

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

Electronically Filed
Aug 23 2022 11:04 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

RONALD SWANSON, an individual,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County
of Clark; and THE HONORABLE SUSAN JOHNSON, District Judge, Dept. 22

Respondent,

and

SONIC CAVITATION, LLC, a Nevada limited liability company; and
GARY GEORGE, an individual,

Real Parties in Interest.

**PETITIONER'S APPENDIX
(VOLUME II OF II)
(APP. 203 - APP. 256)**

Jon T. Pearson (10182)
Erica C. Medley (13959)
Brian D. Downing (14510)
Justin E. Berkman (15869)
HOLLAND & HART LLP
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Las Vegas, Nevada 89134
(702) 669-4600
Counsel for Petitioner

INDEX TO APPENDIX IN CHRONOLOGICAL ORDER

TAB	EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
1.	Ronald Swanson's Motion to Intervene As a Plaintiff on an Order Shortening Time	2018-03-07	I	App. 001 – App. 022
2.	Amended Complaint in Intervention and Cross-Claim	2018-05-30	I	App. 023 – App. 046
3.	Sonic Cavitation, LLC's Answer to Ron Swanson's Amended Complaint in Intervention and Counterclaim	2019-06-25	I	App. 047 – App. 071
4.	Plaintiff Ronald Swanson's Reply to Sonic Cavitation, LLC's Counterclaim	2019-07-16	I	App. 072 – App. 090
5.	Plaintiff Ronald Swanson's Opposition to Sonic Cavitation's Motion to Stay Discovery Pending Resolution of: (A) Motion to Compel; and (B) Motion for Summary Judgment Order Shortening Time	2020-02-10	I	App. 091 – App. 097
6.	Court Minutes	2020-04-07	I	App. 098
7.	Amended Order Setting Civil Jury Trial	2022-04-01	I	App. 099 – App. 102
8.	Renewed Motion to Compel	2022-04-12	I	App. 103 – App. 163
9.	Ronald Swanson's Opposition to Sonic Cavitation's Renewed Motion to Compel	2022-04-26	I	App. 164 – App. 202

TAB	EXHIBIT DESCRIPTION	DATE	VOL.	PAGE NOS.
10.	Order Granting Sonic Cavitation's Renewed Motion to Compel	2022-07-06	II	App. 203 – App. 211
11.	Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel	2022-07-18	II	App. 212 – App. 225
12.	Sonic Cavitation and Gary George's" (1) Opposition to Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel; (2) Application for Order Shortening Time; and (3) Request to Extend dispositive Motion Deadline	2022-07-25	II	App. 226 – App. 233
13.	Plaintiff's Reply in Support of Motion to Reconsider Motion to Compel	2022-08-11	II	App. 234 – App. 240
14.	Recorder's Transcript of Hearing re Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel	2022-08-18	II	App. 241 – App. 256

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6	Court Minutes	2020-04-07	I	App. 098
10	Order Granting Sonic Cavitation's Renewed Motion to Compel	2022-07-06	II	App. 203 – App. 211
13	Plaintiff's Reply in Support of Motion to Reconsider Motion to Compel	2022-08-11	II	App. 234 – App. 240
11	Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel	2022-07-18	II	App. 212 – App. 225
5	Plaintiff Ronald Swanson's Opposition to Sonic Cavitation's Motion to Stay Discovery Pending Resolution of: (A) Motion to Compel; and (B) Motion for Summary Judgment Order Shortening Time	2020-02-10	I	App. 091 – App. 097
4	Plaintiff Ronald Swanson's Reply to Sonic Cavitation, LLC's Counterclaim	2019-07-16	I	App. 072 – App. 090
14	Recorder's Transcript of Hearing re Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel	2022-08-18	II	App. 241 – App. 256
8	Renewed Motion to Compel	2022-04-12	I	App. 103 – App. 163
1	Ronald Swanson's Motion to Intervene As a Plaintiff on an Order Shortening Time	2018-03-07	I	App. 001 – App. 022
9	Ronald Swanson's Opposition to Sonic Cavitation's Renewed Motion to Compel	2022-04-26	I	App. 164 – App. 202

12	Sonic Cavitation and Gary George's" (1) Opposition to Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel; (2) Application for Order Shortening Time; and (3) Request to Extend dispositive Motion Deadline	2022-07-25	II	App. 226 – App. 233
3	Sonic Cavitation, LLC's Answer to Ron Swanson's Amended Complaint in Intervention and Counterclaim	2019-06-25	I	App. 047 – App. 071

Dated: August 23, 2022

/s/ Jon T. Pearson

Jon T. Pearson (10182)
Erica C. Medley (13959)
Brian D. Downing (14510)
Justin E. Berkman (15869)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Counsel for Petitioner

CERTIFICATE OF SERVICE

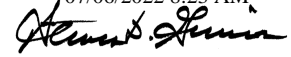
I certify that on August 23, 2022, I submitted the foregoing **PETITIONER’S APPENDIX (VOLUME II OF II) (App. 203 – App. 256)** for filing through the Court’s eFlex electronic filing system. Electronic notification will be sent to the following:

David T. Blake
PO Box 1589
Logandale, Nevada 89021
David.blake@gmail.com
Counsel for Sonic Cavitation, LLC and Gary George

I further certify that a copy of this document will be personally delivered as follows:

Honorable Susan Johnson
Department 22
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, Nevada 89155

/s/ Valerie L. Larsen
An Employee of Holland & Hart LLP


CLERK OF THE COURT

OGM

David T. Blake, Esq. (# 11059)
PO Box 1589
Logandale, Nevada 89021
Telephone: (702) 579-5529
Facsimile: N/A
david.blake@gmail.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MOMIS-RIVERS, LLC, a Delaware Limited
Liability Company,

Plaintiff,

v.

SONIC CAVITATION, LLC, a Nevada
Limited Liability Company; and Does 1-10,
unidentified,

Defendants.

RONALD SWANSON, an individual,

Plaintiff-Intervenor,

v.

SONIC CAVITATION, LLC, a Nevada
Limited Liability Company; SONIC
CAVITATION LIMITED, a foreign
corporation; CENYTH CAPITAL CORP., a
Nevada corporation; CENYTH SC USA
ANGELS, LLC, a Nevada Limited Liability
Company; CENYTH SC USA ANGELS 2,
LLC, a Nevada Limited Liability Company;
PETER DIZER, an individual; GARY
GEORGE, an individual; LORINDA
LIANG, an individual, and Does 1 - 10,
unidentified,

Defendants.

RONALD SWANSON, an individual,

Cross-Claimant,

v.

MOMIS-RIVERS, LLC, a Delaware Limited

Case No. ~~A-16~~-740207-C B
Dept. No. VI XXII

**Order Granting Sonic Cavitation's
Renewed Motion to Compel**

1 Liability Company,

2 Cross-Defendant.

3
4 SONIC CAVITATION, LLC, a Nevada
5 Limited Liability Company,

6 Counter-Claimant,

7 v.

8 RONALD DONLAN SWANSON, an
9 individual,

10 Counter-Defendant,

11 Sonic Cavitation, LLC's ("Sonic's") Renewed Motion to Compel came before this Court
12 on May 31, 2022. David Blake, Esq. appeared for movant, and Piers Tueller, Esq. of Hutchison
13 & Steffen appeared for Ronald Swanson. The Court, having considered the arguments of
14 counsel, the evidence presented, and having reviewed the pleadings and papers on file, now
15 finds and orders as follows:

16 Swanson submitted an affidavit consenting to disbarment (the "Affidavit"), executed on
17 October 19, 2018, to the District of Columbia Court of Appeals Board on Professional
18 Responsibility (the "Board"). The Board accepted the Affidavit and issued a Report and
19 Recommendation on October 29, 2018, recommending that the Court of Appeals enter an order
20 disbaring Swanson pursuant to District of Columbia Bar Rule XI ("D.C. Rule XI") § 12(b).
21 Pursuant to D.C. Rule XI § 12, the Affidavit was required to state, among other things, that
22 consent to disbarment was given freely and voluntarily, that the attorney acknowledged that the
23 material facts upon which the allegations of misconduct are predicated were true, and that the
24 attorney submitted the consent because the attorney could not successfully defend against the
25 allegations in disciplinary proceedings. Additionally, pursuant to D.C. Rule XI § 12(c), the
26 Affidavit may not be disclosed other than by order of the District of Columbia Court of Appeals
27 or consent of the attorney.
28

Swanson contends that the Affidavit is confidential and cannot be used in this Action. Sonic acknowledges that the Affidavit would be confidential, but argues that Swanson has waived any confidentiality by placing the subject matter of the Affidavit at issue under the doctrine of at-issue waiver, citing Leavitt v. Siems, 130 Nev. 503, 511, 330 P.3d 1, 7 (2014), Mitchell v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 131 Nev. 163, 168, 359 P.3d 1096, 1099–100 (2015) and other cases.

The Court finds that Swanson, through his conduct, arguments, claims, and defenses in this action placed the subject matter of his Affidavit at issue, making the Affidavit discoverable and subject to disclosure.

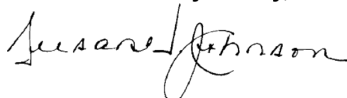
Wherefore, it is hereby ORDERED that Sonic's Renewed Motion to Compel is GRANTED. Swanson must disclose a copy of the Affidavit to Sonic as soon as reasonably possible, but no later than 7 days from the date of this Order.

It is further ORDERED that the Affidavit shall be deemed confidential. No party to this action may disclose the affidavit to any third party other than a party's attorney. Any party desiring to attach the Affidavit as an exhibit to any pre-trial document must do so under seal.

It is further ORDERED that this Order shall not be construed or interpreted as a ruling regarding the admissibility of the Affidavit, which ruling the Court specifically reserves to be made at the time of trial.

Dated this ____ day of _____, 2022.

