IN THE SUPREME COURT OF THE STATE OF NEVADA

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware limited liability company, Appellants/Cross-Respondents vs. LAS VEGAS SUN, INC., a Nevada corporation, Respondent/Cross-Appellant.	Supreme Court No. 80511 District Court Case No. A-17-758861

APPELLANTS'/CROSS-RESPONDENTS' OPPOSITION TO RENEWED MOTION TO *UNSEAL* ARBITRATION AWARD AS NOT CONFIDENTIAL OR SENSITIVE

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I. Introduction

This is the Sun's second time asking this Court to unseal the Award from the parties' confidential arbitration of an accounting dispute. 4/23 Mot. The Review-Journal's opposition to the first request explained that (1) the parties had been litigating the issue of whether to seal the private arbitration materials, including the Award, before the district court since September 2019, (2) the district court was also considering a request to modify and broaden language in its protective order, (3) the district court had taken those issues under submission, and (4) this Court should await the district court's rulings pursuant to SRCR 3(4), 5, and 7. 4/30 Opp. This Court denied the Sun's "motion to unseal" without prejudice. 5/1 Order. That same day, the district court issued its detailed four-page minute order sealing the Award and other private arbitration materials and clarifying (and broadening) its current protective order.[1] 5/1 Notice, Ex. 1. Despite that ruling, and the Sun's several prior failed attempts to unseal the Award, the Sun files its renewed motion seeking to unseal the same document without any new grounds for doing so.

The Sun filed the renewed motion based on its claims that "this Court owes no deference to the district court's decision" and "must conduct an independent analysis under SRCR 3(4)." 5/18 Mot., 2 (citing no authority for either proposition). Although

[1] The Sun quotes language at p.3 of its 5/18 Motion beginning with "provided only," but what the Sun fails to mention is that the district court expressly modified that language to make clear that all arbitration materials are to be treated as confidential. 5/1 Notice, Ex. 1, 4. The eliminated language cannot support the Sun's renewed motion.

the Sun wants to completely ignore the district court's detailed, well-reasoned decision—which was the culmination of seven months of briefing and hearings—SRCR 7 and this Court's recent Order require a different result.

Nevertheless, even without deference to the district court's factual findings, Nevada's strong public policy favoring arbitration—coupled with the parties' agreement and expectation to privately resolve their accounting dispute through arbitration—constitute independent, compelling grounds for this Court to seal the Award under SRCR 3(4). The parties agreed to resolve their accounting dispute through confidential arbitration, and the ***Arbitrator ordered confidentiality*** for all materials generated in the arbitration. Failing to honor this, as the Sun requests, will upend one of the main reasons the parties here and elsewhere choose arbitration (*i.e.*, privacy) and discourage Nevadans from agreeing to arbitrate. Nevada's overburdened courts should encourage and promote arbitration and other forms of alternative dispute resolution.

II. Relevant Facts and Procedural History

In April 2018, the Sun sued the Review-Journal. The district court ordered arbitration of the Sun's accounting claims, which concerned a dispute over the contractual method for accounting the Sun's profit share (if any) under the parties' joint operating arrangement (JOA). In February 2019, the Arbitrator ordered that ***all information*** generated in the course of the arbitration be kept confidential, subject to a narrow exception in Appendix D of the JOA (which allows the Sun's management to see certain accounting information from its competitor, the Review-Journal). 04/23

Mot., Ex. 1, I.A, Ex. 2, Appendix D.

The Sun agreed to keep the arbitration confidential, in part, "to facilitate the expedited 60-day discovery and arbitration process[.]" 5/18 Mot., 8. Based on that promise, the Review-Journal freely exchanged documents and information relating to the accounting dispute without concerns about public disclosure. After the parties received the arbitration decision (Award), the district court ordered that ***all arbitration materials*** be protected from public disclosure in conformity with, and subject to, Appendix D of the JOA (District Court Order). 04/23 Mot., Ex. 3, I.A.

In September 2019, the parties filed dueling motions to vacate/confirm the Award. With its motion, the Sun gratuitously filed nearly 4,000 pages of confidential arbitration materials—almost none of which related to the motion. In December 2019, the district court confirmed the Award. The order confirming the Award and the resulting judgment are publicly available.[2]

In September 2019, the Sun began asking the district court to unseal arbitration-related materials, including the Award. In December 2019, the district court requested additional briefing on three issues.[3] The parties briefed those issues and appeared for the hearing where the district court granted the Sun's request to file *more* briefing. In

[2] Contrary to the Sun's claim, the district court has not operated in secrecy. 5/18 Mot., 1. The district court also stated in its minute order that "it has ***already made public*** the relevant and limited parts of the record that were required to render its decision in this matter[.]" 5/1 Notice, Ex. 1, 4 (emphasis added).

