IN THE SUPREME COURT OF THE STATE OF NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.,

Appellant,

vs.

DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS,

Respondents.

Supreme Court No. 79663

District Court No. A-18-783054-C

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Timothy J. Williams, Department 16, District Judge
District Court Case No. A-18-783054-C

APPELLANTS' APPENDIX VOL. I OF III
APP00001-APP00250

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DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS, Plaintiff, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendant.	A-18-783054-C Case No.: A-18- Dept. No.: Department 16 **COMPLAINT FOR DAMAGES**

Plaintiff U.S Anesthesia Partners (herein Plaintiff) by and through its attorneys of record, the law firm of JOHN H. COTTON & ASSOCIATES, LTD., and for its causes of action against Defendant, complains and alleges as follows:

I.

PARTIES AND JURISDICTION

1. Plaintiff is a foreign corporation, duly licensed to do business in the State of Nevada.

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2. Plaintiff employs licensed physicians, certified registered nurse anesthetists and other authorized health care providers to provide anesthesia services and pain management services.

3. Plaintiff provides such services at multiple locations in Las Vegas, NV.

4 Upon information and belief, defendant DEVIN CHERN TANG, M.D. (hereinafter "DEFENDANT TANG") is, and was at all times relevant hereto, a physician licensed to practice in the State of Nevada pursuant to NRS Chapters 449 and 630.

5. All events described herein occurred in Clark County, NV and therefore jurisdiction in the Eight Judicial District Court of Nevada is proper.

II.

GENERAL ALLEGATIONS

6. In December 2016, Defendant Tang signed an Agreement inclusive of non-competition clauses (the "Agreement" or "NCA") with the entity Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. d/b/a Anesthesiology Consultants, Inc., a Nevada corporation.

7. In November-December 2016, Plaintiff merged and/or acquired and/or joined Fielden Hanson Isaacs Miyada Robison Yeh, Ltd., thereby becoming the employer of Defendant Tang, and becoming the parent company of Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.

8. The Agreement 2.8.1 provision states:

> In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion), directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such

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> termination; (ii) call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof; or (iii) provide management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

9. As expressly stated in the Agreement, but for the agreement of Defendant Tang to comply with such covenants Plaintiff would not have agreed to enter into the Agreement with Defendant Tang.

10. As expressly stated in the Agreement, Defendant Tang:

> recognizes that the Practice's decision to enter into this Agreement is induced primarily because of the covenants and assurances made by Physician in this Agreement, that Physician's covenants regarding non-competition and nonsolicitation in this Section 2.8 are necessary to ensure the continuation of the business of the Practice and the reputation of the Practice as a provider of readily available and reliable, high quality physicians, as well as to protect the Practice from unfair business competition, including but not limited to, the improper use of Confidential Information.

11. Exhibit B to the Employment Agreement is Plaintiff's Clinical Code of Conduct listing an unacceptable behavior as interfering with any contract or business relationship of USAP.

12. Defendant Tang proceeded to work for Plaintiff and from August 2017-June 2018 as an employee of USAP, Defendant Tang administered anesthesia for the following amount of procedures/surgeries at the following facilities: 45 at Desert Springs Hospital, 117 at Durango Outpatient, 12 at Flamingo Surgery Center, 165 at Henderson Hospital, 68 at Horizon Surgery Center, 37 at Institute of Orthopaedic Surgery, 16 at Las Vegas Surgicare, 106 at MountainView Hospital, 7 at Parkway Surgery Center, 22 at Sahara Outpatient Surgery Center, 31 at Seven

Hills Surgery Center, 138 at Southern Hills Hospital, 55 at Specialty Surgery Center, 43 at Spring Valley Medical Center, 1 at St. Rose-De Lima Campus, 38 at St. Rose- San Martin Campus, 51 at St. Rose- Siena Campus, 160 at Summerlin Hospital, 151 at Sunrise Hospital, 1 at Tenaya Surgical Center, 106 at Valley Hospital, and 74 at Valley View Surgery Center for a total of 1,444 at 22 facilities.

13. Defendant Tang's job duties as part and parcel of his employment with Plaintiff included interaction with third-party patients, physicians, and physicians' groups in providing them anesthesiology and pain management services.

14. By virtue of the job duties described in the preceding paragraph of this Complaint, Defendant Tang obtained valuable information as to the nature and character of Plaintiff's business, and the names of third-party patients, physicians, and physicians' groups that had ongoing relationships and good will with Plaintiff.

15. On April 24, 2018, Defendant Sun Anesthesia Solutions registered as a business entity with the Nevada Secretary of State.

16. Defendant Tang is the sole officer listed for Defendant Sun Anesthesia Solutions, and therefore Sun Anesthesia Solutions is the alter ego of Defendant Tang.

17. Defendant Tang created and registered Sun Anesthesia Solutions without Plaintiff's knowledge or approval.

18. Defendant Tang creating and registering Sun Anesthesia Solutions without Plaintiff's knowledge or approval violated the Agreement.

19. Defendant had entered into the Agreement willingly, voluntarily, and without duress.

20. On June 3, 2018, Defendant Tang ceased to work for Plaintiff.

21. Defendant Tang requested of Plaintiff to waive or make void the Agreement's non-compete provisions.

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22. Plaintiff denied Defendant Tang's request to waive or make void the Agreement's non-compete provisions as was Plaintiff's expressly reserved right to do so in the Agreement.

23. Plaintiff by and through its employees have since discovered and determined that Defendant Tang within two months of ceasing to work for Plaintiff was performing anesthesia services at Southern Hills Hospital Medical Center and St. Rose Dominican Hospital- San Martin Campus.

24. On or about July 31, 2018, Dean Polce, D.O., a USAP physician-employee, discovered that Defendant Tang performed anesthesia services at Southern Hills Hospital Medical Center.

25. Defendant Tang doing so at Southern Hills Hospital Medical Center violated the express terms of the Employment Agreement.

26. Defendant Tang performed those anesthesia services at Southern Hills Hospital Medical Center for local vascular neurologist Tamer Ammar, whom USAP had a prior and ongoing professional relationship.

27. Defendant Tang doing so for Dr. Ammar violated the express terms of the Employment Agreement.

28. On or about August 17, 2018, Jay Chang, M.D. and Mike Hansen, M.D., both USAP physician-employees, discovered that Defendant Tang performed anesthesia services at St. Rose Dominican Hospital-San Martin Campus.

29. Defendant Tang doing so at St. Rose Dominican Hospital-San Martin Campus violated the express terms of the Employment Agreement.

30. Defendant Tang performed those anesthesia services at St. Rose Dominican Hospital- San Martin Campus for local general/breast surgeon Anne O'Neill, M.D. whom USAP had a prior and ongoing professional relationship.

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31. Defendant Tang doing so for Dr. O'Neill violated the express terms of the Employment Agreement.

32. Based upon information and belief, Defendant Tang provides and continues to provide anesthesia services at other facilities where Plaintiff has established professional relationships and good will.

33. Defendant Tang providing such services violates the Agreement.

34. Southern Hills Hospital Medical Center is a healthcare facility where Plaintiff by and through its employees regularly conducts business providing anesthesia services, and falls into the definition of "Facility" in the Agreement.

35. St. Rose Dominican Hospital- San Martin Campus is a healthcare facility where Plaintiff by and through its employees regularly conducts business providing anesthesia services, and falls into the definition of "Facility" in the Agreement.

36. Based upon information and belief, Defendant Tang is employed by or is an independent contractor with Red Rock Anesthesia Consultants, LLC.

37. Red Rock Anesthesia Consultants, LLC is headquartered in Las Vegas, NV.

38. Red Rock Anesthesia Consultants, LLC is in direct competition with Plaintiff to obtain the business of third-party patients, third-party physicians, and third-party physician groups in need of anesthesia services.

39. Upon discovery of Defendant Tang providing anesthesia services at Southern Hills Hospital Medical Center, on August 3, 2018, Plaintiff issued a cease and desist letter to Defendant Tang with respect to his violation of the Agreement's non-compete provisions.

40. Plaintiff again issued another cease and desist letter to Defendant Tang on August 28, 2018.

41. On August 31, 2018, Defendant Tang, through counsel, responded to Plaintiff's cease and desist letters denying all the allegations against him contained in said letters.

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PLAINTIFF'S FIRST CAUSE OF ACTION
BREACH OF CONTRACT

42. Plaintiff repeats, realleges and incorporates herein each and every allegation set forth in all previous paragraphs of its Complaint, as well as each and every allegation contained in every other Claim for Relief, as if fully set forth herein.

43. Pursuant to the terms of the Agreement, provision 2.8.1 prohibits Defendant Tang from directly or indirectly providing anesthesiology and/or pain management services, including consultation, management and/or administrative services related thereto, at any of the facilities at which he provided such services during his employment with Plaintiff.

44. Defendant Tang breached the Agreement with Plaintiff after his employment by performing anesthesia services, at minimum at Southern Hills Hospital and St. Rose Dominican Hospital- San Martin Campus, and perhaps other facilities, and actively contacts third-party physicians whom Plaintiff by and through its employees has long-standing professional relationships to provide anesthesia services.

45. As a direct, proximate, and foreseeable result of Defendant Tang's breach of the Agreement, Plaintiff has suffered general and special damages in an amount in excess of Fifteen Thousand Dollars ($15,000.00), including prejudgment interest, the exact amount to be proven at trial.

46. Plaintiff has been required to retain the services of an attorney to prosecute its claim against Defendant Tang and his alter ego Sun Anesthesia Solutions and is entitled to reasonable attorney's fees and costs of suit incurred herein.

PLAINTIFF'S SECOND CAUSE OF ACTION
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

47. Plaintiff repeats, realleges and incorporates herein each and every allegation set forth in all previous paragraphs of its Complaint, as well as each and every allegation contained in every other Claim for Relief, as if fully set forth herein.

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48. There is an implied covenant of good faith and fair dealing in every contract.

49. Defendant Tang breached the implied covenant of good faith and fair dealing by initially accepting the Agreement and non-compete provision therein, and then, after his employment, by performing anesthesia services, at Southern Hills Hospital and St. Rose Dominican Hospital- San Martin Campus and perhaps other facilities, and actively contacting third-party physicians whom Plaintiff's anesthesiologist employees have long-standing professional relationships with to provide anesthesia services in direct violation of the non-compete provision.

50. As a direct, proximate, and foreseeable result of Defendant Tang's and/or his alter ego Sun Anesthesia Solutions' breach of the implied covenant of good faith and fair dealing, Plaintiff has suffered general and special damages in an amount in excess of Fifteen Thousand Dollars ($15,000.00), including prejudgment interest, the exact amount to be proven at trial.

51. Plaintiff has been required to retain the services of an attorney to prosecute its claim against Defendant Tang and his alter ego Sun Anesthesia Solutions and is entitled to reasonable attorney's fees and costs of suit incurred herein.

PLAINTIFF'S THIRD CAUSE OF ACTION
UNJUST ENRICHMENT

52. Plaintiff repeats, realleges and incorporates herein each and every allegation set forth in all previous paragraphs of its Complaint, as well as each and every allegation contained in every other Claim for Relief, as if fully set forth herein.

53. Plaintiff's employees have spent years and significant money developing client relations with third-party facilities, third-party physicians, and third-party physician groups in the Las Vegas medical community.

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54. Plaintiff's relations with such facilities, physicians, and physician groups in the Las Vegas medical community is an asset of significant value to Plaintiff and to any other person or entity engaging in a business similar to Plaintiff.

55. Defendant Tang has actively contacted third-party physicians and physician groups whom Plaintiff's employees have long-standing professional relationships with and this was done without Plaintiff's permission or prior knowledge.

56. Defendant Tang and/or his alter ego Sun Anesthesia Solutions has been unjustly enriched by the wrongful acts described above.

57. As a direct, proximate, and foreseeable result of Defendant Tang's and/or his alter ego Sun Anesthesia Solutions' unjust enrichment, Plaintiff has suffered general and special damages in an amount in excess of Fifteen Thousand Dollars ($15,000.00), including prejudgment interest, the exact amount to be proven at trial.

58. Plaintiff has been required to retain the services of an attorney to prosecute its claim against Defendant Tang and Sun Anesthesia Solutions and is entitled to reasonable attorney's fees and costs of suit incurred herein.

PLAINTIFF'S FOURTH CAUSE OF ACTION
TORTIOUS INTERFERENCE OF CONTRACTUAL RELATIONS

59. Plaintiff repeats, realleges and incorporates herein each and every allegation set forth in all previous paragraphs of its Complaint, as well as each and every allegation contained in every other Claim for Relief, as if fully set forth herein.

60. Plaintiff has an actual non-compete agreement with Defendant Tang.

61. Defendant Tang was aware of the non-compete agreement as reflected in his request to have the non-compete agreement waived or made void.

62. Plaintiff has a business relationship with facilities and physicians in the Las Vegas medical community.

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63. Defendant Tang intentionally, improperly and without privilege, interfered with the prospective economic advantage between Plaintiff and the facilities, physicians, and physician groups in the Las Vegas medical community with which it has a business relationship by actively contacting them to perform medical services. This caused the perspective business advantage Plaintiff had with these facilities and physicians to be tampered with and disrupted.

64. As a direct, proximate, and foreseeable result of Defendant Tang's and/or Sun Anesthesia Solutions' tortious interference, Plaintiff has suffered general and special damages in an amount in excess of Fifteen Thousand Dollars ($15,000.00), including prejudgment interest, the exact amount to be proven at trial.

65. Plaintiff has been required to retain the services of an attorney to prosecute its claim against Defendant Tang and Sun Anesthesia Solutions is entitled to reasonable attorney's fees and costs of suit incurred herein.

PLAINTIFF'S FIFTH CAUSE OF ACTION
INJUNCTIVE RELIEF

66. Plaintiff repeats, realleges and incorporates herein each and every allegation set forth in all previous paragraphs of its Complaint, as well as each and every allegation contained in every other Claim for Relief, as if fully set forth herein.

67. Plaintiff has an interest in protecting its business relationships with facilities, physicians, and physician groups in the Las Vegas medical community.

68. In an effort to protect its economic interests and proprietary matters related to its business, Plaintiff mandates that its employees execute the non-disclosure agreement upon commencement of their employment.

69. Defendant Tang executed such a non-compete agreement willingly, knowingly, voluntarily and without duress.

70. Defendant Tang breached this agreement and continues to breach it.

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71. Plaintiff is entitled to an injunction precluding Defendant Tang and his alter ego Sun Anesthesia Solutions from further breaching the terms of the agreement.

72. Defendant Tang expressly agreed to such an injunction per section 2.8.3 of the Agreement:

> Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of this Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.

73. Plaintiff will suffer irreparable harm by Defendant Tang's and/or his alter ego Sun Anesthesia Solutions' continual breaches of the non-compete agreement if the relief requested by Plaintiff is not granted.

74. Defendant Tang will not be burdened by complying with the terms of the agreement to which he previously agreed to abide.

75. Plaintiff requests injunctive relief in the form of an order precluding Defendant Tang and/or Sun Anesthesia Solutions from further breaching the terms of the agreement.

76. Plaintiff has been required to retain the services of an attorney to prosecute its claim against Defendant Tang and Sun Anesthesia Solutions is entitled to reasonable attorney's fees and costs of suit incurred herein.

PLAINTIFF'S SIXTH CAUSE OF ACTION
DECLARATORY RELIEF

77. Plaintiff repeats, realleges and incorporates herein each and every allegation set forth in all previous paragraphs of its Complaint, as well as each and every allegation contained in every other Claim for Relief, as if fully set forth herein.

78. NRS 30.030 *et seq.*, among other things, authorizes the Courts of this State to declare the rights, status, validity and other legal relations of and between persons as they may be affected by a contract, statute or deed.

79. Plaintiff herein assets that the aforementioned Agreement is a valid contract under NRS 613.200(4) that Defendant Tang has breached as alleged above.

80. Accordingly, this Court has the power and authority to declare the rights and obligations of these parties in connection with the various contracts and the applicable Nevada statute and laws. Specifically, and without limitation, this Court can and should declare that the aforementioned Agreement is a valid contract that has been respectively breached by Defendant Tang, entitling Plaintiff to immediate injunctive relief and damages.

81. Plaintiff has been required to retain the services of an attorney to prosecute its claim against Defendant Tang and Sun Anesthesia Solutions and is entitled to reasonable attorney's fees and costs of suit incurred herein.

III.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendants as more fully set forth below.

WHEREFORE, Plaintiff, while expressly reserving its right to amend this Complaint up to and including the time of trial to include additional defendants, additional theories of recovery, and items of damages not yet ascertained, demands judgment against Defendants as follows:

1. General damages in excess of $15,000;

2. Special damages in excess of $15,000;

3. Punitive or exemplary damages in an amount in excess of $15,000;

4. For a temporary restraining order;

5. For declaratory and permanent injunctive relief;

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6. For pre and post-judgment interest;

7. For reasonable attorney's fees and costs of suit; and

8. For such other and further relief as to the Court deems to be just and appropriate.

Dated this 18th day of October 2018.

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/s/ Adam Schneider
JOHN H. COTTON, ESQ.
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DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS,

Plaintiff,

vs.

DEVIN CHERN TANG, M.D., SUN SOLUTIONS ANESTHESIA, A Nevada Corporation, DOE Defendants I-X,

Defendants.

Case No.: A-18-783054-C
Dept. No.: 16

PLAINTIFF'S MOTION AND NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff U.S Anesthesia Partners (herein Plaintiff) by and through its attorneys of record, the law firm of JOHN H. COTTON & ASSOCIATES, LTD., hereby submits its Motion for Preliminary Injunction in the above-referenced matter pursuant to NRS 33.010.

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This Motion is made and based on all the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, together with such other and further evidence and argument as may be presented and considered by this Court at any hearing of this Motion.

Dated this 19th day of October 2018.

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/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND/OR THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR PRELIMINARY INJUNCTION** for hearing in the above entitled Court on the 29 day of November, 2018, at the hour of 9:00 a.m./~~p.m.~~ or as soon thereafter as counsel may be heard.

Dated this 19th day of October of 2018.

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/s/ Adam Schneider
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. Introduction and factual background

Plaintiff is a foreign corporation duly licensed to do business in State which employs licensed physicians, certified registered nurse anesthetists and other authorized health care providers to provide anesthesia services and pain management services, and in November-December 2016 merged/acquired/joined entity Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. d/b/a Anesthesiology Consultants, Inc., a Nevada corporation. Such a transaction made USAP the parent corporation of Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.

In December 2016, Defendant Devin Chern Tang, M.D. entered into a Physician Employment Agreement with Plaintiff which included a non-compete agreement (NCA), thereby becoming Plaintiff's employee. (**Exhibit A-** Employment Agreement at page 2 sections 1 and 2.1, and page 14 at section 7.)

The Employment Agreement's section 2.8.1 specifically states in relevant part:

> In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion), directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination; (ii) call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof; or (iii) provide

> management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

(Id. at page 5, section 2.8.1).

It was expressly stated and acknowledged that but for the agreement of [Dr. Tang] to comply with such covenants, [Plaintiff] would not have agreed to enter into this Agreement." (Id. at page 7, section 2.10.) Exhibit B to the Employment Agreement is USAP's Clinical Code of Conduct. The Code lists behaviors that are unacceptable including interfering with any contract or business relationship of USAP.

Despite the express language which Defendant entered into freely, voluntarily and without duress, Defendant violated and continues to violate the NCA. At the time of entering into the Employment Agreement, Defendant Tang:

> recognizes that the Practice's decision to enter into this Agreement is induced primarily because of the covenants and assurances made by Physician in this Agreement, that Physician's covenants regarding non-competition and nonsolicitation in this Section 2.8 are necessary to ensure the continuation of the business of the Practice and the reputation of the Practice as a provider of readily available and reliable, high quality physicians, as well as to protect the Practice from unfair business competition, including but not limited to, the improper use of Confidential Information.

(Id. at page 5, section 2.8.)

Plaintiff had and has contractual relationships with many facilities and hospitals in Clark County, including but not limited to Southern Hills Hospital Medical Center, Sunrise Hospital Medical Center, Henderson Hospital, and St. Rose Dominican Hospital- San Martin Campus.

Dr. Tang would proceed to work for Plaintiff providing anesthesia and pain management services. From August 2017 to the end of his employment with USAP in June 2018, Dr. Tang administered anesthesia in the following amount of procedures/surgeries at the following facilities: 45 at Desert Springs Hospital, 117 at Durango Outpatient, 12 at Flamingo Surgery

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Center, 165 at Henderson Hospital, 68 at Horizon Surgery Center, 37 at Institute of Orthopaedic Surgery, 16 at Las Vegas Surgicare, 106 at MountainView Hospital, 7 at Parkway Surgery Center, 22 at Sahara Outpatient Surgery Center, 31 at Seven Hills Surgery Center, 138 at Southern Hills Hospital, 55 at Specialty Surgery Center, 43 at Spring Valley Medical Center, 1 at St. Rose-De Lima Campus, 38 at St. Rose- San Martin Campus, 51 at St. Rose- Siena Campus, 160 at Summerlin Hospital, 151 at Sunrise Hospital, 1 at Tenaya Surgical Center, 106 at Valley Hospital, and 74 at Valley View Surgery Center for a total of 1,444 at 22 facilities.

Unbeknownst to Plaintiff, Defendant Tang knew he was going to leave Plaintiff's employment as evidenced by the formation on April 24, 2018 of "Sun Anesthesia Solutions" with Defendant Tang as its sole officer. (**Exhibit B**- Nevada Secretary of State Business Registry for "Sun Anesthesia Solutions.")

Less than forty days later on June 3, 2018, Defendant Tang worked his last day as an employee of Plaintiff. Defendant asked Plaintiff to void the NCA, to which Plaintiff rejected as expressly reserved in section 2.8.1 of the Agreement. (See id. at page 5, section 2.8.1.)

Plaintiff by and through its employees have since discovered and determined that Defendant Tang within approximately one month of ceasing to work for Plaintiff was performing anesthesia services, at minimum at St. Rose Dominican Hospital- San Martin Campus and Southern Hills Hospital Medical Center (SHHMC) and perhaps other facilities, all in violation of the NCA. (**Exhibit C**- Declaration of Dr. Isaacs.)

Cursory research shows that Defendant Tang works for Red Rock Anesthesia Consultants, LLC, and additionally is affiliated with Sunrise Hospital Medical Center, Valley Hospital Medical Center, MountainView Hospital, and Henderson Hospital. Those are all facilities that Plaintiff by and through its employees provide anesthesia services, thus making Defendant Tang's administration of anesthesia at those facilities in direct violation of the express

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terms of the NCA. (**Exhibit D**- Plaintiff's Nevada locations served inclusive of Southern Hills Hospital Medical Center and St. Rose Dominican Hospital- San Martin).

Defendant Tang, and/or the group he works for Red Rock Anesthesia Consultants LLC, and/or Defendant's alter ego Sun Anesthesia Solutions, actively contacts third-party physicians and physicians' groups whom Plaintiff by and through its employees have long-standing professional relationships to provide anesthesia and pain management services.

II.

REQUESTED RELIEF

Unless Defendant is enjoined, Defendant will continue to violate the NCA, compete directly against Plaintiff, and solicit business with Plaintiff's clients in the form of third-party patients, physicians or physician groups needing anesthesia services, thereby causing continued and irreparable harm to Plaintiff.

Indeed, Defendant Tang expressly agreed to such an injunction per section 2.8.3 of the Agreement:

> Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of this Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.

(Id. at page 6, section 2.8.3.) Therefore Plaintiff requests the immediate entry of a preliminary injunction as follows in a manner consistent with the Agreement to:

1) enjoin Defendant and his alter ego Sun Anesthesia Solutions in competition with Plaintiff from performing any anesthesia services for patients or for physicians or for physicians' groups consistent with the now-violated Agreement; and

2) enjoin Defendant and his alter ego Sun Anesthesia Solutions in competition with Plaintiff from soliciting or doing business with any of Plaintiff's clients in the form of third-party patients, physicians or physician groups consistent with the now-violated Agreement.

III.

APPLICABLE LAW

A. NRS 33.010 allows for injunctions in this instance

NRS 33.010 allows for injunction in any of the following circumstances:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

NRS 33.010. Unquestionably, Plaintiff's Complaint triggers application of NRS 33.010 and the granting of an injunction.

An injunction is indicated to prevent irreparable injury that causes damage to the business and its profits. See Sobol v. Capital Management Consultants, Inc., 102 Nev. 444, 726 P.2d 335. An injunction is likewise indicated to protect business and propriety interests. Guion v. Terra Marketing of Nevada, Inc., 90 Nev. 237, 523 P.2d 847 (1974). An injunction is further indicated should the injury likely be irreparable then "equity will always interpose its powers to protect a person from a threatened injury." Champion v. Sessions, 1 Nev. 478 (1865). An injunction is further indicated to preserve the status quo. Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987).

"A preliminary injunction available if an applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to

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continued, will cause irreparable harm for which compensatory damages is an inadequate remedy." Dangberg Holdings Nevada, LLC v. Douglas Cty., 115 Nev. 129, 978 P.2d 311 (1999).

The decision to grant a preliminary injunction is within the sound discretion of the trial court. Id. at 142-143. So too does the trial court have discretion regarding the amount of security given by the applicant for injunctive relief before the issuance of injunctive relief. See NRCP 65(c). But doing so would be in direct contravention of the Employment Agreement's section 2.8.3.[1] (Exhibit A at page 6.)

A trial court can abuse its discretion in denying injunctive relief. Pickett v. Comanche Construction, Inc., 108 Nev. 422, 836 P.2d 44 (1992) (reversing the trial court's denial of an injunction and finding if the defendant was allowed to act as it desired the Plaintiffs would be subjected to irreparable harm and that compensatory damages would be inadequate).

The mere existence of another remedy does not automatically preclude the issuance of an injunction. Nevada Escrow Service, Inc. v. Crockett, 91 Nev. 201, 533 P.2d 471 (1975).

IV.

ARGUMENT

A. Plaintiff possesses a reasonable likelihood of success on the merits

There is no doubt that Defendant Tang violated the subject NCA. Indeed, knowing full well his conduct would do so, he asked Plaintiff for permission to void the NCA to which Plaintiff rejected. Defendant Tang decided to violate the NCA anyway.

[1] If this court in its discretion orders a bond despite the express language of the Employment Agreement, then the amount of that security should be nominal and de minimis given Defendant Tang will not suffer any harm if he is enjoined from his wrongful conduct violating the NCA.

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Defendant Tang's knowledge and understanding of the NCA is uncontroverted. He signed in December 2016 the Employment Agreement containing the NCA knowingly, willingly, and without duress.

Defendant Tang's contractual obligations are express, clear, and unambiguous. Yet he Defendant Tang chose to violate the NCA nonetheless, as evidenced by his establishment of Sun Anesthesia Solutions with himself as the sole officer 40 days prior to his last day working for Plaintiff. Plaintiff has a legitimate business interest in enjoining Defendant Tang from working as a competitor or for a competitor in the providing of anesthesia services for Las Vegas healthcare providers and for Las Vegas patients.

Defendant Tang knew he was going to breach the NCA and knows he continues to breach the NCA as evidenced by his request to Plaintiff to void the NCA. Telling is that when Plaintiff rejected the request, Defendant Tang did not seek judicial intervention or seek legal counsel. Instead he chose to provide anesthesia services in violation of the NCA and hope that no person affiliated with Plaintiff would notice. Clearly Defendant Tang's strategy failed.

B. Defendant breached the subject contract

The Employment Agreement is clearly a contract. "Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." May v. Anderson, 121 Nev. 668, 119 P.3d 1254 (2005) citing Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring).

Breach of contract is the material failure of performance of a duty arising under a valid agreement. See, e.g., Bernard v. Rock Hill Dev., Co., 103 Nev. 132, 734 P.2d 1238 (1987), Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000).

Based upon the above described conduct, Defendant Tang breached and continues to breach the subject contract. Noteworthy is that Defendant Tang does not deny that he is employed with another anesthesia group or entity, but rather he contends that he can do so at any

facility that he chooses and not be in violation of the NCA. But this is in direct violation of the Employment Agreement as well. (See Exhibit A). Defendant Tang choosing to do so and continuing to do so causes and continues to cause Plaintiff irreparable harm to Plaintiff's customer base and relationships.

C. The NCA's terms are reasonable

Courts are to look to whether the terms of a NCA are likely to be found reasonable at trial when deciding whether a party is likely to succeed in enforcing a NCA for purposes of a preliminary injunction. See Camco, Inc. v. Baker, 113 Nev. 512, 518-20, 936 P.2d 829, 832-834 (1997) (holding a territorial restriction is reasonable when limited to the territory in which the former employers established customer contacts and goodwill.)

Post-employment NCAs are evaluated with a "higher degree of scrutiny than other kinds of noncompete agreements because of the seriousness of restricting an individual's ability to earn an income." Ellis v. McDaniel, 95 Nev. 455, 459, 596 P.2d 222, 224 (1979). Such reasonable restrictions are defined as those "reasonably necessary to protect the business and goodwill of the employer." Jones v. Deeter, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996).

NRS 613.200(4) codifies that NCAs are enforceable when reasonable in scope and duration. To determine reasonableness of a NCA, courts are to consider: 1) the duration of the restriction (here being 24 months from end of employment); 2) geographical scope of the restriction; and 3) the hardship that will be faced by the restricted party. Id. at 296, 913 P.2d at 1275. "The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement." Hanson v. Edwards, 83 Nev. 189, 426 P.2d 792 (1967) (affirming the trial court's order for preliminary injunction and thereby enforcing a NCA with modifications); see also Ellis v. McDonald, 95 Nev. 455, 596 P.2d 222 (1979).

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In Ellis, the Nevada Supreme Court affirmed a post-employment NCA with restrictions of: 1) two years; and 2) five miles encompassing the city limits of Elko, NV. There, Dr. Ellis was the employee of Elko Clinic. The Nevada Supreme Court held the NCA was reasonable as to both restrictions, reasoning that an injunction was indicated because "the goodwill and reputation of the Clinic are valuable assets." Id. at 459.

Noteworthy is that the injunction was then modified to the limited extent of allowing Dr. Ellis to practice another kind of medicine. Elko Clinic did not provide that kind of medicine, and Elko, NV did not have any other doctors practicing that kind of medicine.

D. Plaintiff is suffering irreparable harm due to Defendant's wrongful conduct

An injunction should issue when an employee violates the employee's agreed upon NCA, particularly when the employee joins a business or engages in business in direct competition with the former employer. See, e.g., Las Vegas Novelty, Inc. v. Fernandez, 106 Nev. 113, 787 P.2d 772 (1990) (holding Plaintiff is best protected with an injunction upon the former employee's new employer and the former employee himself to allow Plaintiff time to recoup any lost customers.)

Part and parcel of Defendant Tang's job duties while with Plaintiff was being placed in personal contact with third-party patients, physicians, and physicians' groups in need of anesthesia administration services. While Defendant Tang was an employee of Plaintiff, he obtained valuable information as to the nature and character of Plaintiff's business, names of third-party patients, physicians, and physicians' groups that had ongoing relationships and good will with Plaintiff.

This court not enjoining Defendant Tang from doing so now defeats the entire of the purpose of the NCA. See AEP Industries v. McClure, 302 SE.2d 754 (1983) (North Carolina Supreme Court holding that "equity will interpose in behalf of the employer and restrain the

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breach" when the nature of the employment is bringing the employee in personal contact with patrons and acquiring information about the business).

E. Equity favors a preliminary injunction at this stage

This court must balance Plaintiff's injury or risk of injury against the theoretical harm an injunction could cause to Defendant Tang. Ottenheimer v. Real Estate Division, 91 Nev. 338, 535 P.2d 1284 (1975); see also Basicomputer Corp. Scott, 791 F. Supp. 1280, 1289 (N.D. Ohio 1991) (noting that the test requires more than "just some hardship," and such harshness "requires excessive severity."). This balancing is done in equity, and relative to injunctions can be utilized "only to innocent parties who proceed without knowledge or warning that they are acting contrary to others' vested property rights." Gladstone v. Gregory, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979).

Here, Plaintiff continues to suffer injury all the while Defendant Tang directly competes against Plaintiff in direct violation of the valid and enforceable NCA. This injury clearly outweighs any inconvenience or theoretical harm Defendant Tang may experience from an injunction. The NCA is purposefully crafted and done to allow Plaintiff in that NCA period to allow Plaintiff to continue to secure its relationships with third-parties patients and physicians and healthcare facilities who may have worked with Defendant Tang (at the assignment of Plaintiff) while he was employed with Plaintiff. An injunction would merely require Defendant Tang to honor what he knowingly, willingly and voluntarily agreed to do in December 2016 which was bargained for and for which consideration was given.

Applying the holding of Gladstone to the facts here, Defendant Tang is not entitled to equity being in his favor. He blatantly violated the NCA, is now engaged in competition with Plaintiff, and knew he was going to be in direct violation of the NCA as evidenced by his request to Plaintiff to void the NCA. His post-hoc belief that the NCA is not reasonable and that he can work at facilities where Plaintiff employees practice does not render Defendant Tang an innocent

party who proceeded without knowledge or warning that he was acting contrary to Plaintiff's rights. See id.

V.

CONCLUSION

Non-compete agreement are vital tools to protecting a business's interests from former employees who seek to violate the trust and confidence at one time placed in them. This is no different when it comes to physicians and anesthesiologists such as Defendant Tang. But non-compete agreements only serve a purpose if courts such as this one choose to enforce them.

Defendant Tang and his alter ego Sun Anesthesia Solutions must be enjoined from: 1) performing any anesthesia services for patients or for physicians or for physicians' groups consistent with the now-violated Agreement; and 2) soliciting or doing business with any of Plaintiff's clients in the form of third-party patients, physicians or physician groups.

Dated this 19th day of October 2018.

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Las Vegas, Nevada 89117

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I am an employee of JOHN H. COTTON & ASSOCIATES and that on the 19th day of October 2018, the foregoing **MOTION FOR PRELIMINARY INJUNCTION** was served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court e-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, and if not on the e-serve list, was mailed via U.S. Mail, postage prepared as noted below, as follows:

Howard & Howard
Attn: Robert L. Rosenthal, Esq.
3800 Howard Hughes Parkway, Ste. 1000
Las Vegas, NV 89169

/s/ Jody Foote
An employee of John H. Cotton & Associates

EXHIBIT A

EXHIBIT A

Execution Version

PARTNER-TRACK PHYSICIAN EMPLOYMENT AGREEMENT
BY AND BETWEEN
FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (D/B/A
ANESTHESIOLOGY CONSULTANTS, INC.),
AND
DEVIN CHERN TANG, M.D.

This PARTNER-TRACK PHYSICIAN EMPLOYMENT AGREEMENT (this "Agreement") is entered into this 2nd day of December, 2016, and is effective as of the "Effective Date" as defined in Section 11.13 below, by and between FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (d/b/a Anesthesiology Consultants, Inc.), a Nevada professional corporation (the "Practice"), and Devin Chern Tang, M.D. ("Physician").

W I T N E S S E T H:

WHEREAS, Physician is a licensed physician authorized to practice medicine in the State of Nevada;

WHEREAS, the Practice is a Nevada professional corporation authorized to practice medicine in the State of Nevada;

WHEREAS, Practice contracts with licensed physicians, CRNAs, AAs and other authorized health care providers who provide professional anesthesia services (including any specialty thereof), pain management, anesthesia related consulting, management and administrative services (collectively, "Anesthesiology and Pain Management Services") to patients at several facilities, including inpatient and outpatient facilities. All facilities with which the Practice has a contract to supply licensed physicians, CRNAs, AAs and other authorized health care providers who provide Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, facilities at which any such providers have provided Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, and facilities with which the Practice has had active negotiations to supply any such providers who provide Anesthesiology and Pain Management Services during the Term or during the preceding twelve (12) months shall be collectively referred to as the "Facilities";

WHEREAS, the Practice desires to engage Physician to provide professional Anesthesiology and Pain Management Services at the Facilities and at such other locations as may be appropriate, and Physician desires to be engaged by the Practice to provide professional services at the Facilities and at such other locations as may be appropriate, upon the terms and conditions hereinafter set forth;

WHEREAS, the Practice is subject to that certain Plan Regarding Compensation for Services (ACI), effective as of December 2, 2016 (the "Plan Regarding Compensation for Services"), pursuant to which a Nevada Clinical Governance Board (the "Clinical Governance Board"), a group of licensed physicians employed by the Practice, will manage and oversee certain clinical operations of the Practice including, but not limited to, making certain

determinations and decisions regarding the renewal, modification and termination of this Agreement;

WHEREAS, the Clinical Governance Board is an express third party beneficiary of this Agreement and shall have the right to enforce its rights hereunder in accordance with the applicable laws of the State of Nevada as if it was a party hereto; and

WHEREAS, the Practice and Physician desire that Physician's professional responsibilities under this Agreement shall include the practice of medicine at the Facilities in a manner that is consistent with the manner in which Physician has practiced medicine prior to the date of this Agreement.

NOW, THEREFORE, for and in consideration of the premises and agreements contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby forever acknowledged and confessed and incorporating the recitals set forth above, the parties agree as follows:

1. Engagement.

The Practice hereby employs Physician and Physician hereby accepts such employment on an exclusive basis (unless otherwise approved by the Clinical Governance Board and the Practice), to provide the professional services specified in Section 2.1 hereof at the Facilities during the Term (as defined in Section 6.1 hereof). Although Physician is an employee of the Practice under the terms of this Agreement, Physician shall retain independent discretion and shall exercise professional judgment consistent with generally accepted medical practices, the ethical standards of the Nevada State Medical Association and the American Medical Association, and the professional standards established by the Clinical Governance Board for physician employees of the Practice in the provision of services involving the evaluation and treatment of the patients ("Patients") at the Facilities.

2. Covenants of Physician.

2.1 Availability of Professional Services. Physician shall provide Anesthesiology and Pain Management Services to Patients at the Facilities as required and as scheduled by the Practice and shall devote his or her professional time, attention, and energy to the active practice of medicine for the Practice. All of Physician's professional Anesthesiology and Pain Management Services shall be provided solely and exclusively as an employee of the Practice unless Physician receives prior written consent of the Clinical Governance Board and the Practice. Physician acknowledges and agrees that he/she may be required to meet the minimum requirements of a Partner-Track Physician as determined by the Clinical Governance Board and the Practice from time to time. Physician's duties shall include (i) examination, evaluation, and treatment of Patients, (ii) participation in on-call rotation for afterhours coverage as developed by the Practice, if applicable, (iii) participation in indigent and charity care programs designated by the Practice, if applicable; (iv) compliance with the administrative policies and procedures and the referral policies, in each case developed by or on behalf of the Practice; and (v) performance of such other duties as may reasonably be requested by the Practice from time to time.

Physician must provide medical services on a nondiscriminatory basis and may not refuse to provide medical services to any Patient designated by the Practice, even if such Patient is a participant in, or a part of, indigent or charity care programs, or any managed care plans for which the Practice is contracting to provide Physician's services, or is a Medicaid patient.

2.2 Medical Records/Reports. Physician shall, in accordance with policies developed by or on behalf of the Practice, timely prepare all medical records in respect of Patients treated by Physician. All medical records created or generated by Physician, or anyone acting at the direction or under the supervision of Physician, concerning Patients treated by Physician or any other physician engaged by the Practice during the Term shall be and remain the property of the Practice or Facilities, as appropriate, and shall be maintained at the Facilities; provided, however, that Physician shall have such right of access to such medical records as shall be provided by law. In addition, Physician shall timely prepare and deliver such other records and reports (electronic or otherwise) relating to the operations of Practice as Practice may reasonably request. Physician's use of an electronic medical or health recordkeeping system, including the issuance of unique credentials to access the system and the inputting of data and information in such a system shall not create in Physician any property right to the medical records created and stored in the system. Physician shall abide by all state and federal laws regarding the confidentiality of patient health information, including, without limitation, the Health Insurance Portability and Accountability Act of 1996, and all rules and regulations promulgated thereunder, including the Privacy Standards (45 C.F.R. Parts 160 and 164), the Electronic Transaction Standards (45 C.F.R. Parts 160 and 162) and the Security Standards (45 C.F.R. Parts 160, 162 and 164), and the Health Information Technology for Economic and Clinical Health Act of 2009 enacted as part of the American Recovery and Reinvestment Act of 2009 (collectively, "HIPAA").

2.3 Compliance. Physician understands and acknowledges that the Practice may submit or cause to be submitted claims to patients or third party payors for services based upon encounter information, coding certification of necessity and record documentation prepared and/or approved by Physician. Physician further acknowledges that Physician's compensation provided pursuant to this Agreement is based in large part on the billings and receipts for those services. Physician warrants and covenants that all encounter and coding information and all record documentation prepared or approved by Physician shall be true and correct and accurately represent each patient's condition, the services provided, and other facts and circumstances surrounding Physician's services provided pursuant to this Agreement. Physician understands that false or inaccurate statements in connection with billings, records or other patient encounter documentation are unacceptable to the Practice, and that Physician's failure to comply with the covenants and warranties in this Section 2.3 would constitute a material breach of the Agreement. Physician also understands that Physician's failure to comply with federal and state laws and regulations relating to Physician's practice and actions as an employee of the Practice could result in fines, penalties or other financial liabilities being imposed on the Practice. Physician agrees that, upon written demand from the Practice, Physician shall indemnify and hold harmless the Practice, its directors, officers shareholders and agents ("Indemnified Employer Parties") from all obligation, liability, claims, demands or losses, including attorney fees and costs ("Losses") asserted against the Practice, including settlements thereof, based on (1) Physician's inaccurate, non-compliant, false or unlawful coding, charging or billing, (2) lack of necessity for services provided by Physician, (3) lack of legible supporting documentation or

charts supporting Physician's coding and billing for services, or (4) any other claim based on Physician's conduct. Physician further agrees to indemnify and save harmless the Indemnified Employer Parties for all Losses arising from or related to any violation by Physician of any federal, state or local criminal, civil or common law or applicable rules and regulations. In the event any insurer takes the position that the existence of its indemnification provision in any way reduces or eliminates the insurer's obligation to provide otherwise available insurance coverages, the indemnification program shall be unenforceable to the extent necessary to obtain coverage. Should the Practice eventually receive coverage (payments) from its various insurance policies related to any such Losses where Physician is required to provide indemnification pursuant to this Section 2.3, the Practice hereby agrees to refund any amounts paid by Physician to the extent the insurance payment and payment by Physician are in excess of the loss creating the need for the indemnification and insurance payment.

2.4 Licensure, Compliance with Laws, Standards. As a continuing condition precedent to the obligations of the Practice under this Agreement, Physician covenants that at all times during the Term, Physician shall (i) hold and maintain a valid and unrestricted license to practice medicine in the State of Nevada (including an "Office Based Anesthesia" permit if required by the Clinical Governance Board), including satisfaction of any and all continuing medical education requirements; (ii) successfully apply for and maintain in good standing provisional or active medical staff privileges at the Facility or Facilities to which Physician is assigned by the Practice; (iii) maintain certification by any board or regulatory agency required by any Facility at which Physician practices; and (iv) comply with and otherwise provide professional services in accordance with applicable law, the ethical standards of the American Medical Association and Nevada State Medical Association, the standards and recommendations of the Joint Commission and of any accrediting bodies that may have jurisdiction or authority over Physician's medical practice or the Facilities, the Practice's corporate Bylaws, the Medical Staff Bylaws, the rules and regulations and the policies and procedures of the Practice and Facilities, as each may be in effect from time to time, and the standard of care in the medical community in which the Practice and the Facilities are located. Physician will notify the Practice immediately, but in any event within forty-eight (48) hours of Physician's knowledge thereof, if any of the foregoing shall become, in any manner, untrue.

2.5 Use of Facilities. Physician shall not use the Facilities for any purpose other than for the provision of professional services to Patients and the performance of administrative services required to be performed by Physician pursuant to this Agreement.

2.6 Supervision of Certain Personnel. Physician shall assist in providing the supervision of physician assistants, nurses, nurse anesthetists, anesthesiology assistants and other non-physician health care personnel providing as designated by the Practice. All such non-physician personnel shall be under Physician's control and direction in the performance of health care services for Patients treated by Physician. In addition and to the extent requested by the Practice, Physician shall assist the Practice in developing appropriate scheduling for such non-physician health care personnel.

2.7 Quality Assurance/Utilization Review. Physician shall participate in, and cooperate with the Practice in connection with, the quality assurance and risk management program developed by the Practice for its physician employees. Physician shall also be subject to

and actively participate in any utilization review program developed by or on behalf of the Practice relating to activities of physicians.

