IN THE COURT OF APPEALS OF THE STATE OF NEVADA

IN THE MATTER OF SEARCH WARRANTS REGARDING SEIZURE OF DOCUMENTS, LAPTOP COMPUTERS, CELLULAR TELEPHONES, AND OTHER DIGITAL STORAGE DEVICES FROM THE PREMISES OF LAS VEGAS BISTRO, LLC AND LITTLE DARLINGS OF LAS VEGAS, LLC LAS VEGAS BISTRO, LLC D/B/A LARRY FLYNT'S HUSTLER CLUB; AND LITTLE DARLINGS OF LAS VEGAS, LLC, Appellants, vs. LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondent.	Supreme Court Case No.: 84931-COA [District Court Case No. A-22-851073-C]

Appeal from Eighth Judicial District Court Order Denying
Motion for Equitable Relief Pursuant to NRS 179.085,
Honorable Jerry A. Wiese II, District Judge

REPLY BRIEF OF APPELLANTS LAS VEGAS BISTRO, LLC AND LITTLE DARLINGS OF LAS VEGAS, LLC

DEANNA L. FORBUSH
Nevada Bar No. 6646
COLLEEN E. MCCARTY
Nevada Bar No. 13186
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Facsimile: (702) 597-5503
Attorneys for Appellants

ZACHARY M. YOUNGSMA
Nevada Bar No. 15680
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
Attorneys for Appellants

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Appellant, Las Vegas Bistro, LLC ("LV Bistro") is a Nevada limited liability company managed by Jason Mohney with no other corporate affiliations.

2. Appellant, Little Darlings of Las Vegas, LLC ("LDLV") is a Nevada limited liability company managed by Trevor Bowen with no other corporate affiliations.

3. Appellants were represented in the district court, and are represented in this Court, by the undersigned attorneys of the law firm of Fox Rothschild LLP and Shafer & Associates, P.C.

Dated this 13th day of December, 2022.

By:/s/ *Colleen E. McCarty*_____

DEANNA L. FORBUSH
Nevada Bar No. 6646
COLLEEN E. MCCARTY
Nevada Bar No. 13186
FOX ROTHSCHILD LLP
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899
Facsimile: (702) 597-5503
Attorneys for Appellants

ZACHARY M. YOUNGSMA
Nevada Bar No. 15680
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560
Facsimile: (517) 886-6565
Attorneys for Appellants

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I.
ARGUMENT IN REPLY

A. Introduction.

This appeal is not moot because the Las Vegas Metropolitan Police Department ("LVMPD") has neither returned all the devices seized from Appellants, nor has it returned any of the data imaged from these devices, which is the obvious crux of the equitable relief denied by the district court below. Further, LVMPD has failed to address Appellants' primary argument that the district court clearly erred in finding probable cause to support the issuance of the search warrants in question, where there can be no evidence to support the predicate crime of prostitution. *Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010) (citation omitted) (recognizing the Court's discretion to treat a failure to argue as confession of error).

For these reasons, inclusive of the reasons set forth Appellant's Opening Brief, LV Bistro and LVLD respectfully request that the instant appeal be granted in its entirety, that all of Appellants devices and data be immediately returned and that this matter be closed.

B. The Instant Appeal Is Not Moot and May Be Heard Regardless.

LVMPD's claim of mootness is belied by both the record and its own Answering brief. LVMPD admits in its Answering Brief that it has not yet returned all devices seized and what devices have been returned were all fully imaged prior to their return (*see* Answering Brief at pp. 9-11, 13), with all imaged information

being retained and subject to an investigation for which charges will never be forthcoming.

LVMPD first misdirects the Court concerning the return of property in its attempt to suggest appellate relief is not warranted, citing to a Notice of Returned Property in Respondent's Appendix. (RA 007-021). LVMPD knows that the notice, in fact, excludes each of Appellant's Dell computer servers, 8 digital video recorders and an Apple MacBook, all of which are in addition to the silver Apple laptop purportedly withheld over an ownership dispute. *See* Answering Brief at p. 13, n. 3. This ongoing lack of candor to the Court aside, the more obvious point is that LVMPD only returned Appellants' devices upon their complete imaging, thereby giving LVMPD full access to the information contained therein with impunity. This fact alone negates any claim of mootness.