~~Dated this 6th day of July, 2022~~



District Court Judge

Submitted by:

50B AD4 98A7 5866
Susan Johnson
District Court Judge

CLEAR COUNSEL LAW GROUP

/s/David T. Blake

David T. Blake, Esq. (#11059)

Attorney for Sonic Cavitation, LLC

///

1 ///

2 ///

3 Approved as to form and content:

4 **HUTCHISON & STEFFEN, PLLC**

5

6 *Did not agree with form/content*

Richard L. Wade, Esq. (#11879)

7 *Attorney for Ronald Swanson*

8

9

10

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From: [Rik L. Wade](#)
To: [David T. Blake](#); [Piers R. Tueller](#)
Subject: RE: Sonic Cavitation adv. Swanson - proposed order granting renewed motion to compel
Date: Wednesday, June 22, 2022 3:45:01 PM
Attachments: [image002.png](#)

CAUTION: This email originated from outside the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Please copy me when you submit. Thanks.

Rik Wade

HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
702-385-2500

From: David T. Blake <dtblake@ww.law>
Sent: Wednesday, June 22, 2022 3:17 PM
To: Rik L. Wade <RWade@hutchlegal.com>; Piers R. Tueller <ptueller@hutchlegal.com>
Subject: RE: Sonic Cavitation adv. Swanson - proposed order granting renewed motion to compel

Rik,

I don't agree with any of these changes other than the one in the first paragraph. Sonic will submit an order and Swanson will have to submit his own proposed order. I'll put a note on your signature line that you disagree with the content.

Best regards,

Dave



David T. Blake, Attorney at Law
WOLFE & WYMAN LLP
6757 Spencer Street • Las Vegas, NV 89119
Tel. (702) 476-0100 • Fax (702) 476-0101
Email: dtblake@ww.law

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From: Rik L. Wade <RWade@hutchlegal.com>
Sent: Monday, June 20, 2022 2:05 PM

To: David T. Blake <dtblake@ww.law>; Piers R. Tueller <ptueller@hutchlegal.com>
Subject: RE: Sonic Cavitation adv. Swanson - proposed order granting renewed motion to compel

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Dave,

Thanks for putting this together. Here are our changes.

Rik Wade

HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
702-385-2500

From: David T. Blake <dtblake@ww.law>
Sent: Friday, June 17, 2022 12:19 PM
To: Rik L. Wade <RWade@hutchlegal.com>; Piers R. Tueller <ptueller@hutchlegal.com>
Subject: RE: Sonic Cavitation adv. Swanson - proposed order granting renewed motion to compel

Hi Rik,

Checking in on this. I tried to keep the order as short as possible to make it easy to review. Please let me know if you have any comments.

Dave



David T. Blake, Attorney at Law
WOLFE & WYMAN LLP
6757 Spencer Street • Las Vegas, NV 89119
Tel. (702) 476-0100 • Fax (702) 476-0101
Email: dtblake@ww.law

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From: Rik L. Wade <RWade@hutchlegal.com>
Sent: Wednesday, June 15, 2022 11:07 AM
To: David T. Blake <dtblake@ww.law>; Piers R. Tueller <ptueller@hutchlegal.com>
Subject: RE: Sonic Cavitation adv. Swanson - proposed order granting renewed motion to compel

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Dave,

Thank you, we are reviewing the order.

Rik Wade

HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
702-385-2500

From: David T. Blake <dtblake@ww.law>

Sent: Tuesday, June 14, 2022 11:30 PM

To: Rik L. Wade <RWade@hutchlegal.com>; Piers R. Tueller <ptueller@hutchlegal.com>

Subject: Sonic Cavitation adv. Swanson - proposed order granting renewed motion to compel

Rik/Piers,

Attached is a draft order on Sonic's renewed motion to compel. Please review and let me know if I can put your electronic signature. Thank you.

Best regards,

Dave



David T. Blake, Attorney at Law
WOLFE & WYMAN LLP
6757 Spencer Street • Las Vegas, NV 89119
Tel. (702) 476-0100 • Fax (702) 476-0101
Email: dtblake@ww.law

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Rik L. Wade
Attorney

HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

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Rik L. Wade
Attorney


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Rik L. Wade
Attorney

[HS logo](#)


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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Momis Rivers, LLC, Plaintiff(s)

CASE NO: A-16-740207-B

7 vs.

DEPT. NO. Department 22

8 Sonic Cavitation, LLC,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
system to all recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 7/6/2022

15 Richard Wade

rwade@hutchlegal.com

16 Theresa Mains

theresa@theresamainspa.com

17 Joseph Ganley

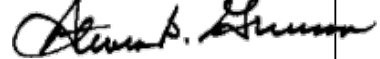
JGanley@hutchlegal.com

18 Sarah Ramo

sramo@hutchlegal.com

19 David Blake

david.blake@gmail.com



1 **MRCN**

2 Joseph R. Ganley (5643)

3 Richard L. Wade (11879)

4 HUTCHISON & STEFFEN, PLLC

5 Peccole Professional Park

6 10080 West Alta Drive, Suite 200

7 Las Vegas, NV 89145

8 Tel: (702) 385-2500

9 Fax: (702) 385-2086

10 jganley@hutchlegal.com

11 rwade@hutchlegal.com

12 *Attorneys for intervening plaintiff /*

13 *cross-claimant plaintiff Ronald Swanson*

14 **DISTRICT COURT**
15 **CLARK COUNTY, NEVADA**

16 RONALD SWANSON, an individual,

17 Plaintiff,

18 v.

19 SONIC CAVITATION, LLC, a Nevada
20 Limited Liability Company; SONIC
21 CAVITATION LIMITED, a foreign
22 corporation; CENYTH CAPITAL CORP., a
23 Nevada corporation; CENYTH SC USA
24 ANGELS, LLC, a Nevada Limited Liability
25 Company; CENYTH SC USA ANGELS 2,
26 LLC, a Nevada Limited Liability Company;
27 PETER DIZER, an individual; GARY
28 GEORGE, an individual; LORINDA LIANG,
an individual, and Does 1 - 10, unidentified,

Defendants.

Case No. A-16-740207-B

Dept. No. XXII

**PLAINTIFF RONALD SWANSON'S
MOTION TO RECONSIDER MOTION
TO COMPEL**

HEARING REQUESTED

Intervening plaintiff Ronald Swanson respectfully moves this Honorable Court to
reconsider defendants' motion to compel production of Ronald Swanson's confidential
affidavit consenting to disbarment because the order contravened an earlier ruling in the case
by Discovery Commissioner Truman already protecting the confidential affidavit and,
respectfully, this Court did not have authority to order production because the District of

1 Columbia Bar rules prohibit its disclosure, which puts Mr. Swanson in the untenable position of
2 having contradictory orders from two legal tribunals with governing authority over him, so if
3 he complies with one order he violates the other and vice versa. This motion is based on the
4 papers and pleadings on file, the attached points and authorities, EDCR 2.24, the Rules of the
5 Washington D.C. Bar Association (“D.C. Bar Rules”) and any oral argument the Court may
6 allow upon rehearing.
7

8 DATED this 18th day of July, 2022.

9 HUTCHISON & STEFFEN, PLLC

10 

11 _____
12 Joseph R. Ganley (5643)
13 Richard L. Wade (11879)
14 Peccole Professional Park
15 10080 West Alta Drive, Suite 200
16 Las Vegas, NV 89145
17 (702) 385-2500

18 *Attorneys for intervening plaintiff /*
19 *cross-claimant plaintiff Ronald Swanson*
20
21
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1 **POINTS AND AUTHORITIES**

2 “[P]ursuant to D.C. [Bar] Rule XI § 12(c), the Affidavit may not be disclosed other than
3 by order of the District of Columbia Court of Appeals or consent of the attorney.” *See* July 6,
4 2022 Order⁵; *see also* Swanson’s Competing Order, Ex. A. This language appears in both of the
5 competing orders. *Id.* Although it is unclear if the Court here has actually entered an order yet
6 on the underlying motion, either way, the Court’s ruling directly contradicts this citation
7 contained within the draft competing orders. That is, the orders contemplated to be signed by
8 this Court both admit by the very language of the orders that this Court does not have the
9 authority to order the relief requested. Because this Court is not the District of Columbia Court
10 of Appeals, it, respectfully, does not have the authority to compel Swanson to produce his
11 confidential affidavit. That affidavit was only crafted and executed in DC with the
12 understanding that it would not be seen or used by any other persons in the world outside of
13 that proceeding, so the order here is clearly erroneous and, respectfully, should be reconsidered.

14 Moreover, the movants already tried to get access to this confidential affidavit when
15 they moved the first time for production. That motion was denied when the matter was then
16 being heard by Discovery Commissioner Truman, although her Report and Recommendations
17 was never signed for unknown reasons. That decision honored D.C. Bar Rule XI that prohibits
18 production except under very narrow circumstances that do not apply here.

19 For these reasons, Swanson now respectfully requests that the Court reconsider its
20 ruling on defendants’ motion to compel. Swanson respectfully submits that that key law was
21 overlooked in making the ruling, believes the Order is clearly erroneous, and that defendants’
22 motion should not have been granted. In addition, Swanson requests that production of the
23 order be stayed until this issue has been resolved.

24 Notably, before SonCav began claiming production of the affidavit was late, Swanson
25 understood that the Court had withdrawn the order it filed on July 5, 2022. Both parties served
26 competing orders. The Court signed and filed the version drafted by Sonic Cavitation on July
27

28 _____
⁵ Swanson understood this order to have been withdrawn; defendants disagree.

1 6, 2022. That same day, Andrew Fanizzi from Department 22 sent an email to all counsel
2 stating, “This order is being returned in light of the Court signing Sonic Cavitation’s competing
3 order.” *See* Email re Order, Ex. B. The email did not contain any attachment. Swanson
4 understood the email to mean that the Court was withdrawing the order it had filed because it
5 either did not intend to sign Sonic Cavitation’s version after all, or because the Court felt the
6 order was incorrect in some way. However, no alternate order has issued since that time, and
7 SonCav’s counsel interpreted the July 6th Fanizzi email as meaning the court clerk was
8 ‘returning’ Swanson’s version of the order unsigned (but without the order actually attached).
9 That interpretation appears forced: why would an email attachment need to be ‘returned,’
10 especially when it was not attached? That said, Swanson concedes that the email was
11 ambiguous and that no other order has been entered since. It is unclear if the July 6, 2022 order
12 is the Court’s final ruling.
13
14

15 **ARGUMENT**

16 **A. This request is timely.**

17 This Court has the inherent authority to reconsider its prior orders. *See Trail v. Faretto*,
18 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). Under EDCR 2.24(b), “[a] party seeking
19 reconsideration of a ruling of the court . . . must file a motion for such relief within 14 days
20 after service of written notice of the order or judgment.”
21

22 It is unclear if the Court has ultimately filed an order (as noted above). That said, the
23 Court signed an order on July 6, 2022 before sending its rescinding email regarding that order.
24 No notice of entry has been filed and, consequently, the 14-day clock to file a motion has not
25 begun. Even if the Court counted from the day the order that was seemingly withdrawn was
26 filed, the deadline would not pass until July 20, 2022, so this motion is timely.