[3] The issues are (a) public policy objectives for private arbitration and confidentiality; (b) whether motions to vacate/confirm an award impacts privacy and confidentiality; and (c) whether the district court may modify the disputed language in its protective order.

April 2020, the parties completed the briefing and awaited the district court's ruling.

On April 23, 2020, the Sun filed its motion to unseal the Award in this Court, which this Court denied as premature. 5/1 Order. On May 1, 2020, the district court issued its minute order ruling in favor of the Review-Journal on the sealing and modification issues. The Sun now renews its request to unseal the Award.

III. The Lengthy District Court Record Deserves Deference.

SRCR 7 prescribes an orderly process for the district courts to consider motions to seal in the first instance.[4] The rule states that "[c]ourt records sealed in the trial court shall be sealed from public access in the Nevada Supreme Court subject to further order of that court." SRCR 7. SRCR 7 thus provides that, at least initially, a district court's sealing order is presumptively valid. This Court routinely relies upon SRCR 7 and grants motions requesting sealing due to the district court first sealing the records below.

Here, after the Sun filed its first motion asking this Court to unseal the Award, the Court acknowledged this deference by denying the Sun's request without prejudice "to renew the motion ***once the issues pending in the district court are resolved***." 5/1 Order (emphasis added). The Court also directed the clerk of court to file the Award under seal "[b]ased on the parties' prior stipulation and ***district court order***." *Id.* (emphasis added). Therefore, although the Sun wants this Court to ignore the

[4] SRCR 3(2) and SRCR 5 also demonstrate the influence of a filing in district court. SRCR 3(2) provides that documents subject to a motion to seal automatically remain sealed pending a further court order, and SRCR 5 provides that the court shall retain jurisdiction to entertain a motion brought under the sealing rules.

extensive litigation of the sealing question before the district court, which resulted in a detailed order sealing the Award, the Sun's position lacks support and undermines the sound, prudential policy that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *United States v. Sealed Search Warrants*, 868 F.3d 385, 398 (5th Cir. 2017) (holding district court in "best position" to "assess . . . the impact of unsealing" records). The Sun's renewed motion should be denied. The full Award, which reveals information from a private arbitration about the Review-Journal's financial matters, particularly auditing, advertising, promotional activities, and trade agreements, should remain sealed.

IV. SRCR 3(4) Supports Sealing the Award Because Compelling Privacy Interests Outweigh Any Public Interest in the Award.

Even if this Court declines to give deference to the district court's order sealing the Award, the Award should remain sealed. The Court may seal records if "compelling privacy or safety interests . . . outweigh the public interest in access to the court record." SRCR 3(4). The rule lists when the "***public interest in privacy***" outweighs the public interest in access to judicial records. *Id* (emphasis added). Specifically, SRCR 3(4) provides the ***public*** interest in privacy trumps the public interest in access to court records upon a court finding that:

> (a) The sealing or redaction is ***permitted*** or required by . . . ***state law***;
> (b) The sealing or redaction furthers . . . a ***protective order*** entered under NRCP 26(c) or JCRCP 26(c);
> . . .

> (e) The sealing or redaction is of the ***confidential terms of a settlement agreement of the parties***; [or]
> . . .
> (h) The ***sealing or redaction is justified or required by another identified compelling circumstance***.

Id (emphasis added). Here, SRCR 3(4)(a) permits sealing the Award based on the Arbitrator's protective order authorized by NRS 38.233(5). Sealing the Award also furthers the district court's now-modified protective order entered under NRCP 26(c). SRCR 3(4)(b). And SRCR 3(4)(h) independently justifies sealing the Award based on the parties' privacy expectations for all materials generated in the arbitration and Nevada's public interest in respecting and protecting private arbitration. Like Nevada's compelling interest in promoting settlements by respecting confidentiality agreements, SRCR 3(4)(e), Nevada's strong public policy favoring arbitration provides an equally compelling basis for sealing the Award.[5]

