inc. v. Takase*, 139 Hawai`i 236, 245, 386 P.3d 873, 882 (2016) (outlining procedures for inadvertent public filings, including temporary sealing by the clerk as authorized by HCRR 3.3 pending a judicial determination of public access).

for customers seeking to book accommodations also are available on the site—in addition to explanations of how its services work. *Id.* at 86-156.

On April 22, 2025, the tax appeal court granted Booking.com's motion to seal. Among other things, the court's order sealed previously public documents; maintained certain documents under seal; and ordered redactions to other documents. Tax Dkt. 311 at 37-38. Booking.com filed the ordered redactions on May 22, 2025.[7] Tax Dkt. 316.

II. STATEMENT OF ISSUES PRESENTED AND RELIEF REQUESTED

Issue 1: Whether a court may seal a transcript of a public summary judgment hearing—publicly filed and accessible for over a year—and other information openly discussed in public hearings consistent with the strong presumption of public access to court records protected by the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution.

Relief Requested: A writ of mandamus ordering the tax appeal court to unseal information openly discussed in public summary judgment hearings, including portions of contracts quoted in the hearings, and a writ of prohibition prohibiting the tax appeal court from enforcing the April 22, 2025 order sealing Tax Dkt. 191 (excerpt of April 17, 2023 hearing publicly filed on March 13, 2024) and sealing or redacting other records with information openly discussed in public summary judgment hearings.

Issue 2: Whether a party claiming trade secret must prove, by non-conclusory evidence, that information to be protected "(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." HRS § 482B-2.

Relief Requested: A writ of mandamus ordering the tax appeal court to limit "trade secret" sealing or redactions to information supported by specific facts that meet the statutory standard for trade secrets and a writ of prohibition prohibiting the tax

[7] The tax appeal court did not review the redactions before filing and approved the proposed redactions based solely on representations from Booking.com.

appeal court from enforcing the April 22, 2025 order without complying with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*.

Issue 3: Whether "confidential business information" is a compelling reason that overrides the public's constitutional presumption of access to court records under the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution.

Relief Requested: A writ of prohibition prohibiting the tax appeal court from using "confidential business information" as a compelling reason for sealing documents submitted with a motion for summary judgment, and a writ of mandamus ordering the tax appeal court to comply with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*.

Issue 4: If "confidential business information" is a compelling reason that overrides the public's constitutional presumption of access to court records under the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution, whether a party claiming confidential business information must prove, by non-conclusory evidence, for example, what reasonable efforts are made to keep the information confidential and how public disclosure of the information would cause competitive disadvantage for the business.

Relief Requested: A writ of mandamus ordering the tax appeal court to limit "confidential business information" sealing or redactions to information supported by specific facts that meet an objective standard for confidential business information and a writ of prohibition prohibiting the tax appeal court from enforcing the April 22, 2025 order without complying with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*.

Issue 5: Whether the public's constitutional right of access to court records under the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution requires redaction of records narrowly tailored to the specific concerns that necessitate the sealing of documents, instead of redacting full documents or full paragraphs within a document.

Relief Requested: A writ of prohibition prohibiting the tax appeal court from enforcing any order to seal entire documents or redact entire paragraphs within a document when narrower redactions would adequately protect any compelling reasons for sealing, and a writ of mandamus ordering the tax appeal court to comply with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*, for example, by ordering narrowly tailored redactions.

Issue 6: Whether a court may enter a stipulated protective order that permits a party to file documents under seal without a motion to seal or any case-by-case judicial review of the documents.

Relief Requested: A writ of prohibition prohibiting the tax appeal court from enforcing Paragraph 7 of the SPO (Tax Dkt. 88), and a writ of mandamus ordering the tax appeal court to comply with the constitutional standards set forth in *Oahu Publications v. Ahn* and *Grube v. Trader*.

III. STATEMENT OF REASONS FOR ISSUING THE WRITS

A. Standard for Writs of Prohibition

A writ of prohibition concerns the supervisory power of the Hawai`i Supreme Court "to restrain a judge of an inferior court from acting beyond or in excess of his [or her] jurisdiction." *Honolulu Advertiser, Inc. v. Takao*, 59 Haw. 237, 241-42, 580 P.2d 58, 62 (1978). It is not "to cure a mere legal error or to serve as a substitute for appeal." *Id.* Prohibition is an appropriate procedure to address questions of grave import, such as "the right of the public to attend and to be present at judicial proceedings." *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 227, 580 P.2d 49, 53 (1978).

B. Standard for Writs of Mandamus

A writ of mandamus requires that the petitioner show "a clear and indisputable right to the relief requested and a lack of other means to redress adequately the alleged wrong or to obtain the requested action." *Kema v. Gaddis*, 91 Hawai`i 200, 204, 982 P.2d 334, 338 (1999). A writ of mandamus cannot supersede a court's discretionary authority nor serve as a legal remedy in lieu of normal appellate procedures. *See id.* Mandamus is the appropriate procedure when a non-party seeks to enforce rights or interests that

do not directly concern the merits of a proceeding. *Gannett*, 59 Haw. at 235-36, 580 P.2d at 57; *see also Kema*, 91 Hawai`i at 205, 982 P.2d at 339 (mandamus for party challenging disclosure of confidential information appropriate when "the order is not immediately appealable or related to the merits of the child protective proceedings").

C. Constitutional Standards for Public Access to Court Records

Pursuant to the First Amendment of the U.S. Constitution and article 1, section 4 of the Hawai`i Constitution, the public has a qualified right of access to court records in a civil case. *E.g.*, *Oahu Publc'ns Inc. v. Ahn*, 133 Hawai`i 482, 496 n.18, 331 P.3d 460, 474 n.18 (2014); *accord Courthouse News Serv. v. Planet*, 947 F.3d 581, 590 (9th Cir. 2020) ("every circuit to consider the issue has uniformly concluded that the right applies to both civil and criminal proceedings.").