27 ///

28 ///

1 **B. The Court’s ruling is clearly erroneous.**

2 A district court may reconsider a previously decided issue if the prior ruling is clearly
3 erroneous. *See Masonry and Tile Contractors v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737,
4 741, 941 P.2d 486, 489 (1997). Reconsideration may be appropriate when “any material matter
5 of law or fact [] was overlooked or misapprehended in the court’s prior opinion.” *Nevius v.*
6 *Warden*, 114 Nev. 664, 667, 960 P.2d 805, 806 (1998). Here, the critical language of the D.C.
7 Bar rule was overlooked: “ the affidavit . . . shall not be publicly disclosed or made available
8 for use in any other proceeding except by order of the Court or upon written consent of the
9 attorney.” D.C. Bar Rule XI § 12(c). “The Court” is expressly defined as the District of
10 Columbia Court of Appeals. *See* D.C. Bar Rules, at Preamble, § 1. Only the District of
11 Columbia Court of Appeals has the authority to compel Swanson to produce his confidential
12 affidavit, and the Court’s ruling here is respectfully erroneous.

13 An attorney barred in the District of Columbia who is accused of misconduct may
14 consent to disbarment if the attorney “knows that if disciplinary proceedings based on the
15 alleged misconduct were brought, the attorney could not successfully defend against them.”
16 D.C. Bar rule XI, § 12. In consenting to disbarment, the attorney must provide an affidavit
17 acknowledging “material facts upon which the allegations of misconduct are predicated.” *Id.*
18 Notably, although the order disbarring the attorney is a public record, it is specially and
19 narrowly restricted: the confidential affidavit “shall not be publicly disclosed or made
20 available for use in any other proceeding except by order of the Court or upon written consent
21 of the attorney.” *Id.* “The Court” is expressly defined as the District of Columbia Court of
22 Appeals. *See* D.C. Bar Rules, at Preamble, § 1. Consequently, the sole Court with the
23 authority to compel production of Swanson’s confidential affidavit is the District of Columbia
24 Court of Appeals.

1 Defendant did not move the District of Columbia Court of Appeals for the relief it seeks
2 because it is trying to run an end-around that prevailing law. Notably, however, both
3 competing orders expressly acknowledge and state this jurisdictional limitation: “[P]ursuant to
4 D.C. [Bar] Rule XI § 12(c), **the Affidavit may not be disclosed other than by order of the**
5 **District of Columbia Court of Appeals** or consent of the attorney.” *See* July 6, 2022 Order
6 (emphasis added); *see also* Swanson’s Competing Order (emphasis added), Ex. A. The
7 language of both competing orders (including the one initially filed by the Court) expressly
8 state that the Court lacks the authority to make this ruling. Therefore, it is clearly erroneous
9 and should be reconsidered.
10
11

12 Conclusion

13 Although it is unclear if the Court has issued a final order, respectfully, the Court lacks
14 the inherent authority to compel Swanson to produce his confidential affidavit. SonCav must
15 seek an order from the District of Columbia Court of Appeals if it wishes to have this affidavit
16 compelled. Therefore, the Court should reconsider the ruling on defendants’ motion to compel.
17

18 DATED this 18th day of July, 2022.

19 

20 Joseph R. Ganley (5643)
21 Richard L. Wade (11879)
22 HUTCHISON & STEFFEN, PLLC

23 *Attorneys for plaintiff Ronald Swanson*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 18th day of July, 2022, I caused the document entitled **PLAINTIFF RONALD SWANSON’S MOTION TO RECONSIDER MOTION TO COMPEL** to be electronically served through the Eighth Judicial District Court’s electronic filing system pursuant to NEFCR (9) on the following:

David T. Blake, Esq.
PO Box 1589
Logandale, Nevada 89021

david.blake@gmail.com
Attorney for Sonic Cavitation, LLC and Gary George

/s/ Sarah Ramo

An employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY



EXHIBIT A

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ORDER
Joseph R. Ganley, Esq.
Richard L Wade, Esq.
Hutchison & Steffen, PLLC
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada, 89145
702-385-2500
rwade@hutchlegal.com

Attorney for Ronald Swanson

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MOMIS-RIVERS, LLC, a Delaware Limited
Liability Company,

Plaintiff,

v.

SONIC CAVITATION, LLC, a Nevada
Limited Liability Company; and Does 1-10,
unidentified,

Defendants.

RONALD SWANSON, an individual,

Plaintiff-Intervenor,

v.

SONIC CAVITATION, LLC, a Nevada
Limited Liability Company; SONIC
CAVITATION LIMITED, a foreign
corporation; CENYTH CAPITAL CORP., a
Nevada corporation; CENYTH SC USA
ANGELS, LLC, a Nevada Limited Liability
Company; CENYTH SC USA ANGELS 2,
LLC, a Nevada Limited Liability Company;
PETER DIZER, an individual; GARY
GEORGE, an individual; LORINDA
LIANG, an individual, and Does 1 - 10,
unidentified,

Defendants.

Case No. A-16-740207-C
Dept. No. VI

**Order Granting Sonic Cavitation's
Renewed Motion to Compel**

1 RONALD SWANSON, an individual,
 2 Cross-Claimant,
 3 v.
 4 MOMIS-RIVERS, LLC, a Delaware Limited
 5 Liability Company,
 6 Cross-Defendant.
 7 SONIC CAVITATION, LLC, a Nevada
 8 Limited Liability Company,
 9 Counter-Claimant,
 10 v.
 11 RONALD DONLAN SWANSON, an
 12 individual,
 13 Counter-Defendant,

13 Sonic Cavitation, LLC's ("Sonic's") Renewed Motion to Compel came before this Court
 14 on May 31, 2022. David Blake appeared for movant, and Piers Tueller of Hutchison & Steffen
 15 appeared for Ronald Swanson. The Court, having considered the arguments of counsel, the
 16 evidence presented, and having reviewed the pleadings and papers on file, now finds and orders
 17 as follows:

18 Swanson submitted an affidavit consenting to disbarment (the "Affidavit"), executed on
 19 October 19, 2018, to the District of Columbia Court of Appeals Board on Professional
 20 Responsibility (the "Board"). The Board accepted the Affidavit and issued a Report and
 21 Recommendation on October 29, 2018, recommending that the Court of Appeals enter an order
 22 disbaring Swanson pursuant to District of Columbia Bar Rule XI ("D.C. Rule XI") § 12(b).
 23 Pursuant to D.C. Rule XI § 12(c), the Affidavit may not be disclosed other than by order of the
 24 District of Columbia Court of Appeals or consent of the attorney.

25 Swanson contends that the Affidavit is confidential and cannot be used in this Action.
 26 Sonic acknowledges that the Affidavit would be confidential, but argues that Swanson has
 27 waived any confidentiality by placing the subject matter of the Affidavit at issue under the
 28 doctrine of at-issue waiver, citing Leavitt v. Siems, 130 Nev. 503, 511, 330 P.3d 1, 7 (2014),

1 and Mitchell v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 131 Nev. 163, 168, 359
2 P.3d 1096, 1099–100 (2015).

3 The Court finds that based on the claims, and defenses in this action the Affidavit
4 contains relevant information that is discoverable and subject to disclosure.

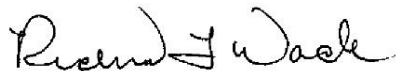
5 Wherefore, it is hereby ORDERED that Sonic's Renewed Motion to Compel is
6 GRANTED.

7 It is further ORDERED that the Affidavit shall be deemed confidential. No party to this
8 action may disclose the affidavit to any third party other than a party's attorney. Any party
9 desiring to attach the Affidavit as an exhibit to any pre-trial document must do so under seal.

10 It is further ORDERED that this Order shall not be construed or interpreted as a ruling
11 regarding the admissibility of the Affidavit, which ruling the Court specifically reserves to be
12 made at the time of trial.

13
14
15
16 Submitted by: _____

17 HUTCHISON & STEFFEN, PLLC

18 

19 _____
20 Richard L. Wade, Esq. (11879)

21 *Attorney for Ronald Swanson*
22
23
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EXHIBIT PAGE ONLY



EXHIBIT B

Sarah Ramo

From: Fanizzi, Andrew <Dept22LC@clarkcountycourts.us>
Sent: Wednesday, July 6, 2022 9:04 AM
To: Rik L. Wade; David T. Blake
Cc: Piers R. Tueller
Subject: RE: A-16-740207-B - proposed order on motion to compel

Good morning,

This order is being returned in light of the Court signing Sonic Cavitation's competing order.

Thank you,

Andrew Fanizzi

Law Clerk to the Honorable Susan Johnson
Eighth Judicial District Court – Dept. XXII
Clark County – Regional Justice Center
Tel: (702) 671-0551
Fax: (702) 671-0571

From: Rik L. Wade <RWade@hutchlegal.com>
Sent: Tuesday, June 28, 2022 9:43 AM
To: David T. Blake <dtblake@ww.law>; DC22Inbox <DC22Inbox@clarkcountycourts.us>
Cc: Piers R. Tueller <ptueller@hutchlegal.com>
Subject: RE: A-16-740207-B - proposed order on motion to compel

[NOTICE: This message originated outside of Eighth Judicial District Court -- DO NOT CLICK on links or open attachments unless you are sure the content is safe.]

Here is the competing order in Word and PDF format.

