Case No. 80511

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 RENEWED MOTION TO *UNSEAL* ARBITRATION AWARD AS NOT CONFIDENTIAL OR SENSITIVE

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I. INTRODUCTION

In Nevada, each court has an independent obligation to determine whether its court records should be sealed from public view—an obligation that does not cede to another court's or an arbitrator's sealing of its own records. This Court explained the same when enacting SRCR 3(7): "Court records sealed in the trial court shall be sealed from public access in the Nevada Supreme Court subject to further order of that court." Therefore, irrespective of parties' boilerplate stipulated confidentiality and protective orders entered in arbitration, or a district court's order blanket sealing portions of its court records, this Court has its own duty to the judiciary and the public to determine whether to seal documents filed in this Court.

The starting point is the presumption of open access. This fundamental principle is a hallmark of American democracy. Newspapers are often the guardians that ensure that court records remain open and the public remains informed about what is happening in the judiciary. Ironically, one newspaper in this case—the RJ—seeks to litigate under a shroud of secrecy. In the lower court, the RJ sought to seal every document remotely connected to the underlying arbitration proceeding, including pages of its own printed and publicly distributed newspaper. The RJ also sought to seal the arbitration award while asking the district court to vacate the Award. It is the same Award that ultimately formed the basis of the district court's judgment in favor of the Sun.

After multiple rounds of briefing, the district court recently granted the RJ's indiscriminate request and sealed every document exchanged or related to the arbitration without regard to the information contained in the documents, including the Award itself. Since the parties bargained for arbitration, the district court felt compelled to defer to the arbitrator's execution of the parties' boilerplate stipulated confidentiality and protective order. Despite the errors inherent in the district court's order, this Court owes no deference to the district court's decision. This Court must conduct an independent analysis under SRCR 3(4) to determine whether *it may seal its records*, as "justified by identified compelling privacy or safety interest that outweigh the public interest in access to the court record."

As discussed in the Sun's Motion to unseal Exhibit 1 to its reply in support of its motion to expedite appeal (Apr. 23, 2020) ("Motion"), and further set forth herein, an Order unsealing the Award in the record of this appeal is proper. Only when a party seeking to withhold court documents from public view can identify compelling privacy or safety interests that outweigh the public interest in access to court records, will sealing be justified. SRCR 3(4). No basis exists to seal the Award, attached as Exhibit 1 to the Sun's Reply in Support of Motion to Expedite Appeal. The parties' stipulated blanket confidentiality order entered in the arbitration does not override Nevada's sealing rules, for "[t]he parties' agreement alone does not constitute a sufficient basis for the court to seal or redact court records." The RJ cannot articulate any compelling

privacy interest in the Award that outweighs the public's interest in open access. An order unsealing the Award is warranted.

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

In the underlying arbitration (from which this appeal stems), the parties entered into a stipulated confidentiality and protective order that designated arbitration materials confidential, "subject to[ ] the provisions of Appendix D" of the parties' governing joint operating agreement—the "JOA." *See* Ex. 1 at 1-2 ("Arbitration SPO"). Appendix D contains a limited confidentiality provision that requires *an arbitrator* to maintain the confidentiality of the RJ's *financial* records inspected during the arbitration. Ex. 2 at 20. Nothing in the JOA provides that the arbitration itself is confidential. *Id.*

After the arbitrator issued the Award, and the parties were briefing motions to confirm and vacate the Award, the parties entered into a stipulated confidentiality and protective order in the district court action ("SPO"). Ex. 3. Building on the Arbitration SPO, the parties stipulated that all information generated in the arbitration shall continue to be deemed confidential, "provided only, however, that such Confidential Information and Highly Confidential Information would have been entitled to confidentiality protections under Appendix D of the 2005 JOA or N[RCP] 26(c)." *Id.* at 1-2 (emphasis added). In other words, arbitration material would remain confidential only if it satisfied Appendix D or NRCP 26 standards (*e.g.*, financial documents, or trade secrets/confidential commercial information), in line with SRCR 3(4).

In their motions to confirm and vacate, the parties cited to and attached arbitration materials as exhibits. Out of an abundance of caution, the parties filed all supporting arbitration documents, including the Award, under seal based on the RJ's position that the Arbitration SPO required the indiscriminate sealing of *all* arbitration materials. The Sun contemporaneously moved to unseal those certain arbitration documents that were not entitled to sealing under SRCR 3(4), *i.e.*, those that did not include the RJ's financial records, or other information entitled to protection.

After a total of 35 filed briefs and 4 hearings on the sealing issues in the underlying action, the Sun filed its Motion in this Court, seeking to unseal the Award attached to its Reply in Support of Motion to Expedite. On May 1, 2020, this Court entered its Order denying the Sun's Motion without prejudice, allowing the Sun to renew the Motion "once the issues pending in district court are resolved." This Court directed the clerk to file the Award under seal. Later that day, the district court entered its Minute Order granting the RJ's request to seal every arbitration document at issue in the sealing motions. The RJ subsequently filed its Notice of the same in this Court. The Sun files this Renewed Motion, and requests that this Court unseal the Award attached as Exhibit 1 to the Sun's Reply in support of its Motion to Expedite Appeal.