Should the Court give any credence to LVMPD's mootness argument based on the return of some devices in question, however, there is still no impediment to considering and ultimately granting the instant appeal. Nevada appellate courts recognize and apply an exception to the mootness doctrine that exists in federal court, regardless of the lack of court rule or statute authorizing the hearing of cases rendered moot but capable of repetition, yet evading review. *See, e.g., Traffic Control Servs. v. United Rentals*, 120 Nev. 168, 171-72, 87 P.3d 1054, 1057 (2004) (recognizing that the "capable of repetition yet evading review" exception to the mootness doctrine applies when the duration of the challenged action is "relatively

short" and there is a "likelihood that a similar issue will arise in the future"); *Solid v. Eighth Jud. Dist.*, 133 Nev. 118, 120, 393 P.3d 666, 670 (2017) (applying the doctrine to review petitioner's challenge to his criminal trial where, although his conviction rendered the issue moot, the same issue was likely to recur in other criminal trials); *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 161, 87 P.3d 521, 524 (2004) ("[W]here an issue is capable of repetition, yet will evade review because of the nature of its timing, we will not treat the issue as moot."); *see also Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2323 (2016) (Thomas, J. dissenting) (applying the doctrine in the Fourteenth Amendment substantive due process context).

Again, the point here is not as LVMPD would suggest that a number of Appellants' devices were eventually returned upon subsequent district court order following their imaging, the point is that LVMPD has ongoing access to the data imaged for a purported investigation that should have been over before it began. It is this obvious inequity that forms the basis for the relief sought below and through the instant appeal. The lack of efficacy of LVMPD's investigation related to the search warrants. Discussed below, is the reason the relief sought should be granted.

C. LVMPD Should Not Be Permitted to Retain Any Information Seized Under the Legally Defective Search Warrants in Question.

Appellants filed their civil complaint for equitable relief below seeking three remedies collectively, as follows: (1) quashing of the search warrants in question,

(2) unsealing of the search warrant affidavits, and/or (3) return of the seized property, inclusive of all devices and the information each contained. An additional alternative request, in the event the district court declined to grant the requested relief, was to allow Appellants a meaningful opportunity to seek protection for all information seized containing attorney-client, work product and accountant-client privileged information. The district court summarily dismissed the alternative request in favor of a screening proposal offered by LVMPD. The initial relief requested, however, based on Appellants' primary argument that the persons and businesses from whom the items were seized can never be accused of, let alone charged with, committing the crimes of Living from Earnings of a Prostitute (NRS 201.320) or Advancing Prostitution (NRS 201.395) is the matter placed squarely before this Court in the instant appeal.[1]

LVMPD in its briefings below, and again in its Answering Brief, have failed to address Appellant's primary assertion and should be viewed as consenting to the district court's error. *Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010) (citation omitted) (recognizing the Court's discretion to treat a failure to argue as confession of error). Indeed, the entirety of LVMPD's argument in this

[1] In focusing in the Reply on its primary argument, Appellants do not waive the remaining arguments set forth in their Opening Brief. Appellants respectfully assert LVMPD's failure to meaningfully address its primary argument, and the consequences thereof, qualify for Reply inclusion as a "new" matter under NRAP 28(c) (limiting reply briefing to any new matter set forth in the opposing brief), but Appellants also continue to assert entitlement to relief under each argument set forth in this appeal.

regard may only be found on 2 of the 39 pages of argument made. *See* Answering Brief at pp. 25-26. And, even the most cursory reading of its claim that the district court correctly found probable cause reveals that no actual substantive argument or reference to the record exists, merely the vague and unsupported claim that "[w]hile the information currently known to Appellants is that undercover officers were solicited, that is not to say there lacks evidence to support probable cause for the act of prostitution within the search warrant materials." *See* Answering Brief at p. 26.

Unlike Appellants, LVMPD knows what is in the affidavits and could direct this Court to the same, but it chose not to do so. And in its errant effort to avoid the issue, tacitly admits that the use of undercover officers is mutually exclusive to the finding of the predicate crime of prostitution necessary to investigate criminal charges beyond the ostensibly observed "soliciting for purposes of prostitution" by Appellants' independent contractors. *See* Answering Brief at pp. 6-7. The rules have meaning, and for these procedural reasons alone, Appellants should prevail.

