IN THE SUPREME COURT OF THE STATE OF NEVADA

NEWS+MEDIA CAPITAL GROUP LLC, a Delaware limited liability company; and LAS VEGAS REVIEW-JOURNAL, INC., a Delaware limited liability company, Appellants/Cross-Respondents vs. LAS VEGAS SUN, INC., a Nevada corporation, Respondent/Cross-Appellant.	Supreme Court No. 80511 District Court Case No. A-17-755861

APPELLANTS' AND CROSS-RESPONDENTS' OPPOSITION TO MOTION TO TEMPORARILY SEAL EXHIBIT 1 TO REPLY IN SUPPORT OF MOTION TO EXPEDITE APPEAL BUT THEN UNSEAL AS NOT CONFIDENTIAL OR SENSITIVE AFTER NOTICE AND OPPORTUNITY TO BE HEARD

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I. Introduction

The Sun asks this Court to use its valuable time and limited resources considering a question that is before the district court: whether to unseal the Award from the parties' confidential arbitration. After investing considerable time, brought about by the Sun's efforts to avoid its agreement to maintain the confidentiality of the private arbitration record in a commercial dispute, the district court has taken the issues under submission and may rule any day. The Sun now impatiently asks this Court to short circuit the district court proceedings. The Sun's end-run attempt is not supported by the SRCR, prudential considerations, or judicial economy and should be denied on this basis alone.

If the Court reaches the merits of the motion, Nevada's strong public policy favoring arbitration—coupled with the parties' agreement and expectation to privately resolve their business dispute through arbitration—constitute a compelling basis to seal the Award under SRCR 3(4). The parties agreed to confidentiality, and the Arbitrator ordered it for ***all materials*** generated in the arbitration. Failing to honor the parties' agreement and the Arbitrator's order, as the Sun requests, will upend one of the main reasons the parties here and elsewhere choose arbitration as a means for resolving disputes (*i.e.*, privacy) and discourage Nevadans from agreeing to arbitrate. Now more than ever, Nevada's overburdened courts should be encouraging arbitration. These reasons carry even more force because the Sun attached the Award not because of its relevance to the motion to expedite, but to place it in the record in order to file this motion in the hope of getting around the confidentiality order.

II. Relevant Facts and Procedural History

In April 2018, the Sun sued the Review-Journal. The district court ordered arbitration of the Sun's accounting claims under the parties' joint operating arrangement (JOA). The parties agreed and the Arbitrator ordered that ***all information*** generated in the course of the arbitration be kept confidential *in conformity with and subject to the provisions of Appendix D* of the JOA. *See* Mot., Ex. 1 at I.A; Mot., Ex. 2 at Appendix D.[1]

The Sun agreed to keep the arbitration confidential, in part, "to facilitate the expedited 60-day discovery and arbitration process[.]" Mot. at 9. Based on that promise, the Review-Journal freely exchanged documents and information without concerns about public disclosure. After the parties received the arbitration decision (Award), the district court protected ***all arbitration materials*** from public disclosure *in conformity with, and subject to, the provisions of Appendix D* of the JOA. *See* Mot., Ex. 3 at I.A.

In September 2019, the parties filed dueling motions to vacate/confirm the Award. With its motion, the Sun gratuitously filed nearly 4,000 pages of confidential arbitration materials—almost none of which related to the motion. In December 2019, the district court confirmed the Award.

In September 2019, the Sun began asking the district court to unseal arbitration-related materials, ***including the Award***. In December 2019, the district court invited

[1] Appendix D requires that the Sun's auditor maintain the confidentiality of the audit but allows the auditor to share certain financial information with the Sun's management. So, the phrase "in conformity with and subject to Appendix D" simply confirms that even though the entire arbitration is confidential, the Sun's management would still be allowed to see the Review-Journal's audit information outlined in Appendix D.

additional briefing on three issues.[2] The parties briefed those issues and appeared for another hearing.[3] During that hearing, the district court granted the Sun's request to file *more* briefing. On April 8, 2020, after seven months, the parties completed the briefing. The district court now has all arbitration-sealing issues under submission.[4]

III. SRCR 3(2) and SRCR 7 Favor Allowing the District Court to Rule First.

The Sun asks this Court to unseal the Award even though the district court is currently considering the same request. The Sun fails to disclose that the district court has also been asked to modify the disputed "proviso" language. *See* Mot., Ex. 3 at I.A. This Court should wait until the district court rules. Doing so will reduce the potential for conflicting orders on the same subject.

SRCR 3(2) provides that documents subject to a motion to seal—such as the Award—remain under seal as a matter of course pending a court order. Similarly, SRCR 7 provides that a district court's sealing orders remain in force in the Supreme Court until a court order instructs otherwise. Therefore, the cautious, prudent course is to seal the Award, which reveals information about individuals and discussion of the Review-Journal's financial matters, particularly auditing, advertising, promotional activities, and trade agreements.