Rik Wade

HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
702-385-2500

From: Rik L. Wade
Sent: Tuesday, June 28, 2022 9:25 AM
To: David T. Blake <dtblake@ww.law>; dc22inbox@clarkcountycourts.us
Cc: Piers R. Tueller <ptueller@hutchlegal.com>
Subject: RE: A-16-740207-B - proposed order on motion to compel

Good morning,

Here is Ronald Swanson's competing order.

Rik Wade

HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
702-385-2500

From: David T. Blake <dtblake@ww.law>

Sent: Tuesday, June 28, 2022 9:18 AM

To: dc22inbox@clarkcountycourts.us

Cc: Rik L. Wade <RWade@hutchlegal.com>; Piers R. Tueller <ptueller@hutchlegal.com>

Subject: A-16-740207-B - proposed order on motion to compel

Please see the attached proposed order on Sonic Cavitation Inc.'s Renewed Motion to Compel. The opposing party disagreed as to form/content and the email string so indicating follows the proposed order. Opposing counsel is copied on this email. Please let me know if you need anything else.

Best regards,

Dave



David T. Blake, Attorney at Law
WOLFE & WYMAN LLP
6757 Spencer Street • Las Vegas, NV 89119
Tel. (702) 476-0100 • Fax (702) 476-0101
Email: dtblake@ww.law

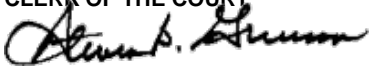
This message is intended only for the use of the individual or entity to which it is addressed, and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via the U.S. Postal Service. You will be promptly reimbursed for all costs of mailing. Thank you.

Rik L. Wade
Attorney



HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.



David T. Blake, Esq. (# 11059)
PO Box 1589
Logandale, Nevada 89021
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Facsimile: N/A
david.blake@gmail.com

**DISTRICT COURT
CLARK COUNTY, NEVADA**

MOMIS-RIVERS, LLC, a Delaware Limited
Liability Company,

Plaintiff,

v.

SONIC CAVITATION, LLC, a Nevada
Limited Liability Company; and Does 1-10,
unidentified,

Defendants.

Case No. A-16-740207-B
Dept. No. XXII

Sonic Cavitation and Gary George's:

**(1) Opposition to Plaintiff Ronald
Swanson's Motion to Reconsider
Motion to Compel;**

**(2) Application for Order Shortening
Time;**

and

**(3) Request to Extend dispositive
Motion Deadline.**

RONALD SWANSON, an individual,

Plaintiff-Intervenor,

v.

SONIC CAVITATION, LLC, a Nevada
Limited Liability Company; SONIC
CAVITATION LIMITED, a foreign
corporation; CENYTH CAPITAL CORP., a
Nevada corporation; CENYTH SC USA
ANGELS, LLC, a Nevada Limited Liability
Company; CENYTH SC USA ANGELS 2,
LLC, a Nevada Limited Liability Company;
PETER DIZER, an individual; GARY
GEORGE, an individual; LORINDA
LIANG, an individual, and Does 1 - 10,
unidentified,

Defendants.

1 RONALD SWANSON, an individual,
2 Cross-Claimant,
3 v.
4 MOMIS-RIVERS, LLC, a Delaware Limited
5 Liability Company,
6 Cross-Defendant.
7 SONIC CAVITATION, LLC, a Nevada
8 Limited Liability Company,
9 Counter-Claimant,
10 v.
11 RONALD DONLAN SWANSON, an
12 individual,
13 Counter-Defendant,

14 Sonic Cavitation, LLC (“Sonic”) and Gary George hereby oppose Plaintiff’s Motion to
15 Reconsider Motion to Compel (the “Motion to Reconsider”) and request that the court hear
16 Swanson’s Motion to Reconsider on shortened time as argued in more detail below.

17 **I.**

18 **Declaration of David T. Blake in support of Application for Order Shortening Time and**
19 **Request to Extend Dispositive Motion Deadline**

- 20 1. I am an attorney licensed to practice in the State of Nevada.
21 2. I am over the age of 18 and am competent to testify regarding the matters stated
22 herein.
23 3. I am the attorney of record for Defendants Sonic Cavitation, LLC, Cenyth SC
24 USA Angels, LLC, and Gary George (collectively “Defendants”).
25 4. I make this Declaration in support of Defendants’ request for an order shortening
26 time and extend dispositive motion deadline.
27 5. A jury trial is set for this case to occur sometime in the 5-week stack starting on
28 October 10, 2022 at 9:30 am.
6. Given the age of this case, it is very unlikely that any other matter on the October

1 10 trial stack will commence before this case.

2 7. Pretrial briefing deadlines are pending as the case approaches trial. Defendants
3 intend to file a motion for summary judgment prior to trial, but Swanson refuses to disclose a
4 key piece of evidence prior to trial.

5 8. The Court recently ordered Swanson to disclose an affidavit consenting to
6 disbarment (the "Affidavit") in the District of Columbia. *See* July 6, 2022 Order, on file herein.

7 9. As previously briefed to the court, the Affidavit contains an admission that may
8 dispose of most or all of the issues that Swanson is raising in this action.

9 10. Swanson seeks reconsideration of this Court's order compelling him to disclose
10 the Affidavit and a hearing is scheduled on the Motion for Reconsideration on August 18, 2022
11 at 9:00 am.

12 11. Resolving the Motion to Reconsider on or after August 18 would result in
13 additional delay and place the resolution of Defendant anticipated motion for summary
14 judgment close to the eve of trial.

15 12. Defendants request that the Court shorten the time for hearing on Swanson's
16 Motion to Reconsider so that disclosure of the Affidavit may be compelled and allow
17 Defendants sufficient time to file their summary judgment motion after Swanson discloses the
18 Affidavit.

19 13. A proposed Order Shortening Time Follows this Motion.

20 I declare under penalty of perjury that the foregoing is true and correct.

21 Dated: July 25, 2022.

22
23 /s/ David T. Blake
David T. Blake (#11059)

24 **II.**

25 **Background**

26 This case is a dispute between Sonic Cavitation and its former general counsel, Plaintiff-
27 in-intervention Ronald Swanson. A key document in the case is a Specification of Charges filed
28

1 against Swanson before the District of Columbia Court of Appeals Board on Professional
2 Responsibility. *See* Exhibit A to April 12, 2022 Renewed Motion to Compel on file herein.
3 Swanson submitted an affidavit consenting to disbarment (the “Affidavit”) rather than defend
4 the charges against him. The Specification of Charges is a detailed document that details
5 wrongdoing by Swanson that comprises 20 pages and 74 paragraphs. By consenting to
6 disbarment, Swanson was required to admit the material facts alleged against him were true. *See*
7 July 6, 2022 order, on file herein. As argued in detail in the Renewed Motion to Compel, many
8 of the factual allegations that Swanson asserts in this action are also address in the Specification
9 of Charges and, by necessity, the Affidavit in which Swanson admits that the material
10 allegations against him are true. *See* Renewed Motion to Compel at 2-5.

11 As argued below, Swanson’s Motion to Reconsider is meritless and should be rejected.
12 Additionally, the court should extend the time for dispositive motions until after Swanson has
13 disclosed the Affidavit.

14 **III.**

15 **Argument**

16 **A. The Motion to Reconsider Must be Denied because Swanson placed the contents of** 17 **the Affidavit at issue and this court may compel its disclosure.**

18 Swanson’s Motion to Reconsider raises one and only one argument in support of
19 reconsideration. Swanson argues that the only court that may order disclosure of the affidavit is
20 the District of Columbia Court of appeals. *See* Motion to Reconsider at 5:26-28. In essence,
21 Swanson is arguing that the affidavit must remain confidential because no court with authority
22 has deemed the affidavit non-confidential.¹ This argument misconstrues or misunderstands the
23 policy, purpose, and consequence of the at-issue waiver doctrine on which the court compelled

24
25
26 ¹ To the extent that Swanson is arguing that the at-issue waiver dispute must have been
27 resolved by the District of Columbia Court of Appeals, he is in error. Swanson cites to no
28 rule that vests exclusive jurisdiction and authority with the District of Columbia Court of
Appeals to resolve all discovery matters touching on the confidentiality of an affidavit
consenting to disbarment. Moreover, such a rule would violate principles of extraterritorial
enforcement of state law.

1 disclosure of the Affidavit. The at-issue waiver doctrine is not a judicial mechanism that gives
2 courts discretion to determine that confidential information be disclosed according to the
3 discovery needs of the case. In other words, it is not a rule that allows a court to order that
4 confidential information “be publicly disclosed or made available for use in any other
5 proceeding . . .” See D.C. Bar Rule XI § 12. Sonic did not rely on this language or exception to
6 disclosure in its motion to compel. Swanson’s Motion to Reconsider, therefore, misses the mark
7 in identifying error in the Court’s decision. Instead, the at-issue waiver doctrine can be used
8 only in limited circumstances where (a) disclosure of confidential information may be consented
9 to by a litigant (e.g. situations involving attorney client privilege or private health information)
10 and (b) the litigant places the contents of the confidential information at issue. There is not
11 dispute that the court in which the lawsuit is filed is the court that will resolve discovery issues,
12 including issues relating to the at-issue waiver doctrine. Swanson does not dispute this and cites
13 to no case that would suggest otherwise.

14 And the at-issue waiver doctrine arises not because a court deems the information non-
15 confidential but because of the conduct of one party to the litigation. The at-issue doctrine has
16 been applied many contexts where the information would otherwise be deemed confidential
17 absent a waiver by a party. See Wardleigh v. Second Judicial Dist. Court In & For Cty. of
18 Washoe, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995) (attorney-client privilege); JPMorgan
19 Chase Funding Inc. v. Cohan, 134 A.D.3d 455, 456, 20 N.Y.S.3d 363, 364 (N.Y. App. Div.
20 2015) (tax returns); Hudson Specialty Ins. Co. v. Haley & Aldrich, Inc., 159 A.D.3d 1344, 1345,
21 73 N.Y.S.3d 812, 814 (N.Y. App. Div. 2018) (Insurance and subrogation claim files); State v.
22 Davis, 522 S.W.3d 360, 369 (Mo. Ct. App. 2017) (statements to probation officer). Assertion of
23 an affirmative defense can operate as an at issue waiver. See Village Bd. of Vil. of Pleasantville
24 v. Rattner, 130 A.D.2d 654, 655 (1987); McGrath v. Nassau Cty. Health Care Corp., 204 F.R.D.
25 240, 247 (E.D.N.Y. 2001).

