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. II OF III
APP00251-APP00500

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injunctive relief, and attorneys' fees, and REMAND for further proceedings consistent with this opinion.

All Citations

888 F.3d 197, 168 Lab.Cas. P 36,617, 100 Fed.R.Serv.3d 554, 2018 IER Cases 144,004, 27 Wage & Hour Cas.2d (BNA) 1173

Footnotes

1 The district court's order, which appears to be unchanged from the proposed order submitted by Vacation with its motion for summary judgment, erroneously states that it was issued in 2015. The district court's docket, however, makes clear that the order was issued in 2016.

2 Michael also briefly suggests that he was improperly made a party under Rule 14 of the Federal Rules of Civil Procedure. However, Vacation explicitly, and correctly, cited Rules 19 and 20 as the basis for joinder.

3 The district court never actually ruled on the motion to dismiss for lack of subject-matter jurisdiction. Rather, the motion remained pending for over a year and was simply terminated after the district court granted Vacation's motion for summary judgment—including on the claims Michael sought to have dismissed for lack of jurisdiction. That was error. A court may not assume its jurisdiction for purposes of deciding a case on the merits. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " (alternation in original) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884))). In light of the fact that the district court never actually ruled on the motion to dismiss, it is unclear that a deferential standard of review should apply. Nonetheless, we are satisfied that, even on de novo review, the exercise of supplemental jurisdiction was proper here.

4 There are several exceptions contained in § 1367(b) for claims against joined parties that are not relevant here. *See* 28 U.S.C. § 1367(b).

5 It does not appear that Michael was ever able to obtain discovery from Vacation. In April 2015, the district court issued an order quashing standard discovery and permitting discovery only as ordered by the court. In July 2015, Michael filed a motion for discovery. The district court never ruled on that motion, but simply terminated it after granting Vacation's motion for summary judgment. Nonetheless, Karen and Vacation had exchanged discovery addressing the same nucleus of facts.

6 There is, in fact, evidence in the record refuting the notion that there is a uniform commissions rate in the industry. The Hankamer affidavit explains that the commissions paid in the industry vary depending on the different overhead expenses incurred by different companies.

7 Furthermore, while the Baker affidavit calculates Vacation's lost-profit damages based on the D'Onofrio's gross revenues, Texas law requires that lost-profits damages be "based on net profits, not gross revenue or gross profits." *Kellmann v. Workstation Integrations, Inc.*, 332 S.W.3d 679, 684 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

8 Baker asserts in his affidavit that the "total sum of commissions" earned by the D'Onofrios "equals eighty percent (80%) of the total commission on the sales" and multiplies that amount by 1.25 to determine the "missing twenty percent (20%)," without ever explaining where he derived the relevant eighty-percent and twenty-percent figures.

9 While it is unclear whether the district court relied upon the Allen and Hankamer affidavits in granting summary judgment, the Baker affidavit is the only evidence of damages in the record, and the district court's final order awarded damages to Vacation in precisely the amount calculated by Baker.

10 The district court had previously entered an order quashing all standard discovery and permitting only that discovery specifically ordered by the court. Accordingly, at the time of Michael's motion, no Rule 26 disclosures had been made and no interrogatories served.

11 Prior to 2010, the notice requirement was contained in Rule 56(c), which defined a ten-day notice requirement. *See Leatherman*, 28 F.3d at 1397.

12 Vacation contends that our review should be for plain error because Karen challenges the grant of summary judgment for the first time on appeal. However, we apply plain-error review when "the party against whom summary judgment is granted moves for reconsideration under Fed. R. Civ. P. 59(e), but does *not*, in that motion, challenge the procedural propriety of the summary judgment ruling." *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 771 (5th Cir. 2000). Here, Karen did not file any Rule 59(e) motion. Instead, she directly appealed the grant of summary judgment, which we permit. *See*

Conley v. Bd. of Trs. of Grenada Cty. Hosp., 707 F.2d 175, 178 (5th Cir. 1983) (stating that the non-moving party "could have sought direct appeal" from the *sua sponte* grant of summary judgment without notice).

13 The district court also erred by failing to state the reasons for granting summary judgment with respect to the hostile work environment claim on the record, as is required by Rule 56(a). *See* Fed. R. Civ. P. 56(a) ("The court should state on the record the reasons for granting or denying the motion.").

14 Any delay in discovery with respect to Karen's hostile work environment claim in the 11 months between the time it was filed and the time the district court granted summary judgment appears not to be a failure on her part. The district court had issued an earlier order quashing standard discovery and permitting discovery only as ordered by the court, and it does not appear that the district court ever set a discovery schedule for the hostile work environment claim.

15 The parties do not dispute that the covenants here at issue were part of an otherwise enforceable agreement.

16 We note that Vacation frames its conversion claim as a claim for conversion of confidential information only, and does not contend that Karen converted the laptop itself.

17 While Karen did share a screenshot of her sales record with Michael, which Michael subsequently sent to CruiseOne, Vacation offers no argument for why that information was confidential. The shared screenshot included only information on the volume and amount of Karen's sales, not on the customers with whom she did business.

18 The D'Onofrios contend that there is no cause of action for tortious interference with an *existing* business relationship, only tortious interference with a *contract* or tortious interference with a *prospective* business relationship. In *Whisenhunt v. Lippincott*, 474 S.W.3d 30 (Tex. App.—Texarkana 2015, no pet.), the Texas Appeals Court noted the uncertainty whether tortious interference with an existing business relationship and tortious interference with a contract are separate torts, but then simply listed the elements of tortious interference with a contract as the elements for tortious interference with an existing business relationship. *See id.* at 44 & n.14. The Texas Supreme Court recently stated that "Texas law recognizes two types of tortious-interference claims: one based on interference with an existing contract and one based on interference with a prospective business relationship." *El Paso Healthcare Sys. Ltd. v. Murphy*, 518 S.W.3d 412, 421 (Tex. 2017). We find it unnecessary to resolve the issue as Vacation has failed to establish that it is entitled to judgment as a matter of law on either claim. To the extent its claim should be construed as a claim for tortious interference with a contract, it has not pointed to any existing contract with which the D'Onofrios allegedly interfered.

19 While the parties' briefs also address a conspiracy to commit conversion claim against Karen, Vacation's Second Amended Counterclaim against Karen did not allege a conspiracy count, and its motion for summary judgment sought judgment on conspiracy claims against Michael only. In any event, any conspiracy claims against Karen would fail for the same reasons as the conspiracy claims against Michael.

20 The only evidence that Vacation points to in the record of Karen's providing travel services to CruiseOne customers occurred in September 2014, after Karen contends that she believed she had been terminated. An employee's fiduciary duty to not compete with her employer ends when the employment relationship ends. *See Bray*, 702 S.W.2d at 270 ("[O]nce an employee resigns, he may actively compete with his former employer."). Here, there is a factual dispute as to when the employment relationship was terminated. A jury could conclude that the employment relationship—and, with it, Karen's fiduciary duty to not compete—ended by August 11, 2014; on that day a Vacation manager sent an e-mail indicating that Karen no longer worked at Vacation, and by then the company had already locked Karen out of its computer network. While the duty to not use "confidential or proprietary information acquired during the [employment] relationship ... survives termination of employment," *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd), there is no evidence that the September 2014 communication involved the use of any confidential or proprietary information.

End of Document

EXHIBIT 2

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Viking Group, Inc. v. Pickvet, W.D.Mich., May 3, 2017

309 Ga.App. 503
Court of Appeals of Georgia.

BUNKER HILL INTERNATIONAL, LTD. et al.
v.
NATIONSBUILDER INSURANCE SERVICES, INC. et al.

No. A11A0749.
|
May 5, 2011.

Synopsis

Background: Former employee and his current employer filed suit against former employer seeking declaration that restrictive covenants contained in employment contract between former employee and former employer were unenforceable under Georgia law. Former employer filed motion to dismiss on ground that forum selection and choice-of-law provisions in the contract required former employee to litigate his claim in Illinois. The Superior Court, Gwinnett County, Jackson, J., granted motion. Former employee and his current employer appealed.

Holdings: The Court of Appeals, Andrews, J., held that:

[1] although employment contract specified that it should be construed according to Illinois law, the question of venue was a procedural one to which Georgia law applied under the rule of lex fori, and

[2] forum-selection provision in employment contract was void.

Reversed.

West Headnotes (11)

[1] Action
What law governs

Under the "rule of lex fori," procedural or remedial questions are governed by the law of the forum, the state in which the action is brought.

4 Cases that cite this headnote

[2] Contracts
Legal remedies and proceedings

Although employment contract specified that it should be construed according to Illinois law, the question of venue was a procedural one to which Georgia law applied under the rule of lex fori, providing that procedural or remedial questions are governed by the law of the forum.

4 Cases that cite this headnote

[3] Contracts
Agreement as to place of bringing suit; forum selection clauses

Application of forum-selection provision in employment contract that contained non-compete and non-solicitation covenants, so as to require former employee to bring his declaratory judgment suit challenging validity of the covenants in Illinois rather than Georgia, would contravene public policy, and thus the forum-selection provision was void, as covenants were void under Georgia law, in that they contained no territorial limitation, and it was likely that non-compete covenant would be enforced against former employee in Illinois, in that covenant noted that former employee had specialized knowledge and experience related to employer's affairs and business as well as numerous contacts in the industry, such that an Illinois court would likely sympathize with employer's attempt to restrain former employee from making use of such knowledge and experience in his new endeavor.

6 Cases that cite this headnote

[4] Contracts

Agreement as to place of bringing suit; forum selection clauses

Forum selection clauses are prima facie valid and should be enforced unless the opposing party shows that such enforcement would be unreasonable under the circumstances.

2 Cases that cite this headnote

[5] **Contracts**

Agreement as to place of bringing suit; forum selection clauses

To invalidate a forum selection clause, the opposing party must show that trial in the chosen forum will be so inconvenient that he will, for all practical purposes, be deprived of his day in court; a freely negotiated agreement should be upheld absent a compelling reason such as fraud, undue influence, or overweening bargaining power.

Cases that cite this headnote

[6] **Contracts**

Agreement as to place of bringing suit; forum selection clauses

Contracts

Agreements relating to actions and other proceedings in general

A forum-selection or choice-of-law provision may be invalid where the provision contravenes a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.

2 Cases that cite this headnote

[7] **Contracts**

Agreement as to place of bringing suit; forum selection clauses

In the absence of evidence of fraud, undue influence, or overweening bargaining power as between the parties, a party can invalidate a forum selection clause only if he can show that (a) at least one of the covenants violates Georgia public policy, and (b) such a covenant would likely be enforced against him by a court in the selected forum.

5 Cases that cite this headnote

[8] **Contracts**

Restraint of Trade or Competition in Trade

Restrictive covenants in employment contracts are in partial restraint of trade and are enforceable only if strictly limited in time and territorial effect and are otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee.

4 Cases that cite this headnote

[9] **Contracts**

Restrictions unlimited as to place

A non-compete covenant in an employment contract without any territorial limitation is unenforceable under Georgia law because it provides inadequate notice of its extent to the ex-employee.

2 Cases that cite this headnote

[10] **Contracts**

Extent of territory embraced in general

Contracts

Restrictions unlimited as to place

Under Illinois law related to restrictive covenants in employment agreements, as the specificity of limitation regarding the class of person with whom contact is prohibited increases, the need for limitation expressed in territorial terms decreases; only when a covenant lacks both a geographic limitation and any qualifying language concerning the particular customers to which it applies, then, will it be found unreasonable under Illinois law.

1 Cases that cite this headnote

[11] **Labor and Employment**

Formation;Requisites and Validity

> The court does not edit or "blue-pencil" employment agreements in order to salvage some provisions when others have been found void.
>
> 2 Cases that cite this headnote

Attorneys and Law Firms

****663** Jackson & Lewis, Brandon Micheal Cordell, Robert W. Capobianco, Atlanta, C. Todd Van Dyke, for appellants.

Lewis, Brisbois, Bisgaard & Smith, John Christopher Patton, Thomas Christopher Grant, Atlanta, for appellees.

Opinion

****664** ANDREWS, Judge.

***503** In April 2006 and again in June 2008, Kevin Cunningham entered into employment agreements as an executive vice president of NBIS Construction and Transport Services, Inc. (NBIS), an Illinois company. The agreements contained identical covenants not to compete with NBIS and its affiliates and not to solicit the company's customers or employees. After Cunningham resigned from his position and joined Bunker Hill International, Ltd., a Georgia company, Cunningham and Bunker Hill brought this action for a declaration that the restrictive covenants were unenforceable under Georgia law. NBIS moved to dismiss on the ground that the forum selection and choice-of-law provisions in the contract required Cunningham to litigate his claim in Illinois, and the trial court granted the motion. On appeal, Cunningham repeats arguments made below that he is entitled to litigate his claim in a Georgia court because the covenants at issue contravene Georgia public policy. We ***504** agree and reverse.

The record shows that Cunningham began working for the predecessor of NBIS, an insurance underwriter for heavy equipment, in April 2006, at which time he signed the first version of the employment agreement at issue. Soon afterward, NBIS asked Cunningham to move to Georgia for the purpose of overseeing its Atlanta operations. In July 2006, Cunningham agreed and moved to Atlanta. In June 2008, Cunningham signed an amended agreement. Cunningham's Illinois counsel "crafted" the amended agreement, and Cunningham insisted that NBIS accept the parties' original version of the covenants without which, as he said, he would not sign the new document.

The amended agreement contained the following noncompetition provision:

> (a) During your employment, without the prior written consent of the Company, you shall not, directly or indirectly, accept employment or compensation from, or perform services in any material respect and of any nature for, any business enterprise other than on behalf of the Company and its affiliates.
>
> (b) You understand and agree that you have specialized knowledge and experience related to the affairs and business of the Company as well as numerous contacts in the industry in which the Company [and its successors and affiliates] operate. You further understand that if you were to compete against the Company, ... the Company ... would suffer serious harm and substantial damage. Consequently, *for a period commencing on the date hereof and ending two (2) years after the date hereof,* you shall not, directly or indirectly, ... own or have an ownership interest in, manage, operate, control, render services or advice to, or otherwise be associated or affiliated with or employed or engaged by any Person that conducts or plans to conduct a business that is competitive with the business of the Company....

(Emphasis supplied.) The same clause provided that for two years after Cunningham left NBIS, he could "act solely as a retail producer... (but not as a manager, underwriter, [or] employee of an insurance company ...)" of various types of insurance, including those underwritten by NBIS.

