

IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD SWANSON, an individual,

Petitioner,

v.

THE 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.

Electronically Filed
Aug 23 2022 11:16 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 85205

Petition from the Eighth Judicial
District Court, the Honorable Susan
Johnson Presiding, Case No.
A-16-740207-B

**NRAP 27(e) EMERGENCY MOTION TO STAY ORDER COMPELLING PETITIONER
TO PRODUCE A CONFIDENTIAL AFFIDAVIT THAT IS GOVERNED BY D.C. BAR
RULES, NOT NEVADA RULES OF CIVIL PROCEDURE
(ACTION REQUIRED BY AUGUST 25, 2022),**

AND MOTION FOR INTERIM STAY WITH RULE 27(e) CERTIFICATE

Jon T. Pearson (10182)
Erica C. Medley (13959)
Brian D. Downing (14510)
Justin E. Berkman (15869)
HOLLAND & HART LLP
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Counsel for Petitioner Ronald Swanson

NRAP 26.1 DISCLOSURE

The counsel below certifies that the following are persons and entities as described in Rule 26.1(a) of the Nevada Rules of Appellate Procedure and must be disclosed. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Petitioner/Intervenor Plaintiff Ronald Swanson is an individual.

Dated: August 23, 2022

/s/ Jon T. Pearson

Jon T. Pearson (10182)

HOLLAND & HART LLP

9555 Hillwood Drive, 2nd Floor

Las Vegas, Nevada 89134

Counsel for Petitioner

PRELIMINARY STATEMENT

In the underlying case, the district court granted defendants/real parties in interest's (collectively, "Defendants") motion to compel the production of a confidential affidavit relating to petitioner Ronald Swanson's consensual disbarment from the D.C. Bar, despite the express dictate of the D.C. Bar Rules that makes clear that only the D.C. Court of Appeals has the authority to allow for the disclosure of the confidential affidavit, and in contravention of this Court's precedent regarding the at-issue doctrine. Swanson thus asks this Court to stay the order pending resolution of this petition.¹ The district court has denied such a stay, creating the requisite emergency under Rule 27(e), and directed Swanson to produce the confidential affidavit by August 25, 2022.

PROCEDURAL BACKGROUND

On July 6, 2022, the district court granted Defendants' renewed motion to compel production of the confidential affidavit, disregarding D.C. Rule XI § 12(c) and this Court's precedent related to the at-issue waiver doctrine. (Mot. 001–004)² Swanson moved to reconsider the district court's order granting the motion to compel, (Mot. 010–016; Mot. 024–029), which the court heard and denied on August

¹ This motion identifies each individual's first and last name when that person first appears. After that, for simplicity and to avoid confusion, this motion will use the individual's given last name. The use of last names is not meant to be disrespectful.

² Citations to "Mot." refers to Swanson's Exhibits to this motion.

18, 2022 (Mot. 031, 033). At the conclusion of that hearing, Swanson requested a stay pending resolution of this writ, which the district court denied, ordering production of the confidential affidavit by August 25, 2022. (Mot. 034–036) On August 23, 2022, Swanson filed this petition for extraordinary relief, challenging the district court’s order granting the motion to compel.

ARGUMENT

A. The Impropriety of the District Court Order Compelling the Production of the Confidential Affidavit

1. Only the D.C. Court of Appeals Has Jurisdiction to Release the Confidential Affidavit

D.C. Bar Rules are clear: although the order disbarring an attorney becomes a public record, “the affidavit . . . *shall not* be publicly disclosed or *made available for use in any other proceeding* except by order of the Court or upon written consent of the attorney.” D.C. Bar Rule XI § 12(c) (emphasis supplied). “The Court” refers to the D.C. Court of Appeals. *See* D.C. Bar Rule I § 1. Thus, to request release of documents designated as confidential, the party seeking the confidential information must either obtain written consent from the lawyer or make a motion to the D.C. Court of Appeals and establish good cause for the requested disclosure. *See* D.C. Bar Rule XI § 17(e) (“For good cause shown, the Court on motion may authorize disclosure of otherwise confidential information through discovery or appropriate

processes in any civil, criminal, or administrative action, subject to such protective order as the Court may deem appropriate . . . ”).

