

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.

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Elizabeth A. Brown
Clerk of Supreme Court
District Court Case No. 17-259

**APPELLANTS'/CROSS-RESPONDENTS' MOTION TO FILE PORTIONS
OF OPENING BRIEF AND APPENDIX UNDER SEAL**

KEMP JONES, LLP

J. Randall Jones, Esq. (#1927)
Michael J. Gayan, Esq. (#11135)
Mona Kaveh, Esq. (#11825)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

JENNER & BLOCK LLP

Richard L. Stone, Esq. (pro hac vice)
David R. Singer, Esq. (pro hac vice)
Amy M. Gallegos, Esq. (pro hac vice)
633 West 5th Street, Suite 3600
Los Angeles, California 90071-2054

*Attorneys for Appellants/Cross-Respondents
News+Media Capital Group LLC and
Las Vegas Review-Journal, Inc.*

I. Introduction

After seven months of briefing and hearings on the issue, on May 1, 2020, the district court issued a detailed minute order sealing the parties' private arbitration materials and clarifying (and broadening) the protective order that had already been in place to make clear that all arbitration materials are to be treated as confidential. 5/1 Notice, Ex. 1. The district court's 17-page findings of fact, conclusions of law, and sealing order was filed in this Court on May 28, 2020 (the "District Court Sealing Order"). 5/28 Notice, Ex. 1. In reaching its ruling, the district court considered several factors, including Nevada's strong public policy favoring arbitration, the arbitrator's authority to order and maintain confidentiality of arbitration proceedings, the compelling privacy and safety interests that outweigh the public interest in access to the arbitration materials under SRCR 3(4), and the unique facts of the matter (i.e., involving sophisticated parties who entered into a highly complex joint operating arrangement; competing newspapers exchanging private and confidential business information; and the parties submission of their dispute to private arbitration). *Id.*

The documents (and portions of its opening brief referencing those documents) that the Review-Journal is seeking to seal in this Court have all been sealed by the district court under that ruling. These include the briefs and/or portions of the briefs on the motions to confirm and/or vacate the arbitration award,¹ as well as certain exhibits to

¹ These filings referenced and/or quoted confidential arbitration information, so each party sought either the sealing of the entire brief and/or portions of the brief (with the publicly-filed version redacted) until the district court ruled on the parties' sealing and

those briefs, including a profit and loss statement,² the final arbitration award,³ excerpts of hearing transcripts and deposition testimony from the private arbitration proceedings, and other confidential arbitration records. Under SRCR 7, these records sealed in the district court are required to be sealed in this Court absent a further order. The Review-Journal thus moves this Court for an order requesting that portions of its opening brief and appendix *remain* sealed pursuant to SRCR 7. The pages of the appendix with documents ordered sealed by the district court are: 147-178, 179-204, 230-247, 335-359, 360-405, 406-473, 474-507, and 530-551; and the pages of the opening brief that redact references to those sealed documents are: ii-iv, 3-7, 9-10, 12-13, 16-20, 22-36, 38-39, 41, 43-44, 46-47, 49, 51-54 (collectively, the “Sealed Records”).

Nevertheless, even if this Court were to consider the sealing question, Nevada’s strong public policy favoring arbitration—coupled with the arbitrator’s confidentiality order and the parties’ expectation to privately and confidentially resolve their commercial accounting dispute through arbitration—constitute independent, compelling grounds for this Court to maintain the sealing of the Sealed Records under SRCR 3(4). The parties agreed to resolve their accounting dispute through confidential arbitration, and the *Arbitrator ordered confidentiality* for all materials generated in

unsealing motions. The district court ultimately ordered the sealing of the confidential arbitration materials. 5/28 Notice, Ex. 1.

² This document contains highly sensitive, financial information. The Review-Journal sought to seal this document in the district court, which the Sun did not oppose.

³ The Sun has sought to unseal the final arbitration award in this Court. The briefing on that issue is currently pending.

the arbitration. Failing to honor this will upend one of the main reasons the parties here and elsewhere choose arbitration (*i.e.*, privacy) and discourage Nevadans from agreeing to arbitrate. Nevada's overburdened courts should continue to encourage and promote arbitration and other forms of alternative dispute resolution.