The agreement also included a nonsolicitation provision that "for a period commencing on the date hereof" and ending "two years after the date you cease to be an employee of the Company," ***505** Cunningham would not

> (i) induce or attempt to induce any employee ... or other person that has a commercial relationship with [NBIS] ... to leave the employ of, or otherwise alter the level of service provided to, or change the

> relationship with [NBIS], or (ii) hire or offer ... any employment of compensation to any employee of [NBIS]....

For the same period, Cunningham also could not "produce or seek to produce insurance from" or "derive compensation of any kind from, or otherwise establish a commercial relationship with, any now existing employee or customer of [NBIS and its affiliates], ... or any of the foregoing that may come into existence on any date on which you were an employee of" NBIS or its affiliates.

The agreement contained the following language concerning the parties' chosen forum and law:

> ****665** This Agreement and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of Illinois. The parties agree that any disputes regarding the rights of the parties under this Agreement or the enforceability of this Agreement, whether in law or equity, shall be litigated in either the Circuit Court of Cook County, Illinois or the United States District Court for the Northern District of Illinois. The parties consent and submit to the jurisdiction and venue of such courts and agree to waive and will not assert defenses of lack of jurisdiction or improper venue in any such action filed in either of these courts.

After Cunningham expressed his dissatisfaction with the direction of NBIS, he offered the company a buyout, which was rejected. He resigned from NBIS on May 21, 2010, and began working for Bunker Hill on May 22. This litigation followed.

The question before us is whether the forum selection clause in the employment agreement between Cunningham and NBIS was enforceable such that the trial court properly granted NBIS's motion to dismiss this Georgia action. [1]

[1] [2] ***506** "Under the rule of lex fori, procedural or remedial questions are governed by the law of the forum, the state in which the action is brought." (Punctuation omitted.) *Brinson v. Martin,* 220 Ga.App. 638, 469 S.E.2d 537 (1996). Specifically, and although the contract at issue here specifies that the contract should be construed according to Illinois law, the question of venue is a procedural one to which Georgia law applies. Id. at 638–639, 469 S.E.2d 537 (applying Georgia law to the questions of proper venue even when the contract at issue contained forum-selection and choice-of-law provisions that Nebraska law should apply).

[3] [4] [5] As this Court has held, forum selection clauses "are prima facie valid and should be enforced unless the opposing party shows that such enforcement would be unreasonable under the circumstances." *Iero v. Mohawk Finishing Products,* 243 Ga.App. 670, 671, 534 S.E.2d 136 (2000), citing *The Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

> To invalidate such a clause, the opposing party must show that trial in the chosen forum will be so inconvenient that he will, for all practical purposes, be deprived of his day in court. A freely negotiated agreement should be upheld absent a compelling reason such as fraud, undue influence, or overweening bargaining power.

(Punctuation and footnotes omitted.) *Iero,* 243 Ga.App. at 671, 534 S.E.2d 136.

[6] A forum-selection or choice-of-law provision may also be invalid, however, where the clause "contravenes 'a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.' " *Iero,* 243 Ga.App. at 671, 534 S.E.2d 136, quoting *The Bremen,* 407 U.S. at 15, 92 S.Ct. 1907; see also *CS–Lakeview at Gwinnett v. Simon Property Group,* 283 Ga. 426, 428, 659 S.E.2d 359 (2008) (a choice-of-law provision may be held unenforceable if the "application of the chosen law would be contrary to the public policy or prejudicial to the interests of this state"). Thus we have recently invalidated two forum-selection clauses where the contracts at issue violated public policy, although both of these cases involved statutory rather than judicial expressions of such policy. *Walker v. Amerireach.com,* 306

Ga.App. 658, 660(1), 703 S.E.2d 100 (2010) (reversing dismissal of complaint where plaintiff's claims were based on a statutory violation and thus the contractual defense of a forum-selection clause did not apply) (Cert. granted *Amerireach.com v. Walker* (Case No. S11G0417, Mar. 7, 2011)); *Moon v. CSA—Credit Solutions of America,* 304 Ga.App. 555, 696 S.E.2d 486 (2010) (physical precedent only).

[7] Given the absence of evidence of "fraud, undue influence, or ***507** overweening bargaining power" as between the parties before us, Cunningham can succeed in invalidating ****666** the forum-selection clause at issue only if he can show that (a) at least one of the covenants violate Georgia public policy and (b) such a covenant would likely be enforced against him by an Illinois court. Only if these conditions are met could we conclude that an Illinois venue for this dispute would deprive Cunningham of a meaningful opportunity to argue that the covenants were void, thus doing damage to both him and the Georgia public policy against restraint of trade. See *Iero,* 243 Ga.App. at 671, 534 S.E.2d 136 (to contravene public policy, forum selection clause must "be damaging to the forum itself, not simply damaging to the litigants because of an unfavorable law in the selected forum").

[8] [9] (a) "Restrictive covenants in employment contracts are in partial restraint of trade and are enforceable only if strictly limited in time and territorial effect and are otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee." (Citation and punctuation omitted.) *Fuller v. Kolb,* 238 Ga. 602, 603, 234 S.E.2d 517 (1977). Specifically, a noncompete covenant without any territorial limitation is unenforceable under Georgia law because it provides inadequate notice of its extent to the ex-employee—a fault exacerbated in the case before us by the agreement's bar on dealings between Cunningham and entities which were NBIS clients at any time during his employment there. See id. at 604, 234 S.E.2d 517 (noting that a restriction on the ex-employee's dealings with clients who had been such for a year before employee's departure made the noncompete covenant at issue more onerous). As such, the covenants at issue here are void. Id. at 603–604, 234 S.E.2d 517 (voiding noncompete and nonsolicitation provisions, and disapproving prior precedent "insofar as it intimates that a restrictive covenant in an employment contract is enforceable without an explicit territorial limitation").

[10] (b) By contrast, Illinois courts have struck down only noncompete covenants so broad as to bar an ex-employee's dealings with "any existing *or future* customer" of the employer, "from and after the date of execution" of the agreement. *Eichmann v. Nat. Hosp., etc. Svcs.,* 308 Ill.App.3d 337, 340, 241 Ill.Dec. 738, 719 N.E.2d 1141 (1999). Illinois courts take the view that "as the specificity of limitation regarding the class of person with whom contact is prohibited increases, the need for limitation expressed in territorial terms decreases." (Citation and punctuation omitted.) Id. at 345, 241 Ill.Dec. 738, 719 N.E.2d 1141. Only when a covenant lacks "*both* a geographic limitation and any qualifying language concerning the particular customers to which it applies," then, will it be found unreasonable under Illinois law. (Emphasis in original.) Id. at 345, 241 Ill.Dec. 738, 719 N.E.2d 1141.

Thus the Illinois Court of Appeals has recently sustained a ***508** non-compete covenant containing no territorial limitation "where the purpose of the restriction was to protect the employer from losing customers to a former employee who, by virtue of his employment, gained special knowledge and familiarity with the customers' requirements." *Steam Sales Corp. v. Summers,* 405 Ill.App.3d 442, 459, 344 Ill.Dec. 692, 937 N.E.2d 715 (2010). In holding the covenant enforceable, the *Steam Sales* court looked to extrinsic evidence that the employer's territory was itself geographically limited. Id.

The noncompete covenant before us notes that Cunningham had "specialized knowledge and experience related to the affairs and business of the Company as well as numerous contacts in the industry," meaning that an Illinois court would likely sympathize with an employer seeking to restrain an employee from making use of such knowledge and experience in his new endeavor. See *Steam Sales,* 405 Ill.App.3d at 459–460, 344 Ill.Dec. 692, 937 N.E.2d 715 (finding covenant reasonable and enforceable). The covenants before us are also temporally limited, whereas the covenants struck down in *Eichmann* were "both temporally and geographically unlimited." 308 Ill.App.3d at 344, 241 Ill.Dec. 738, 719 N.E.2d 1141.

(c) Cunningham has thus shown both that the noncompete and nonsolicitation provisions are unenforceable in Georgia and that at least one of them would likely be enforced in an Illinois court.

**667 [11] Georgia courts do not edit or "blue-pencil" employment agreements in order to salvage some provisions when others have been found void. *Advance Technology Consultants v. RoadTrac, LLC,* 250 Ga.App. 317, 320, 551 S.E.2d 735 (2001). It follows that the agreement's forum-selection provision is void because its application would likely result in the enforcement by an Illinois court of at least one covenant in violation of Georgia public policy. The trial court therefore erred when it granted NBIS's motion to dismiss this action.

Judgment reversed.

PHIPPS, P.J., and McFADDEN, J., concur.

All Citations

309 Ga.App. 503, 710 S.E.2d 662, 11 FCDR 1419

Footnotes

1 Because the agreement at issue was entered into in 2008, we apply the law of restrictive covenants as it existed before the November 2010 ratification of an amendment to the Constitution of Georgia adopting OCGA § 13–8–2.1(a) into law. See *Cox v. Altus Healthcare, etc.,* 308 Ga.App. 28, 30(2), 706 S.E.2d 660 (2011).

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EXHIBIT 3

164 F.Supp.3d 592
United States District Court,
S.D. New York.

MasterCard International Incorporated, Plaintiff,
v.
Nike, Inc., William E. Dennings III,
and Ryan Fusselman, Defendants.

No. 15-cv-114 (NSR)
|
Signed February 23, 2016

Synopsis

Background: Employer brought action against its former employees and employees' current employer, alleging breach of contract, tortious interference, and unfair competition. Employees and current employer moved to dismiss.

Holdings: The District Court, Nelson S. Roman, J., held that:

[1] non-recruitment provision in long term incentive compensation plan agreement was enforceable under New York law;

[2] employer sufficiently alleged that employees breached confidentiality provision in long term incentive compensation plan agreement under New York law;

[3] under New York's choice of law analysis, Oregon law, rather than New York law, applied to employer's tortious interference claim;

[4] employer sufficiently alleged that employees and current employer acted with improper purpose or through improper means, as required to state tortious interference with contract claim under Oregon law; and

[5] under Oregon law, employer's unfair competition claim was preempted by Oregon's Trade Secrets Act (OUTSA).

Motion granted in part and denied in part.

West Headnotes (43)

[1] **Federal Civil Procedure**
Insufficiency in general

Federal Civil Procedure
Matters deemed admitted;acceptance as true of allegations in complaint

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[2] **Federal Civil Procedure**
Insufficiency in general

A claim has facial plausibility, as required to survive a motion to dismiss for failure to state a claim, when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[3] **Federal Civil Procedure**
Insufficiency in general

Although a complaint attacked by a motion to dismiss for failure to state a claim does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[4] **Federal Civil Procedure**
Construction of pleadings

Federal Civil Procedure
Matters deemed admitted;acceptance as true of allegations in complaint

On a motion to dismiss for failure to state a claim, a court should accept non-conclusory allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[5] **Federal Civil Procedure**
Pleading, Defects In, in General

The duty of a court on a motion to dismiss for failure to state a claim is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[6] **Federal Civil Procedure**
Matters considered in general

When ruling on a motion to dismiss for failure to state a claim, a court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[7] **Federal Civil Procedure**
Matters considered in general

On a motion to dismiss for failure to state a claim, courts may consider matters of which judicial notice may be taken and documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[8] **Federal Civil Procedure**
Matters considered in general

One way a document may be deemed incorporated by reference, such that it may be considered on a motion to dismiss for failure to state a claim, is where the complaint "refers to" the document. Fed. R. Civ. P. 12(b)(6).

Cases that cite this headnote

[9] **Contracts**
Restraint of Trade or Competition in Trade

Under New York law, the three-part reasonableness test applicable to restrictive covenants in employment agreements applies to non-recruitment provisions.

1 Cases that cite this headnote

[10] **Contracts**
Restraint of Trade or Competition in Trade

Non-recruitment provisions are inherently more reasonable and less restrictive than non-compete clauses under New York law; nevertheless, a non-recruitment provision still operates as an anti-competitive agreement and warrants judicial scrutiny beyond general contract principles.

1 Cases that cite this headnote

[11] **Contracts**
Limitations as to time and place in general

Contracts
Restrictions unlimited as to place

Non-recruitment provision in long term incentive compensation plan agreement, which prohibited employees from soliciting employees, consultants, suppliers, and other persons engaged in business with employer for 24-month period and 12-month period following termination of their employment, was enforceable under New York law; although there was no geographic limitation on the provision, employer's business was conducted worldwide, provision was designed to prevent competitors from poaching employees from employer's highly developed information security department, and provision merely foreclosed one potential

avenue for employer's employees to learn about job opportunities.

Cases that cite this headnote

[12] **Contracts**
Restraint of Trade or Competition in Trade

Under New York law, a restrictive covenant in an employment agreement is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.

1 Cases that cite this headnote

[13] **Contracts**
Limitations as to time and place in general

Under New York law, courts typically examine whether a restrictive covenant in an employment agreement is limited in time and geographic scope to assess reasonableness.

Cases that cite this headnote

[14] **Contracts**
Restraint of Trade or Competition in Trade

Under New York law, a violation of any prong of the three-part reasonableness test renders the restrictive covenant invalid.

Cases that cite this headnote

[15] **Contracts**
Restraint of Trade or Competition in Trade

Under New York law, determination of the enforceability of a restrictive covenant focuses on the particular facts and circumstances giving context to the employment agreement.

1 Cases that cite this headnote

[16] **Contracts**
Restrictions unlimited as to place

Under New York law, where an employer's business is conducted worldwide to a global customer base, the lack of a geographic restriction in a restrictive covenant is necessary.

Cases that cite this headnote

[17] **Federal Civil Procedure**
Fact issues

Whether information concerning compensation, capabilities, and performance of employer's employees was proprietary or confidential was factual question under New York law that could not be determined on motion to dismiss in employer's action against its former employees for allegedly breaching confidentiality provision in long term incentive compensation plan agreement.

Cases that cite this headnote

[18] **Contracts**
Contract not to engage in or injure business carried on by another

Employer sufficiently alleged that its former employees breached confidentiality provision in long term incentive compensation plan agreement under New York law, where employer alleged that employees reconfigured their current employer's network to resemble employer's network using confidential information that employees were privy to from previous employment, that employees used confidential information to reconfigure the network because it was less expensive than developing its own system, and that employee disclosed confidential information concerning other employee and employer's network configuration to solicit other employee.