There are only two ways to obtain a confidential affidavit under the D.C. Bar Rules—by written consent from the lawyer or by order from the D.C. Court of Appeals—neither of which has happened here. Defendants in the underlying action could have moved for the appropriate relief before the D.C. Court of Appeals to obtain the confidential affidavit, but they did not. Because the D.C. Court of Appeals has not ordered the disclosure of the confidential affidavit and Swanson will not provide his consent for such disclosure, the district court cannot compel Swanson to produce the confidential affidavit. The district court, which failed to address the jurisdictional question,³ thus committed clear legal error by circumventing the authority that rests exclusively with the D.C. Court of Appeals. *See* D.C. Bar Rule XI § 12(c).

³ This Court has admonished courts for not addressing arguments raised by the parties. *See, e.g., Yellow Cab of Reno v. Second Judicial Dist. Ct. of Nev.*, 127 Nev. 583, 592, 262 P.3d 699, 704 (2011) (“Unfortunately, despite the fact that the parties had briefed this issue, the district court failed to address Yellow Cab’s NRS 706.473 argument. Instead, in denying Yellow Cab’s summary judgment motion, the district court summarily concluded, without explanation or analysis, that whether Willis was an independent contractor or an employee was a question of fact for the jury to decide.”); *Tri-Cnty. Equip. & Leasing, LLC v. Klinke*, 128 Nev. 352, 354, 286 P.3d 593, 594 (2012).

2. The District Court Misapplied the At-Issue Doctrine

“[A]t-issue waiver occurs when the holder of the privilege pleads a claim or defense in such a way that eventually he or she will be forced to draw upon the privileged communication at trial in order to prevail[.]” *Wardleigh v. Second Judicial Dist. Ct.*, 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995). The equitable purpose of the at-issue waiver doctrine is to prevent privilege-holders from using privileged or confidential information as both a sword and shield. *See Wardleigh*, 111 Nev. at 354, 891 P.2d at 1186. Put another way, when “a party seeks an advantage in litigation by revealing part of a privileged communication, the party shall be deemed to have waived the entire attorney-client privilege as it relates to the subject matter of that which was partially disclosed.” *Id.* (internal citations and quotations omitted).

In *Wardleigh*, this Court rejected the *Hearn* test articulated by *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). “*Hearn* proposed a three-tier test which requires that the repository of the privilege (1) make an assertion through some affirmative act that (2) renders relevant to the action (3) privileged matter vital to the opposing party’s defense.” *Wardleigh*, 111 Nev. at 356, 891 P.2d at 1187 (quoting *Hearn*, 68 F.R.D. at 581). Had this Court adopted the *Hearn* test, which it did not, Defendants’ arguments would hold water. This Court, however, rejected the *Hearn* test because it violated principles of fairness.

Fairness should not simply dictate that because pleadings raise issues implicating a privileged communication, the privilege regarding those issues is waived. Rather, fairness should dictate that where litigants raise issues that will compel the litigants to necessarily *rely upon* privileged information at trial to *defend* those issues, the privilege as it relates only to those issues should be waived. Allocations of burdens of pleading and proof should not be the basis for depriving privilege-holders of their privilege.

Id. (emphasis added).

Swanson did not rely on the confidential affidavit, nor does he intend to, to support *his* claims or defenses. He simply acknowledges that he consented to disbarment because he could not defend himself, and he claims that he could not defend himself because his hard drive containing exculpatory evidence was stolen from his Connecticut apartment. Refusing to analyze whether Swanson will need to rely on the confidential affidavit, Defendants claim that, based on the pleadings, the confidential affidavit is relevant. But this approach was rejected by this Court. In fact, it would set a dangerous precedent if an opposing party were allowed to claim at-issue waiver just because a specific communication or document could be relevant, rather than necessary for the holder of the privileged communication or confidential document to rely on that document to prove *their* claim or defenses.