In *Ahn*, this Court stated that when the public has a constitutional right of access, it is a prerequisite to sealing that "the reasons supporting closure must be articulated in findings." 133 Hawai`i at 498, 331 P.3d at 476. "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.* Thus, the court is required to make specific "findings that 'the closure is essential to preserve higher values' and that the closure is 'narrowly tailored' to serve that interest." *Grube v. Trader*, 142 Hawai`i 412, 424, 420 P.3d 343, 355 (2018); *Ahn*, 133 Hawai`i at 507, 331 P.3d at 485 ("the trial court is required to make specific findings demonstrating a compelling interest, a substantial probability that the compelling interest would be harmed, and there is no alternative to continued sealing of the transcript that would adequately protect the compelling interest.").

> 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); *accord Grube*, 142 Hawai`i at 425-28, 420 P.3d at 356-59 (findings "must contain sufficient detail

for a reviewing court to evaluate each of the criteria, including the strength of the interest weighing toward closure or sealing, the potential that disclosure will cause irreparable harm to that interest, and the feasibility of protecting the interest through alternate methods").

"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 Takase*, 139 Hawai`i at 246-47, 386 P.3d at 883-84.

D. Issue 1: A Court Cannot Seal Information Openly Discussed in a Public Hearing.

Information discussed in a public hearing is not confidential. "Secrecy is a one-way street: Once information is published, it cannot be made secret again." *United States v. Doe*, 870 F.3d 991, 1002 (9th Cir. 2017); *accord Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) ("We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again."); *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1184 (9th Cir. 2006) (affirming an unsealing order because the information at issue was "already publicly available"); *see also Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) ("appeals seeking to restrain 'further dissemination of publicly disclosed information' are moot"); *MD Spa Shop LLC v. Med-Aesthetic Sols, Inc.*, No. 21-CV-1050, 2021 U.S. Dist. LEXIS 210552 at *18-19 (S.D.

Cal. Oct. 29, 2021) ("A request to seal information that was publicly disclosed involves 'an inherent logical dilemma' in that 'information that has already entered the public domain cannot in any meaningful way be later removed from the public domain.'"). Even as to the constitutional right of privacy, this Court has observed that an individual cannot claim protection for "information that has already been made public." *Civil Beat Law Ctr. for the Pub. Int., Inc. v. City & County of Honolulu*, 144 Hawai`i 466, 482, 445 P.3d 47, 63 (2019). Prior public disclosure is a bell that cannot be unrung.

On April 17, 2023, the tax appeal court held a *public* hearing on Booking.com's motion for partial summary judgment. Tax Dkt. 120. During that hearing, among other things, the parties discussed whether Booking.com is a travel agent for purposes of registering as a foreign corporation with DCCA.[8] *See* Tax Dkt. 191. Counsel quoted verbatim from sealed contract terms in Exhibit B to Tax Dkt. 108:

> 2.3 Commission. . . . the commission shall be at all times . . . calculated in accordance with the confirmed booking as provided to accommodation as confirmed by Booking.com to guests.
>
> 2.3.5 the extranet shows details of all reservations made at the accommodation through the platforms (indiscernible) on a commission. Following the end of the month -- end of a month, Booking.com shall make its best efforts to promptly make an online reservation statement available on the extranet to the accommodation showing the reservations of all guests whose date of departure fell on the previous month.
>
> 4.3.1 Booking.com is entitled to promote the accommodation using the accommodation's name in online marketing, including email marketing and/or pay-per-click advertising. Booking.com runs online marketing campaigns at its own cost and discretion.
>
> 4.3.3. The accommodation agrees not to use, display, benefit from, include, utilize, refer to, or specifically target the Booking.com brand, slash, logo, including name, tradename, trademark, service mark, or other similar indicia of identity or source for price comparison purposes or any other purpose, whether on the Booking -- whether on the accommodation platform or any third party -- (inaudible due to cough).

[8] That hearing also is the only articulation of the tax appeal court's reasoning for granting Booking.com partial summary judgment. Tax Dkt. 125 (granting motion "for the reasons stated by the Court on the record").

Tax Dkt. 191 at 9-11 (reordered numerically).[9] Counsel for Booking.com also paraphrased section 2.5.5 regarding complaints. *Id.* at 13. Booking.com publicly posts its current—substantially similar—contract terms. Tax Dkt. 288 at 23, 25, 28.[10]

At the May 6, 2024 hearing, counsel for Booking.com quoted the following language from sealed exhibit 22 (Tax Dkt. 207):[11]

> 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

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[9] Public First obtained Tax Dkt. 191—a partial transcript of the April 17 hearing—months before Booking.com made any effort to seal the document.

[10] Section 2.3.5 as quoted in the hearing is section 2.3.8 in the current contract terms publicly posted by Booking.com.

[11] Public First transcribed the recording in the first instance, but is ordering the hearing transcripts. At times, counsel for Booking.com may have paraphrased the document.

> 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.

And from its amended response to Request for Admission No. 14, Booking.com quoted from sealed exhibit 19 (Tax Dkt. 204) at the May 6 hearing:

> **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.

Id. at 10:55-10:56 a.m.; *see also, e.g.*, Tax Dkt. 155 at 11 (original admission response not sealed); Civ. Dkt. 204 at 44-45, 47 (similar discovery response not sealed).

The tax appeal court erroneously granted Booking.com's motion to seal the entirety of a partial transcript and the information liberally quoted from exhibits in the public summary judgment hearings. The court did not address the prior public disclosure of this information in its order. *See* Tax Dkt. 311. Information quoted by the parties in public hearings should not be sealed or redacted, including, but not limited to Tax Dkt. 108, 110, 191, 204, and 207.