2.8 Business Protection. Physician recognizes that the Practice's decision to enter into this Agreement is induced primarily because of the covenants and assurances made by Physician in this Agreement, that Physician's covenants regarding non-competition and non-solicitation in this Section 2.8 are necessary to ensure the continuation of the business of the Practice and the reputation of the Practice as a provider of readily available and reliable, high quality physicians, as well as to protect the Practice from unfair business competition, including but not limited to, the improper use of Confidential Information.

2.8.1 Non-Competition. In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion), directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination; (ii) call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof; or (iii) provide management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

2.8.2 Non-Solicitation. In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not (i) solicit or otherwise attempt to contact any past or current Patient, or immediate family member of such Patient, for purposes of inducing the Patient to become a patient of Physician or the patient of any medical practice in which Physician practices or otherwise has a financial interest; (ii) solicit or otherwise attempt to contact any physician (including surgeons) for which licensed physicians, CRNAs, AAs and other authorized health care providers employed by the Practice currently provide, or have provided during the twelve month period prior to the termination of Physician's employment, consultative services or anesthesia services, for purposes of inducing such physician to consult with Physician or consult with any medical practice in which Physician practices or otherwise has a financial interest; (iii)

solicit any of the Facilities for the purpose of obtaining any contractual relationship with the Facility for Physician or any medical practice in which Physician practices or otherwise has a financial interest; or (iv) solicit for employment, or employ or engage any individual who is or was employed by the Practice during the twenty-four month period prior to the termination of Physician's employment, including, but not limited to, employees of any entity, the majority of the equity interests of which is owned by the Practice.

2.8.3 Additional Agreements. Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of this Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.

2.8.4 Access to Medical Records. The Practice shall use all reasonable efforts to provide Physician (i) access to the medical records of the Patients whom Physician has seen or treated upon authorization of the Patient in the same form as maintained or available to the Practice; and (ii) any copies of the medical records for a reasonable fee.

2.8.5 Format of Medical Records and Patient Lists. Any access to a list of Patients or to Patients' medical records after termination of this Agreement shall not include such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to this Agreement.

2.8.6 Continuing Care and Treatment. Physician shall not be prohibited from providing continuing care and treatment to a specific Patient or Patients during the course of an acute illness at any time, including following termination of this Agreement or Physician's employment. Following such termination, Physician understands and agrees that Physician will not be permitted to utilize Facility premises, staff, supplies and/or any other Facility-owned resource, unless failure to do so would compromise an acute patient's health and well-being, in which case the Practice, in its sole discretion, will provide written authorization to Physician on a case-by-case basis so that Physician may treat such Patient at the appropriate Facility, and even then, only to the extent and of such duration, that the acute nature of the Patient's condition requires.

2.9 Confidentiality. As of the date of the execution of this Agreement and during the course of Physician's employment, in order to allow Physician to carry out Physician's duties hereunder, the Practice has provided and will continue to provide to Physician Confidential Information (defined below). Physician agrees to keep confidential and not to use or to disclose to others during the Term of this Agreement and for a period of five (5) years thereafter, except as expressly consented to in writing by the Practice or required by law, any financial, accounting and statistical information, marketing plans, business plans, feasibility studies, fee schedules or books, billing information, patient files, confidential technology, proprietary information, patient lists, policies and procedures, or trade secrets of the Practice or U.S. Anesthesia Partners, Inc. ("USAP"), or other papers, reports, records, memoranda, documents, files, discs, or copies thereof pertaining to patients of physicians employed by the Practice, or the Practice's or

USAP's (or any affiliate's thereof) business, sales, financial condition or products, or any matter or thing ascertained by Physician through Physician's affiliation with the Practice, the use or disclosure of which matter or thing might reasonably be construed to be contrary to the best interests of the Practice or USAP (collectively, the "Confidential Information"). This restriction shall not apply to such information if Physician can establish that such information (i) has become generally available to and known by the public (other than as a result of an unpermitted disclosure directly or indirectly by Physician or Physician's affiliates, advisors, or representatives), (ii) has become available to Physician on a non-confidential basis from a source other than the Practice and its affiliates, advisors, or representatives, provided that such source is not and was not bound by a confidentiality agreement with or other obligation of secrecy of the Practice of which Physician has knowledge, or (iii) has already been or is hereafter independently acquired or developed by Physician without violating any confidentiality agreement with or other obligation of secrecy to the Practice.

Should Physician leave the employment of the Practice, Physician will neither take nor retain, without prior written authorization from the Practice, any Confidential Information. Physician further agrees to destroy any paper or electronic copies of Confidential Information, including information contained on any personal device.

Exceptions.

2.9.1 It shall not be a breach of Physician's covenants under Section 2.9 if a disclosure is made pursuant to a court order, a valid administrative agency subpoena, or a lawful request for information by an administrative agency. Physician shall give the Practice prompt notice of any such court order, subpoena, or request for information.

2.9.2 Physician shall not be prohibited from releasing any Confidential Information to Physician's legal counsel or financial advisors, provided that Physician places such advisors under legal obligation not to disclose the Confidential Information.

2.10 Enforcement. Sections 2.8 and 2.9 shall be construed as an agreement independent of any other provision in this Agreement; no claim or cause of action asserted by Physician against the Practice, whether predicated upon this or other Sections of this Agreement or otherwise shall constitute a defense of the enforcement of Sections 2.8 and 2.9 of this Agreement.

It is understood by and between the parties hereto that the covenants set forth in Sections 2.8 and 2.9 of this Agreement are essential elements of this Agreement, and that, but for the agreement of Physician to comply with such covenants, the Practice would not have agreed to enter into this Agreement. The Practice and Physician agree that the foregoing covenants are appropriate and reasonable when considered in light of the nature and extent of the business conducted by the Practice.

If any provision or subdivision of this Agreement, including, but not limited to, the time or limitations specified in or any other aspect of the restraints imposed under Sections 2.8 and 2.9 is found by a court of competent jurisdiction to be unreasonable or otherwise unenforceable, any such portion shall nevertheless be enforceable to the extent such court shall deem

reasonable, and, in such event, it is the parties' intention, desire and request that the court reform such portion in order to make it enforceable. In the event of such judicial reformation, the parties agree to be bound by Sections 2.8 and 2.9 as reformed in the same manner and to the same extent as if they had agreed to such reformed Sections in the first instance.

Without limiting other possible remedies to the Practice for the breach of the covenants in Sections 2.8 and 2.9, Physician agrees that injunctive or other equitable relief shall be available to enforce the covenants set forth in Sections 2.8 and 2.9, such relief to be without the necessity of posting a bond, cash, or otherwise.

2.11 Discretionary Reviews. The Clinical Governance Board, in its sole discretion, may conduct a review of Physician's ability to safely practice anesthesiology or pain management medicine in general and in Physician's specific practice including evaluation of mental and physical condition, judgment, knowledge, and any other conditions that may impact the safety of a Patient ("Review"). In the event the Review includes an evaluation of Physician's mental or physical condition, such evaluation shall be performed by an independent physician chosen by the Practice and approved by the Clinical Governance Board in its sole discretion. The costs of any evaluations of Physician by an independent physician shall be borne by the Practice except to the extent the Review is required as a result of complaints regarding Physician's behaviors in performance of his/her obligations hereunder in which case the costs of such evaluation(s) shall be borne solely by Physician. Physician and the Practice agree that the Clinical Governance Board shall conduct an annual Review upon Physician reaching the age of sixty-eight (68).

2.11.1 Upon receipt by Physician of a Review requiring that Physician take remedial actions in order to satisfy the Clinical Governance Board, Physician shall promptly take such actions at Physician's sole cost and expense and failure to take such actions to the satisfaction of the Clinical Governance Board shall be a material breach of this Agreement. If Physician fails to participate in the Review to the satisfaction of the Clinical Governance Board or during any period where Physician is required to take remedial actions as a result of a Review, the Clinical Governance Board may place Physician on unpaid administrative leave until such time as Physician participates in the Review or completes remedial actions to the satisfaction of the Clinical Governance Board.

2.11.2 Upon receipt by Physician of an unsatisfactory Review in the Clinical Governance Board's sole discretion, the Practice may, subject to the terms of this Agreement, immediately terminate Physician or take such other actions as the Clinical Governance Board determines to be necessary in order to protect Patient health or safety or to provide quality medicine to patients receiving services of physicians employed by the Practice.

3. Covenants of the Practice.

3.1 Compensation and Fringe Benefits. The Practice shall provide Physician with the compensation and other fringe benefits described in Article 5 hereof subject to the eligibility and other requirements of said plans and programs. Physician agrees that the Practice will not be obligated to institute, maintain, or refrain from changing, amending, or discontinuing any of its

medical, health, dental, insurance, disability or other benefit plans or programs, so long as such actions are similarly applicable to covered employees generally.

3.2 Operational Requirements. The Practice shall provide, or cause to be provided, all space, equipment, and supplies, all non-physician health care personnel and all clerical, administrative, and other personnel reasonably necessary and appropriate, consistent with past practice, for Physician's practice of medicine pursuant to this Agreement.

4. Professional Fees.

Physician acknowledges that, during the Term, Patients will be billed in the name of the Practice or Physician, as determined by the Practice, for all professional services rendered by Physician. Except as otherwise approved by the Clinical Governance Board and the Practice, the Practice shall be entitled to all fees generated by Physician from or incident to professional services rendered by Physician while employed by the Practice hereunder. Subject to applicable laws and in certain cases, the approval of the Clinical Governance Board and the Practice, Physician expressly and irrevocably transfers, assigns, and otherwise conveys to the Practice all right, title, and interest of Physician in and to any of such fees, whether in cash, goods, or other items of value, resulting from or incident to Physician's practice of medicine and all related professional activities during the Term, and does hereby appoint the Practice as Physician's agent and attorney-in-fact for collection of the same or otherwise enforcing Physician's interests therein. To the extent Physician should receive any amounts from Patients thereof, any third party payers, or any other parties in respect thereof, Physician shall forthwith endorse and deliver the same to the Practice.

5. Financial Arrangement.

5.1 Compensation. As compensation for the services to be provided by Physician hereunder, the Practice agrees to pay Physician pursuant to the USAP Nevada Compensation Plan then in effect for Partner-Track Physicians (as defined in Section 8). The USAP Nevada Compensation Plan in effect as of the Effective Date is attached as Exhibit A hereto.

5.2 Other Benefits. Subject to Section 3.1 above, the Practice also agrees to provide Physician the same various fringe and other benefits as other Partner-Track Physicians.

5.3 Vacation and Leave. Physician shall be entitled to annual vacation, meeting and sick leave as offered by the Practice pursuant to its policies and procedures. The Clinical Governance Board shall have the ultimate authority to resolve scheduling, vacation, educational leave or leave of absence conflicts, and to establish the application and processing requirements for any time away from work. All scheduling procedures and practices shall be established by the Clinical Governance Board. All vacation and leave of any kind shall be uncompensated.

6. Term and Termination.

6.1 Term. The initial term of this Agreement shall be for two (2) years commencing on the Effective Date, unless sooner terminated as provided herein (the "Initial Term"). Upon expiration of the Initial Term, this Agreement shall automatically renew for successive additional one (1) year periods unless this Agreement is sooner terminated as provided in Section 6.2

herein. The Initial Term of this Agreement and, in the event this Agreement is extended beyond the Initial Term, all renewals and extensions of this Agreement, are collectively defined as the "Term."

6.2 Termination. This Agreement may be sooner terminated on the first of the following to occur:

6.2.1 Termination by Agreement. In the event the Practice and Physician shall mutually agree in writing, this Agreement may be terminated on the terms and date stipulated therein.

6.2.2 Termination by Promotion to Physician-Partner Status. If Physician remains employed with the Practice on a full time basis without interruption for two (2) consecutive years from Physician's first date of service with the Practice, Physician shall be eligible for consideration for an offer to become a Physician-Partner (as defined in Section 8). Any such offer to become a Physician-Partner is at the sole discretion of the Practice and requires the approval of two-thirds (2/3) of the members of the Clinical Governance Board. An offer to become a Physician-Partner shall be conditioned by the Practice upon (i) the execution by Physician of a Physician-Partner employment agreement and/or other documents that may be reasonably requested by the Practice, (ii) the purchase by Physician of shares of common stock of USAP in accordance with the ACI Equity Incentive Plan (see Schedule 6.2.2 for additional details with respect to such purchase), and (iii) Board Certification. In the event that Physician becomes a Physician-Partner, this Agreement shall automatically terminate.

6.2.3 Termination for Specific Breaches. In the event Physician shall (i) materially fail by omission or commission to comply with the provisions specified in Section 2.1 hereof, or (ii) materially fail to comply with the provisions specified in Section 2.2 hereof, and Physician is unable to cure such material failure within fifteen (15) days after his or her receipt of a written notice from the Practice informing him or her of such material failure, this Agreement may then be terminated in the discretion of the Practice by written notice to Physician.

6.2.4 Termination by Death of Physician. This Agreement shall automatically terminate upon the death of Physician. In the event of termination due to death of Physician, the Practice shall pay to the executor, trustee or administrator of Physician's estate, or if there is no such executor or administrator, then to Physician's heirs as determined by any court having jurisdiction over Physician's estate, the compensation payable to Physician through date of death. Any such compensation shall be paid to Physician's executor or administrator within ninety (90) days after receipt by the Practice of a certified copy of letters testamentary or a letter of administration reflecting the appointment and qualification of such person or persons to be executor or administrator of Physician's estate. In the event there is no executor, trustee or administrator of Physician's estate, then the Practice shall pay all amounts due to Physician's heirs within ninety (90) days after receipt by the Practice of a copy of a court order determining Physician's heirs and the share of Physician's estate to which each is entitled, certified as true and correct by the clerk of the court issuing such order. Upon payment of all compensation due to Physician's executor, trustee, administrator, or heirs, as the case may be, pursuant to this

Section 6.2.4, the Practice shall have no further obligation or liability to Physician or such persons for compensation or other benefits hereunder.

6.2.5 Termination Upon Disability of Physician. Provided that, as determined in the sole discretion of Clinical Governance Board (i) reasonable accommodation is not required, (ii) no reasonable accommodation may be made to enable Physician to safely and effectively perform the normal and complete duties required of Physician in Article 2 of this Agreement, or (iii) legally protected leave is inapplicable or has been exhausted, this Agreement may be immediately terminated by the Practice upon written notice to Physician or Physician's legal representative, as appropriate, upon the occurrence of the disability of Physician. The term "disability of Physician" shall have the same meaning as that type of disability that entitles Physician to payments for permanent disability pursuant to the disability policy covering Physician; provided, that, in the event (A) no disability policy exists covering Physician or (B) the terms of such Policy do not qualify Physician for payments for permanent disability, the term "disability of Physician," as used herein, shall mean that point in time when Physician is unable to resume the normal and complete duties required of Physician in Article 2 of this Agreement at the standards applicable to Physician, as performed prior to such time, within one hundred and eighty (180) days after the disabling event. If the disabling event is not a separate and distinct happening, the 180-day period shall begin at the time Physician is unable to perform the duties required in Article 2 of this Agreement for thirty (30) consecutive work days. Additionally, Physician shall be considered disabled if Physician does not perform his or her duties for one-hundred and eighty (180) days during a 360-day period. If the Clinical Governance Board determines that Physician is not performing his or her duties because of a disability or medical condition, then Physician shall submit to a physical and/or mental examination of two (2) independent physicians selected by the Clinical Governance Board reasonably in good faith to determine the nature and extent of such disability and Physician agrees to be bound by such determination.

Notwithstanding anything to the contrary in this Section 6.2.5, if, after the termination of this Agreement, (i) Physician demonstrates, by submission to a physical and/or mental examination of two (2) independent physicians selected by the Clinical Governance Board reasonably in good faith, that Physician is able to resume the normal and complete duties required of Physician in Article 2 of this Agreement, and (ii) this Agreement would still be in effect but for Physician's termination pursuant to this Section 6.2.5; then Physician shall be reinstated as an employee of the Practice upon the same terms and conditions that were in effect as of the date of termination; provided, however, that Physician's compensation shall be agreed upon by Physician and the Practice.

6.2.6 Immediate Termination by the Practice. Subject to any due process procedures established by the Clinical Governance Board from time to time, this Agreement may be immediately terminated by the Practice, upon the occurrence of any one of the following events: (i) Physician's failure to meet any one of the qualifications set forth in Section 2.3 of this Agreement; (ii) a determination is made by the Clinical Governance Board that there is an immediate and significant threat to the health or safety of any Patient as a result of the services provided by Physician under this Agreement; (iii) the disclosure by Physician of the terms of this Agreement in violation of Section 2.9 above; (iv) any felony indictment naming Physician; (v) any investigation for any alleged violation by Physician of any Medicare or Medicaid statutes, 42

U.S.C. § 1320a 7b (the "Anti-Kickback Statute"), 31 U.S.C. § 3729 (the "False Claims Act"), 42 U.S.C. § 1395nn (the "Stark Law"), or the regulations promulgated pursuant to such statutes or any similar federal, state or local statutes or regulations promulgated pursuant to such statutes; (vi) Physician's ineligibility to be insured against medical malpractice; (vii) Physician's loss or reduction of medical staff privileges for cause at any of the Facilities to which Physician is assigned; (viii) Physician does not satisfactorily pass the Review as described in Section 2.11 of this Agreement; (ix) any dishonest or unethical behavior by Physician that results in damage to or discredit upon the Practice; (x) any conduct or action by Physician that negatively affects the ability of Physician employees of the Practice to deliver Anesthesiology and Pain Management Services to any Facility or on behalf of the Practice; (xi) Physician's failure to comply with clinical practice guidelines as may be established by the Practice or any facilities from time to time, (xii) Physician engages in any activity that is not first approved by the Clinical Governance Board and the Practice which directly competes against the business interests of the Practice and Physician fails to disclose such conflict of interest to the Practice, (xiii) Physician has been convicted of a crime involving violence, drug or alcohol, sexual misconduct or discriminatory practices in the work place, (xiv) Physician while at work or required to be available to work, either has a blood alcohol level greater than .04 or is under the influence of drugs (which shall mean having a measurable quantity of any non-prescribed controlled substances, illegal substances, marijuana in blood or urine while being tested for the same), (xv) Physician while at work or required to be available to work is under the influence of prescribed drugs to the point that his or her skills and judgment are compromised, (xvi) Physician fails to submit to an alcohol and drug test within one hour of the Practice's request at a testing site selected by the Practice (which test shall only be requested if the Practice has reasonable suspicion that Physician is in violation of subsection (xiv) and (xv) hereof); (xvii) Physician continues, after written notice, in patterns of performing non-indicated procedures or in patterns of performing procedures without proper consent in non-emergent situations, or (xviii) Physician's violation of the Clinician Code of Conduct of the Practice (as amended by the Practice from time to time) following exhaustion of any appeal or cure process provided for therein. The current Clinician Code of Conduct of the Practice is attached hereto as Exhibit B.

6.2.7 Default. In the event either party shall give written notice to the other that such other party has substantially defaulted in the performance of any material duty or material obligation imposed upon it by this Agreement, and such default shall not have been cured within fifteen (15) days following the giving of such written notice, the party giving such written notice shall have the right to immediately terminate this Agreement.

6.2.8 Termination Due to Legislative or Administrative Changes. In the event that there shall be a change in federal or state law, the Medicare or Medicaid statutes, regulations, or general instructions (or in the application thereof), the adoption of new legislation or regulations applicable to this Agreement, or the initiation of an enforcement action with respect to legislation, regulations, or instructions applicable to this Agreement, any of which affects the continuing viability or legality of this Agreement or the ability of either party to obtain reimbursement for services provided by one party to the other party or to patients of the other party, then either party may by notice propose an amendment to conform this Agreement to existing laws. If notice of such a change or an amendment is given and if the Practice and Physician are unable within ninety (90) days thereafter to agree upon the amendment, then either

party may terminate this Agreement by ninety (90) days' notice to the other, unless a sooner termination is required by law or circumstances.

6.2.9 Termination Without Cause. Physician may terminate employment pursuant to this Agreement, without cause, by providing ninety (90) days prior written notice to the Practice. The Practice may terminate the employment of Physician pursuant to this Agreement, without cause following the affirmative vote of sixty-seven percent (67%) of the Clinical Governance Board, immediately upon written notice to Physician of intent to terminate. Upon receipt of notice from the Practice of its intention to terminate this Agreement without cause, Physician's right to treat Patients or otherwise provide Anesthesiology and Pain Management Services as an employee of the Practice shall automatically terminate, unless the Clinical Governance Board notifies Physician otherwise. In the event this Agreement is terminated by the Practice pursuant to this Section 6.2.9, the Practice shall pay to Physician (i) all amounts due and payable to Physician for services rendered prior to the date of term and (ii) as severance, an amount equal to one quarter (1/4) of Physician's previous twelve (12) months' income under the USAP Nevada Compensation Plan applicable to Physician during such period measured from the date of termination of this Agreement, less customary and applicable withholdings (the "Severance Payments"). Any Severance Payments under this Section 6.2.9 shall be conditioned upon (A) Physician having provided within thirty (30) days of the termination of employment (or such other time period (up to 55 days after termination) as required by applicable law), an irrevocable waiver and general release of claims in favor of the Practice and its affiliates, their respective predecessors and successors, and all of the respective current or former directors, officers, members of the Clinical Governance Board, employees, shareholders, partners, members, agents or representatives of any of the foregoing (collectively, the "Released Parties"), in a form reasonably satisfactory to the Practice, that has become effective in accordance with its terms (the "Release"), and (B) Physician's continued compliance with the terms of the restrictive covenants in Sections 2.8 and 2.9 of this Agreement applicable to Physician. Subject to Physician's timely delivery of the Release, the Severance Payments payable under this Section 6.2.9 will commence on the first payroll date following the date the Release becomes irrevocable with such first installment to include and satisfy all installments that would have otherwise been made up to such date assuming for such purpose that the installments had commenced on the first payroll date following Physician's termination of employment and shall be completed within ninety (90) days of the date of termination of employment; provided, however, that if the Severance Payments are determined to be deferred compensation subject to Section 409A of the Internal Revenue Code of 1986, as amended, and if the period during which Physician has discretion to execute or revoke the Release straddles two (2) tax years, then the Practice will commence the first installment of the Severance Payments in the second of such tax years.

6.3 Effect of Expiration or Termination. Upon the expiration or earlier termination of this Agreement, neither party shall have any further obligation hereunder except for (a) obligations accruing prior to the date of expiration or termination and (b) obligations, promises, or covenants contained herein which are expressly made to extend beyond the Term. Immediately upon the effective date of termination, Physician shall (i) surrender all keys, identification badges, telephones, pagers, and computers, as well as any and all other property of the Practice in Physician's possession, and (ii) withdraw from the medical staff of every Facility in which Physician holds medical staff privileges. If required by the Practice, Physician shall

deliver to each Facility that is served by the Practice Physician's written consent to be personally bound by this Section 6.3. Physician further agrees that failure to comply with this provision shall constitute a material breach of this Agreement upon which Physician's rights to any further benefits under this Agreement shall terminate immediately and automatically.

6.4 Termination of Privileges. Notwithstanding any current or future Facility or medical staff bylaws, rule, or regulation to the contrary, Physician waives due process, notice, hearing, and review in the event his or her membership or privileges at any Facility are terminated under the circumstances described in Section 6.3(ii); provided, however, that if the termination of such membership or privileges is based on the quality of services rendered or is reportable to the appropriate Nevada Medical Board or the National Practitioner Data Bank, such termination shall be conducted in conformance with any applicable fair hearing rights set forth in the then current medical staff bylaws at the Facility. If required by the Practice, Physician shall deliver to each Facility that is served by the Practice Physician's written consent to be personally bound by this Section. Physician further agrees that failure to comply with this provision shall constitute a material breach of this Agreement upon which Physician's rights to any further benefits under this Agreement shall terminate immediately and automatically.

7. Status of Physician as Employee.

It is expressly acknowledged by the parties hereto that Physician, in the performance of services hereunder, is an employee of the Practice. Accordingly, the Practice shall deduct from the compensation paid to Physician pursuant to Article 5 hereof appropriate amounts for income tax, unemployment insurance, Medicare, social security, or any other withholding required by any law or other requirement of any governmental body.

8. Status of Physician.

It is expressly acknowledged by the parties hereto that Physician is not a "Physician-Partner" (as defined in the Plan Regarding Compensation for Services) but is a "Partner-Track Physician" (as defined in the Plan Regarding Compensation for Services). Physician shall be compensated as a Partner-Track Physician pursuant to the USAP Nevada Compensation Plan.

9. Suspension.

Physician recognizes and agrees that the Clinical Governance Board has the authority to immediately suspend Physician (with or without pay) from his or her duties at any time if a member of the Clinical Governance Board believes that patient safety is endangered. Such immediate suspension can only last 24 hours unless extended by the Clinical Governance Board. Further, the Clinical Governance Board has the authority to suspend Physician from some or all of his or her duties if the Clinical Governance Board reasonably believes that patient safety is at risk or while the Clinical Governance Board investigates any of Physician's actions that could lead to termination or is deemed to be violation of this Agreement as long as the nature of Physician's actions justifies the protection of patients, the Physician, the Practice and other employees of the Practice or a Facility. The Clinical Governance Board may also enact such suspension (with or without pay) after its investigation of Physician's action as a protective or disciplinary measure. Whenever suspension of Physician in involved, the Clinical Governance

Board has the discretion to determine the timing of such suspension and to determine if such suspension will be with or without pay.

10. Professional Liability Insurance.

Physician authorizes the Practice to add Physician as an insured under such professional liability or other insurance coverage as the Practice may elect to carry from time to time. The Practice shall include Physician under such liability or other insurance during the Term of this Agreement. If required by the Practice, Physician will be responsible to provide and pay for "tail insurance coverage" insuring Physician after the termination of this Agreement.

11. Miscellaneous.

11.1 Additional Assurances. The provisions of this Agreement shall be self-operative and shall not require further agreement by the parties except as may be herein specifically provided to the contrary; provided, however, at the request of either party, the other party shall execute such additional instruments and take such additional acts as the requesting party may reasonably deem necessary to effectuate this Agreement.

11.2 Consents, Approvals, and Discretion. Except as herein expressly provided to the contrary, whenever in this Agreement any consent or approval is required to be given by either party or either party must or may exercise discretion, the parties agree that such consent or approval shall not be unreasonably withheld or delayed and such discretion shall be reasonably exercised.

11.3 Legal Fees and Costs. In the event that either party commences an action to enforce or seek a declaration of the parties' rights under any provision of this Agreement, the prevailing party shall be entitled to recover its legal expenses, including, without limitation, reasonable attorneys' fees, costs and necessary disbursements, in addition to any other relief to which such party shall be entitled.

11.4 Choice of Law and Venue. Whereas the Practice's principal place of business in regard to this Agreement is in Clark County, Nevada, this Agreement shall be governed by and construed in accordance with the laws of such state, and such county and state shall be the venue for any litigation, special proceeding or other proceeding as between the parties that may be brought, or arise out of, in connection with or by reason of this Agreement.

11.5 Benefit Assignment. Subject to provisions herein to the contrary, this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors and assigns. Physician may not assign this Agreement or any or all of his or her rights or obligations hereunder without the prior written consent of the Practice. The Practice may assign this Agreement or any or all of its rights or obligations hereunder to a Nevada professional corporation, or to an entity that is an association, partnership, or other legal entity owned or controlled by or under common control with the Practice. Except as set forth in the immediately preceding sentence, the Practice may not assign this Agreement or any or all of its rights or obligations hereunder to any legal entity without the prior written consent of Physician.

11.6 Waiver of Breach. The waiver by either party or the Clinical Governance Board of a breach or violation of any provision of this Agreement shall not operate as, or be construed to constitute, a waiver by such party of any subsequent breach of the same or other provision hereof.

11.7 Notice. Any notice, demand or communication required, permitted or desired to be given hereunder shall be deemed effectively given when personally delivered, when received by overnight courier, or when received by prepaid certified mail, return receipt requested, addressed as follows:

The Practice:	Anesthesiology Consultants, Inc. P.O. Box 401805 Las Vegas, NV 89140-1805 Attention: President
Physician:	Devin Chern Tang, M.D. 11425 S. Bermuda Rd., Unit 2013 Henderson, NV 89002

or to such other address, and to the attention of such other person or officer as either party may designate, with copies thereof to the respective counsel thereof, all at the address which a party may designate by like written notice.

11.8 Severability. In the event any provision of this Agreement is held to be invalid, illegal, or unenforceable for any reason and in any respect such invalidity, illegality or unenforceability thereof shall not affect the remainder of this Agreement which shall be in full force and effect, enforceable in accordance with its terms.

11.9 Gender and Number. Whenever the context of this Agreement requires, the gender of all words herein shall include the masculine, feminine, and neuter, and the number of all words herein shall include the singular and plural.

11.10 Divisions and Headings. The division of this Agreement into sections and the use of captions and headings in connection therewith is solely for convenience and shall have no legal effect in construing the provisions of this Agreement.

11.11 Entire Agreement. This Agreement, together with the Plan Regarding Compensation for Services, supersedes all previous contracts, and constitutes the entire agreement existing between or among the parties respecting the subject matter hereof, and neither party shall be entitled to other benefits than those specified herein. As between or among the parties, no oral statements or prior written material not specifically incorporated herein shall be of any force and effect the parties specifically acknowledge that, in entering into and executing this Agreement each is relying solely upon the representations and agreements contained in this Agreement and no others. All prior representations or agreements, whether written or oral, not expressly incorporated herein, are superseded and no changes in or additions

to this Agreement shall be recognized unless and until made in writing and signed by all parties hereto.

11.12 Amendment. This Agreement may only be amended by a writing signed by each of the parties hereto.

11.13 Effective Date. For the avoidance of doubt, this Agreement shall only be effective upon the date of the occurrence of the Closing Date (as defined in the Agreement and Plan of Merger (the "Merger Agreement") dated as November 4, 2016 among U.S. Anesthesia Partners Holdings, Inc., the Practice and the other parties thereto) (the "Effective Date"). In the event that the Merger Agreement is terminated, this Agreement shall automatically terminate and be of no further force and effect.

[THE REMAINDER OF THIS PAGE HAS INTENTIONALLY BEEN LEFT BLANK. SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in multiple originals, effective as of the date and year first above written.

PRACTICE:

FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (D/B/A ANESTHESIOLOGY CONSULTANTS, INC.)

By: Jason N. Workman

Name:

Title:

PHYSICIAN:

Name: Devin Chern Tang, M.D.

[Signature Page to Partner-Track Employment Agreement]

Schedule 6.2.2

Subject to the ACI Equity Incentive Plan, newly promoted Physician-Partners (as defined in the Plan Regarding Compensation for Services) will be required to purchase shares of common stock, $0.001 par value, of Parent ("Common Stock") having a value of $125,000 at the then fair market value (as determined in good faith by the board of directors of Parent) which such persons can do all at once upon becoming a Physician-Partner or by purchasing over several years (so long as such persons purchase at least a minimum of $25,000 of such shares of Common Stock each year for five years).

Notwithstanding the foregoing, any physician who (a) was a Partner-Track Physician as of December 2, 2016 and (b) is required by the terms of a Retention Bonus Agreement executed by such physician effective as of December 2, 2016 to purchase less than $125,000 worth of shares of Common Stock at the time of such Partner-Track Physician's promotion to Physician-Partner may (but shall not be required to) purchase additional shares of Common Stock up to an amount such that the sum of the shares purchased with the bonus paid under such Retention Bonus Agreement and such additional purchased shares has an aggregate value of $125,000 at the then fair market value (as determined in good faith by the board of directors of Parent)

The purchased shares will be subject to the Vesting and Stockholders Arrangement Agreement (ACI) then in effect.

Exhibit A

USAP NEVADA COMPENSATION PLAN

Defined terms used herein shall have the meanings given to them in the Plan Regarding Compensation for Services (USAP Nevada) ("***PRCS***") adopted by the Clinical Governance Board effective as of December 2, 2016 and employment agreements entered into by each Physician-Partner, and each Partner-Track Physician, on the one hand, and FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (d/b/a Anesthesiology Consultants, Inc.), a Nevada professional corporation ("***ACI***") on the other hand (each a "***Provider Services Agreement***").

The PRCS established the basis upon which Physician-Partners and Partner-Track Physicians will be paid Physician-Partner Compensation for Anesthesia Services rendered as Physician-Partners and Partner-Track Physicians. The USAP Nevada Compensation Plan (the "***Plan***"), effective as of the Effective Time (as defined in the Merger Agreement), sets forth the methodology of allocation of the Physician-Partner Compensation and the Physician-Partner Compensation Expenses to Nevada Division and individual Physician-Partners and Partner-Track Physicians assigned to each Nevada Division. The Plan, together with the new Provider Services Agreements effective concurrently with the Plan, replaces in their entirety all prior compensation programs and arrangements of ACI with respect to the Physician-Partners and Partner-Track Physicians. The Plan will be the basis for determining the compensation paid to Physician-Partners and Partner-Track Physicians pursuant to their individual Provider Service Agreements, and may be amended from time to time as set forth herein and in the PRCS, subject in all cases to the approval requirements set forth in the Charter, if any.

Subject to established company guidelines and policies, Physician-Partner Compensation shall be paid at least monthly on estimated or "draw" basis to individual Physician-Partners and Partner-Track Physicians in each Nevada Division as set forth in the Compensation Plan for each Nevada Division attached hereto as Appendix A, subject to the Clinical Governance Board and USAP and the quarterly allocation reconciliation process described below. Each Physician-Partner and Partner-Track Physician will also be entitled to receive a quarterly payment payable as soon as reasonably practicable but in no event later than the thirtieth (30^{th}) day of the calendar month following the end of each quarter (which payment shall subtract the draws previously received during the quarter). Notwithstanding the foregoing, in no event shall the estimate or draw in any quarterly period exceed a pro-rated portion of 85% of the physician's projected taxable income for such period, subject to the Clinical Governance Board.

The quarterly payment shall be calculated as follows:

1. Pursuant to the PRCS, the Practice shall prepare Financial Statements for ACI (the "***ACI P&L***"), which shall reflect the Divisional Net Revenue and Expenses of ACI for the quarter.

2. The calculation of Physician-Partner Compensation shall be set forth on the ACI P&L. Physician-Partner Compensation shall be allocated to the Physician-

Partners and Partner-Track Physicians based upon the compensation plan for the Nevada Divisions.

Physician-Partners and Partner-Track Physicians are not permitted to carry a negative balance at any time. If, at any time, an individual carries a negative balance, the Practice reserves the right to withhold amounts payable to such individual until the negative balance is cured.

In addition, within thirty (30) days following the delivery of the audited financial statements of Holdings, USAP shall reconcile the actual amounts due to Physician-Partners and Partner-Track Physicians for the prior fiscal year and such physician's compensation may be adjusted upwards or downwards to reflect such reconciliation.

If at any time after the date hereof, there are any issues with the operation of the Plan or the interaction of the Plan with the PRCS, then the Clinical Governance Board and the Practice shall work together in good faith to make sure adjustments to the Plan as are necessary or desirable to achieve the original intent and economics of the effectiveness of the Plan.

Additionally, Physician-Partner Compensation will be reduced by any amounts owed and outstanding to Holdings or any of Holdings' affiliates (but more than ninety (90) days in arrears) by any Physician-Partner in final settlement of such amounts pursuant to such Physician-Partner's indemnification or other obligations to the extent Holdings or any of Holdings' affiliates are finally determined to be entitled to such amounts (whether through mutual agreement of the parties thereto, or as a result of dispute resolution provisions) in accordance with the terms of the Merger Agreement for any claims owed by individual Physician-Partners pursuant thereto.

Appendix A
to Exhibit A

(Applicable Nevada Division Compensation Plan)

Appendix A
to Exhibit A

Exhibit B

Clinician Code of Conduct

Introduction

U.S. Anesthesia Partners, Inc. ("USAP") is an organization built on the highest standards of quality care and professional demeanor for all of its associated clinical providers. Each of USAP's affiliated practices partners with its contracted facilities to offer its patients and their families the best clinical experience available in its marketplace. Such practices' clinical providers are chosen with the expectation that each will represent the organization in an exemplary way. This Code of Conduct (this "Code") has been established to ensure USAP's core principles are maintained throughout the organization.

Fielden, Hanson, Isaacs, Miyada, Robison, Yeh, Ltd. (d/b/a Anesthesiology Consultants, Inc.) (the "Practice") establishes this Code for all of the clinical providers (the "clinical providers") employed by the Practice. This Code sets forth the expectations for all clinical providers, as well as the procedural steps and governing bodies responsible for the enforcement of these expectations.

Every clinical provider is expected to understand and fully comply with this Code. It is each clinical provider's responsibility to seek clarification of or guidance on any provision of this Code that he/she does not understand or for which he/she needs further clarification. This Code is applicable to all clinical providers. In addition, promotion of and adherence to this Code will be one criterion used in evaluating performance of clinical providers. Each clinical provider will be deemed to have accepted this Code upon execution of an employment agreement with the Practice that incorporates this Code or if a clinical provider is not executing such an employment agreement then such clinical provider will be required to execute an acknowledgment within 30 days of receipt of a copy of this Code by such clinical provider.

Standards of Conduct

The Practice has determined that the following behaviors are unacceptable and will subject any of the clinical providers to the disciplinary process outlined below:

1. Any behavior that is deemed abusive to fellow employees, patients, guests, or staff of any hospital, ambulatory surgery center, or any other site at which the Practice furnishes services (the "facilities"). Such behavior includes, but is not limited to, verbal or physical intimidation, inappropriate language or tone, harassment, discrimination, or comments that are demeaning personally or professionally.

2. Not responding to pages or phone calls while on duty at a facility or on call.

3. Failure to maintain privileges or credentialing at any facility where a clinical provider is on staff.

4. Removal or a request for removal from any facility based on violation of the medical staff by-laws.

5. Any violation of the Compliance Plan. Each clinical provider will be given proper notice to correct any deficiency deemed an unintentional oversight. All clinical providers will receive continuing education on the Compliance Plan.

6. Any action deemed to be against the best interests of the Practice or USAP. Such actions include, but are not limited to, disclosing confidential information to the extent restricted pursuant to any employment agreement between the clinical provider and the Practice, making derogatory comments about the Practice or USAP, or interfering with any contract or business relationship of the Practice or USAP.

7. Clinical performance deemed unsatisfactory by the Practice.

8. Physical or mental impairment while performing clinical duties, including but not limited to, substance abuse or any other condition preventing a clinical provider from adequately performing the necessary clinical tasks.

9. Failure of a clinical provider to report behavior that violates this Code or other policies of the Practice or a facility.

The matters enumerated above are in addition to the matters that may result in an immediate termination under the employment agreement with the Practice. Any matter that is deemed to be an immediate termination under the employment agreement, other than a violation of this Code, is not required go through the disciplinary action process outlined below.

Reporting Violations and Discipline

Strict adherence to this Code is vital. The Practice will implement procedures to review any violations of the above Standards of Conduct, which the Practice may change from time to time.

Amendment

This Code may be amended by the written consent of the Practice and the vote of sixty-seven percent (67%) of the members of the Clinical Governance Board.

EXHIBIT B

EXHIBIT B

SUN ANESTHESIA SOLUTIONS

New Search | Manage this Business | Calculate List Fees | Printer Friendly

Business Entity Information

Status:	Active	File Date:	4/24/2018
Type:	Domestic Corporation	Entity Number:	E0200202018-0
Qualifying State:	NV	List of Officers Due:	4/30/2019
Managed By:		Expiration Date:	
NV Business ID:	NV20181291522	Business License Exp:	4/30/2019

Additional Information

Central Index Key:	

Registered Agent Information

Name:	RONALD H REYNOLDS	Address 1:	823 LAS VEGAS BLVD SOUTH STE 280
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89101
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent		
Status:	Active		

View all business entities under this registered agent

Financial Information

No Par Share Count:	100.00	Capital Amount:	$0

No stock records found for this company

Officers

☐ Include Inactive Officers

President - DEVIN TANG

Address 1:	12284 KINGS EAGLE ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89141	Country:	
Status:	Active	Email:	

Secretary - DEVIN TANG

Address 1:	12284 KINGS EAGLE ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89141	Country:	
Status:	Active	Email:	

Treasurer - DEVIN TANG

Address 1:	12284 KINGS EAGLE ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89141	Country:	
Status:	Active	Email:	

Director - DEVIN TANG

Address 1:	12284 KINGS EAGLE ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89141	Country:	
Status:	Active	Email:	

Actions\Amendments

Click here to view 2 actions\amendments associated with this company

Entity Actions for "SUN ANESTHESIA SOLUTIONS"

Action Type:	Initial List		
Document Number:	20180182976-24	# of Pages:	1
File Date:	4/24/2018	Effective Date:	

No notes for this action)

Action Type:	Articles of Incorporation		
Document Number:	20180182975-13	# of Pages:	1
File Date:	4/24/2018	Effective Date:	

Initial Stock Value: No Par Value Shares: 100 ——— Total Authorized Capital: $ $0.00

EXHIBIT C

EXHIBIT C

DECLARATION OF W. BRADFORD ISAACS, M.D.

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, W. Bradford Isaacs, M.D, declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct:

1. I am the chairman of the Nevada chapter of the governing board for U.S. Anesthesia Partner (USAP), and make this Declaration in support of Plaintiff's Motion for Preliminary Injunction.

2. I have personal knowledge of the matters set forth herein, except as those matters stated on information and belief, which I believe to be true. I am competent to testify as to the matters set forth herein if called upon to do so.

3. In November-December 2016, USAP merged/acquired/joined Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. d/b/a Anesthesiology Consultants, Inc., a Nevada corporation, and with that transaction USAP became the parent company for Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.

4. USAP is a corporation duly licensed to conduct business in the State of Nevada. That USAP has been providing leading perioperative and anesthesia services to the vast majority of facilities in the city of Las Vegas for over a decade.

5. USAP hand-selects providers who not only demonstrate excellent clinical knowledge and skill, but also compassion for their patients. That in order to uphold the reputation of providing our patients with the best possible care, each of our anesthesiologists has a license to practice medicine and is either Board Certified or Eligible.

6. USAP through its healthcare provider employees perform thousands of anesthetics annually in a wide range of specialties, including cardiothoracic, obstetrics/gyn, general, orthopedics, pediatrics, and neurosurgery. That such services offered include general, regional,

neuraxial, local anesthetics, and sedation.

7. Devin Tang began working for USAP in December 2016. In order to do so, Dr. Tang signed an Employment Agreement inclusive of non-compete provisions per section 2.8, that violations of the Employment Agreement would result in a preliminary injunction per section 2.8.3, and that his agreement to the non-compete provisions was a necessary component for employment per section 2.10.

8. Exhibit B to the Employment Agreement is USAP's Clinical Code of Conduct. That the Code lists behaviors that are unacceptable including interfering with any contract or business relationship of USAP.

9. USAP by and through its healthcare provide employees provides anesthesia and pain management services at the following locations in Nevada- Desert Springs Hospital, Mountain View Hospital, St. Rose - San Martin Campus, St. Rose - Siena Campus, Southern Hills Hospital, Spring Valley Hospital, Summerlin Hospital, Sunrise Hospital and Medical Center, Valley Hospital Medical Center, Flamingo Surgery Center, Parkway Surgery Center, Sahara Surgery Center, Seven Hills Surgery Center, Specialty Surgery Center, Valley View Surgery Center, Durango Surgery Center, North Vista Hospital, Carson Tahoe Regional Medical Center, Carson Tahoe Sierra Surgery Hospital, Sierra Surgery Center, Western Nevada Surgical Center, Henderson Hospital, Henderson Hospital Surgery Center, University Medical Center, 215 Surgery Center, Affinity Surgery Center, Ambulatory Surgical Center, Box Canyon Surgery Center, Centennial Surgery Center, Ear, Nose, and Throat Surgery, Desert Orthopedic Center, Las Vegas Regional Surgery Center, Las Vegas Surgery Center, Minimally Invasive Spine Institute, Red Rock Surgery Center, Surgical Arts Center, Stone Creek Surgery Center, Shepherd Eye Center (Henderson), Shepherd Eye Center (Las Vegas), Shepherd Eye Center (Southwest),

Shepherd Eye Center (Summerlin), SHER Fertility Clinic, Siena Surgery Center, Sunset Ridge Surgery Center, LLC, Sunset Surgery Center, Tenaya Surgical Center, Warm Springs Surgical Center, Alta Rose Surgery Center, Boulder City Hospital, Smoke Ranch Surgery Center, Nevada Fertility Institute, Coronado Surgery Center, The Center for Surgical Intervention, Green Valley Fertility Center, Horizon Surgery Center aka Parkway Surgery Center at Horizon. Such facilities fall under the Employment Agreement's page 1 definition of facilities.