26 The attorney-client privilege example highlights the error of Swanson’s reasoning. A
27 court cannot compel disclosure of privileged information absent statutory authority, no matter
28 how relevant the privileged information. Nevertheless, a court can compel disclosure of

1 privileged because a party places the information at issue in the litigation, which would result in
2 unfairness to the opposing party. As noted by the Nevada Supreme Court:

3 this . . . rule promotes fairness . . . and discourages abuse of the privilege; it
4 prevents the patient from putting his physical or mental condition in issue and
5 then asserting the privilege to prevent an adversary from obtaining evidence that
6 might rebut the patient's claim.

7 Mitchell v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark, 131 Nev. 163, 168, 359
8 P.3d 1096, 1099–100 (2015).

9 The waiver of confidentiality can occur with sealed or confidential court records similar
10 to those Swanson. For example, in Green v. Montgomery, 95 N.Y.2d 693, 700, 746 N.E.2d
11 1036, 1041 (2001), the New York Court of Appeals examined various cases where a party
12 waived confidentiality of prior juvenile or sealed court records by affirmatively placing facts
13 arising from the records at issue. The Court specifically noted that courts have “consistently
14 held that the statutory protection is waived” when a party “affirmatively places the conduct at
15 issue by bringing a civil suit.” In such instances, the privilege or confidentiality “may not be
16 used as a sword to gain an advantage in a civil action.” See id. And “[s]elective disclosure is not
17 permitted as a party may not rely on the protection of the privilege regarding damaging
18 communications while disclosing other self-serving communications.” Deutsche Bank Tr. Co.
19 of Americas v. Tri-Links Inv. Tr., 43 A.D.3d 56, 64, 837 N.Y.S.2d 15, 23 (2007).

20 Thus, Swanson’s Motion to Reconsider erroneously attempts to divest this Court of its
21 authority to resolve an ordinary and routine discovery issue in this case. The at-issue waiver
22 doctrine applies because Swanson, not the D.C. Court of Appeals, not this Court, and not any
23 other court, entity, or party, can waive the confidentiality of the Affidavit. The Court correctly
24 held that Swanson placed the contents of the Affidavit at issue by affirmatively making
25 numerous allegations, assertions, defenses, and arguments in this action that make the Affidavit
26 relevant. In fact, Swanson is a plaintiff-in-intervention in this case. He became the plaintiff-in-
27 interest by affirmatively filing a motion to be the Plaintiff in this case when the original
28 plaintiff, Momis-Rivers, was about to dismiss the action.

 Finally, this is not a situation where Swanson has no choice but to disclose the Affidavit.

1 An injured plaintiff can maintain the confidentiality of his or her medical records by not filing a
2 lawsuit. If Swanson wishes the Affidavit to remain confidential, he can withdraw his claims
3 against Defendants and withdraw his assertions which place the contents of the Affidavit at
4 issue.

5 **B. The Court should extend the dispositive motion deadline until 30 days after**
6 **Swanson discloses the Affidavit.**

7 As noted above, Defendants intend to file a motion for summary judgment based on the
8 contents of the Affidavit, but Swanson still disputes disclosure of the Affidavit. The Affidavit is
9 a signed statement under oath that is highly relevant to issues to be addressed on summary
10 judgment. Good cause exists to extend the deadline.

11 **IV.**

12 **Conclusion**

13 The D.C. Bar Rules provide that either Swanson or the District of Columbia Court of
14 Appeals can disclose the Affidavit. Here, Swanson placed the Affidavit at issue, thereby waiving
15 any objection to the confidentiality of the Affidavit. This Court certainly has the authority to
16 enforce the at-issue waiver doctrine and correctly held that Swanson placed the Affidavit at issue
17 and compel disclosure of the Affidavit. The Court should deny the Motion to Reconsider.
18 Additionally, the Court should extend the dispositive motion deadline to 30 days after Swanson
19 discloses the Affidavit.

20 Dated: July 25, 2022

21 /s/ David T. Blake

22 David T. Blake (#11059)

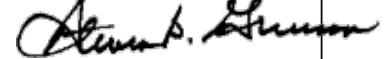
ORDER SHORTENING TIME

Upon the Declaration of David T. Blake, Esq. and good cause appearing therefore:

IT IS HEREBY ORDERED that the **Plaintiff Ronald Swanson's Motion to Reconsider Motion to Compel** shall be heard in Department 22 at the Regional Justice Center located at 200 Lewis Avenue on the _____ day of _____, 2022, at the hour of _____ am/pm.

Dated: _____.

DISTRICT COURT JUDGE



RPLY

Jon T. Pearson (10182)
Brian D. Downing (14510)
Justin E. Berkman (15869)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
(702) 669-4600
(702) 669-4650 fax
jtpearson@hollandhart.com
bddowning@hollandhart.com
jeberkman@hollandhart.com

Counsel for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

RONALD SWANSON, an individual,

Intervenor Plaintiff,

v.

SONIC CAVITATION, LLC, a Nevada limited liability company; SONIC CAVITATION LIMITED, a foreign corporation; CENYTH CAPITAL CORP., a Nevada corporation; CENYTH SC USA ANGELS, LLC, a Nevada limited liability company; PETER DIZER, an individual; GARY GEORGE, an individual; LORINDA LIANG, an individual, and DOES 1 - 10, unidentified,

Defendants.

And All Related Claims.

Case No. A-16-740207-B

Dept. No. 22

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO RECONSIDER MOTION TO
COMPEL**

Hearing Date: Aug. 18, 2022

Hearing Time: 9:00 AM

PRELIMINARY STATEMENT

Plaintiff moved for reconsideration of the Court's order compelling Plaintiff to produce a confidential affidavit relating to Plaintiff's consensual disbarment from the District of Columbia Bar. Reconsideration is warranted for two reasons. *First*, this Court lacks the authority to compel Plaintiff to produce a highly confidential affidavit. D.C. Bar Rules are clear: "the affidavit required . . . *shall not* be publicly disclosed or made available for use in *any other proceeding* except by order of the [D.C.] Court [of Appeals] or upon written consent of the attorney." D.C. Bar Rule XI

Even if the doctrine applies to confidential communications, something the Nevada Supreme Court has never held, Plaintiff has not placed the contents of the confidential affidavit at issue, and will never need to rely on the contents of that affidavit to prevail. Defendants' analogy that an injured plaintiff can only maintain the confidentiality of his medical records by not suing is an apples to pork rinds comparison. Plaintiff is not seeking damages arising from his consensual disbarment, and he never placed his voluntary disbarment at issue. Defendants, however, want this Court to conflate the confidential affidavit as being potentially "relevant" to claims and defenses with it being "at issue." But Nevada law states that at-issue waiver occurs when the holder of the privilege "will be forced to draw upon the privileged communication at trial in order to prevail." *Wardleigh v. Second Jud. Dist. Court*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995).

21 || **ARGUMENT**

Defendants’ opposition provides no case law, statutory authority, or any other authority that allows this Court to disregard the plain language of D.C. Bar Rule XI § 12(c), and effectively usurp the authority and jurisdiction of the D.C. Court of Appeals. Under that rule, although the order disbarring an attorney on consent shall be a matter of public record, “the affidavit required . . . *shall not* be publicly disclosed or made available for use in *any other proceeding* except by

1 order of the Court or upon written consent of the attorney.” D.C. Bar Rule XI § 12(c) (emphasis
2 supplied). Because the D.C. Court of Appeals has not ordered the disclosure of the confidential
3 affidavit, and Plaintiff will not provide his consent for such disclosure, the Court cannot compel
4 Plaintiff to produce the confidential affidavit. In fact, because the confidential affidavit cannot be
5 “made available for use in any other proceeding” *unless* ordered by the D.C. Court of Appeals or
6 upon written consent of the attorney, the confidential affidavit is not discoverable under Rule 26
7 of the Nevada Rules of Civil Procedure. By not being discoverable, there is no basis for this Court
8 to compel its production.

9 In *In re Brown*, for example, a former attorney petitioned the D.C. Court of Appeals for
10 reinstatement after his consensual disbarment. 617 A.2d 194, 194 (Ct. App. D.C. 1992). Following
11 Brown’s disbarment in D.C., the Virginia State Bar Disciplinary Board (“Board”) considered
12 reciprocal disciplinary action against him. *Id.* at 195. The Board reviewed Brown’s affidavit to the
13 D.C. Bar in determining the disciplinary measures it would impose, and the D.C. Court of Appeals
14 noted that, under D.C. Bar Rule XI § 12(c), the Virginia Board was only permitted to review
15 Brown’s affidavit because Brown provided a copy of it to the Board. *See id.*, n.5. If another
16 jurisdiction’s bar, which is expressly authorized to oversee the professional conduct of its
17 members, must comply with the D.C. Bar Rule, then this Court must abide by it in a matter in
18 which Plaintiff’s confidential affidavit is far less relevant, if at all. For these reasons, Defendants
19 must seek an order from the D.C. Court of Appeals to obtain Plaintiff’s confidential affidavit.¹

20 **B. The At-Issue Waiver Doctrine Only Applies to Privileged Communications**

21 Defendants’ opposition erroneously applies the at-issue waiver doctrine to argue that the
22 Court properly ordered the production of the confidential affidavit. Defendants, however, ignored

23
24 ¹ D.C. Bar Rule XI § 17(f) requires Disciplinary Counsel to file a written request with the Board
25 for permission to communicate information about any disciplinary matter to, among others, law
26 enforcement agencies, state or federal attorney disciplinary agency, board, or committee that has
27 a legitimate interest in such matter. Permission to communicate such information may be granted,
28 in writing, by the Chairperson of the Board or the Chairperson’s designated Board member upon
good cause shown and subject to any limitations or conditions the Board may impose, including
appropriate protections of confidentiality. If Disciplinary Counsel must obtain permission, there
is no reason to believe that a foreign jurisdiction can simply compel the production without
requiring a litigant to seek permission from the appropriate court—here, the D.C. Court of
Appeals.