E. Issue 2: A Finding of Trade Secret Must Be Supported by Specific Facts that Meet the Statutory Standards.

Public First does not dispute that licensing agreements, customer lists, and business operations can be trade secrets—if proven by competent, non-conclusory

evidence—that meet the "compelling interest" standard for sealing. Here, however, the proof falls well short of establishing that the extensive sealing and redactions concern trade secrets.

A "trade secret" is 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." HRS § 482B-2. The person claiming a trade secret must prove that those elements exist. *Roy v. GEICO*, 152 Hawai`i 225, 242-43, 524 P.3d 1249, 1266-67 (App. 2023), *writ denied*, No. SCWC-18-613 (July 25, 2023) ("Conclusory claims such as these are insufficient to establish the existence of a trade secret."); *accord 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).

As a threshold issue, the tax appeal court erred by collapsing the statutory standard to a single inquiry into whether "disclosure of such information would give competitors an advantage over the moving party." Tax Dkt. 311 at 18. The court cites a federal case, but, as explained in that case, the Ninth Circuit uses a common law standard to define trade secrets. *Apple, Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1222 (9th Cir. 2013) ("The Ninth Circuit has adopted the Restatement's definition of 'trade secret.'"). The Legislature defined trade secret more specifically than the common law.

For the economic value prong, trade secrets must be identified with particularity to separate a trade secret from general industry knowledge. *Robbins Geller Rudman & Dowd, LLP v. Office of Attorney Gen.*, 328 P.3d 905, 911 (Wash. App. 2014) ("The alleged unique, innovative, or novel information must be described with specificity"); *see Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) ("Information that is public knowledge or that is generally known in an industry cannot be a trade secret."). Numerous factors may support a finding that information derives independent economic value from its secrecy. *E.g.*, *Bernier v. Merrill Air Eng'rs*, 770 A.2d 97, 107-08 (Me. 2001) (discussing, for example, the information's novelty or other concrete value in

competition); *Robbins*, 328 P.3d at 911 ("the effort and expense that was expended in developing the information").

The tax appeal court found that Booking.com had trade secrets in such broad categories as "business model," "platform operations," "marketing information," "business relationship information," and "licensing terms." Tax Dkt. 311 at 6-16, 21-37. Neither the court nor Booking.com provided any facts to distinguish Booking.com's purported trade secrets from industry standards or from the information that Booking.com already published on its website or in its Securities and Exchange Commission disclosures. *E.g.*, Tax Dkt. 288 at 19-156. When so much public information discusses Booking.com's "business model," for example, a generalized concern is insufficient to justify sealing. The tax appeal court's broad categories allowed the designation of virtually any information that Booking.com simply did not want to disclose.[12] *See, e.g.*, *N. Am. Lubricants Co. v. Terry*, No. Civ. S-11-1284 KJM GGH, 2011 U.S. Dist. LEXIS 133672, at *18-19 (E.D. Cal. Nov. 18, 2011) (rejecting, for lack of specificity, claims of trade secret for "'business model,' 'business plan,' and 'marketing materials, as well as any other 'boilerplate' items").

Moreover, neither the tax appeal court nor Booking.com explained how the information derived economic value from its secrecy or how competitors could use the information to gain an unfair advantage. The tax appeal court simply concludes that the documents contain trade secrets and that disclosure of trade secrets would harm Booking.com. *E.g.*, Tax Dkt. 311 at 20; *accord* Tax Dkt. 265 at 35-37; *see Nozawa v. Operating Eng'rs Local Union No. 3*, 142 Hawai`i 331, 333, 418 P.3d 1187, 1189 (2018) ("an affidavit is conclusory if it expresses a conclusion without stating the underlying facts"). Such conclusory findings and conclusions are insufficient to prove trade secrets. *McCallum v. Allstate Prop. & Cas. Ins. Co.*, 204 P.3d 944, 951 (Wash. App. 2009) ("Sullivan's and Bjorback's declarations consist of conclusory statements that should its competitors gain access to its national policies, the competitors will gain an unfair

[12] In contrast, the tax appeal court did define some more specific categories, for example, commission algorithms or formulas. *E.g.*, Tax Dkt. 311 at 6 ¶ 25(2).

advantage. And similarly, the declarations provide only conclusory statements that Allstate devoted considerable time, manpower, and finances to developing the documents. Again, the declarations include no specific examples to support these conclusions."), *cited with approval in Roy*, 152 Hawai`i at 243, 524 P.3d at 1267; *accord Squiric v. Surgical Hosp.*, 2020-Ohio-7026 ¶¶ 76-81 (App. 2020) ("The affiant said disclosure of the financial information would leave the hospital open to attack from competitors without explaining how this would occur. The court is left to speculate as to the fears of the hospital and create our own scenarios for how the secretive nature of annual financial statements and profit and loss statements has independent economic value due to being secret from unknown others. Plus, the unknown others must be able to 'obtain economic value' from the release of the information, and the hospital has not explained how this would occur."); *Peterson Mach. Co. v. May*, 496 P.3d 672, 680 (Or. App. 2021) (customer lists are not trade secret if the identity of potential customers is readily ascertainable by competitors).

As this Court explained in *Grube*, a court cannot simply defer to conclusory assertions by a party. In that case, there was no question that sealing may be justified with *properly supported evidence* that public disclosure would harm a pending investigation. *E.g.*, 142 Hawai`i at 421, 420 P.3d at 352. However, this Court held the trial court's conclusory finding of harm to pending investigations "fully lacking in the specificity required to demonstrate a compelling interest." *Id.* at 426, 420 P.3d at 357. There were "no details of any ongoing investigations" and "no information regarding how disclosure would impair these investigations or pose a danger to specific individuals." *Id.* Similarly, here, the findings and evidence do not provide specific facts from which this Court can meaningfully review the court's conclusion that the withheld documents and information have independent economic value as trade secrets. *See id.*; *Ahn*, 133 Hawai`i at 498, 476 ("entry of specific findings allows fair assessment of the trial judge's reasoning by the public and the appellate courts").