10. Dr. Tang's job duties while with USAP included being placed in personal contact with third-party patients, physicians, and physicians' groups in need of anesthesia administration services. Dr. Tang would have obtained valuable information as to the nature and character of Plaintiff's business, names of third-party patients, physicians, and physicians' groups that had ongoing relationships and good will with Plaintiff.

11. USAP has a series of contractual relationships with local healthcare facilities and hospitals, including but not limited to- 1) Anesthesiology Services Agreement to provide professional anesthesiology services solely for Henderson Hospital located at 1050 Galleria Drive, Henderson, NV; 2) Professional Services Agreement with Sunrise Hospital and Medical Center for anesthesia services; 3) Anesthesia Services Agreement with St. Rose Dominican- Siena Campus on an exclusive basis with no employment or contract with any person or entity other than USAP to provide anesthesia services notwithstanding cardiovascular surgery anesthesia; 4) Professional Services Agreement with Southern Hills and Medical Center for anesthesia services. Such facilities fall under the Employment Agreement's page 1 definition of facilities.

12. During the course of Dr. Tang's employment with USAP, unbeknownst to myself or any other person at USAP, and without anybody's permission affiliated with USAP in violation of the Agreement, Sun Anesthesia Solutions was registered with the Nevada Secretary of State business

registry on April 24, 2018 with Dr. Tang as the president, secretary, treasurer, and director.

13. To the best of my knowledge, Sun Anesthesia Solutions is actively licensed to do business in the State of Nevada.

14. Dr. Tang as part and parcel of his employment with USAP interacted with third-party patients, physicians and physicians' groups in providing anesthesiology and pain management services. From August 2017-June 2018 as an employee of USAP, Dr. Tang administered anesthesia for the following amount of procedures/surgeries at the following facilities: 45 at Desert Springs Hospital, 117 at Durango Outpatient, 12 at Flamingo Surgery Center, 165 at Henderson Hospital, 68 at Horizon Surgery Center, 37 at Institute of Orthopaedic Surgery, 16 at Las Vegas Surgicare, 106 at MountainView Hospital, 7 at Parkway Surgery Center, 22 at Sahara Outpatient Surgery Center, 31 at Seven Hills Surgery Center, 138 at Southern Hills Hospital, 55 at Specialty Surgery Center, 43 at Spring Valley Medical Center, 1 at St. Rose-De Lima Campus, 38 at St. Rose- San Martin Campus, 51 at St. Rose- Siena Campus, 160 at Summerlin Hospital, 151 at Sunrise Hospital, 1 at Tenaya Surgical Center, 106 at Valley Hospital, and 74 at Valley View Surgery Center for a total of 1,444 at 22 facilities.

15. June 3, 2018 was Dr. Tang's last day of employment with USAP. Prior to, Dr. Tang requested a waiver or voiding of the non-compete provisions of the Employment Release, to which USAP rejected as expressly allowed for in its discretion in section 2.8.1.

16. On or about July 31, 2018, Dean Polce, D.O., a USAP physician-employee, discovered that Dr. Tang performed anesthesia services at Southern Hills Hospital Medical Center. Dr. Tang doing so at Southern Hills Hospital Medical Center violated the express terms of the Employment Agreement.

17. Dr. Tang performed those anesthesia services at Southern Hills Hospital Medical Center

for local vascular neurologist Tamer Ammar, whom USAP had a prior and ongoing professional relationship. Dr. Tang doing so for Dr. Ammar violated the express terms of the Employment Agreement.

18. On or about August 17, 2018, Jay Chang, M.D. and Mike Hansen, M.D., both USAP physician-employees, discovered that Dr. Tang performed anesthesia services at St. Rose Dominican Hospital-San Martin Campus. Dr. Tang doing so at St. Rose Dominican Hospital-San Martin Campus violated the express terms of the Employment Agreement.

19. Dr. Tang performed those anesthesia services at St. Rose Dominican Hospital- San Martin Campus for local general/breast surgeon Anne O'Neill, M.D. whom USAP had a prior and ongoing professional relationship. Dr. Tang doing so for Dr. O'Neill violated the express terms of the Employment Agreement.

20. Dr. Tang, Sun Anesthesia Solutions, and/or Dr. Tang's present employer believed by me to be Red Rock Anesthesia, are in direct competition with USAP. Dr. Tang continuing to do so irreparably harms USAP.

Executed on: 10/ 17 /2018
Date

W. Bradford Isaacs, M.D.

EXHIBIT D

EXHIBIT D

https://www.usap.com/locations/usap-nevada/locations-contact

Business offices

USAP Nevada
9127 W. Russell Road, Suite 110
Las Vegas, NV 89148
(702) 878-0070

Payments Mailing Address: USAP Nevada
P.O. Box 749030
Los Angeles, CA 90074-9030

Locations we serve

Desert Springs Hospital
2075 E Flamingo Rd
Las Vegas, NV 89119
(702) 733-8800
Driving Directions

Mountain View Hospital
3100 N Tenaya Way
Las Vegas, NV 89128
(702) 962-5000
Driving Directions

St. Rose - San Martin Campus
8280 W Warm Springs Rd
Las Vegas, NV 89113
(702) 492-8000
Driving Directions

St. Rose - Siena Campus
3001 St Rose Pkwy
Henderson, NV 89052
(702) 616-5000
Driving Directions

Southern Hills Hospital
9300 W Sunset Rd
Las Vegas, NV 89148
(702) 880-2100
Driving Directions

Spring Valley Hospital
5380 S Rainbow Blvd
Las Vegas, NV 89118
(702) 853-3000
Driving Directions

Summerlin Hospital
657 N Town Center Dr
Las Vegas, NV 89144
(702) 233-7000
Driving Directions

Sunrise Hospital and Medical Center
3186 S Maryland Pkwy

Las Vegas,, NV 89109
(702) 731-8000
Driving Directions

Valley Hospital Medical Center
620 Shadow Ln
Las Vegas, NV 89106
(702) 388-4000
Driving Directions

Flamingo Surgery Center
2565 E Flamingo Rd
Las Vegas, NV 89121
(702) 697-7900
Driving Directions

Parkway Surgery Center
100 N Green Valley Pkwy # 125
Henderson, NV 89074
(702) 616-4954
Driving Directions

Sahara Surgery Center
2401 Paseo Del Prado
Las Vegas, NV 89102
(702) 362-7874
Driving Directions

Seven Hills Surgery Center
876 Seven Hills Dr
Henderson, NV 89052
(702) 914-2028
Driving Directions

Specialty Surgery Center
7250 Cathedral Rock Dr
Las Vegas, NV 89128
(702) 933-3999
Driving Directions

Valley View Surgery Center
1330 S Valley View Blvd
Las Vegas, NV 89102
(702) 675-4600
Driving Directions

Durango Surgery Center
8530 W Sunset Rd
Las Vegas, NV 89113
(702) 789-5700
Driving Directions

North Vista Hospital
1409 E Lake Mead Blvd
North Las Vegas, NV 89030
(702) 649-7711
Driving Directions

Carson Tahoe Regional Medical Center
1600 Medical Pkwy
Carson City, NV 89703
Driving Directions

Carson Tahoe Sierra Surgery Hospital
1400 Medical Parkway
Carson City, NV 89703
Driving Directions
Sierra Surgery Center
973 Mica Drive, Suite 101
Carson City, NV 89703
Driving Directions
Western Nevada Surgical Center
1299 Mountain St
Carson City, NV 89703
Driving Directions
Henderson Hospital
1180 E. Lake Mead
Henderson , NV 89015
(702) 864-5706
Driving Directions
University Medial Center
1800 W. Charleston Blvd
Las Vegas, NV 89102
(702) 383-2000
Driving Directions
215 Surgery Center
6120 South Fort Apache Rd
Suite 200
Las Vegas, NV 89148
(702) 948-8894
Driving Directions
Affinity Surgery Center
10135 W. Twain Avenue
#110
Las Vegas , NV 89147
(702) 832-5959
Driving Directions
Ambulatory Surgical Center
3820 Hualapai Way
#100
Las Vegas, NV 89147
(702) 952-1660
Driving Directions
Box Canyon Surgery Center
2555 Box Canyon Drive
Las Vegas, NV 89128
(702) 316-4400
Driving Directions
Centennial Surgery Center
4454 N. Decatur Blvd
Las Vegas, NV 89130
(702) 839-1203
Driving Directions
Ear, Nose, and Throat Surgery
8840 W. Sunset Rd
Las Vegas, NV 89148

(702) 792-6700
Driving Directions
Desert Orthopedic Center
2800 E Desert Inn Rd
Suite 15
Las Vegas, NV 89121
(702) 735-7355
Driving Directions
Las Vegas Regional Surgery Center
3560 E. Flamingo Road
Las Vegas, NV 89128
(702) 454-8712
Driving Directions
Las Vegas Surgery Center
870 S Rancho Dr
Las Vegas, NV 89106
(702) 870-2090
Driving Directions
Minimally Invasive Spine Institute
9331 W. Sunset Road
Las Vegas, NV 89148
(702) 476-2951
Driving Directions
Red Rock Surgery Center
7135 W. Sahara Avenue
Las Vegas, NV 89117
(702) 227-5848
Driving Directions
Surgical Arts Center
9499 W. Charleston
250
Las Vegas, NV 89117
(702) 933-3600
Driving Directions
Stone Creek Surgery Center
5915 S. Rainbow Blvd.
Suite 108
Las Vegas, NV 89118
(702) 227-7959
Driving Directions
Shepherd Eye Center (Henderson)
2475 W. Horizon Ridge
Suite 120
Henderson , NV 89052
(702) 731-2088
Driving Directions
Shepherd Eye Center (Las Vegas)
3575 Pecos-McLeod Interconnect
Las Vegas, NV 89121
(702) 731-2088
Driving Directions
Shepherd Eye Center (Southwest)
9100 W. Post Road

Las Vegas, NV 89148
(702) 731-2088
Driving Directions

Shepherd Eye Center (Summerlin)
2100 N. Rampart Blvd.
Las Vegas, NV 89128
(702) 731-2088
Driving Directions

SHER Fertility Clinic
5320 S. Rainbow Blvd
Suite 300
Las Vegas, NV 89118
(702) 892-9696
Driving Directions

Siena Surgery Center
2865 Siena Heights Dr.
Suite 200
Henderson , NV 89052
(702) 586-3211
Driving Directions

Sunset Ridge Surgery Center, LLC
8352 W. Warm Springs Road
Suite 110
Las Vegas, NV 89113
(702) 445-6993
Driving Directions

Sunset Surgery Center
9120 W. Russell Rd.
Suite 200
Las Vegas, NV 89148
(702) 476-2897
Driving Directions

Tenaya Surgical Center
2800 N. Tenaya Way
Las Vegas, NV 89128
(702) 838-7755
Driving Directions

Warm Springs Surgical Center
3235 E. Warm Springs Road
Suite 110
Las Vegas, NV 89120
(702) 802-5200
Driving Directions

Alta Rose Surgery Center
501 Rose Street
Suite 110
Las Vegas , NV 89106
(702) 386-9906
Driving Directions

Boulder City Hospital
901 Adams Blvd.
Las Vegas, NV 89005

(702) 293-4111
Driving Directions

Smoke Ranch Surgery Center
7180 Smoke Ranch Rd
Las Vegas, NV 89128
(702) 483-2270
Driving Directions

Nevada Fertility Institute
8530 W. Sunset Rd.
Suite 310
Las Vegas, NV 89113
(702) 936-8710
Driving Directions

Coronado Surgery Center
2779 W. Horizon Ridge Pkwy
Suite 140
Las Vegas, NV 89052
(702) 589-9250
Driving Directions

The Center for Surgical Intervention
5950 S. Durango Dr.
Las Vegas, NV 89113
(702) 562-3039
Driving Directions

Green Valley Fertility Center
2510 Wigwan Pkwy
Suite 201
Las Vegas, NV 89074
(702) 722-2229
Driving Directions

REQT
John H. Cotton, Esq.
Nevada Bar No. 5268
jhcotton@jhcottonlaw.com
Adam Schneider, Esq.
Nevada Bar No. 010216
aschneider@jhcottonlaw.com
JOHN H. COTTON & ASSOCIATES
7900 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Telephone: (702) 832-5909
Facsimile: (702) 832-5910
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

DEPARTMENT XVI
NOTICE OF HEARING CHANGE TO
DATE 11/19/18 TIME 9:30 AM
APPROVED BY CII

U.S. ANESTHESIA PARTNERS,

Plaintiff,

vs.

DEVIN CHERN TANG, M.D., SUN SOLUTIONS ANESTHESIA, A Nevada Corporation, DOE Defendants I-X,

Defendants.

Case No.: A-18-783054-C
Dept. No.: 16

PLAINTIFF'S REQUEST FOR HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION BE SET ON ORDER SHORTENING TIME

Plaintiff U.S Anesthesia Partners (herein Plaintiff) by and through its attorneys of record, the law firm of JOHN H. COTTON & ASSOCIATES, LTD., hereby submits this Request for Hearing on Plaintiff's Motion for Preliminary Injunction be set on Order Shortening Time based upon the following exhibits-

Exhibit A- Plaintiff's Motion for Preliminary Injunction (sans exhibits);

Exhibit B- Declaration of Jaymin Chang, M.D.; and

//

NOV 0 5 2018

JOHN H. COTTON & ASSOCIATES
7900 W. Sahara Avenue, Las Vegas, Nevada 89117
Telephone: (702) 832-5909 | Facsimile: (702) 832-5910

Exhibit C- Declaration of Adam Schneider, Esq.

Dated this 5th day of November 2018.

JOHN H. COTTON & ASSOCIATES, LTD.
7900 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

NOTICE OF MOTION ON ORDER SHORTENING TIME

TO: ALL INTERESTED PARTIES AND/OR THEIR COUNSEL OF RECORD

It appearing to the satisfaction of the Court that good cause appears based upon the Declaration of Counsel per EDCR 2.26,

IT IS HEREBY ORDERED that the foregoing **MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME** shall be heard by this Court on the **19th day of November 2018, at the hour of 9:30a.m.** or as soon thereafter as counsel may be heard.

Dated this 5TH day of November 2018.

DISTRICT COURT JUDGE
HONORABLE TIMOTHY WILLIAMS

CH

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I am an employee of JOHN H. COTTON & ASSOCIATES and that on the 5th day of November 2018, the foregoing **PLAINTIFF'S REQUEST FOR ORDER SHORTENING TIME** was served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court e-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, and if not on the e-serve list, was mailed via U.S. Mail, postage prepared as noted below, as follows:

Howard & Howard
3800 Howard Hughes Parkway, Ste. 1000
Las Vegas, NV 89169

/s/ Jody Foote
An employee of John H. Cotton & Associates

EXHIBIT A

EXHIBIT A

MOT
John H. Cotton, Esq.
Nevada Bar No. 5268
jhcotton@jhcottonlaw.com
Adam Schneider, Esq.
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS,

Plaintiff,

vs.

DEVIN CHERN TANG, M.D., SUN SOLUTIONS ANESTHESIA, A Nevada Corporation, DOE Defendants I-X,

Defendants.

Case No.: A-18-783054-C
Dept. No.: 16

PLAINTIFF'S MOTION AND NOTICE OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiff U.S Anesthesia Partners (herein Plaintiff) by and through its attorneys of record, the law firm of JOHN H. COTTON & ASSOCIATES, LTD., hereby submits its Motion for Preliminary Injunction in the above-referenced matter pursuant to NRS 33.010.

//

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This Motion is made and based on all the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, together with such other and further evidence and argument as may be presented and considered by this Court at any hearing of this Motion.

Dated this 19th day of October 2018.

JOHN H. COTTON & ASSOCIATES, LTD.
7900 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND/OR THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **MOTION FOR PRELIMINARY INJUNCTION** for hearing in the above entitled Court on the 29 day of November, 2018, at the hour of 9:00 a.m./~~p.m.~~ or as soon thereafter as counsel may be heard.

Dated this 19th day of October of 2018.

JOHN H. COTTON & ASSOCIATES, LTD.
7900 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

A. Introduction and factual background

Plaintiff is a foreign corporation duly licensed to do business in State which employs licensed physicians, certified registered nurse anesthetists and other authorized health care providers to provide anesthesia services and pain management services, and in November-December 2016 merged/acquired/joined entity Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. d/b/a Anesthesiology Consultants, Inc., a Nevada corporation. Such a transaction made USAP the parent corporation of Fielden Hanson Isaacs Miyada Robison Yeh, Ltd.

In December 2016, Defendant Devin Chern Tang, M.D. entered into a Physician Employment Agreement with Plaintiff which included a non-compete agreement (NCA), thereby becoming Plaintiff's employee. (**Exhibit A-** Employment Agreement at page 2 sections 1 and 2.1, and page 14 at section 7.)

The Employment Agreement's section 2.8.1 specifically states in relevant part:

> In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion), directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination; (ii) call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof; or (iii) provide

> management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

(Id. at page 5, section 2.8.1).

It was expressly stated and acknowledged that but for the agreement of [Dr. Tang] to comply with such covenants, [Plaintiff] would not have agreed to enter into this Agreement." (Id. at page 7, section 2.10.) Exhibit B to the Employment Agreement is USAP's Clinical Code of Conduct. The Code lists behaviors that are unacceptable including interfering with any contract or business relationship of USAP.

Despite the express language which Defendant entered into freely, voluntarily and without duress, Defendant violated and continues to violate the NCA. At the time of entering into the Employment Agreement, Defendant Tang:

> recognizes that the Practice's decision to enter into this Agreement is induced primarily because of the covenants and assurances made by Physician in this Agreement, that Physician's covenants regarding non-competition and nonsolicitation in this Section 2.8 are necessary to ensure the continuation of the business of the Practice and the reputation of the Practice as a provider of readily available and reliable, high quality physicians, as well as to protect the Practice from unfair business competition, including but not limited to, the improper use of Confidential Information.

(Id. at page 5, section 2.8.)

Plaintiff had and has contractual relationships with many facilities and hospitals in Clark County, including but not limited to Southern Hills Hospital Medical Center, Sunrise Hospital Medical Center, Henderson Hospital, and St. Rose Dominican Hospital- San Martin Campus.

Dr. Tang would proceed to work for Plaintiff providing anesthesia and pain management services. From August 2017 to the end of his employment with USAP in June 2018, Dr. Tang administered anesthesia in the following amount of procedures/surgeries at the following facilities: 45 at Desert Springs Hospital, 117 at Durango Outpatient, 12 at Flamingo Surgery

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Center, 165 at Henderson Hospital, 68 at Horizon Surgery Center, 37 at Institute of Orthopaedic Surgery, 16 at Las Vegas Surgicare, 106 at MountainView Hospital, 7 at Parkway Surgery Center, 22 at Sahara Outpatient Surgery Center, 31 at Seven Hills Surgery Center, 138 at Southern Hills Hospital, 55 at Specialty Surgery Center, 43 at Spring Valley Medical Center, 1 at St. Rose-De Lima Campus, 38 at St. Rose- San Martin Campus, 51 at St. Rose- Siena Campus, 160 at Summerlin Hospital, 151 at Sunrise Hospital, 1 at Tenaya Surgical Center, 106 at Valley Hospital, and 74 at Valley View Surgery Center for a total of 1,444 at 22 facilities.

Unbeknownst to Plaintiff, Defendant Tang knew he was going to leave Plaintiff's employment as evidenced by the formation on April 24, 2018 of "Sun Anesthesia Solutions" with Defendant Tang as its sole officer. (**Exhibit B-** Nevada Secretary of State Business Registry for "Sun Anesthesia Solutions.")

Less than forty days later on June 3, 2018, Defendant Tang worked his last day as an employee of Plaintiff. Defendant asked Plaintiff to void the NCA, to which Plaintiff rejected as expressly reserved in section 2.8.1 of the Agreement. (See id. at page 5, section 2.8.1.)

Plaintiff by and through its employees have since discovered and determined that Defendant Tang within approximately one month of ceasing to work for Plaintiff was performing anesthesia services, at minimum at St. Rose Dominican Hospital- San Martin Campus and Southern Hills Hospital Medical Center (SHHMC) and perhaps other facilities, all in violation of the NCA. (**Exhibit C-** Declaration of Dr. Isaacs.)

Cursory research shows that Defendant Tang works for Red Rock Anesthesia Consultants, LLC, and additionally is affiliated with Sunrise Hospital Medical Center, Valley Hospital Medical Center, MountainView Hospital, and Henderson Hospital. Those are all facilities that Plaintiff by and through its employees provide anesthesia services, thus making Defendant Tang's administration of anesthesia at those facilities in direct violation of the express

terms of the NCA. (**Exhibit D**- Plaintiff's Nevada locations served inclusive of Southern Hills Hospital Medical Center and St. Rose Dominican Hospital- San Martin).

Defendant Tang, and/or the group he works for Red Rock Anesthesia Consultants LLC, and/or Defendant's alter ego Sun Anesthesia Solutions, actively contacts third-party physicians and physicians' groups whom Plaintiff by and through its employees have long-standing professional relationships to provide anesthesia and pain management services.

II.

REQUESTED RELIEF

Unless Defendant is enjoined, Defendant will continue to violate the NCA, compete directly against Plaintiff, and solicit business with Plaintiff's clients in the form of third-party patients, physicians or physician groups needing anesthesia services, thereby causing continued and irreparable harm to Plaintiff.

Indeed, Defendant Tang expressly agreed to such an injunction per section 2.8.3 of the Agreement:

> Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of this Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.

(Id. at page 6, section 2.8.3.) Therefore Plaintiff requests the immediate entry of a preliminary injunction as follows in a manner consistent with the Agreement to:

1) enjoin Defendant and his alter ego Sun Anesthesia Solutions in competition with Plaintiff from performing any anesthesia services for patients or for physicians or for physicians' groups consistent with the now-violated Agreement; and

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2) enjoin Defendant and his alter ego Sun Anesthesia Solutions in competition with Plaintiff from soliciting or doing business with any of Plaintiff's clients in the form of third-party patients, physicians or physician groups consistent with the now-violated Agreement.

III.

APPLICABLE LAW

A. NRS 33.010 allows for injunctions in this instance

NRS 33.010 allows for injunction in any of the following circumstances:

> 1. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.
> 2. When it shall appear by the complaint or affidavit that the commission or continuance of some act, during the litigation, would produce great or irreparable injury to the plaintiff.
> 3. When it shall appear, during the litigation, that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual.

NRS 33.010. Unquestionably, Plaintiff's Complaint triggers application of NRS 33.010 and the granting of an injunction.

An injunction is indicated to prevent irreparable injury that causes damage to the business and its profits. See Sobol v. Capital Management Consultants, Inc., 102 Nev. 444, 726 P.2d 335. An injunction is likewise indicated to protect business and propriety interests. Guion v. Terra Marketing of Nevada, Inc., 90 Nev. 237, 523 P.2d 847 (1974). An injunction is further indicated should the injury likely be irreparable then "equity will always interpose its powers to protect a person from a threatened injury." Champion v. Sessions, 1 Nev. 478 (1865). An injunction is further indicated to preserve the status quo. Dixon v. Thatcher, 103 Nev. 414, 742 P.2d 1029 (1987).

"A preliminary injunction available if an applicant can show a likelihood of success on the merits and a reasonable probability that the non-moving party's conduct, if allowed to

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continued, will cause irreparable harm for which compensatory damages is an inadequate remedy." Dangberg Holdings Nevada, LLC v. Douglas Cty., 115 Nev. 129, 978 P.2d 311 (1999).

The decision to grant a preliminary injunction is within the sound discretion of the trial court. Id. at 142-143. So too does the trial court have discretion regarding the amount of security given by the applicant for injunctive relief before the issuance of injunctive relief. See NRCP 65(c). But doing so would be in direct contravention of the Employment Agreement's section 2.8.3.[1] (Exhibit A at page 6.)

A trial court can abuse its discretion in denying injunctive relief. Pickett v. Comanche Construction, Inc., 108 Nev. 422, 836 P.2d 44 (1992) (reversing the trial court's denial of an injunction and finding if the defendant was allowed to act as it desired the Plaintiffs would be subjected to irreparable harm and that compensatory damages would be inadequate).

The mere existence of another remedy does not automatically preclude the issuance of an injunction. Nevada Escrow Service, Inc. v. Crockett, 91 Nev. 201, 533 P.2d 471 (1975).

IV.

ARGUMENT

A. Plaintiff possesses a reasonable likelihood of success on the merits

There is no doubt that Defendant Tang violated the subject NCA. Indeed, knowing full well his conduct would do so, he asked Plaintiff for permission to void the NCA to which Plaintiff rejected. Defendant Tang decided to violate the NCA anyway.

[1] If this court in its discretion orders a bond despite the express language of the Employment Agreement, then the amount of that security should be nominal and de minimis given Defendant Tang will not suffer any harm if he is enjoined from his wrongful conduct violating the NCA.

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Defendant Tang's knowledge and understanding of the NCA is uncontroverted. He signed in December 2016 the Employment Agreement containing the NCA knowingly, willingly, and without duress.

Defendant Tang's contractual obligations are express, clear, and unambiguous. Yet he Defendant Tang chose to violate the NCA nonetheless, as evidenced by his establishment of Sun Anesthesia Solutions with himself as the sole officer 40 days prior to his last day working for Plaintiff. Plaintiff has a legitimate business interest in enjoining Defendant Tang from working as a competitor or for a competitor in the providing of anesthesia services for Las Vegas healthcare providers and for Las Vegas patients.

Defendant Tang knew he was going to breach the NCA and knows he continues to breach the NCA as evidenced by his request to Plaintiff to void the NCA. Telling is that when Plaintiff rejected the request, Defendant Tang did not seek judicial intervention or seek legal counsel. Instead he chose to provide anesthesia services in violation of the NCA and hope that no person affiliated with Plaintiff would notice. Clearly Defendant Tang's strategy failed.

B. Defendant breached the subject contract

The Employment Agreement is clearly a contract. "Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." May v. Anderson, 121 Nev. 668, 119 P.3d 1254 (2005) citing Keddie v. Beneficial Insurance, Inc., 94 Nev. 418, 421, 580 P.2d 955, 956 (1978) (Batjer, C.J., concurring).

Breach of contract is the material failure of performance of a duty arising under a valid agreement. See, e.g., Bernard v. Rock Hill Dev., Co., 103 Nev. 132, 734 P.2d 1238 (1987), Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000).

Based upon the above described conduct, Defendant Tang breached and continues to breach the subject contract. Noteworthy is that Defendant Tang does not deny that he is employed with another anesthesia group or entity, but rather he contends that he can do so at any

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facility that he chooses and not be in violation of the NCA. But this is in direct violation of the Employment Agreement as well. (See Exhibit A). Defendant Tang choosing to do so and continuing to do so causes and continues to cause Plaintiff irreparable harm to Plaintiff's customer base and relationships.

C. The NCA's terms are reasonable

Courts are to look to whether the terms of a NCA are likely to be found reasonable at trial when deciding whether a party is likely to succeed in enforcing a NCA for purposes of a preliminary injunction. See Camco, Inc. v. Baker, 113 Nev. 512, 518-20, 936 P.2d 829, 832-834 (1997) (holding a territorial restriction is reasonable when limited to the territory in which the former employers established customer contacts and goodwill.)

Post-employment NCAs are evaluated with a "higher degree of scrutiny than other kinds of noncompete agreements because of the seriousness of restricting an individual's ability to earn an income." Ellis v. McDaniel, 95 Nev. 455, 459, 596 P.2d 222, 224 (1979). Such reasonable restrictions are defined as those "reasonably necessary to protect the business and goodwill of the employer." Jones v. Deeter, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996).

NRS 613.200(4) codifies that NCAs are enforceable when reasonable in scope and duration. To determine reasonableness of a NCA, courts are to consider: 1) the duration of the restriction (here being 24 months from end of employment); 2) geographical scope of the restriction; and 3) the hardship that will be faced by the restricted party. Id. at 296, 913 P.2d at 1275. "The period of time during which the restraint is to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement." Hanson v. Edwards, 83 Nev. 189, 426 P.2d 792 (1967) (affirming the trial court's order for preliminary injunction and thereby enforcing a NCA with modifications); see also Ellis v. McDonald, 95 Nev. 455, 596 P.2d 222 (1979).

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In Ellis, the Nevada Supreme Court affirmed a post-employment NCA with restrictions of: 1) two years; and 2) five miles encompassing the city limits of Elko, NV. There, Dr. Ellis was the employee of Elko Clinic. The Nevada Supreme Court held the NCA was reasonable as to both restrictions, reasoning that an injunction was indicated because "the goodwill and reputation of the Clinic are valuable assets." Id. at 459.

Noteworthy is that the injunction was then modified to the limited extent of allowing Dr. Ellis to practice another kind of medicine. Elko Clinic did not provide that kind of medicine, and Elko, NV did not have any other doctors practicing that kind of medicine.

D. Plaintiff is suffering irreparable harm due to Defendant's wrongful conduct

An injunction should issue when an employee violates the employee's agreed upon NCA, particularly when the employee joins a business or engages in business in direct competition with the former employer. See, e.g., Las Vegas Novelty, Inc. v. Fernandez, 106 Nev. 113, 787 P.2d 772 (1990) (holding Plaintiff is best protected with an injunction upon the former employee's new employer and the former employee himself to allow Plaintiff time to recoup any lost customers.)

Part and parcel of Defendant Tang's job duties while with Plaintiff was being placed in personal contact with third-party patients, physicians, and physicians' groups in need of anesthesia administration services. While Defendant Tang was an employee of Plaintiff, he obtained valuable information as to the nature and character of Plaintiff's business, names of third-party patients, physicians, and physicians' groups that had ongoing relationships and good will with Plaintiff.

This court not enjoining Defendant Tang from doing so now defeats the entire of the purpose of the NCA. See AEP Industries v. McClure, 302 SE.2d 754 (1983) (North Carolina Supreme Court holding that "equity will interpose in behalf of the employer and restrain the

breach" when the nature of the employment is bringing the employee in personal contact with patrons and acquiring information about the business).

E. Equity favors a preliminary injunction at this stage

This court must balance Plaintiff's injury or risk of injury against the theoretical harm an injunction could cause to Defendant Tang. Ottenheimer v. Real Estate Division, 91 Nev. 338, 535 P.2d 1284 (1975); see also Basicomputer Corp. Scott, 791 F. Supp. 1280, 1289 (N.D. Ohio 1991) (noting that the test requires more than "just some hardship," and such harshness "requires excessive severity.") This balancing is done in equity, and relative to injunctions can be utilized "only to innocent parties who proceed without knowledge or warning that they are acting contrary to others' vested property rights." Gladstone v. Gregory, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979).

Here, Plaintiff continues to suffer injury all the while Defendant Tang directly competes against Plaintiff in direct violation of the valid and enforceable NCA. This injury clearly outweighs any inconvenience or theoretical harm Defendant Tang may experience from an injunction. The NCA is purposefully crafted and done to allow Plaintiff in that NCA period to allow Plaintiff to continue to secure its relationships with third-parties patients and physicians and healthcare facilities who may have worked with Defendant Tang (at the assignment of Plaintiff) while he was employed with Plaintiff. An injunction would merely require Defendant Tang to honor what he knowingly, willingly and voluntarily agreed to do in December 2016 which was bargained for and for which consideration was given.

Applying the holding of Gladstone to the facts here, Defendant Tang is not entitled to equity being in his favor. He blatantly violated the NCA, is now engaged in competition with Plaintiff, and knew he was going to be in direct violation of the NCA as evidenced by his request to Plaintiff to void the NCA. His post-hoc belief that the NCA is not reasonable and that he can work at facilities where Plaintiff employees practice does not render Defendant Tang an innocent

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party who proceeded without knowledge or warning that he was acting contrary to Plaintiff's rights. See id.

V.

CONCLUSION

Non-compete agreement are vital tools to protecting a business's interests from former employees who seek to violate the trust and confidence at one time placed in them. This is no different when it comes to physicians and anesthesiologists such as Defendant Tang. But non-compete agreements only serve a purpose if courts such as this one choose to enforce them.

Defendant Tang and his alter ego Sun Anesthesia Solutions must be enjoined from: 1) performing any anesthesia services for patients or for physicians or for physicians' groups consistent with the now-violated Agreement; and 2) soliciting or doing business with any of Plaintiff's clients in the form of third-party patients, physicians or physician groups.

Dated this 19th day of October 2018.

JOHN H. COTTON & ASSOCIATES, LTD.
7900 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I am an employee of JOHN H. COTTON & ASSOCIATES and that on the 19th day of October 2018, the foregoing **MOTION FOR PRELIMINARY INJUNCTION** was served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court e-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, and if not on the e-serve list, was mailed via U.S. Mail, postage prepared as noted below, as follows:

Howard & Howard
Attn: Robert L. Rosenthal, Esq.
3800 Howard Hughes Parkway, Ste. 1000
Las Vegas, NV 89169

/s/ Jody Foote
An employee of John H. Cotton & Associates

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EXHIBIT B

EXHIBIT B

DECLARATION OF JAYMIN CHANG, M.D.

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, Jaymin Chang, M.D., declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct:

1. I am the vice-chairman and part of the leadership of the Nevada chapter of the governing board for U.S. Anesthesia Partners (USAP), and make this Declaration in support of USAP's Request for Hearing on Order Shortening Time.

2. I have personal knowledge of the matters set forth herein, except as those matters stated on information and belief, which I believe to be true. I am competent to testify as to the matters set forth herein if called upon to do so.

3. It is my understanding that on October 25, 2018 Dr. Tang through his counsel was served with the Summons, Complaint, and USAP's Motion for Preliminary Injunction.

4. Despite Dr. Tang's knowledge of the lawsuit asserting violations of the non-compete provisions of the Employment Agreement with USAP, today I witnessed Dr. Tang in scrubs enter Southern Hills Hospital Operating Room no. 3 where based upon information and belief he would provide anesthesia services for local surgeon Peter Caravella, M.D.

5. Dr. Tang providing those anesthesia services at Southern Hills Hospital for Dr. Caravella today violates Dr. Tang's Employment Agreement with USAP.

6. Dr. Tang continues to cause irreparable harm upon USAP despite his knowledge of the lawsuit and the Motion for Preliminary Injunction. Therefore the hearing set for November 29, 2018 must be expedited and instead heard by the court as soon as possible.

Executed on: 11/2/2018
Date

/s/ Jaymin Chang
Jaymin Chang, M.D.

EXHIBIT C

EXHIBIT C

John H. Cotton & Associates, Ltd.
7900 West Sahara, Suite 200
Las Vegas, Nevada 89117

DECLARATION OF COUNSEL PURSUANT TO EDCR 2.26

STATE OF NEVADA)
)ss:
COUNTY OF CLARK)

ADAM SCHNEIDER, ESQ. being first duly sworn, deposes and says:

1. Your Declarant is duly licensed to practice law in the State of Nevada, is an attorney with the law firm John H. Cotton & Associates, Ltd., is counsel for Plaintiff, and has personal knowledge of the facts stated herein.

2. On October 18, 2018, Plaintiff filed a Complaint for Damages.

3. On October 19, 2018, Plaintiff filed a Motion for Preliminary Injunction (MPI). (**Exhibit A to Plaintiff's Request**- MPI) (sans exhibits).

4. At the time of Plaintiff's Request, Plaintiff's MPI is set for hearing on November 29, 2018 9a.m. (Id.)

5. On October 25, 2018, Defendants' counsel accepted service of the Summons, Complaint, and MPI with exhibits. That according to my calculations under NRCP 6 and EDCR 2.20, Defendants' responsive pleading to the MPI will come due November 9, 2018.

6. On November 2, 2018, I was made aware of Defendant Tang's behavior as detailed in the Declaration of Dr. Chang. (**Exhibit B to Plaintiff's Request**- Dec. of Dr. Chang).

7. I therefore on November 2, 2018 called Department 16's Judicial Executive Assistant Lynn Berkheimer. I sought guidance on Department 16's preferred procedure for getting a hearing already on calendar instead expedited and heard on Order Shortening Time. I advised Ms. Berkheimer that Defendants had retained counsel and accepted service of the Summons, Complaint, and MPI on October 25, 2018. I advised Ms. Berkheimer that Plaintiff did not want a hearing too soon in time because Plaintiff wanted to ensure Defendants had their full allotment

of days under NRCP 6 and EDCR 2.20 to file their responsive pleading to the MPI and/or Complaint.

8. Ms. Berkheimer provided me with November 19, 2018 9:30a.m. as an available docket, and advised it needed to be secured through a Request for Hearing on Order Shortening Time supported by affidavit/declaration. Plaintiff's Request, this Declaration, and Dr. Chang's Declaration are supplied herein to satisfy that.

9. Given the nature of Plaintiff's Complaint and facts discovered only after service of process upon Defendants, Plaintiff requests its MPI hearing presently set for November 29, 2018 9a.m. ***instead be set for Monday November 19, 2018 9:30a.m. on Order Shortening Time.***

10. I am emailing Defendants' counsel with a copy of Plaintiff's Request and exhibits at the time of lodging Plaintiff's Request with this Court to give Defendants' counsel adequate time to adjust their calendars accordingly.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct this 5th day of November 2018.

/s/ Adam Schneider
Adam Schneider

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DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS, Plaintiff, vs. DEVIN CHERN TANG, M.D., SUN SOLUTIONS ANESTHESIA, A Nevada Corporation, DOE Defendants I-X, Defendants.	CASE NO. A-18-783054-C DEPT. NO. XVI **OPPOSITION TO PLAINTIFF'S REQUEST FOR HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Devin Chern Tang, M.D. ("Dr. Tang") and Sun Solutions Anesthesia ("Sun Solutions") (collectively "Defendants") hereby oppose Plaintiff's Motion for Preliminary Injunction.

This Opposition is based upon the pleadings and papers on file, the attached Declarations of Devin Tang, M.D. (**Exhibit A**) and Peter Caravella, M.D., FACS (**Exhibit B**), the attached points and authorities, the attached exhibits, and whatever argument the Court may entertain at hearing on this matter.

DATED this 9th day of November, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Ryan O'Malley
By: _____
Martin A. Little (#7067)
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POINTS AND AUTHORITIES

I.
INTRODUCTION

The non-compete at issue here is overbroad and not reasonably related to any legitimate business purpose; therefore, it is wholly unenforceable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016) (holding that a non-compete that extends beyond what is necessary to protect the employer's interest renders the provison wholly unenforceable).[1] The plain language of the provision states that if Dr. Tang had ever taken a case at a hospital during his time at USAP, he is barred from accepting *any* cases from *any* provider at that *entire facility* for a two-year period, even for providers that USAP has never worked with, and even if USAP later ceases providing any services at that facility. USAP additionally takes the position in its Motion[2] that the non-compete precludes Dr. Tang from taking cases at any hospital at which USAP currently provides services, even if they had not done so during the time when they had employed Dr. Tang. The non-compete's focus on entire *facilities* rather than individual *physicians* is nonsensical because, generally speaking, physicians (and not hospitals) hire anesthesiologists. The non-compete is therefore overbroad and invalid.

Even if the non-compete were enforceable, Dr. Tang is not competing with USAP. Since his departure from USAP, Dr. Tang has limited his practice in Nevada to accepting overflow cases from Red Rock Anesthesiology Consultants ("Red Rock"), which are assigned to him by that group. He has never solicited business from any current or former USAP clients; indeed, he has never directly solicited business from *any* physician or physician group. USAP is therefore not being harmed by Dr. Tang's conduct, and it is certainly not experiencing the irreparable harm necessary to support a preliminary injunction. Even if USAP were being harmed in some way by

[1] On June 3, 2017, the Nevada Legislature enacted **AB 276**, which modifies *Golden Road's* holding with respect to the construction and severability of non-compete agreements. However, the Agreement at issue in this case was executed on December 2, 2016, well before the enactment of AB 276, but after the holding in *Golden Road*. Thus, **the holding in *Golden Road* controls.**

[2] *See* Pl.'s Mot. at 5:22–6:2. ("Those are all facilities that [USAP] by and through its employees provide[s] anesthesia services, thus making [Dr. Tang's] administration of anesthesia at those facilities in direct violation of the express terms of the NCA.")

Dr. Tang's conduct, monetary damages are sufficient to remedy the harm at issue. USAP's motion should therefore be denied in its entirety.

II
STATEMENT OF FACTS

Dr. Tang's Practice with Premier Anesthesiology Consultants

In August of 2016, Dr. Tang moved to Las Vegas and accepted a position with Premier Anesthesiology Consultants ("PAC"). (Ex. A at ⁋ 4.) PAC was a subsidiary of an entity called Anesthesiology Consultants, Inc. ("ACI"). Dr. Tang accepted a position with PAC because he perceived it to be one of the few groups that treated its employees fairly while offering a clear path to partnership for its physicians. (*Id.*)

USAP Acquires Premier Anesthesiology Consultants

In or around December of 2016, PAC/ACI was acquired by U.S. Anesthesiology Partners ("USAP"). (*Id.* at ⁋ 5.) In connection with this acquisition, USAP required Dr. Tang to execute a Physician-Track Employment Agreement ("Agreement"), which is attached as **Exhibit C**. (*Id.*) The Agreement contained the following Non-Competition Clause:

> In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that ***Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion)***, directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) ***provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services*** (1) in the case of each day during the Term, within the twenty-four month period prior to such day and ***(2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination;*** (ii) ***call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof***; or (iii) provide management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

(Ex. C at p. 5, emphases added.)

In the time following the USAP acquisition, the conditions of Dr. Tang's employment deteriorated. (Ex. A. at ⁋ 6.) Surgeons who had previously worked with PAC increasingly became dissatisfied. (*Id.* at ⁋ 6.) For example, Las Vegas Surgical Associates ("LVSA"), a prior client of PAC, was unhappy with some of the anesthesiologists[3] that USAP had provided to cover procedures, and it therefore withdrew its business from USAP in February of 2018. (*See* Ex. B at ⁋ 8.) Former PAC client Tarek Ammar, M.D. encountered issues with scheduling failures, and similarly withdrew his business. (Ex. A at ⁋ 18(a)). Other physicians and physician groups similarly withdrew or curtailed their business with USAP following the acquisition.

Dr. Tang Separates from USAP

Dr. Tang became uncomfortable with the prospect of continuing to work with USAP. (*Id.* at ⁋ 7.) Thus, in or around March of 2018, he provided 90 days' notice of his intent to terminate his employment with USAP, as provided in Paragraph 6.2.9 of the Agreement. (*See* Ex. A at ⁋ 7; Ex. C at 13 ("Physician may terminate employment pursuant to this Agreement, without cause, by providing ninety (90) days prior written notice to the Practice.")). In April of 2018 (and after providing his 90 days' notice), Dr. Tang created Sun Anesthesia Solutions ("Sun Anesthesia"), which was to serve as his professional corporation following his departure. (Ex. A at ⁋ 8.)