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[2] The issues are (a) public policy objectives for private arbitration and confidentiality; (b) whether motions to vacate/confirm an award impacts privacy and confidentiality; and (c) whether the district court may modify the disputed "proviso" language.
[3] The Review-Journal *never* agreed to unseal any arbitration materials. *See* Mot. at 4.
[4] Contrary to the Sun's claim, the district court has not operated in secrecy. *See* Mot. at 1–2. The order confirming the Award and the resulting judgment are publicly available.

SRCR 3(2) and SRCR 7 prescribe an orderly process for the district courts to consider motions to seal in the first instance. The Sun's request for this Court to rule before the district court, if entertained, may impede the district court's ability to rule on the issue. The Sun's position lacks support in Nevada law and undermines the sound, prudential policy that the "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *see United States v. Sealed Search Warrants*, 868 F.3d 385, 398 (5th Cir. 2017) (holding district court in "best position" to "assess . . . the impact of unsealing" records).[5] The Sun's motion should be denied on this basis alone.

IV. SRCR 3(4) Supports Sealing the Award Because Compelling Privacy Interests Outweigh Any Public Interest in Accessing the Award.

The court may seal records if "compelling privacy or safety interests . . . outweigh the public interest in access to the court record." SRCR 3(4). The rule lists situations where the "***public*** interest in privacy" outweighs the public interest in access to judicial records. *Id* (emphasis added). Specifically, SRCR 3(4) provides the ***public*** interest in privacy trumps the public interest in access to court records upon a court finding that:

> (a) The sealing or redaction is ***permitted*** or required by . . . ***state law***;
> (b) The sealing or redaction furthers . . . a ***protective order*** entered under NRCP 26(c) or JCRCP 26(c);
> . . .

[5] A district court "retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits." *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 530 (2006); *see also* SRCR 5.

> (e) The sealing or redaction is of the ***confidential terms of a settlement agreement of the parties***; [or]
> . . .
> (h) The ***sealing or redaction is justified or required by another identified compelling circumstance***.

Id (emphasis added). Here, SRCR 3(4)(a) permits sealing the Award based on the Arbitrator's protective order authorized by NRS 38.233(5). Sealing the Award also furthers the district court's protective order entered under NRCP 26(c). *See* SRCR 3(4)(b). And SRCR 3(4)(h) justifies sealing the Award based on Nevada's public interest in parties privately arbitrating disputes. Like Nevada's compelling interest in promoting settlements by respecting confidentiality agreements, Nevada's strong public policy favoring arbitration provides an equally compelling basis for sealing the Award.

1. Nevada's strong public policy favoring private arbitration justifies sealing the Award.

For good reason, Nevada has a strong public policy favoring private arbitration.[6] Nevada has enacted many statutes, rules, and programs to promote and encourage all forms of ADR to reduce the court system's crushing caseloads.[7] For example, Nevada

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[6] *See, e.g.*, *State ex rel. Masto v. Second Jud. Dist. Ct.*, 125 Nev. 37, 44, 199 P.3d 828, 832 (2009) ("As a matter of public policy, Nevada courts encourage arbitration"); *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 252, 89 P.3d 36, 39 (2004) ("Nevada's version of the Uniform Arbitration Act (UAA) clearly favors arbitration. And we have previously recognized a strong policy in favor of arbitration").

[7] Nevada courts have some of the highest caseloads in the nation. *See* 2018 Annual Report of the Nevada Judiciary, at 5 ("the work of the Judicial Branch continues [at] a high rate that exceeds the level of cases handled by most courts in America."). To reduce these caseloads, Nevada has adopted pre-litigation procedures (*e.g.*, NRS 40.600, *et seq.*), mediation programs and requirements, mandatory arbitration for smaller cases, a voluntary early settlement program (EDCR 2.34(h)), a district court settlement judge

protects settlement communications and settlement agreements from public disclosure to encourage parties to privately resolve their disputes. *See, e.g.*, NRS § 48.105 (barring admission of settlement communications); SRCR 3(4)(e) (allowing sealing of confidential settlement terms).[8] Private arbitration requires similar protections to further Nevada's strong public policy favoring arbitration.

2. The inherently private nature of arbitration motivates parties to select it instead of the public court system.

Parties often agree to privately arbitrate in lieu of litigation in order to maintain confidentiality.[9] Courts recognize that because arbitration is "inherently private," there is a corresponding "strong public policy in favor of preserving the confidentiality of such private proceedings." *Perdue v. Citigroup Glob. Markets, Inc.*, 2008 WL 11336459, at *4 (N.D. Ga. 2008) (collecting cases); *see also Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) ("confidentiality is a paradigmatic aspect of arbitration"). Courts around the country have noted that parties submit to arbitration precisely because that forum is

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program, the short-trial program, mandatory settlement conferences (EDCR 2.51), and the mandatory Supreme Court settlement program (NRAP 16).