For the confidentiality prong, neither the tax appeal court nor Booking.com articulate what efforts, if any, Booking.com took to maintain the confidentiality of its purported trade secrets. "Allowing private information to become public, even through

carelessness, precludes protection as a trade secret." *Woo v. Fireman's Fund Ins. Co.*, 154 P.3d 236, 241-42 (Wash. App. 2007) (company failed to take reasonable steps to maintain secrecy when documents publicly filed with court and failed to identify any other efforts to keep the information confidential); *In re Providian Credit Card Cases*, 116 Cal. Rptr. 2d 833, 844-45 (App. 2002) (rejecting trade secret claim, in part, because company failed to stamp documents as "Confidential").

Booking.com objectively did not take reasonable efforts to keep some of this information confidential. As already highlighted, Booking.com's business model, operations, and marketing; its terms of service with customers; and its General Delivery Terms with accommodation providers are readily available on its website and its SEC filings. Tax Dkt. 288 at 19-156. Additional descriptions of Booking.com's business are publicly filed in the civil case it filed against DOTAX. *E.g.*, Civ. Dkt. 73 at 7-17; Civ. Dkt. 204 at 9-11, 31-61; Civ. Dkt. 214 at 10-11, 22-30; Civ. Dkt. 260 at 8-36; Civ. Dkt. 273 at 20, 26-30. Booking.com did not stamp documents as confidential and in numerous discovery responses expressly disclaimed that it was providing confidential information. It even allowed purported trade secrets to sit on the public court docket for over eight months without taking any action to seal the records. If this information truly was Booking.com's secret sauce, the tax appeal court could have articulated all the steps that Booking.com takes to ensure that the information never sees the light of day. It did not.

The tax appeal court cites cases that allowed sealing for contracts, customer lists, pricing terms, or other categories of information in specific instances. *E.g.*, Tax Dkt. 311 at 19. But such cases are not a shortcut around Booking.com's burden to produce specific, non-conclusory evidence that the contracts, customer lists, pricing terms, and other withheld information is in fact trade secret *in this case*. As reflected in the cases cited here, a trade secret determination is fact specific—not all contracts and customer lists are protected.

The tax appeal court failed to enter an order—compliant with *Ahn* and *Grube*—that articulated *specific* facts to find that any of the information filed with the court is trade secret.

F. Issue 3: Confidential Business Information—Short of Trade Secret—Is Not a Compelling Interest for Sealing.

Confidential business information is not a separate compelling interest from trade secrets. The tax appeal court repeatedly references "confidential business information" as an alternative basis for sealing. *E.g.*, Tax Dkt. 311 at 21 ("trade secrets and/or confidential business information"). Information, however, is not "of such gravity as to overcome the strong presumption in favor of openness" solely because a company considers it confidential.[13] *Grube*, 142 Hawai`i 425-26, 420 P.3d at 356-57.

The law does not protect confidential business information to the same extent as trade secrets. *See Kondash v. Kia Motors, Inc.*, 767 Fed. Appx. 635, 639 (6th Cir. 2019) (applying Ohio Uniform Trade Secrets Act) ("The fact that a document will reveal 'competitively-sensitive financial and negotiating information' is not an adequate justification for sealing"). The Legislature enacted the Hawai`i Uniform Trade Secrets Act to identify protectible business information.[14] HRS ch. 482B. Moreover, the Hawai`i Rules of Evidence only recognize a privilege against disclosure for trade secrets, not confidential business information. HRE 508. There is no legal protection against disclosure for information that does not rise to the level of trade secret.

In one context, Hawai`i law does recognize protection for confidential business information. For discovery purposes, under the lower "good cause" standard, the Hawai`i Rules of Civil Procedure allow for a protective order for "trade secret or other

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[13] Similarly, as this Court has observed, an individual's preference for privacy in court proceedings does not justify sealing. *Grube*, 142 Hawai`i at 425, 420 P.3d at 356 ("[S]imply preserving the comfort or official reputations of the parties is not a sufficient justification."). Parties must meet a higher standard to overcome the strong presumption of openness. Nothing justifies providing corporations more leeway than individuals to hide information solely based on a subjective desire for secrecy.

[14] To promote uniformity in trade secret law, this Court has held that Hawaii's adoption of the Uniform Trade Secrets Act preempts most claims regarding the disclosure of information that does not rise to the level of a trade secret. *BlueEarth Biofuels, LLC v. Haw. Elec. Co.*, 123 Hawai`i 314, 327, 235 P.3d 310, 323 (2010) ("the HUTSA preempts non-contract, civil claims based on the improper acquisition, disclosure or use of confidential and/or commercially valuable information that does not rise to the level of a statutorily-defined trade secret.").

confidential . . . commercial information."[15] HRCP 26(c)(7). But protective orders for discovery are not a basis for sealing records filed with the court. *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 blanket protective order for discovery); *Markel Am. Ins. Co. v. Internet Brands, Inc.*, No. CV-17-2429 (AJWx), 2017 U.S. Dist. LEXIS 224860, at *20-21 (C.D. Cal. Aug. 2, 2017) ("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."); *Dew v. E.I. Dupont Nemours & Co.*, No. 5:18-CV-73-D, 2024 U.S. Dist. LEXIS 216518, at *69 (E.D.N.C. Nov. 27, 2024) ("The standard a party must satisfy before being granted a protective order differs by an order of magnitude from the standard a party must satisfy to keep judicial documents out of the public eye.").