Cases that cite this headnote

[19] **Federal Civil Procedure**

Insufficiency in general

Deciding the plausibility of a complaint is a context-specific task on a motion to dismiss for failure to state a claim.

Cases that cite this headnote

[20] **Contracts**

Contract not to engage in or injure business carried on by another

Employer sufficiently alleged that its former employees breached non-solicitation provision in long term incentive compensation plan agreement under New York law, where employer alleged that employee's responsibilities at current employer included developing suppliers for its information security department, that employees induced suppliers in business with employer to divert resources to current employer, and that employer and current employer competed for limited resources and personnel in the information security realm.

Cases that cite this headnote

[21] **Federal Courts**

Conflict of Laws;Choice of Law

When a federal district court sits in diversity, it generally applies the law of the state in which it sits, including that state's choice of law rules.

Cases that cite this headnote

[22] **Action**

What law governs

A federal district court sitting in diversity in New York only needs to undergo a conflict of laws analysis if there is indeed a conflict.

Cases that cite this headnote

[23] **Action**

What law governs

Laws are in conflict where the applicable law from each jurisdiction provides different substantive rules.

Cases that cite this headnote

[24] **Action**

What law governs

In the absence of substantive difference between laws for different jurisdictions, a New York federal district court sitting in diversity will dispense with choice of law analysis; and if New York law is among the relevant choices, New York courts are free to apply it.

Cases that cite this headnote

[25] **Torts**

Improper means;wrongful, tortious or illegal conduct

New York draws a distinction between tortious interference with a contract and tortious interference with a nonbinding economic relation; whereas a plaintiff may recover damages for tortious interference with contract even if the defendant was engaged in lawful behavior, tortious interference with prospective business relations requires a showing of more culpable conduct on the part of the defendant.

Cases that cite this headnote

[26] **Torts**

Knowledge and intent;malice

Oregon requires a showing of improper purpose for cases alleging tortious interference with contract.

Cases that cite this headnote

[27] **Torts**

Improper means;wrongful, tortious or illegal conduct

Missouri requires a showing of improper means for all tortious interference cases.

Cases that cite this headnote

[28] **Action**

What law governs

New York's choice-of-law principles dictate that the law of the jurisdiction with the most significant interest in, or relationship to, the dispute applies.

Cases that cite this headnote

[29] **Action**

What law governs

New York's choice of law interests analysis requires an evaluation of both the significant contacts and the location of those contacts as well as whether the purpose of the law is to regulate conduct or allocate loss.

Cases that cite this headnote

[30] **Torts**

What law governs

Under New York's choice of law interests analysis, the parties' domiciles and locus of the tort generally comprise the significant contacts; the respective importance of each of those contacts is determined by the nature of the law in question.

Cases that cite this headnote

[31] **Torts**

What law governs

Where the applicable laws are conduct-regulating under New York's choice of law analysis, the locus of the tort will almost always be determinative.

Cases that cite this headnote

[32] **Negligence**

What law governs

Under New York's choice of law analysis, where negligent conduct occurs in one jurisdiction but the plaintiff's injuries are suffered in another, the situs of the tort is where the last event necessary for liability occurred; however, this last place criterion is not chiseled in stone, but rather gives way when it is at war with state interests so that the more general principles of interest analysis apply.

Cases that cite this headnote

[33] **Labor and Employment**

What law governs

Under New York's choice of law analysis, Oregon law, rather than New York law, applied to employer's tortious interference with contract claim against its former employees and employees' current employer, although alleged injury was inflicted in New York as employer was domiciled in New York, where employees were domiciled in Oregon, current employer was incorporate and headquartered in Oregon, and other employees that employees allegedly solicited were hired to work in Oregon.

Cases that cite this headnote

[34] **Torts**

Knowledge and intent;malice

Torts

Improper means;wrongful, tortious or illegal conduct

To sufficiently state a claim for tortious interference with contract under Oregon law, a plaintiff must allege that the defendant acted with an improper purpose or through improper means.

Cases that cite this headnote

[35] **Torts**

Knowledge and intent;malice

Under Oregon law, deliberate interference alone does not give rise to tort liability under theory of tortious interference with contract.

Cases that cite this headnote

[36] **Torts**

Knowledge and intent;malice

Torts

Improper means;wrongful, tortious or illegal conduct

To be entitled to reach a jury on a tortious interference with contract claim under Oregon law, a plaintiff must not only prove that defendant intentionally interfered with his business relationship but also that defendant had a duty of noninterference; i.e., that he interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff.

Cases that cite this headnote

[37] **Torts**
Knowledge and intent;malice
Torts
Absence of justification or privilege
Torts
Burden of proof

On a tortious interference with contract claim under Oregon law, the burden of proof rests with a plaintiff to show both that a defendant intentionally interfered with the plaintiff's economic relationship and that the defendant had no privilege to do so.

Cases that cite this headnote

[38] **Labor and Employment**
Elements

Employer sufficiently alleged that its former employees and employees' current employer acted with improper purpose or through improper means, as required to state tortious interference with contract claim under Oregon law, where employer alleged that current employer solicited former employees to develop its own information security department at the expense of employer, that current employer caused employees to violate non-solicitation and confidentiality provisions in their employment agreements, and that current employer was aware of the provisions in the agreements.

Cases that cite this headnote

[39] **Antitrust and Trade Regulation**
Trade Secrets and Proprietary Information

Under Oregon law, employer's unfair competition claim asserted against its former employees and employees' current employer was preempted by Oregon's Trade Secrets Act (OUTSA), where employer alleged that employees and current employer misappropriated employer's confidential information, skills, expenditures, and laborers, and poached employer's employees. Or. Rev. Stat. § 646.473.

Cases that cite this headnote

[40] **Antitrust and Trade Regulation**
Trade Secrets and Proprietary Information

Under Oregon law, a claim for unfair competition is preempted by Oregon's Trade Secrets Act (OUTSA) when it rests primarily in defendants' alleged misappropriation of trade secrets. Or. Rev. Stat. § 646.473.

Cases that cite this headnote

[41] **Antitrust and Trade Regulation**
Elements of misappropriation

Oregon's Trade Secrets Act (OUTSA) requires a plaintiff to demonstrate that: (1) the subject of the claim qualifies as a statutory trade secret; (2) the plaintiff employed reasonable measures to maintain the secrecy of its trade secrets; and (3) the conduct of the defendants constitutes statutory misappropriation. Or. Rev. Stat. § 646.461 et seq.

Cases that cite this headnote

[42] **Antitrust and Trade Regulation**
Misappropriation

To sustain an unfair competition claim under the misappropriation theory in New York,

a plaintiff must show that the defendants misappropriated the plaintiffs' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so.

Cases that cite this headnote

[43] **Antitrust and Trade Regulation**
Passing off or Palming off

New York recognizes the "palming off" theory of an unfair competition claim, which occurs in the context of one manufacturer passing off another's goods as his own.

Cases that cite this headnote

Attorneys and Law Firms

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OPINION & ORDER

NELSON S. ROMÁN, United States District Judge

Plaintiff MasterCard International Incorporated ("Plaintiff" or "MasterCard") brings this action alleging breach of contract, tortious interference, and unfair competition against Defendants NIKE, Inc. ("NIKE"), William E. Dennings III ("Dennings"), and Ryan Fusselman ("Fusselman") (collectively, "Defendants"). Defendants move to dismiss Plaintiffs amended complaint (ECF No. 13, or the "Amended Complaint") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the following reasons, Defendants' motion is DENIED in part and GRANTED in part.

BACKGROUND

The following facts are taken from the Amended Complaint unless otherwise noted ***597** and re accepted as true for the purposes of this motion.

Dennings and Fusselman[1] are former employees of MasterCard[2] and currently work at NIKE.[3] (Am. Compl. ¶ 1.) Dennings was MasterCard's Chief Information Security ("IS") Officer ("CISO") until May 28, 2013, and Fusselman was the Senior Business Leader in MasterCard's IS department until October 11, 2013. (*Id.* ¶¶ 2–3.) Fusselman reported directly to Dennings. (*Id.* ¶ 34.) Dennings and Fusselman had responsibility for managing MasterCard's information security department, sequencing and carrying out initiatives to protect data, identifying new personnel, and promoting existing personnel. (*Id.* ¶ 30.) They also received confidential information about MasterCard's network configuration, as well as suppliers and other persons engaged in business with MasterCard. (*Id.* ¶ 31.)

As part of their employment with MasterCard, Dennings and Fusselman each signed a Long Term Incentive Compensation Plan Agreement ("LTIP Agreement"), which contains, among other things, restrictions regarding disclosure of MasterCard's confidential information and solicitation of MasterCard's employees, consultants, suppliers, and other persons engaged in business with MasterCard. (*Id.* ¶ 4.) Section 2 of Dennings' and Fusselman's LTIP Agreements prohibit them from soliciting MasterCard employees, consultants, suppliers, and other persons engaged in business with MasterCard for a 24-month period (Dennings)/12-month period (Fusselman) following termination of their employment (the "Non-Solicitation Clause"). (*Id.* ¶¶ 38, 40.) Section 3 of Dennings' and Fusselman's LTIP Agreements prohibits them from disclosing MasterCard's confidential information to NIKE (the "Non-Disclosure Clause"). (*Id.* ¶¶ 39–40.) Section 5 of the LTIP Agreements provides that MasterCard is entitled to an injunction to prevent breaches of the LTIP Agreement. (*Id.* ¶ 42.) Additionally, Dennings and Fusselman certified that they would comply with MasterCard's Code of Conduct in the course of their employment, which provides for non-disclosure of confidential information. (*Id.* ¶ 43.) NIKE was aware of these provisions in the LTIP Agreements. (*Id.* ¶¶ 52, 68.)

The Amended Complaint alleges that, in recent years, there has been an increasing demand for IS personnel due to the rise in electronic storage and growing data security threats. (*Id.* ¶¶ 6–7.) Furthermore, there is a limited supply of skilled personnel available to perform IS job functions. (*Id.* ¶ 7.) The Amended Complaint

further alleges that MasterCard's success is derived, in part, from its ability to provide a secure platform for customer information which it receives and transmits. (*Id.* ¶¶ 10–12.) As of 2013, MasterCard had a developed IS department,[4] whereas NIKE was looking to create such a department. (*Id.* ¶¶ 13–14.) According to the Amended Complaint, "[i]nformation security concerns the protection of data that companies store and transmit about customers, contracting parties and themselves." (*Id.* ¶ 5.) Prior to his departure from MasterCard, Dennings prepared a report on the retention and development of key talent in ***598** the IS department. (*Id.* ¶ 49.) Dennings resigned from MasterCard on or about May 28, 2013 and accepted a position with NIKE. (*Id.* ¶ 50.) Subsequently, Dennings solicited Fusselman to join NIKE, and Fusselman resigned from MasterCard and accepted a position with NIKE on October 11, 2013. (*Id.* ¶ 65.)

Dennings and Fusselman allegedly conspired to build NIKE's IS department by using confidential information from MasterCard about its employees and consultants and the configuration and software of MasterCard's network, as well as soliciting MasterCard's employees, consultants, suppliers, and others engaged in business with MasterCard. (*Id.* ¶ 14.) In particular, of the eleven employees of MasterCard's IS department that left their employ between May 2013 and September 2014, eight individuals joined NIKE's IS department. (*Id.* ¶ 28.) The Amended Complaint further alleges that Dennings and Fusselman used personal social media accounts, such as LinkedIn, and personal e-mails and cell phones to encourage MasterCard employees to join NIKE. (*Id.* ¶ 88.)

STANDARD ON A MOTION TO DISMISS

[1] [2] [3] [4] [5] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir.2010). A court should accept non-conclusory allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Ruotolo v. City of N.Y.*, 514 F.3d 184, 188 (2d Cir.2008). "[T]he duty of a court 'is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.' " *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 113 (2d Cir.2010) (quoting *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir.1998)).

[6] [7] [8] When ruling on a motion to dismiss for failure to state a claim under Rule 12(b)(6), a "court may consider the facts as asserted within the four corners of the complaint together with the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *Peter F. Gaito Architecture, LLC v. Simone Dev. Corp.*, 602 F.3d 57, 64 (2d Cir.2010) (internal quotation marks and citation omitted). Courts also may consider "matters of which judicial notice may be taken" and "documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir.1993). One way a document may be deemed incorporated by reference is where the complaint "refers to" the document. *EQT Infrastructure Ltd. v. Smith*, 861 F.Supp.2d 220, 224 n. 2 (S.D.N.Y.2012).

DISCUSSION

*599 I. Breach of Contract[5]

Plaintiff's first cause of action against Defendants asserts that Dennings and Fusselman breached the LTIP Agreements and MasterCard's Code of Conduct by disclosing MasterCard's confidential information to NIKE and soliciting, or assisting NIKE to solicit, directly or indirectly, managers, employees, or suppliers of MasterCard and others engaged in business with MasterCard. (Am. Compl. ¶ 124–31.) Defendants advance three grounds for dismissal of the breach of contract claim: (1) the non-recruitment provision of the LTIP Agreements is unenforceable; (2) the Amended Complaint is devoid of well-pleaded facts regarding Dennings' and

Fusselman's misuse of confidential information; and (3) the allegations regarding breaches of the Non-Solicitation Provision of the LTIP Agreements are conclusory. (Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint ("Defs.' Mot.") at 7–16.) The Court will address the merits of each of Defendants' arguments in turn.

A. Enforceability of Non-Recruitment Provision

Both Dennings' and Fusselman's LTIP Agreements contain a provision that prohibits them from "directly or indirectly, solicit[ing], induc[ing], recruit [ing], or encourag[ing] any other employee, agent, consultant or representative to leave the service of [MasterCard] for any reason ..." for a period of 24 months (Dennings) or 12 months (Fusselman) following termination of their employment (the "Non-Recruitment Provision"). (Am. Compl. ¶¶ 38, 40.) In examining whether Plaintiff may maintain a valid breach of contract claim as to the Non-Recruitment Provision, this Court first must determine whether the Non-Recruitment Provision qualifies as a restrictive covenant or is subject to a less stringent level of scrutiny. Then, the Court will apply the appropriate analysis to determine if the Non-Recruitment Provision is enforceable.

i. Applicable Inquiry

As an initial matter, the parties appear to disagree as to whether the Non-Recruitment Provision qualifies as a restrictive covenant, which dictates the nature of this Court's inquiry into the enforceability of the provision. Plaintiff contends that non-recruitment provisions are distinct from non-compete provisions, which are considered restrictive covenants, because non-recruitment provisions do not impede an employee's "ability to earn a livelihood or otherwise interfere with her or his mobility." (Memorandum of Law in Opposition to Defendants' Motion to Dismiss ("Pl.'s Opp.") at 13.) Consequently, Plaintiff argues that the enforceability of a nonrecruitment provision is governed by general contract principles. (*Id.* at 16.) Defendants argue that prevailing New York law draws no distinction between non-recruitment and non-compete provisions. (Defendants' Reply Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint ("Reply") at 2.) Therefore, Defendants contend, the Non-Recruitment Provision should be subject to the reasonableness standard adopted by the New York Court of Appeals in *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (N.Y.1999). (Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Amended Complaint ("Defs.' Mot.") at 7.)