[8] *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003) (recognizing "strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations" to foster "a more efficient, more cost-effective, and significantly less burdened judicial system."); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004) ("If nothing else, honoring the parties' express wish for confidentiality may facilitate settlement, which courts are bound to encourage.").

[9] *See ITT Indus., Inc. v. Rayonier, Inc.*, 2005 WL 1744988, at *2 (S.D.N.Y. 2005) ("One of the principal reasons people agree to arbitrate rather than litigate, is to maintain confidentiality"); *Original Appalachian Artworks, Inc. v. Jakks Pacific, Inc.*, 2017 WL 5476798, at *4 (N.D. Ga. 2017) ("parties often enter into [arbitration] to maintain confidentiality").

private and, consequently, promotes voluntary agreements to arbitrate. *See, e.g.*, *Original Appalachian Artworks,* 2017 WL 5476798, at *4 ("parties often enter into them to maintain confidentiality; and . . . it promotes the voluntary execution of private arbitration agreements—a sound public policy objective").[10] Here, failing to honor the parties' agreement to privately and confidentially arbitrate their contractual dispute and the Arbitrator's order requiring it, Nevadans will be less likely to agree to arbitrate—a result that will inevitably increase court caseloads.

The Sun contends, without legal support, that its agreement to confidentially arbitrate with the Review-Journal and the Arbitrator's order are nullified simply because the parties followed Nevada's statutory arbitration procedures. If that were true, private arbitrations would cease to exist because the statutorily required "next step" after every arbitration is a motion to confirm or vacate an award. *See* NRS §§ 38.239, .241. This involuntary publication of private arbitration materials would dissuade parties from enforcing arbitration awards, undercut a key benefit of arbitration, and discourage parties from agreeing to arbitrate at all. Although a split of authority exists on this issue, many courts have recognized and promoted these sound public-policy objectives,

[10] *See also In re Teligent, Inc.*, 640 F.3d 53, 57–58 (2d Cir. 2011) ("Confidentiality is an important feature of the mediation and other alternative dispute resolution processes. Promising participants confidentiality in these proceedings promotes the free flow of information that may result in the settlement of a dispute, and protecting the integrity of alternative dispute resolution generally[.]") (internal quotations omitted).

which Nevada espouses, by sealing arbitration awards[11] and other arbitration materials.[12]

Nevada's strong public policy favoring private arbitration is akin to the policy to protect confidential settlements. *See, e.g.*, SRCR 3(4)(e). Therefore, the Court should

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[11] *See Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 592 F.Supp.2d 825, 828 (E.D. Pa. 2009) (sealing arbitration award because privacy interest a legitimate purpose to keep arbitration proceedings private and promotes voluntary private arbitration agreements); *Barkley v. Pizza Hut of America, Inc.*, 2015 WL 5915817, at *2 (M.D. Fla. 2015) (sealing arbitration award and materials to maintain confidentiality and promote voluntary arbitration agreements*); see also Seals v. Herzing Inc.-New Orleans*, 482 Fed. Appx. 893 (5th Cir. 2012) (affirming sealing of award and arbitration transcripts); *Original Appalachian*, 2017 WL 5476798, at *4 (sealing arbitration award and finding "legitimate concerns involving the parties' privacy interests"); *Decapolis Group, LLC v. Mangesh Energy, Ltd.*, 2014 WL 702000, at *2 (N.D. Tex. 2014) (sealing arbitration award with "sensitive information" and "business strategies"); *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 2014 WL 5481107, at *2 (E.D. Mich. 2014) (sealing arbitration award to protect "privacy rights"); *American Bankers Ins. Co. of Fla. v. National Cas. Co.*, 2009 WL 257890, at *2 (E.D. Mich. 2009) (sealing arbitration award because "public right of access does not attach").