Even if Defendants believe that the confidential affidavit could be used for impeachment, such a basis would not invoke the at-issue doctrine because *Swanson*—not Defendants—did not rely on the information. *See id.*; *see also Mir v. L-3 Communs. Integrated Sys., L.P.*, 315 F.R.D. 460, 472 (N.D. Tex. 2016) (“*Mir*

only asserts that he is entitled to this document for possible impeachment or corroboration. Mir’s arguments do not properly sound in an at-issue theory of waiver”). Besides its lack of authority to compel production of the document, the district court also committed legal error by not addressing whether Swanson would need to rely on the confidential affidavit to support his claims or defenses.

B. A Stay Is Necessary under the NRAP 8(c) Factors

Under NRAP Rule 8(c), courts should consider four factors in deciding whether to issue a stay:

(1) whether the object of the writ petition would be defeated if the stay is denied, (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied, (3) whether the real party in interest will suffer irreparable or serious injury if the stay is granted, and (4) whether petitioner is likely to prevail on the merits in the writ petition.

Id. While this Court has “not ascribed particular weights to any of the stay factors in the civil context,” it has “recognized that depending on the type of appeal, certain factors may be especially strong and counterbalance other weak factors.” *State v. Robles-Nieves*, 129 Nev. 537, 542, 306 P.3d 399, 403 (2013); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

1. The First Factor—the Object of the Writ Being Defeated if the Stay Is Denied—Supports a Stay

Because of the “interlocutory nature” of this appeal, “the first stay factor takes on added significance.” *Mikohn Gaming*, 89 P.3d at 39, 120 Nev. at 253. If Swanson is forced to produce the confidential affidavit, or if he decides not to produce it and

face potential consequences of that decision before this Court grants the relief requested by Swanson, the object of the writ will be defeated. Without a stay, the harm will be done before this Court can address the issues on the merits. The first factor thus supports granting the stay requested.

2. The Fourth Factor Supports a Stay Because Swanson’s Writ Is Likely to Prevail on the Merits

“[W]hen moving for a stay pending an appeal or writ proceedings, a movant does not always have to show a probability of success on the merits, the movant must ‘present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.’” *Fritz Hansen*, 116 Nev. at 659, 6 P.3d at 987 (citing *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)) (emphasis added).

When, as here, a district court order requires the disclosure of confidential information, a party has “no plain, speedy and adequate remedy at law” other than by seeking writ relief because with no relief the information would lose its confidential quality. *Wardleigh*, 111 Nev. at 350–51, 891 P.2d at 1183–84 (stating a writ of “prohibition is the remedy which is generally employed to prevent improper discovery” (quoting *State ex rel. Tidvall v. Dist. Ct.*, 91 Nev. 520, 524, 539 P.2d 456, 458 (1975))). As shown above, Swanson has presented a substantial case on the merits that the district court committed legal error by not addressing the threshold jurisdictional question and by simply bypassing the exclusive authority of the D.C.

Court of Appeals. The district court also committed legal error by not assessing whether Swanson would need to rely on the confidential affidavit to support *his* claims or defenses.

3. The Second and Third Factors—Which Consider the Likelihood of Irreparable Harm—Support a Stay

“Although irreparable or serious harm remains part of the stay analysis, this factor will not generally play a significant role in the decision whether to issue a stay.” *Mikohn*, 120 Nev. at 253, 89 P.3d at 39. Even so, this Court has held that the forced disclosure of confidential documents constitutes irreparable harm because the disclosure is irretrievable once made. *See Schlatter*, 93 Nev. at 193, 561 P.2d at 1344. Following production, a party is effectively deprived of any remedy as one cannot put the genie back in the bottle.

The harm to Swanson is undeniable: once he produces the protected information, the damage will be done. He will have no recourse for redress if he is forced to comply with the district court’s decision because this Court cannot remedy that harm by way of appeal after the fact. Once the confidential affidavit is disclosed, the petition will effectively be pointless and its object completely defeated.