[9] ***600** This Court is persuaded that the reasonableness test set forth in *BDO Seidman* applies to non-recruitment provisions. Admittedly, the contract provision before the court in *BDO Seidman* was a non-compete clause; nevertheless, in analyzing such a provision, the New York Court of Appeals broadly noted that "ancillary employee anti-competitive agreement[s]" should "be carefully scrutinized by the courts." 93 N.Y.2d at 388, 690 N.Y.S.2d 854, 712 N.E.2d 1220 (citing *Columbia Ribbon & Carbon Mfg. Co. v. A–I–A Corp.*, 42 N.Y.2d 496, 499, 398 N.Y.S.2d 1004, 369 N.E.2d 4 (1977)). At least one other court in this Circuit also has concluded that the three-prong *BDO Seidman* test applies with equal force to nonrecruitment provisions. In *Reed Elsevier Inc. v. Transunion Holding Company*, the court noted that "[c]ourts applying New York law have observed that there is a dearth of case law addressing no-hire provisions, and consequently apply the same three-prong analysis applied to non-compete clauses to determine the reasonableness of no-hire provisions." No. 13–cv–8739 (PKC), 2014 WL 97317, at *7 (S.D.N.Y. Jan. 19, 2014) (citing *Evolution Mkts., Inc. v. Penny*, No. 7823/09, 2009 N.Y. Misc. LEXIS 1276, at *7–8 (Sup.Ct., Westchester Cnty.2009) ("There appears to be no New York Court of Appeals case discussing the applicable standard for non-recruitment covenants. In fact, both parties can point to only one New York case discussing the standard."); *OTG Mgmt., LLC v. Konstantinidis*, 40 Misc.3d 617, 967 N.Y.S.2d 823, 826 (N.Y.Sup.Ct.2013) (noting a lack of precedent governing no-hire provisions and applying the three-prong reasonableness test to a non-recruitment agreement)). Additionally, at least one New York trial court has held that the *BDO Seidman* test applies to non-solicitation clauses. *See Lazer Inc. v. Kesselring*, 13 Misc.3d 427, 431, 823 N.Y.S.2d 834 (N.Y.Sup.Ct.2005) (holding that "a covenant not to solicit former coemployees is a species, albeit a limited one, of a covenant not to compete in the broad sense and is governed by the three-part test of reasonableness articulated in *BDO Seidman*.") The court in *Lazer* noted that a non-solicitation agreement "restricting as

it does a former employee's freedom to solicit his former coemployees, necessarily also affects the general competitive mold of society, and is in derogation of the concept, invoked in the cases on this subject, that our economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas." *Id.*

[10] Plaintiff lodges a series of unpersuasive challenges to the *Lazer* court's determination that the *BDO Seidman* test applies to nonrecruitment provisions. First, Plaintiff contends that *Lazer* is distinguishable because it arose in the context of a motion for summary judgment. (Pl.'s Opp. at 14.) However, the procedural posture of the case did not affect the court's determination of the nature of the reasonableness inquiry, only the ultimate application of the *BDO Seidman* reasonableness inquiry. Second, Plaintiff argues that the *Lazer* court ignored the unique policy considerations of non-compete clauses inapplicable to non-recruitment provisions. (Pl.'s Opp. at 13–16.) In particular, Plaintiff notes that non-recruitment provisions are subject to greater scrutiny because that type of post-employment restriction may contribute to "loss of a man's livelihood." *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 272, 246 N.Y.S.2d 600, 196 N.E.2d 245 (1963). This Court agrees that non-recruitment provisions are "inherently more reasonable and less restrictive than non-complete clauses." *Admarketplace Inc. v. Salzman*, 2014 WL 1278504, at *4, 2014 N.Y. Misc. LEXIS 1458, at *10 (N.Y.Sup.Ct. Mar. 28, 2014) (internal quotations and ***601** citations omitted). This is because a nonrecruitment provision does not impede an individual's ability to procure new employment. Nevertheless, a non-recruitment provision still operates as an anti-competitive agreement and warrants judicial scrutiny beyond general contract principles. Third, Plaintiff asserts that the *Lazer* court mis-cited a New Hampshire Supreme Court decision cited in *BDO Seidman—Technical Aid Corporation v. Allen*, 134 N.H. 1, 591 A.2d 262 (N.H.1991) ("*Technical Aid*"). (Pl.'s Opp. at 15.) In particular, Plaintiff argues that the *Lazer* court "confused the New Hampshire Supreme Court's discussion of a provision restricting solicitation of customers (which is a form of non-compete) with a non-recruitment of employees provision." (*Id.*) However, it appears that the New Hampshire court in *Technical Aid* did engage in a three prong analysis, or at least some version of it, for a non-recruitment provision. 134 N.H. at 13–14, 591 A.2d 262 (holding that the 18-month non-recruitment restrictment was not excessive in light of the "legitimate interest in retaining the services of [ ] current employees ....") Finally, Plaintiff seeks to distinguish the nonrecruitment provision in *Lazer*, which was enacted "only in conjunction with the nondisclosure of proprietary information provisions ... and the noncompetition provisions," and the Non-Recruitment Provision. 13 Misc.3d at 429, 823 N.Y.S.2d 834. However, the *Lazer* court explicitly noted that even if the nonrecruitment provision were construed as a standalone covenant, it would still be unenforceable in New York. *Id.*

ii. Application of *BDO Seidman* Test

[11] **[12]** **[13]** **[14]** **[15]** Having determined that the Non-Recruitment Provision is subject to the *BDO Seidman* test, the Court next turns to an application of that test to determine whether the provision is enforceable. In *BDO Seidman*, the New York Court of Appeals adopted a three-part test to determine the reasonableness, and ultimately the enforceability, of anti-competitive employee agreements. *BDO Seidman*, 93 N.Y.2d at 388–89, 690 N.Y.S.2d 854, 712 N.E.2d 1220. "A restraint is reasonable only if it: (1) is *no greater* than is required for the protection of the *legitimate interest* of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." *Id.* Courts also typically examine whether the restriction is limited in time and geographic scope to assess reasonableness. *Id.* "A violation of any prong renders the covenant invalid." *Id.* "Under New York law, determination of the enforceability of a restrictive covenant focuses on the particular facts and circumstances giving context to the agreement." *Reed Elsevier*, 2014 WL 97317, at *7 (internal quotation and citation omitted).

[16] In the instant case, Plaintiff concedes that there is no geographic limitation on the Non-Recruitment Provision. Nevertheless, "where an employer's business is conducted worldwide to a global customer base, 'the lack of a geographic restriction is necessary.' " *Reed Elsevier*, 2014 WL 97317, at *7 (quoting *Evolution Mkts., Inc. v. Penny*, No. 7823/09, 2009 N.Y. Misc. LEXIS 1276, at *44 (N.Y.Sup.Ct.2009)). Furthermore, New York courts have upheld as reasonable one year and two year non-solicitation provisions, like Dennings' and Fusselman's Non-Recruitment Provisions. *See Silipos, Inc. v. Bickel*, No. 06–cv–2205, 2006 WL 2265055, at *6 (S.D.N.Y. Aug. 8, 2006) (citing *Crown It Servs. Inc. v. Koval-Olsen*, 11

A.D.3d 263, 782 N.Y.S.2d 708, 710 (1st Dep't 2004) (one-year restriction)); *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 201, 651 N.Y.S.2d 504, 505 (1st Dep't 1996) (two-year restriction). Thus, the Court cannot ***602** conclude that the geographic and temporal scope of the Non-Recruitment Provision are unreasonable.

Courts in New York have determined interests to be legitimate in the context of ancillary employee anti-competitive agreements when they are designed "(1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases were the employee's services to the employer are deemed special or unique." *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir.1999) (citing *Purchasing Assocs.*, 13 N.Y.2d at 272–73, 246 N.Y.S.2d 600, 196 N.E.2d 245). Plaintiff contends that the Non-Recruitment Provision protects the following "legitimate interests": (1) MasterCard's goodwill, (2) MasterCard's confidential information, (3) MasterCard's "investments in developing and retaining highly qualified employees in ISD and related departments," (4) MasterCard's investments in its network, (5) MasterCard's business relationships, (6) "maintenance of a highly qualified and specialized ISD," and (7) employee productivity and morale. (Pl.'s Opp. at 17) (citing Am. Compl. ¶¶ 4–13, 44–45.) While the Court is skeptical as to whether all of these interests qualify as legitimate, Plaintiff's assertion that the Non-Recruitment Provision is designed to prevent competitors from poaching employees from MasterCard's highly developed IS department as well as protect against the misappropriation of MasterCard's proprietary IS network coincides with the legitimate interests recognized by courts in New York. *See Admarketplace*, 2014 WL 1278504, at *4, 2014 N.Y. Misc. LEXIS 1458, at *10 ("The gravamen of [plaintiff's] allegations is that [defendant] has been poaching employees from [plaintiff], inducing them to switch companies for greater compensation hoping that [they] bring proprietary information with them. A non-recruitment prohibition directly guts this channel of wrongful competition."). Of course, the merit of Plaintiff's allegations that NIKE was attempting to poach MasterCard's employees in the hopes of replicating MasterCard's developed IS network will be borne out in discovery.

Additionally, given the limited time frame of the Non-Recruitment Provision, the Court cannot conclude that the Non-Recruitment Provision is unenforceable on undue hardship grounds at this juncture. *See Marsh USA Inc. v. Karasaki*, No. 08–cv–4195 (JGK), 2008 WL 4778239, at *18 (S.D.N.Y. Oct. 31, 2008).

Finally, Defendants contend the Non-Recruitment Provision is injurious to the public at large, and therefore unenforceable, because it "has the effect of preventing MasterCard employees who are not subject to restrictive covenants from learning of opportunities in the economy that may be able to use their services ...." (Defs.' Mot. at 12, n. 7.) However, the Non-Recruitment Provision merely forecloses one potential avenue for MasterCard employees to learn about job opportunities and only for a limited time frame. MasterCard employees are free to pursue employment at other companies—the Non-Recruitment Provision merely limits the ability of former employees to assist NIKE to poach employees for a specified period. MasterCard employees are even free to pursue employment at NIKE—the Non-Recruitment Provision just limits one means of learning about potential employment opportunities at NIKE. The Court is not persuaded that such a prohibition is injurious to the public at large.

Accordingly, the Court finds that the Non-Recruitment Provision is enforceable at this stage of the litigation and declines to dismiss Plaintiff's breach of contract ***603** claim with respect to the Non-Recruitment Provision.

B. Confidentiality Provision

The Court next turns to Plaintiff's claim that Defendants breached the Confidentiality Provision in the LTIP Agreement. The LTIP Agreement prohibits direct or indirect disclosure of "Confidential Information," which is defined in the LTIP Agreement as information that is of a "confidential, competitively sensitive, proprietary and/or secret character and is not generally available to the public." (Declaration of David W. Garland ("Garland Decl."), Exhibit 2 at 3.) Defendants attack Plaintiff's breach of contract claim with respect to the Confidentiality Provision on two primary grounds: (1) Plaintiff fails to establish that basic information regarding employees is "confidential" and (2) allegations in the Amended Complaint regarding alleged disclosure and misappropriation of Confidential Information that are made "on information and belief" are insufficient to withstand a motion to dismiss. (Defs.' Mot. at 13–14.)

[17] The Amended Complaint alleges that information concerning the compensation, capabilities and performance of MasterCard's employees, as well as information regarding MasterCard's network configuration, is confidential, competitively sensitive, and not generally available to the public. (Pl.'s Opp. at 11 (citing Am. Compl. ¶¶ 31, 39, 41, 47–50).) Defendants appear to suggest that because certain MasterCard employees had LinkedIn profiles that publicly display information regarding their expertise and capabilities, the alleged Confidential Information described in the Amended Complaint is not in fact confidential. However, "[w]hether the information at issue is actually either proprietary or confidential is a factual determination which cannot be made" at the motion to dismiss stage. *Trusthouse Forte, Inc. v. 795 Fifth Ave. Corp.*, No. 08–cv–1698 (CBM), 1981 WL 1113, at *5 (S.D.N.Y. Aug. 31, 1981).

[18] Defendants further challenge Plaintiff's claim that Defendants breached the Confidentiality Provision on the basis that the "information and belief" allegations in the Amended Complaint are improper. In particular, Defendants cite *JBCHoldings N.Y., LLC, v. Pakter* for the proposition that "information and belief" allegations must be "accompanied by a statement of the facts upon which the belief is founded." (Defs.' Mot. at 14 (citing 931 F.Supp.2d 514, 527 (S.D.N.Y.2013) (internal citation and quotation omitted)). They further argue that the allegations are entirely conclusory rather than proper factual allegations. (Defs.' Mot. at 14.) Plaintiff counters that *Barrett v. Forest Laboratories, Inc.*, a subsequent case from this district, clarified that the *JBC* court's holding was limited to Rule 9(b)'s heightened pleading standard. (Pl.'s Opp. at 9 (citing 39 F.Supp.3d 407, 432–33 (S.D.N.Y.2014))).