The Ninth Circuit memorandum decision cited by the tax appeal court, Tax Dkt. 311 at 19, does not treat confidential business information as different from trade secrets. *In re Elec. Arts, Inc.*, 298 Fed Appx. 568, 569 (9th Cir. 2008) (mem.) (holding that information "plainly falls within the definition of 'trade secrets'"). Federal courts nevertheless have more flexibility to incorporate common law privileges limiting disclosure of information because Fed. R. Evid. 501, unlike HRE 501, does not displace the common law. Fed. R. Evid. 501 ("common law . . . governs a claim of privilege"); *see Peer News LLC v. City & County of Honolulu*, 143 Hawai`i 472, 488, 431 P.3d 1245, 1261 (2018) ("the HRE do not allow for common law privileges"). Thus, federal cases discussing federal law regarding trade secret and confidential business information cannot readily compare to cases discussing the uniform statutory standards.

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[15] The Uniform Information Practices Act (Modified), HRS ch. 92F (UIPA), also protects "confidential business information" contained in government records if disclosure would frustrate a legitimate government function, as discussed below, but as this Court has observed, UIPA standards do not apply to court cases. *Hawai`i Police Dep't v. Kubota*, 155 Hawai`i 136, 152, 557 P.3d 865, 881 (2024) ("HRS § 92F-3 (2012) exempts 'nonadministrative functions of the courts of this State' from UIPA. UIPA does not create the equivalent of a discovery privilege to prevent disclosure of government records in a lawsuit.").

Federal courts also rely on concepts such as "confidential," "financially sensitive," or "proprietary" information as a basis for sealing because the common law Restatement definition of trade secret used by federal courts is more restrictive than the uniform statutory standard. *BlueEarth*, 123 Hawai`i at 326, 235 P.3d at 322 (uniform law "is more inclusive than the previous definitions of 'trade secret' at common law"). Hawai`i courts need not resort to ill-defined common law standards in the same manner as federal courts. *Id.* (holding that uniform act "creates a 'two-tiered' approach to protection of commercial knowledge, under which 'information is classified only as either a protected "trade secret" or unprotected "general skill and knowledge"'").

In the end, sealing court filings simply because a company says that its records are not public has consequences. For example, Reuters has detailed how courts' lax enforcement of the strong presumption of public access to court records in corporate cases prolonged health and safety crises. Reuters, *Hidden Injustice: How U.S. Courts Cover Up Deadly Secrets*, at www.reuters.com/investigates/section/usa-courts-secrecy/. Booking.com may not be seeking to cover up a health epidemic like opiod addiction, but it initiated this action in state court seeking to deny the public fisc nearly $20 million in GET. The evidence underlying Booking.com's tax avoidance scheme should be public—unless it rises to the level of a trade secret.

If a company cannot explain with specificity how particular information derives economic value from its secrecy and how the company endeavors to keep that information secret (the trade secret standard), then the information does not deserve sealing in court. There is no basis to apply a more lenient "confidential business information" standard under the strong constitutional presumption of public access.

G. Issue 4: A Finding of Confidential Business Information Must Be Supported by Specific Facts.

Although the tax appeal court references confidential business information as a compelling reason for sealing, it never explains what standard it used to make that determination.[16] Sealing court records cannot be premised on an unspecified and

[16] The cases that the tax appeal court cites do not provide a standard. *Aya Healthcare Servs. v. AMN Healthcare, Inc.*, No. 17cv205-MMA (MDD), 2020 U.S. Dist. LEXIS 68855,

potentially subjective standard. But if confidential business information were a compelling interest under the U.S. and Hawai`i Constitutions—it is not—UIPA may provide a starting point for the Court to develop a standard for court records.

To the extent potentially relevant to court records, UIPA protects confidential business information when public disclosure "would be likely to cause substantial competitive harm." *E.g.*, OIP Op. No. F17-02 at 8. The protection only extends to specific information and must be supported by more than conclusory assertions. *Id.* at 8-9. The existence of some protected information does not justify withholding more than necessary. *Id.* at 9. "Mundane information about a business, or information that is publicly available, is not considered confidential commercial or financial information." *Id.* at 8-9.

In Opinion F17-02, OIP rejected confidential business information claims over a company's narrative descriptions of its "business model" because the company failed to "provide a specific explanation of how its competitors could make use of the withheld information to cause substantial competitive harm." *Id.* at 9. The Office further rejected claims over information that was a matter of public knowledge. *Id.* at 10. It also refused to protect "standard" contract terms as confidential business information when the contract language was not obviously unique and the company failed to explain how disclosure would cause competitive harm. *Id.* at 11; *accord 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 information"). The facts presented in Opinion F17-02 are

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at *17 (S.D. Cal. Apr. 20, 2020); *Stout v. Hartford Life & Accident Ins. Co.*, No. CV 11-6186 CW, 2012 U.S. Dist. LEXIS 172088, at *7 (N.D. Cal. Dec. 4, 2012). As already noted, the Ninth Circuit case applied a trade secret standard.

indistinguishable from the facts before the tax appeal court. If the tax appeal court had applied any objective standard—even under a more lenient confidential business information standard, rather than trade secret—sealing would not have been justified.

A further consideration specific to court records is whether the information is core to the dispute in the case. When corporations seek to hide non-trade secrets relevant to the core dispute in a lawsuit, the standards for secrecy must be higher to overcome a central tenet of the constitutional right of access—"providing the public with a more complete understanding of the judicial system." *Ahn*, 133 Hawai`i at 502, 331 P.3d at 480. The public cannot engage in an informed discussion of court proceedings and a judge's decisions without access to the key non-privileged evidence in the case. *E.g.*, *KPG Invs., Inc. v. Sonn*, No. 3:22-cv-236-ART-CLB, 2023 U.S. Dist. LEXIS 111279, at *11-12 (D. Nev. June 28, 2023) (denying motion to seal "contracts, letters relating to financial compensation, and emails relating to the core dispute in this action"); *Osram Sylvania, Inc. v. Ledvance LLC*, No. 20-CV-9858 (RA), 2021 U.S. Dist. LEXIS 22447, at *5-6 (S.D.N.Y. Feb. 5, 2021) (refusing to seal entirety of license agreement "critical" to lawsuit); *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 if Booking.com had explained how it would be harmed by disclosure—it has not—the tax appeal court should not have sealed the entirety of the contracts and other documents that were at the heart of Booking.com's dispute with DOTAX, especially those portions openly discussed in public hearings.

