

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,

v.

LAS VEGAS SUN, INC., a Nevada
corporation,

Respondent.

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District Court Case No. A-18-772591-B

**RESPONDENT/CROSS-APPELLANT'S REPLY IN SUPPORT OF
RENEWED MOTION TO UNSEAL ARBITRATION AWARD AS NOT
CONFIDENTIAL OR SENSITIVE**

LEWIS ROCA ROTHGERBER CHRISTIE LLP

E. LEIF REID, SBN 5750
KRISTEN L. MARTINI, SBN 11272
NICOLE SCOTT, SBN 13757
One East Liberty Street, Suite 300
Reno, Nevada 89501

PISANELLI BICE PLLC

JAMES J. PISANELLI, Bar No. 4027
TODD L. BICE, Bar No. 4534
JORDAN T. SMITH, Bar No. 12097
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

Attorneys for Respondent/Cross-Appellant Las Vegas Sun, Inc.

I. INTRODUCTION

The Sun requests to unseal the arbitration award, like its requests to unseal a *limited* amount of other arbitration documents below, for the simple reason that nothing contained in the Award implicates any compelling privacy interest sufficient to supersede Nevada’s fundamental policy of open access to court records.¹ This Court has made unequivocally clear that “[c]ourts may only seal their records or documents when the sealing is ‘justified by identified compelling privacy or safety interests that outweigh the public interest in access to the court record.’” *Jones v. Nev. Comm’n on Jud. Discipline*, 130 Nev. 99, 108-09, 318 P.3d 1078, 1085 (2014) (emphasis added) (internal citations omitted). This axiomatic “presumption favoring public access to judicial records and documents is only overcome when the party requesting the sealing of a record or document demonstrates that ‘the public right of access is outweighed by a significant competing interest.’” *Id.* (emphasis added). The RJ has failed to overcome the required presumption to seal the Award.

II. SRCR APPLIES TO THIS COURT’S APPELLATE RECORD, AND REQUIRES ITS INDEPENDENT SEALING DETERMINATION

SRCR 1(4) makes clear that the sealing rules apply to “all court records in civil actions.” If this Court deferred to a lower court’s sealing of records, the mandate that

¹ The Sun never sought to *unseal* nearly “4,000 pages of confidential arbitration materials.” *See* Opp’n. The Sun only moved to unseal those documents that do not include the RJ’s financial records or other confidential or proprietary information—including the Award, published advertisements in the RJ’s own newspaper, and similar documents not protected under SRCR 3(4).

any party seeking to seal appellate records must file a motion to seal in this Court would be nugatory—an impermissible reading of SRCR. *Howard v. State*, 128 Nev. 736, 745, 291 P.3d 137, 143 (2012) (concluding that, consistent with SRCR 3, even when a party seeks to seal appellate records in a criminal case, the party must file a written motion with this Court); *see also* SRCR 3(1). The RJ does not argue that this Court is excused from obligations under SRCR 3(4), either. *See* Opp’n 4. Rather, the RJ asserts, without authority, that this Court “routinely relies upon SRCR 7 and grants motions requesting sealing due to the district court first sealing the records below.” *Id.* Among this Court’s handful of unpublished decisions addressing sealing records under SRCR 7, the discussion is confined to footnotes without substantive analysis.² They do not support the deference that the RJ requests be imposed on this Court.

As SRCR 7 makes clear, however, while records sealed in the district court shall be sealed by the Clerk of the Court on appeal, the sealing will only remain in effect until *further order* of the Court. To be clear, SRCR 4 grants this Court express authority to unseal court records on its *own* motion. SRCR 4(2). The RJ’s assertion that this Court

² *E.g.*, *Shabrokh v. Eighth Judicial Dist. Court*, No. 80447-COA 2020 WL 636252, at *1 n.1 (Nev. App. Feb. 6, 2020) (unpublished disposition); *Shabrokh v. Eighth Judicial Dist. Court*, No. 79992-COA, 2019 WL 6208545, at *1 n.1 (Nev. App. Nov. 20, 2019) (unpublished disposition); *Mulkern v. Eighth Judicial Dist. Court*, No. 76399, 2018 WL 4002249, at *1 n.1 (Nev. Aug. 16, 2018) (unpublished disposition). The remaining dispositions addressing SRCR 7 cannot be cited as persuasive authority pursuant to NRAP 36(c)(3).

must or should defer to the trial court’s sealing decision as a matter of “prudential policy” is unsupported by the cases it cites³ and ignores the clear mandates of SRCR.

III. SRCR AND NEVADA’S POLICY OF OPEN ACCESS PROHIBIT SEALING THE AWARD

The RJ’s arguments that sealing the Award is permitted under SRCR 3(4) due to the “privacy” of arbitration, and the arbitrator’s execution of the parties’ stipulated confidentiality order is meritless.

A. Nevada’s Policy Favoring Arbitration does Not Extend to Sealing Court Records

This Court has neither recognized “confidentiality” or “privacy” of arbitrations when expressing its policy favoring arbitration, nor asserted any policy favoring arbitration when sealing its court records. *See* Mot. 9. The out-of-state decisions cited by the RJ to persuade this Court otherwise are unpersuasive and wholly distinguishable.⁴

³ In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), cited by the RJ, the Court considered whether a protective order entered on a showing of good cause was limited to the context of pretrial discovery and not publicly available information, not whether documents should be sealed. *See* Opp’n 5. In *United States v. Sealed Search Warrants*, 868 F.3d 385 (5th Cir. 2017), the district court’s order sealing pre-indictment search warrants that omitted any factual finding with requisite detail was before the court on direct appeal, and was subject to abuse of discretion review in that Circuit. The parties had not sought to unseal the appellate records of the Circuit court. *See id.*; Opp’n 5.