[19] "Deciding the plausibility of a complaint is, of course, a 'context-specific task.' " *Barrett*, 39 F.Supp.3d at 432 (quoting *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937). The Amended Complaint alleges, upon information and belief, that Defendants reconfigured NIKE's network to resemble MasterCard's network using MasterCard's Confidential Information, which Dennings and Fusselman were privy to in their previous positions within the IS department at MasterCard (Am. Compl. ¶¶ 55, 56, 69); Defendants used MasterCard's Confidential Information to reconfigure NIKE's network because doing so was less expensive than developing its own system from scratch (*Id.* ¶ 57); and Dennings disclosed Confidential Information concerning Fusselman and MasterCard's network configuration to solicit Fusselman (*Id.* ¶ 64). The ***604** Court finds that these allegations are sufficient to state a claim under the *Twombly/Iqbal* standards. "Both *Twombly* and *Iqbal* recognize that, on a motion to dismiss, courts must assume as true the factual allegations in a complaint." *Barrett*, 39 F.Supp.3d at 432 (citations omitted). At this stage of the litigation, Plaintiff has alleged sufficiently a breach of the Confidentiality Provision. *See KatiRoll Co. v. Kati Junction, Inc.*, 33 F.Supp.3d 359, 372 (S.D.N.Y.2014) (upholding plaintiff's misappropriation of confidential information claim at motion to dismiss stage). The Court notes that to the extent discovery does not substantiate Plaintiff's allegations, this claim may be properly dismissed at the summary judgment stage.

C. Non-Solicitation Provision

[20] Defendants' argument regarding Plaintiff's claim that Defendants breached the Non-Solicitation Provision closely tracks their attack on Plaintiff's claim premised upon a breach of the Confidentiality Provision. In particular, Defendants contend that the Amended Complaint fails to identify MasterCard's suppliers that Defendants allegedly solicited and fails to allege how NIKE diverted those suppliers' resources from MasterCard. (Defs.' Mot. at 16.) However, the Amended Complaint alleges that Dennings' responsibilities at NIKE include developing relationships with suppliers for NIKE's IS department (Am. Compl. ¶ 53), and Defendants induced suppliers and others engaged in business with MasterCard to divert resources from MasterCard to NIKE (*Id.* ¶¶ 55–57, 69, 89). While the Amended Complaint does not state the identity of these suppliers, the Court notes that such level of specificity is not required at this stage of the litigation. Moreover, the Court is not persuaded by Defendants' argument that NIKE could not have breached the Non-Solicitation Provision because MasterCard and NIKE are not competitors. (Defs.' Mot. at 15–16.) MasterCard and NIKE are engaged in different businesses (Am. Compl. ¶¶ 10, 14); nevertheless, the Amended Complaint alleges that the two companies compete for limited resources and personnel in the IS realm. (*Id.* ¶¶ 5–14, 140.) Accordingly, the Court declines to dismiss Plaintiff's claim for breach of the Non-Solicitation Provision.

II. Tortious Interference

The Court next turns to Plaintiff's claim for tortious interference with contract. As an initial matter, the parties dispute which states' law governs the tortious interference claim. Defendants assert that Oregon law should apply. (Defs.' Mot. at 19–20.) Plaintiffs, on the other hand, argue that New York law applies. (Pl.'s Opp. at 18.) Prior to examining the substantive merits of Plaintiff's tortious interference claim, the Court will first determine the applicable law.

A. Choice of Law Analysis

[21] [22] [23] [24] "When a federal district court sits in diversity, it generally applies the law of the state in which it sits, including that state's choice of law rules." *In re Coudert Bros. LLP*, 673 F.3d 180, 186 (2d Cir.2012). This Court is sitting in diversity in New York, which only requires a court to undergo a conflict of laws analysis if there is indeed a conflict. *Int'l Bus. Machines Corp. v. Liberty Mut. Ins. Co.*, 363 F.3d 137, 143 (2d Cir. 2004) (citing *In re Allstate Ins. Co.*, 81 N.Y.2d 219, 233, 597 N.Y.S.2d 904, 613 N.E.2d 936 (N.Y.1993)). "Laws are in conflict '[w]here the applicable law from each jurisdiction provides different substantive rules.' " *Int'l Bus. Machines Corp.*, 363 F.3d at 143 (quoting *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir.1998)). "In the absence of substantive difference, however, a New York court will ***605** dispense with choice of law analysis; and if New York law is among the relevant choices, New York courts are free to apply it." *Int'l Bus. Machines Corp.*, 363 F.3d at 143 (citing *J. Aron & Co. v. Chown*, 231 A.D.2d 426, 647 N.Y.S.2d 8 (N.Y.App.Div.1996)).

[25] [26] [27] New York draws a distinction between tortious interference with a contract and tortious interference with a nonbinding economic relation. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189, 785 N.Y.S.2d 359, 818 N.E.2d 1100 (N.Y.2004). Whereas a plaintiff may recover damages for tortious interference with contract "even if the defendant was engaged in lawful behavior," tortious interference with prospective business relations requires a showing of "more culpable conduct on the part of the defendant." *Id.* at 189–90, 785 N.Y.S.2d 359, 818 N.E.2d 1100. Oregon, on the other hand, requires a showing of "improper purpose" even for cases alleging tortious interference with contract. *Douglas Med. Ctr. LLC v. Mercy Med. Ctr.*, 203 Or.App. 619, 630, 125 P.3d 1281, 1287 (Or.Ct.App.2006). Missouri similarly requires a showing of "improper means" for all tortious interference cases. *EnviroPak Corp. v. Zenfinity Capital, LLC*, No. 04:14–cv–00754, 2015 WL 331807, at *7, 2015 U.S. Dist. LEXIS 7770, at *19 (E.D.Mo. Jan. 23, 2015) (citing *Clinch v. Heartland Health*, 187 S.W.3d 10, 16 (Mo.App.W.D.2006)) (citing *Carter v. St. John's Reg'l Med. Ctr.*, 88 S.W.3d 1, 14 (Mo.App.S.D.2002)). Given the discrepancy between New York and Oregon/Missouri law regarding the requisite elements to plead tortious interference with contract, the Court must undertake a choice of law analysis.

[28] [29] [30] [31] [32] New York's choice-of-law principles dictate that the law of the jurisdiction " 'with the most significant interest in, or relationship to, the dispute' " applies. *White Plains Coat & Apron Co. v. Cintas Corp.*, 460 F.3d 281, 284 (2d Cir.2006) (quoting *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 (2d Cir.1997)). This "interests" analysis requires an evaluation of both "the significant contacts" and the location of those contacts as well as "whether the purpose of the law is to regulate conduct or allocate loss." *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir.1996). The parties' domiciles and locus of the tort generally comprise the significant contacts. *Id.* at 646. Furthermore, "[t]he respective importance of each of those contacts is determined by the nature of the law in question." *Id.* Where, as here, the applicable laws are conducting regulating, "the locus of the tort will almost always be determinative ...." *Id.* (internal citations and quotations omitted). The New York Court of Appeals has "held that where negligent conduct occurs in one jurisdiction but the plaintiff's injuries are suffered in another, the situs of the tort is where the last event necessary for liability occurred. *White Plains Coat & Apron*, 460 F.3d at 285 (citing *Schultz v. Boy Scouts of Am.*, 65 N.Y.2d 189, 195, 491 N.Y.S.2d 90, 480 N.E.2d 679 (1985)). "However, this last place criterion is not chiseled in stone, but rather gives way when it is at war with state interests so that the more general principles of interest analysis apply." *Planet Payment, Inc. v. Nova Info. Sys.*, 2011 WL 1636921, at *9, 2011 U.S. Dist. LEXIS 49154, at *26 (E.D.N.Y. Mar. 31, 2011) (internal quotations omitted). "[W]here one state's relationship to the conduct at issue overwhelmed the interest of the state where the damage occurred, courts have declined to apply the last event necessary test." *Id.*, 2011 WL 1636921, at *9, 2011 U.S. Dist. LEXIS 49154, at *26–27 (collecting cases).

[33] In the instant action, Plaintiff's domicile is New York, whereas Defendants *606 are domiciled in Oregon. Additionally, the locus of the tort—"the place where the alleged injury is inflicted"—is New York because Plaintiff is domiciled in New York. *Mark Andrew of the Palm Beaches, Ltd. v. GMAC Commercial Mortg. Corp.*, 265 F.Supp.2d 366, 378 (S.D.N.Y.2003). Nevertheless, the Court finds it appropriate to deviate from the "last place criterion" because Oregon has a much greater relationship to the conduct at issue. The individual defendants are domiciled in Oregon; NIKE is incorporated and headquartered in Oregon; and the former MasterCard employees that Plaintiff alleges Defendants solicited were hired to work in Oregon. (Reply at 7.) New York's sole relation to the action is that MasterCard is domiciled there. Therefore, Oregon law applies to the evaluation of Plaintiff's tortious interference claim.

B. Merits of Claim

[34] [35] [36] [37] As stated above, to sufficiently state a claim for tortious interference under Oregon law, a plaintiff must allege that the defendant acted with an improper purpose or through improper means. Defendants contend that Plaintiff's claim fails because the Amended Complaint does not suggest that Defendants "were acting only to inflict harm upon MasterCard." (Defs.' Mot. at 21.) Under Oregon law, "[d]eliberate interference alone does not give rise to tort liability." *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 498, 982 P.2d 1117, 1124 (1999). "To be entitled to reach a jury, a plaintiff must not only prove 'that defendant intentionally interfered with his business relationship but also that defendant had a duty of noninterference; *i.e.*, that he interfered for an improper purpose rather than for a legitimate one, or that defendant used improper means which resulted in injury to plaintiff.' " *Id.* (quoting *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979)). "The burden of proof rests with a plaintiff to show both that a defendant intentionally interfered with the plaintiff's economic relationship and that the defendant had no privilege to do so." *Chase Gardens*, 328 Or. at 498–99 (citation omitted).

[38] Here, the Amended Complaint alleged that Defendants acted both with an improper purpose and through improper means. First, the Amended Complaint states that NIKE, in apparent recognition of limited IS personnel and resources, solicited MasterCard's former employees and other business contacts to develop its own IS department at the expense of MasterCard. The Amended Complaint further alleges that in doing so, NIKE caused MasterCard's former employees to violate their LTIP Agreements, which contain prohibitions against solicitation of MasterCard business contacts, recruitment of MasterCard employees, and misappropriation of MasterCard Confidential Information. Allegedly, NIKE was aware of these provisions in the LTIP Agreements. (Am. Compl. ¶¶ 52, 68.) At the motion to dismiss stage, Plaintiff has alleged sufficiently that Defendants acted with an improper purpose or through improper means with respect to the tortious interference claim. Accordingly, the Court denies Defendants' motion to dismiss Plaintiff's tortious interference claim.

III. Unfair Competition

[39] As with the tortious interference claim, the parties appear to dispute which state's law is applicable to the unfair competition claim. Defendants contend that Oregon law applies (Defs.' Mot. at 24), whereas Plaintiff asserts that New York law applies. (Pl.'s Opp. at 22.) First, the Court must ascertain whether there is a difference between Oregon and New York law with respect to unfair competition. If *607 there is a difference, the Court will conduct an interests analysis to determine which state's law applies.

[40] [41] Under Oregon law, a claim for unfair competition is preempted by Oregon's Trade Secrets Act ("OUTSA") when it "rests primarily in Defendants' alleged misappropriation of trade secrets." *Precision Automation, Inc. v. Tech. Servs.*, 2007 WL 4480736, at *3, 2007 U.S. Dist. LEXIS 94555, at *7 (D.Or. Dec. 14, 2007). Plaintiff's unfair competition claim alleges that Defendants misappropriated Plaintiff's "Confidential Information, skills, expenditures and labors of MasterCard" (Am. Compl. ¶ 143) as well as poached MasterCard's employees. (*Id.* ¶ 144.) While the latter allegation does not appear on its face to constitute a misappropriation of a trade secret, a federal court applying Oregon law has acknowledged that a similar allegation "is clearly encompassed by OUTSA's broad prohibition of any 'improper acquisition, disclosure or use of a trade secret.' " *Vigilante.com, Inc. v. ArgusTest.com, Inc.*, 2005 WL 2218405, at *13, 2005 U.S. Dist. LEXIS 45999, at *39 (D. Or. Sept. 6, 2005). Therefore, if analyzed under Oregon law, Plaintiff's unfair competition claim

would be preempted by the OUTSA, which requires "a plaintiff to demonstrate that: (1) the subject of the claim qualifies as a statutory trade secret; (2) the plaintiff employed reasonable measures to maintain the secrecy of its trade secrets; and (3) the conduct of the defendants constitutes statutory misappropriation." *Id.*, 2005 WL 2218405, at *13, 2005 U.S. Dist. LEXIS 45999, at *38 (internal quotation and citation omitted).

[42] **[43]** To sustain an unfair competition claim under the misappropriation theory in New York,[6] a plaintiff "must show that the defendants misappropriated the plaintiffs' labors, skills, expenditures, or good will and displayed some element of bad faith in doing so." *Rockland Exposition, Inc. v. Alliance of Auto. Serv. Providers of New Jersey*, 894 F.Supp.2d 288, 325 (S.D.N.Y.2012) (citations and quotations omitted). Given the conflict between Oregon and New York law with respect to unfair competition claims, the Court must conduct an interests analysis to determine which state's law controls. Because unfair competition is a conduct-centered claim like tortious interference, the Court concludes that Oregon law applies for the reasons stated in Section II. A *supra*.

The Amended Complaint does not allege the elements of an OUTSA claim. Accordingly, Plaintiff's unfair competition claim is dismissed without prejudice.

CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' motion to dismiss Plaintiffs breach of contract and tortious interference claim. Additionally, the unfair competition claim is dismissed without prejudice. Defendants are directed to file answers within 30 days hereof. The patties are directed to appear for an initial pre-trial conference on April 15, 2016 at 12:00 p.m. Parties shall bring a completed case management plan to the initial pre-trial conference. The Court respectfully directs the Clerk to terminate the motion at ECF No. 14.

SO ORDERED:

All Citations

164 F.Supp.3d 592

Footnotes

1 Dennings and Fusselman are Oregon residents. (Am. Compl. ¶¶ 18-19.)

2 MasterCard is a Delaware corporation with its principal place of business in New York. (*Id.* ¶ 16.)

3 NIKE is an Oregon corporation with its principal place of business in Oregon. (*Id.* ¶ 17.)

4 *See* Paragraphs 24–27 of the Amended Complaint for further description of MasterCard's IS department.

5 The parties do not dispute that New York law applies to Plaintiff's breach of contract claim.

6 New York also recognizes the "palming off" theory of an unfair competition claim, which occurs in the context one manufacturer passing off another's goods as his own. *See ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 850 N.Y.S.2d 366, 880 N.E.2d 852, 858 (2007).

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EXHIBIT 4

2016 WL 1657474
Only the Westlaw citation is currently available.
NON–PRECEDENTIAL DECISION—
SEE SUPERIOR COURT I.O.P. 65.37
Superior Court of Pennsylvania.