[12] *See Perdue*, 2008 WL 11336459, at *5 (sealing arbitration transcripts and finding no presumption of public access); *see also DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997) (sealing arbitration record to "safeguard such confidential material as may exist"); *Whitewater West Industries, Ltd. v. Pacific Surf Designs, Inc.*, 2019 WL 1590470, at *4 (S.D. Cal. 2019) (sealing arbitration materials to prevent "competitive disadvantage"); *Penn. National Mutual Casualty Ins. Co. v. Everest Reinsurance Co.*, 2019 WL 1205297, at *3 (M.D. Pa. 2019) (sealing arbitration documents to prevent "significant impact on [movant's] ability to negotiate other agreements"); *CAA Sports LLC. v. Dogra*, 2018 WL 6696622, at *2 (E.D. Mo. 2018) (sealing arbitration materials irrelevant to district court proceedings); *Visteon Corporation v. Leuliette*, 2018 WL 623663, at *6 (E.D. Mich. 2018) (same); *Johnson v. Oracle America, Inc.*, 2017 WL 11493479, at *1 (N.D. Cal. 2017) (sealing arbitration materials with irrelevant information); *Ovonic Battery Company, Inc. v. Sanyo Electric Co.*, Ltd, 2014 WL 2758756, at *3 (N.D. Cal. 2014) (sealing arbitration materials to prevent diminished bargaining position); *Utica Mutual Insurance Company v. INA Reinsurance Company*, 2012 WL 13028279, at *8 (N.D.N.Y. 2012) (sealing arbitrations documents where disclosure "harmful to [movant's] interest"); *Scott D. Boras Inc. v. Sheffield*, 2009 WL 3444937, at *1 (S.D.N.Y. 2009) (sealing "proprietary business matters" from arbitration).

honor the parties' agreement to confidentially arbitrate by sealing the Award. Any other outcome would eviscerate one of the main reasons for arbitrating and discourage this important alternative to lawsuits. *See, e.g.*, *Civil Rights for Seniors v. Admin. Office of the Cts.*, 129 Nev. 752, 313 P.3d 216 (2013) (holding unsealing Foreclosure Mediation records would "***have a chilling effect*** on open and candid FMP participation, undermining the Legislature's interest in promoting mediation.") (emphasis added); *Trs. of Plumbers & Pipefitters Union Local 525 Health & Welfare Tr. Plan v. Developers Sur. & Indem. Co.*, 120 Nev. 56, 62, 84 P.3d 59, 62 (2004) (discussing "Nevada's policy to encourage pretrial dispute resolution," and rejecting ruling that would "not only remove the incentive to settle, [but] would create an incentive to litigate.").

3. The public interest in the Award, if any, is low because it has no relevance to the Sun's motion to expedite appeal.

Much like the Sun's filing of nearly 4,000 pages of irrelevant arbitration materials in the district court, the Sun did not need to file the Award here. The motion to expedite appeal is not about the merits of the Award; it is about whether the circumstances justify expediting the appeal. A presumption of public access requires that materials relate to the court's adjudicative process. *See In re Nat'l Consumer Mortg.*, LLC, 512 B.R. 639, 641 (D. Nev. 2014) (holding low public right to irrelevant information). The Sun has routinely abused court process by filing arbitration materials with little or no bearing on the outcome of the matter for the sole apparent purpose of asking to unseal the materials. No public policy is served by unsealing otherwise confidential materials that

are filed for no purpose other than undermining confidentiality agreements and orders.

4. The Sun's reading of SRCR 3(4) is wrong.

The Sun focuses on the language that the "parties' agreement alone does not constitute a sufficient basis for the court to seal or redact court records." SRCR 3(4), when read in its entirety, defeats the Sun's contention that its promises to keep all arbitration materials confidential and the Arbitration order entered under NRS 38.233(5) constitute an agreement alone. "The parties' agreement alone," does not extend to all agreements because the Rule lists ***certain agreements between the parties that justify sealing***. SRCR 3(4)(e) identifies an overriding public interest to protect the "confidential terms of a settlement agreement," which arise from the parties' agreement. In addition, SRCR 3(4)(b) identifies an overriding public interest in "further[ing] . . . a protective order entered under NRCP 26(c)," which exists here.

The Sun's reliance on the unpublished decision in *Wciorka v. Malaga*, 442 P.3d 152, n.1 (Nev. 2019) is off point. In *Wciorka*, the court rejected to parties' stipulation to seal the entire appellate record. Here, the parties agreed to ***confidentially arbitrate***, which raises a completely different question that implicates Nevada's public policy.

V. Conclusion

The Sun's motion to unseal the Award should be denied because (1) the same request is pending before the district court, (2) honoring the parties' agreement to arbitrate privately promotes Nevada's strong public policy favoring private arbitration, and (3) the Award has no bearing on the Sun's motion to expedite appeal.

DATED this 30th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify that I am an employee of Kemp Jones, LLP and that on April 30, 2020, I caused the foregoing APPELLANTS' AND CROSS-RESPONDENTS' OPPOSITION TO MOTION TO TEMPORARILY SEAL EXHIBIT 1 TO REPLY IN SUPPORT OF MOTION TO EXPEDITE APPEAL BUT THEN UNSEAL AS NOT CONFIDENTIAL OR SENSITIVE AFTER NOTICE AND OPPORTUNITY TO BE HEARD to be served by electronically filing the foregoing with the Clerk of the Supreme Court of Nevada by using the court's electronic filing system, which will send notice of electronic filing to the following:

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