1 Nevada’s definition of the at-issue waiver doctrine. The Nevada Supreme Court stated that the
2 doctrine only applies to privileged communications. *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Court*
3 *of Nev.*, 133 Nev. 369, 380, 399 P.3d 334, 345 (2017) (“The at-issue waiver doctrine applies where
4 the client has placed at issue the substance or content of a privileged communication.”); *Wardleigh*,
5 111 Nev. at 355; *Mitchell v. Eighth Jud. Dist. Court of Nev.*, 131 Nev. 163, 168, 348 P.3d 675,
6 678 (2015) (“[T]his . . . rule promotes fairness . . . and discourages abuse of the privilege.”) The
7 confidential affidavit here is not a privileged communication, and Defendants offer no explanation
8 or support for why this Court should disregard Nevada’s definition of the at-issue waiver doctrine.
9 Defendants instead equate “confidential information” with “privileged communications,” hoping
10 the Court will overlook Nevada Supreme Court precedent. (*See* Opposition to Motion for
11 Reconsideration at 5–6) Because the at-issue waiver doctrine does not apply, and because D.C.
12 Bar Rule requires Defendants to seek the appropriate relief before the D.C. Court of Appeals, the
13 Court should reconsider its decision and deny Defendants’ motion to compel.

14 **C. Even If the At-Issue Waiver Doctrine Applied, Plaintiff Never Made the Contents of**
15 **the Confidential Affidavit “At Issue”**

16 Even if the Court finds that the at-issue waiver doctrine applies to confidential
17 communications or documents, which it should not, and simply disregards the plain language of
18 D.C. Bar Rule XI § 12(c), which it should not, Plaintiff should not be compelled to produce the
19 confidential affidavit because Plaintiff never made the contents of the confidential affidavit “at
20 issue.” The Nevada Supreme Court explained that the attorney-client privilege is “intended as a
21 shield, not a sword. *Wardleigh*, 111 Nev. at 354, 891 P.2d at 1186. Put another way, when “a party
22 seeks an advantage in litigation by revealing part of a privileged communication, the party shall
23 be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of
24 that which was partially disclosed.” *Id.* (internal citations and quotations omitted; emphasis
25 added); *see also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, Nos. 93 Civ. 6876
26 (KMW, 94 Civ. 1317 (KMW), 1995 WL 598971 at *6 (S.D.N.Y. Oct. 11, 1995) (“[Waiver] aims
27 to prevent prejudice to a party and distortion of the judicial process that may be caused by the
28 privilege-holder’s selective disclosure during the litigation.”) (internal quotations and citations

1 omitted).² Case law presumes as a factual predicate to finding “at issue” waiver that the disclosing
2 party will actually rely on the privileged communications. *Windsor Secs, LLC v. Arent Fox LLP*,
3 273 F. Supp. 3d 512, 519 (S.D.N.Y. 2017). To apply the at-issue waiver doctrine to confidential
4 communications that are not privileged, the Court would need to decide whether Plaintiff has
5 caused the contents of the confidential affidavit to be “at issue.” He has not.

6 Plaintiff has not used the confidential affidavit as a sword by partially disclosing its
7 contents or affirmatively relying on it to support his claims or defenses. And Defendants offered
8 no meaningful analysis showing that Plaintiff relied, or will rely, on the confidential affidavit to
9 support his claims or defenses. Defendants instead merely state that “Swanson placed the contents
10 of the Affidavit at issue by affirmatively making numerous allegations, assertions, defenses, and
11 arguments in this action that make the Affidavit relevant.” (Opposition to Motion for
12 Reconsideration at 6) Although the Court’s order contains the same language, it does not appear
13 that any specific findings were made by the Court that would support that statement. (*See* Order
14 Granting Renewed Motion to Compel dated July 6, 2022; Court’s Minutes dated May 31, 2022)
15 But relevance does not necessarily equate to “at issue,” and D.C. Bar Rule XI § 12(c) makes clear
16 that it cannot be used in this proceeding.

17 Still, Plaintiff alleges that Defendants filed a Bar Complaint containing untrue statements
18 against Plaintiff, that Plaintiff could not rebut Defendants’ allegations because Defendants had
19 stolen Plaintiff’s hard drive, and because Defendants possessed the hard drive containing
20 documents that would have exculpated Plaintiff, Plaintiff was forced to consent to disbarment
21 rather than engage in a protected, expensive legal battle with the D.C. Bar. (*See* Opposition to
22

23 ² *See also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (“However, the attorney-client
24 privilege cannot at once be used as a shield and a sword. . . . A defendant may not use the privilege to
25 prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.”)
26 (internal citations omitted); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996) (“The
27 doctrine of waiver of the attorney-client privilege is rooted in notions of fundamental fairness. Its principal
28 purpose is to protect against the unfairness that would result from a privilege holder selectively disclosing
privileged communications to an adversary, revealing those that support the cause while claiming the
shelter of the privilege to avoid disclosing those that are less favorable.”); *cf.*, *In re Residential Capital, LLC*,
491 B.R. 63, 69-70 (S.D.N.Y. 2013) (forbidding a party from using certain “cherry pick[ed]”
selectively disclosed advice of counsel at trial because of their tactic of invoking attorney-client privilege
during the litigation); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 (Del. Ch. 2000) (same).

1 Renewed Motion to Compel filed on April 26, 2022) The consensual order for disbarment is a
2 public record. The contents of the confidential affidavit are not. And the contents of the
3 confidential affidavit are pointless and will not be used by Plaintiff to support his claims or
4 defenses. Defendants could have pursued the release of the confidential affidavit from the D.C.
5 Court of Appeals, and they could have sought to take Plaintiff's deposition in this lawsuit. They
6 chose not to. Because Defendants did not provide more, and cannot provide more, the contents of
7 the confidential affidavit cannot be found to be "at issue." Thus, Plaintiff has not waived the
8 confidentiality of the affidavit.³

9 **CONCLUSION**

10 For these reasons, the motion for reconsideration should be granted, and Defendants'
11 renewed motion to compel should be denied.

12 Dated: August 11, 2022

13 /s/ Jon T. Pearson

14 Jon T. Pearson

15 Brian D. Downing

16 Justin E. Berkman

17 HOLLAND & HART LLP

18 9555 Hillwood Drive, 2nd Floor

19 Las Vegas, Nevada 89134

20 *Counsel for Plaintiff*

21
22
23
24
25
26 ³ Although Defendants' request to extend the dispositive motion deadline does not comply with
27 EDCR 2.25, Plaintiff takes no position other than make clear that the dispositive motion deadline
28 should not be based on when the confidential affidavit is disclosed but when the issue on whether
it must be disclosed is fully resolved, including any writ of mandamus or writ of prohibitions are
resolved by the Nevada Supreme Court, if necessary.

CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2022, an accurate copy of **Plaintiff's Reply In Support Of Motion To Reconsider Motion To Compel** was served by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

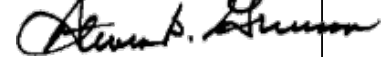
David T. Blake
PO Box 1589
Logandale, Nevada 89021
David.blake@gmail.com

*Counsel for Sonic Cavitation, LLC and
Gary George*

/s/ Valerie Larsen

An Employee of Holland & Hart LLP

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1 TRAN

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA
5

6
7 MOMIS RIVERS

8 Plaintiff,

9 vs.

10 SONIC CAVITATION, LLC

11 Defendant.
12

CASE NO. A-16-740207-B

DEPT. XXII

13 BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

14 **AUGUST 18, 2022**

15 **RECORDER'S TRANSCRIPT OF HEARING RE**

16 ***PLAINTIFF RONALD SWANSON'S MOTION TO RECONSIDER MOTION TO***
17 ***COMPEL***

18
19
20 **APPEARANCES:**

21 For Ronald Swanson:

BRIAN DOWNING, ESQ.

22
23 For the Defendant:

DAVID BLAKE, ESQ.

24
25 **RECORDED BY: NORMA RAMIREZ, COURT RECORDER**

1 THURSDAY, AUGUST 18, 2022 AT 9:10 A.M.

2
3 THE COURT: Momis Rivers, LLC versus Sonic Cavitation, LLC, case number
4 A16-740207-B.

5 MR. BLAKE: Good morning, Your Honor. David Blake, bar number 11059
6 on behalf of Sonic Cavitation, Cenyth USA, LLC and Gary George.

7 THE COURT: Okay.

8 MR. DOWNING: Good morning, Your Honor. Brian Downing on behalf of the
9 Plaintiff, Ronald Swanson.

10 THE COURT: Okay. And this is Plaintiffs' Motion to Reconsider Motion to
11 Compel. And I have read your papers, and you talk about some confusion with
12 emails and so forth and I don't know what that means but I will tell you I signed the
13 competing order.

14 MR. DOWNING: And, Your Honor, to be perfectly candid, we weren't counsel
15 at the time that that happened, we would adopt prior counsel's position on that that
16 there was some ambiguity as to whether that order was entered, when it was --
17 when it was entered --

18 THE COURT: The one I signed and filed is the one that was entered.

19 MR. DOWNING: Okay. Your Honor, we understand that. I mean, we still
20 take the position that it's never been entered through a notice of entry; that may be a
21 separate issue.

22 THE COURT: Well, that'd be his job --

23 MR. DOWNING: That's correct, Your Honor.

24 THE COURT: -- to do a notice of entry.

25 MR. DOWNING: Yeah, we would agree with that.

1 THE COURT: Okay. Anything else?

2 MR. DOWNING: [Indecipherable]. Yes -- yes, Your Honor.

3 THE COURT: Okay.

4 MR. DOWNING: May I use the lectern?

5 THE COURT: Yes.

6 MR. DOWNING: Thank you.

7 Your Honor, first of all thank you for hearing this this morning, allowing
8 us to make a record on this. Obviously we weren't counsel at the time of the
9 underlying motions here or the -- even filing this motion. We understand this has
10 already been litigated. It's been thoroughly litigated and so we're not here to rehash
11 any points or belabor this issue, we just have two main points we want to go over
12 with the Court.