Dr. Tang did not conceal his intention to continue working as an anesthesiologist in Las Vegas following his departure from USAP. (*Id.* at ⁋ 10.) In the time between his providing notice of his intent to terminate the Agreement and the termination date, he had two exit interviews with W. Bradford Isaacs, M.D., who is the Chairman of the Clinical Governance Board of USAP Nevada. (*Id.* at ⁋ 9.) During his first exit interview, Dr. Tang expressed a desire to continue working as an anesthesiologist in Las Vegas following his separation from USAP. (*Id.* at ⁋ 11.) Dr. Isaacs expressed his opinion that "corporate" was unlikely to grant a waiver of the non-compete provision of the Agreement, and he encouraged Dr. Tang to take a week to reconsider

[3] According to its website, USAP works with approximately 115 anesthesiologists in Nevada alone. See Leadership & Team, https://www.usap.com/locations/usap-nevada/leadership-team (last visited November 8, 2018). This sheer breadth and volume of physicians—at least in LVSA's experience and opinion—appears to have led to inconsistent quality of care from case-to-case, which led LVSA to terminate its relationship with USAP. (*See* Ex. B at ⁋ 7.)

his decision to leave. (*Id.*) Approximately one week later, Dr. Tang had a second exit interview with Dr. Isaacs and reaffirmed his intention to leave USAP and to continue working as an anesthesiologist in Las Vegas following his departure. (*Id.* at ⁋ 12.) During that meeting, Dr. Isaacs generally advised him not to continue working as an anesthesiologist, as he apparently believed that the practice area was no longer viable or desirable to work in. (*Id.*) However, he did not specifically mention the non-competition clause of the Agreement or caution Dr. Tang against accepting work for other providers, and he certainly did not suggest that Dr. Tang would be precluded from accepting assignments from providers not working with USAP. (*Id.*)

Dr. Tang's Affirmative Efforts to Not Compete With USAP Following His Departure

In or around June of 2018, Dr. Tang's notice period ended, and he became an independent contractor. (*Id.* at ⁋ 13.) Since his departure, he has made affirmative efforts not to compete with USAP. (*Id.* at ⁋ 14.) For example, as Dr. Tang understands it, University Medical Center ("UMC") does not have any contractual relationship with USAP. (*Id.* at ⁋ 15.) He therefore accepted overflow cases from UMC through his professional corporation. (*Id.*)

Dr. Tang had also occasionally accepted overflow cases from Red Rock. (*Id.* at ⁋ 16.) Approximately one-and-a-half months after his departure from USAP, Red Rock Anesthesia Consultants informed Dr. Tang that they accept a steady caseload from UMC. (*Id.* at ⁋ 17.) He has therefore accepted cases in Las Vegas exclusively through Red Rock Anesthesia Consultants since that time. (*Id.*)

Over the course of his relationship with Sun Anesthesia, Dr. Tang has occasionally been assigned to work with physicians who either currently work with USAP or had previously done so. (*See id.* at ⁋⁋ 18, 23.) However, Dr. Tang has never solicited business from these providers or any others; rather, the providers had independently decided to divert some or all of their work from USAP to Red Rock, as was the case with LVSA and Dr. Ammar's practice. (*Id.*)

Dr. Tang Has Never Solicited Any Physician That Has a Relationship with USAP

Aside from his contacts to UMC and Red Rock Anesthesia Consultants, Dr. Tang has never directly solicited work from any physician, physician group, or other healthcare provider.

(*Id.* at ⁋ 19.) Specifically, Dr. Tang has never solicited any work from any physician, physician group, or healthcare provider with whom he had ever had a relationship because of his time at USAP. (*Id.* at ⁋ 20.) Dr. Tang has never encouraged any physician, physician group, or healthcare provider to terminate a relationship with USAP or to divert any portion of their anesthesiology coverage from USAP. (*Id.* at ⁋ 21.) To Dr. Tang's knowledge, no physician, physician group, or healthcare provider has ever terminated a relationship with USAP or diverted any portion of their anesthesiology coverage from USAP because of Dr. Tang's departure or his affiliation with Red Rock or any other provider. (*Id.* at ⁋ 22.) To whatever extent that Dr. Tang has ever worked with a physician that had previously worked with USAP, he did so only because that physician had independently requested anesthesia services from UMC or Red Rock Anesthesia Consultants, and he was subsequently assigned to the case by one of those two providers. (*Id.* at ⁋ 23.)

In short, in the time since his departure from USAP, Dr. Tang has merely accepted assignments from UMC and Red Rock Anesthesia Consultants; he has otherwise taken no steps whatsoever to solicit business from anyone, whether or not they had a relationship with USAP. (*Id.* at ⁋ 24.)

The Unclear Extent of USAP's Relationships with Las Vegas Hospitals

In the Declaration of W. Bradford Isaacs, M.D. (the "Isaacs Declaration"), he indicates that USAP has an "Anesthesiology Services agreement to provide professional anesthesiology services solely for Henderson Hospital." (*See* Isaacs Declaration at ⁋ 11.) This appears to suggest that USAP has an agreement with Henderson Hospital to be its exclusive provider of anesthesiology services.

Although USAP may have had an exclusive agreement with Henderson Hospital at one point, this no longer appears to be the case. On April 19, 2018, Sam Kaufman (the CEO of Henderson Hospital) circulated an announcement stating that, "effective on May 1, 2018, Henderson Hospital will no longer have a closed anesthesia model for most areas of the facility. . . . Commencing May 1st, the Hospital's Department of Anesthesia will be open to all anesthesiologists wishing to apply for privileges, except for OB Anesthesia." (Emphasis in original.) This correspondence is attached to this Opposition as **Exhibit D**. (*Accord* Ex. A at ⁋

26.) Dr. Tang has not provided OB anesthesiology services in Las Vegas following his departure from USAP. (*Id.* at ¶ 27.)

Dr. Tang does not know the specifics of USAP's contractual relationship with any other hospitals; however, generally speaking, surgeons with privileges at any given hospital are permitted to work with any anesthesiologist that they choose (so long as those anesthesiologists are also privileged at the same facility). (*Id.* at ¶ 28.) Dr. Tang is not aware of USAP having any exclusivity agreement with any hospital that has precluded him from providing any services since his departure from USAP. (*Id.* at ¶ 29.)

III.
LEGAL STANDARD

NRCP 65 and NRS 33.010 permit the issuance of preliminary injunctions under certain circumstances. "A preliminary injunction is available upon a showing that the party seeking it enjoys a reasonable probability of success on the merits and that the defendant's conduct, if allowed to continue, will result in irreparable harm for which compensatory damages is an inadequate remedy." *Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 726 P.2d 335, 337 (1986); *see also Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329, 1330 (1978) (plaintiff failed to meet its burdens and thus denial of preliminary injunction relief was not abuse of discretion).

Where a claim for money damages is a sufficient remedy, there is no need to grant a restraining order. *Ramada Inns*, 94 Nev. at 780, 587 P.2d at 1330 (1978) (affirming trial court's denial of motion for preliminary injunction because "money damages [were] an adequate remedy for the vindication of appellant's right."). The availability of adequate money damages do not support Plaintiff's claim of irreparable harm nor justify injunctive relief:

> [T]he temporary loss of income, ultimately recovered, does not usually constitute irreparable injury ... The key word in this consideration is irreparable. Mere injuries, however substantial in terms of money, time and energy expended ... are not enough.

Los Angeles Memorial Coliseum Comm v. N.F.L., 634 F.2d 1197, 1201 (9th Cir. 1980) (emphasis added).

The Nevada Supreme Court has held that "in considering preliminary injunctions, courts also weigh ... the public interest." *Univ. & Cmty. Coll. Sys. of Nevada v. Nevadans for Sound Gov't,*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004); *see also Salazar v. Buono*, 559 U.S. 700, 714, (2010) ("[A] court should be particularly cautious when contemplating relief that implicates public interests."). In considering preliminary injunctions, courts weigh the potential hardships to the relative parties and others, and the public interest. See *Nevadans for Sound Gov't*, 120 Nev. at 721, 100 P.3d at 187. Post-employment anti-competitive covenants must be scrutinized particularly closely, "because a loss of a person's livelihood is a very serious matter." *See Traffic Control Servs., Inc. v. United Rentals Nw.*, Inc., 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004).

IV.
ARGUMENT

USAP is unlikely to prevail on the merits, it faces no irreparable harm, and the balance of hardships is in favor of Dr. Tang. Therefore, no grounds exist for granting a preliminary injunction, and USAP's Motion should be denied.

A. USAP does not Enjoy a Reasonable Likelihood of Success on the Merits

USAP is unlikely to prevail. The scope of the non-compete is overbroad and not reasonably related to protecting a legitimate business interest of USAP; it is therefore wholly unenforceable. Even if the non-compete were not wholly unenforceable, Dr. Tang is not competing with USAP and has never directly solicited the business of any physician or physician group since his departure; rather, he simply accepts overflow cases assigned to him by Red Rock. Dr. Tang has therefore not violated the Agreement.

1. The Non-Compete at Issue Here is Facially Unreasonable and Invalid

USAP's position in its Motion appears to be that Dr. Tang has violated the non-competition clause merely by accepting assignments from Red Rock which involve procedures conducted at hospitals at which USAP also takes cases, even in the absence of any solicitation of USAP clients. (*See* Pl.'s Mot. at 5:20–6:6.) This interpretation, if accepted, is overbroad, and it renders the entire non-competition clause unenforceable.

a. The Non-Compete is Wholly Invalid if Any Portion is Invalid

In July 2016, the Nevada Supreme Court held that when a non-compete agreement extends beyond what is necessary to protect the employer's interest, the agreement is wholly unenforceable and courts may not modify or "blue pencil" the contract to make it reasonable. *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016). Therefore, if any terms of a non-compete agreement are found to be unreasonable, the entire agreement is unenforceable and the court will not edit or narrow the non-compete agreement in any manner. *Id.* The Court explained that its prohibition of modifying unreasonable terms avoids "the possibility of trampling the parties' contractual intent" and creating an agreement not actually contemplated by the parties. *Id.* The Court further explained that because an employer-drafted contract containing unenforceable provisions would likely be signed by an employee, if the Court chose to modify the agreement to make it enforceable, it would encourage "employers with superior bargaining power 'to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full.'" *Id.* Accordingly, the Court held that unreasonable non-compete agreements are wholly unenforceable. *Id.*

b. Covenants Not to Compete are Strictly Construed

An agreement by an employee not to compete is generally considered a restraint of trade and unenforceable, unless reasonable in scope and breadth. *Hotel Riviera, Inc. v. Torres*, 97 Nev. 399, 404, 632 P.2d 1155, 1158-59 (1981). A restraint of trade is unreasonable if it is greater than is required for the protection of the person for whose benefit the restraint is imposed or imposes undue hardship upon the person restricted. *Ellis v. McDaniel*, 95 Nev. 455, 458, 596 P.2d 222, 224 (1979). Nevada courts therefore "strictly construe the language of covenants not to compete; and in the case of an ambiguity, that language is construed against the drafter." *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 489, 117 P.3d 219, 225 (2005).

Post-employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business. *Hotel Riviera*, 97 Nev. at 404, 632 P.2d at 1158–59. Thus, noncompetition clauses are strictly limited to the protection of a legitimate business interest of the employer. *Duneland Emergency Physician Med. Corp. v. Brunk*, 723 N.E.

2d 963 (Ind. Ct. App. 2000). In order for a plaintiff to enjoy a probability of success on the merits of its case to enforce a non-compete clause, the Court must consider whether the provisions of the non-compete would likely be found reasonable at trial. *Hansen v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967).

For example, in evaluating the reasonableness of the non-compete provision at issue in *Golden Road*, the Court looked to its prior decisions in *Jones v. Deeter*, 913 P.2d 1272 (Nev. 1996), wherein it held that a five-year time restriction was unreasonable, and *Camco, Inc. v. Baker*, 113 Nev. 512 (1997), which concluded that a geographic restriction of 50 miles from any area which was the "target of a corporate plan for expansion" was unreasonable. *Id.* The Court reasoned that if such restrictions were unreasonable in those cases, then prohibiting an employee "from employment, affiliation, or service with any gaming business" was also unreasonable. *Id.* Additionally, the Court found that prohibiting an employee from working in any capacity, even as a custodian, did not further any protectable any legitimate business interests on the part of the employer. *Id.* Accordingly, the Court determined that the provision was overbroad and unreasonable. *Id.*

c. The Non-Compete at Issue Here is Overbroad and Therefore Invalid

The plain language of the non-compete at issue here purports to prevent Dr. Tang from "provid[ing] Anesthesiology and Pain Management Services at any of the Facilities at which [he] has provided any Anesthesiology and Pain Management Services . . . within the twenty-four month period prior to the date of . . . termination" of the Agreement. (Ex. C at p. 5.) On its face, this provision appears to prevent Dr. Tang from accepting cases at any facility at which he had even taken a case during his time at USAP, even if USAP were to later cease providing anesthesiology services at those facilities. In its Motion, USAP appears to attribute an even broader construction to this language, arguing that it extends to any "facilities that [USAP] by and through its employees provide[s] anesthesia services." (Pl.'s Mot. at 5:22–6:1.) In short, USAP takes the position that the non-compete at issue prevents Dr. Tang from working at any facility at which USAP either previously provided services (even if they do no longer), or currently provides services (even if they had not when they had employed Dr. Tang).

However, USAP's focus on *hospitals* (or "facilities") misses the point because, generally speaking, hospitals do not hire anesthesiologists—*physicians* do. A physician conducting a surgical procedure at a hospital at which she has privileges may, in the overwhelming majority of cases, hire any anesthesiologist she chooses. (*See* Ex. A at ⁋ 28.) The only relevant relationship between the anesthesiologist and the hospital is whether the anesthesiologist carries privileges at that facility. Nevertheless, the plain language of the non-compete at issue purports to lock an anesthesiologist out of an entire hospital the moment that he takes a single case for a single provider at that hospital. This is not a reasonable means for USAP to protect its business, and the Court should hold it to be unenforceable. *Golden Rd.*, 376 P.3d at 156.

2. Dr. Tang is Not Competing With USAP

Although the overbreadth of the language addressed in the previous section invalidates the entire non-compete under *Golden Rd.*, it is worth noting that Dr. Tang is complying with the portions of the non-compete which appear to be reasonably related to a business purpose. The non-compete purports to preclude a physician from

> call[ing] on, solicit[ing] or attempt[ing] to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof[.]"

(Ex. C at p. 5). Unlike the language addressed in the previous section, this portion of the non-compete does appear to have some reasonable relation to a legitimate business purpose, at least to the extent that it applies to physicians or physician groups rather than entire hospitals. Its plain language precludes Dr. Tang from soliciting business from surgeons who hire USAP to provide anesthesiology services, which would amount to competing with USAP.

However, this language describes precisely what Dr. Tang is *not* doing. As set forth at length in his Declaration, Dr. Tang has never solicited any business from any physician or physician group doing business with USAP since his departure. (*See* Ex. A at ⁋⁋ 19–25.) In fact, Dr. Tang has never directly solicited *any* physician or physician group since his departure from USAP, whether they work with USAP or not. (*Id.* at ⁋ 19.) Instead, Dr. Tang merely accepts

overflow work from Red Rock, and he goes wherever he is assigned. (*Id.* at ⁋ 24.) This is not competing with USAP—by definition, any physician to whom Dr. Tang is assigned under these circumstances is not working with USAP; they are working with Red Rock, and for reasons completely unrelated Dr. Tang's affiliation with that practice.

In short, the overbreadth of the non-compete makes it wholly unenforceable under *Golden Rd.*, and Dr. Tang is not competing with USAP in any event. USAP therefore does not enjoy a substantial likelihood of success on the merits, and their Motion should be denied.

B. **USAP Does Not Face Irreparable Harm**

In its Motion, USAP fails to cite any evidence of irreparable harm to justify a preliminary injunction except for various bare invocations of the words "irreparable harm." Conclusory allegations, with no evidentiary support, are insufficient to demonstrate irreparable harm. *Oakland Tribune Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (holding conclusory affidavits of an "interested party"—plaintiff's principal shareholder—as to "loss of reputation competitiveness and goodwill" deemed insufficient to establish irreparable harm); *Am. Passage Media Corp. v. Cass Communications, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (holding conclusory affidavits from plaintiffs executives delineating "disruptive effect" on plaintiff's business are insufficient); *accord Paramount Ins., Inc. v. Rayson & Smitley*, 86 Nev. 644, 650, 472 P.2d 530, 534 (1970) (recognizing that conclusory allegations in an affidavit were insufficient to warrant extraordinary relief of a writ of attachment).

In the section of USAP's Motion dedicated to irreparable harm, USAP merely states that "[a]n injunction should issue when an employee violates the employee's agreed upon NCA, particularly when the employee joins a business or engages in business in direct competition with the former employer." (Mot. at p. 11:10–12.) Assuming *arguendo* that this conclusory statement has any merit, it is a point irrelevant to this case, as Dr. Tang is not competing with USAP.[4] The case that USAP cites in support of this proposition, *Las Vegas Novelty, Inc. v. Fernandez*, involved two former employees of a wholesaler soliciting and selling to their former employer's

[4] *See supra* at 11:10–12:7.

existing customers, which is a fact pattern inapposite to this case, in which no soliciting to USAP's clientele is occurring. 106 Nev. 113, 787 P.2d 772 (1990).

In any event, USAP cannot articulate irreparable harm because it does not face any irreparable harm. It is difficult to imagine how USAP would be "irreparably harmed" if it fails in its effort to enjoin Dr. Tang from accepting cases for *any* provider (including the ones who have never worked with USAP) performing surgeries at *any* hospital in which Dr. Tang had ever taken a case during his time at USAP. It is indeed hard to imagine how USAP would be harmed at all under these circumstances, but to whatever extent harm may occur, monetary damages are a sufficient remedy. *See, e.g., Wisc. Gas Co. v. Federal Energy Reg. Comm'n.*, 244 U.S. App. D.C. 349 (D.C. Cir. 1985) ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm.").

C. **The Balance of Hardships Favors Dr. Tang**

Although USAP does not face any significant harm if its Motion is denied, Dr. Tang faces potentially disastrous harm if it is granted. "In considering preliminary injunctions, courts also weigh the potential hardships to the relative parties and others, and the public interest." *Univ. and Comm. College Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 100 P.3d 179, 187 (2004). The public interest in free competition must necessarily be considered by courts in determining whether to grant injunctive relief. *See, e.g., Cincinnati Bengals, Inc. v. Bergey*, 453 F. Supp. 129, 147 (S.D. Ohio 1974) (the public interest should "encourage to the fullest extent practicable free and open competition in the marketplace"). In Nevada, the public interest in free and open competition is embodied by NRS 598A.030.2(b), which states that "[i]t is the policy of this state . . . to preserve and protect the free, open and competitive nature of our market system". And, "[w]here . . . the effect of [an] injunction would be disastrous to an established and legitimate business though its destruction or interruption in whole or in part, strong and convincing proof of the right on the part of the complainant, and of the urgency of his case, is necessary to justify an exercise of the injunctive power." *Rhodes Mining Co. v. Belleville Placer Mining Co.*, 32 Nev. 230, 106 P. 561, 562 (1910).

Granting USAP's Motion would, as a practical matter, prevent Dr. Tang from taking any anesthesiology cases for any provider at nearly every hospital in Las Vegas. This is, to say the least, a substantial hardship. On the other hand, USAP does not face any significant hardship if Dr. Tang is permitted to continue accepting overflow cases from Red Rock while not soliciting any of USAP's clients. The balance of hardships therefore favors Dr. Tang, and USAP's motion should be denied.

D. To the Extent any Injunction Issues, the Court Must Require Plaintiff to Post a Substantial Bond

The underlying purpose of requiring a bond where an injunction is issued is "(1) to discourage parties from requesting injunctions based on tenuous legal grounds; and (2) to assure judges that defendants will be compensated for their damages if it later emerges that the defendant was wrongfully enjoined." *Sionix Corp. v. Moorehead*, 299 F. Supp. 2d 1082, 1086 (S.D. Cal. 2003), *accord Tracy v. Capozzi*, 98 Nev. 120, 642 P.2d 591 (1982). Thus, in order to protect a party subject to an injunction, the bond amount must be sufficient to compensate it for all damages incurred as a result of the wrongful injunction. *See id.*

Here, Dr. Tang's income from his anesthesiology practice amounts to approximately $44,000 per month. (Ex. A at ¶ 3.) Dr. Tang's lost income from an improperly granted injunction would therefore be substantial. The merits of USAP's case are, at best, highly questionable, and the balance of hardships strongly favors Dr. Tang. Thus, if a preliminary injunction is granted, a bond of $1 million is appropriate.

E. A Preliminary Injunction Should Not Issue Without a Full Evidentiary Hearing

Finally, even if the Court were to decline to deny USAP's motion outright, it should not grant a preliminary injunction without first conducting a full evidentiary hearing following a brief period of discovery.

Facts related to the structure of the transaction between USAP and its predecessor-in-interest, Premier Anesthesiology Consultants, are unknown at this point and are potentially dispositive of the case. For example, if the transaction between USAP and PAC was an asset purchase or sale, the non-competition clause would be nullified because covenants not to compete

are generally not assignable. *See Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004) ("We . . . hold that, absent an agreement negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration, employee noncompetition covenants are not assignable."); *cf. Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. Adv. Op. 38, 351 P.3d 720 (2015) (clarifying that the rule in Traffic Control does not apply to a sale of 100% membership interest in an entity where the equity sale does not create a new entity). Although the Isaacs Declaration generally alleges that "USAP merged/acquired/joined [PAC/ACI],"[5] the details of that transaction are crucial and must be resolved through discovery prior to any grant of an injunction. Indeed, it is not obvious from the face of the record currently before the Court whether USAP is even the proper Plaintiff in this action.

Moreover, the nature of the contractual relationships between USAP and the various hospitals it cites in its Motion are at best unclear and at worst misleading; for example, the Isaacs Declaration supporting the Motion implies that Henderson Hospital exclusively works with USAP to provide anesthesia services[6] when such is not the case.[7] USAP repeatedly references its alleged contractual relationships with various hospitals as a basis for its argument that it faces irreparable harm in this case. The details are potentially important here, as well, and an injunction should not issue until these facts are developed through discovery.

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[5] *See* Isaacs Declaration at ⁋ 6.

[6] *See* Isaacs Declaration at ⁋ 11.

[7] See Ex. D.

IV.
CONCLUSION

For these reasons, USAP's Motion lacks merit and should be denied.

DATED this 9th day of November, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Ryan O'Malley
By: _____
Martin A. Little (#7067)
Ryan T. O'Malley (#12461)
3800 Howard Hughes Parkway, #1000
Las Vegas, Nevada 89169
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, 10th Floor, Las Vegas, Nevada, 89169.

On this day I served the preceding **OPPOSITION TO PLAINTIFF'S REQUEST FOR HEARING ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION BE SET ON ORDER SHORTENING TIME** in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

John H. Cotton (#5268)
Adam Schneider (#10216)
JOHN H. COTTON & ASSOCIATES
7900 W. Sahara Avenue, Suite 200
Las Vegas, NV 89117
Telephone: (702) 832-5909
Facsimile: (702) 832-5910
Attorneys for Plaintiff

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on **November 9, 2018**, at Las Vegas, Nevada.

/s/ Karen Gomez

An Employee of Howard & Howard Attorneys PLLC

4829-4963-4426, v. 1

EXHIBIT A

DECLARATION OF DEVIN TANG, M.D.

I, Devin Tang, M.D., declare as follows:

1. I a physician licensed and board-certified anesthesiologist licensed to practice in Nevada, and I am a Defendant in this lawsuit.

2. I graduated from Boston University School of Medicine in 2007. I completed my internship in internal medicine at Caritas Carney Hospital in 2008, and my anesthesiology residency at University of Pennsylvania in 2011.

3. My income from my anesthesiology practice is approximately $44,000 per month.

My Tenure with USAP and its Predecessor

4. In or around August of 2016, I moved to Las Vegas and accepted a position with Premier Anesthesiology Consultants, Inc. ("PAC"). I accepted a position with PAC because I perceived it to be one of the few groups that treated its employees fairly everyone offered an equal partnership or road to become a partner.

5. In or around December of 2016, PAC/ACI was acquired by U.S. Anesthesiology Partners ("USAP"). In connection with this acquisition, USAP required me to execute a Physician-Track Employment Agreement (the "Agreement"), attached to this Opposition as Exhibit C.

6. In the time following the USAP acquisition, the conditions of my employment deteriorated. Morale among the anesthesiologists working with the practice declined, and surgeons who had previously worked with PAC began to look elsewhere.

My Departure from USAP

7. I became uncomfortable with the prospect of continuing to work with USAP. Thus, in or around March of 2018, I provided 90 days' notice of my intent to terminate my employment with USAP, as provided in Paragraph 6.2.9 of the Agreement.

8. In April of 2018, and after providing my 90 days' notice, I created Sun Anesthesia Solutions ("Sun Anesthesia), which was to serve as my professional corporation following my departure.

9. In the time between my providing notice of my intent to terminate the Agreement

and the termination date, I had two exit interviews with W. Brad Isaacs, M.D., who is the Chairman of the Clinical Governance Board of USAP Nevada.

10. At no point during my departure did I attempt to conceal my intention to continue working as an anesthesiologist in Las Vegas following my departure from USAP.

11. During my first exit interview, I expressed a desire to continue working as an anesthesiologist in Las Vegas following my separation from USAP. Dr. Isaacs expressed his opinion that "corporate" was unlikely to grant a waiver of the non-compete provision of the Agreement, and he encouraged to take a week to reconsider my decision to leave.

12. Approximately one week later, I had a second exit interview with Dr. Isaacs and reaffirmed my intention to leave USAP and to continue working as an anesthesiologist in Las Vegas following my departure. During that meeting, Dr. Isaacs generally advised me not to continue working as an anesthesiologist, as he apparently believed that the practice area was no longer viable or desirable to work in. However, he did not specifically mention the non-competition clause of the Agreement or caution me against accepting work for other providers.

My Practice Following My Departure

13. In or around June of 2018, my notice period ended, and I became an independent contractor.

14. Since my departure, I have made affirmative efforts not to compete with USAP.

15. For example, my understanding was that University Medical Center ("UMC") did not and does not have any contractual relationship with USAP. Thus, following my departure from USAP, I accepted overflow cases from UMC through my professional corporation, Sun Anesthesia.

16. During the same period, I also accepted overflow cases from Red Rock Anesthesia Consultants.

17. Approximately one-and-a-half months after my departure from USAP, Red Rock Anesthesia Consultants informed me that they accept a steady caseload from UMC. I (through Sun Anesthesia) have therefore accepted cases in Las Vegas exclusively through Red Rock Anesthesia Consultants since that time.

18. When I am not assigned to do cases at UMC, I work with the following providers:

a. Las Vegas Surgical Associates, which include Dr.'s Peter Caravella, Anne O'Neill, Yogesh Patel, Damon Schroer, Charles Kim, Arthur Fusco, and David Chiapaikeo. From my understanding, this surgical group was dissatisfied with USAP after the acquisition and chose to cease doing business with them prior to my departure. A declaration from Dr. Caravella is attached to this Opposition.

b. Tarek Ammar, M.D., a gastroenterologist. From my understanding, USAP had made some scheduling errors with Dr. Ammar, which led to him moving his anesthesiology coverage to Red Rock Anesthesia Consultants. This happened to occur just after my departure from USAP; however, I did not solicit Dr. Ammar, nor did I in any way encourage him to divert any portion of his anesthesiology coverage from USAP.

c. Other surgeons that Red Rock Anesthesia assigns to me include John Kastrup, M.D. (orthopedic surgeon); Robert Wiencek, M.D. (cardiothoracic surgeon); and Ashraf Osman, M.D. (cardiothoracic surgeon). I am unaware of whether these physicians had any relationship with USAP.

I Have Never Solicited Work from USAP Clients

19. Aside from my contacts with UMC and Red Rock Anesthesia Consultants, I have never directly solicited work from <u>any</u> physician, physician group, or other healthcare provider.

20. Specifically, and to be clear, I have never solicited any work from any physician, physician group, or healthcare provider with whom I have ever had a relationship as a result of my time at USAP.

21. I have never encouraged any physician, physician group, or healthcare provider to terminate a relationship with USAP or to divert any portion of their anesthesiology coverage from USAP.

22. To my knowledge, no physician, physician group, or healthcare provider has ever terminated a relationship with USAP or diverted any portion of their anesthesiology coverage

from USAP because of my departure or my affiliation with any other provider.

23. To whatever extent that I have ever worked with a physician that had previously worked with USAP, I did so because that physician had independently requested anesthesia services from UMC or Red Rock Anesthesia Consultants, and I was subsequently assigned to the case by one of those two providers.

24. In short, in the time since my departure from USAP, I (through Sun Anesthesiology) have merely accepted assignments from UMC and Red Rock Anesthesia Consultants, and have otherwise taken no steps whatsoever to solicit business from anyone.

My Understanding of USAP's Relationships with Las Vegas Hospitals

25. In the Declaration of W. Bradford Isaacs, M.D., I noticed that Dr. Isaacs indicated that USAP has an "Anesthesiology Services agreement to provide professional anesthesiology services *solely for Henderson Hospital*." To me, this suggests that USAP has an agreement with Henderson Hospital to be its exclusive provider of anesthesiology services.

26. Although USAP may have had an exclusive agreement with Henderson Hospital at one point, this has not been the case for over six months. On April 19, 2018, Sam Kaufman (the CEO of Henderson Hospital) circulated an announcement stating that, "effective on May 1, 2018, Henderson Hospital will ***no longer*** have a closed anesthesia model for most areas of the facility. . . . Commencing May 1st, the Hospital's Department of Anesthesia will be ***open*** to all anesthesiologists wishing to apply for privileges, except for OB Anesthesia." (Emphasis in original.) This correspondence is attached to my Opposition to Plaintiff's Motion for Preliminary Injunction as Exhibit E.

27. I do not, and have never, provided OB anesthesiology services in Las Vegas following my departure from USAP.

28. I do not know the specifics of USAP's contractual relationship with any other hospitals. However, as a practicing anesthesiologist, I know that, generally speaking, surgeons with privileges at any given hospital are permitted to work with any anesthesiologist that they choose.

29. I am not aware of USAP having any exclusivity agreement with any hospital that has precluded me from providing any services since my departure from USAP.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct, except to the extent that any statements are made on information and belief, in which case I believe those statements to be true.

Executed on: 11/9/18

(Date)

Devin Tang, M.D.

4836-2262-5914, v. 1
4836-2262-5914, v. 1

EXHIBIT B

DECLARATION OF PETER CARAVELLA, M.D., FACS

I, Peter Caravella, M.D., FACS, declare as follows:

1. I a physician licensed and board-certified cardiac & thoracic surgeon licensed to practice in Nevada.

2. I am a partner with Las Vegas Surgical Associates ("LVSA").

3. Prior to February of 2018, LVSA had been working with Premier Anesthesia Consultants, Inc. ("PAC") to obtain anesthesiologist coverage for surgical procedures performed by its member physicians. I am informed that PAC was a subsidiary of Anesthesia Consultants, Inc. ("ACI").

4. PAC consisted of approximately twelve to fifteen anesthesiologists, all of whom we were comfortable working with. These anesthesiologists included Devin Tang, M.D.

5. My understanding is that, in or around December of 2017, PAC/ACI were acquired by U.S. Anesthesia Partners, Inc. ("USAP").

6. According to its website, USAP works with approximately 115 anesthesiologists in the State of Nevada alone.[1]

7. LVSA attempted to work with USAP for a time after its acquisition of PAC. However, USAP began sending anesthesiologists to cover cases who we were not familiar with and not comfortable working with.

8. LVSA ceased its relationship with USAP in or around February of 2018, due to our dissatisfaction with USAP's services and providers.

9. At approximately the same time, LVSA began working with Red Rock Anesthesia Consultants to provide coverage for cases.

10. We chose to work with Red Rock Anesthesia Consultants because we were familiar and comfortable with many of the anesthesiologists working with that group.

[1] *See* Leadership & Team, https://www.usap.com/locations/usap-nevada/leadership-team (last visited November 8, 2018).

11. To my knowledge, Red Rock Anesthesia Consultants works with approximately eight to ten anesthesiologists, any one of whom may be sent to provide anesthesiology coverage for a case that we refer to them.

12. I am informed and believe that, at the time we chose to work with Red Rock Anesthesia Consultants, Dr. Tang was not yet working with that group; we began our relationship with Red Rock in February of 2018, and Dr. Tang began working with them in or around June of 2018.

13. Although we are comfortable working with Dr. Tang, we do not work with him exclusively, nor did we switch to Red Rock Anesthesia Consultants because Dr. Tang works with their group.

14. Dr. Tang has never solicited my business.

15. To my knowledge, Dr. Tang has never solicited the business of any of my partners.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct, except to the extent that any statements are made on information and belief, in which case I believe those statements to be true.

Executed on: 11/9/18
(Date)

Peter Caravella, M.D., FACS

4841-9055-9098, v. 1

EXHIBIT C

Execution Version

PARTNER-TRACK PHYSICIAN EMPLOYMENT AGREEMENT
BY AND BETWEEN
FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (D/B/A
ANESTHESIOLOGY CONSULTANTS, INC.),
AND
DEVIN CHERN TANG, M.D.

This PARTNER-TRACK PHYSICIAN EMPLOYMENT AGREEMENT (this "Agreement") is entered into this 2nd day of December, 2016, and is effective as of the "Effective Date" as defined in Section 11.13 below, by and between FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (d/b/a Anesthesiology Consultants, Inc.), a Nevada professional corporation (the "Practice"), and Devin Chern Tang, M.D. ("Physician").

W I T N E S S E T H:

WHEREAS, Physician is a licensed physician authorized to practice medicine in the State of Nevada;

WHEREAS, the Practice is a Nevada professional corporation authorized to practice medicine in the State of Nevada;

WHEREAS, Practice contracts with licensed physicians, CRNAs, AAs and other authorized health care providers who provide professional anesthesia services (including any specialty thereof), pain management, anesthesia related consulting, management and administrative services (collectively, "Anesthesiology and Pain Management Services") to patients at several facilities, including inpatient and outpatient facilities. All facilities with which the Practice has a contract to supply licensed physicians, CRNAs, AAs and other authorized health care providers who provide Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, facilities at which any such providers have provided Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, and facilities with which the Practice has had active negotiations to supply any such providers who provide Anesthesiology and Pain Management Services during the Term or during the preceding twelve (12) months shall be collectively referred to as the "Facilities";

WHEREAS, the Practice desires to engage Physician to provide professional Anesthesiology and Pain Management Services at the Facilities and at such other locations as may be appropriate, and Physician desires to be engaged by the Practice to provide professional services at the Facilities and at such other locations as may be appropriate, upon the terms and conditions hereinafter set forth;

WHEREAS, the Practice is subject to that certain Plan Regarding Compensation for Services (ACI), effective as of December 2, 2016 (the "Plan Regarding Compensation for Services"), pursuant to which a Nevada Clinical Governance Board (the "Clinical Governance Board"), a group of licensed physicians employed by the Practice, will manage and oversee certain clinical operations of the Practice including, but not limited to, making certain

determinations and decisions regarding the renewal, modification and termination of this Agreement;

WHEREAS, the Clinical Governance Board is an express third party beneficiary of this Agreement and shall have the right to enforce its rights hereunder in accordance with the applicable laws of the State of Nevada as if it was a party hereto; and

WHEREAS, the Practice and Physician desire that Physician's professional responsibilities under this Agreement shall include the practice of medicine at the Facilities in a manner that is consistent with the manner in which Physician has practiced medicine prior to the date of this Agreement.

NOW, THEREFORE, for and in consideration of the premises and agreements contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby forever acknowledged and confessed and incorporating the recitals set forth above, the parties agree as follows:

1. Engagement.

The Practice hereby employs Physician and Physician hereby accepts such employment on an exclusive basis (unless otherwise approved by the Clinical Governance Board and the Practice), to provide the professional services specified in Section 2.1 hereof at the Facilities during the Term (as defined in Section 6.1 hereof). Although Physician is an employee of the Practice under the terms of this Agreement, Physician shall retain independent discretion and shall exercise professional judgment consistent with generally accepted medical practices, the ethical standards of the Nevada State Medical Association and the American Medical Association, and the professional standards established by the Clinical Governance Board for physician employees of the Practice in the provision of services involving the evaluation and treatment of the patients ("Patients") at the Facilities.

2. Covenants of Physician.

2.1 Availability of Professional Services. Physician shall provide Anesthesiology and Pain Management Services to Patients at the Facilities as required and as scheduled by the Practice and shall devote his or her professional time, attention, and energy to the active practice of medicine for the Practice. All of Physician's professional Anesthesiology and Pain Management Services shall be provided solely and exclusively as an employee of the Practice unless Physician receives prior written consent of the Clinical Governance Board and the Practice. Physician acknowledges and agrees that he/she may be required to meet the minimum requirements of a Partner-Track Physician as determined by the Clinical Governance Board and the Practice from time to time. Physician's duties shall include (i) examination, evaluation, and treatment of Patients, (ii) participation in on-call rotation for afterhours coverage as developed by the Practice, if applicable, (iii) participation in indigent and charity care programs designated by the Practice, if applicable; (iv) compliance with the administrative policies and procedures and the referral policies, in each case developed by or on behalf of the Practice; and (v) performance of such other duties as may reasonably be requested by the Practice from time to time.

Physician must provide medical services on a nondiscriminatory basis and may not refuse to provide medical services to any Patient designated by the Practice, even if such Patient is a participant in, or a part of, indigent or charity care programs, or any managed care plans for which the Practice is contracting to provide Physician's services, or is a Medicaid patient.

2.2 Medical Records/Reports. Physician shall, in accordance with policies developed by or on behalf of the Practice, timely prepare all medical records in respect of Patients treated by Physician. All medical records created or generated by Physician, or anyone acting at the direction or under the supervision of Physician, concerning Patients treated by Physician or any other physician engaged by the Practice during the Term shall be and remain the property of the Practice or Facilities, as appropriate, and shall be maintained at the Facilities; provided, however, that Physician shall have such right of access to such medical records as shall be provided by law. In addition, Physician shall timely prepare and deliver such other records and reports (electronic or otherwise) relating to the operations of Practice as Practice may reasonably request. Physician's use of an electronic medical or health recordkeeping system, including the issuance of unique credentials to access the system and the inputting of data and information in such a system shall not create in Physician any property right to the medical records created and stored in the system. Physician shall abide by all state and federal laws regarding the confidentiality of patient health information, including, without limitation, the Health Insurance Portability and Accountability Act of 1996, and all rules and regulations promulgated thereunder, including the Privacy Standards (45 C.F.R. Parts 160 and 164), the Electronic Transaction Standards (45 C.F.R. Parts 160 and 162) and the Security Standards (45 C.F.R. Parts 160, 162 and 164), and the Health Information Technology for Economic and Clinical Health Act of 2009 enacted as part of the American Recovery and Reinvestment Act of 2009 (collectively, "HIPAA").

2.3 Compliance. Physician understands and acknowledges that the Practice may submit or cause to be submitted claims to patients or third party payors for services based upon encounter information, coding certification of necessity and record documentation prepared and/or approved by Physician. Physician further acknowledges that Physician's compensation provided pursuant to this Agreement is based in large part on the billings and receipts for those services. Physician warrants and covenants that all encounter and coding information and all record documentation prepared or approved by Physician shall be true and correct and accurately represent each patient's condition, the services provided, and other facts and circumstances surrounding Physician's services provided pursuant to this Agreement. Physician understands that false or inaccurate statements in connection with billings, records or other patient encounter documentation are unacceptable to the Practice, and that Physician's failure to comply with the covenants and warranties in this Section 2.3 would constitute a material breach of the Agreement. Physician also understands that Physician's failure to comply with federal and state laws and regulations relating to Physician's practice and actions as an employee of the Practice could result in fines, penalties or other financial liabilities being imposed on the Practice. Physician agrees that, upon written demand from the Practice, Physician shall indemnify and hold harmless the Practice, its directors, officers shareholders and agents ("Indemnified Employer Parties") from all obligation, liability, claims, demands or losses, including attorney fees and costs ("Losses") asserted against the Practice, including settlements thereof, based on (1) Physician's inaccurate, non-compliant, false or unlawful coding, charging or billing, (2) lack of necessity for services provided by Physician, (3) lack of legible supporting documentation or

charts supporting Physician's coding and billing for services, or (4) any other claim based on Physician's conduct. Physician further agrees to indemnify and save harmless the Indemnified Employer Parties for all Losses arising from or related to any violation by Physician of any federal, state or local criminal, civil or common law or applicable rules and regulations. In the event any insurer takes the position that the existence of its indemnification provision in any way reduces or eliminates the insurer's obligation to provide otherwise available insurance coverages, the indemnification program shall be unenforceable to the extent necessary to obtain coverage. Should the Practice eventually receive coverage (payments) from its various insurance policies related to any such Losses where Physician is required to provide indemnification pursuant to this Section 2.3, the Practice hereby agrees to refund any amounts paid by Physician to the extent the insurance payment and payment by Physician are in excess of the loss creating the need for the indemnification and insurance payment.

2.4 Licensure, Compliance with Laws, Standards. As a continuing condition precedent to the obligations of the Practice under this Agreement, Physician covenants that at all times during the Term, Physician shall (i) hold and maintain a valid and unrestricted license to practice medicine in the State of Nevada (including an "Office Based Anesthesia" permit if required by the Clinical Governance Board), including satisfaction of any and all continuing medical education requirements; (ii) successfully apply for and maintain in good standing provisional or active medical staff privileges at the Facility or Facilities to which Physician is assigned by the Practice; (iii) maintain certification by any board or regulatory agency required by any Facility at which Physician practices; and (iv) comply with and otherwise provide professional services in accordance with applicable law, the ethical standards of the American Medical Association and Nevada State Medical Association, the standards and recommendations of the Joint Commission and of any accrediting bodies that may have jurisdiction or authority over Physician's medical practice or the Facilities, the Practice's corporate Bylaws, the Medical Staff Bylaws, the rules and regulations and the policies and procedures of the Practice and Facilities, as each may be in effect from time to time, and the standard of care in the medical community in which the Practice and the Facilities are located. Physician will notify the Practice immediately, but in any event within forty-eight (48) hours of Physician's knowledge thereof, if any of the foregoing shall become, in any manner, untrue.

2.5 Use of Facilities. Physician shall not use the Facilities for any purpose other than for the provision of professional services to Patients and the performance of administrative services required to be performed by Physician pursuant to this Agreement.

2.6 Supervision of Certain Personnel. Physician shall assist in providing the supervision of physician assistants, nurses, nurse anesthetists, anesthesiology assistants and other non-physician health care personnel providing as designated by the Practice. All such non-physician personnel shall be under Physician's control and direction in the performance of health care services for Patients treated by Physician. In addition and to the extent requested by the Practice, Physician shall assist the Practice in developing appropriate scheduling for such non-physician health care personnel.

2.7 Quality Assurance/Utilization Review. Physician shall participate in, and cooperate with the Practice in connection with, the quality assurance and risk management program developed by the Practice for its physician employees. Physician shall also be subject to

and actively participate in any utilization review program developed by or on behalf of the Practice relating to activities of physicians.

2.8 Business Protection. Physician recognizes that the Practice's decision to enter into this Agreement is induced primarily because of the covenants and assurances made by Physician in this Agreement, that Physician's covenants regarding non-competition and non-solicitation in this Section 2.8 are necessary to ensure the continuation of the business of the Practice and the reputation of the Practice as a provider of readily available and reliable, high quality physicians, as well as to protect the Practice from unfair business competition, including but not limited to, the improper use of Confidential Information.

2.8.1 Non-Competition. In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion), directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination; (ii) call on, solicit or attempt to solicit any Facility serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof; or (iii) provide management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

2.8.2 Non-Solicitation. In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not (i) solicit or otherwise attempt to contact any past or current Patient, or immediate family member of such Patient, for purposes of inducing the Patient to become a patient of Physician or the patient of any medical practice in which Physician practices or otherwise has a financial interest; (ii) solicit or otherwise attempt to contact any physician (including surgeons) for which licensed physicians, CRNAs, AAs and other authorized health care providers employed by the Practice currently provide, or have provided during the twelve month period prior to the termination of Physician's employment, consultative services or anesthesia services, for purposes of inducing such physician to consult with Physician or consult with any medical practice in which Physician practices or otherwise has a financial interest; (iii)

solicit any of the Facilities for the purpose of obtaining any contractual relationship with the Facility for Physician or any medical practice in which Physician practices or otherwise has a financial interest; or (iv) solicit for employment, or employ or engage any individual who is or was employed by the Practice during the twenty-four month period prior to the termination of Physician's employment, including, but not limited to, employees of any entity, the majority of the equity interests of which is owned by the Practice.

2.8.3 Additional Agreements. Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of this Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.

2.8.4 Access to Medical Records. The Practice shall use all reasonable efforts to provide Physician (i) access to the medical records of the Patients whom Physician has seen or treated upon authorization of the Patient in the same form as maintained or available to the Practice; and (ii) any copies of the medical records for a reasonable fee.

2.8.5 Format of Medical Records and Patient Lists. Any access to a list of Patients or to Patients' medical records after termination of this Agreement shall not include such list or records to be provided in a format different than that by which such records are maintained except by mutual consent of the parties to this Agreement.

2.8.6 Continuing Care and Treatment. Physician shall not be prohibited from providing continuing care and treatment to a specific Patient or Patients during the course of an acute illness at any time, including following termination of this Agreement or Physician's employment. Following such termination, Physician understands and agrees that Physician will not be permitted to utilize Facility premises, staff, supplies and/or any other Facility-owned resource, unless failure to do so would compromise an acute patient's health and well-being, in which case the Practice, in its sole discretion, will provide written authorization to Physician on a case-by-case basis so that Physician may treat such Patient at the appropriate Facility, and even then, only to the extent and of such duration, that the acute nature of the Patient's condition requires.