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, which concerned a dispute over the contractual method for accounting the Sun's profit share (if any) under the parties' joint operating arrangement (JOA). In February 2019, the Arbitrator ordered that ***all information*** generated in the course of the arbitration be kept confidential, subject to a narrow exception in Appendix D of the JOA (which allows the Sun's management to see certain accounting information from its competitor, the Review-Journal). 04/23 Mot., Ex. 1, I.A, Ex. 2, Appendix D.

The Sun agreed to keep the arbitration confidential, in part, "to facilitate the expedited 60-day discovery and arbitration process[.]" 5/18 Mot., 8. Based on that promise, the Review-Journal freely exchanged documents and information relating to the accounting dispute without concerns about public disclosure. After the parties received the arbitration decision (Award), the district court ordered that ***all arbitration materials*** be protected from public disclosure in conformity with, and subject to, Appendix D of the JOA. 04/23 Mot., Ex. 3, 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. 5/28 Notice, Ex. 1, 3:22-24. In December 2019, the district court confirmed the Award. The order confirming the Award and the resulting judgment are publicly available. The district court also “already made public the relevant and limited parts of the record that were required to render its decision in this matter[.]” 5/28 Notice, Ex. 1, 15:9-11.

In September 2019, the Sun began asking the district court to unseal materials from the confidential arbitration. In December 2019, the district court requested additional briefing on three issues.⁴ The parties briefed those issues and appeared for the hearing where the district court granted the Sun’s request to file *more* briefing. In April 2020, the parties completed the briefing and awaited the district court’s ruling. On May 1, 2020, the district court issued its minute order, resolving the factual disputes and ruling in favor of the Review-Journal on the sealing and modification issues. Notice of the district court’s well-reasoned 17-page District Court Sealing Order was filed on May 28, 2020.

III. SRCR 7 Requires Sealing Portions of the Opening Brief and Appendix.

SRCR 7 prescribes an orderly process for the district courts to consider motions

⁴ 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 language in its protective order.

to seal in the first instance. The rule states that “[c]ourt records sealed in the trial court shall be sealed from public access in the Nevada Supreme Court subject to further order of that court.” SRCR 7. The District Court Sealing Order sealed all of the documents that the Review-Journal is seeking to seal through this motion. *See* 5/28 Notice, Ex. 1, at 16 ¶¶ (b)-(g). SRCR 7 requires these records to be sealed in this Court absent a further order from the court. The Review-Journal therefore respectfully requests that these documents (and portions of the opening brief referencing those documents) **remain** sealed in this Court.⁵

IV. The Sealed Records Should Remain Sealed in this Court Under SRCR 3(4) Because Compelling Privacy Interests Outweigh Any Minimal Public Interest in these Materials.

Even if this Court declines to consider or defer to the District Court Sealing Order, the Sealed Records should remain sealed. 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 when 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 NRCR 26(c) or JCRCP 26(c);

⁵ 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); *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).

- (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 the sealing of the Sealed Records based on the Arbitrator’s protective order authorized by NRS 38.233(5). Sealing the documents also furthers the district court’s now-modified protective order entered under NRCP 26(c). SRCR 3(4)(b). And SRCR 3(4)(h) independently justifies sealing the documents based on Nevada’s public interest in respecting and protecting private arbitration and the parties’ privacy expectations for all materials generated in the arbitration. Like Nevada’s compelling interest in promoting settlements by respecting confidentiality agreements, SRCR 3(4)(e), Nevada’s strong public policy favoring arbitration provides an equally compelling basis for sealing these confidential arbitration documents.⁶

⁶ The *district court stated* that in reaching its ruling, it considered, *inter alia*, “Nevada’s strong public policy in favor of arbitration and securing benefits of a bargained-for exchange,” and “compelling reasons favoring the public’s interest in the access of the information in private arbitration against *the [district court]’s duty to guard against court filings that might have become a vehicle for improper purposes.*” 5/28 Notice, Ex. 1, 12:26-13:3 (emphasis added). The *district court further found* that the Arbitrator’s Order constitutes a “compelling circumstance” under SRCR 3(4)(h) and that “additional compelling circumstances exist in light of the benefits of the arbitration agreement, Nevada’s public policies concerning the public’s right to information and private arbitration, the Newspaper Preservation Act’s influence on the parties’ agreement, and [the district court]’s restricted review of the Arbitrator’s determinations.” *Id.*, 13:23-28. It also acknowledged the “sophisticated parties” involved. *Id.*, 12:2-4.