1. Solicitation Is Not Prostitution.

Assuming for purposes of argument that the Court overlooks the procedural opportunity to conclude this matter on procedural grounds, with each real party in interest being returned to the pre-search warrant status quo, it is incumbent upon this Court, then, to look beyond LVMPD's surface claim that any relief being

granted would act as an impediment to its investigation and to look squarely at the investigation itself.

The items seized more than eight (8) months ago, as noted in LVMPD's Answering Brief, were targeted because of a belief that each of Appellant's businesses had "an accepted culture involving prostitution." *See* Answering Brief at p. 8. The search warrants did not seek devices or documents from the independent contractors acting as entertainers who are alleged to have been observed soliciting undercover officers for the purpose of prostitution. *See* Answering Brief at pp. 6-7. The search warrants instead were directed at Appellants, two well-established adult nightclubs holding highly regulated privileged licenses, and their respective managers. These same businesses advised LVMPD in response to its Advancing Prostitution notice letters that they have no need to, nor do they in fact, condone prostitution activities on their premises and that they have otherwise taken all necessary steps to ensure their entertainers comply with the law. *See* AA000039 – AA000049. Appellants know their business operations and therefore know that the undercover operations could not implicate them for the crimes of Living from Earnings of a Prostitute (NRS 201.320) or Advancing Prostitution (NRS 201.395) because no such activities are permitted to take place and certainly no undercover police officers engaged in such activities.

This is the legal defect at the heart of the instant appeal. NRS 179.085 provides that a "person aggrieved by an unlawful search and seizure or the

deprivation of property may move the court having jurisdiction where the property was seized for the return of the property on the ground that: . . . (b) the warrant is insufficient on its face; (c) there was not probable cause for believing the existence of the grounds on which the warrant was issued; (d) the warrant was illegally executed; or (e) retention of the property by law enforcement is not reasonable under the totality of the circumstances." NRS 179.085(1). Upon a showing made pursuant to paragraphs (b) – (d), the property must be restored and deemed inadmissible at any hearing or trial. NRS 179.085(2).

The crimes of Living from the Earnings of a Prostitute (NRS 201.320) and Advancing Prostitution (NRS 201.395) each require as an essential element the act of prostitution, which is defined in statute as "engaging in sexual conduct with another person in return for a fee, monetary consideration or other thing of value." NRS 201.295(5) (emphasis added). LVMPD could not have asserted the act of prostitution in support of its search warrants, as this Court's review of the affidavits will show, because Appellants have taken the required steps to ensure prostitution does not occur on their premises, and the undercover police officers providing the affidavits for the search warrants in question could only have witnessed solicitation of prostitution by Appellants' independent contractors.

Accordingly, Appellants respectfully submit that the search warrants and search warrants affidavits in question are necessarily devoid of sufficient facts and circumstances to establish probable cause for the charges of Living from the

Earnings of a Prostitute (NRS 201.320) and Advancing Prostitution (NRS 201.395) to justify the seizure of Appellants' property, and absent such mandatory evidentiary support, the district court erred in denying Appellants' request that the search warrants be quashed.

2. The Affidavits Should Be Unsealed and Further Argument Permitted If the Court Doubts Appellants' Account of Events.

The district court further erred in overlooking the good cause reasons to unseal the search warrants and search warrants affidavits, leaving Appellants without access to the "**facts and circumstances**" LVMPD insists are the gravamen of any probable cause determination. *See* Answering Brief at pp. 25-26 (emphasis in original). Under Nevada law, search and seizure protections are embodied in Article 1, Section 18 of the Nevada Constitution and NRS 179.045(4), which sets forth that "upon a showing of good cause, [a judge or] magistrate may order [such] an affidavit ... to be sealed. [And that likewise,] [u]pon a showing of good cause, a court may cause the affidavit ... to be unsealed."

The record will show that LVMPD's investigation is tied only to allegations of solicitation of prostitution by Appellants' independent contractors at Appellants' businesses in January and March of 2022 and whether Appellants properly abated the alleged illegal activity, as required under NRS 201.395(c). All the events at issue, however, occurred prior to LVMPD's execution of its legally defective search warrants at Appellants' businesses on April 5, 2022, more than eight (8)

months ago. For this additional reason, there could be no good cause to maintain the search warrants affidavits under seal. Unsealing them will in no way impact the investigation of events that already occurred. And, to the extent the search warrants are not quashed, Appellants must be permitted the opportunity to evaluate the contents of the underlying documents to further illustrate its argument, constituting "good cause" for purposes of ordering the search warrants unsealed within the meaning of NRS 179.045(4).