LEHIGH ANESTHESIA ASSOCIATION, Appellant
v.
Michael MELLON, CRNA, Appellee.

No. 1570 EDA 2015.
|
Filed April 26, 2016.

Synopsis

Background: Anesthetist's former employer brought action against anesthetist, alleging breach of restrictive covenant prohibiting anesthetist, following termination of employment, from performing services for employer's clients and certain former clients. The Court of Common Pleas, Lehigh County, Civil Division, No. 2012-C-3692, granted anesthetist's motion for summary judgment. Employer appealed.

Holding: The Superior Court, No. 1570 EDA 2015, Gantman, P.J., held that covenant's prohibition was overly broad and, thus, unenforceable.

Affirmed.

West Headnotes (1)

[1] **Contracts**
General or Partial Restraint
Contracts
Restrictions Unlimited as to Place

Restrictive covenant's prohibition of anesthetist's providing services to clients and certain former clients of anesthetist's 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 anesthetist in finding potential future employer, especially when coupled with unlimited geographical scope of the covenant.

Cases that cite this headnote

Appeal from the Order May 5, 2015, In the Court of Common Pleas of Lehigh County, Civil Division at No(s): 2012–C–3692.

BEFORE: GANTMAN, P.J., MUNDY, J., and MUSMANNO, J.

MEMORANDUM BY GANTMAN, P.J.:

*1 Appellant, Lehigh Anesthesia Association ("LAA"), appeals from the order entered in the Lehigh County Court of Common Pleas, which granted summary judgment in favor of Appellee, Michael Mellon, CRNA. We affirm.

The relevant facts and procedural history of this case are as follows. Appellee, a certified nurse anesthetist, began working for LAA in 2001. Both parties entered into a written employment agreement ("Agreement") on September 24, 2001. Paragraph 9 of the Agreement contains a restrictive covenant, which states in relevant part:

9. *Restrictive Covenant*

A. In the course of inviting Employee to join Employer's practice of anesthesia, and in his employment, he will be introduced to and have made available to him certain of Employer's contacts and referring doctor relationships, hospital sources, business and professional relationships and the like. Employee acknowledges that because he has not been in a private (fee-for-service) practice in anesthesia previously, he has no referring doctor or facility following in the area, nor does he have any substantial experience in the "business" of a private, fee-for-service anesthesia practice.

Accordingly, Employee recognizes and agrees that termination of his employment for any reason followed by his entering into a business or practice competitive with that of Employer (*i.e.*, the rendering of anesthesia services to clients of Employer), as an employee, owner,

> contractor, or otherwise, would allow Employee to take many of the sources of the Employer's success with Employee to the ongoing practice's detriment, for Employer would have established the Employee is in a situation that makes him a very strong competitor for the Employer's current and potential practice sources.
>
> Therefore, Employee agrees that he will pay to Employer the amount specified below for each "client" of "Employer" for whom he, or his subsequent employers(s), employee(s), subcontractor(s) or the like, provide, services to within the twenty-four (24) months after termination of this Agreement. Any amounts payable hereunder shall be due in two (2) equal installments thirteen (13) and twenty-five (25) months after commencement of Employee's competitive activity.
>
> For purposes of this Paragraph 9, "Employer" is defined to include Lehigh Anesthesia Associates, P.C., and the Center for Ambulatory Anesthesia, Inc., and Employer's "clients" are clients of any of those entities.
>
> * * *
>
> For this purpose, Employer's clients are clients for whom Employer has provided any billable services within the forty-eight (48) months preceding Employee's termination of employment.
>
> * * *
>
> B. For the reasons described above, Employee further agrees he will not solicit any clients or contractual arrangement of the Employer or convert to his possession and/or disclose in any manner any contractual arrangements, patient lists, addresses or other data about the patients, clients, and/or contracts neither before nor after termination of his employment hereunder. All such information is hereby agreed to be confidential to Employer and of essential importance to its ongoing practice. All reasonable legal fees and costs incurred by Employer in connection with the enforcement of this subparagraph upon a breach hereof of Employee shall be paid by employee.

***2** (*See* Appellee's Brief in Support of Motion for Summary Judgment, Exhibit D at 6–8; R.R. at 25a–27a). LAA subsequently terminated Appellee's employment in May 2012, after receiving numerous complaints from patients and clients regarding Appellee's poor work and behavior. Thereafter, Appellee began working for Professional Anesthesia Consultants, P.C. ("PAC") in King of Prussia. While working for PAC, Appellee provided anesthetist services for Carlisle Endoscopy Center ("CEC"), one of LAA's clients from 2001 until 2011.

On September 6, 2012, LAA filed a *praecipe* for a writ of summons against Appellee. LAA filed a complaint on February 28, 2013, against Appellee that alleged breach of the Agreement's restrictive covenant. Appellee filed on March 20, 2013, an answer with new matter and counterclaims. On April 11, 2013, LAA filed an answer and new matter to the counterclaims, to which Appellee replied. Appellee filed, on April 30, 2014, a motion for summary judgment and a brief in support of his motion. LAA filed a response on May 30, 2014, as well as a memo in opposition to the summary judgment motion. Appellee filed a reply brief on June 10, 2014.

The court granted Appellee's summary judgment motion on September 2, 2014, as to all of LAA's claims. Thereafter, Appellee filed a *praecipe* to discontinue his counterclaims. LAA timely filed a notice of appeal on May 29, 2015. The court ordered LAA on June 5, 2015, to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P.1925(b), and LAA timely complied on June 25, 2015.

LAA raises the following issues for our review:

> DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION IN HOLDING THAT BECAUSE [LAA] HAD TERMINATED [APPELLEE]—REGARDLESS OF THE REASON—THEN AS A MATTER OF LAW, [LAA] FORFEITED THE RIGHT TO ENFORCE THE CLIENT–SPECIFIC RESTRICTIVE COVENANT IN [APPELLEE'S] EMPLOYMENT AGREEMENT, AND IN RELYING ON *INSULATION CORP. OF AMERICA V. BROBSTON*, 446 Pa.Super. 520, 667 A.2d 729 (Pa.Super.1995) FOR THAT PROPOSITION?
>
> DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION IN GRANTING [APPELLEE'S] SUMMARY JUDGMENT MOTION, AND REFUSING TO ENFORCE THE CLIENT–

SPECIFIC RESTRICTIVE COVENANT IN [LAA'S] EMPLOYMENT AGREEMENT, ON THE BASIS THAT THE COVENANT WAS AIMED AT RESTRAINING [APPELLEE] "FROM THE EXERCISE OF HIS PROFESSION WITHIN CERTAIN GEOGRAPHIC ... BOUNDS" WHEN THE COVENANT CLEARLY WAS NOT BASED ON ANY GEOGRAPHIC LIMITATION?

DID THE TRIAL COURT ERR AS A MATTER OF LAW AND/OR ABUSE ITS DISCRETION IN GRANTING [APPELLEE'S] SUMMARY JUDGMENT MOTION AND REFUSING TO ENFORCE THE RESTRICTIVE COVENANT IN HIS EMPLOYMENT AGREEMENT ON THE BASIS THAT THERE WAS NO GENUINE ISSUE ON THE MATERIAL FACT AS TO WHETHER [LAA] HAD TERMINATED [APPELLEE] FOR POOR JOB PERFORMANCE?

(LAA's Brief at 5).

In the issues combined, LAA argues the restrictive covenant at issue should be enforced. LAA claims the court's reliance on *Brobston, supra* is misplaced in light of more recent case law that confirms LAA's termination of Appellee does not automatically prohibit LAA as a matter of law from enforcing a restrictive covenant against Appellee. LAA also alleges the restrictive covenant did not prohibit Appellee from practicing his profession within a particular geographic area upon termination; the covenant allowed Appellee to provide anesthesia services at any facility so long as it was not one of the 40+/− medical offices or facilities in eastern and central Pennsylvania under contract with LAA or which had been under contract with LAA during the four-year period before Appellee's termination. LAA claims Appellee violated these terms of the restrictive covenant when, after his termination in 2012, Appellee took a position with PAC in King of Prussia. While working for PAC, Appellee provided anesthesia services for CEC, one of LAA's clients from 2001 until 2011. LAA asserts the court in this case misperceived there was some "geographic extent" to the restrictive covenant, as Appellee could have worked for any employer that did not meet the restrictive covenant definition of a "client." LAA states it had a particular interest to protect and Appellee's termination did not affect his ability to earn a living. LAA maintains there are genuine issues of material fact which barred summary judgment. LAA concludes this Court should reverse the order granting summary judgment and remand for further proceedings. We do not agree.

***3** Initially, we observe:

> Our scope of review of an order granting summary judgment is plenary. [W]e apply the same standard as the trial court, reviewing all the evidence of record to determine whether there exists a genuine issue of material fact. We view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law will summary judgment be entered. All doubts as to the existence of a genuine issue of a material fact must be resolved against the moving party.
>
> Motions for summary judgment necessarily and directly implicate the plaintiff's proof of the elements of [his] cause of action. Summary judgment is proper if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. In other words, whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense, which could be established by additional discovery or expert report and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. Thus, a record that supports summary judgment either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.
>
> Upon appellate review, we are not bound by the trial court's conclusions of law, but may reach our own conclusions. The appellate Court will disturb the trial court's order only upon an error of law or an abuse of discretion.
>
> > Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration. Consequently, the court abuses its discretion if, in resolving the issue for decision, it misapplies the law or exercises its

> discretion in a manner lacking reason. Similarly, the trial court abuses its discretion if it does not follow legal procedure.
>
> * * *
>
> Where the discretion exercised by the trial court is challenged on appeal, the party bringing the challenge bears a heavy burden.
>
> [I]t is not sufficient to persuade the appellate court that it might have reached a different conclusion if ... charged with the duty imposed on the court below; it is necessary to go further and show an abuse of the discretionary power. An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused.
>
> * * *

***4** *Glaab v. Honeywell Intern., Inc.*, 56 A.3d 693, 696–97 (Pa.Super.2012) (quoting *Chenot v. A.P. Green Services, Inc.*, 895 A.2d 55, 60–62 (Pa.Super.2006) (internal citations and quotation marks omitted)).

Contract construction and interpretation is a question of law for the court to decide. *Profit Wise Marketing v. Wiest*, 812 A.2d 1270, 1274 (Pa.Super.2002); *J.W.S. Delavau, Inc. v. Eastern America Transport & Warehousing, Inc.*, 810 A.2d 672, 681 (Pa.Super.2002), *appeal denied*, 573 Pa. 704, 827 A.2d 430 (2003) (reiterating: "The proper interpretation of a contract is a question of law to be determined by the court in the first instance"). In construing a contract, the intent of the parties is the primary consideration. *Tuscarora Wayne Mut. Ins. Co. v. Kadlubosky*, 889 A.2d 557, 560 (Pa.Super.2005).

> When interpreting agreements containing clear and unambiguous terms, we need only examine the writing itself to give effect to the parties' intent. The language of a contract is unambiguous if we can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. When terms in a contract are not defined, we must construe the words in accordance with their natural, plain, and ordinary meaning. As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used.
>
> On the contrary, the terms of a contract are ambiguous if the terms are reasonably or fairly susceptible of different constructions and are capable of being understood in more than one sense. Additionally, we will determine that the language is ambiguous if the language is obscure in meaning through indefiniteness of expression or has a double meaning.

Profit Wize Marketing, supra at 1274–75 (internal citations and quotation marks omitted).

> Where there is any doubt or ambiguity as to the meaning of the covenants in a contract or the terms of a grant, they should receive a reasonable construction, and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the grant was made. It is the intention of the parties which is the ultimate guide, and, in order to ascertain that intention, the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement.

Giant Food Stores, LLC v. THF Silver Spring Development, L.P., 959 A.2d 438, 448 (Pa.Super.2008), *appeal denied*, 601 Pa. 697, 972 A.2d 522 (2009) (internal citations and quotation marks omitted). In either event, "[T]he court will adopt an interpretation which under all circumstances ascribes the most reasonable, probable, and natural conduct of the parties, bearing in mind the objects manifestly to be accomplished." *E.R. Linde Const. Corp. v. Goodwin*, 68 A.3d 346, 349 (Pa.Super.2013).

***5** The general rules of contract interpretation also apply in the context of restrictive covenants. *Baumgardner v. Stuckey*, 735 A.2d 1272, 1274 (Pa.Super.1999). Non-compete covenants in employment contracts exist to protect the rights of the employer. *Hess v. Gebhard &*

Co., 570 Pa. 148, 159, 808 A.2d 912, 918 (2002). These covenants are important business tools, because they allow employers to prevent their employees and agents from learning the employers' business practices and then moving into competition with them. *Id.* Non-compete clauses permit an employer to protect its legitimate business interests, client base, good will, and investments in employees. *WellSpan Health v. Bayliss*, 869 A.2d 990, 996 (Pa.Super.2005).

For a covenant not to compete to be enforceable in Pennsylvania, it must be: (1) ancillary to the employment relationship; (2) reasonably necessary for the protection of the employer; (3) reasonable in duration and geographic reach. *Missett v. Hub Inter. Pennsylvania, LLC*, 6 A.3d 530, 538 (Pa.Super.2010). For an employment restriction to be considered "ancillary to employment," the restriction must relate to a contract of employment. *Modern Laundry & Dry Cleaning Co. v. Farrer*, 370 Pa.Super. 288, 536 A.2d 409, 411 (Pa.Super.1987). So long as the employment restriction is "an auxiliary part of the taking of employment and not a later attempt to impose additional restrictions on an unsuspecting employee, such a covenant is supported by valid consideration and is therefore enforceable." *Id.* Pennsylvania courts have consistently held the acceptance of employment is sufficient consideration to support a restrictive covenant. *Brobston, supra* at 733; *Modern Laundry & Dry Cleaning Co., supra* at 411; *Records Center, Inc. v. Comprehensive Management, Inc.*, 363 Pa.Super. 79, 525 A.2d 433 (Pa.Super.1987).

Nevertheless,

> Post-employment restrictive covenants are subject to a more stringent test of reasonableness.... This heightened scrutiny stems from a historical reluctance on the part of our courts to enforce any contracts in restraint of free trade, particularly where they restrain an individual from earning a living at his trade. This close scrutiny also stems from our recognition of the inherently unequal bargaining positions of employer and employee when entering into such agreements. The determination of whether a post-employment restrictive covenant is reasonable, and therefore enforceable, is a factual one which requires the court to consider all the facts and circumstances. A restrictive covenant found to be reasonable in one case may be unreasonable in others.