1. Nevada’s strong public policy favoring private arbitration justifies sealing the Sealed Records.

Nevada has a strong public policy favoring private arbitration.⁷ Nevada has enacted many statutes, rules, and programs to promote and encourage all forms of ADR to reduce the court system’s crushing caseloads.⁸ For example, Nevada protects settlement communications and confidential 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).⁹ Private arbitration warrants 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. 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

⁷ *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).

⁸ Nevada courts have some of the highest caseloads in the nation. *See* 2018 Annual Report of the Nevada Judiciary, 5 (“the work of the Judicial Branch continues [at] a high rate that exceeds the level of cases handled by most courts in America.”).

⁹ *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.”).

*4 (N.D. Ga. 2008) (collecting cases); *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 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”); *In re Teligent, Inc.*, 640 F.3d 53, 57–58 (2d Cir. 2011). Here, failing to honor the parties’ agreement to privately and confidentially arbitrate their accounting dispute and the Arbitrator’s order requiring confidentiality, Nevadans will be less likely to agree to arbitrate—a result that will inevitably increase court caseloads. Many courts have recognized and promoted these sound public-policy objectives, which Nevada espouses, by sealing arbitration materials.¹⁰

¹⁰ *See Perdue*, 2008 WL 11336459, at *5 (sealing arbitration transcripts and finding no presumption of public access); *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); *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London*, 592

Nevada's strong public policy favoring private arbitration is analogous to the state's policy to protect confidential settlements. *See, e.g.*, SRCR 3(4)(e). Therefore, the Court should honor the parties' agreement and the Arbitrator's Order to confidentially arbitrate by sealing the Sealed Records. 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 mediation records would "have a chilling effect on open and candid" participation, "undermining the Legislature's interest in promoting mediation."); *Trs. of Plumbers & Pipefitters Union v. Dev. 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.").

V. Conclusion

Based upon the foregoing, the Review-Journal respectfully requests this motion be granted and that portions of its opening brief and accompanying appendix be filed under seal in this Court. The pages of the appendix with documents the Review-Journal

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); *Barkeley 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); *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").

is seeking to keep sealed in this Court are: 147-178, 179-204, 230-247, 335-359, 360-405, 406-473, 474-507, and 530-551; and the pages of the opening brief that redact references to those documents are: ii-iv, 3-7, 9-10, 12-13, 16-20, 22-36, 38-39, 41, 43-44, 46-47, 49, 51-54.

DATED this 1st day of June, 2020.

KEMP JONES, LLP

/s/ J. Randall Jones

J. Randall Jones, Esq. (#1927)
Michael J. Gayan, Esq. (#11135)
Mona Kaveh, Esq. (#11825)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

Richard L. Stone, Esq. (pro hac vice)
David R. Singer, Esq. (pro hac vice)
Amy M. Gallegos, Esq. (pro hac vice)
JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, California 90071-2054

*Attorneys for Appellants/ Cross-Respondents
News+Media Capital Group LLC and
Las Vegas Review-Journal, Inc.*

CERTIFICATE OF SERVICE

I certify that I am an employee of Kemp Jones, LLP and that on June 1, 2020, I caused the foregoing APPELLANTS'/CROSS-RESPONDENTS' MOTION TO FILE PORTIONS OF OPENING BRIEF AND APPENDIX UNDER SEAL 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:

E. Leif Reid, Esq.
Kristen L. Martini, Esq.
Nicole Scott, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
One East Liberty Street, Suite 300
Reno, Nevada 89501-2128

James J. Pisanelli, Esq.
Todd L. Bice, Esq.
Jordan T. Smith, Esq.
PISANELLI BICE PLLC
400 South 7th Street, Suite 300
Las Vegas, Nevada 89101

DATED this 1st day of June, 2020.

/s/ Pamela Montgomery
An employee of Kemp Jones, LLP