It is undisputed that the blanket sealing of warrant materials is constitutionally required to be an option of last resort and should not have been the district court's default position, as was the case here. *Howard v. State*, 128 Nev. 736, 745, 291 P.3d 137, 143, n.4 (2012) (citing SRCR 3(5)(b), (c) and SRCR 3(6) in a criminal case and ruling that "sealing of an entire court file is prohibited and….should the court order sealing, it 'shall use the least restrictive means and duration'"); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3rd Cir. 1984) (noting the district court abused its discretion when it "failed to consider less restrictive means to keep this information from the public"). The Court should immediately remedy this legal error and permit further briefing, should it be necessary to fully resolve the instant appeal.

D. Reversal and Remand to the District Court Is Appropriate in the Alternative.

LVMPD is currently able to conduct unfettered searches of all information it has imaged from Appellants' devices and the documentation otherwise seized. This means that LVMPD is permitted to search all documents and devices seized without Appellants having the opportunity to redact its highly confidential and privileged information contained therein. The district court's acquiescence to LVMPD's request that its Digital Forensics Lab ("DFL") be permitted to run a search for certain names and contact information to find and segregate these materials, however, provides no guarantee that any protections pursuant to the attorney-client and accountant-client privileges will be afforded to Appellants. And if that does not occur, Appellants will have absolutely no recourse. There is no way to restore the privileged nature of information; once such information is disclosed, it is irretrievable.

NRS 49.095 unambiguously guarantees a client the right "to prevent any other person from disclosing" privileged communications, and this broad language in the statute does not allow for persons other than the client itself to use or disclose the privileged information over the client's assertion of privilege. In a corporate context, too, a client corporation is not a living entity that can make decisions independently – people must make decisions on its behalf. Thus, the

issue pertains to all persons who have the authority to assert or must hold inviolate a corporation's privilege.

In the case of Appellants, the list of names requested by the district court and subsequently provided to LVMPD numbered over 100, taking into account all the attorneys, accountants and their staff members who interact with members of Appellants' respective management teams. The district court's order allowing LVMPD, through its DFL, to proceed with and be responsible for locating and redacting all of Appellants' privileged materials in this context is legally untenable and requires this Court's intervention.

II.
CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's

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decision to deny Appellants the requested equitable relief and grant same in an Order of Reversal.

Dated this 13th day of December, 2022.

FOX ROTHSCHILD LLP

By:*/s/ Colleen E. McCarty*

DEANNA L. FORBUSH
Nevada Bar No. 6646
COLLEEN E. MCCARTY
Nevada Bar No. 13186
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899

ZACHARY M. YOUNGSMA
Nevada Bar No. 15680
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Reply Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

2. I further certify that this Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 2,641 words.

3. Finally, I hereby certify that I have read this Reply Brief and, to the best of my knowledge, information, and belief it is not frivolous or interposed for any improper purpose. I further certify that this Reply Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be

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subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of December, 2022.

FOX ROTHSCHILD LLP

By:*/s/ Colleen E. McCarty*

DEANNA L. FORBUSH
Nevada Bar No. 6646
COLLEEN E. MCCARTY
Nevada Bar No. 13186
1980 Festival Plaza Drive, Suite 700
Las Vegas, Nevada 89135
Telephone: (702) 262-6899

ZACHARY M. YOUNGSMA
Nevada Bar No. 15680
SHAFER & ASSOCIATES, P.C.
3800 Capital City Blvd., Suite 2
Lansing, Michigan 48906
Telephone: (517) 886-6560

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2022, I caused the foregoing **REPLY BRIEF OF APPELLANTS LAS VEGAS BISTRO, LLC AND LITTLE DARLINGS OF LAS VEGAS, LLC** to be served on all parties to this action by electronically filing it with the Court's e-filing system, which will electronically serve the following:

Nick D. Crosby, Esq.
ncrosby@maclaw.com
Jackie V. Nichols, Esq.
jnichols@maclaw.com
MARQUIS AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondent

/s/ Jineen DeAngelis
An employee of Fox Rothschild LLP