1. Nevada's strong public policy favoring private arbitration justifies sealing the Award.

Nevada has a strong public policy favoring private arbitration.[6] Nevada has

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[5] The ***district court stated*** that in reaching its ruling, it considered, *inter alia*, "Nevada's strong public policy in favor of arbitration and securing benefits of a bargained-for exchange," and "compelling reasons favoring the public's interest in the access of the information in private arbitration against ***the [district court]'s duty to guard against court filings that might have become a vehicle for improper purposes***." 5/1 Notice, Ex. 1, 3 (emphasis added). The ***district court further found*** that the Arbitrator's Order constitutes a "compelling circumstance" under SRCR 3(4)(h) and that "additional compelling circumstances exist in light of the benefits of the arbitration agreement, Nevada's public policies concerning the public's right to information and private arbitration, the Newspaper Preservation Act's influence on the parties' agreement, and [the district court]'s restricted review of the Arbitrator's determinations." *Id.* It also acknowledged the "sophisticated parties" involved. *Id.*, 2.

[6] *See, e.g.*, *State ex rel. Masto v. Second Jud. Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) ("As a matter of public policy, Nevada courts encourage arbitration"); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 252, 89 P.3d 36, 39 (2004).

enacted many statutes, rules, and programs to promote and encourage all forms of ADR to reduce the court system's crushing caseloads.[7] For example, Nevada protects settlement communications and confidential settlement agreements from public disclosure to encourage parties to privately resolve their disputes. *See, e.g.*, NRS § 48.105 (barring admission of settlement communications); SRCR 3(4)(e) (allowing sealing of confidential settlement terms).[8] Private arbitration warrants similar protections to further Nevada's strong public policy favoring arbitration.

2. The inherently private nature of arbitration motivates parties to select it instead of the public court system.

Parties often agree to privately arbitrate in lieu of litigation in order to maintain confidentiality. Courts recognize that because arbitration is "inherently private," there is a corresponding "strong public policy in favor of preserving the confidentiality of such private proceedings." *Perdue v. Citigroup Glob. Markets, Inc.*, 2008 WL 11336459, at *4 (N.D. Ga. 2008) (collecting cases); *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) ("confidentiality is a paradigmatic aspect of arbitration"). Courts around the country have noted that parties submit to arbitration precisely because that forum is private and, consequently, promotes voluntary agreements to arbitrate. *See, e.g.*, *Original*

[7] Nevada courts have some of the highest caseloads in the nation. *See* 2018 Annual Report of the Nevada Judiciary, 5 ("the work of the Judicial Branch continues [at] a high rate that exceeds the level of cases handled by most courts in America.").
[8] *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003) (recognizing "strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations" to foster "a more efficient, more cost-effective, and significantly less burdened judicial system."); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004) ("If nothing else, honoring the parties' express wish for confidentiality may facilitate settlement, which courts are bound to encourage.").

Appalachian Artworks, 2017 WL 5476798, at *4 ("parties often enter into them to maintain confidentiality; and . . . it promotes the voluntary execution of private arbitration agreements—a sound public policy objective"); *In re Teligent, Inc.*, 640 F.3d 53, 57–58 (2d Cir. 2011). Here, failing to honor the parties' agreement to privately and confidentially arbitrate their accounting dispute and the Arbitrator's order requiring it, Nevadans will be less likely to agree to arbitrate—a result that will inevitably increase court caseloads.

3. Following the statutory process to confirm or vacate the Award does not automatically destroy the arbitration's privacy.

The Sun contends, without legal support, that the parties' agreement to confidentially arbitrate ***and the Arbitrator's order*** requiring it are nullified simply because the parties moved to confirm/vacate the Award. If that were true, *private* arbitrations would cease to exist because the statutorily required "next step" after every arbitration is a motion to confirm or vacate an award. *See* NRS §§ 38.239, .241.[9] This involuntary publication of private arbitration materials would undercut a key benefit of arbitration, and, as a result, discourage parties from agreeing to arbitrate. Although a split of authority exists on this issue, many courts have recognized and promoted these sound public-policy objectives, which Nevada espouses, by sealing arbitration awards[10]

[9] The ***district court noted*** that it "has ***grave concerns*** about the use of a motion to vacate and/or confirm an arbitration award as a tool to transform a bargained for private dispute into a public dispute by merely filing a motion." 5/1 Notice, Ex. 1, 3.