13 The first one is the presentation of this matter as an issue of
14 discoverability or primarily an issue of discoverability. We don't agree with that --
15 that characterization. While discoverability is certainly an issue here we think this is
16 far more an issue of jurisdiction. Now, there's a rule here that governs jurisdiction
17 where this issue can be heard and I'm sure Your Honor has heard this rule before
18 and read it more you'd like, but at the risk of that I'll read it one more time. That rule
19 states that this affidavit at issue here: "Shall not be publically disclosed or made
20 available for use in any other proceeding except by order of the court or upon written
21 consent of the attorney." Now --

22 THE COURT: But this is where my rub is though. He -- he put it in -- at issue
23 in this case.

24 MR. DOWNING: Well, that's what we'd like to discuss here. We can move to
25 that part. That would be the second issue that we want to discuss here.

1 Now, we think that the Defendant here is -- by arguing that issue is
2 conflating two separate concepts. They're trying to conflate the concept of that
3 issue and the concept of relevance, any they use this term throughout the briefing.
4 They say it a number of different ways. They say it's in documents, it's important,
5 it's relevant, it's highly relevant, it's critical, but this is not the standard for at issue.
6 At issue on a lay sense is similar to the concept for determining, meaning to
7 relevance. The definition of that -- the concept is different. At issue at its basic
8 sense means you're using information or portions of information as a sword in
9 litigation and you're relying on it to further or advance your argument while at the
10 same time you are withholding the remainder of that information by invoking
11 privilege or in this case confidentiality as a shield. That's not what we're doing here.
12 We don't need this document to prevail on our claims, we've never used this
13 document as a sword, we've never relied on it in order to advance our claims or to
14 make an argument in this action. It's just not what we're doing.

15 And if you -- the Defendants argue that it's at issue or relevant because
16 it would resolve claims in this issue but that's also not the standard here. That at
17 most makes it potentially relevant and if you take that argument to its logical
18 conclusion what they're arguing would really eviscerate privilege because what
19 they're saying is any time a document is relevant or it would resolve a claim
20 essentially the standard for any document that's ever been placed on a privileged
21 log. Just merely by virtue of being placed in that privileged log and being -- saying
22 that it's relevant it would then be at issue and which would then in turn waive that
23 privilege that you're claiming. That's clearly not the case just from a logical
24 perspective.

25 Again, we've never relied on this. That kind of -- that position really go

1 privilege but that's how the Court -- or that's how the Defendant characterizes this
2 order and I'll quote you a portion of their opposition. The evidence is this. They say
3 that they characterize that --

4 THE COURT: You got --

5 MR. DOWNING: -- the order --

6 THE COURT: -- a page?

7 MR. DOWNING: What's that?

8 THE COURT: You got a page?

9 MR. DOWNING: It's six. Their opposition to the Motion to re -- the instant
10 motion.

11 THE COURT: Right. Okay.

12 MR. DOWNING: It's page six. They characterize the order as holding
13 "Swanson placed the context" --

14 THE COURT: You got a line? I'm sorry. I don't see it.

15 MR. DOWNING: Yeah, let me get it for you. Yes, Your Honor, it is line --
16 between 22 and 23.

17 THE COURT: Okay.

18 MR. DOWNING: It starts "Swanson placed." Well, as the --

19 THE COURT: Okay.

20 MR. DOWNING: -- Court correctly held. They're characterizing the holding of
21 this Court that: "Swanson placed the contents of the affidavit at issue by
22 affirmatively making numerous allegations, assertions, defenses and arguments in
23 this action that make the affidavit relevant." In other words, they're arguing that this
24 affidavit is at issue or the contents of the affidavit are at issue because it's relevant.
25 As we've just discussed that's not the standard for placing a document at issue.

1 The at issue concept is much more narrowed than the concept of relevance. And to
2 reiterate, we've never placed this affidavit at issue, we've never relied on it to further
3 our case. We've never used it as a sword in any way. And we would add to that
4 that it's also -- it's -- while it's not necessary to our case it's also not necessary to the
5 Defendants' case in order to prevail on their case at least. For one, they don't need
6 this affidavit to prevail they already have this information. They have the document
7 at issue with these documents. They were the parties that filed the bar complaint,
8 presumably they would have support for bringing those claims. But also, there are
9 other options if the information is necessary to get it. They could have taken
10 discovery in this action; they could have taken a deposition of the Plaintiff to get that
11 information. They did neither of those things. They essentially took no discovery up
12 and till this point, and there really isn't -- another issue with -- with briefing in this --
13 or the Defense briefing is there really isn't a reason given for why the affidavit itself,
14 the document itself, is important here separate from the information contained within
15 it. But to the extent that we set that aside and we concede that the document itself
16 is important here, they have yet to provide any explanation for why they haven't
17 taken advantage or pursued the remedy that's in the rule which says you have to go
18 to the court of appeals for the District of Columbia to get this released or disclosed.
19 They just haven't done that. They now want to come to the Court and ask them to
20 disregard this rule and it's a jurisdictional rule that requires issues that are -- that go
21 to the core of the District of Columbia's ability to govern the practice of law in their
22 jurisdiction. They want it to be heard by courts that have an interest in that issue,
23 that's the reasoning for the rule. They asked the Court to just disregard that rule
24 and hear this matter and disregard it, instead of taking all these steps that they could
25 have taken over the last year to get this information on their own.

1 And with that, Your Honor -- with that, Your Honor, I would just like to
2 reserve some time on reply.

3 THE COURT: Okay. Counsel.

4 MR. BLAKE: Sure. I want to address first the argument that somehow we're
5 relying on relevance and not necessarily Swanson's conduct of putting this affidavit
6 at issue. That's just totally, wholly inaccurate in my view of what our argument and
7 what the events of this case are.

8 The case was initiated by Momis Rivers, it didn't involve any allegations
9 of misconduct against -- you know, related to Swanson, it didn't involve a breach of
10 conduct -- breach of contract claim by Swanson, it was simply, hey, we invested
11 money in the company, we're entitled to repayment of that. It was pretty generic
12 breach of contract case. Well, Mr. Rivers finds about Swanson's actions and wants
13 to withdraw from the case, Swanson intervenes, he files a motion to intervene, Sonic
14 Cavitation objected to that. The Court at that time allowed Swanson to intervene
15 over Sonic Cavitation's objection and he -- at that time the operative complaint was
16 still Momis Rivers' complaint. In his motion to intervene Swanson never disclosed
17 that he was planning on filing an amended complaint, yet nobody has filed an
18 answer so a couple of days later -- I don't remember how long it was, maybe a week
19 later, Swanson filed his first amended complaint and dramatically expands the
20 scope of the allegations in this case. And we put tables together; we briefed it very
21 thoroughly in our moving papers in the original renewed Motion to Compel. We
22 went line by line, okay, here's the allegation in Swanson's first amended complaint,
23 this is what he's alleging. Peter Dizer stole 40 -- \$400,000.00 from the company,
24 here's what the -- the specification of charges says. It says Peter removed the
25 money from Sonic's account to protect the account so Swanson couldn't steal any

1 more money from it. The allegation is that Swanson wasn't compensated enough;
2 he is entitled to a breach of contract. This is what's alleged in his first amended
3 complaint. You look at the state's specification of charges which he admitted to in
4 the affidavit. There's a direct allegation that he stole more than a million dollars from
5 the company. The -- the two documents are just diametrically opposed. Swanson
6 admits in his opposition to our original to compel. He admits that he entered into the
7 affidavit at time when he was facing legal fees in this action; he was facing legal
8 fees in the other action. He knew this action was going on and so he knew that that
9 affidavit when he signed it could have implications in this case. And so this is
10 exactly a situation of Swanson is placing these issues -- he's affirmatively alleging
11 these issue, he is the Plaintiff, he's the intervenor. He filed the first amended
12 complaint and he is asserting all of these claims against Sonic and the other
13 Defendants. So, he's placing them all at issue and yet at the same time he signs
14 this affidavit that materially contradicts almost every single allegation that he has in
15 this case. That's exactly like a personal injury plaintiff, filing a lawsuit for damages
16 and then using the confidentiality of medical records as a shield to refuse to disclose
17 those evidence.

18 It's -- the affidavit is not discoverable solely because it's relevant, it's
19 discoverable because Swanson's conduct, his allegations, placed the affidavit at
20 issue. And he's -- he's already denied the impact of the affidavit. He denied it, he
21 say, oh, I just had to do it, I didn't really mean it. I don't remember exactly what he
22 said, I don't have it exactly in front of me, but in his opposition to our renewed
23 Motion to Compel Swanson against denied the impact of the affidavit stating, oh, I
24 didn't really -- minimizing the impact and I remember he did specifically say I only
25 did it because I couldn't defend the action and for no other reason. But that is belied

1 by the fact that the bar requirement specifically require him to sign the affidavit
2 stating that all of the material allegations against him are true. And his allegation
3 that, oh I couldn't defend it is just a simple red herring because if he couldn't defend
4 the actions he could just no appear; he could just -- what would be the difference of
5 him not defending the charges? They would just take a default against him, they
6 would disbar him. The consequence would be the same in my opinion.

7 And as a final point, Swanson has sued Sonic in Connecticut I believe
8 and he's testified about this affidavit in Connecticut and this is what he said about it.
9 He was asked about this affidavit. The question is: "And that affidavit has to contain
10 and acknowledgement that the material facts upon which the allegations and
11 misconduct are predicated are true." Answer -- this is Swanson's answer: "I
12 understand that, that's what's written but with the DC bar counsel and my counsel it
13 was explained that in practice that is not what happens." So, Swanson is going to
14 come in here and if he is not forced to disclose that affidavit he is going to try and
15 tell the jury, if this case goes to a jury trial, that that's not what he meant and they're
16 not going to be able to see the affidavit. He has placed it an issue, it is absolutely
17 critical and it would be a miscarriage of justice to allow him to place all of those
18 allegations at issue and then simultaneously withhold that affidavit.