2.9 Confidentiality. As of the date of the execution of this Agreement and during the course of Physician's employment, in order to allow Physician to carry out Physician's duties hereunder, the Practice has provided and will continue to provide to Physician Confidential Information (defined below). Physician agrees to keep confidential and not to use or to disclose to others during the Term of this Agreement and for a period of five (5) years thereafter, except as expressly consented to in writing by the Practice or required by law, any financial, accounting and statistical information, marketing plans, business plans, feasibility studies, fee schedules or books, billing information, patient files, confidential technology, proprietary information, patient lists, policies and procedures, or trade secrets of the Practice or U.S. Anesthesia Partners, Inc. ("USAP"), or other papers, reports, records, memoranda, documents, files, discs, or copies thereof pertaining to patients of physicians employed by the Practice, or the Practice's or

USAP's (or any affiliate's thereof) business, sales, financial condition or products, or any matter or thing ascertained by Physician through Physician's affiliation with the Practice, the use or disclosure of which matter or thing might reasonably be construed to be contrary to the best interests of the Practice or USAP (collectively, the "Confidential Information"). This restriction shall not apply to such information if Physician can establish that such information (i) has become generally available to and known by the public (other than as a result of an unpermitted disclosure directly or indirectly by Physician or Physician's affiliates, advisors, or representatives), (ii) has become available to Physician on a non-confidential basis from a source other than the Practice and its affiliates, advisors, or representatives, provided that such source is not and was not bound by a confidentiality agreement with or other obligation of secrecy of the Practice of which Physician has knowledge, or (iii) has already been or is hereafter independently acquired or developed by Physician without violating any confidentiality agreement with or other obligation of secrecy to the Practice.

Should Physician leave the employment of the Practice, Physician will neither take nor retain, without prior written authorization from the Practice, any Confidential Information. Physician further agrees to destroy any paper or electronic copies of Confidential Information, including information contained on any personal device.

Exceptions.

2.9.1 It shall not be a breach of Physician's covenants under Section 2.9 if a disclosure is made pursuant to a court order, a valid administrative agency subpoena, or a lawful request for information by an administrative agency. Physician shall give the Practice prompt notice of any such court order, subpoena, or request for information.

2.9.2 Physician shall not be prohibited from releasing any Confidential Information to Physician's legal counsel or financial advisors, provided that Physician places such advisors under legal obligation not to disclose the Confidential Information.

2.10 Enforcement. Sections 2.8 and 2.9 shall be construed as an agreement independent of any other provision in this Agreement; no claim or cause of action asserted by Physician against the Practice, whether predicated upon this or other Sections of this Agreement or otherwise shall constitute a defense of the enforcement of Sections 2.8 and 2.9 of this Agreement.

It is understood by and between the parties hereto that the covenants set forth in Sections 2.8 and 2.9 of this Agreement are essential elements of this Agreement, and that, but for the agreement of Physician to comply with such covenants, the Practice would not have agreed to enter into this Agreement. The Practice and Physician agree that the foregoing covenants are appropriate and reasonable when considered in light of the nature and extent of the business conducted by the Practice.

If any provision or subdivision of this Agreement, including, but not limited to, the time or limitations specified in or any other aspect of the restraints imposed under Sections 2.8 and 2.9 is found by a court of competent jurisdiction to be unreasonable or otherwise unenforceable, any such portion shall nevertheless be enforceable to the extent such court shall deem

reasonable, and, in such event, it is the parties' intention, desire and request that the court reform such portion in order to make it enforceable. In the event of such judicial reformation, the parties agree to be bound by Sections 2.8 and 2.9 as reformed in the same manner and to the same extent as if they had agreed to such reformed Sections in the first instance.

Without limiting other possible remedies to the Practice for the breach of the covenants in Sections 2.8 and 2.9, Physician agrees that injunctive or other equitable relief shall be available to enforce the covenants set forth in Sections 2.8 and 2.9, such relief to be without the necessity of posting a bond, cash, or otherwise.

2.11 Discretionary Reviews. The Clinical Governance Board, in its sole discretion, may conduct a review of Physician's ability to safely practice anesthesiology or pain management medicine in general and in Physician's specific practice including evaluation of mental and physical condition, judgment, knowledge, and any other conditions that may impact the safety of a Patient ("Review"). In the event the Review includes an evaluation of Physician's mental or physical condition, such evaluation shall be performed by an independent physician chosen by the Practice and approved by the Clinical Governance Board in its sole discretion. The costs of any evaluations of Physician by an independent physician shall be borne by the Practice except to the extent the Review is required as a result of complaints regarding Physician's behaviors in performance of his/her obligations hereunder in which case the costs of such evaluation(s) shall be borne solely by Physician. Physician and the Practice agree that the Clinical Governance Board shall conduct an annual Review upon Physician reaching the age of sixty-eight (68).

2.11.1 Upon receipt by Physician of a Review requiring that Physician take remedial actions in order to satisfy the Clinical Governance Board, Physician shall promptly take such actions at Physician's sole cost and expense and failure to take such actions to the satisfaction of the Clinical Governance Board shall be a material breach of this Agreement. If Physician fails to participate in the Review to the satisfaction of the Clinical Governance Board or during any period where Physician is required to take remedial actions as a result of a Review, the Clinical Governance Board may place Physician on unpaid administrative leave until such time as Physician participates in the Review or completes remedial actions to the satisfaction of the Clinical Governance Board.

2.11.2 Upon receipt by Physician of an unsatisfactory Review in the Clinical Governance Board's sole discretion, the Practice may, subject to the terms of this Agreement, immediately terminate Physician or take such other actions as the Clinical Governance Board determines to be necessary in order to protect Patient health or safety or to provide quality medicine to patients receiving services of physicians employed by the Practice.

3. Covenants of the Practice.

3.1 Compensation and Fringe Benefits. The Practice shall provide Physician with the compensation and other fringe benefits described in Article 5 hereof subject to the eligibility and other requirements of said plans and programs. Physician agrees that the Practice will not be obligated to institute, maintain, or refrain from changing, amending, or discontinuing any of its

medical, health, dental, insurance, disability or other benefit plans or programs, so long as such actions are similarly applicable to covered employees generally.

3.2 Operational Requirements. The Practice shall provide, or cause to be provided, all space, equipment, and supplies, all non-physician health care personnel and all clerical, administrative, and other personnel reasonably necessary and appropriate, consistent with past practice, for Physician's practice of medicine pursuant to this Agreement.

4. Professional Fees.

Physician acknowledges that, during the Term, Patients will be billed in the name of the Practice or Physician, as determined by the Practice, for all professional services rendered by Physician. Except as otherwise approved by the Clinical Governance Board and the Practice, the Practice shall be entitled to all fees generated by Physician from or incident to professional services rendered by Physician while employed by the Practice hereunder. Subject to applicable laws and in certain cases, the approval of the Clinical Governance Board and the Practice, Physician expressly and irrevocably transfers, assigns, and otherwise conveys to the Practice all right, title, and interest of Physician in and to any of such fees, whether in cash, goods, or other items of value, resulting from or incident to Physician's practice of medicine and all related professional activities during the Term, and does hereby appoint the Practice as Physician's agent and attorney-in-fact for collection of the same or otherwise enforcing Physician's interests therein. To the extent Physician should receive any amounts from Patients thereof, any third party payers, or any other parties in respect thereof, Physician shall forthwith endorse and deliver the same to the Practice.

5. Financial Arrangement.

5.1 Compensation. As compensation for the services to be provided by Physician hereunder, the Practice agrees to pay Physician pursuant to the USAP Nevada Compensation Plan then in effect for Partner-Track Physicians (as defined in Section 8). The USAP Nevada Compensation Plan in effect as of the Effective Date is attached as Exhibit A hereto.

5.2 Other Benefits. Subject to Section 3.1 above, the Practice also agrees to provide Physician the same various fringe and other benefits as other Partner-Track Physicians.

5.3 Vacation and Leave. Physician shall be entitled to annual vacation, meeting and sick leave as offered by the Practice pursuant to its policies and procedures. The Clinical Governance Board shall have the ultimate authority to resolve scheduling, vacation, educational leave or leave of absence conflicts, and to establish the application and processing requirements for any time away from work. All scheduling procedures and practices shall be established by the Clinical Governance Board. All vacation and leave of any kind shall be uncompensated.

6. Term and Termination.

6.1 Term. The initial term of this Agreement shall be for two (2) years commencing on the Effective Date, unless sooner terminated as provided herein (the "Initial Term"). Upon expiration of the Initial Term, this Agreement shall automatically renew for successive additional one (1) year periods unless this Agreement is sooner terminated as provided in Section 6.2

herein. The Initial Term of this Agreement and, in the event this Agreement is extended beyond the Initial Term, all renewals and extensions of this Agreement, are collectively defined as the "Term."

6.2 Termination. This Agreement may be sooner terminated on the first of the following to occur:

6.2.1 Termination by Agreement. In the event the Practice and Physician shall mutually agree in writing, this Agreement may be terminated on the terms and date stipulated therein.

6.2.2 Termination by Promotion to Physician-Partner Status. If Physician remains employed with the Practice on a full time basis without interruption for two (2) consecutive years from Physician's first date of service with the Practice, Physician shall be eligible for consideration for an offer to become a Physician-Partner (as defined in Section 8). Any such offer to become a Physician-Partner is at the sole discretion of the Practice and requires the approval of two-thirds (2/3) of the members of the Clinical Governance Board. An offer to become a Physician-Partner shall be conditioned by the Practice upon (i) the execution by Physician of a Physician-Partner employment agreement and/or other documents that may be reasonably requested by the Practice, (ii) the purchase by Physician of shares of common stock of USAP in accordance with the ACI Equity Incentive Plan (see Schedule 6.2.2 for additional details with respect to such purchase), and (iii) Board Certification. In the event that Physician becomes a Physician-Partner, this Agreement shall automatically terminate.

6.2.3 Termination for Specific Breaches. In the event Physician shall (i) materially fail by omission or commission to comply with the provisions specified in Section 2.1 hereof, or (ii) materially fail to comply with the provisions specified in Section 2.2 hereof, and Physician is unable to cure such material failure within fifteen (15) days after his or her receipt of a written notice from the Practice informing him or her of such material failure, this Agreement may then be terminated in the discretion of the Practice by written notice to Physician.

6.2.4 Termination by Death of Physician. This Agreement shall automatically terminate upon the death of Physician. In the event of termination due to death of Physician, the Practice shall pay to the executor, trustee or administrator of Physician's estate, or if there is no such executor or administrator, then to Physician's heirs as determined by any court having jurisdiction over Physician's estate, the compensation payable to Physician through date of death. Any such compensation shall be paid to Physician's executor or administrator within ninety (90) days after receipt by the Practice of a certified copy of letters testamentary or a letter of administration reflecting the appointment and qualification of such person or persons to be executor or administrator of Physician's estate. In the event there is no executor, trustee or administrator of Physician's estate, then the Practice shall pay all amounts due to Physician's heirs within ninety (90) days after receipt by the Practice of a copy of a court order determining Physician's heirs and the share of Physician's estate to which each is entitled, certified as true and correct by the clerk of the court issuing such order. Upon payment of all compensation due to Physician's executor, trustee, administrator, or heirs, as the case may be, pursuant to this

Section 6.2.4, the Practice shall have no further obligation or liability to Physician or such persons for compensation or other benefits hereunder.

6.2.5 Termination Upon Disability of Physician. Provided that, as determined in the sole discretion of Clinical Governance Board (i) reasonable accommodation is not required, (ii) no reasonable accommodation may be made to enable Physician to safely and effectively perform the normal and complete duties required of Physician in Article 2 of this Agreement, or (iii) legally protected leave is inapplicable or has been exhausted, this Agreement may be immediately terminated by the Practice upon written notice to Physician or Physician's legal representative, as appropriate, upon the occurrence of the disability of Physician. The term "disability of Physician" shall have the same meaning as that type of disability that entitles Physician to payments for permanent disability pursuant to the disability policy covering Physician; provided, that, in the event (A) no disability policy exists covering Physician or (B) the terms of such Policy do not qualify Physician for payments for permanent disability, the term "disability of Physician," as used herein, shall mean that point in time when Physician is unable to resume the normal and complete duties required of Physician in Article 2 of this Agreement at the standards applicable to Physician, as performed prior to such time, within one hundred and eighty (180) days after the disabling event. If the disabling event is not a separate and distinct happening, the 180-day period shall begin at the time Physician is unable to perform the duties required in Article 2 of this Agreement for thirty (30) consecutive work days. Additionally, Physician shall be considered disabled if Physician does not perform his or her duties for one-hundred and eighty (180) days during a 360-day period. If the Clinical Governance Board determines that Physician is not performing his or her duties because of a disability or medical condition, then Physician shall submit to a physical and/or mental examination of two (2) independent physicians selected by the Clinical Governance Board reasonably in good faith to determine the nature and extent of such disability and Physician agrees to be bound by such determination.

Notwithstanding anything to the contrary in this Section 6.2.5, if, after the termination of this Agreement, (i) Physician demonstrates, by submission to a physical and/or mental examination of two (2) independent physicians selected by the Clinical Governance Board reasonably in good faith, that Physician is able to resume the normal and complete duties required of Physician in Article 2 of this Agreement, and (ii) this Agreement would still be in effect but for Physician's termination pursuant to this Section 6.2.5; then Physician shall be reinstated as an employee of the Practice upon the same terms and conditions that were in effect as of the date of termination; provided, however, that Physician's compensation shall be agreed upon by Physician and the Practice.

6.2.6 Immediate Termination by the Practice. Subject to any due process procedures established by the Clinical Governance Board from time to time, this Agreement may be immediately terminated by the Practice, upon the occurrence of any one of the following events: (i) Physician's failure to meet any one of the qualifications set forth in Section 2.3 of this Agreement; (ii) a determination is made by the Clinical Governance Board that there is an immediate and significant threat to the health or safety of any Patient as a result of the services provided by Physician under this Agreement; (iii) the disclosure by Physician of the terms of this Agreement in violation of Section 2.9 above; (iv) any felony indictment naming Physician; (v) any investigation for any alleged violation by Physician of any Medicare or Medicaid statutes, 42

U.S.C. § 1320a 7b (the "Anti-Kickback Statute"), 31 U.S.C. § 3729 (the "False Claims Act"), 42 U.S.C. § 1395nn (the "Stark Law"), or the regulations promulgated pursuant to such statutes or any similar federal, state or local statutes or regulations promulgated pursuant to such statutes; (vi) Physician's ineligibility to be insured against medical malpractice; (vii) Physician's loss or reduction of medical staff privileges for cause at any of the Facilities to which Physician is assigned; (viii) Physician does not satisfactorily pass the Review as described in Section 2.11 of this Agreement; (ix) any dishonest or unethical behavior by Physician that results in damage to or discredit upon the Practice; (x) any conduct or action by Physician that negatively affects the ability of Physician employees of the Practice to deliver Anesthesiology and Pain Management Services to any Facility or on behalf of the Practice; (xi) Physician's failure to comply with clinical practice guidelines as may be established by the Practice or any facilities from time to time, (xii) Physician engages in any activity that is not first approved by the Clinical Governance Board and the Practice which directly competes against the business interests of the Practice and Physician fails to disclose such conflict of interest to the Practice, (xiii) Physician has been convicted of a crime involving violence, drug or alcohol, sexual misconduct or discriminatory practices in the work place, (xiv) Physician while at work or required to be available to work, either has a blood alcohol level greater than .04 or is under the influence of drugs (which shall mean having a measurable quantity of any non-prescribed controlled substances, illegal substances, marijuana in blood or urine while being tested for the same), (xv) Physician while at work or required to be available to work is under the influence of prescribed drugs to the point that his or her skills and judgment are compromised, (xvi) Physician fails to submit to an alcohol and drug test within one hour of the Practice's request at a testing site selected by the Practice (which test shall only be requested if the Practice has reasonable suspicion that Physician is in violation of subsection (xiv) and (xv) hereof); (xvii) Physician continues, after written notice, in patterns of performing non-indicated procedures or in patterns of performing procedures without proper consent in non-emergent situations, or (xviii) Physician's violation of the Clinician Code of Conduct of the Practice (as amended by the Practice from time to time) following exhaustion of any appeal or cure process provided for therein. The current Clinician Code of Conduct of the Practice is attached hereto as Exhibit B.

6.2.7 Default. In the event either party shall give written notice to the other that such other party has substantially defaulted in the performance of any material duty or material obligation imposed upon it by this Agreement, and such default shall not have been cured within fifteen (15) days following the giving of such written notice, the party giving such written notice shall have the right to immediately terminate this Agreement.

6.2.8 Termination Due to Legislative or Administrative Changes. In the event that there shall be a change in federal or state law, the Medicare or Medicaid statutes, regulations, or general instructions (or in the application thereof), the adoption of new legislation or regulations applicable to this Agreement, or the initiation of an enforcement action with respect to legislation, regulations, or instructions applicable to this Agreement, any of which affects the continuing viability or legality of this Agreement or the ability of either party to obtain reimbursement for services provided by one party to the other party or to patients of the other party, then either party may by notice propose an amendment to conform this Agreement to existing laws. If notice of such a change or an amendment is given and if the Practice and Physician are unable within ninety (90) days thereafter to agree upon the amendment, then either

party may terminate this Agreement by ninety (90) days' notice to the other, unless a sooner termination is required by law or circumstances.

6.2.9 Termination Without Cause. Physician may terminate employment pursuant to this Agreement, without cause, by providing ninety (90) days prior written notice to the Practice. The Practice may terminate the employment of Physician pursuant to this Agreement, without cause following the affirmative vote of sixty-seven percent (67%) of the Clinical Governance Board, immediately upon written notice to Physician of intent to terminate. Upon receipt of notice from the Practice of its intention to terminate this Agreement without cause, Physician's right to treat Patients or otherwise provide Anesthesiology and Pain Management Services as an employee of the Practice shall automatically terminate, unless the Clinical Governance Board notifies Physician otherwise. In the event this Agreement is terminated by the Practice pursuant to this Section 6.2.9, the Practice shall pay to Physician (i) all amounts due and payable to Physician for services rendered prior to the date of term and (ii) as severance, an amount equal to one quarter (1/4) of Physician's previous twelve (12) months' income under the USAP Nevada Compensation Plan applicable to Physician during such period measured from the date of termination of this Agreement, less customary and applicable withholdings (the "Severance Payments"). Any Severance Payments under this Section 6.2.9 shall be conditioned upon (A) Physician having provided within thirty (30) days of the termination of employment (or such other time period (up to 55 days after termination) as required by applicable law), an irrevocable waiver and general release of claims in favor of the Practice and its affiliates, their respective predecessors and successors, and all of the respective current or former directors, officers, members of the Clinical Governance Board, employees, shareholders, partners, members, agents or representatives of any of the foregoing (collectively, the "Released Parties"), in a form reasonably satisfactory to the Practice, that has become effective in accordance with its terms (the "Release"), and (B) Physician's continued compliance with the terms of the restrictive covenants in Sections 2.8 and 2.9 of this Agreement applicable to Physician. Subject to Physician's timely delivery of the Release, the Severance Payments payable under this Section 6.2.9 will commence on the first payroll date following the date the Release becomes irrevocable with such first installment to include and satisfy all installments that would have otherwise been made up to such date assuming for such purpose that the installments had commenced on the first payroll date following Physician's termination of employment and shall be completed within ninety (90) days of the date of termination of employment; provided, however, that if the Severance Payments are determined to be deferred compensation subject to Section 409A of the Internal Revenue Code of 1986, as amended, and if the period during which Physician has discretion to execute or revoke the Release straddles two (2) tax years, then the Practice will commence the first installment of the Severance Payments in the second of such tax years.

6.3 Effect of Expiration or Termination. Upon the expiration or earlier termination of this Agreement, neither party shall have any further obligation hereunder except for (a) obligations accruing prior to the date of expiration or termination and (b) obligations, promises, or covenants contained herein which are expressly made to extend beyond the Term. Immediately upon the effective date of termination, Physician shall (i) surrender all keys, identification badges, telephones, pagers, and computers, as well as any and all other property of the Practice in Physician's possession, and (ii) withdraw from the medical staff of every Facility in which Physician holds medical staff privileges. If required by the Practice, Physician shall

deliver to each Facility that is served by the Practice Physician's written consent to be personally bound by this Section 6.3. Physician further agrees that failure to comply with this provision shall constitute a material breach of this Agreement upon which Physician's rights to any further benefits under this Agreement shall terminate immediately and automatically.

6.4 Termination of Privileges. Notwithstanding any current or future Facility or medical staff bylaws, rule, or regulation to the contrary, Physician waives due process, notice, hearing, and review in the event his or her membership or privileges at any Facility are terminated under the circumstances described in Section 6.3(ii); provided, however, that if the termination of such membership or privileges is based on the quality of services rendered or is reportable to the appropriate Nevada Medical Board or the National Practitioner Data Bank, such termination shall be conducted in conformance with any applicable fair hearing rights set forth in the then current medical staff bylaws at the Facility. If required by the Practice, Physician shall deliver to each Facility that is served by the Practice Physician's written consent to be personally bound by this Section. Physician further agrees that failure to comply with this provision shall constitute a material breach of this Agreement upon which Physician's rights to any further benefits under this Agreement shall terminate immediately and automatically.

7. Status of Physician as Employee.

It is expressly acknowledged by the parties hereto that Physician, in the performance of services hereunder, is an employee of the Practice. Accordingly, the Practice shall deduct from the compensation paid to Physician pursuant to Article 5 hereof appropriate amounts for income tax, unemployment insurance, Medicare, social security, or any other withholding required by any law or other requirement of any governmental body.

8. Status of Physician.

It is expressly acknowledged by the parties hereto that Physician is not a "Physician-Partner" (as defined in the Plan Regarding Compensation for Services) but is a "Partner-Track Physician" (as defined in the Plan Regarding Compensation for Services). Physician shall be compensated as a Partner-Track Physician pursuant to the USAP Nevada Compensation Plan.

9. Suspension.

Physician recognizes and agrees that the Clinical Governance Board has the authority to immediately suspend Physician (with or without pay) from his or her duties at any time if a member of the Clinical Governance Board believes that patient safety is endangered. Such immediate suspension can only last 24 hours unless extended by the Clinical Governance Board. Further, the Clinical Governance Board has the authority to suspend Physician from some or all of his or her duties if the Clinical Governance Board reasonably believes that patient safety is at risk or while the Clinical Governance Board investigates any of Physician's actions that could lead to termination or is deemed to be violation of this Agreement as long as the nature of Physician's actions justifies the protection of patients, the Physician, the Practice and other employees of the Practice or a Facility. The Clinical Governance Board may also enact such suspension (with or without pay) after its investigation of Physician's action as a protective or disciplinary measure. Whenever suspension of Physician in involved, the Clinical Governance

Board has the discretion to determine the timing of such suspension and to determine if such suspension will be with or without pay.

10. Professional Liability Insurance.

Physician authorizes the Practice to add Physician as an insured under such professional liability or other insurance coverage as the Practice may elect to carry from time to time. The Practice shall include Physician under such liability or other insurance during the Term of this Agreement. If required by the Practice, Physician will be responsible to provide and pay for "tail insurance coverage" insuring Physician after the termination of this Agreement.

11. Miscellaneous.

11.1 Additional Assurances. The provisions of this Agreement shall be self-operative and shall not require further agreement by the parties except as may be herein specifically provided to the contrary; provided, however, at the request of either party, the other party shall execute such additional instruments and take such additional acts as the requesting party may reasonably deem necessary to effectuate this Agreement.

11.2 Consents, Approvals, and Discretion. Except as herein expressly provided to the contrary, whenever in this Agreement any consent or approval is required to be given by either party or either party must or may exercise discretion, the parties agree that such consent or approval shall not be unreasonably withheld or delayed and such discretion shall be reasonably exercised.

11.3 Legal Fees and Costs. In the event that either party commences an action to enforce or seek a declaration of the parties' rights under any provision of this Agreement, the prevailing party shall be entitled to recover its legal expenses, including, without limitation, reasonable attorneys' fees, costs and necessary disbursements, in addition to any other relief to which such party shall be entitled.

11.4 Choice of Law and Venue. Whereas the Practice's principal place of business in regard to this Agreement is in Clark County, Nevada, this Agreement shall be governed by and construed in accordance with the laws of such state, and such county and state shall be the venue for any litigation, special proceeding or other proceeding as between the parties that may be brought, or arise out of, in connection with or by reason of this Agreement.

11.5 Benefit Assignment. Subject to provisions herein to the contrary, this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors and assigns. Physician may not assign this Agreement or any or all of his or her rights or obligations hereunder without the prior written consent of the Practice. The Practice may assign this Agreement or any or all of its rights or obligations hereunder to a Nevada professional corporation, or to an entity that is an association, partnership, or other legal entity owned or controlled by or under common control with the Practice. Except as set forth in the immediately preceding sentence, the Practice may not assign this Agreement or any or all of its rights or obligations hereunder to any legal entity without the prior written consent of Physician.

11.6 Waiver of Breach. The waiver by either party or the Clinical Governance Board of a breach or violation of any provision of this Agreement shall not operate as, or be construed to constitute, a waiver by such party of any subsequent breach of the same or other provision hereof.

11.7 Notice. Any notice, demand or communication required, permitted or desired to be given hereunder shall be deemed effectively given when personally delivered, when received by overnight courier, or when received by prepaid certified mail, return receipt requested, addressed as follows:

The Practice:	Anesthesiology Consultants, Inc. P.O. Box 401805 Las Vegas, NV 89140-1805 Attention: President
Physician:	Devin Chern Tang, M.D. 11425 S. Bermuda Rd., Unit 2013 Henderson, NV 89002

or to such other address, and to the attention of such other person or officer as either party may designate, with copies thereof to the respective counsel thereof, all at the address which a party may designate by like written notice.

11.8 Severability. In the event any provision of this Agreement is held to be invalid, illegal, or unenforceable for any reason and in any respect such invalidity, illegality or unenforceability thereof shall not affect the remainder of this Agreement which shall be in full force and effect, enforceable in accordance with its terms.

11.9 Gender and Number. Whenever the context of this Agreement requires, the gender of all words herein shall include the masculine, feminine, and neuter, and the number of all words herein shall include the singular and plural.

11.10 Divisions and Headings. The division of this Agreement into sections and the use of captions and headings in connection therewith is solely for convenience and shall have no legal effect in construing the provisions of this Agreement.

11.11 Entire Agreement. This Agreement, together with the Plan Regarding Compensation for Services, supersedes all previous contracts, and constitutes the entire agreement existing between or among the parties respecting the subject matter hereof, and neither party shall be entitled to other benefits than those specified herein. As between or among the parties, no oral statements or prior written material not specifically incorporated herein shall be of any force and effect the parties specifically acknowledge that, in entering into and executing this Agreement each is relying solely upon the representations and agreements contained in this Agreement and no others. All prior representations or agreements, whether written or oral, not expressly incorporated herein, are superseded and no changes in or additions

to this Agreement shall be recognized unless and until made in writing and signed by all parties hereto.

11.12 Amendment. This Agreement may only be amended by a writing signed by each of the parties hereto.

11.13 Effective Date. For the avoidance of doubt, this Agreement shall only be effective upon the date of the occurrence of the Closing Date (as defined in the Agreement and Plan of Merger (the "Merger Agreement") dated as November 4, 2016 among U.S. Anesthesia Partners Holdings, Inc., the Practice and the other parties thereto) (the "Effective Date"). In the event that the Merger Agreement is terminated, this Agreement shall automatically terminate and be of no further force and effect.

[THE REMAINDER OF THIS PAGE HAS INTENTIONALLY BEEN LEFT BLANK. SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in multiple originals, effective as of the date and year first above written.

PRACTICE:

FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (D/B/A ANESTHESIOLOGY CONSULTANTS, INC.)

By: Jason N. Workman

Name: _____

Title: _____

PHYSICIAN:

Name: Devin Chern Tang, M.D.

[Signature Page to Partner-Track Employment Agreement]

Schedule 6.2.2

Subject to the ACI Equity Incentive Plan, newly promoted Physician-Partners (as defined in the Plan Regarding Compensation for Services) will be required to purchase shares of common stock, $0.001 par value, of Parent ("Common Stock") having a value of $125,000 at the then fair market value (as determined in good faith by the board of directors of Parent) which such persons can do all at once upon becoming a Physician-Partner or by purchasing over several years (so long as such persons purchase at least a minimum of $25,000 of such shares of Common Stock each year for five years).

Notwithstanding the foregoing, any physician who (a) was a Partner-Track Physician as of December 2, 2016 and (b) is required by the terms of a Retention Bonus Agreement executed by such physician effective as of December 2, 2016 to purchase less than $125,000 worth of shares of Common Stock at the time of such Partner-Track Physician's promotion to Physician-Partner may (but shall not be required to) purchase additional shares of Common Stock up to an amount such that the sum of the shares purchased with the bonus paid under such Retention Bonus Agreement and such additional purchased shares has an aggregate value of $125,000 at the then fair market value (as determined in good faith by the board of directors of Parent)

The purchased shares will be subject to the Vesting and Stockholders Arrangement Agreement (ACI) then in effect.

Exhibit A

USAP NEVADA COMPENSATION PLAN

Defined terms used herein shall have the meanings given to them in the Plan Regarding Compensation for Services (USAP Nevada) ("***PRCS***") adopted by the Clinical Governance Board effective as of December 2, 2016 and employment agreements entered into by each Physician-Partner, and each Partner-Track Physician, on the one hand, and FIELDEN, HANSON, ISAACS, MIYADA, ROBISON, YEH, LTD. (d/b/a Anesthesiology Consultants, Inc.), a Nevada professional corporation ("***ACI***") on the other hand (each a "***Provider Services Agreement***").

The PRCS established the basis upon which Physician-Partners and Partner-Track Physicians will be paid Physician-Partner Compensation for Anesthesia Services rendered as Physician-Partners and Partner-Track Physicians. The USAP Nevada Compensation Plan (the "***Plan***"), effective as of the Effective Time (as defined in the Merger Agreement), sets forth the methodology of allocation of the Physician-Partner Compensation and the Physician-Partner Compensation Expenses to Nevada Division and individual Physician-Partners and Partner-Track Physicians assigned to each Nevada Division. The Plan, together with the new Provider Services Agreements effective concurrently with the Plan, replaces in their entirety all prior compensation programs and arrangements of ACI with respect to the Physician-Partners and Partner-Track Physicians. The Plan will be the basis for determining the compensation paid to Physician-Partners and Partner-Track Physicians pursuant to their individual Provider Service Agreements, and may be amended from time to time as set forth herein and in the PRCS, subject in all cases to the approval requirements set forth in the Charter, if any.

Subject to established company guidelines and policies, Physician-Partner Compensation shall be paid at least monthly on estimated or "draw" basis to individual Physician-Partners and Partner-Track Physicians in each Nevada Division as set forth in the Compensation Plan for each Nevada Division attached hereto as Appendix A, subject to the Clinical Governance Board and USAP and the quarterly allocation reconciliation process described below. Each Physician-Partner and Partner-Track Physician will also be entitled to receive a quarterly payment payable as soon as reasonably practicable but in no event later than the thirtieth (30^{th}) day of the calendar month following the end of each quarter (which payment shall subtract the draws previously received during the quarter). Notwithstanding the foregoing, in no event shall the estimate or draw in any quarterly period exceed a pro-rated portion of 85% of the physician's projected taxable income for such period, subject to the Clinical Governance Board.

The quarterly payment shall be calculated as follows:

1. Pursuant to the PRCS, the Practice shall prepare Financial Statements for ACI (the "***ACI P&L***"), which shall reflect the Divisional Net Revenue and Expenses of ACI for the quarter.

2. The calculation of Physician-Partner Compensation shall be set forth on the ACI P&L. Physician-Partner Compensation shall be allocated to the Physician-

Partners and Partner-Track Physicians based upon the compensation plan for the Nevada Divisions.

Physician-Partners and Partner-Track Physicians are not permitted to carry a negative balance at any time. If, at any time, an individual carries a negative balance, the Practice reserves the right to withhold amounts payable to such individual until the negative balance is cured.

In addition, within thirty (30) days following the delivery of the audited financial statements of Holdings, USAP shall reconcile the actual amounts due to Physician-Partners and Partner-Track Physicians for the prior fiscal year and such physician's compensation may be adjusted upwards or downwards to reflect such reconciliation.

If at any time after the date hereof, there are any issues with the operation of the Plan or the interaction of the Plan with the PRCS, then the Clinical Governance Board and the Practice shall work together in good faith to make sure adjustments to the Plan as are necessary or desirable to achieve the original intent and economics of the effectiveness of the Plan.

Additionally, Physician-Partner Compensation will be reduced by any amounts owed and outstanding to Holdings or any of Holdings' affiliates (but more than ninety (90) days in arrears) by any Physician-Partner in final settlement of such amounts pursuant to such Physician-Partner's indemnification or other obligations to the extent Holdings or any of Holdings' affiliates are finally determined to be entitled to such amounts (whether through mutual agreement of the parties thereto, or as a result of dispute resolution provisions) in accordance with the terms of the Merger Agreement for any claims owed by individual Physician-Partners pursuant thereto.

Appendix A
to Exhibit A

(Applicable Nevada Division Compensation Plan)

Appendix A
to Exhibit A

Exhibit B

Clinician Code of Conduct

Introduction

U.S. Anesthesia Partners, Inc. ("USAP") is an organization built on the highest standards of quality care and professional demeanor for all of its associated clinical providers. Each of USAP's affiliated practices partners with its contracted facilities to offer its patients and their families the best clinical experience available in its marketplace. Such practices' clinical providers are chosen with the expectation that each will represent the organization in an exemplary way. This Code of Conduct (this "Code") has been established to ensure USAP's core principles are maintained throughout the organization.

Fielden, Hanson, Isaacs, Miyada, Robison, Yeh, Ltd. (d/b/a Anesthesiology Consultants, Inc.) (the "Practice") establishes this Code for all of the clinical providers (the "clinical providers") employed by the Practice. This Code sets forth the expectations for all clinical providers, as well as the procedural steps and governing bodies responsible for the enforcement of these expectations.

Every clinical provider is expected to understand and fully comply with this Code. It is each clinical provider's responsibility to seek clarification of or guidance on any provision of this Code that he/she does not understand or for which he/she needs further clarification. This Code is applicable to all clinical providers. In addition, promotion of and adherence to this Code will be one criterion used in evaluating performance of clinical providers. Each clinical provider will be deemed to have accepted this Code upon execution of an employment agreement with the Practice that incorporates this Code or if a clinical provider is not executing such an employment agreement then such clinical provider will be required to execute an acknowledgment within 30 days of receipt of a copy of this Code by such clinical provider.

Standards of Conduct

The Practice has determined that the following behaviors are unacceptable and will subject any of the clinical providers to the disciplinary process outlined below:

1. Any behavior that is deemed abusive to fellow employees, patients, guests, or staff of any hospital, ambulatory surgery center, or any other site at which the Practice furnishes services (the "facilities"). Such behavior includes, but is not limited to, verbal or physical intimidation, inappropriate language or tone, harassment, discrimination, or comments that are demeaning personally or professionally.

2. Not responding to pages or phone calls while on duty at a facility or on call.

3. Failure to maintain privileges or credentialing at any facility where a clinical provider is on staff.

4. Removal or a request for removal from any facility based on violation of the medical staff by-laws.

5. Any violation of the Compliance Plan. Each clinical provider will be given proper notice to correct any deficiency deemed an unintentional oversight. All clinical providers will receive continuing education on the Compliance Plan.

6. Any action deemed to be against the best interests of the Practice or USAP. Such actions include, but are not limited to, disclosing confidential information to the extent restricted pursuant to any employment agreement between the clinical provider and the Practice, making derogatory comments about the Practice or USAP, or interfering with any contract or business relationship of the Practice or USAP.

7. Clinical performance deemed unsatisfactory by the Practice.

8. Physical or mental impairment while performing clinical duties, including but not limited to, substance abuse or any other condition preventing a clinical provider from adequately performing the necessary clinical tasks.

9. Failure of a clinical provider to report behavior that violates this Code or other policies of the Practice or a facility.

The matters enumerated above are in addition to the matters that may result in an immediate termination under the employment agreement with the Practice. Any matter that is deemed to be an immediate termination under the employment agreement, other than a violation of this Code, is not required go through the disciplinary action process outlined below.

Reporting Violations and Discipline

Strict adherence to this Code is vital. The Practice will implement procedures to review any violations of the above Standards of Conduct, which the Practice may change from time to time.

Amendment

This Code may be amended by the written consent of the Practice and the vote of sixty-seven percent (67%) of the members of the Clinical Governance Board.

EXHIBIT D

HENDERSON
HOSPITAL
A Member of The Valley Health System

IMPORTANT ANNOUNCEMENT

TO:	**Henderson Hospital Medical Staff**
FROM:	**Sam Kaufman, CEO, Henderson Hospital**
DATE:	**April 19, 2018**
RE:	**Anesthesiology Coverage at Henderson Hospital**

Please be advised that, effective at 12:00 am on May 1, 2018, Henderson Hospital will ***no longer*** have a closed anesthesia model for most areas of the facility, including the Henderson Hospital Outpatient Center located on the campus in the Medical Office Building. Commencing May 1st, the Hospital's Department of Anesthesia will be ***open*** to all anesthesiologists wishing to apply for privileges, except for OB Anesthesia. The application process for anesthesiologists interested in providing non-OB anesthesia services may begin immediately and we would encourage those interested physicians to do so by contacting the Medical Staff Office at Henderson Hospital for applications. Please submit your request to: Helen.Vitelle@uhsinc.com or call 702-963-7658.

If there is an urgent need for additional anesthesia coverage, then anesthesiologists who currently have privileges elsewhere in the Valley Health System will be given priority status particularly since the regulatory requirements will have already been met as well as the completion of the mandatory CERNER training and Nuance, Dynamic Documentation, ePrescribe onboarding. The Medical Staff is able to grant temporary privileges to meet urgent patient care needs.

As in most other hospitals in our community, please make certain that your office schedulers are aware that they are, beginning May 1st, required to notify the Henderson Hospital Scheduling Department (or House Supervisors after hours) as to who will be providing Anesthesia services for any cases scheduled in the Hospital ORs, Endoscopy and Cath Lab, or the Outpatient Center. The Scheduling telephone number is 702-963-7164.

For all Labor & Delivery Services, Henderson Hospital will still maintain a closed model for Anesthesia with USAP. This will be a 24/7/365 in-house coverage arrangement with Board Certified OB Anesthesiologists providing the coverage. GYN (both elective and emergent cases) will require physicians to call in their own preferred Anesthesiologist.

On behalf of the Management team, we wish to thank the physicians of USAP for their service to Henderson Hospital during our inaugural year and look forward to having them continue as members of the Medical Staff, serving our physicians who they have worked so closely with since the Hospital opened in October, 2016. Please feel free to contact me at 702-963-7710 or Diane Gregory, Director of Business Development at 702-963-7880 if you have any questions. Thank you and we look forward to serving you and your patients in the near future.

RPLY
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS, Plaintiff, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	Case No.: A-18-783054-C Dept. No.: 16 **PLAINTIFF'S REPLY RE: MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME** **Date: 11/19/2018** **Time: 9:30a.m.**

Plaintiff U.S Anesthesia Partners (herein Plaintiff) by and through its attorneys of record, the law firm of JOHN H. COTTON & ASSOCIATES, LTD., hereby submits its Reply to "Opposition to Plaintiff's Request for Hearing on Plaintiff's Motion for Preliminary Injunction".

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This Reply is made and based on all the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, together with such other and further evidence and argument as may be presented and considered by this Court at any hearing of this Motion.

Dated this 15th day of November 2018.

JOHN H. COTTON & ASSOCIATES, LTD.
7900 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117

/s/ Adam Schneider
JOHN H. COTTON, ESQ.
ADAM A. SCHNEIDER, ESQ.
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Defendants' Introduction and Statement of Facts in their Opposition ignore the key aspects of Plaintiff's Statement of Facts contained in Plaintiff's Motion. Two glaring omissions stand out:

A. Defendants do not address disclosure of confidential information

It is uncontroverted that Plaintiff entered into the Employment Agreement (EA) inclusive of a Non-Compete Agreement (NCA) with Defendant Tang because of Defendant Tang's contractually-bound agreement that non-competition and nonsolicitation are necessary to ensure the continuation of Plaintiff's business and protect Plaintiff from unfair business competition and improper use of confidential information Yet for all of what is said in Defendant Tang's Opposition, his Declaration, and his obviously solicited Declaration from Dr. Caravella, Defendant Tang never once addresses his improper use of confidential information. This glaring concession by omission is grounds by itself for this court to grant the Motion.

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B. Defendants misconstrue Dr. Isaac's Declaration to be a distraction to the court

Defendant Tang goes out of his way to contest what he believes to be an arguably false statement in Dr. Isaacs' Declaration. This is despite that none of Dr. Tang's known violations have occurred at Henderson Hospital. The mention of the Henderson Hospital contract was clearly done as but one example of the many contracts which USAP has or had with local facilities. Indeed, Defendants elect to ignore the balance of the entire paragraph where Henderson Hospital is mentioned. Had they done so, they would see the mentioning of Henderson Hospital and others was to show that "[s]uch facilities fall under the Employment Agreement's page 1 definition of facilities." (Pl.'s Mot. at Exhibit B, ¶ 11.)

II.

RESPONSE TO DEFENDANT TANG'S DECLARATION

Defendant Tang's Declaration is at worst knowingly untruthful and at best woefully ignorant. Multiple examples are worth noting for this court:

A. Defendant Tang *voluntarily* entered into the EA, *voluntarily* worked for Plaintiff, and was justly compensated for it before terminating the EA

It is uncontroverted Defendant Tang entered into the subject EA inclusive of its NCA voluntarily, knowingly, and without duress. Defendant Tang's assumption of the NCA obligations at the outset of his employment with USAP was legal and binding as a matter of law. See Hansen v. Edwards, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967) (holding that NCAs executed at the inception of the employment relationship are legal and binding).

Now Defendant Tang falsely claims he was "required" to sign the EA. (Def.'s Op. at Exhibit A- Dec. of Tang at ¶ 5.) Yet he evidenced no duress in doing so.

It is also uncontroverted that Defendant Tang continued to work for Plaintiff for months on end after he entered into the EA without complaint while reaping the rewards of the EA financially and by increasing his standing in the medical community. See Camco v. Baker, 113

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Nev. 512, 517, 936 P.2d 829, 832 (1997) (holding in relevant part: 1) continued employment with the present employer constitutes valid consideration for an employee's NCA with a former employer; 2) a NCA "is no more than a modification to the original employment contract"; and 3) continued employment is the equivalent to the employer's "forbearance to discharge.").

Now Defendant Tang claims he "became uncomfortable" working for Plaintiff at an unknown date or time. (Def.'s Op. at Exhibit A- Dec. of Tang at ¶ 7.) He offers no evidence of ever reporting the same to Plaintiff management to discuss or address, nor did he express anything of the sort in either of his two exit interview with Dr. Isaacs.

Yet for how lengthy his Declaration is, Defendant Tang chooses not to address that: 1) Plaintiff never *forced* him to work for Plaintiff; 2) he signed a similar NCA when he began work for his prior employer ACI; and 3) an option available to him was to not sign the EA and find employment elsewhere.

Defendant Tang voluntarily chose to enter into the EA and was compensated thousands of dollars monthly upon doing so. Only now when his contractual violations are laid out in detail for this court does he say he was essentially "required" to sign the EA. Defendants offer no evidence to support duress in execution of the EA before signing it.

B. Defendant Tang's exit interviews

Defendant Tang had two exit interviews with Dr. Isaacs. (Def.'s Op. at Exhibit A- Dec. of Tang at ¶ 9.) Yet he ignores for this court that Dr. Isaacs conveyed a desire for Defendant Tang to stay with USAP and provided financial arguments for staying with USAP. He further ignores that when Dr. Isaacs was asked about the NCA, he conveyed that the NCA would not be waived, and that when Defendant Tang was asked what he was going to do next he was at best totally evasive. All the while, Defendant Tang was in the process of or had already created his alter ego co-defendant Sun Anesthesia Solutions unbeknownst to USAP.

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C. USAP has ongoing relationships with providers Defendant Tang provides anesthesia services in violation of the EA's NCA

Defendant Tang lists Drs. Wiencek and Osman as doctors whom he works with in providing anesthesia services for their patients. In an effort to totally avoid the issue and his responsibility to comply with the NCA, he implied that he had no knowledge of the relationship between these doctors and USAP. Hiding his head in the sand with no effort to determine if USAP had prior relationships is no defense to his breach. Defendant Tang knew Drs. Wiencek and Osman have had prior relationships with USAP and in fact, Dr. Osman has again approached USAP for anesthesia coverage.