Defendants, however, will suffer no irreparable harm by a stay. Defendants, who have no need for the affidavit, are unaware of what information is actually contained within it, and are seeking it merely to abuse the discovery process and harass Swanson. Defendants could not even formulate a cognizable argument as to

why the affidavit was necessary, given that it cannot be used in any proceeding without Swanson’s consent or an order from the D.C. Court of Appeals—a remedy that Defendants have inexplicably never pursued. *See* D.C. Bar Rule XI § 12(c) (emphasis added). And because Defendants do not know what the affidavit says, the best they could do when challenged was speculate that the contents could help them “resolve” their claims in the underlying action. But this is not adequate grounds to force the disclosure of the affidavit or make it “at-issue,” especially given that Defendants had alternative routes to obtain information regarding the contents of the affidavit by engaging in discovery in the underlying action, such as by deposing Swanson, and simply chose not to pursue these routes. In fact, Defendants have performed practically no discovery in the underlying action during the five years during which it has been pending, instead opting at the eleventh hour to have the district court usurp the authority of an appellate court of another jurisdiction based on their speculation regarding the contents of the affidavit. For the same reason that Defendants did not find it necessary to timely seek this affidavit during discovery in the underlying action, Defendants will not be prejudiced by a stay of the district court’s decision during the pendency of the petition.

C. Rule 27(e) Emergency Motion for Interim Stay

Because Swanson will need to either produce the confidential affidavit or address any potential consequences for his noncompliance with the district court’s

order in as few as two days from the filing of this writ petition, an interim stay order is needed to avoid serious and imminent harm. *See* NRAP 27(e)(4). Swanson has worked diligently to prepare the petition and this motion for stay in an expeditious manner. Swanson recognizes, however, that this Court may want additional time to consider the request to extend the district court's stay through the resolution of the writ petition. If so, this Court should at least stay the order on an interim basis while the Court considers that stay request. Absent this emergency relief, Swanson could be required to comply with an order that the district court had no authority to issue, making both the stay and the underlying petition moot.

CONCLUSION

Based on the foregoing, this emergency motion to stay should be granted. All four factors weigh in favor of a stay pending resolution of Swanson's writ petition.

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
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Counsel for Petitioner

NRAP 27(e) CERTIFICATE

A. Contact Information

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Brian D. Downing
Justin E. Berkman
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9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Real Parties in Interest

David T. Blake
PO Box 1589
Logandale, Nevada 89021
(702) 579-5529

B. Nature of Emergency

At the motions hearing held on August 18, 2022, the district court denied Swanson's motion for reconsideration, and denied his request for a stay to allow him to file a writ petition. The district court instructed Swanson to produce the confidential affidavit within seven days. To review the challenge to the improper order compelling Swanson to produce the confidential affidavit, it is imperative that this Court grant a stay of the enforcement of the order. At the least, this Court should grant an interim stay while it considers granting a stay for the full pendency of the writ petition.

C. Notice and Service

Today, my colleague Brian Downing personally called David Blake and informed him of this motion for stay. My office e-mailed copies of the motion for stay and this certificate to counsel for real parties in interest.

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 **NRAP 27(e) Emergency Motion to Stay Order Compelling Petitioner To Produce A Confidential Affidavit That Is Governed By D.C. Bar Rules, Not Nevada Rules Of Civil Procedure, and Motion for Interim Stay with Rule 27(e) Certificate** 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

INDEX OF EXHIBITS TO PETITIONER’S EMERGENCY MOTION TO STAY

Exhibit	Description	Pages (Mot.)
1	Order Granting Sonic Cavitation’s Renewed Motion to Compel	001–009
2	Motion to Reconsider Motion to Compel	010–023
3	Reply in Support of Motion to Reconsider	024–030
4	Excerpts from Transcript of Hearing re Motion to Reconsideration	031–038

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EXHIBIT 1

Heather S. Smith

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-~~A~~ 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 disbarring 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.