The tax appeal court did not apply any objective standard for what constitutes confidential business information, and the findings and evidence do not support sealing such information.

H. Issue 5: The Scope of the Tax Appeal Court's Sealing and Redactions Were Excessive.

Sealing and redactions must be narrowly tailored to protecting a legitimate compelling interest. *Grube*, 142 Hawai`i at 427, 420 P.3d at 358; *Ahn*, 133 Hawai`i at 507,

331 P.3d at 485; *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 951 (9th Cir. 1998). The tax appeal court unjustifiably sealed entire documents or redacted entire paragraphs from documents. For example, the tax appeal court sealed portions of contracts or redacted portions of discovery responses that were quoted verbatim in public hearings or that merely recited information otherwise publicly accessible. The tax appeal court did not narrowly tailor withheld information to specific justifications for sealing.

I. Issue 6: The Tax Appeal Court Cannot Authorize Filings Under Seal Without Judicial Review.

A blanket order that authorizes sealed filings without public notice and judicial review turns the constitutional presumption of public access on its head. *Civil Beat Law Ctr. for the Pub. Int., Inc. v. Maile*, 117 F.4th 1200, 1212 (9th Cir. 2024) ("where the right of access attaches, the procedures of case-by-case sealing and mandatory, categorical sealing are not on equal constitutional footing."); *Associated Press v. U.S. Dist. Ct.*, 705 F.2d 1143, 1147 (9th Cir. 1983) (holding that an order sealing all filed documents until reviewed by the court was unconstitutional because 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"). The tax appeal court's SPO is unconstitutional.

The SPO "impermissibly reverses" the constitutional presumption of access by granting authority to file documents under seal based solely on Booking.com's determination that the records are "nonpublic information." Tax Dkt. 88 at 5 ¶ 7 ("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."); *accord id.* at 2 (defining "confidential" information most broadly as any material that Booking.com deems "deserving of protection from public disclosure and/or is nonpublic information"). Even worse than the unconstitutional order in *Associated Press*, the tax appeal court would never consider whether sealing the particular documents was appropriate. Tax Dkt. 88 at 5 ¶ 7 ("No further order of 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.").

The SPO expressly abandons the tax appeal court's gatekeeping role protecting the public's constitutional rights. It rescinds the notice requirement that provides the public an opportunity to object and rejects any obligation on the court to review the particular records and enter specific findings that justify sealing. These are all constitutionally required "procedural prerequisites" that must be met before sealing. *E.g.*, *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.").

The SPO also does not meet the substantive requirements of the constitutional right of public access. It does not even require a compelling interest, and sealing is premised entirely on Booking.com's determination of confidentiality. As addressed above, Booking.com's mere preference to keep records confidential is not enough to file documents under seal. If a party's determination were sufficient basis to withhold court records, the public's constitutional rights would be illusory because parties often prefer to keep the public in the dark about the details of litigation. *Grube*, 142 Hawai`i at 423, 420 P.3d at 354 ("often parties to the litigation are either indifferent or antipathetic to disclosure requests."). Ultimately, "[t]he right of access to court documents belongs to the public, and the [parties] were in no position to bargain that right away." *San Jose Mercury News v. U.S. Dist. Ct.*, 187 F.3d 1096, 1101 (9th Cir. 1999); *Citizens First Nat. 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.").

All of the documents at issue in Public First's motion to unseal were filed under seal pursuant to the SPO without prior notice or judicial findings. The SPO impermissibly remains in effect, authorizing additional filings by Booking.com and DOTAX under seal without notice or judicial findings.

J. The Public Has No Remedy Other than a Writ of Prohibition and/or Mandamus.

HCRR 10.15 provides: "A person or entity may seek review of 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." This Court has recognized that a petition for

writ of prohibition or mandamus is the appropriate procedure for members of the public excluded from judicial proceedings in violation of the constitutional right of access. *Gannett Pac. Corp. v. Richardson*, 59 Haw. 224, 235-36, 580 P.2d 49, 58 (1978).

> To permit a third party to intervene would unnecessarily encumber pending litigation and invite the entry of 'nonparty-parties' when the right or interest sought to be enforced is not directly involved in the subject matter of the pending proceeding. *His remedy must ordinarily lie in an original action in prohibition or in mandamus*.

Id. (citations omitted) (emphasis added).

The *Gannett* court's observation is consistent with this Court's holdings in more recent cases. *E.g.*, *State v. Nilsawit*, 139 Hawai`i 86, 94, 384 P.3d 862, 870 (2016); *Honolulu Police Dep't v. Town*, 122 Hawai`i 204, 216-17, 225 P.3d 646, 658-59 (2010); *Breiner v. Takao*, 73 Haw. 499, 502, 835 P.2d 637, 640 (1992). When a nonparty raises legal concerns unrelated to the merits of an underlying proceeding and that cannot be appealed, then relief in the nature of prohibition or mandamus is appropriate. *Nilsawit*, 139 Hawai`i at 94, 384 P.3d at 870 (media entities may seek writ of prohibition or mandamus when denied application for extended coverage because order is not immediately appealable or related to the merits of the underlying proceeding); *Honolulu Police Dep't*, 122 Hawai`i at 216-17, 225 P.3d at 658-59 ("HPD is not a party to the case. . . . Having no remedy by way of appeal, HPD properly sought redress from the [order denying HPD's motion to quash subpoena duces tecum] by mandamus."); *Breiner*, 73 Haw. at 502, 835 P.2d at 640 ("[M]andamus is the appropriate remedy where the order of the court imposed a restraint on free speech rights unrelated to the merits of the criminal trial and thus could not be raised on appeal.").