III. NO JUSTIFICATION EXISTS TO SEAL THE AWARD

The Award should not be sealed as there is no independent basis to seal the Court's record from public access. First, the parties' Arbitration SPO does not extend to sealing court records, and does not provide the required, independent basis to seal.

Moreover, the RJ is unable to rebut the presumption of public access to the Award, for it cannot identify any compelling privacy or safety interest that outweighs the public's interest in open access to the Court record.

A. The Presumption is Open Access to Court Records

Courts 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." SRCR 3(4); *Jones v. Nev. Comm'n on Jud. Discipline*, 130 Nev. 99, 108-09, 318 P.3d 1078, 1085 (2014). When considering whether to keep court records shielded from the public under SRCR 3, the presumption is openness and public access. "*This presumption favoring public access to judicial 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." *Jones*, 130 Nev. at 109, 318 P.3d at 1085 (emphasis added). "[T]he threat of 'secret judicial proceedings' would undermine 'public confidence in this court and the judiciary,' while '[o]penness promotes public understanding, confidence, and acceptance of judicial process and results." *Id.* (citations omitted) (second alteration in original); SRCR (3) (entitled, "Policy," and reading, "All court records in civil actions are available to the public, except as otherwise provided in these rules or by statute."). Thus, only where the party seeking to seal can rebut the presumption of open access, can court records be sealed.

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B. Arbitration Confidentiality Orders are Not Entitled to Deference

In making the determination of whether the sealing of court records satisfies SRCR 3, Nevada courts, like the overwhelming majority of other courts across the country, will not defer to the parties' agreement of confidentiality as a sufficient basis for sealing. SRCR 3(4) provides that "the parties' agreement alone does not constitute a sufficient basis for the court to seal or redact court records." *See also Wciorka v. Malaga*, No. 77030, *1 n.1, 442 P.3d 152, n.1 (Nev. 2019) (unpublished disposition).

Courts overwhelmingly recognize that the expectations of privacy in arbitration proceedings disappear when parties move into the judicial arena, and instead, the public access consideration is paramount. Although parties to an arbitration are generally permitted to keep their private undertakings out of the public eye,

> [t]he circumstance changes when a party seeks to enforce the fruits of their private agreement to arbitrate, *i.e.* the arbitration award in [ ] court . . . . A party to an arbitration proceeding that is subject to confirmation proceedings in a [ ] court cannot have a legitimate expectation of privacy in all papers pertaining to the arbitration because the party should know of the presumption of public access to judicial proceedings.

E.g., *Redeemer Comm. of Highland Credit Strategies Funds v. Highland Capital Mgmt., L.P.*, 182 F. Supp. 3d 128, 133 (S.D.N.Y. 2016) (internal quotation marks omitted).

In that vein, courts will not haphazardly defer to underlying arbitration confidentiality agreements or orders, or even arbitration rules, when parties utilize judicial resources to vacate or confirm an arbitration award as a result. *See, e.g.*, *Zurich*

Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497, 504 & 507 n.3 (E.D. Pa. 2004).[1] Even where parties agree to blanket confidentiality of arbitration documents, that agreement "misses the point—[the court's] obligation is to the process and not the parties' agreements." *Wilmington Savings Fund Society, FSB v. Houston Cas. Co.*, No. 17-1867, 2018 WL 3768531, at *3 (D. Del. Aug. 8, 2018). Any arbitration confidentiality agreement, while enforceable to govern the parties' conduct, "does not govern [the court's] obligation to ensure public access." *Id.* (citing *Bradford & Bigelow, Inc. v. Richardson*, 109 F. Supp. 3d 445, 447 (D. Mass. 2015)).

Like the majority of other states, Nevada does not have any statute or rule providing for confidentiality in contracted-for arbitrations. *See* NRS 38.206-.248. This Court, however, gave direction on this issue when adopting SRCR and admonishing that the parties' agreement, alone, is insufficient to seal a court record. SRCR 3(4). Instead, the public's interest in open court records must be balanced against privacy

[1] (Stating that "[i]n making its determination [of whether to seal arbitration records], one of the obligations of the district court is to 'protect the legitimate public interest in filed materials from overly broad and unjustifiable protective orders agreed to by the parties for their self-interests,'" and expressly rejecting the belief that the "policy of encouraging arbitration trump[s] the clear law and policy standards established by the United States Supreme Court and the Court of Appeals for the Third Circuit for maintaining open and accessible records of legal matters for public scrutiny") (quoting *Leucadia, Inc. v. Applied Extrusion Tech., Inc.,* 998 F.2d 157, 165 (3d Cir. 1993)); *ZuGrynberg v. BP P.L.C.*, 205 F. Supp. 3d 1, at *3 (D.D.C. 2016); *Ovonic Battery Co., Inc. v. Sanyo Elec. Co., Ltd.*, No. 14-cv-01637-JD, 2014 WL 2758756, at *3 (N.D. Cal. June 17, 2014); *Century Indem. Co. v. AXA Belgium*, No. 11 Civ. 7263(JMF), 2012 WL 4354816, at *14 (S.D.N.Y. Sept. 24, 2012); *Powertech Tech. Inc. v. Tessera, Inc.*, No. C 11-6121 CW, 2012 WL 3283421, at *1-2 (N.D. Cal. Aug. 10, 2012); *Zimmer, Inc. v. Scott*, No. 10 C 3170, 2010 WL 3004237, at *2-3 (N.D. Ill. July 28, 2010).