Defendant Tang's tactic of hiding behind his proactive ignorance is not tenable for obvious reasons. Taking Defendant Tang's conduct as legitimate would render any NCA meaningless.

In fact, Defendant Tang makes no mention that anesthesia groups such as USAP provide anesthesia services for surgeons who do all cases, at all facilities, with widely varying payer mixes. As such, any new employee with USAP has access to all these surgeons. The NCA which Defendant Tang voluntarily entered into bears this in mind to prevent any former employee from obtaining the "best work" from any given desired surgeon or any given payer. If the NCA were to be found unenforceable, then: 1) USAP's business would necessarily suffer greatly; and 2) anyone who starts working for USAP could do so with the intent of getting the "best work," e.g., obtaining patients with commercial insurance (as opposed to governmental payers who pay much less than commercial payers and, often, pay less than cost). In other words, absent a preliminary injunction being issued immediately and the NCA found presumptively reasonable, then every USAP employee will have every incentive to siphon as much of the commercial payer work as possible.

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III.

LAW & ARGUMENT

A. By the express terms of Defendant's signed EA, injunctive relief is required with no need for the posting of a bond.

As already pointed out in Plaintiff's Motion, Defendants have already agreed expressly that irreparable harm is caused by a physician's breach entitling Plaintiff to injunctive relief without the need for posting a bond. (See Pl.'s Mot. at Exhibit A, page 6, section 2.8.3.)

Yet it is as if Defendants never bothered to read the Motion or the express terms of the contract because Defendants now argue for a $1 million bond. Defendants make no mention of the fact that no bond is expressly contracted for in the EA. Defendant Tang knew this legal proceeding was going to take place without a bond if he chose to breach the EA. He chose to breach the EA and agreed that such a procedure can occur without a bond.[1]

B. The terms of the EA *already* take into account the holding of Golden Road

Defendants give nominal analysis in their footnote 1 for why they believe Golden Road Motor Inn v. Islam, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016) issued in July 2016 controls over the express terms of the contract entered into December 2016. Their legal argument for this is essentially nothing more than "because I said so." Indeed, the text of AB 276 and NRS 613 are silent as to whether they apply to NCAs signed *before* June 3, 2017. Defendants seem to suggest that AB 276's enactment in June 2017 (and its later codification in

[1] Telling is that Defendants hired counsel to defend the lawsuit. All evidence suggests Defendant Tang was equally capable of hiring the same counsel before he signed the EA where the subject clause could have been the subject of negotiation if warranted. Defendant elected not to do so, signed the EA, and began to be compensated thousands of dollars monthly pursuant to it.

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NRS 613)[2] would otherwise be applicable if it happened to have occurred before Defendant Tang signed the EA in December 2016.

Yet a plain reading of the EA shows that Plaintiff conducted its due diligence first, was cognizant of the Golden Road holding *before* presenting the EA to Defendant Tang for his review, and ultimately secured his approval without objection. Defendants suggest that Golden Road forbids Nevada's established precedent against "blue penciling" NCAs. Yet Defendants neglect to tell this court that the practice of "blue penciling" is now required upon a finding of a NCA being overbroad, unreasonable, or without valuable consideration. Such revisions must be done so to make the limitations (typically amount of time, geographic area, and scope of job duties) reasonable and not any greater than necessary to protect the interests of the employer.

Moreover, as Plaintiff's Motion already pointed out for this court and indeed block-quoted for this court, Defendant Tang has already voluntarily agreed that if any restrictions in the EA is held by any court to be unenforceable or unreasonable then a lesser restriction shall be severable and enforced in its place with the remaining restrictions enforced independently of each other. (See Pl.'s Mot. at Exhibit A, page 6, section 2.8.3.) Telling is Defendants *entirely* ignore this provision of the EA in their Opposition.

C. Defendant Tang has no defenses to his breach of contract

Often times in breach of contract cases, the Defendant will claim a host of reasons for why Defendant entered into a contract they now claim was legally deficient and voidable. Here, Defendants make no such arguments and de facto acknowledge that Defendant Tang entered into the contract knowingly, voluntarily, without duress, and with sufficient consideration to be justly compensated for his services. Instead Defendants offer no analysis in their Opposition to argue the entire EA is somehow unenforceable other than a "because I said so" basis.

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[2] Defendants do not say so for the court, but the modifications to the holding of Golden Road with respect to the construction and severability of noncompete agreements are codified in NRS 613.

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D. Defendants' cited cases are inapplicable and inapposite

Defendants go on to cite several cases in an attempt to demonstrate why the Plaintiff's Motion is in error. Each will be addressed in turn for why they each hold no precedential value to aid in this court's decision.

Golden Rd. Motor Inn, Inc. v. Islam, 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016)

In Golden Rd. Motor Inn, Inc. v. Islam, 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016), a casino brought action against a former casino host and her new employer for breach of the NCA in the host's employee contract with the casino. Id. at 154. The NCA prohibited the host from all types of employment with any gaming operation within 150 miles of the casino for one year following the end of her employment. Id. Here, the NCA at issue is not so restrictive. Defendant Tang can provide any *non*-anesthesia and *non*-pain management services that he wants.

Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 632 P.2d 1155 (1981)

In Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 632 P.2d 1155 (1981), an employment contract was entered between a hotel and an employee. The contract included a NCA restricting the employee from competing against the hotel in the State of Nevada following the employment's termination, throughout the remainder of the employee's life. Id. at 400. The lower court found the NCA unreasonable. Id. On appeal, the appellate court found that no postemployment NCA existed in the contract and, thus, the question of reasonableness was irrelevant. Id.

In this case, there is in fact a NCA restricting Defendant Tang from certain post-employment conduct—unlike what the Hotel Riviera court had before it. Unlike the instant matter, the Hotel Riviera court dealt with a NCA that restricted an employee from competing against the Hotel up until the employee's death. Here, the NCA is only applicable for the two years following the agreement's termination.

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Duneland Emergency Physician Med. Corp. v. Brunk, 723 N.E. 2d 963 (Ind. Ct. App. 2000)

In Duneland Emergency Physician Med. Corp. v. Brunk, 723 N.E. 2d 963 (Ind. Ct. App. 2000), a medical company sought to enforce a NCA against a physician who was previously employed in its emergency room. Id. at 965.

The appellate court in affirming the lower court's ruling that the NCA was reasonable but not enforceable, found that the medical company could not show that the NCA involved a protectable business interest or that it incurred irreparable harm. Id. at 967.

Similar to Duneland, this case involves a medical company enforcing a NCA against a former physician employee. But unlike Duneland, Defendant Tang has affected USAP's ability to secure clients and protect its business interests by virtue of his working for and gaining business experience under USAP. This added experience makes him viable to other companies in direct competition with USAP at the very facilities where USAP has a protectable business interest in customer goodwill.

It should be noted that the NCA in this instant matter is far less restrictive than that in Duneland. Because the Duneland NCA was considered reasonable, it stands to reason that the NCA here is certainly reasonable. Specifically, it does not restrict Dr. Tang's ability to earn a livelihood by practicing medicine. It only prohibits him from practicing anesthesia or pain management services, taking Plaintiff's clients and interfering with Plaintiff's current business relationships.

Jones v. Deeter, 913 P.2d 1272 (Nev. 1996)

In Jones v. Deeter, 913 P.2d 1272 (Nev. 1996), a lighting company sought to enforce a NCA against a fired employee after he sought employment and was ultimately hired as an independent contract by a competing company. Id. at 1273. The NCA restricted the fired employee from competing against the company within a 100-mile radius for a five-year period. Id.

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The Nevada Supreme Court, in reversing the trial court's order enjoining the fired employee, found the NCA to be unreasonable because of its five-year time length. Id. at 1275. Here, the NCA is for two years, and is thus reasonable and enforceable.

Camco, Inc. v. Baker, 113 Nev. 512 (1997)

In Camco, Inc. v. Baker, 113 Nev. 512 (1997), former employees signed a contract to not compete with the employing corporation after leaving its employ for two years within 50 miles of any of the corporation's stores that are existing, under construction, or the target of a corporate plan for expansion. Id. at 514–15. The Nevada Supreme Court affirmed the trial court's denial of the corporation's motion, as the NCA was unreasonable. Id. at 520. Specifically, the Court found that the NCA to areas targeted by the corporation was unreasonable and should only be limited to territory where the corporation established customer contacts and good will. Id.

Unlike here, the corporation in Camco sought to restrict the former employees from competing in cities that the corporation targeted for expansion. No such restriction is at issue here.

Oakland Tribune Inc. v. Chronicle Pub. Co., 762 F.2d 1374 (9th Cir. 1985)

In Oakland Tribune Inc. v. Chronicle Pub. Co., 762 F.2d 1374 (9th Cir. 1985), a competing newspaper group sought to enjoin publishing companies use and enforcement of exclusivity provisions as part of purchase agreements for features for their newspapers. Id. at 1375–76. The appellate court affirmed the lower court's denial of the injunction as there was no evidence the newspaper group would suffer irreparable harm. Id. at 1378.

Unlike the instant matter, Oakland does not deal with enforcing a NCA between a former employer and the ex-employee. Rather, Oakland simply involved a newspaper group seeking to enjoin publishing groups from enforcing an exclusivity provision, which the newspaper attributed to the publishing groups' ability to monopolize the newspaper market in that region.

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Am. Passage Media Corp. v. Cass Communications, Inc., 750 F.2d 1470 (9th Cir. 1985)

In Am. Passage Media Corp. v. Cass Communications, Inc., 750 F.2d 1470 (9th Cir. 1985), a firm brought suit against a newspaper advertisement competitor, challenging a number of exclusive agreements the competitor had with various newspapers as an illegal restraint on trade under the Sherman Act. Id. at 1472.

The Ninth Circuit Court, in reversing the lower court's granting of the firm's preliminary injunction, found that there was no demonstration of irreparable harm. Id. at 1473–74. Specifically, the firm's supplied affidavits only showed the firm's loss of revenue without sufficient support in facts for injunctive relief. Id. Moreover, the threat of being driven out of business was not sufficient to establish irreparable harm. Id.

Here, unlike the firm in Am. Passage, Plaintiff has provided affidavits establishing a set of facts illustrating Defendants conduct which will result in irreparable harm to Plaintiff—namely, the interference with USAP's business relationships. Unlike the firm in Am. Passage, Plaintiff has demonstrated more than a mere "threat of being driven out of business." Further, contrary to the instant matter, Am. Passage dealt with a firm seeking to restrain a competitor from a perceived illegal restraint on trade under the Sherman Act—which are issues completely inapplicable to the instant matter.

Paramount Ins., Inc. v. Rayson & Smitley, 86 Nev. 644, 472 P.2d 530 (1970)

In Paramount Ins., Inc. v. Rayson & Smitley, 86 Nev. 644, 472 P.2d 530 (1970), creditors sought a judicial foreclosure of several properties and filed an affidavit of attachment and directed the sheriff to levy on the property of one of the debtors. Id. at 646.

The debtor moved to discharge the attachment on grounds it was improperly issued. Id. The Nevada Supreme Court, in affirming the trial court's reversing of the issuance of the writ of attachment, found the affidavit was conclusory and insufficient to show the security had in fact diminished in value of the sum due to the creditors. Id. at 649–50.

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The Paramount case is completely inapposite to the current issues before the court. Unlike here, the Paramount case did not involve a NCA but, rather, a judicial foreclosure of properties. Moreover, unlike here, the creditors in Paramount had only conclusory statements supporting their affidavit. Here, Plaintiff provided affidavits establishing a set of facts illustrating Defendants conduct which will result in irreparable harm to Plaintiff.

Wisc. Gas Co. v. Federal Energy Reg. Comm'n., 244 U.S. App. D.C. 349 (D.C. Cir. 1985)

In Wisc. Gas Co. v. Federal Energy Reg. Comm'n., 244 U.S. App. D.C. 349 (D.C. Cir. 1985), gas companies moved to stay an order by the Federal Energy Regulation Commission that would do away with the minimum commodity bill. Id. at 352–53.

The companies argued that if their customers were not contractually obligated to purchase a minimum amount of gas, pursuant to the bill, there would be no assurance that the companies could continue to receive gas from their suppliers because the suppliers might be reluctant to renew their contracts. Id. at 355. The Court held that the companies' allegations were so speculative and hypothetical that no irreparable harm was shown, and, thus, the motion was denied. Id. at 355–56.

No NCA was involved between those parties, unlike here. Plus unlike those gas companies, Plaintiff is not relying on "speculative" results to demonstrate its irreparable harm. Plaintiff's Motion, supplied Declarations, and this Reply all show Plaintiff suffering irreparable harm daily by virtue of Defendant Tang's ongoing conduct.

Univ. and Comm. College Sys. of Nev. v. Nevadans for Sound Gov't, 120 Nev. 712 (2004)

In Univ. and Comm. College Sys. of Nev. v. Nevadans for Sound Gov't, 120 Nev. 712 (2004), a university sought a preliminary injunction against a group that wanted to gather signatures on the school's property. The Court held the university's guidelines for prompting safety were reasonable under a constitutional analysis and did not infringe upon NRS 293.127565 which is the statute regulating the use of public buildings to gather signatures.

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Neither the facts nor the legal arguments on appeal there dealt in any way with a NCA or any irreparable harm to a former employer when the ex-employee breaches a NCA.

Traffic Control Servs., Inc. v. United Rentals Nw., Inc., 120 Nev. 168, 87 P.3d 1054 (2004)

In Traffic Control Servs., Inc. v. United Rentals Nw., Inc., 120 Nev. 168, 87 P.3d 1054 (2004), an employee signed a NCA with a limited partnership in exchange for $10,000. Id. at 169. The employee alleged he received assurances from the partnership's management that they would not sell the partnership. Id. at 170. The limited partnership management subsequently sold the company to the employee's former employer, which caused the employee to leave the partnership. Id. at 171. The partnership's attempted assignment of the NCA to the new company was considered invalid by the Nevada Supreme Court absent express consent by the employee—which needed to be obtained via an arm's-length negotiation with the employee supported by valuable consideration. Id. at 176.

Here, unlike in Traffic, the NCA did not limit Defendant Tang's ability to practice medicine in his specialty, and in fact allowed him to continue to work as a gainfully employed anesthesiologist up until Defendant Tang terminated his employment relationship with USAP. Defendant Tang makes no such arguments that he was somehow induced into signing the EA with a NCA based upon negotiations he had with USAP before he voluntarily entered into the EA.

Excellence Cmty. Mgmt. v. Gilmore, 131 Nev. 347, 351 P.3d 720 (2015)

In Excellence Cmty. Mgmt. v. Gilmore, 131 Nev. 347, 351 P.3d 720 (2015), a company brought suit against a former employee and her new employment seeking a preliminary injunction to enforce a provision in her employment agreement, prohibiting her from soliciting persons or entities contractually engaged in business with the company. Id. at 721. The Court

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determined that the sale of 100% percent of the company's membership interest did not create a new entity. Id. at 722–23. Thus, the NCA remained enforceable after the sale. Id. at 723.[3]

Similar to Excellence, this case involves an employee that signed a NCA to, in part, not solicit business from its former employer's clients. Contrary to Excellence, Plaintiff has suffered irreparable harm as Defendant Tang has direct contact with third-party physicians and facilities which USAP had and has long-standing professional relationships with to provide anesthesia services.

E. Defendants do not challenge Plaintiff's case law regarding irreparable harm

Plaintiff has already told this court of the harm in denying injunctive relief. Pickett v. Comanche Construction, Inc., 108 Nev. 422, 836 P.2d 44 (1992). Defendants entire ignore Pickett in their Opposition.

Plaintiff has already noted for the Court that the mere existence of money damages does not automatically preclude injunction. Nevada Escrow Service, Inc. v. Crockett, 91 Nev. 201, 533 P.2d 471 (1975). Defendants entirely ignore Crocket in their Opposition. See also Hansen, 83 Nev. at 192, 426 P.2d at 793-794 (acknowledging that the risk of losing patients to the ex-employee *in and of itself* is a legitimate basis for a NCA.)

Defendants neglect to tell this court that the Nevada Supreme Court has already found the following to be irreparable harm: 1) acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits (Sobol v. Capital Management, 102 Nev. 444, 446, 726 P.2d 335, 337 (1986)); and 2) former employee competed with his former employer, solicited former employer's employees, disparaged his former employer, disclosed his

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[3] In doing so, the Court distinguished the transaction from Traffic Control which was limited to asset purchases and explained that Traffic Control was based upon the law of contractual assignments which applies when an entirely different entity as the acquirer becomes involved to be the new employer. Issues of fact remained however if the employee solicited business from the company's clients or they contacted her new employment independently for business. Id. 724–25.

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former employer's confidential information, and misappropriated its trade secrets (Finkel v. Cashman, 128 Nev. 68, 72, 270 P.2d 1259, 1263 (2012)).

As established through Plaintiff's Motion and supportive Declarations of Drs. Isaacs and Chang, Defendant Tang commits at least one of these acts *daily* to Plaintiff's ongoing harm. See also Def.'s Op. at page 13 citing Rhodes Mining Co. v. Belleville Placer Mining Co., 32 Nev. 230, 106 P. 561 (1910).

In Rhodes, the court granted a mining company's preliminary injunction against a competing mining company to enjoin it from any continued mining activity until a final determination was made regarding who owned the land in dispute. Id. at 235. Since ownership in the land was in dispute and irreparable harm would come by the competing company mining the land in the meantime, the Court affirmed the granting of the preliminary injunction. Id. Plaintiff agrees with Defendants' use of Rhodes and this Court should grant the underlying Motion to prevent Plaintiff from suffering irreparable harm.

F. The NCA's terms are reasonable

The EA itself notes that if a term is ruled by a court to be unreasonable, then the unreasonable term will be replaced with a lesser restrictive term. This begs the question of what is a reasonable restrictive term under Nevada law. See Hansen v. Edwards, 83 Nev. 189, 191-192, 426 P.2d 792, 793 (1967) (explaining that reasonableness in the context of a NCA turns on whether the NCA "imposes upon the employee any greater restraint than is reasonably necessary to protect the business and goodwill of the employer. . . . The period of time during which the restraint it to last and the territory that is included are important factors to be considered in determining the reasonableness of the agreement.")

Plaintiff has already provided in its Motion a clear legal premise for how the terms of the NCA are reasonable and consistent with Nevada law. See, e.g., Hansen v. Edwards, 83 Nev. 189, 426 P.2d 792 (1967) (holding a NCA reasonable with a limitation of the former employee

podiatrist from practicing in Reno, NV with a sua sponte ruling of a time period for one year); Ellis v. McDaniel, 95 Nev. 455, 596 P.2d (1979) (holding a NCA reasonable with a 5-mile radius of Elko, NV and a time period of two years). See also Sheehan & Sheehan v. Nelson, 121 Nev. 481, 117 P.3d 219 (2005) (holding a NCA reasonable which did not prevent the former employee's work for an entity located outside of the NCA's specified geographic area).

Defendants choose not to address these decisions and instead focus on factors that are not at issue in Defendants' violations. For example:

1) this case is not about the length of time of the NCA restriction. Yet that is exactly what Defendants choose to address in their Opposition. (Def. Op. at page 10.)

2) this case is not about a restriction of a 50-mile area from a target of corporate expansion. Yet that is exactly what Defendants choose to talk about in their Opposition. (Def.'s Op. at page 10.)[4]

3) this case is not about Defendant Tang working for Red Rock Anesthesia as a custodian. Yet that is exactly the strawman Defendants choose to address in their Opposition. (Def.'s Op. at page 10.)

4) Defendants are not prohibiting Defendant Tang or his alter ego from practicing medicine anywhere else for anybody else so long as the medicine practiced is not anesthesiology or pain management. Yet that is exactly what Defendants choose to talk about in their Opposition. (Def.'s Op. at page 14.)

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[4] Indeed, Plaintiff already cited this court to what Defendants cites, Camco v. Baker, 113 Nev. 512, 518-20, 936 P.2d 829, 832-834 (1997), for the proposition that a territorial restriction is reasonable when limited to the territory in which the former employers established customer contacts and goodwill.

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G. Defendants' request for an evidentiary hearing is unnecessary and nothing but a stall tactic

Defendants Request an evidentiary hearing only after discovery, all the while Defendants continue daily to cause irreparable harm to Plaintiffs, is unwarranted, unnecessary, and nothing more than a stall tactic before Defendants' actions are legally determined to be in breach of the contract. It is not surprising Defendant Tang suggests this because it allows him to continue violating the EA's NCA daily with no legal repercussions in the interim. The court granted Plaintiff's Motion to be heard on Order Shortening Time for a reason. Allowing this requested discovery period and later holding a evidentiary hearing would fly in the face of securing a preliminary injunction as expeditiously as possible.

H. Contrary to Defendant Tang's sworn Declaration, USAP has a contractual relationship with UMC

Defendant Tang takes the time to swear under oath that USAP has no contractual relationship with University Medical Center (UMC). In doing so, Defendant Tang states he knew the EA's NCA was facility-based which is why he was looking for work at facilities with no connection to USAP. Clearly his ability to provide his new employer with anesthesia coverage allows him and his new employer to compete with USAP when it comes to any given facility's coverage contract. Such competition would not result if he complied with the EA and practiced in a non-anesthesia practice.

As previously stated in Plaintiffs' Motion, Red Rock Anesthesia is in direct competition with USAP for cases and contractual work within the facilities where Defendant Tang has provided anesthesia services. Defendant Tang working for Red Rock Anesthesia aids it in coverage where it otherwise may not be able to cover the work. Defendant Tang directly aids this direct competitor and contributes to its ability to challenge USAP for work and for potential

facility contracts as well as potential insurer contracts. This undoubtedly goes to the essence of a NCA.[5]

Not only has Defendant Tang provided anesthesia services for surgeons who have been consumers of USAP services, but now he is providing anesthesia services for surgeons who may potentially ask USAP for coverage were he not aiding USAP's direct competitor, Red Rock Anesthesia. Indeed, Defendant Tang's providing anesthesia services to Dr. Caravalla has occurred based upon a working relationship previously established while Defendant Tang worked at USAP. But for Defendant Tang working with USAP, Defendant Tang would never have had a working relationship with Dr. Caravella and would be just another stranger who Dr. Caravella would not be comfortable with providing anesthesia to his surgical patients.

In that sense, Defendant Tang parlayed that professional relationship established under USAP to work with Dr. Caravella. Allowing Defendant Tang or any other employee so inclined as Defendant Tang sets an untenable precedent for future employers, future employees, and the merits of any NCA in Nevada. Should this court legitimize Defendant Tang's actions, that would necessarily mean there is nothing to prevent any future employee from establishing professional relationships with the customers of the employer to the later benefit of that employee and detriment of the employer.

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[5] Plaintiff has not named Red Rock Anesthesia as a Defendant based upon the facts known at this time. But this court must be aware that such precedent exists should Plaintiff seek leave to amend the Complaint to add Red Rock Anesthesia as a Defendant. See Las Vegas Novelty v. Fernandez, 106 Nev. 113, 787 P.2d 722 (1990) (holding a subsequent employer of the subject employee not need be in privity to the NCA between the employee and the former employer in order for an injunction to be issued against the subsequent employer if the subsequent employer breached the NCA in active concert with the subject employee). Glaringly silent in any part of the Defendants' Opposition is Defendant Tang making Red Rock Anesthesia aware of the NCA or that Defendant Tang told Red Rock Anesthesia about the NCA before being hired, being assigned to facilities in violation of the NCA, or being assigned to physicians who had or have an ongoing relationship with USAP.

On a more basic note, having a disgruntled ex-employee working at the same facilities and in proximity to the surgeons, hospital staff, and hospital administration that USAP has developed relationships with certainly introduces the potential for slander upon USAP. Though USAP is not aware of these kinds of behaviors from Defendant Tang, the risk of that potential is one of the basic reasons why an entity like USAP has a facility-based NCA in the first place. See Camco v. Baker, 113 Nev. 512, 936 P.2d 829 (1997) (holding that customer contracts and goodwill are protectable interests of the employer in geographic areas where the employer has done business, but not enforceable as to cities where the employer had not opened its business).

In any event, Defendant Tang is *patently wrong* that USAP has no contractual relationship with UMC. In fact, USAP has a per-diem relationship with UMC, has numerous anesthesiologists with UMC privileges, has the Obstetrics anesthesia contract with UMC, and is looking to acquire other contracts at UMC. So why Defendant Tang chose to be untruthful to this court is not apparent, but he obviously has motive for saying so. He wants the court to believe that he was working at a facility where USAP had no presence and therefore was not violating the EA's NCA. But he is mistaken, which is all the more reason why a preliminary injunction must be issued immediately to stop such wrongful conduct.

///

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IV.

CONCLUSION

Defendant Tang and his alter ego Defendant Sun Anesthesia Solutions must be enjoined from providing anesthesia services in violation of the Employment Agreement's non-competition agreement.

Dated this 15th day of November 2018.

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/s/ Adam Schneider
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I am an employee of JOHN H. COTTON & ASSOCIATES and that on the 15th day of November 2018, the foregoing ***PLAINTIFF'S REPLY RE: MOTION FOR PRELIMINARY INJUNCTION ON ORDER SHORTENING TIME*** was served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court e-filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, and if not on the e-serve list, was mailed via U.S. Mail, postage prepared as noted below, as follows:

Howard & Howard
3800 Howard Hughes Parkway, Ste. 1000
Las Vegas, NV 89169

/s/ Jody Foote
An employee of John H. Cotton & Associates

ANS
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS, Plaintiff, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	CASE NO. A-18-783054-C DEPT. NO. XVI **ANSWER**

Devin Chern Tang, M.D. ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") answer Plaintiff's Complaint as follows:

I.

PARTIES AND JURISDICTION

1. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 1; therefore, Defendants deny.

2. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 2; therefore, Defendants deny.

3. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 3; therefore, Defendants deny.

4. Defendants admit the allegations in Paragraph 4.

5. Defendants aver that the allegations in Paragraph 5 constitute a legal conclusion to which no response is required. However, Defendants do not contest jurisdiction in this case.

II.

GENERAL ALLEGATIONS

6. Answering Paragraph 6, Defendants admit that Dr. Tang signed a document styled "Partner-Track Physician Employment Agreement" ("Agreement"). Defendants aver that the Agreement speaks for itself. To whatever extent a further response is required, Defendants deny.

7. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 7; therefore, Defendants deny.

8. Answering Paragraph 8, Defendants aver that the language of the Agreement speaks for itself. To whatever extent a further response is required, Defendants deny.

9. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 9; therefore, Defendants deny.

10. Answering Paragraph 10, Defendants aver that the language of the Agreement speaks for itself. To whatever extent a further response is required, Defendants deny.

11. Answering Paragraph 11, Defendants admit that the Agreement includes an Exhibit B, which is titled "Clinician Code of Conduct." Defendants aver that said Exhibit speaks for itself. To whatever extent a further response is required, Defendants deny.

12. Answering Paragraph 12, Defendants admit that Dr. Tang was employed by USAP during the dates in question. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 12 concerning the number of procedures performed at the facilities identified, and Defendants therefore deny those allegations. To whatever extent a further response is required, Defendants deny.

13. Answering Paragraph 13, Defendants admit that providing anesthesiology services for a healthcare provider constitutes an interaction with that provider. To whatever extent a further response is required, Defendants deny.

14. Answering Paragraph 14, Defendants admit that Dr. Tang became aware of the names of healthcare providers that were working with USAP in connection with his duties as a USAP employee. Defendants aver that Plaintiff's allegation that Dr. Tang received "valuable

information as to the nature and character of [USAP's business]" is vague, and Defendants therefore deny. Defendants lack information sufficient to form a belief as to whether and to what extent various providers had "ongoing relationships and good will" with USAP. To whatever extent a further response is required, Defendants deny.

15. Defendants admit the allegations in Paragraph 15.

16. Defendants admit the allegations in Paragraph 16.

17. Answering Paragraph 17, Defendants admit that Sun Anesthesia Solutions was created without USAP's approval; however, Defendants aver that Dr. Tang did not require USAP's approval to create a business entity. Defendants aver that the public registration of Sun Anesthesia solutions constituted constructive notice of the creation of that entity. To whatever extent a further response is required, Defendants deny.

18. Defendants deny the allegations in Paragraph 18.

19. Defendants aver that the allegations in Paragraph 19 constitute legal conclusions to which no response is required. To whatever extent a response is required, Defendants deny.

20. Defendants admit the allegations in Paragraph 20.

21. Defendants admit the allegations in Paragraph 21.

22. Defendants admit the allegations in Paragraph 22.

23. Defendants admit the allegations in Paragraph 23.

24. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 24; therefore, Defendants deny.

25. Defendants deny the allegations in Paragraph 25.

26. Answering Paragraph 26, Defendants admit that Dr. Tang performed anesthesia services for Dr. Ammar through Red Rock Anesthesia Consultants. Defendants lack information sufficient to form a belief as to the extent to which USAP and Dr. Ammar had a prior or current professional relationship. To whatever extent a further response is required, Defendants deny.

27. Defendants deny the allegations in Paragraph 27.

28. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 28; therefore, Defendants deny.

29. Defendants deny the allegations in Paragraph 29.

30. Answering Paragraph 30, Defendants admit that Dr. Tang performed anesthesia services for Dr. O'Neill through Red Rock Anesthesia Consultants. Defendants lack information sufficient to form a belief as to the extent to which USAP and Dr. O'Neill had a prior or current professional relationship. To whatever extent a further response is required, Defendants deny.

31. Defendants deny the allegations in Paragraph 31.

32. Answering Paragraph 32, Defendants admit that Dr. Tang continues to practice anesthesiology by accepting overflow cases from Red Rock Anesthesia Consultants. Dr. Tang occasionally receives assignments to work with \with physicians who have worked with USAP. Defendants lack information sufficient to form a belief as to whether or to what extent USAP had "established professional relationships" or "good will" with these physicians. To whatever extent a further response is required, Defendants deny.

33. Defendants deny the allegations in Paragraph 33.

34. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 34; therefore, Defendants deny.

35. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 35; therefore, Defendants deny.

36. Answering Paragraph 36, Dr. Tang admits that he is an independent contractor for Red Rock Anesthesia Consultants.

37. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 37; therefore, Defendants deny.

38. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 38; therefore, Defendants deny.

39. Defendants admit the allegations in Paragraph 39.

40. Defendants admit the allegations in Paragraph 40.

41. Defendants admit the allegations in Paragraph 41.

PLAINTIFF'S FIRST CAUSE OF ACTION
BREACH OF CONTRACT

42. Defendants here incorporate all prior Paragraphs as though fully set forth.

43. Answering Paragraph 43, Defendants aver that the Agreement speaks for itself. To whatever extent a further response is required, Defendants deny.

44. Defendants deny the allegations in Paragraph 44.

45. Defendants deny the allegations in Paragraph 45.

46. Defendants deny the allegations in Paragraph 46.

PLAINTIFF'S SECOND CAUSE OF ACTION
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

47. Defendants here incorporate all prior Paragraphs as though fully set forth.

48. Defendants admit the allegations in Paragraph 48.

49. Defendants deny the allegations in Paragraph 49.

50. Defendants deny the allegations in Paragraph 50.

51. Defendants deny the allegations in Paragraph 51.

PLAINTIFF'S THIRD CAUSE OF ACTION
UNJUST ENRICHMENT

52. Defendants here incorporate all prior Paragraphs as though fully set forth.

53. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 53; therefore, Defendants deny.

54. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 54; therefore, Defendants deny.

55. Defendants deny the allegations in Paragraph 55.

56. Defendants deny the allegations in Paragraph 56.

57. Defendants deny the allegations in Paragraph 57.

58. Defendants deny the allegations in Paragraph 58.

PLAINTIFF'S FOURTH CAUSE OF ACTION
TORTIOUS INTERFERENCE OF CONTRACTUAL RELATIONS

59. Defendants here incorporate all prior Paragraphs as though fully set forth.

60. Answering Paragraph 60, Defendants aver that the Agreement speaks for itself. Defendants further aver that the non-compete provision referred to is void under Nevada law. To whatever extent a further response is required, Defendants deny.

61. Answering Paragraph 61, Defendants admit that Dr. Tang was aware that the Agreement contained a non-compete provision.

62. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 62; therefore, Defendants deny.

63. Defendants deny the allegations in Paragraph 63.

64. Defendants deny the allegations in Paragraph 64.

65. Defendants deny the allegations in Paragraph 65.

PLAINTIFF'S FIFTH CAUSE OF ACTION
INJUNCTIVE RELIEF

66. Defendants here incorporate all prior Paragraphs as though fully set forth.

67. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 67; therefore, Defendants deny.

68. Defendants lack information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 68; therefore, Defendants deny.

69. Defendants aver that Paragraph 69 consists of legal conclusions to which no response is required. To whatever extent a response is required, Defendants denies.

70. Defendants deny the allegations in Paragraph 70.

71. Defendants deny the allegations in Paragraph 71.

72. Answering Paragraph 72, Defendants aver that the Agreement speaks for itself. To whatever extent a further response is required, Defendants deny.

73. Defendants deny the allegations in Paragraph 73.

74. Defendants deny the allegations in Paragraph 74.

75. Defendants aver that Paragraph 75 constitutes a request for relief to which no response is required. To whatever extent a response is required, Defendants deny.

76. Defendants deny the allegations in Paragraph 76.

PLAINTIFF'S SIXTH CAUSE OF ACTION
DECLARATORY RELIEF

77. Defendants here incorporate all prior Paragraphs as though fully set forth.

78. Answering Paragraph 78, Defendants aver that the statutory provisions cited speak for themselves. To whatever extent a further response is required, Defendants deny.

79. Defendants deny the allegations in Paragraph 79.

80. Defendants deny the allegations in Paragraph 80.

81. Defendants deny the allegations in Paragraph 81.

AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim against Defendants upon which relief can be granted.

2. Plaintiff is barred from maintaining this action by virtue of its own unclean hands and inequitable conduct.

3. Plaintiff's alleged damages were contributed to its own actions or inactions.

4. Plaintiff failed to mitigate its damages, if any, and to the extent of such failure is precluded from recovery.

5. Plaintiff lacks standing to assert some, or all, of its claims for relief.

6. Plaintiff has not and will not sustain any damages because of Defendants' alleged conduct.

7. Plaintiff's claims against Defendants are barred by intervening and superseding acts of others.

8. Plaintiff's damages, if any, were caused by someone, or some entity, other than Defendants.

9. Plaintiff's claims are barred by the doctrines of waiver, estoppel and laches.

10. All of the other defenses are incorporated herein, as applicable, for purposes of non-waiver.

11. All of the other defenses set forth in NRCP, Rule 8, are incorporated herein, as applicable, for purposes of non-waiver.

12. Pursuant to Nevada Rules of Civil Practice 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendants' Answer and, therefore, Defendants reserve the right to amend this Answer to allege additional affirmative defenses if subsequent investigation so warrants.

PRAYER FOR RELIEF

Defendants deny that Plaintiff is entitled to any relief whatsoever. Defendants ask the Court to dismiss Plaintiff's Complaint with prejudice with costs and attorneys' fees to be awarded to Defendants as allowed by law.

DATED this 16th day of November, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, 10th Floor, Las Vegas, Nevada, 89169.

On November 16, 2018, I served the preceding **ANSWER** in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

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Adam Schneider (#10216)
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Attorneys for Plaintiff

I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on **November 16, 2018**, at Las Vegas, Nevada.

/s/ Anya Ruiz

An Employee of Howard & Howard Attorneys PLLC

4829-4963-4426, v. 1

CASE NO. A-18-783054-C

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

U.S. ANESTHESIA PARTNERS,

Plaintiff,

vs.

DEVIN TANG, M.D.,

Defendant.

REPORTER'S TRANSCRIPT
OF
MOTIONS

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED MONDAY, NOVEMBER 19, 2018

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

APPEARANCES:

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* * * * *

LAS VEGAS, NEVADA; MONDAY, NOVEMBER 19, 2018

10:34 A.M.

P R O C E E D I N G S

* * * * * * *

10:34:44

THE COURT: All right. Good morning.

IN UNISON: Good morning.

THE COURT: Let's go ahead and note our appearances for the record.

10:34:49 MR. O'MALLEY: Ryan O'Malley for defendants.

MR. SCHNEIDER: Adam Schneider, 10216 for plaintiff.

MR. COTTON: And John Cotton for the plaintiff.

10:34:58 THE COURT: Okay. Once again, good morning.

And it's my understanding this is plaintiff's motion for a preliminary injunction; is that correct?

MR. SCHNEIDER: That's correct, Judge.

THE COURT: All right. So you have the floor.

10:35:08 MR. SCHNEIDER: Okay. I appreciate it. Is it all right if I sit? You want me to take the podium?

THE COURT: You can sit. You can take the podium. It's to your discretion. I have no problem. What is easy for you? That's what we'll do.

10:35:19 MR. SCHNEIDER: Appreciate it. Right here. I

10:35:20 got all my information right here in front of me, Judge.

Before we go into some of the more legal aspects of what we're here to talk about today, I think 10:35:29 it's important for the Court to know the timeline that we're talking about relative to defendant Tang's conduct.

So what we have is a physician who's offered a job with my client, USAP, and is provided a partnership 10:35:50 track employment agreement and signs it.

And not to get too -- not to bore the Court to death with block quotes, but I think it's important to note the sections that are really at play here and the language that is simplistic in nature. So in other 10:36:10 words, if you look at page 5, Section 2.8.

THE COURT: And I'm going to look at. And --

MR. SCHNEIDER: Okay.

THE COURT: We're not in a hurry. I mean, really we're not. So ...

10:36:21 MR. SCHNEIDER: All right.

THE COURT: I think it's better to give it the time it deserves. And we're at Section 2.?

MR. SCHNEIDER: Page 5.

THE COURT: Yes.

10:36:28 MR. SCHNEIDER: Section 2.8.

10:36:30 THE COURT: All right. I'm with you. That's the non-compete.

MR. SCHNEIDER: Exactly. So when you look at it, it says "the physician." Not the practice, the 10:36:40 physician recognizes that the practice's decision to enter this -- into this agreement is induced primarily because the covenants and assurance made by the physician in this agreement. That the physician's covenants regarding non-competition, non-solicitation 10:37:00 in Section 2.8 are necessary to ensure the continuation of the business of the practice as well as -- you know, and there's another clause in there about also protecting the practice from unfair business competition including but not limited to the improper 10:37:15 use of confidential information.

Then if we segue to page 7, Section 2.10, there's two things that I wanted to highlight for the Court. The first one is Sections 2.8 and 2.9 shall be construed as an agreement independent of any other 10:37:39 provision of this agreement.

Then if you look further, it speaks to Section 2.8 and 2.9 are essential elements of this agreement. And that, but for the agreement of the physician to comply with those covenants, the practice 10:37:57 would not have agreed to enter into the agreement in

10:38:00 the first place.

And then they go on to say, well, both practice and the physician, that they agree that the foregoing covenants are appropriate and reasonable when 10:38:12 considered in light of the nature and extent of the business conducted by the practice.

So that's what we have entering the business agreement between -- or I should say the employment agreement between defendant Tang and my client. 10:38:28 Defendant Tang does so voluntarily, knowingly, willingly, without duress.

THE COURT: I can -- I think we can all agree on one point. When it comes to restrictive covenant vis-à-vis employment, there's a lot of case law out 10:38:45 there. And, typically, they're enforceable if the Court makes a determination they're reasonable upon duration or time; right?

And then the next issue, typically, we look at would be the geographical limitation to determine 10:39:00 whether it's reasonable or not.

What I find unique about this one here, it doesn't appear to me it has a necessarily a geographical limitation. Time, two years. I mean, you know, it depends on the circumstances. But, and I 10:39:12 think the position the defense is taking is this. That

10:39:17 it's not specific and it's void and vague. And it's not a geographical location. It talks about facilities and the like, but it doesn't set forth the facilities with any particularity that would be required, 10:39:28 potentially. And I don't know that. But that's the issue; right?

The defense is saying yes.

MR. SCHNEIDER: Yeah. I mean, I don't think there's a challenge from the defendant saying, Well, 10:39:43 it's too long. I think they're just saying, Well, it's just too vague. I don't think they're really pointing out like, Well, it needed to have said Las Vegas or Clark County in order for it to be enforceable. I didn't see that language in there.

10:40:00 But it's, but it's facility-based because that's where the work is. That's where the anesthesia services are provided is at various facilities. So I think it's -- it would be odd for a practice who provides the type of medical services, such as USAP 10:40:21 physicians do, to say, Well, everything in Clark County, everything in Arizona, everything in North Dakota.

THE COURT: Well, I mean, that would probably be unreasonable based upon the geographical location 10:40:33 limitation. But, I mean, in a lot of these you do see

10:40:36 geographical limitations. You know, for example, Clark County or whatever. I mean, I've seen a lot of these before.

And so, I mean, I'm looking at it from a 10:40:45 perspective in a general sense. These types of restrictive covenants can be enforceable. However, I'm to give it scrutiny. There's no question about it. And I have to make a determination as to whether it's reasonable or not at the end of the day. And that's, 10:40:58 typically, what the analysis would be.

And I think we all can agree with that too.

MR. SCHNEIDER: We can all agree with that.

THE COURT: Right?

So what I need to do is focus on the salient 10:41:08 points I have to review and determine to make a determination as to whether this is an enforceable restrictive covenant. That's probably the best way I can say it.

MR. SCHNEIDER: Of course. I mean, and those 10:41:23 are what all the terms speak to.

You know, on top of which I -- I didn't get the sense from the defendant's opposition about what they found to be confusing about it other than to say, Well, it's just too vague.

10:41:45 The problem is so, for example -- and here's

10:41:49 kind of what underlines -- underscores the point here, Judge. If a hospital opens up and enters into a contract with USAP, which may not have even been part of the terms at the time of entering into the contract, 10:42:07 then it doesn't really do any good to say Well, let's just limit it to the 5-mile radius of Las Vegas city proper.

Instead, it's facility-based because that's where all the work occurs. This isn't a situation 10:42:28 where you have an outpatient clinic, and then you move across the street. And then you sort of siphon off clients just like they kind of did in the Hansen v Edwards case that's been spoken about at length in the briefs. It's also not like the Ellis McDaniel case 10:42:49 which speaks to, Well, instead of making it a 100-mile radius or 50-mile radius, let's make it a 5-mile radius.

The contract is there because everybody knows that the work conducted is anesthesia services, which 10:43:06 can't be done by a matter of statute, unless it's through licensed facilities which are really only qualified through outpatient facilities that get certain certificates from the state in addition to hospitals. So that's the reason why it's facility 10:43:27 based as opposed to, you know, the geographic terms.

10:43:35 I mean, all the other case law that is out there always had -- almost always has a city limit restriction or a county restriction. But in this instance, that's not what the business is about. So
10:43:50 wouldn't really do any good to talk about a square mile radius area if it's really just being conducted at the various facilities that's contemplated in the contract.

Yeah. I mean, and not only that, but the facilities themselves are actually defined. It's not
10:44:16 some vague ambiguous definition of what a facility is. I mean, it's right there on page 1 where it speaks to the different types of facilities that are contemplated in the contract.

Then if you move to page 2, Section 2.1, when
10:44:38 it speaks to the covenants of the physician, the availability of professional services, that speaks to the duties that the physician has vis-à-vis the providing of anesthesia services as well.

So, again, I don't see the -- I just don't see
10:44:59 how the defendant at this point can say, Man, I just didn't know what that meant. Or I didn't know what that meant because there's, there's nothing to suggest that he didn't know what it meant.

He walked into this and entered into it and
10:45:16 signed it. It's only after he goes Man, I think I

might be able to make more money elsewhere does he walk out of the contract. Doesn't tell my client about it. Sets up his own corporation unbeknownst to my client. And then continues to work and provide anesthesia services all unbeknownst to my client after the termination of the agreement.

It's only when he's essentially caught lying to my client wandering the halls of facilities, which, by the way, would be in violation of Section 6.3 of the agreement because he had to terminate his privileges at those facilities, does he then say, Oh well, I'm not -- I'm actually not violating the contract because you guys don't have contracts with this particular facility, and the surgeons that I'm working for will -- I didn't solicit them. I came through another group.

Bottom line, Judge, is that he's providing anesthesia services that he explicitly said he was never going to do. Those are all things that are contemplated in the contract. I just don't see how the geographic term and not saying Clark County, or not saying a 50-mile radius of Las Vegas proper would deem the contract to be unreasonable.

THE COURT: I understand.

MR. SCHNEIDER: Yeah.

THE COURT: I'm quite sure the other side has

something to say about that.