Public First is not a party to the underlying case. And these concerns have nothing to do with the merits of the case. But the tax appeal court's sealing order violates the public's—and Public First's—constitutional rights, causing irreparable harm. The public is entitled to access the sealed judicial records.

CONCLUSION

Public First respectfully requests that the Hawai`i Supreme Court issue a writ of prohibition to the tax appeal court prohibiting enforcement of any order to seal Tax Dkt.

108, 110-11, 166-67, 183, 187-91, 202-05, 207, 215, 224-25, and 228 and prohibiting any order authorizing the parties to file records under seal without a motion to seal and case-by-case judicial review; and a writ of mandamus ordering the tax appeal court to comply with the constitutional standards set forth in *Grube* and *Ahn*.

Dated: Honolulu, Hawai`i, May 23, 2025

Respectfully submitted,

/s/ Robert Brian Black
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Booking.com B.V. v. Suganuma

Intermediate Court of Appeals of Hawai'i

May 7, 2025, Decided; May 7, 2025, Electronically Filed

NO. CAAP-22-0000441

Reporter
2025 Haw. App. LEXIS 199 *; 2025 LX 51133

BOOKING.COM B.V., Plaintiff-Appellant, v. GARY S. SUGANUMA, in his official capacity as Director of Taxation, and STATE OF HAWAII DEPARTMENT OF TAXATION, Defendants-Appellees

Notice: SUMMARY DISPOSITIONAL ORDERS OF THIS COURT DO NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED. SEE HAWAI'I RULES OF APPELLATE PROCEDURE FOR GUIDELINES RESTRICTING PUBLICATION AND CITATION OF SUMMARY DISPOSITIONAL ORDERS.

Prior History: [*1] APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT. CASE NO. 1CC191000107.

Core Terms

Booking, circuit court, declaratory relief, declaratory, taxes

Counsel: On the briefs: Ray K. Kamikawa, Nathaniel A. Higa, for Plaintiff-Appellant.

Lauren K. Chun, Deputy Solicitor General, State of Hawai'i, for Defendants-Appellees Gary S. Suganuma, in his official capacity as Director of Taxation, and State of Hawai'i Department of Taxation.

Judges: By: Hiraoka, Presiding Judge, Nakasone and McCullen, JJ.

Opinion

SUMMARY DISPOSITION ORDER

Booking.com B.V.[1] appeals from the January 24, 2023 **Final Judgment** for Gary S. Suganuma,[2] in his official capacity as Director of Taxation, and the State of Hawai'i Department of Taxation (together, **DOTax**), entered by the Circuit Court of the First Circuit.[3] Booking.com challenges the circuit court's June 13, 2022 "Order Granting Defendants . . . Motion to Dismiss Complaint." We affirm.

Booking.com sued DOTax on January 18, 2019. The complaint alleged: Booking.com is headquartered in Amsterdam, the Netherlands; it operates a website on which travelers can make reservations for transient accommodations and travel-related services; it receives a predetermined per-reservation commission from the lodging and service providers; *Hawaii Administrative Rules (**HAR**) § 18-237-29.53-10(a)(3)*[4] **[*2]** imposed tax on electronic commerce in a discriminatory manner, subjecting online merchants to taxation that is not imposed on brick-and-mortar merchants solely because the transient accommodations or travel-related bookings

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[1] B.V. stands for *besloten vennootschap*; it means *private limited company* in Dutch.

[2] Gary S. Suganuma, the current director of taxation, is substituted for former directors Linda Chu Takayama and Isaac W. Choy, pursuant to *Hawai'i Rules of Appellate Procedure Rule 43(c)(1)*.

[3] The Honorable Gary W.B. Chang presided.

[4] *HAR § 18-237-29.53-10* (2018) provides, in relevant part:

> (a) Except as provided in *section 18-237-29.53-04* [("Services related to real property")], services performed by a commissioned agent are used or consumed where the agent is located at the time the agent's services are performed; provided that:
>
> . . . .
>
> (3) when transient accommodations or travel-related bookings are sold, purchased, or arranged online through a commissioned agent, the agent's service is used or consumed where the transient accommodation or travel-related booking is located.

are "sold, purchased, or arranged" online. Booking.com sought a declaration under Hawaii Revised Statutes (**HRS**) § 91-7 that HAR § 18-237-29.53-10(a)(3) was invalid and void.

On November 10, 2021, DOTax issued a Notice of Final Assessment of General Excise and/or Use Tax to Booking.com for calendar years 2010 through 2020 totaling $19,737,315.28. Booking.com filed an appeal in the Tax Appeal Court on December 9, 2021. Judiciary Information Management Systems No. 1CTX-21-0001613. We take judicial notice under Rule 201, Hawaii Rules of Evidence, Chapter 626 HRS (2016), that the tax appeal is set for trial the week of June **[*3]** 15, 2026.

The State moved to dismiss the complaint below on March 14, 2022. The motion was heard on May 10, 2022. The circuit court entered an order granting the motion on June 13, 2022. This appeal followed. The Final Judgment was entered on January 24, 2023, after a temporary remand.

Booking.com states a single point of error: "The circuit court erred in ruling that it lacks subject matter jurisdiction to hear Booking's challenge to the validity of the Department's Rule pursuant to HRS § 91-7."

The existence of subject matter jurisdiction is a question of law we review de novo under the right/wrong standard. Ocean Resort Villas Vacation Owners Ass'n v. Cnty. of Maui, 147 Hawai'i 544, 552, 465 P.3d 991, 999 (2020). Interpretation of a statute is also a question of law we review de novo. Id.