⁴ *See* Opp’n 7-8 (citing *Perdue v. Citigroup Glob. Markets, Inc.*, 2008 WL 11336459 (N.D. Ga. 2008) (where the court did not engage in any sealing analysis whatsoever, and deferred to the arbitration panel’s specific order entered after briefing by the parties in arbitration as to the confidentiality of the hearing transcripts); *Guyden v. Aetna, Inc.*, 544 F.3d 736 (2d Cir. 2008) (where the plaintiff sought to invalidate confidentiality provisions for all arbitrations arising from, or be compelled to arbitrate whistle-blower claims, and not discussing sealing court records); *Original Appalachian Artworks, Inc. v. Jakes Pacific, Inc.*, 2017 WL 5476798 (N.D. Ga. 2017) (where the court summarily granted sealing,

Nevada’s statutes, rules, and programs that promote various forms of ADR or SRCR 3(4)’s reference to settlement agreements, are inapplicable to the position the RJ is advancing. As a matter of statutory interpretation, had the Nevada Legislature or this Court intended arbitration materials to be blanket sealed in the judicial forum in furtherance of Nevada’s policy favoring arbitration, as the RJ argues (Opp’n 6-9), they would have enacted statutes or rules stating so, like they did with certain mediation documents and confidential settlement agreements. They did not. Moreover, other mediation documents (like those exchanged in Nevada’s Foreclosure Mediation Rules) and settlement agreements have been specially protected from public access because doing so furthered the *amicable resolution of disputes*, which occurs in a collaborative and joint-resolution oriented manner. Arbitration is in stark contrast to those circumstances, representing the adversarial adjudicatory process where a winner is crowned and the decision may be propelled into the public realm upon judicial review if a party invokes the courts’ powers to confirm or vacate the award.

The RJ cannot morph Nevada’s policy favoring arbitration into a basis to seal court records from public access. In practice, the RJ’s theory amounts to a star chamber, creating an adversarial adjudicatory forum hidden from public view pursuant to the parties’ stipulation—even when lower courts and this Court are called upon to review

finding that the parties’ unopposed motions to seal constituted “good cause”); *In re Teligent, Inc.*, 640 F.3d 53 (2d Cir. 2011) (providing that confidentiality is “an important feature of mediation” because it “promotes the free flow of information that may result in the settlement of a dispute,” and refusing to lift confidentiality of a settlement).

arbitration awards, they too will be bound to secrecy. This offends the very foundation of American democracy upon which our country was built, and is advanced solely to prevent the Sun from presenting evidence contradicting the RJ's meritless arguments.

B. Neither the Arbitration SPO nor the SPO Provides a Basis to Seal the Award in this Court

The RJ's continued reliance on the parties' stipulated—and boilerplate—confidentiality and protective order entered in arbitration (and subsequent district court order that modified the arbitration SPO) provides no basis to seal court records. Opp'n 8-9. While the RJ states that a “split of authority exists on this issue,” *id.*, the RJ fails to acknowledge that courts across the nation overwhelmingly refuse to seal arbitration documents. *See, e.g.*, Mot. 6-7 (providing a mere sampling of cases). The majority view, aptly expressed by the Ninth Circuit in *Kamakana*, is that parties' stipulated confidentiality and protective orders have no bearing whether *sealing court records from public view* is appropriate. *See* Mot. 8. The arbitrator did not examine any of the documents at issue before signing off on the parties' boilerplate confidentiality order. *See id.* at 3 & Ex. 1. The authority cited by the RJ represents jurisdictional outliers with minimal, conclusory, or no sealing analysis, or they are based on unopposed motions to seal or entirely distinguishable facts. Opp'n. 8 n.10.

IV. CONCLUSION

An order *unsealing* the Award is proper under SRCR 3(4) and the presumption of open access to court records: nothing in it implicates any privacy interest of the RJ.

DATED this 2nd day of June, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: /s/*Kristen L. Martini*

E. LEIF REID, SBN 5750

KRISTEN L. MARTINI, SBN 11272

NICOLE SCOTT, SBN 13757

One East Liberty Street, Suite 300

Reno, Nevada 89501

JAMES J. PISANELLI, Bar No. 4027

TODD L. BICE, Bar No. 4534

JORDAN T. SMITH, Bar No. 12097

PISANELLI BICE PLLC

400 South 7th Street, Suite 300

Las Vegas, Nevada 89101

Attorneys for Respondent/Cross-Appellant

Las Vegas Sun, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP and that on June 2, 2020, I caused the foregoing **RESPONDENT/CROSS-APPELLANT'S REPLY IN SUPPORT OF 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 ECF system, which will send notice of electronic filing to the following:

J. Randall Jones, SBN 1927
Michael J. Gayan, SBN 11135
Mona Kaveh, SBN 11825
KEMP JONES, LLP
3880 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Richard L. Stone
Amy M. Gallegos
David R. Singer
JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, California 90071

/s/ Jessie M. Helm
Employee of Lewis Roca Rothgerber Christie LLP