Brobston, supra at 733–34 (internal citations omitted). "[A] post-employment covenant that merely seeks to eliminate competition *per se* to give the employer an economic advantage is generally not enforceable. The presence of a legitimate, protectable business interest of the employer is a threshold requirement for an enforceable non-competition covenant." *WellSpan Health, supra* at 996–97 (citations omitted). "If the threshold requirement of a protectable business interest is met, the next step in analysis of a non-competition covenant is to apply the balancing test defined by our Supreme Court." *Id.* at 999 (citing *Hess, supra* at 163, 808 A.2d at 920). "First, the court balances the employer's protectable business interest against the employee's interest in earning a living. Then, the court balances the employer and employee interests with the interests of the public." *Id.* To weigh the competing interests of the employer and employee, the court must conduct an examination of reasonableness. *WellSpan Health, supra* at 999.

***6** To determine reasonableness, a covenant must be reasonably necessary for the employer's protection, and the terms of the covenant must be reasonably limited in terms of the temporal and geographical restrictions imposed on the former employee. *Id.* (citations omitted).

> An [employee] may receive specialized training and skills, and learn the carefully guarded methods of doing business which are the trade secrets of a particular enterprise. To prevent an [employee] from utilizing such training and information in competition with his former employer, for the patronage of the public at large, restrictive covenants are entered into. They are enforced by the courts as reasonably necessary for the protection of the employer. **A general covenant not to compete, however, imposes a greater hardship upon an [employee]**

> **than upon a seller of a business. An [employee] is prevented from practicing his trade or skill, or from utilizing his experience in the particular type of work with which he is familiar.** He may encounter difficulty in transferring his particular experience and training to another line of work, and hence his ability to earn a livelihood is seriously impaired. Further, the [employee] will usually have few resources in reserve to fall back upon, and he may find it difficult to uproot himself and his family in order to move to a location beyond the area of potential competition with his former employer. Contrarywise, the mobility of capital permits the businessman to utilize his funds in other localities and in other industries.

Brobston, supra at 734 (citations omitted) (emphasis in original). Furthermore, "[w]hen ... the covenant imposes restrictions broader than necessary to protect the employer, we have repeatedly held that a court of equity may grant enforcement limited to those portions of the restrictions that are reasonably necessary for the protection of the employer." *Hess, supra* at 162–63, 808 A.2d at 920 (citation omitted). "If ... an employer does not compete in a particular geographical area, enforcement of a non-competition covenant in that area is not reasonably necessary for the employer's protection." *WellSpan Health, supra* at 1001.

Moreover,

> Where an employee is terminated by his employer on the grounds that he has failed to promote the employer's legitimate business interests, it clearly suggests an implicit decision on the part of the employer that its business interests are best promoted without the employee in its service. The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.

**7 *Brobston, supra* at 735. Still, "the circumstances of termination are, alone, not determinative of whether the restrictive covenant is enforceable under *Brobston.*" *Missett, supra* at 539.

Instantly, the trial court relied on *Brobston* and concluded:

> [D]espite its asseverations in respect to the court's duty to scrutinize the "fact[s] and circumstances" of each case, [LAA] nevertheless fails to point to any fact of record indicative of why the present matter is distinguishable from *Brobston.* Rather, perusal of [LAA's] brief reveals merely the contention that the present restrictive covenant does not resemble to the sort of "unfettered control" to which *Brobston* adverted in arriving at is holding. The argument is unavailing. Here, as in *Brobston,* the subject covenant is aimed at restraining the previous employee from the exercise of his profession within certain geographic and temporal bounds.
>
> Additionally, [LAA] argues that even though an employee may be terminated for cause, he may still have "knowledge of protectable trade secrets, or significant customer contacts constituting protectable business interests." However, such an argument misconstrues the import of *Brobston.* The disclosure of trade secrets remains actionable as a common law tort ... but what *Brobston* proscribes is an employer discarding an employee deemed worthless by the organization while simultaneously asserting, through a restrictive covenant, that the employee is nevertheless capable of posing a competitive threat. The [Superior] Court, in fact, underscored this very point:

> "The salesman discharged for poor sales performance cannot reasonably be perceived to pose the same competitive threat to his employer's business interests as the salesman whose performance is not questioned, but who voluntarily resigns to join another business in direct competition with the employer." *Brobston, supra* [at 735–36]. As such, any "significant customer contacts," so long as they do not constitute confidential information protected by the law of tort, cannot be deemed a legitimate business interest of the employer *vis-à-vis* a discarded employee.
>
> The facts and circumstances of this case reveal no genuine issue of fact on the issue of whether [LAA] terminated [Appellee] for what it deemed to be poor job performance. In view of [LAA's] failure to point to any record evidence to refute such a conclusion, as a matter of law it cannot prevail on any claim based on the subject restrictive covenant. [Appellee] is, therefore, entitled to summary judgment in his favor on the claim.

(Trial Court Opinion, filed July 2, 2015, at 4–6) (some internal citations omitted). The record supports this decision. An examination of the restrictive covenant at issue reveals that the terms are both ambiguous and overly broad or unreasonable. The covenant specifically prohibits Appellee from rendering anesthesia services to any of LAA's current or former clients dating back to 2008. (*See* Appellee's Brief in Support of Motion for Summary Judgment, Exhibit D at 6; R.R. at 25a.) The covenant defines "clients" as those "for whom [LAA] has provided any billable services [within] the forty-eight (48) months preceding [Appellee's] termination of employment." *See id.* Nevertheless, LAA interprets the term "clients" more broadly to include also businesses which conduct business with current and prior clients of LAA, even if these businesses have not been direct clients of LAA. By virtue of this unwarranted extension, LAA wants to hold Appellee in violation of the restrictive covenant because, after his termination, Appellee took a position with PAC in King of Prussia. While working for PAC, Appellee was asked to provide anesthesia services for CEC, which happened to be one of LAA's clients from 2001 until 2011. Thus, the reach of the covenant terms is overly broad and cannot be understood to limit businesses in PAC's position. *See Profit Wize Marketing, supra.* There is no indication from the surrounding circumstances that the parties intended for the covenant to restrict Appellee by restricting his new employer. *See Giant Food Stores, supra.* The covenant restrictions in this regard are broader than necessary to protect LAA's business interests. *See Hess, supra.* Interpreting the covenant so generally as to restrict Appellee from working for any employer that might happen to conduct business with one of LAA's current or former clients places an undue hardship on Appellee in terms of finding potential future employment, especially when coupled with the unlimited geographical scope of the covenant. *See Brobston, supra.* Construing the restrictive covenant so broadly is not reasonably necessary to protect LAA, whereas it prevents Appellee "from practicing his trade or skill, or from utilizing his experience in the particular type of work with which he is familiar." *See id.; WellSpan Health, supra.* We conclude the court properly granted summary judgment in favor of Appellee. *See Glaab, supra.* Accordingly, we affirm.

***8** Order affirmed.

All Citations

Not Reported in A.3d, 2016 WL 1657474

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EXHIBIT 5

KeyCite Yellow Flag - Negative Treatment
Not Followed as Dicta Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc., 11th Cir.(Ga.), April 1, 2005

243 Ga.App. 772
Court of Appeals of Georgia.

AGA, LLC
v.
RUBIN.

No. A00A0064.
|
May 2, 2000.

Synopsis
Physician petitioned for temporary restraining order precluding employer from enforcing provisions of non-competition clause contained in physician's employment contract. The Superior Court, Fulton County, Barnes, J., granted petition. Employer appealed. The Court of Appeals, sitting en banc, Blackburn, P.J., overruling *Dominy*, 215 Ga.App. 537, 451 S.E.2d 472, held that territorial limitation contained in contract was overbroad and unenforceable because territory was undefinable until physician's employment ended.

Affirmed.

West Headnotes (8)

[1] **Contracts**
Restraint of Trade or Competition in Trade

Unlike a contract in general restraint of trade, a restrictive covenant in an employment contract is considered to be in partial restraint of trade and will be upheld if the restraint imposed is not unreasonable, is founded upon valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public.

Cases that cite this headnote

[2] **Contracts**
Questions for jury

Whether a restrictive covenant in an employment contract is reasonable is a question of law for court determination, which considers the nature and extent of the trade or business, the situation of the parties, and all the other relevant circumstances.

Cases that cite this headnote

[3] **Contracts**
Restraint of Trade or Competition in Trade

A helpful tool in determining the reasonableness of a restrictive covenant in an employment contract is to apply the three-element test of duration, territorial coverage, and scope of activity.

1 Cases that cite this headnote

[4] **Appeal and Error**
Labor and Employment
Contracts
Restraint of Trade or Competition in Trade

In considering the reasonableness of restrictive covenants in an employer/employee agreement, strict appellate scrutiny is required.

2 Cases that cite this headnote

[5] **Contracts**
Questions for jury

Whether a restrictive covenant in an employer/employee agreement is reasonable presents an issue of law.

1 Cases that cite this headnote

[6] **Contracts**
Extent of territory embraced in general

Non-competition clause in physician's employment contract was overbroad and unenforceable; territory was undefinable until physician's employment ended, as

covenant precluded him from rendering services in any hospital at which he regularly performed services for employer during term of agreement; overruling *Dominy v. Nat. Emergency Svcs.*, 215 Ga.App. 537, 451 S.E.2d 472.

4 Cases that cite this headnote

[7] **Contracts**
Extent of territory embraced in general

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.

2 Cases that cite this headnote

[8] **Contracts**
Restraint of Trade or Competition in Trade

Usually, whether a restrictive covenant in an employment contract is reasonable can appropriately be answered based upon the wording of the covenant; however, occasionally facts might be necessary to show that a questionable restriction, though not void on its face, is, in fact, reasonable.

1 Cases that cite this headnote

Attorneys and Law Firms

****805** ***775** Minkin & Snyder, Michael J. King, G. Brian Raley, Joseph H. Akers, Atlanta, for appellant.

Gambrell & Stolz, Irwin W. Stolz, Jr., Robert G. Brazier, Seaton D. Purdom, Atlanta, for appellee.

Opinion

***772** BLACKBURN, Presiding Judge.

[1] [2] [3] [4] [5] AGA, LLC appeals the trial court's order granting Dr. Raymond Rubin's petition for a temporary restraining order which precludes AGA from enforcing the provisions of the noncompetition clause contained ***773** in Rubin's employment contract. The trial court determined that the territorial limitation contained in the contract was overbroad and unenforceable because the territory was undefinable until Rubin's employment ended. We agree.

> Unlike a contract in general restraint of trade, a restrictive covenant in an employment contract is considered to be in partial restraint of trade and will be upheld if the restraint imposed is not unreasonable, is founded upon valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. Whether the imposed restraint in an employment contract is reasonable is a question of law for court determination, which considers the nature and extent of the trade or business, the situation of the parties, and all the other relevant circumstances. *W.R. Grace & Co. v. Mouyal,* 262 Ga. 464, 465(1), 422 S.E.2d 529 [(1992)]; *Dougherty, McKinnon &c. v. Greenwald, Denzik &c.,* 213 Ga.App. 891, 893(2), 447 S.E.2d 94 [(1994)]. A helpful tool in determining the reasonableness of a particular restraint provision is to apply the three-element test of duration, territorial coverage, and scope of activity. Id. In considering the reasonableness of restrictive covenants in an employer/employee agreement, strict appellate scrutiny is required; whether the restraint was reasonable presents an issue of law. *McAlpin v. Coweta &c. Assoc.,* 217 Ga.App. 669, 672(1), (2), 458 S.E.2d 499 [(1995)].

(Punctuation omitted.) *Delli–Gatti v. Mansfield,* 223 Ga.App. 76, 77–78(1), 477 S.E.2d 134 (1996).

[6] In the present case, Rubin worked for AGA pursuant to an employment agreement from March 1996 to March 1999. The noncompetition covenant within the agreement provided:

> [F]or a period of eighteen (18) months following termination of employment with Employer (regardless of the reasons for such termination), Employee shall not, either for himself or on behalf of any other person, persons, partnership, association, corporation or other business entity, render or be retained or employed to render as a doctor of medicine, any gastroenterology services, other than in an emergency ****806** situation, at (i) any hospital at which Employee regularly performs services for Employer during the term of this Agreement, including, without limitation, those set forth in ***774** Exhibit B attached hereto (collectively, the "Restricted Hospitals") or (ii) any location within a five-mile radius of any of the Restricted Hospitals, except as an Employee of Employer.

Exhibit B to the agreement identified three hospitals: Crawford Long Hospital in Atlanta; Piedmont Hospital in Atlanta; and Gwinnett Medical Center in Lawrenceville. By the terms of the agreement, Exhibit B was not an exhaustive list.

[7] Relying on *Jarrett v. Hamilton,* 179 Ga.App. 422, 425(1), 346 S.E.2d 875 (1986), the trial court determined that the territorial limitation was unenforceable because the territory was not determinable until the time of the employee's termination. The trial court was correct. Our Supreme Court has held, in several cases, that "a territorial restriction which cannot be determined until the date of the employee's termination is too indefinite to be enforced." *Koger Properties v. Adams–Cates Co.,* 247 Ga. 68(1), 274 S.E.2d 329 (1981). See also *Durham v. Stand–By Labor of Ga.,* 230 Ga. 558, 562(2)(a), 198 S.E.2d 145 (1973); *Ellison v. Labor Pool of America,* 228 Ga. 147, 150–152(3), 184 S.E.2d 572 (1971). The employee must be able to " 'forecast with certainty the territorial extent of the duty owing' " the employer. *Koger,* supra at 68, 274 S.E.2d 329.

[8] In *Dominy v. Nat. Emergency Svcs.,* 215 Ga.App. 537, 451 S.E.2d 472 (1994), the covenant provided, in pertinent part:

> "for a period of two (2) years after the termination of this Agreement, however the same may be terminated, Physician shall not directly or indirectly solicit a contract to perform nor perform nor have any ownership or financial interest in any corporation, partnership, or other entity soliciting or contracting to perform emergency medical service *for any medical institution at which Physician has performed the same or similar services under this Agreement or any prior Agreement between Physician and Corporation.*"

Id. at 538–539(2), 451 S.E.2d 472. We found this restriction to be reasonable. It is clear that the territorial limitation in *Dominy* could not be determined until the employment ended. Because this determination did not follow Supreme Court precedent, it must be overruled to the extent it violated the holding in *Koger.* See *Koger,* supra.