We begin with the plain language of the statute. Ocean Resort Villas, 147 Hawai'i at 553, 465 P.3d at 1000. HRS § 91-7 (2012 & Supp. 2018) provides:

> **Declaratory judgment on validity of rules**. (a) Any interested person may obtain a judicial declaration as to the validity of an agency rule as provided in subsection (b) by bringing an action against the agency in the circuit court or, if applicable, the environmental court, of the county in which the petitioner resides or has its principal place of business. The action may be maintained whether or not the petitioner has first requested the agency **[*4]** to pass upon the validity of the rule in question.
> (b) The court shall declare the rule invalid if it finds that it violates constitutional or statutory provisions, or exceeds the statutory authority of the agency, or was adopted without compliance with statutory rulemaking procedures.

The plain language of HRS § 91-7 supports Booking.com's argument that the circuit court had subject matter jurisdiction over its declaratory judgment action.

DOTax argued the circuit court lacked subject matter jurisdiction because the Hawai'i declaratory judgment statute provides:

> In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a *judgment or order merely declaratory of right is prayed for;* ***provided that declaratory relief may not be obtained . . . in any controversy with respect to taxes***[.]

HRS § 632-1(a) (2016) (emphasis added).[5] The statute is jurisdictional. Island Ins. Co. v. Perry, 94 Hawai'i 498, 502, 17 P.3d 847, 851 (App. 2000); Hawai'i Rules of Civil Procedure Rule 57 ("declaratory relief may not be obtained in any controversy with respect to taxes").

In Tax Found. of Haw. v. State, 144 Hawai'i 175, 439 P.3d 127 (2019), Tax Foundation filed a **[*5]** declaratory judgment action challenging the State's calculation of its cost to administer a City and County of Honolulu rail surcharge on general excise and use taxes collected by DOTax. Tax Foundation didn't dispute liability to pay general excise and use tax or the rail surcharge itself; it challenged "only the 'administration and allocation' of the Honolulu County surcharge after it is assessed and collected." Id. at 188, 439 P.3d at 140. The supreme court held, "this is not a 'controversy with respect to taxes' and the exclusionary provision does not apply because only suits that would restrain the assessment and collection of taxes fall within the scope of HRS § 632-1."

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[5] The prohibition against declaratory relief in controversies with respect to taxes was added to HRS § 632-1 in 1972. 1972 Haw. Sess. Laws Act 89, § 1(a). It was added "to mirror the tax exclusion in the federal Declaratory Judgment Act," 28 U.S.C. § 2201, which "prohibits declaratory relief in tax matters to permit the government to assess and collect taxes alleged to be due it without judicial interference." Tax Found. of Haw. v. State, 144 Hawai'i 175, 187, 439 P.3d 127, 139 (2019).

Then, in Ocean Resort Villas, timeshare owners sought declaratory relief over the constitutionality of the County of Maui's timeshare real property tax classification, which imposed a higher rate on timeshares compared to the "hotel and resort" classification. *147 Hawai'i at 547, 465 P.3d at 994*. The supreme court noted that the complaint and two amendments all "sought declaratory relief in the form of voiding the County's real property timeshare tax, a result which would 'interfere with the assessment or collection of taxes.'" *Id. at 556, 465 P.3d at 1003*. The court held that the lawsuit was "a 'controversy with **[*6]** respect to taxes,' for which declaratory relief under *HRS § 632-1* is not allowed. For that reason, the circuit court lacked jurisdiction over the Taxpayers' suit." Id.

Booking.com argues that *HRS § 91-7* independently creates jurisdiction in the circuit courts over declaratory judgment actions about "the validity of an agency rule," including rules promulgated by DOTax. It contends that *HRS § 632-1* applies only to "cases of actual controversy," and argues — disingenuously — that

> there was no "controversy" at all between [Booking.com] and [DOTax] at the time this action was filed, and still today there is no controversy between the parties that [Booking.com] seeks to have resolved by this action. Indeed, ***[Booking.com] does not seek any ruling regarding the application of the Rule [HAR § 18-237-29.53-10(a)(3)] to [Booking.com] in this action***.

(Emphasis added.)

Booking.com, then, is not "[a]ny interested person" entitled to seek relief under *HRS § 91-7*. "[A]ny interested person is one who is, without restriction 'affected' by or 'involved' with the validity of an agency rule." *Asato v. Procurement Pol'y Bd., 132 Hawai'i 333, 343, 322 P.3d 228, 238 (2014)* (cleaned up). If Booking.com doesn't seek a ruling that *HAR § 18-237-29.53-10(a)(3)* does not apply to it, it is not "any interested person" entitled to declaratory relief under *HRS § 91-7*.

Here, Booking.com's complaint alleges **[*7]** that *HAR § 18-237-29.53-10(a)(3)* is a discriminatory tax that violates the *Internet Tax Freedom Act, 47 U.S.C. § 151*, and the *Commerce and Supremacy clauses of the United States Constitution*. It requests a declaration that *HAR § 18-237-29.53-10(a)(3)* "is invalid and void." If successful, it would restrain and interfere with the assessment or collection of taxes. Under Ocean Resort Villas, the circuit court had no jurisdiction over Booking.com's suit. *147 Hawai'i at 556, 465 P.3d at 1003*. The circuit court did not err by granting DOTax's motion to dismiss.[6]

The Final Judgment entered by the circuit court on January 24, 2023, is affirmed.

DATED: Honolulu, Hawai'i, May 7, 2025.

/s/ Keith K. Hiraoka

Presiding Judge

/s/ Karen T. Nakasone

Associate Judge

/s/ Sonja M.P. McCullen

Associate Judge

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[6] Booking.com is not without a means to challenge *HAR § 18-237-29.53-10(a)(3)*. Its recourse is through the tax appeal procedures of *HRS Chapter 232*, something it is already pursuing. See *Ocean Resort Villas, 147 Hawai'i at 556-57, 465 P.3d at 1003-04*.