and safety interests, and the latter must outweigh the presumption of open court records before any sealing can be justified. *Id.*

The Arbitration SPO is of no real consequence when considering whether a court record may be sealed. As the Ninth Circuit accurately explained, "[l]ike many pretrial protective orders, the judge signed off on the order without the benefit of making an individualized determination as to specific documents." *Kamakana v. Cty. & Cnty. of Honolulu*, 447 F.3d 1172, 1183 (9th Cir. 2006). Thus, any "claimed reliance on the order is not a 'compelling reason' that rebuts the presumption of access." *Id.*

Moreover, regardless of arbitrators' authority to enter protective orders to the same extent as a court could, *see* NRS 38.233(5), Nevada's Rules for Sealing and Redacting Records admonishes that the sealing of an entire court record file is prohibited, and the court must use the least restrictive means and duration if any sealing or redaction is ordered. SRCR 3(5)(c), 3(6).

Although the Arbitration SPO governed the *parties'* obligation to maintain confidentiality over the documents, it does not govern the *Court's* obligation to the process and to ensure public access absent specific justification. The arbitrator signed the Arbitration SPO upon the parties' stipulation (to facilitate the expedited 60-day discovery and arbitration process under Appendix D of the JOA) and without reviewing any of the documents. The Arbitration SPO alone does not constitute a sufficient basis for the court to seal or redact the Award. *See* SRCR 3(4). For that same reason, a blanket arbitration confidentiality order does not constitute a sufficient basis to seal the entire

arbitration record in a district court confirmation proceeding under SRCR 3(4)(h)'s catchall provision.

Indeed, Nevada favors arbitration for the reasons that arbitration can avoid higher costs and delays associated with litigation. *E.g.*, *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 252, 89 P.3d 36, 39 (2004).[2] However, this Court has never referenced Nevada's policy favoring arbitration in conjunction with confidentiality afforded arbitrations—let alone expressed that the privacy of arbitration trumps the paramount notion of open access to court records codified in SRCR 3(4). If confidentiality was recognized as the central policy of arbitration, courts would never invalidate confidentiality provisions in arbitration agreements. And, more importantly, if the considerations of privacy and confidentiality in arbitration proceedings were supreme and granted arbitration information total immunity from the sealing analysis, SRCR would contain such an exception. Yet, in a time where arbitration proceedings and confidentiality orders entered therein are commonplace, SRCR has no exception.[3]

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[2] *U.S. Home Corp. v. Michael Ballesteros Tr.*, 134 Nev. 180, 191, 415 P.3d 32, 42 (2018); *Sylver v. Regents Bank, N.A.*, 129 Nev. 282, 286, 300 P.3d 718, 721 (2013); *Picardi v. Eighth Judicial Dist. Court*, 127 Nev. 106, 112, 251 P.3d 723, 726 (2011).

[3] *Compare with* Foreclosure Mediation R. 22 (confidentiality afforded foreclosure mediation) & NRS 48.105 (confidentiality afforded settlement discussions); *see also Jones*, 130 Nev. at 109, 318 P.3d at 1085.

C. Sealing the Award is Not Justified Under SRCR 3(4)

The RJ cannot identify any compelling privacy interest that outweighs the public's interest in accessing the Award. SRCR 3(4) identifies the grounds where the public interest in privacy outweigh the public interest in open court records, and therefore, the sealing of a particular court record is justified. *See* SRCR 3(4)(a)-(h). The Award does not reveal information about individuals, discuss any of the RJ's financial records, or otherwise implicate any compelling interest that would justify sealing it away from public view. The Award is a judicial document that directly affected the district court's adjudication of the parties' motion to confirm and vacate. It was at the heart of what the district court was asked to act upon, and the district court entered Judgment on its order. "The public in th[is case] has a right to know what the [district c]ourt has done." *Global Reinsurance Corp.-U.S. Branch v. Argonaut Ins. Co.*, No. 07-CV-8196 (PKC), 2008 WL 18-5459, at *2 (S.D.N.Y. April 24, 2008).

V. CONCLUSION

An order *unsealing* the Award is proper under SRCR 3(4) and the presumption of open access to court records.

DATED this 18th day of May, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP and that on May 18, 2020, I caused the foregoing **RESPONDENT/CROSS-APPELLANT'S 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:

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