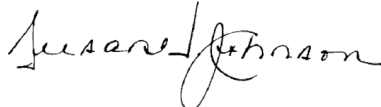
Wherefore, it is hereby ORDERED that Sonic's Renewed Motion to Compel is GRANTED. Swanson must disclose a copy of the Affidavit to Sonic as soon as reasonably possible, but no later than 7 days from the date of this Order.

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*

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: [image001.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

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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
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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
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10080 W. Alta Drive, Suite 200
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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
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Tel. (702) 476-0100 • Fax (702) 476-0101
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Rik L. Wade
Attorney

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Mot. 007

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Rik L. Wade
Attorney


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Rik L. Wade
Attorney

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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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)

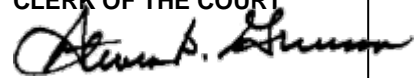
10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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
20
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EXHIBIT 2



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

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

An employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY



EXHIBIT A

ORDER

Joseph R. Ganley, Esq.
Richard L Wade, Esq.
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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,
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*
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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

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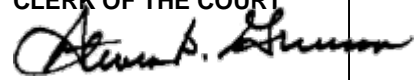
Rik L. Wade
Attorney



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EXHIBIT 3



RPLY

Jon T. Pearson (10182)
Brian D. Downing (14510)
Justin E. Berkman (15869)
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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

1 § 12(c) (emphasis supplied). Because Plaintiff will not consent to disclosing the confidential
2 affidavit, Defendants only available route for relief is to petition the D.C. Court of Appeals for an
3 order allowing its release. Defendants have refused to seek relief before the appropriate court.

4 *Second*, Defendants’ opposition focuses almost exclusively on the at-issue waiver
5 doctrine. Although the Court’s order granting the renewed motion to compel states that “[Plaintiff],
6 through his conduct, claims, and defenses in this action place the subject matter of his Affidavit at
7 issue, making the Affidavit discoverable and subject to disclosure,” there do not appear to be any
8 findings by the Court to support that statement. Even so, the at-issue waiver doctrine does not
9 apply to confidential communications, just privileged communications.

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

20 Plaintiff’s motion for reconsideration should be granted.

21 **ARGUMENT**

22 **A. D.C. Bar Rule XI § 12(c) Does Not Allow This Court to Compel the Production of**
23 **the Confidential Affidavit**

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

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

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

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

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

¹ D.C. Bar Rule XI § 17(f) requires Disciplinary Counsel to file a written request with the Board for permission to communicate information about any disciplinary matter to, among others, law enforcement agencies, state or federal attorney disciplinary agency, board, or committee that has a legitimate interest in such matter. Permission to communicate such information may be granted, 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

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

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

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

² *See also United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (“However, the attorney-client privilege cannot at once be used as a shield and a sword. . . . A defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.”) (internal citations omitted); *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340-41 (9th Cir. 1996) (“The doctrine of waiver of the attorney-client privilege is rooted in notions of fundamental fairness. Its principal 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*

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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.

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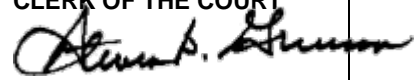
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EXHIBIT 4



TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

MOMIS RIVERS

Plaintiff,

vs.

SONIC CAVITATION, LLC

Defendant.

CASE NO. A-16-740207-B

DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE
AUGUST 18, 2022

RECORDER'S TRANSCRIPT OF HEARING RE
PLAINTIFF RONALD SWANSON'S MOTION TO RECONSIDER MOTION TO
COMPEL

APPEARANCES:

For Ronald Swanson:

BRIAN DOWNING, ESQ.

For the Defendant:

DAVID BLAKE, ESQ.

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 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?

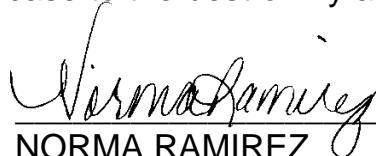
1 MR. BLAKE: Okay. And then to the extent that Swanson hasn't disclosed the
2 affidavit I'll put a placeholder and well attach it after he discloses it or address that
3 issue if he doesn't disclose it then because that's the same day he's -- that's his
4 deadline to disclose the affidavit.

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

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

7 * * * * *

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9
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
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