19 Just one more point that I want to make on -- there was an argument in
20 the reply raised for the first time that -- or maybe this was -- actually this was not
21 raised for the first time, this was raised in their motion for reconsideration. Is that
22 this Court doesn't have the jurisdiction to deem the affid -- deem the affidavit non-
23 confidential. And I just want to clarify that this is precisely a situation where the at
24 issue doctrine -- this is what is created for. We're not asking you to deem the
25 affidavit non-confidential as a matter of public policy or as an interpretation of the

1 DC bar rules or as a matter of critical relevance in this case, it's we're simply asking
2 the Court because Swanson can consent to the disclosure of the affidavit that's
3 where the waiver issue comes in. His ability to consent creates his ability to waive
4 the confidentiality and his waiver has happened by his conduct in this case. If he
5 doesn't want to disclose the affidavit he can withdraw his claims, he can dismiss his
6 first amended complaint. That's an option to him. It's not like you're compelling him
7 to disclose it. He can withdraw the claims and then -- then we would stand down.
8 We would say, okay, fine, it's confidential and then we would go to the DC bar and
9 trying get it or just move on without it, but with him standing here with that first
10 amended complaint and all the allegations that he's made in this case he cannot say
11 that he did not put the affidavit at issue.

12 Unless the Court has any other questions for me I'll stand on that.

13 THE COURT: Okay. Thank you.

14 MR. BLAKE: Thank you.

15 MR. DOWNING: Your Honor, just a couple more things.

16 First I want to respond to the allegation that he knew that this affidavit
17 would be used in this court. That's very clearly not the case. He relied on a rule
18 which said it would not be used in this court. Again, "shall not be publically
19 disclosed or made available for use in any other proceeding." That's the rule that he
20 relied upon when he made this affidavit.

21 Now, to touch on the main point here, this issue of relevance versus at
22 issue. What I just heard was the information within the affidavit is relevant. The
23 information within isn't at issue. At no point was there any argument that the
24 affidavit itself is at issue. The information related to that affidavit could be an issue
25 or is relevant and in order to get that information they had multiple channels to go

1 through. They could have deposed the Plaintiff, they didn't do that, they could have
2 taken other discovery, they didn't do that. What they're arguing here is, well, you
3 can't come in and explain to the jury. That's -- that's a credibility issue. They should
4 have taken the deposition, locked him in on story like you would with any other fact
5 in a trial and then you -- we can test the credibility of that testimony. They could
6 have gotten this even without that. Again, they could have gone to the DC Court of
7 Appeals, they chose not to do that.

8 Now, this other issue that was raised, that's been raised in the briefing,
9 is this idea that if this is somehow the same as a personal injury case when we're
10 talking about medical records that are at issue. The distinction there is that if I were
11 to file a personal injury case based on my medical records I am placing my medical
12 records themselves at issue and at the same time under this scenario I'm trying to
13 withhold other parts of my medical record. That is a definition of at issue waiver.
14 We have never put this affidavit at issue, we've never tried to use it as a sword in
15 this action, all we've tried to do is to invoke our privilege. We've never used it to --
16 or relied on it further or take -- get any advantage of this litigation. It's a completely
17 different situation from this idea of a personal injury case which is a prototypical
18 example of at issue waiver, it's just different here. Again, they've still provided no
19 argument or defense to have -- this affidavit itself is at issue in this case. Only
20 potentially relevant information within it is at issue in this case.

21 [indecipherable] Your Honor. {indecipherable}.

22 THE COURT: Thank you. Counsel, I appreciate your position but I am
23 denying the Motion for Reconsideration. I think I got it right the first time.

24 MR. DOWNING: Thank you, Your Honor.

25 THE COURT: Okay.

1 MR. DOWNING: And I have one more matter for the Court's attention. I
2 understand the ruling. If you would.

3 THE COURT: Sure.

4 MR. DOWNING: So, candidly it is our intention to take this up on a writ.
5 Rather than rush back here on an expedited basis which, you know, it always jams
6 up counsel, jams up the Court, we would ask to make an oral motion. If you would
7 allow for us -- to grant a stay pending the resolution of that writ just based on the
8 grounds of the injury that it would cause and this is a situation where you can't
9 unring this bell once you let the cat of the proverbial bag and then this affidavit is
10 disclosed it essentially defeats the purpose of the appeal. And while we -- obviously
11 I would expect -- disagree on the likelihood on the merits of this writ I think that
12 maybe we would be more likely to agree that this isn't -- because of the jurisdictional
13 issues involved is not, you know, your garden variety of a discovery dispute. It's not
14 as black and white as that. But, we would ask that we'd be given the opportunity at
15 least to -- because that this is a novel issue and there's jurisdictional issues involved
16 that we'd be given the opportunity to bring this up on a writ and have it reviewed
17 prior to actually disclosing this matter which we contend would really defeat the
18 purpose of that writ.

19 THE COURT: Okay.

20 MR. BLAKE: I don't think the right thing to do here is to address this issue in
21 piecemeal. We already decided at one time around that you got another delay by
22 filing the Motion for Reconsideration. All of the arguments that they raised here
23 could have been raised then. So, to add a writ to that additional delay and then
24 another trial and then a potential appeal after that, if Swanson is gonna bring in the
25 Supremes in this case let's just get the case resolved, let's get it tried. Let's get a --

1 let's get him -- let's have him disclose the affidavit, we'll file it in our Motion for
2 Summary Judgment. The Court has already held that it was under seal and so it
3 won't be disclosed to a jury, it won't be disclosed to the general public in that
4 scenario. Let's have all of the issues play out before we start taking writ petitions
5 and if they want to take writ petition in the interim, the Supremes disagree, let them
6 disagree but I don't think that's efficient or necessary.

7 THE COURT: Okay. Actually our Supreme Court is pretty fast in terms of
8 getting writ petitions decided. I'm gonna deny your request for a stay. We do have
9 a trial that is scheduled on a five week stack October 10th, it's a jury trial. Right now
10 you guys are number two on the stack. And if more time is needed on that stack I
11 certainly could put you toward the back of the stack, okay?

12 MR. DOWNING: Thank you, Your Honor. On that issue I would say we do
13 have, as we've mentioned, today there is a trial proceeding in Connecticut that's set
14 to start on November 1st for jury selection, we expect it's gonna take about three
15 weeks. So, that is an issue with our availability. That's what we were discussing
16 right now.

17 THE COURT: Okay. Well, if that's the thing I'll put you toward the front of the
18 stack. Somehow we'll make this work but --

19 MR DOWNING: Sounds good --

20 THE COURT: -- we gotta --

21 MR DOWNING: -- Your Honor.

22 THE COURT: -- get this tried, it' s 2016 case.

23 MR. DOWNING: Thank you, Your Honor.

24 MR. BLAKE: Judge, just one kind of point that I know we ran into when we
25 submitted our last order. In terms of the time frame for Swanson to disclose the

1 affidavit, can we get specificity from the Court on how long he has to disclose the
2 affidavit?

3 THE COURT: Well, he technically should have done it already but -- what do
4 you suggest?

5 MR. BLAKE: I mean, they're gonna file a writ petition -- five days, seven
6 days, something like that.

7 THE COURT: Okay. One week. Okay, one week would be -- well, today is
8 the 18th? 18th, so you're looking at the 25th.

9 MR. BLAKE: Okay. And then one other issue that we didn't mention, now
10 that the -- the issue of the affidavit is resolved Sonic is planning on filing a Motion for
11 Summary Judgment. We had included a request to extend the deadline to file a
12 motion. I think our motion would have been timely under the prior order but now
13 since the Motion for Reconsideration has delayed things would the Court grant us
14 an extension to file our Motion for Summary --

15 THE COURT: When --

16 MR. BLAKE: -- Judgment?

17 THE COURT: -- are you looking at doing it because I do need to read it and --

18 MR. BLAKE: Yeah, yeah --

19 THE COURT: -- he needs to oppose it and all that kind of stuff?

20 MR. BLAKE: Right. I was thinking I could file it within a week, two weeks.
21 We could do a order shortening time and then depending on how in a hurry you are
22 to resolve it I think if we do it in the ordinary course. That's fine with us but I want to
23 file it very quickly and if we say thirty days I'll just take all the time and I'd rather get
24 a shorter deadline.

25 THE COURT: Okay.

1 MR. BLAKE: I know myself.

2 THE COURT: Okay. Because we've got pre-trial conference calendar call on
3 the 28th of September.

4 MR. BLAKE: If we could have the -- maybe we do the hearing on the MSJ at
5 that time and try --

6 THE COURT: Well --

7 MR. BLAKE: -- get the briefing done --

8 THE COURT: -- you gotta file --

9 MR. BLAKE: -- before --

10 THE COURT: -- it first, okay? What was the deadline for it before?

11 MR. BLAKE: The prior -- I don't -- I don't have the exact deadline off the top
12 of my head. I know we filed a motion to extend discovery so it would have been
13 thirty days after that extension of discovery but I didn't look at the dates. I can't
14 remember exactly when discovery closed.

15 THE COURT: Because I'm looking at this. If you got it done within a week
16 then I'd be hearing it just before the pre-trial conference calendar call.

17 MR. BLAKE: That's in the ordinary course.

18 THE COURT: That's the ordinary course.

19 MR. BLAKE: That works for me. I'll do it in a week. I think that's fine. I just
20 wanted to raise the issue and make sure that -- I don't want to file the motion if the
21 Court's gonna deny it based on untimeliness. That's the biggest issue.

22 THE COURT: I understand. You got a week.

23 MR. BLAKE: Okay.

24 THE COURT: So, it's due August 25th and that would be for any dispositive
25 motions, okay?


1 MR. BLAKE: Okay. And then to the extent that Swanson hasn't disclosed the
2 affidavit I'll put a placeholder and well attach it after he discloses it or address that
3 issue if he doesn't disclose it then because that's the same day he's -- that's his
4 deadline to disclose the affidavit.

5 THE COURT: Okay. All right. Thank you.

6 [Proceedings concluded at 9:33 a.m.]

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10 ATTEST: I do hereby certify that I have truly and correctly transcribed the
11 audio/video recording in the above-entitled case to the best of my ability.

12 
13 NORMA RAMIREZ
14 Court Recorder
15 District Court Dept. XXII
16 702 671-0572
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