MR. O'MALLEY: If I may, your Honor.

THE COURT: Not unless he's --

You're done?

MR. SCHNEIDER: No. I mean, I mean, if the judge wants to speak to, Hey, I'm zeroing in on let's talk about reasonableness --

THE COURT: Understand, I'm not an advocate on either side. They've made points in their position -- in their points and authorities. Once they -- if they bring something up, I might follow up on that.

MR. SCHNEIDER: Right. Right. I understand.

THE COURT: But I understand my role.

MR. SCHNEIDER: Absolutely, Judge. What I'm doing is trying to address the Court's questions --

THE COURT: Yeah.

MR. SCHNEIDER: -- about reasonableness. I think I've done that.

THE COURT: Well, I think all I was doing was just -- in a general sense when you see these types of agreements restrictive covenants vis-à-vis employment, usually the focus is on duration, time, and geographical limitations.

MR. SCHNEIDER: Agreed.

THE COURT: We don't have that here. This is

10:47:35 somewhat unique. And I'll hear what counsel has to say.

MR. O'MALLEY: I just feel more comfortable standing when I talk.

10:47:42 THE COURT: That's fine, sir.

MR. O'MALLEY: So to be clear about what our position is, our position is not that this is too vague, and we can't make heads or tails what it says. We know what it says. Our problem with the agreement

10:47:54 at issue here is that it's overbroad.

As the Court indicated, it is not -- you know, we don't take any issue with the time limitation. Two years is, I think, fairly standard for this agreement. But it is not limited as to geographic scope.

10:48:07 And the whole point behind, you know, the general categories of looking at, you know, time and geographic scope, things like that is to, I think, get to the bottom of whether the covenant not to compete at issue is reasonably -- is reasonable. Whether it's

10:48:26 reasonably related to the legitimate business purpose of protecting the business from unfair competition.

This provision, the one at issue here is, you know, unbounded as to the geographical scope and purports to basically any time Dr. Tang steps into a

10:48:45 facility anywhere, to do -- to take one case for one

surgeon that might have called USAP at any point during his employment, that whole facility is tainted as far as the agreement is concerned.

He can't take any cases there for the term of the non-compete. He has to terminate his privileges at that facility if he leaves USAP. There is no reason. USAP does not stand to protect its business by preventing Dr. Tang from working for any physician at that entire facility.

Generally, I don't know the terms of these agreements that USAP apparently has with these facilities that they've mentioned a few points in their briefing. Those agreements are in evidence. But I do know that, generally speaking, surgeons are the ones who are in charge of booking an anesthesiologist for their procedures. The facility doesn't really have anything to do with that determination. Again, generally. I don't know what these agreements say.

So USAP, you know, in what sense is USAP protecting its business, like protecting its legitimate business interest by preventing Dr. Tang from working for anyone at a facility, making him terminate his privileges at any facility that he had worked at, even once, for any surgeon during his time at USAP?

That just sweeps too broadly especially in

10:50:18 lack -- or in light of the lack of any geographic limitation. It's not that it's vague. It's pretty clear, but it's too broad. That is our concern. Well, that's what I wanted to address with respect to what's 10:50:34 been covered so far.

THE COURT: You brought up an issue regarding -- I'm looking for it in here. I remember reading. Let me see if I can see it. Regarding some of the work, it's his position that it doesn't -- let 10:50:48 me see here. For example, working at UMC does not have a contractual relationship with USAP.

MR. O'MALLEY: Well, and actually, I think that's -- that was Dr. Tang's understanding. I think in the reply --

10:51:03 THE COURT: Yeah.

MR. O'MALLEY: -- there was an assertion that UMC did have some kind of agreement with USAP.

But I think that we brought that up just in connection with stating that Dr. Tang really has tried 10:51:18 not to compete with USAP. He took cases at UMC initially because his understanding was they didn't have an agreement with USAP.

And he's never solicited any physicians whether they work for -- like, whether they've ever had 10:51:33 a relationship with USAP or not, he's never solicited

any physician's business. He's just taken overflow case from UMC, and then, subsequently, just overflow cases from Red Rock. And he just goes where he's sent.

So it may be that USAP has some sort of agreement with UMC. I don't know. Again, those agreements aren't in evidence.

But I just wanted to make that point. It appears that Dr. Tang may have been mistaken. But I don't think that really affects our argument concerning the over breadth of the provision at all.

THE COURT: I understand, sir.

MR. O'MALLEY: And I think I've responded to what's been raised so far. So unless the Court has any additional questions about what I've said so far, I guess I'll sit back down.

THE COURT: Okay.

MR. SCHNEIDER: So just a couple of points is when we're speaking to the geographic restriction of the facilities by their terms are actually even more specific than a radius, or city, or a county. So this notion --

THE COURT: Tell me how is that. Because when I look here and I read the contractual language under 2.8.1, as it relates to the facilities, it appears to me, number one, it doesn't set forth or list out the

10:53:10 specific facilities he would be prohibited from conducting and/or doing business at.

Is that an important point? Because we don't have a geographical limitation. But how would the 10:53:23 doctor know in reviewing this specifically what would be -- without really using a better term -- the lay of the land as it relates to the limitation of the non-compete? And the reason why I say that is this because historically they always do and typically 10:53:44 involve geographic limitations.

And here, I'm just looking at it. It talks about the facilities. And unless I'm missing something, it's even unclear as to whether that facility came online and started doing business with 10:54:02 the plaintiff, and the doctor was doing business at that facility, would he be prohibited, even though they weren't contemplated at the time the contract was entered into, from conducting business at that facility?

10:54:19 MR. SCHNEIDER: Right, Judge. So the answer is when you look at the term Facility, which is for what it's worth capitalized, you then go back to page 1. And it's the third Whereas paragraph where then it defines what those facilities are. So it's not 10:54:37 as if that it's somehow an undefined term that a doctor

who went to school for 20 years, is board certified, and completed a residency, and fellowship, and has read the most complex medical journals on the plant would somehow understand.

THE COURT: That doesn't mean they're lawyers, though. I mean, really. Let's look at that differently. That doesn't mean they're lawyers.

MR. SCHNEIDER: And --

THE COURT: I know a lot of really good doctors that when it comes to legal and business issues, they're not the best.

MR. SCHNEIDER: Right. And so all -- and really to avoid any of that, all Dr. Tang could have done is said, Okay, what's the list; right? Which sort of speaks to what I would talk about at the beginning of the oral argument is that this notion that, Well, I just didn't know what it meant, but I'm trying to avoid working at places that USAP has terms and agreements with.

So, for example, this notion that, Well, I did my best to go work at UMC because, to my knowledge, USAP didn't have any kind of agreements with UMC.

The problem with that is that all he had to do was ask. Right? All he had to do was say, Hey, does USAP have terms and agreements with UMC because I'm

thinking about working there. Which again, is actually contemplated in the contract.

THE COURT: Is there some place --

MR. SCHNEIDER: Not only that --

THE COURT: -- is there some place --

MR. SCHNEIDER: -- but it varies over time.

THE COURT: Well, here's my question. Is there some place in the contract that provides specifically that upon termination, once the restrictive covenant kicks in that before going to a facility he should inquire as to whether or not they're covered by the terms and conditions of the agreement?

MR. SCHNEIDER: There's no duty on the physician to do so. But I think it's because the employment agreement is structured in a way that, Okay, if the physician decides to walk, it's done with the following in mind. He's going to resign his privileges. He's going to go -- he's going to provide medicine other than anesthesia and other than pain medicine anywhere he wants.

And if he decides to try to carve out an exception to the rule so to speak, he would have to tell USAP, Hey, I'm going to practice anesthesia elsewhere, and this is why there are -- there's clauses in the employment agreement that speak to putting the

10:57:26 group on notice or language that speaks to unless it's with, you know, without the group's knowledge or consent. So I think that's where -- that's where that analysis would be triggered.

10:57:45 So not only that, Judge, but this document, while it's signed in December of 2016, is very much a living document based upon the facilities that offer anesthesia services, the facilities that don't. When physicians get hired. When they terminate. When they

10:58:07 retire. So, and not only that, but USAP has every right to expand its contractual relations with any facility that it wants.

THE COURT: I'm not saying that they don't have a right to expand their contractual relationships.

10:58:23 But what happens in this scenario? Hypothetically, the physician leaves, for whatever reason, and they start working at UMC. And at the time they started working at UMC, USAP had no relationship with them. Then three months, four months into the relationship with UMC

10:58:46 where Dr. Tang is working, they enter into a contract with UMC.

Under those terms and conditions, would the contract have some sort of retroactive application and preclude Dr. Tang from continuing ongoing and providing

10:59:10 ongoing anesthesia services at UMC? And I think that's

10:59:13 a really good example.

MR. SCHNEIDER: So the answer is no. And I think you then just have to go back to --

THE COURT: So you're saying that he

10:59:21 wouldn't --

MR. SCHNEIDER: -- the definition.

THE COURT: He wouldn't be prohibited? Or would he? I'm just trying to make sure I'm not missing anything.

10:59:31 MR. SCHNEIDER: Well to me, the hypothetical really goes back to how do we define facilities. And then you go back to page 1, the third whereas paragraph.

THE COURT: Well, that would be --

10:59:42 MR. SCHNEIDER: -- of, you know --

THE COURT: -- from what -- the gist I get from that would be facilities that are providing anesthesia. I mean ...

MR. SCHNEIDER: Yes.

10:59:51 THE COURT: I mean, it says -- it says facilities. Let me see here.

Paragraph 3. Facilities, professional anesthesia services including any specialty thereof, pain management, anesthesia, related consulting,

11:00:06 management, and administrative services collectively

anesthesia and pain management services. And it has to be a licensed facility; right? And it's fairly broad.

MR. SCHNEIDER: Right. So you got facilities which the practice has a contract. You got facilities --

THE COURT: And that could be -- I read that as being a hospital, outpatient. Maybe all sorts of different types of places.

MR. SCHNEIDER: Sure. So, but to your point, Judge. If Dr. Tang and USAP enter into per diem contracts concurrently or they walk into a new facility where they each concurrently have a contractual relation, I don't know that that's part of the contract. That's not what we're talking about here. We're talking about a facility which Dr. Tang provides services, that USAP has a contract with, and we're talking about facilities or groups that USAP has and had professional relationships with.

And this is exactly why we wrote what we wrote, and I'll just kind of direct the Court to it, on page 18 of the reply, now that we know kind of what we were dealing with in terms of opposition, is this notion of, Well, why can't he just work where he wants to work for who he wants to work for? In other words, I just show up, Judge. I don't know who I'm going to

work for. I don't know where I go to work. But all I know is that I just show up and provide anesthesia services. Maybe just so happens it would be a group that has relationships with USAP, but that's -- why am I in trouble for that?

So this is exactly why we speak to what we speak to. If you look at page 18 of the reply. I mean --

THE COURT: You know, though, this is -- I don't mind telling you what I'm thinking about. This is what I'm thinking. Say, hypothetically, this was the scenario: The duration was two years and the geographical prohibition was Clark County. You know what, that might be reasonable. I don't mind saying that. You know, and you see many of these that are like that; right?

So because a geographical limitation is limited. He can go out of state. Or he can leave, or do whatever he has to do. Go to Reno. Go to Scottsdale. I mean, you know, but there's a trigger there. There's a geographical limitation. And I get it.

But I'm trying to figure out the extent of the limitation when the contract doesn't specifically set forth a limitation when it's talking about facilities.

11:03:00 And that's my question.

Because you can tell me if you agree or disagree with this statement. But let me see what the defense says when they talk about it being overbroad.

11:03:17 And that's their big issue. Because, for example, they cite the Hotel Riviera case on page 9 of the opposition. And it says in agreement -- and this is just in a general sense. An agreement by an employee not to compete is generally considered a restraint on

11:03:49 trade and unenforceable unless reasonable in scope and breadth.

And so I think, clearly -- I mean, I don't mind saying this. I have no problem with two years. I get that. I'm just trying to determine what the scope

11:04:03 and breadth of the limitation will be. And without a geographical limitation, how can I make that determination?

MR. SCHNEIDER: So the -- so to the first part of your point as far as the scope, Dr. Tang can

11:04:16 practice any type of medicine that he wants so long as it's not anesthesia or pain management.

THE COURT: Well, can't -- but if you look at the agreement, can't he practice anesthesia and pain management in Clark County? It just depends on the

11:04:32 facility; right?

11:04:34 MR. COTTON: He's right.

MR. SCHNEIDER: Yeah, yeah. Because the facilities -- it's not -- and this is -- I feel like we're on the same page. I'm just trying to get us
11:04:42 there. Which is, I feel like the Court is saying, Clark County. If Clark County was there written in the contract, there's an inclination by the Court to determine it to be reasonable.

THE COURT: I mean --

11:04:57 MR. SCHNEIDER: With that mentality in mind, the contract is written to say, Well, look. We're doing everything that we can to make sure that this employment agreement is not overly restrictive, which is why we're only speaking to the facilities that
11:05:19 contemplate USAP and the physician who in this case happens to be Dr. Tang.

So it's actually the facilities are a carve out within Clark County, not Clark County in general. So I feel like if the Court is inclined to say Clark
11:05:38 County being in this contract would make the contract reasonable, Well, then it stands to reason that if we use those facilities -- we use the term facilities, that it's actually a smaller limitation than Clark County and, thus, the Court should be more inclined to
11:05:58 say that the contract is reasonable.

11:06:02 THE COURT: Well, here's my next question, though. Is there any geographical limitation on the enforcement of the contract?

MR. SCHNEIDER: So, yeah. So he's got to be 11:06:15 licensed in Nevada. So that's number one. He's got to have privileges at certain facilities. So that's number two.

The issue, I think, is that it's not -- the contract is written not with square mileage in mind as 11:06:36 much as it is the facilities where the work is done. Which is why, you know, this is just not a situation where a casino worker can't work on the strip or otherwise.

Because we're dealing with these buildings 11:06:57 that are dispersed throughout Clark County, or throughout Nevada for that matter, where Dr. Tang would have the opportunity to speak with, meet with, conduct business with some of USAP's clients and businesses. Which kind of leads me to the other point. Which is, 11:07:20 you know, you made some mention of the Hotel Riviera case. But on top of that, you know, let's not forget that good will, business interest, and customer contacts are all legally recognizable as that under Nevada law.

11:07:38 So what the contract is written, knowing that

11:07:43 those things are protected, that those things are tangible interests that the business has to protect itself.

THE COURT: I mean, when I'm looking at this, 11:07:54 think about it for a second. If I crafted an order, how could I craft an order that specifically enforced this agreement without even knowing what facilities he's prohibited from going to?

MR. SCHNEIDER: Yeah. So the answer is all 11:08:08 facilities that existed at the time that he left according to the terms of the agreement.

THE COURT: But what are those facilities according to the terms of the agreement? I mean, I'm looking. You know, the thing about it is I was 11:08:20 sitting. When I was reading this I said to myself. How would I perfect an order that would be -- and understand this, and this is why this is so important. If I'm going to enter an order, due process mandates that my order can't be vague. It has to be specific. 11:08:36 It has -- I mean, because, for example, someone could run in six months later and say the doctor's violating the preliminary injunction. But how can I say, yes or no as far as that is concerned because -- I'm not going to enter a vague order. I'm not.

11:08:55 MR. SCHNEIDER: And we'll -- we are happy to

provide you that list. And, in fact, Dr. Isaac speaks to the facilities in his declaration about where USAP has business, or has business relationships, or has good will established. And those would be the facilities that would be contemplated, you know, on top of the UMC issue that Dr. Tang introduced in his opposition.

THE COURT: Sir, go ahead.

MR. O'MALLEY: Your Honor, USAP had indicated, I think, that -- you know, the Court gave a hypothetical which I think makes a good point. Which is, you know, if USAP subsequently makes a contractual relationship with a facility that it does not currently have a relationship now, would that mean that Dr. Tang is prohibited from practicing there as well? The answer was no. But I don't feel like I understand why. I don't think that that's what the agreement says. I think that under the plain language of the agreement, if USAP does subsequently form a relationship with a facility, that's now under the terms of the non-compete.

THE COURT: But that's why I asked the question.

MR. SCHNEIDER: No.

THE COURT: It didn't seem clear to me. But

11:10:08 go ahead.

MR. SCHNEIDER: That is not true.

MR. O'MALLEY: I could be wrong. But as we sit here, I don't understand that. And the lack of a 11:10:16 geographical limitation express in the agreement is relevant because USAP is in a lot of different places. And as I understand it, you know, they're continuing to expand. They're in Colorado, Florida, Maryland. They're in Nevada, Oklahoma, Texas, Washington.

11:10:32 If USAP starts expanding into subsequent states and forming relationships with hospitals in those states, I don't see why those wouldn't also be covered under the scope of the non -- of the non-compete as drafted.

11:10:47 So I think that the Court is correct that it would be very difficult to craft an order that would be sufficient here. And it also illustrates the extent to which this is really burdensome, you know, to the extent that the -- that this non-compete purports to 11:11:05 cover multiple states, and it's amorphous. It can change if USAP starts moving into other states or forming relationships with other facilities. Unless there's language that limits it that I haven't seen in the agreement.

11:11:17 MR. SCHNEIDER: All right. So to counsel's

point, Judge, that's where there's a duration of two years as to following the terms of the contract.

THE COURT: But, I mean, hypothetically, this is what counsel brought up that USP -- is it USP?

MR. SCHNEIDER: USAP.

THE COURT: USAP.

MR. SCHNEIDER: Yes.

THE COURT: They have facilities in other states; right? What -- why wouldn't this contract without a geographical limitation potentially become an issue if -- for example, what was one of the other locations, sir, that they --

MR. O'MALLEY: Maryland, Colorado.

THE COURT: What if they went to Colorado? Without a geographical limitation, could this non-compete be enforced against the doctor?

MR. SCHNEIDER: Yes. Right. Because the answer is yes because the facilities are defined how they're defined.

THE COURT: So you're saying that this would be --

MR. SCHNEIDER: -- for the duration of two years.

THE COURT: You're saying this would be enforceable against the doctor in Colorado? That would

be --

MR. SCHNEIDER: No, just -- no. Just the facilities where Dr. Tang performed his procedures at. So in other words if somehow he were to have done services in Colorado, then, okay, it would. But to my understanding he's only licensed in Nevada. And all he's providing --

THE COURT: But what does the contract provide? Because, Gentlemen, I understand. But, I mean, what does the contract say? Because at the end of the day that's what I have -- my thrust and focus is going to be on scrutinizing the language of the contract; right?

And the reason why I think that's important too because if I enter any order in this matter, it's going to have to be based on the material language that's contained in the contract, not any other issues. It's going to be based specifically on key contractual provisions because I can't go beyond that; right?

MR. SCHNEIDER: And that's all we're asking for, Judge.

THE COURT: Yeah. But without any geographical limitation, once again, how can I set forth an order?

MR. SCHNEIDER: So, I mean, I feel like we're

keeping -- emphasizing geography; whereas, I feel like the -- certainly from my side of the bench, I keep talking about facilities or really, you know, the buildings.

THE COURT: But here's the thing.

MR. SCHNEIDER: So --

THE COURT: And this is the issue I see. If they listed out the specific facilities in Clark County with some particularity, when he enters the contract he knows he can't go to UMC. He knows he can't go to Humana. He knows he can't go to Desert Springs, or he can't go to the hospitals in Henderson. It's clearly -- it's clearly set forth that this is the restrictive covenant.

I look at it from this perspective, and I don't mind saying it, it's not clear to me.

MR. SCHNEIDER: So I think the -- yeah, so the issue --

THE COURT: I mean, it defines facilities that provide anesthesia and pain management; right? We know, typically, that's going to be an outpatient facility or maybe a hospital that has to be accredited I would think. But other than that ...

MR. SCHNEIDER: Right. So to your point, Judge, Dr. Tang knows where he provides services.

11:16:07 THE COURT: But it's not limited to just to where he went; is it? To places he had provided services at before. It's not limited -- it's broader than that, right?

11:16:18 MR. SCHNEIDER: It's certainly a component to it. Because I think what the issue here is that at the time that a physician enters into the contract saying for this example of December of 2016, he may not be -- he may not at the time be going to Desert Springs Hospital; right? But three months later, he may be going to Desert Springs Hospital all the time. So now it becomes the sort of unworkable every week there's a new amendment to it. Because like I said before, this is a living, breathing document, based upon where physicians work and where they're staffed. Which I think, you know, quite frankly --

THE COURT: Well, here's the thing about that. I understand the argument. But we're not talking about the Constitution. We're talking about a document, a contract; right?

MR. SCHNEIDER: Right.

THE COURT: And I get it. But, I mean, even -- I mean, you look at some of the cases. They say 50 miles is sufficient. That maybe it's more than that might be unreasonable.

11:17:27 If they'd have put in the contract -- and maybe I'll pull back a little bit. If they'd have said City of Las Vegas, North Las Vegas, and Henderson, I think if that was set forth in the contract, and they
11:17:44 didn't even include unincorporated Clark County, I think it would be very difficult for me not to enforce that restrictive covenant. It's clear you can't go to North Town. You can't go to Henderson. You can't go to City of Las Vegas. That would cover quite a bit of
11:18:01 hospitals and facilities. But it's clear as to what they're entering into at the time. Yeah, they can still go to Overton maybe, or down to south to -- what's the name?

MR. SCHNEIDER: Laughlin?

11:18:12 THE COURT: Maybe they go to Laughlin; right?

MR. SCHNEIDER: Yeah.

THE COURT: But, but and that's the thing. Because this is what -- and maybe I didn't look close enough at the cases, and if there are cases out there,
11:18:22 all the cases that I'm familiar with deal with duration and time and geographical limitation.

You know, and this isn't necessarily a geographical limitation. It talks about facilities, but it doesn't list out all the facilities, and it
11:18:41 doesn't have a geographical limitation that I'm aware

of. Because if they -- say, hypothetically, they said facilities along with North Las Vegas, Henderson, and Las Vegas, that's a different story there, I think.

MR. SCHNEIDER: And to the Court's point, is there -- is -- in other words is the Court addressing some blue line provisions that the Court would be willing to place into the contract pursuant to the terms?

THE COURT: I'm not -- no.

MR. SCHNEIDER: Okay.

THE COURT: I mean, I don't rewrite contracts; right?

Here's my role. And it's really this simple. To make a determination as to whether this is reasonable or not. Right? Nothing more. Nothing less. I don't rewrite contracts.

We deal with -- I mean, I'm business court. I do business court now. And I did construction defect, and that was very contractual based. It was. Indemnity contracts between developers and subcontractors. I'm dealing with business contracts, shareholder derivative claims, all sorts of wonderful things; right? And one thing I don't do, I don't rewrite contracts, I mean.

So, I mean, that's -- at the end of the day --

and I don't mind telling you this. If there's -- if you want me to dig deep and there's some more case law you just want to give me to read as to maybe why geographical limitations might not be as important, or, I mean, I don't -- Gentlemen, I'll read whatever you give me. I really will.

MR. SCHNEIDER: Yes. So the answer is I would like the opportunity to supply --

THE COURT: Right?

MR. SCHNEIDER: -- you with supplemental briefing because I think we -- you know, a quarter of the reply deals with some of the case law citations that the plaintiff -- or excuse me, the defendant raised.

THE COURT: Right.

MR. SCHNEIDER: And why -- and why these are inapposite to these facts.

But nonetheless, I think supplemental briefing, if the Court's inviting it, I would want to supply it. Because I think that with it, the Court will understand plaintiff's position and grant the relief that my client is seeking.

THE COURT: Sir?

MR. O'MALLEY: Your Honor, I don't think that supplemental briefing is really necessary. I think

that the fact -- like, the idea that this is a living and breathing document that that, you know, under which the obligations of my client or anybody who enters into one of these agreements changes over the course of, I guess, the two years after Dr. Tang leaves for any reason, that by itself is sufficient to indicate that just on its face this thing is really -- it's unclear. Like, it's amorphous. And it shows why a geographical limitation is so necessary.

But with that being said, if the Court wants to order supplemental briefing on that issue just as long as I get a chance to do a reply.

THE COURT: Absolutely. I'm -- I would never deny you of that opportunity.

MR. SCHNEIDER: Nor are we saying that, Judge. Yeah.

THE COURT: Pardon?

MR. SCHNEIDER: Nor is the plaintiff saying that.

THE COURT: Absolutely. I mean.

MR. SCHNEIDER: Yeah.

THE COURT: Because I don't mind digging deep and so on. This is what I think we'll do. Where is the case at from a time perspective? Is time of the essence, or no?

11:22:12 MR. SCHNEIDER: Well, certainly from our --
THE COURT: The defendants have answered; right?
MR. SCHNEIDER: Correct.
11:22:18 THE COURT: Okay. And so actually the only thing that would be required procedurally would be a 16.1 early case conference; right?
MR. SCHNEIDER: Yeah. Which --
THE COURT: Okay.
11:22:26 MR. SCHNEIDER: Yeah, so from a procedural standpoint --
THE COURT: So we're not --
MR. SCHNEIDER: -- that's where we're at.
THE COURT: Yes.
11:22:31 MR. SCHNEIDER: From a functional perspective, you know, there's a reason that my client had this hearing earlier than when it was normally docketed.
THE COURT: And I have no problem with that.
MR. SCHNEIDER: Yeah.
11:22:41 THE COURT: I'm kind of looking at it from this perspective. This is what I would rather do.
Number one, I think we've made a pretty good record. And I don't mind letting everybody say what they have to say because that's your ethical
11:22:51 obligations to your client. I get that. And I love to

11:22:53 listen to lawyers because sometimes I overlook -- I don't grasp everything going on from a law and motion standpoint until you're here, and I like to listen and ask questions.

11:23:06 This is kind of how I see it. And you can correct me if I'm wrong or not. When I talk about additional briefing, I don't need Supreme Court quality briefing. I mean, I'm just going to tell you this. But I do like copies of cases. And all I'm thinking it would be something like this: Like, a two-page summaries saying, Judge, these are additional cases that focus on lack of geographical limitation we invite you to read.

Or, Judge, here are cases that say a 11:23:38 geographical limitation is of paramount significance, and without it, the agreement is unenforceable; right? Or something regarding particularly. I mean, I'm not going to tell you what to do. But the reason why I think that's important because at the end of the day, 11:23:54 and every case is unique, and I don't like rushing to judgment. I don't like doing that.

And so if we have maybe just two weeks to get that done. You just both submit briefing on that point with cases attached and cited. And, you know, I'll 11:24:12 read those. And then I'll issue a minute order and

11:24:14 tell you what I think. How's that?

MR. SCHNEIDER: Yeah. Let's go.

MR. O'MALLEY: Works for us.

THE COURT: Anybody -- and that way you don't
11:24:25 have to spend -- you know, just research. You don't have to do the analysis. You can say Smith versus Jones and have in brackets [Geographical limitation is critical to the Court's analysis, and without one, it's unenforceable as a matter of law.] Something like
11:24:43 that; right? That's all I need.

But I'll read the cases. Because I don't mind doing this. This case might be -- I mean, for me it's a case of first impression. I haven't seen it before. I don't mind saying that. And so, consequently, if
11:24:52 there's an appeal, I want to get it right. That's all. I don't mind telling you that. Everybody understand?

MR. SCHNEIDER: Yeah.

THE COURT: So how about this. And we have the holidays. And I believe that I don't mind saying
11:25:07 this because, you know, I was a practitioner for a long time, and we get overly optimistic about how quickly we can get things done. And I'm going to use your input for this. And so bear in mind, Thursday is Thanksgiving; right? So I wouldn't want you to really
11:25:30 start researching this week.

11:25:32 But if we're talking about maybe it's better to have the due date three weeks out. I don't know. You tell me what's best for you and your client.

MR. SCHNEIDER: Yeah. So today is the 19th, 11:25:43 you know. I think by December 7 would give both parties plenty of opportunity to supply the Court with, you know, that the bullet point-type briefing --

THE COURT: Yeah.

MR. SCHNEIDER: -- that the Court is looking 11:26:01 for.

THE COURT CLERK: That's a Friday.

THE COURT: I mean, gentlemen, I have no problem. I'm letting you decide this. What's best for you?

11:26:07 MR. O'MALLEY: I don't have any objection to December 7.

THE COURT: Okay. And so what we'll do then, we'll set supplemental for December 7.

And what's the -- December 7 is a Friday.

11:26:27 THE COURT CLERK: Um-hum.

THE COURT: We'll set this for a chambers matter the following week on the 14th.

MR. SCHNEIDER: Okay.

THE COURT: All right. And, you know what, 11:26:41 and like I said I don't need a lot of analysis other

11:26:46 than parenthetical statements as to what the case stands for. If you give me five or six good cases, I'll read them all. I'll sit down with a cup of coffee and just kind of go through them. And I'll issue a
11:26:55 minute order.

And regardless of which way I go, since it is somewhat of a unique case, I will get that done for you. And then if there's an appeal, I respect everybody's appeal. I do. But I want to make sure if
11:27:09 it does go up I'm on the right side. I don't mind saying this.

All right. Anything else I can help you with? Okay. Well, enjoy your Thanksgiving. Happy Thanksgiving.

11:27:20 MR. SCHNEIDER: You too, Judge. Thank you.

MR. O'MALLEY: Happy Thanksgiving to you too, your Honor.

THE COURT: All right.

(Proceedings were concluded.)

* * * * * * * * *

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

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DISTRICT COURT

CLARK COUNTY, NEVADA

U.S. ANESTHESIA PARTNERS, Plaintiff, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	CASE NO. A-18-783054-C DEPT. NO. XVI **SUPPLEMENTAL AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Devin Chern Tang, M.D. ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") submit the attached authorities to aid the Court in its consideration of Plaintiff's Motion for Preliminary Injunction.

Although there is no Nevada authority directly on point addressing the enforceability of a non-compete agreement lacking any geographical limitation, cases from other jurisdictions make clear that the lack of a geographic limitation is fatal in the absence of special circumstances justifying so broad a scope, such as when an employer truly does business worldwide:

Exhibit 1: *D'Onofrio v. Vacation Publications, Inc.*, 888 F.3d 197 (5th Cir. 2018) ("[T]he absence of a geographical restriction will generally render a covenant not to compete unreasonable.")

Exhibit 2: *Bunker Hill Int'l, Ltd. v. Nationsbuilder Ins. Servs., Inc.*, 710 S.E.2d 662, 666 (2011) ("[A] noncompete covenant without any territorial limitation is unenforceable under Georgia law because it provides inadequate notice of its extent to the ex-employee.")

Exhibit 3: *MasterCard Int'l Inc. v. Nike, Inc.*, 164 F. Supp. 3d 592, 601 (S.D.N.Y. 2016) (applying, to Nike, the principle that "where an employer's business is conducted worldwide to a global customer base, the lack of a geographic restriction is necessary.") (emphasis added; internal quotations omitted.)

Of course, USAP's business is not "conducted worldwide to a global customer base," and the "marketplace" for anesthesiology services is inherently distinct from the global market applicable to the sale of shoes or other consumer goods. These common-sense principles caused the Superior Court of Pennsylvania to invalidate a non-compete agreement binding an anesthesiologist without any geographic limitation:

Exhibit 4: *Lehigh Anesthesia Ass'n v. Mellon,* No. 1570 EDA 2015, 2016 WL 1657474 (Pa. Super. Ct. Apr. 26, 2016) (holding restrictive covenant's prohibition of anesthesiologist providing services to clients and certain former clients of former employer following termination of employment was overly broad and, thus, unenforceable; prohibition was broader than necessary to protect employer's business interests, and prohibition placed undue hardship on anesthesiologist in finding potential future employer, especially when coupled with unlimited geographical scope of the covenant).

USAP takes the position that, notwithstanding the lack of a geographic limitation, the agreement is nevertheless reasonable because it is limited to facilities with which USAP has a contractual relationship (even if those relationships are formed after the execution of the agreement or, indeed, after Dr. Tang's departure). However, courts recognize that non-compete agreements with an unclear or shifting scope based on events after the agreement is executed are too indefinite and fundamentally unfair to be enforced:

Exhibit 5: *AGA, LLC v. Rubin*, 243 Ga. App. 772, 533 S.E.2d 804 (2000) ("A territorial restriction in a non-competition clause in an employment contract is too indefinite to be enforced if it cannot be determined until the date of the employee's termination; the employee must be able to forecast with certainty the territorial extent of the duty owing the employer.")

Exhibit 6: *Trading Partners Collaboration, LLC v. Kantor*, No. CIV.A.09-0823JAG, 2009 WL 1653130, at *6 (D.N.J. June 9, 2009) (holding noncompete agreement which restricted a former employee from participating in any business competitive with the employer now or in the future, was overly broad and unenforceable, because "[any] change in business activities by [the employer] . . . might cause [the employee] to be in violation of the Agreement without being able to anticipate such violation.")

DATED this 7th day of December, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Ryan T. O'Malley

By: _____

Martin A. Little (#7067)
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3800 Howard Hughes Parkway, #1000
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Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that I am employed in the County of Clark, State of Nevada, am over the age of 18 years and not a party to this action. My business address is Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, 10th Floor, Las Vegas, Nevada, 89169.

On this day I served the **SUPPLEMENTAL AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION** in this action or proceeding electronically with the Clerk of the Court via the Odyssey E-File and Serve system, which will cause this document to be served upon the following counsel of record:

John H. Cotton (#5268)
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I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on **December 7, 2018**, at Las Vegas, Nevada.

/s/ Anya Ruiz

An Employee of Howard & Howard Attorneys PLLC

4849-1372-3266, v. 1

HOWARD & HOWARD ATTORNEYS PLLC

EXHIBIT 1

888 F.3d 197
United States Court of Appeals, Fifth Circuit.

Karen D'ONOFRIO, Plaintiff–Appellant
v.
VACATION PUBLICATIONS, INCORPORATED, doing business as Vacations To Go, Defendant–Third Party Plaintiff–Appellee
v.
Michael D'Onofrio, doing business as Tranquility Base Enterprises, Third Party Defendant–Appellant
Karen D'Onofrio, Plaintiff–Appellant
v.
Vacation Publications, Incorporated, doing business as Vacations To Go, Defendant–Appellee

No. 16-20628
|
April 23, 2018

Synopsis

Background: Former employee brought action against former employer for interfering with her rights under the Family Medical Leave Act (FMLA). Employer counterclaimed against employee and her husband for breach of covenant not to compete, conversion of confidential information, and tortious interference with business relations. Action was consolidated with employee's separate Title VII case. The United States District Court for the Southern District of Texas, Lynn N. Hughes, J., 2016 WL 11083941, granted summary judgment to employer, and, 2017 WL 8780887, awarded attorney's fees to employer as prevailing party. Employee and husband appealed.

Holdings: The Court of Appeals, Stephen A. Higginson, Circuit Judge, held that:

[1] district court had supplemental subject-matter jurisdiction over employer's state-law claims against husband;

[2] summary judgment affidavits were not competent evidence;

[3] employer did not interfere with employee's FMLA rights by requiring her to perform work while on leave;

[4] district court's error in failing to give notice before sua sponte granting summary judgment to employer on Title VII hostile work environment claim was not harmless;

[5] covenants not to compete were unreasonable restraints on trade and therefore were unenforceable;

[6] genuine disputes of material fact precluded summary judgment on employer's conversion claim; and

[7] genuine dispute of material fact precluded summary judgment on employer's claim for tortious interference with business relationships.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes (53)

[1] **Federal Courts**
Jurisdiction

Court of Appeals reviews a district court's assumption of subject-matter jurisdiction de novo.

Cases that cite this headnote

[2] **Federal Courts**
Supplemental jurisdiction

Once subject-matter jurisdiction is established, Court of Appeals reviews district court's decision to exercise supplemental jurisdiction for abuse of discretion.

2 Cases that cite this headnote

[3] **Federal Courts**
Necessity of Objection;Power and Duty of Court

Federal Courts
Pleadings and motions

Federal Courts

Presumptions and burden of proof

District court could not assume its jurisdiction for purposes of deciding a case on the merits, and thus it erred in terminating defendant's motion to dismiss for lack of subject-matter jurisdiction after it granted plaintiff's motion for summary judgment, including on claims that defendant sought to have dismissed for lack of jurisdiction.

Cases that cite this headnote

[4] **Federal Courts**

Jurisdiction of Entire Controversy; Pendent and Supplemental Jurisdiction

Question for determining federal district court's supplemental jurisdiction is whether the supplemental claims are so related to original-jurisdiction claims that they derive from a common nucleus of operative fact. 28 U.S.C.A. § 1367(a).

2 Cases that cite this headnote

[5] **Federal Courts**

Claims under statutes, ordinances, or regulations

District court had supplemental subject-matter jurisdiction over employer's third-party state-law claims against former employee's husband, in employee's action against employer for interference with her FMLA rights; there was common nucleus of operative fact between employee's FMLA claims and employer's state-law claims against husband, as employer contended employee was not eligible for FMLA leave because she misrepresented her reasons for taking leave and improperly used leave to help husband establish cruise franchise that competed with employer's, and employer alleged in its claims against husband that he conspired with employee in committing fraud, breaching her covenant not to compete, and breaching her fiduciary duty. 28 U.S.C.A. § 1367(a); Family and Medical Leave Act of 1993 § 102, 29 U.S.C.A. § 2612(a)(1)(C).

1 Cases that cite this headnote

[6] **Federal Courts**

Claims under statutes, ordinances, or regulations

District court acted within its discretion in exercising its supplemental jurisdiction over employer's third-party state-law claims against former employee's husband, in employee's action against employer for interference with her FMLA rights; even if state-law claims predominated over FMLA claims, state-law issues were neither novel nor complex, district court had not dismissed FMLA claims, no other exceptional circumstances compelled declining jurisdiction, and considerations of judicial economy, convenience, fairness, and comity weighed in favor of exercising jurisdiction, as parties had exchanged substantial discovery and there was no apparent unfairness resulting from exercise of jurisdiction. 28 U.S.C.A. § 1367(a); Family and Medical Leave Act of 1993 § 102, 29 U.S.C.A. § 2612(a)(1)(C).

1 Cases that cite this headnote

[7] **Federal Courts**

Depositions and discovery

Rulings on motions for discovery are reviewed by Court of Appeals for abuse of discretion.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**

Admissibility

At the summary judgment stage, evidence relied upon need not be presented in admissible form, but it must be capable of being presented in a form that would be admissible in evidence. Fed. R. Civ. P. 56(c)(4).

2 Cases that cite this headnote

[9] **Federal Civil Procedure**

Admissibility

Neither legal conclusions nor statements made without personal knowledge are capable of being presented in admissible form, as required to support motion for summary judgment. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 701, 702.

2 Cases that cite this headnote

[10] **Federal Civil Procedure**

Sufficiency of showing

Statements in employees' summary judgment affidavits, that former employee had violated covenant not to compete, that covenant was reasonable and enforceable, and that former employee had made material misrepresentations to employer, were legal conclusions and thus were not competent evidence on employer's motion for summary judgment on claim against employee for breach of covenant not to compete. Fed. R. Civ. P. 56(c)(4).

Cases that cite this headnote

[11] **Federal Civil Procedure**

Sufficiency of showing

Damages calculation in employee's summary-judgment affidavit was speculative and not adequately based on personal knowledge, and thus it should not have been relied on to support employer's motion for summary judgment on claims against former employee for conversion and breach of covenant not to compete; employee based his estimate of former employee's commissions with employer's competitor on his knowledge of how commissions worked in industry, not how they worked at competitor, he calculated employer's damages to include all former employee's revenues while identifying only one former customer of employer who subsequently did business with former employee, and he failed to adequately explain reasoning behind calculations. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602.

Cases that cite this headnote

[12] **Damages**

Loss of earnings, services, or consortium

Damages

Mode of estimating damages in general

Damages

Mode of estimating damages in general

Texas law requires that lost-profits damages be based on net profits, not gross revenue or gross profits.

Cases that cite this headnote

[13] **Labor and Employment**

Denial of or interference with rights in general

To establish a claim for FMLA interference, an employee must show that the defendant interfered with, restrained, or denied her exercise or attempt to exercise FMLA rights, and that the violation prejudiced her. Family and Medical Leave Act of 1993 §§ 102, 102, 102, 29 U.S.C.A. §§ 2612(a)(1)(C), (c), 2615(a)(1).

Cases that cite this headnote

[14] **Labor and Employment**

Denial of or interference with rights in general

FMLA interference claim merely requires proof that the employer denied the employee her entitlements under the FMLA. Family and Medical Leave Act of 1993 §§ 102, 102, 102, 29 U.S.C.A. §§ 2612(a)(1)(C), (c), 2615(a)(1).

Cases that cite this headnote

[15] **Labor and Employment**

Other particular rights or violations

Giving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued

employment. Family and Medical Leave Act of 1993 §§ 102, 102, 102, 29 U.S.C.A. §§ 2612(a)(1)(C), (c), 2615(a)(1).

Cases that cite this headnote

[16] **Labor and Employment**
Other particular rights or violations

Employer did not interfere with employee's FMLA rights by requiring her to perform work while on leave, rather, employer gave employee the option to either take unpaid leave or continue to service her existing vacation-sales accounts while on leave in order to continue to earn commissions on those accounts. Family and Medical Leave Act of 1993 §§ 102, 102, 102, 29 U.S.C.A. §§ 2612(a)(1)(C), (c), 2615(a)(1).

Cases that cite this headnote

[17] **Federal Civil Procedure**
Motion

While district courts may grant summary judgment sua sponte, they must first give the parties notice and a reasonable time to respond. Fed. R. Civ. P. 56(f).

Cases that cite this headnote

[18] **Federal Courts**
Summary judgment

Harmless error doctrine applies to lack of notice that is required before district court may grant summary judgment sua sponte, and a sua sponte grant of summary judgment may be affirmed if the nonmoving party admits that he has no additional evidence anyway or if the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact. Fed. R. Civ. P. 56(f).

Cases that cite this headnote

[19] **Federal Courts**
New Trial, Rehearing, or Reconsideration

Plain-error review applies when the party against whom sua sponte summary judgment is granted moves for reconsideration but does not, in that motion, challenge the procedural propriety of the summary judgment ruling. Fed. R. Civ. P. 56(f), 59(e).

Cases that cite this headnote

[20] **Federal Courts**
Summary judgment

District court's error in failing to give notice before sua sponte granting summary judgment to employer on former employee's Title VII hostile work environment claim was not harmless; there was no pending motion for summary judgment on the claim, and the lack of notice deprived the employee of the opportunity to collect and submit evidence, such as by deposing key witnesses or issuing written discovery demands to employer. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed. R. Civ. P. 56(f).

Cases that cite this headnote

[21] **Contracts**
Restraint of Trade or Competition in Trade

Under Texas law, reasonable covenants not to compete serve the legitimate business interest of preventing departing employees from using the business contacts and rapport established during their employment to take the employer's clients with them when they leave.

Cases that cite this headnote

[22] **Contracts**
General or Partial Restraint

Under Texas law, covenants not to compete that extend to clients with whom the employee had no dealings during her employment or amount to industry-wide exclusions are overbroad and unreasonable. Tex. Bus. & C. Code § 15.50(a).

Cases that cite this headnote

[23] **Contracts**
Restrictions unlimited as to place

Under Texas law, absence of a geographical restriction will generally render a covenant not to compete unreasonable. Tex. Bus. & C. Code § 15.50(a).

Cases that cite this headnote

[24] **Contracts**
General or Partial Restraint

Under Texas law, covenants not to compete were unreasonable restraints on trade and therefore were unenforceable by ocean-cruise sales company against its former employee; covenants amounted to an industry-wide restriction, preventing former employee from working in any job related to the sales or marketing of not just ocean cruises, but also a host of other travel products, such as escorted or independent tours, safaris, or resort stays. Tex. Bus. & C. Code § 15.50(a).

Cases that cite this headnote

[25] **Federal Courts**
Need for further evidence, findings, or conclusions

Remand was appropriate for district court to reform under Texas law, if possible, unenforceable covenants not to compete in agreement between ocean-cruise sales company and its former employee; Court of Appeals had determined covenants amounted to impermissible industry-wide restriction, but reformation on appeal was impossible because the record lacked the requisite information concerning either the geographical territories in which the former employee worked or the customers with whom she did business. Tex. Bus. & C. Code § 15.50(a).

Cases that cite this headnote

[26] **Federal Civil Procedure**
Tort cases in general

Genuine disputes of material fact existed as to whether employee and her husband accessed or exercised control over employer's customer lists or other confidential information by unlawful means, as to whether employee refused employer's demand for return of property, and as to amount of any damages, precluding summary judgment on employer's conversion claim under Texas law against employee and husband. Fed. R. Civ. P. 56.