[10] *See Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 592 F.Supp.2d 825, 828 (E.D. Pa. 2009) (sealing arbitration award because privacy interest a legitimate purpose to keep arbitration proceedings private and promotes voluntary private arbitration

and other arbitration materials.[11]

Nevada's strong public policy favoring private arbitration is analogous to the state's policy to protect confidential settlements. *See, e.g.*, SRCR 3(4)(e). Therefore, the Court should honor the parties' agreement to confidentially arbitrate by sealing the Award. Any other outcome would eviscerate one of the main reasons for arbitrating and discourage this important alternative to lawsuits. *See, e.g.*, *Civil Rights for Seniors v. Admin. Office of the Cts.*, 129 Nev. 752, 313 P.3d 216 (2013) (holding unsealing mediation records would "have a chilling effect on open and candid" participation, "undermining the Legislature's interest in promoting mediation."); *Trs. of Plumbers & Pipefitters Union v. Dev. Sur. & Indem. Co.*, 120 Nev. 56, 62, 84 P.3d 59, 62 (2004) (discussing "Nevada's policy to encourage pretrial dispute resolution," and rejecting ruling that would "not

agreements); *Barkley v. Pizza Hut of America, Inc.*, 2015 WL 5915817, at *2 (M.D. Fla. 2015) (sealing arbitration award and materials to maintain confidentiality and promote voluntary arbitration agreements*); Seals v. Herzing Inc.-New Orleans*, 482 Fed. Appx. 893 (5th Cir. 2012) (affirming sealing of award); *Original Appalachian*, 2017 WL 5476798, at *4 (sealing arbitration award and finding "legitimate concerns involving the parties' privacy interests"); *Decapolis Group, LLC v. Mangesh Energy, Ltd.*, 2014 WL 702000, at *2 (N.D. Tex. 2014) (sealing arbitration award with "sensitive information" and "business strategies"); *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 2014 WL 5481107, at *2 (E.D. Mich. 2014) (sealing arbitration award to protect "privacy rights").

[11] *See Perdue*, 2008 WL 11336459, at *5 (sealing arbitration transcripts and finding no presumption of public access); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997) (sealing arbitration record); *Whitewater West Industries, Ltd. v. Pacific Surf Designs, Inc.*, 2019 WL 1590470, at *4 (S.D. Cal. 2019) (sealing arbitration materials to prevent "competitive disadvantage"); *Penn. National Mutual Casualty Ins. Co. v. Everest Reinsurance Co.*, 2019 WL 1205297, at *3 (M.D. Pa. 2019) (sealing arbitration documents); *CAA Sports LLC. v. Dogra*, 2018 WL 6696622, at *2 (E.D. Mo. 2018) (sealing arbitration materials irrelevant to proceedings); *Ovonic Battery Company, Inc. v. Sanyo Electric Co.*, Ltd, 2014 WL 2758756, at *3 (N.D. Cal. 2014) (sealing arbitration materials to prevent diminished bargaining position); *Utica Mutual Insurance Company v. INA Reinsurance Company*, 2012 WL 13028279, at *8 (N.D.N.Y. 2012) (sealing arbitrations documents where disclosure "harmful to [movant's] interest").

only remove the incentive to settle, [but] would create an incentive to litigate.").

4. The Sun's reading of SRCR 3(4) is wrong.

The Sun focuses on the language that the "parties' agreement alone does not constitute a sufficient basis for the court to seal or redact court records." SRCR 3(4), when read in its entirety, defeats the Sun's contention that its confidentiality agreement and the Arbitration Order entered under NRS 38.233(5) constitute an "agreement alone." "The parties' agreement alone," does not extend to all agreements because the Rule lists ***certain agreements between the parties that justify sealing***. SRCR 3(4)(e) identifies an overriding public interest to protect the "confidential terms of a settlement agreement." In addition, SRCR 3(4)(b) identifies an overriding public interest in "further[ing] . . . a protective order entered under NRCP 26(c)," which exists here.

The Sun's reliance on the unpublished decision in *Wciorka v. Malaga*, 442 P.3d 152, n.1 (Nev. 2019) is off point. In *Wciorka*, the court rejected the parties' ***stipulation to seal*** the entire appellate record. Here, the parties agreed to ***confidentially arbitrate***, which raises a completely different question that implicates Nevada's public policy.

V. Conclusion

The Sun's renewed motion to unseal the Award should be denied.

DATED this 26th day of May, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Kemp Jones, LLP and that on May 26, 2020, I caused the foregoing APPELLANTS'/CROSS-RESPONDENTS' OPPOSITION TO RENEWED MOTION TO *UNSEAL* ARBITRATION AWARD AS NOT CONFIDENTIAL OR SENSITIVE to be served by electronically filing the foregoing with the Clerk of the Supreme Court of Nevada by using the court's electronic filing system, which will send notice of electronic filing to the following:

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