Cases that cite this headnote

[27] **Conversion and Civil Theft**
In general;nature and elements

Under Texas law, elements of a conversion cause of action are: (1) the plaintiff owned, had legal possession of, or was entitled to possession of the property; (2) the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with the plaintiff's rights; and (3) the defendant refused plaintiff's demand for the return of the property.

Cases that cite this headnote

[28] **Conversion and Civil Theft**
Intangible and intellectual property in general

There is no cause of action under Texas law for conversion of intangible property except in cases where an underlying intangible right has been merged into a document and that document has been converted.

Cases that cite this headnote

[29] **Conversion and Civil Theft**
Intangible and intellectual property in general

Under Texas law, illegally taking a list of customer information can give rise to a claim for conversion.

Cases that cite this headnote

[30] **Conversion and Civil Theft**
In general;nature and elements

Under Texas law, plaintiff must prove damages before recovery is allowed for conversion.

Cases that cite this headnote

[31] **Conversion and Civil Theft**
Measure of damages in general

Under Texas law, measure of damages for a conversion claim is generally the fair market value of the property at the time and place of the conversion.

Cases that cite this headnote

[32] **Torts**
Prospective advantage, contract or relations;expectancy

Under Texas law, elements of tortious interference with a prospective business relationship are that (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result.

2 Cases that cite this headnote

[33] **Federal Civil Procedure**
Tort cases in general

Genuine issue of material fact existed as to whether there was reasonable probability that employer would have entered into business relationships with clients who previously booked travel with it or contacted it for travel bookings, but who instead booked travel with former employee, precluding summary judgment on employer's claim under Texas law against former employee for tortious interference with prospective business relationships.

3 Cases that cite this headnote

[34] **Federal Civil Procedure**
Tort cases in general

Genuine issue of material fact existed as to whether employer suffered any actual harm or damages as result of its clients who booked travel with former employee, precluding summary judgment on employer's claim under Texas law against former employee for tortious interference with existing business relationships.

1 Cases that cite this headnote

[35] **Conspiracy**
Nature and Elements in General

Under Texas law, elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result.

Cases that cite this headnote

[36] **Conspiracy**
Nature and Elements in General

Under Texas law, civil conspiracy is a derivative tort, and a defendant's liability for conspiracy depends on participation in some underlying tort.

Cases that cite this headnote

[37] **Conspiracy**
Nature and Elements in General

Under Texas law, where underlying tort claim fails, so too does civil conspiracy claim.

Cases that cite this headnote

[38] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine dispute of material fact existed as to whether employee did anything more than prepare to compete with her employer while still working for it, precluding summary judgment on employer's claims under Texas law for breach of fiduciary duty and knowing participation in breach of fiduciary duty against employee and her husband respectively.

Cases that cite this headnote

[39] **Fraud**
Fiduciary or confidential relations

Under Texas law, elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship must exist between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant.

1 Cases that cite this headnote

[40] **Fraud**
Persons liable

Third party who knowingly participates in breach of a fiduciary duty becomes a joint tortfeasor with the fiduciary and is liable as such.

Cases that cite this headnote

[41] **Fraud**
Persons liable

Under Texas law, to establish a claim for knowing participation in a breach of fiduciary duty, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of a fiduciary relationship.

Cases that cite this headnote

[42] **Labor and Employment**
Fiduciary duty

Under Texas law, it is generally true that employees are not fiduciaries of their employers simply by virtue of the employment relationship.

Cases that cite this headnote

[43] **Labor and Employment**
Self-serving conduct

Under Texas common-law principles of agency, employees do owe certain limited fiduciary duties to not compete with their employers.

Cases that cite this headnote

[44] **Labor and Employment**
Self-serving conduct

Under Texas law, scope of employee's common-law fiduciary duties not to compete are carefully and narrowly drawn to balance an employer's right to demand and receive loyalty with society's legitimate interest in encouraging competition, and thus an at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed, but an employee may not appropriate his employer's trade secrets, solicit his employer's customers while still working for his employer, or carry away certain information, such as lists of customers.

Cases that cite this headnote

[45] **Labor and Employment**
Self-serving conduct

Under Texas law, employee's becoming the part owner of a competing franchise is insufficient to establish breach of a fiduciary duty to employer.

Cases that cite this headnote

[46] **Labor and Employment**
Duty not to compete in general

Under Texas law, employee's fiduciary duty to not compete with her employer ends when the employment relationship ends.

Cases that cite this headnote

[47] **Fraud**
Elements of Actual Fraud

Under Texas law, elements of common-law fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Cases that cite this headnote

[48] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine dispute of material fact existed as to whether employee took FMLA leave to care for her husband or to attend training with employer's competitor, precluding summary judgment on employer's claim against employee under Texas law for fraud based on employee's alleged misrepresentation of her need of FMLA leave. Family and Medical Leave Act of 1993 § 102, 29 U.S.C.A. § 2612(a)(1)(C).

Cases that cite this headnote

[49] **Fraud**
Fraudulent Concealment

Under Texas law, elements of fraud by nondisclosure are: (1) the defendant failed to disclose material facts to the plaintiff that the defendant had a duty to disclose; (2) the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal opportunity to discover the facts; (3) the defendant was deliberately silent when the defendant had a duty to speak; (4) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (5) the plaintiff relied on the defendant's nondisclosure; and (6) the plaintiff was injured as a result of acting without that knowledge.

Cases that cite this headnote

[50] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving
Federal Civil Procedure
Tort cases in general

Genuine dispute of material fact existed as to whether employee actively engaged in any competitive conduct with respect to employer until after she believed that she had been terminated, precluding summary judgment on employer's claim against employee under Texas law for fraud based on employee's failure to disclose her intent to compete with employer as the partial owner of competing franchise.

Cases that cite this headnote

[51] **Federal Civil Procedure**
Employees and Employment Discrimination, Actions Involving

Genuine dispute of material fact existed as to whether employer suffered any damages as result of employee's failure to disclose her intention to attend a competitor's training while on FMLA leave, precluding summary judgment on employer's claim against employee under Texas law for fraud by nondisclosure. Family and Medical Leave Act of 1993 § 102, 29 U.S.C.A. § 2612(a)(1)(C).

Cases that cite this headnote

[52] **Federal Civil Procedure**
Appellate Costs

Trial court may not grant an unconditional award of appellate attorneys' fees.

Cases that cite this headnote

[53] **Costs**
American rule;necessity of contractual or statutory authorization or grounds in equity

Under Texas law, the recovery of attorneys' fees must be authorized by statute.

Cases that cite this headnote

***203** Appeals from the United States District Court for the Southern District of Texas, Lynn N. Hughes, U.S. District Judge

Attorneys and Law Firms

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Mary Alice Parsons, Esq., Hext & Parsons, L.L.P., Houston, TX, for Third Party Defendant–Appellant.

Before WIENER, HIGGINSON, and COSTA, Circuit Judges.

Opinion

STEPHEN A. HIGGINSON, Circuit Judge:

In this employment dispute, Karen D'Onofrio sued her former employer, Vacations to Go ("VTG" or "Vacation"), a division of Vacation Publications, Inc., the largest seller of ocean-going cruises in the world, for interfering with her rights under the Family Medical Leave Act. Vacation counter sued, alleging that Karen and her husband, Michael D'Onofrio, breached Karen's covenant not to compete, converted confidential information, and tortuously interfered with its business relationships, among other things, by conspiring to establish a competing vacation-sales franchise. A year after Vacation moved for summary judgment, the district court granted that motion—terminating all pending motions and entering final judgment on all claims, including those not addressed in its order. Finding numerous disputes of material fact, we reverse in part, affirm in part, vacate the district court's award of attorneys' fees, damages, and injunctive relief, and remand for further proceedings.

I.

A.

Karen D'Onofrio began working as a sales representative for Vacation in 2012. ***204** Vacation provided Karen with specialized training in sales and marketing and with industry knowledge and confidential information including client information and marketing and sales techniques. The employment contract she signed with Vacation stated that during the course of her employment and for 18 months thereafter she would not, among other things: (1) "[w]ork in any capacity ... for any direct or indirect competitor of VTG in any job related to sales or marketing of cruises, escorted or independent tours, river cruises, safaris, or resort stays"; (2) "[d]isclose directly or indirectly VTG's ... Confidential Information to any person ... for any purpose or reason whatsoever"; (3) "[d]irectly or indirectly use VTG's ... Confidential Information for [her] own benefit for any purpose whatsoever"; (4) "[s]olicit, engage in selling to, engage in business with, or call upon any person or entity who or which has purchased a cruise, escorted or independent tour, river cruise, safari or resort stay from VTG within the preceding 3 years"; or (5) "[s]olicit or induce any person that has been a customer of VTG within the preceding 3 years to terminate its relationship with VTG."

Michael is an aerospace engineer, but has supplemented his income throughout his career with various direct-sales ventures, including cookware, kitchen gadgets, and mattresses. In 2011, he was involved in a major car accident in which he sustained severe and lasting injuries requiring multiple surgeries. Due to the injuries he sustained, he found it impossible to continue his direct-sales business as he could no longer carry the products

he sold to customers or trade shows. In April 2014, prior to undergoing major back surgery, Michael decided to pursue a "long-held desire" to sell travel services, which he could do without carrying heavy merchandise. He decided to purchase a franchise of CruiseOne, a company that also sells cruises and other travel-related products and services. In support of his application to purchase the franchise, Michael attached a screenshot of Karen's sales records at Vacation, including her sales totals but not customer information. In May 2014, the D'Onofrios executed a franchise agreement between CruiseOne and Tranquility Base Enterprises, an entity jointly owned by Michael and Karen.

On July 7, 2014, Karen received a confirmation e-mail stating that she was scheduled to attend a CruiseOne training in Florida beginning on July 10. On July 9, at the suggestion of Vacation's human resources ("HR") specialist, Karen requested leave from Vacation pursuant to the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2612(a)(1)(C), in order to care for Michael. Vacation offered Karen two options: she could go on unpaid FMLA leave or she could log in remotely a few times per week and continue to service her existing accounts so that she could keep the commissions from those accounts while on leave. Karen chose the latter option, and agreed to continue servicing existing clients but not take new leads. On July 10, she attended the CruiseOne training in Florida while Michael stayed home.

On July 14, 2014, Vacation's senior director of HR e-mailed Karen confirming that her FMLA leave had begun on July 11 and asking that she update her e-mail away message to reflect that she was on leave but would be responding to clients periodically. On July 17, Karen's manager checked Karen's Vacation e-mail account to ensure that she had updated her away message, and noticed that Karen had not responded to any e-mails since July 12. Her manager had also received several complaints from Karen's clients that she had not responded to their voicemails. The HR director then sent Karen an e-mail reiterating Karen's responsibilities if she ***205** wanted to continue servicing clients and receiving commissions while on leave. Karen responded on July 21, stating that her laptop had not been working. On August 11, after not being able to reach Karen for over a week, her manager accessed Karen's Vacation e-mail account and found 220 unread e-mails. Karen had not read a single e-mail since July 26.

In light of Karen's failure to respond to client e-mails and voicemails, the HR director decided to bring Karen's clients in house while she was on leave. He e-mailed her to inform her of the change, explaining that the clients would be returned to her upon her return from FMLA leave. Karen was also locked out of her Vacation accounts. The senior director of operations then e-mailed Vacation's in-house salespersons, informing them that they would be covering Karen's clients while she was on leave and asking that they inform Karen's clients of the arrangement. One manager mistakenly informed 23 clients via e-mail that Karen was no longer working at Vacation. One such e-mail went to Michael, as he had previously booked a cruise through his wife.

After being locked out of her Vacation accounts and learning of the e-mail that Michael received, Karen believed that she had been terminated from Vacation. She filed for unemployment benefits on August 24, 2014. In response, Vacation indicated that Karen was still employed and on FMLA leave. In October 2014, Vacation e-mailed Karen confirming that her FMLA leave had expired and asking whether she planned to return. Karen responded that she was not returning because she believed that she had been terminated in August.

Karen also alleges that she was sexually harassed during her employment with Vacation. She alleges that one Vacation employee, an IT technician, touched her breasts and, after she reported the conduct, continued to hover around her work area, stare at her, and make unwanted physical contact with her. After reporting the continued harassment, she was reassigned to another department on a different floor, but other employees, including supervisors, allegedly made inappropriate comments and jokes, used obscene language, and engaged in unwanted physical contact.

B.

Because it is relevant to several of the issues raised on appeal, we recount in some detail the tangled procedural history of this case. In February 2015, Karen filed suit against Vacation in state court alleging FMLA violations. Vacation filed counterclaims against Karen for breach of contract, conversion of confidential information, fraud, tortious interference with existing and prospective

business relations, and breach of fiduciary duty. Vacation subsequently removed the case to federal court. It then sought and received leave to join Michael as a third-party defendant, asserting claims against him for conversion, civil conspiracy, tortious interference, and aiding and abetting breach of fiduciary duties.

In June 2015, Karen moved to voluntarily dismiss her FMLA claims, which Vacation opposed and the district court denied. In July, Michael moved to dismiss the complaint against him for lack of subject-matter jurisdiction. Then in August, Vacation moved for summary judgment on Karen's FMLA claims against it and its claims against both her and Michael. The next month, Karen, proceeding *pro se*, filed a separate federal lawsuit asserting claims for sexual harassment by two Vacation employees in violation of Title VII, which was consolidated with this case in December 2015.

***206** On August 22, 2016, the district court granted Vacation's motion for summary judgment.[1] The court terminated all pending motions, including Michael's motion to dismiss for lack of subject-matter jurisdiction (which was not addressed in the court's order) and issued a final judgment disposing of all claims, including the sexual harassment claims added in December 2015 (which were not addressed in either Vacation's motion for summary judgment or the court's order). The D'Onofrios timely appealed.

II.

A.

[1] **[2]** **[3]** Michael first contends that the district court lacked subject-matter jurisdiction over the claims against him because they were state-law claims that did not arise out of the same nucleus of operative fact as Karen's federal FMLA claims against Vacation.[2] We "review[ ] a district court's assumption of subject-matter jurisdiction *de novo*." *Arena v. Graybar Elec. Co.*, 669 F.3d 214, 218–19 (5th Cir. 2012). Once subject-matter jurisdiction is established, we review the decision to exercise supplemental jurisdiction for abuse of discretion. *See Mendoza v. Murphy*, 532 F.3d 342, 346 (5th Cir. 2008).[3]

[4] Federal district courts have "supplemental jurisdiction over all ... claims that are so related to claims in the action within [the district court's] original jurisdiction that they form part of the same case or controversy under Article III," including "claims that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a); *see also State Nat. Ins. Co. v. Yates*, 391 F.3d 577, 579 (5th Cir. 2004).[4] "The question under section 1367(a) is whether the supplemental claims are so related to the original claims that they ... 'derive from a common nucleus of operative fact.' " *Mendoza*, 532 F.3d at 346 (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)).

[5] Here, there is a "common nucleus of operative fact" between Karen's FMLA claims and Vacation's state-law claims ***207** against Michael. Karen alleged that Vacation interfered with her rights under the FMLA. In defense, Vacation argued that Karen was not eligible for FMLA leave because she misrepresented her reasons for taking leave and improperly used her leave to help Michael establish a CruiseOne franchise, including by attending a CruiseOne training. In its claims against Michael, Vacation alleges that he conspired with Karen in committing fraud, breaching her covenant not to compete, and breaching her fiduciary duty to Vacation. Thus, the question whether Karen was entitled to FMLA leave—or, more to the point, whether she misused her leave in order to start a competing enterprise with Michael—derives from the same nucleus of operative facts as Vacation's claims against Michael. Accordingly, the district court had subject-matter jurisdiction over Vacation's state-law claims against Michael. *See State Nat. Ins. Co.*, 391 F.3d at 579, 581 (holding that district court had supplemental jurisdiction over defendant's state-law counterclaims against additional party).

[6] Section 1367(c) provides that district courts may decline to exercise supplemental jurisdiction over a claim if: (1) "the claim raises a novel or complex issue of State law"; (2) "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction"; (3) "the district court has dismissed all claims over which it has original jurisdiction"; or (4) "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c). Here, consideration of those factors, and of judicial economy, convenience, fairness, and comity, lead us to conclude that the exercise of supplemental jurisdiction was

proper in this case. *See Mendoza*, 532 F.3d at 346 (stating that our review of the exercise of supplemental jurisdiction is guided by the § 1367(c) factors and "considerations of judicial economy, convenience, fairness, and comity").

Of the § 1367(c) factors, only the second even conceivably weighs in favor of declining supplemental jurisdiction. Vacation's claims arguably predominate "in terms of proof, ... the scope of the issues raised, [and] the comprehensiveness of the remedy sought," *Jackson v. Stinchcomb*, 635 F.2d 462, 473 (5th Cir. 1981) (quoting *Gibbs*, 383 U.S. at 726, 86 S.Ct. 1130), though, as discussed above, the claims are intertwined. Regardless, the remaining three factors weigh clearly in favor of retaining jurisdiction. The state-law issues raised, while numerous, are neither novel nor complex; the district court had not dismissed the FMLA claims; and no other exceptional circumstances compelled declining jurisdiction.

Consideration of the common-law factors of judicial economy, convenience, fairness, and comity further convince us that the district court did not abuse its discretion by exercising supplemental jurisdiction. By the time that Michael filed his motion to dismiss for lack of subject-matter jurisdiction, the parties had exchanged substantial discovery.[5] In fact, Vacation's motion for summary judgment was filed just one month later. Finally, there does not appear to be, nor does Michael identify, any unfairness resulting from the exercise of supplemental jurisdiction.

***208 B.**

[7] Before turning to the D'Onofrios' various challenges to the district court's grant of summary judgment, we first address their evidentiary challenges. *See Christophersen v. Allied–Signal Corp.*, 939 F.2d 1106, 1109 (5th Cir. 1991) (en banc) (stating that, in an appeal from summary judgment raising evidentiary issues, we first "review the trial court's evidentiary rules, which define the summary judgment record"), *abrogated on other grounds by Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Rulings on motions for discovery are reviewed for abuse of discretion. *Atkinson v. Denton Publ'g Co.*, 84 F.3d 144, 147 (5th Cir. 1996).

1.

First, Karen contends that the district court erred by not sustaining her objections to various statements in the depositions of three Vacation employees. She argues that the following were either inadmissible conclusions or made without personal knowledge: statements in the affidavit of Thain Allen that Karen had violated the covenant not to compete, that the covenant was enforceable, and that Karen had made material misrepresentations to Vacation; statements in the affidavit of Emerson Hankamer that the covenant not to compete was reasonable; and statements in the affidavit of Robert Baker calculating damages based on his knowledge of "how commissions work in the industry" generally rather than how they work at CruiseOne specifically.

[8] [9] Rule 56(c)(4) of the Federal Rules of Civil Procedure provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). At the summary judgment stage, evidence relied upon need not be presented in admissible form, but it must be "*capable* of being 'presented in a form that would be admissible in evidence.' " *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016) (quoting Fed. R. Civ. P. 56(c)(2)). Neither legal conclusions nor statements made without personal knowledge are capable of being so presented. *See* Fed. R. Evid. 602, 701, 702.

[10] [11] [12] The objected-to statements of Allen and Hankamer are legal conclusions and thus are not competent summary judgment evidence. *See Cutting Underwater Techs. USA, Inc. v. Eni U.S. Operating Co.*, 671 F.3d 512, 515 (5th Cir. 2012) (stating that conclusions of law cannot be utilized in a motion for summary judgment). The objected-to calculation of damages in the Baker affidavit is speculative and not adequately based on personal knowledge. *See* Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602. He bases his estimate of the D'Onofrios' commissions on his knowledge of "how commissions work in the industry," not how they work at CruiseOne in particular;[6] calculates Vacation's damages to include all of the D'Onofrios' revenues while identifying only one former Vacation customer who subsequently did

business with the D'Onofrios;[7] and fails to adequately ***209** explain the reasoning behind his calculations.[8] The objected-to statements should not have been relied upon to support summary judgment.[9] *See Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992) (holding that conclusory assertions in affidavit could not be relied upon in summary judgment proceedings).

2.

Second, Michael contends that the district court erred by denying his motion for discovery. Shortly after he was joined as a party, Michael moved for permission to issue seven requests for production and nineteen interrogatories and to depose a corporate representative of Vacation pursuant to Rule 30(b)(6).[10] The district court never ruled on that motion; it simply terminated the motion when it granted Vacation's motion for summary judgment. Finding the evidence in the record sufficient to reverse the grant of summary judgment against Michael, we need not reach the issue.

C.

Karen contends that the district court erred by granting summary judgment against her on her claims of FMLA interference and hostile work environment. She contends that Vacation interfered with her right to FMLA leave by requiring her to perform work while on leave and that the district court erred by granting summary judgment *sua sponte* on her hostile work environment claim without giving her prior notice as required under Rule 56(f). We affirm the district court with respect to the FMLA claims, but find reversible error with respect to the hostile work environment claim.

1.

[13] **[14]** An employee is generally entitled to up to 12 weeks of unpaid leave to care for a spouse with a serious health condition, and employers may not interfere with the employee's attempt to take such leave. *See* 29 U.S.C. §§ 2612(a)(1)(C) & (c), 2615(a)(1). To establish a claim for FMLA interference, an employee must show that the defendant "interfered with, restrained, or denied her exercise or attempt to exercise FMLA rights, and that the violation prejudiced her." *Bryant v. Tex. Dep't of Aging & Disability Servs.*, 781 F.3d 764, 770 (5th Cir. 2015) (quoting *Cuellar v. Keppel Amfels, L.L.C.*, 731 F.3d 342, 347 (5th Cir. 2013)). "An 'interference claim merely requires proof that the employer denied the employee [her] entitlements under the FMLA.' " *Acker v. Gen. Motors, L.L.C.*, 853 F.3d 784, 788 (5th Cir. 2017) (quoting *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1051 (8th Cir. 2006)).

***210** **[15]** **[16]** The parties agree that Karen was given the option to either take unpaid leave or continue to service her existing accounts while on leave in order to continue to earn commissions on those accounts. Giving employees the option to work while on leave does not constitute interference with FMLA rights so long as working while on leave is not a condition of continued employment. *See Massey–Diez v. Univ. of Iowa Cmty. Med. Servs., Inc.*, 826 F.3d 1149, 1159–60 (8th Cir. 2016) (noting that FMLA regulations "permit voluntary and uncoerced acceptance of work by employees on medical leave, so long as acceptance is not a condition of employment"); *cf. Evans v. Books-a-Million*, 762 F.3d 1288, 1297 (11th Cir. 2014) (noting that an employer may violate employee's FMLA rights by *coercing* her to work while on leave). Here, Karen entered a joint statement of fact stating that she was presented with the two options and that she chose to continue servicing her existing accounts. Accordingly, Vacation did not interfere with Karen's FMLA rights and we affirm the grant of summary judgment on Karen's FMLA claims.

2.

[17] **[18]** **[19]** Karen maintains that the district court also erred by granting summary judgment *sua sponte* on her hostile work environment claim without giving prior notice. While district courts may grant summary judgment *sua sponte*, *see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1397 (5th Cir. 1994), they must first give the parties "notice and a reasonable time to respond," Fed. R. Civ. P. 56(f).[11] We have "strictly enforced" the notice requirement. *Leatherman*, 28 F.3d at 1397. However, "the harmless error doctrine applies to lack of notice required by rule 56[f]," and the *sua sponte* grant of summary judgment may be affirmed "if the nonmoving party admits

that he has no additional evidence anyway" or if "the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." *Id.* at 1398 (quoting *Powell v. United States*, 849 F.2d 1576, 1580, 1582 (5th Cir. 1988)). [12]

[20] Here, the district court granted summary judgment on Karen's hostile work environment claim despite there being no pending motion for summary judgment on that claim. It erred by failing to give notice of its intent to grant summary judgment *sua sponte*, as required by Rule 56(f). [13] Vacation defends that error as harmless because, according to Vacation, Karen failed to present sufficient evidence ***211** to support her hostile work environment claim. However, Karen's failure to marshal sufficient evidence *before* receiving any notice that the district court was considering the merits of her hostile work environment claim does not mean that the error was harmless. She contends that, had she received notice, she would have deposed key Vacation witnesses, including the individual employees who allegedly harassed her, and issued written discovery to Vacation on her harassment claim. [14] Where, as here, the lack of notice deprived the non-moving party of the opportunity to collect and submit summary judgment evidence, the error is not harmless. *See Powell*, 849 F.2d at 1582. We therefore reverse the grant of summary judgment on Karen's hostile work environment claim.

D.

The D'Onofrios next contend that the district court erred by granting summary judgment in favor of Vacation on its various claims against them. We address each claim in turn.

1.

Karen contends that the district court erred by granting summary judgment on Vacation's claim for breach of contract. She insists that the covenants not to compete that Vacation alleges she breached were unreasonable and therefore unenforceable under Texas law. We agree that the covenants are unreasonable as written.

[21] Reasonable covenants not to compete serve the legitimate business interest of preventing departing employees from "using the business contacts and rapport established" during their employment to take the employer's clients with them when they leave. *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 387 (Tex. 1991). A covenant not to compete is enforceable under Texas law if it is "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." Tex. Bus. & Com. Code § 15.50(a). [15] In the case of personal services occupations, such as salespersons, the employer has the burden of establishing that covenants not to compete meet the requirements of § 15.50. Tex. Bus. & Com. Code § 15.51(b). If a court determines that a covenant not to compete does not contain reasonable time, geography, and scope limitations, but is otherwise enforceable, then it "shall reform the covenant to the extent necessary to cause the limitations contained in the covenant" to be "reasonable and to impose a restraint that is not greater than necessary." *Id.* § 15.51(c).

[22] **[23]** **[24]** Under Texas law, covenants not to compete that "extend[ ] to clients with whom the employee had no dealings during [her] employment" or amount to industry-wide exclusions are "overbroad and unreasonable." ***212** *Gallagher Healthcare Ins. Servs. v. Vogelsang*, 312 S.W.3d 640, 654 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 1996, writ denied)). Similarly, the absence of a geographical restriction will generally render a covenant not to compete unreasonable. *See Peat Marwick Main & Co.*, 818 S.W.2d at 387 (stating that a restrictive covenant "must not restrain [a former employee's] activities into a territory into which his former work has not taken him" (quoting *Wis. Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819, 820 (1933))). Here, the covenants at issue prohibit Karen—for a period of 18 months after her employment with Vacation—from, among other things, working "in any capacity" for "any direct or indirect competitor of VTG in any job related to sales or marketing of cruises, escorted or independent tours, river cruises, safaris, or resort stays" or doing any business with "any person or entity" who has purchased a cruise or other

travel product from Vacation in the preceding 3 years. The covenants amount to an industry-wide restriction—preventing former employees from working in any job related to the sales or marketing of not just cruises, but also a host of other travel products—and are not limited as to either geography or clients with whom former employees actually worked during their employment. Accordingly, they amount to unreasonable restraints on trade and are therefore unenforceable. *See Gallagher Healthcare Ins. Servs.*, 312 S.W.3d at 654; *Wright v. Sport Supply Grp., Inc.*, 137 S.W.3d 289, 298 (Tex. App.—Beaumont 2004, no pet.) (holding that covenant that included geographical restriction but did "not limit the prohibitions just to customers with whom [the former employee] had dealings while he was employed" was "over broad" and an "unreasonable restraint[ ] of trade").

[25] Section 15.51 of the Texas Business and Commerce Code requires courts to reform covenants found to be unreasonable as to time, geographical area, or scope of activity. Tex. Bus. & Com. Code § 15.51(c). However, such reformation is impossible when, as here, the record lacks the requisite information concerning either the geographical territories in which the former employee worked or the customers with whom she did business. A remand is therefore appropriate to permit the district court to make those initial determinations and reform the covenants accordingly. *See Wright*, 137 S.W.3d at 299 (remanding to trial court for reformation where record was unclear as to who former employee's customers were).

2.

[26] The D'Onofrios further assert that the district court erred by granting summary judgment on Vacation's conversion of confidential information claims. Finding material disputes of fact, we agree and reverse.

[27] **[28]** **[29]** "The elements of a conversion cause of action are: (1) the plaintiff[ ] owned, had legal possession of, or was entitled to possession of the property; (2) the defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner, to the exclusion of and inconsistent with the plaintiff's rights; and (3) the defendant refused plaintiff's demand for the return of the property." *Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, 404 S.W.3d 737, 748 (Tex. App.—El Paso 2013, no pet.). There is no cause of action under Texas law for "conversion of intangible property except in cases where an underlying intangible right has been merged into a document and that document has been converted." ***213** *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 901 (Tex. App.—Dallas 2001, no pet.). For example, illegally taking a list of customer information can give rise to a claim for conversion. *See Deaton v. United Mobile Networks, L.P.*, 926 S.W.2d 756, 763 (Tex. App.—Texarkana 1996) ("[T]he illegal taking of the customer information would constitute conversion."), *aff'd in part, rev'd in part on other grounds*, 939 S.W.2d 146 (Tex. 1997).

Vacation argues that Karen had access to its confidential information and trade secrets, including customer lists, while involved with CruiseOne, but the only tangible property that it alleges she converted is a laptop computer. Even assuming that electronic information accessible through a laptop is the kind of "document" with which intangible rights can be merged and that can thus be converted, [16] there is a dispute of fact as to whether Karen exercised dominion or control over that information in an unlawful manner. Vacation points to evidence that Karen had access to such information, including during the time in which she was on FMLA leave but also involved with the CruiseOne franchise, but Karen points to evidence that she did not access any confidential information during that time and that, in fact, she was unable to do so because her access to Vacation's network had been terminated. Furthermore, there is no evidence that Karen shared any confidential information with Michael or that Michael otherwise unlawfully exercised control over any such information. [17] Accordingly, a reasonable jury could find that the D'Onofrios did not access or exercise control over customer lists or any other confidential information by unlawful means.

There is also a dispute of fact as to whether Karen refused Vacation's demand for the return of the property. Vacation points to a March 2014 e-mail from Vacation's president reminding all employees that they were "prohibited by their employment contracts and Texas law from diverting or stealing leads or sales, or otherwise competing with VTG, while working for VTG or for eighteen months after leaving VTG." It argues that that e-mail constituted a demand for return of VTG property which Karen ignored by maintaining possession of the laptop while involved with CruiseOne approximately six

months later. A reasonable jury could find that the March 2014 e-mail was not a demand for the return of the laptop.

[30] [31] Finally, "[a] plaintiff must prove damages before recovery is allowed for conversion." *United Mobile Networks, LP v. Deaton*, 939 S.W.2d 146, 147 (Tex. 1997). The measure of damages for a conversion claim is generally "the fair market value of the property at the time and place of the conversion." *Id.* at 147–48. However, the only evidence of damages put forth by Vacation was the speculative affidavit of Vacation's Senior Director of Sales, discussed above, calculating his estimate of the total gross revenues generated by the D'Onofrios' CruiseOne franchise. Aside from the speculative nature of the calculation, Vacation failed to establish that the full gross revenues that the D'Onofrios generated was equal to the fair market value of the allegedly converted confidential information. In fact, Vacation points to ***214** only one former Vacation customer, by the name of Focke, who did any business with the D'Onofrios. Accordingly, we reverse the grant of summary judgment on this claim.

3.

The D'Onofrios next challenge the district court's grant of summary judgment on Vacation's claims against them for tortious interference with a prospective business relationship and tortious interference with an existing business relationship. We find issues of material fact that preclude summary judgment and reverse.

[32] The elements of tortious interference with a prospective business relationship are "that (1) there was a reasonable probability that the plaintiff would have entered into a business relationship with a third party; (2) the defendant either acted with a conscious desire to prevent the relationship from occurring or knew the interference was certain or substantially certain to occur as a result of the conduct; (3) the defendant's conduct was independently tortious or unlawful; (4) the interference proximately caused the plaintiff injury; and (5) the plaintiff suffered actual damage or loss as a result." *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 923 (Tex. 2013).

[33] Here, there is question of material fact as to the first element. Vacation argues that there is a reasonable probability that it would have entered into business relationships with clients who had either previously booked travel with Vacation or contacted it for travel bookings. However, the only evidence of a possible future business relationship that Vacation points to is a single customer, Focke, who had previously booked a cruise for her parents through Vacation and subsequently booked a vacation through the D'Onofrios. But Focke testified that she never had any plans to book another cruise. A reasonable jury could conclude that there was not a reasonable probability that Focke would have entered into a business relationship with Vacation in the future. Accordingly, the district court erred by granting summary judgment on this claim. *See Caller–Times Pub. Co. v. Triad Commc'ns, Inc.*, 855 S.W.2d 18, 24–25 (Tex. App.—Corpus Christi 1993, no writ) (finding evidence insufficient to establish tortious interference with a prospective business relationship where evidence of future relationship was speculative).

To the extent that Texas recognizes a cause of action for tortious interference with an existing business relationship,[18] its elements are: "(1) unlawful actions undertaken by [the defendant] without a legal right or justifiable excuse; (2) with the ***215** intent to harm [the plaintiff]; and (3) resulting actual harm or damage." *Am. Med. Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 335 (Tex. App.—Houston [14th Dist.] 1991, no writ); *accord Apani Sw., Inc. v. Coca–Cola Enters.*, 300 F.3d 620, 633–34 (5th Cir. 2002) (citing *Morris v. Jordan Fin. Corp.*, 564 S.W.2d 180, 184 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.)). "It is not necessary to establish the existence of a valid contract, but the interference with a general business relationship is actionable only if the defendant's interference is proven to be motivated by malice." *CF & I Steel Corp. v. Pete Sublett & Co.*, 623 S.W.2d 709, 715 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

[34] Here, at the very least, a question of material fact as to whether Vacation suffered any actual harm or damage precludes summary judgment. As discussed above, Vacation points to only one individual with whom it even arguably had an existing business relationship, and that individual testified that she did not intend to ever purchase another cruise. Accordingly, Vacation has failed to show as a matter of law that the D'Onofrios caused it any harm by doing business with Focke.

4.

[35] [36] [37] Michael also challenges the district court's grant of summary judgment on Vacation's claims against him for conspiracy to covert confidential information and conspiracy to interfere with existing business relationships. [19] The elements of civil conspiracy are: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result." *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). However, conspiracy is a derivative tort, and a defendant's liability for conspiracy "depends on participation in some underlying tort." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). Where the underlying tort claim fails, so too does the conspiracy claim. *See Grant Thornton, LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 930–31 (Tex. 2010). Because we reverse summary judgment on the underlying claims for conversion and tortious interference, so, too, do we reverse summary judgment on the conspiracy claims.

5.

[38] Next, the D'Onofrios challenge the district court's grant of summary judgment in favor of Vacation on its claims for breach of fiduciary duty against Karen and knowing participation in a breach of fiduciary duty against Michael. We find the evidence insufficient to support summary judgment and reverse.

[39] [40] [41] "The elements of a breach of fiduciary duty claim are: (1) a fiduciary relationship must exist between the plaintiff and defendant; (2) the defendant must have breached his fiduciary duty to the plaintiff; and (3) the defendant's breach must result in injury to the plaintiff or benefit to the defendant." *Hunn v. Dan Wilson Homes, Inc*, 789 F.3d 573, 581 (5th Cir. 2015) (quoting *Graham Mortg. Corp. v. Hall*, 307 S.W.3d 472, 479 (Tex. App.—Dallas 2010, no pet.)). A third party who knowingly participates in the breach of a fiduciary duty "becomes a joint tortfeasor with the fiduciary and is liable as such." ***216** *Id.* (quoting *Kinzbach Tool Co. v. Corbett–Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942)). "To establish a claim for knowing participation in a breach of fiduciary duty, a plaintiff must assert: (1) the existence of a fiduciary relationship; (2) that the third party knew of the fiduciary relationship; and (3) that the third party was aware that it was participating in the breach of a fiduciary relationship." *Meadows v. Hartford Life Ins. Co.*, 492 F.3d 634, 639 (5th Cir. 2007) (applying Texas law).

[42] [43] [44] Karen first denies that she was in a fiduciary relationship with Vacation. It is generally true that employees are not fiduciaries of their employers simply by virtue of the employment relationship. However, under common-law principles of agency, employees do owe certain limited fiduciary duties to not compete with their employers. *See Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002). The scope of such duties has been carefully and narrowly drawn to balance "an employer's right to demand and receive loyalty" with "society's legitimate interest in encouraging competition." *Id.* at 201. "An at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed." *Id.* (quoting *Augat, Inc. v. Aegis, Inc.*, 409 Mass. 165, 565 N.E.2d 415, 419 (1991)). However, an employee "may not appropriate his employer's trade secrets[,] ... solicit his employer's customers while still working for his employer ..., [or] carry away certain information, such as lists of customers." *Id.* at 202 (quoting *Augat, Inc.*, 565 N.E.2d at 419–20); *accord M P I, Inc. v. Dupre*, 596 S.W.2d 251, 254 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) ("It is only when an employee uses his official position to gain a business opportunity which belongs to his employer or when he actually competes for customers while still employed that a legal wrong will have accrued.").

[45] Vacation contends that Karen breached her fiduciary duty by becoming a fifty-percent owner in the franchise of a competitor, using a screenshot of her sales record at Vacation to obtain the competing franchise, attending a training for that competitor, and working for that competing franchise while still employed by Vacation. However, becoming the part owner of a competing franchise is insufficient to establish breach of a fiduciary duty. *See Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 511 (Tex. App.—Houston [1st Dist.] 2003, no pet.) ("To form his own company, Azripe had to incorporate or otherwise establish a business entity, obtain permits, and obtain insurance. These were permissible preparations to compete, not breaches of a fiduciary duty."). The

same is true of the screenshot of Karen's sales records. The screenshot did not include client names, only sales information, and there is no evidence that the list was used for any purpose other than to demonstrate Karen's sales abilities. Similarly, attending a training for a competitor is an "active step" towards going into competition with one's employer but does not involve the appropriation of the employer's trade secrets, confidential information, or customers.

[46] There is some evidence that Karen answered the phones for the CruiseOne franchise as early as July 2014 (approximately a month before she believed she had been terminated). In a July 27, 2014 e-mail—which appears to relate to home repairs and not travel sales—Michael provides the phone number for "our travel agency" and states that "mostly Karen works this as her business line." However, there is no evidence that Karen actually spoke to customers on the phone or that ***217** she used her position at Vacation "to gain a business opportunity belonging to" Vacation or solicited business away from Vacation while still employed by Vacation.[20] *See Bray v. Squires*, 702 S.W.2d 266, 270–71 (Tex. App.—Houston [1st Dist.] 1985, no writ) (affirming jury verdict that former associates did not breach fiduciary duties where record was open to the interpretation that the defendants had discussions with, but did not solicit business from, law firm's client before leaving firm).

Furthermore, while there is some evidence that the D'Onofrios *wanted* to use Karen's book of business from Vacation to build up their CruiseOne business, there is also evidence that the sales Karen generated for CruiseOne were the result of her own personal contacts and not any sales lists or other confidential information from Vacation. *See Ameristar Jet Charter, Inc. v. Cobbs*, 184 S.W.3d 369, 374–75 (Tex. App.—Dallas 2006, no pet.) (finding evidence sufficient to support jury's finding of no breach of fiduciary duty where former employee denied taking confidential information and testified that he solicited business using publicly available information); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd) (stating that duty to not disclose confidential information "does not bar use of general knowledge, skill, and experience"). A reasonable jury could conclude that Karen did no more than prepare to compete with Vacation while still employed by it, and thus did not breach her fiduciary duty.

Summary judgment on the claim against Michael for knowing participation in the breach of a fiduciary duty cannot stand for the same reasons. Because Vacation failed to establish that there is no dispute of material fact as to whether Karen breached her fiduciary duty, it necessarily failed to establish that there is no dispute of material fact as to whether Michael participated in any such breach. We reverse the grant of summary judgment on these claims.

6.

We next turn to the district court's grant of summary judgment on Vacation's fraud claims. Vacation asserted claims against Karen for common-law fraud and fraud by nondisclosure, alleging that she misrepresented her need for FMLA leave and failed to disclose her ownership interest in the CruiseOne franchise and the fact that she was using her FMLA leave to travel and attend a CruiseOne training. Once again, we find disputes of material fact and reverse.

***218** **[47]** **[48]** The elements of common-law fraud are: "(1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury." *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (quoting *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001)). Vacation claims that Karen made false representations regarding her need for FMLA leave, but a dispute of material fact as to her purpose in taking leave precludes summary judgment.

There is evidence that Karen made plans to attend the CruiseOne training in Florida before she made arrangements to go on leave, suggesting that her purpose in taking leave may have been to attend the training rather than care for Michael. However, that she did attend training while on leave does not itself establish that she misrepresented her need for FMLA leave. Vacation does not dispute that Michael needed care, and there is evidence suggesting that Karen did, in fact, care for him while on

leave. Karen also testified that she was not even aware of the possibility of taking FMLA leave until it was suggested to her by her supervisor, who was aware of the stress she was under while working and also taking care of Michael. Accordingly, there is evidence from which a reasonable jury could conclude that Karen did not misrepresent her need for FMLA leave.

[49] The district court also granted summary judgment on Vacation's claim for fraud by nondisclosure. "The elements of fraud by nondisclosure are (1) the defendant failed to disclose material facts to the plaintiff that the defendant had a duty to disclose; (2) the defendant knew the plaintiff was ignorant of the facts and the plaintiff did not have an equal opportunity to discover the facts; (3) the defendant was deliberately silent when the defendant had a duty to speak; (4) by failing to disclose the facts, the defendant intended to induce the plaintiff to take some action or refrain from acting; (5) the plaintiff relied on the defendant's nondisclosure; and (6) the plaintiff was injured as a result of acting without that knowledge." *White v. Zhou Pei*, 452 S.W.3d 527, 537 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

[50] Vacation first argues that Karen failed to disclose her intent to compete with it as the partial owner of a CruiseOne franchise. This claim fails for essentially the same reasons as the breach-of-fiduciary-duty claim. "[A]n employee who plans to compete with his employer has no general duty to disclose his plans." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 285 (5th Cir. 2007) (citing *Johnson*, 73 S.W.3d at 201). As discussed above, a reasonable jury could conclude that Karen made plans to compete with Vacation but did not actively engage in any competitive conduct until after she believed that she had been terminated. Accordingly, a reasonable jury could find that she did not have a duty to disclose her plans.

[51] Vacation also argues that Karen failed to disclose her intention to attend a CruiseOne training while on FMLA leave. However, even assuming that the other elements have been met, Vacation's evidence with respect to damages is insufficient to establish injury as a matter of law. As discussed above with respect to the Baker affidavit, a reasonable jury could conclude that Vacation failed to establish an injury caused by Karen's allegedly wrongful conduct.

***219 E.**

Finally, the D'Onofrios argue that the district court committed a number of errors relating to the relief awarded to Vacation. Because we reverse summary judgment on all of Vacation's claims against the D'Onofrios, we also vacate the district court's award of damages, injunctive relief, and attorneys' fees.

[52] **[53]** We note that the award of damages was independently erroneous in light of the infirm evidence used to support it, as discussed above. Furthermore, with respect to attorneys' fees, the district court awarded Vacation $50,000 in fees "in the event an appeal is filed with the Fifth Circuit Court of Appeals," and additional fees if a petition for *certiorari* is filed with the Supreme Court. However, "[a] trial court may not grant an unconditional award of appellate attorneys' fees." *Rittgers v. Rittgers*, 802 S.W.2d 109, 115 (Tex. App.—Corpus Christi 1990, writ denied); *accord Hughes v. Habitat Apartments*, 828 S.W.2d 794, 795 (Tex. App.—Dallas 1992, no writ) ("A trial court must condition an award of appellate attorney's fees upon the appellant's unsuccessful appeal."). What's more, under Texas law, the recovery of attorneys' fees must be authorized by statute, *see Tony Gullo Motors I, LP v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006), and we have been offered no such authorization here. While Texas law authorizes the recovery of attorneys' fees for claims based on "an oral or written contract,"—as well as seven other categories of claims not relevant here—*see* Tex. Civ. Prac. & Rem. Code § 38.001(8), for claims involving the breach of a covenant not to compete, section 15.51(c) of the Texas Business and Commerce Code "preempts an award of [attorney's] fees under any other law." *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 645 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (alternation in original) (quoting *Perez v. Tex. Disposal Sys., Inc.*, 103 S.W.3d 591, 594 (Tex. App.—San Antonio 2013, pet. denied)). And section 15.51(c) "makes no provision for an award of fees to an employer." *Id.*

III.

For the foregoing reasons, we AFFIRM in part, REVERSE in part, VACATE the awards of damages,