Usually, whether a covenant is reasonable can appropriately be answered based upon the wording of the covenant. However,

> [o]ccasionally facts might be necessary to show that a questionable restriction, though not void on its face, is, in fact, reasonable.... However, the indefinite restriction imposed in this case could not be saved by additional facts and is in fact void on its face.

Koger, supra at 69(2), 274 S.E.2d 329. There were no facts discussed in *Dominy* that could save the void restriction. Similarly, the facts of the present case cannot save a restrictive covenant that is void on its face. See *Ceramic*

&c. Coatings Corp. v. Hizer, 242 Ga.App. 391, 529 S.E.2d 160 (2000) (" 'a territorial limitation not determinable until the time of the employee's termination invalidates the provision and the entire agreement' ").

We cannot agree with AGA that the covenant should receive less scrutiny simply because Rubin was a physician. The facts do not suggest that Rubin was a partner, shareholder, or other form of owner or manager of AGA. See *Rash v. Toccoa Clinic Med. Assoc.,* 253 Ga. 322, 320 S.E.2d 170 (1984) (the Supreme Court of Georgia distinguished an employment agreement from the partnership agreement it considered).

Judgment affirmed.

JOHNSON, C.J., POPE, P.J., ANDREWS, P.J., SMITH, P.J., RUFFIN, ELDRIDGE, BARNES, MILLER, ELLINGTON and PHIPPS, JJ., and McMURRAY, Senior Appellate Judge, concur.

All Citations

243 Ga.App. 772, 533 S.E.2d 804, 2000-1 Trade Cases P 72,904, 00 FCDR 2106

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EXHIBIT 6

2009 WL 1653130
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court, D. New Jersey.

TRADING PARTNERS COLLABORATION, LLC, Plaintiff,
v.
Michael KANTOR, Promotion Optimization Institute, LLC, Defendants.

Civil Action No. 09–0823 (JAG).
|
June 9, 2009.

West KeySummary

1 **Contracts**
General or Partial Restraint

A non-compete clause, which restricted a former employee from participating in any business competitive with the employer now or in the future, was overly broad and unenforceable. As the non-compete clause was drafted, the former employee could conceivably enter into a business or profession that was not competing with the employer only to find that months later, the employer had **changed** its business plan to encompass the former employee's chosen arena of employment.

Cases that cite this headnote

Attorneys and Law Firms

Roger Lai, Archer & Greiner, P.C., Haddonfield, NJ, for Plaintiff.

William Goldberg, Hackensack, NJ, for Defendants.

Opinion

GREENAWAY, JR., District Judge.

*1 This matter comes before this Court on the motion by plaintiff, Trading Partners Collaboration, LLC ("Plaintiff" or "TPC"), which seeks a preliminary injunction restraining defendants Michael Kantor and Promotion Optimization Institute, LLC ("POI") (collectively "Defendants") from (1) accessing, using, or disclosing any of TPC's trade secret, confidential, and/or proprietary business information; (2) soliciting or communicating in any way with any party or entity that is or has been an actual or prospective customer, member, and/or sponsor of TPC; (3) enjoining Michael Kantor from competing with TPC, including continuing to compete with TPC through POI; (4) enjoining POI from engaging in any business that competes with TPC; and (5) ordering Defendants to return to TPC any confidential, proprietary and/or trade secret information of TPC, including, but not limited to, customer, member and sponsorship lists (collectively referred to as "customer list"), including any copies thereof, pending the conclusion of this lawsuit or further order of the Court.

I. *FACTS*

TPC is a limited liability company, organized under the laws of the State of New Jersey, with its principal place of business located at 1055 Parsippany Blvd., Suite 201, Parsippany, New Jersey 07054. (Verified Complaint at ¶ 2.) TPC also maintains an office in South Plainfield, New Jersey. (*Id.* at ¶ 11.) The members of TPC are residents of Connecticut and Pennsylvania. (*Id.* at ¶ 3.) Defendant Michael Kantor is an individual residing at 27 Inwood Drive, Bardonia, New York 10954. (*Id.* at ¶ 4.) Upon information and belief, Defendant POI is a limited liability company organized under the laws of the State of Ohio. (*Id.* at ¶ 5.) Upon information and belief, POI is owned and operated exclusively by Michael Kantor. (*Id.* at ¶ 6.)

TPC is a membership organization and educational resource which fosters collaboration among trading partners who are engaged in the sale of consumer goods. (*Id.* at ¶ 13.) TPC provides services to its sponsors and members for trade promotion management and marketing in all its forms, with an emphasis on optimization, effectiveness, and collaboration. (*Id.*) TPC fosters, promotes, provides platforms for collaboration, and educational opportunities regarding the trading partner relationship. (*Id.*) Members of TPC are offered access to articles, newsletters, white papers, research,

case studies, presentations, networks, webinars, and conferences regarding trade promotion issues. (*Id.* at ¶ 14.) TPC's members, customers, and sponsors generally consist of manufacturers and retailers of consumer goods who seeks to learn about and enter into collaborative relationships for the purpose of marketing and maximizing sales of a product, as well as service provided to manufacturers and retailers of consumer goods. (*Id.* at ¶ 15.)

Defendant Michael Kantor was employed by TPC as a Managing Director from approximately March 6, 2006, until November 7, 2008. (*Id.* at ¶ 16.) Upon information and belief, Kantor owns and operates POL (*Id.*) Upon information and belief, POI is also a membership organization that was formed to, and has been engaged in, offering programs and publications to collaborating trading partners for the purpose of educating its members about trade promotion and merchandising, providing forums for collaboration and networking for practitioners of trade promotion merchandising. (*Id.* at ¶ 18.) Plaintiff asserts that POI's activities are in direct competition with the same goods and services provided by TPC. (*Id.*)

***2** On or about March 6, 2006, Michael Kantor accepted an Offer of Employment ("the offer") with TPC as a Managing Director and signed TPC's Employee Confidentiality and Non–Competition Agreement ("the Agreement"). (*Id.* at ¶¶ 20–22.) The Agreement includes restrictions on competition with TPC and its affiliates, which includes, but is not limited to Trade Promotion Management Associates ("TPMA") and Vendor Compliance Federation ("VCF"). (*Id.* at ¶ 22.) The Agreement prohibits Kantor, for a period of two years subsequent to the termination of his employment with TPC, from engaging in numerous competitive activities, including the following: (a) engaging in a competing business; (b) soliciting customers and/or prospective customers of TPC; (c) possessing and/or using any confidential information of TPC[1]; (d) diverting customers and/or prospective customers of TPC to competitors; and (e) making any defamatory statements about TPC. (*Id.* at ¶ 23.)

During his employment with TPC, Michael Kantor gained access to TPC's trade secrets and proprietary information, including, but not limited to, customer and member lists, pricing policies, business plans and operations, finances, contracts, address lists, services marks, copyrights, advertisements, drawings, data sheets, specifications, bills of material, sketches, calculations, reports, designs, software, and similar documents, processes, and proprietary information. (*Id.* at ¶ 24.)

On or about November 7, 2008, Michael Kantor's employment with TPC was terminated for cause. (*Id.* at ¶ 25.) Upon information and belief, Kantor is presently employed as the Executive Director for Defendant POI and he is the sole owner and operator of POI. (*Id.* at ¶ 26.) While still employed with TPC, Kantor began engaging in activities for his personal benefit or for the benefit of a new industry organization (which has become POI), including, but not limited to, creating this new organization for the purpose of competing with TPC, soliciting TPC's sponsors and members to engage in business with his new organization; selling advertising for CPGmatters Magazine (a trade publication for the commercial packaged goods industry); and promoting his new organization to existing and potential customers of TPC. (*Id.* at ¶ 27.)

After TPC conducted a forensic examination of Kantor's computer, it learned that while still employed with TPC, Kantor, exceeding his authorized use of the material, e-mailed copies of TPC's member list and other confidential and proprietary information to his personal e-mail account. (*Id.* at ¶ 28.) Further, during his employment with TPC, Kantor allegedly made false and disparaging statements about TPC to TPC's current or prospective customers and industry experts, including that TPC was not making any monetary investment into the goods and services that it was providing to its members and that TPC did not have any interest in expanding the scope of the goods and services that TPC provides to its members. (*Id.* at ¶ 29.)

***3** Since his termination from TPC, Kantor, in direct violation of the Agreement, has continued to engage in activities to further POI's business and to compete with TPC. (*Id.* at ¶ 30.) Kantor's activities include, but are not limited to, contacting TPC's sponsors and members, and organizing conferences to market on behalf of consumer goods trading partners, particularly those focused in the area of trade promotion and merchandising, who seek to collaborate or learn about collaboration and whom are existing or potential customers and members of TPC. (*Id.*)

TPC sent Kantor a letter, through its counsel, on or about November 7, 2008, after Kantor had been terminated, to remind him of his non-compete obligations, pursuant to the terms of the Agreement. (*Id.* at ¶ 35.) One month later, on December 11, 2008, TPC again through counsel, advised Kantor, in writing, that he was engaged in activities that directly violated the terms of the Agreement. (*Id.* at ¶ 36.) TPC requested that Kantor confirm, in writing, that he would abide by the terms of the Agreement. (*Id.*) TPC advised Kantor, by correspondence dated January 2, 2009, that he was violating the terms of the Agreement and demanded that he cease and desist from such activities. (*Id.* at ¶ 37.)

On or about February 25, 2009, Plaintiff filed this Complaint against Michael Kantor and POL The Complaint is comprised of the following causes of action: violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, et seq. (Count I); violation of the New Jersey Computer Related Offenses Act, N.J. Stat. Ann. § 2A:38A–1 et seq. (Count II); Breach of Contract (the non-compete) (Count III); Breach of the Implied Covenant of Good Faith and Fair Dealing (Count IV); Breach of the Duty of Loyalty (Count V); Tortious Interference with Contractual Relations (Count VI); Intentional Interference with Prospective Economic Advantage (Count VII); Defamation/Commercial Disparagement (Count VIII); and Misappropriation of Trade Secrets (Count IX).

II. *STANDARD OF REVIEW*

"[T]he grant of injunctive relief is an 'extraordinary remedy, which should be granted only in limited circumstances.' " *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir.1989) (citing *Frank's GMC Truck Ctr. Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir.1988)). Generally, in determining whether to grant a preliminary injunction or a temporary restraining order, courts consider four factors:

> (1) the likelihood that the applicant will prevail on the merits at final hearing; (2) the extent to which the plaintiffs are being irreparably harmed by the conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest.

S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir.1992) (citing *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 197–98 (3d Cir.1990)). "[W]hile the burden rests upon the moving party to make [the first] two requisite showings, the district court" should look to factors three and four when relevant. *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir.1994). "All four factors should favor preliminary relief before the injunction will issue." *S & R Corp.*, 968 F.2d at 374 (citing *Hoxworth*, 903 F.2d at 192).

***4** In order to prove irreparable harm, the moving party must "demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Acierno*, 40 F.3d at 653 (quoting *Instant Air Freight Co.*, 882 F.2d at 801). "Economic loss does not constitute irreparable harm." *Acierno*, 40 F.3d at 653. "[T]he injury created by a failure to issue the requested injunction must " 'be of a peculiar nature, so that compensation in money cannot atone for it.' " The word irreparable connotes " 'that which cannot be repaired, retrieved, put down again [or] atoned for.' " " *Id.* (internal citations omitted). In addition, the claimed injury cannot merely be possible, speculative or remote. *Id.* at 655. "More than a risk of irreparable harm must be demonstrated. The requisite for injunctive relief has been characterized as a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; an injunction may not be used simply to eliminate a possibility of a remote future injury.' " *Id.* (quoting *Cont'l Group, Inc. v. Amoco Chems. Corp.*, 614 F.2d 351, 358 (3d Cir.1980)).

III. *ANALYSIS*

The crux of Plaintiffs action is its breach of contract claim. Plaintiff seeks the issuance of a temporary restraining order enjoining Defendant from the ongoing breach of its contract with Plaintiff. In order to recover, Plaintiff must show a reasonable probability of success on the merits and immediate irreparable harm. [2]

(1) Plaintiffs Breach of Contract Claim

Under New Jersey law, "to establish a breach of contract claim, a plaintiff has the burden to show that the parties entered into a valid contract, that the defendant failed

to perform his obligations under the contract and that the plaintiff sustained damages as a result." *Murphy v. Implicito,* 392 N.J.Super. 245, 920 A.2d 678, 689 (N.J.Super.Ct.App.Div.2007).

a) Non–Compete Agreement

Both parties concede that Kantor and TPC entered into the Agreement-a confidentiality and non-compete agreement. Plaintiff alleges that Defendant Kantor breached the Agreement when he became involved in a competing business, namely, POI, and by his use of and disclosure of trade secret and confidential and/or proprietary information belonging to TPC. Defendants argue that the Agreement is unenforceable because it is overly broad and represents an unreasonable restraint on Kantor's ability to secure employment.

The Agreement restricts Kantor's post-employment activities. Section 1(a) of the Agreement provides, "Employee shall not directly or indirectly, assist in, have any financial interest in, or participate in any way in, as an owner, partner, employee, agent, board member or shareholder, any business that involves, in whole or in part, activities competitive with the business heretofore now or hereafter carried on by the Group in any state in the U.S.A. in which the Group has conducted business during the period of two years prior to the date of such termination." (Verified Complaint, Exh. B.)[3]

***5** The Agreement also restricts Kantor's contact with former customers of TPC. Paragraph 1(b) of the Agreement provides, "Employee shall not (I) initiate contact directly or indirectly, with or (ii) accept any business from, in both cases, any customers or prospects from the Group with which the Group has done business or conducted sales discussions during the preceding twelve months prior to the date of termination, or attempt to induce any person or company to cancel or curtail their business with the Group." (*Id.*)

"It is settled law in New Jersey that restrictive covenants are valid in appropriate circumstances." *Scholastic Funding Group, LLC v. Kimble, et al.,* 2007 WL 1231795 at *4 (D.N.J.2007). A non-compete covenant will be "given effect if it is reasonable in view of all the circumstances of the particular case. It will generally be found to be reasonable where it simply protects the legitimate interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." *Solari Industries, Inc. v. Malady,* 55 N.J. 571, 264 A.2d 53, 56 (N.J.1970). "Beyond that, three additional factors should be considered in determining whether the restrictive covenant is overbroad: its duration, geographic limits, and the scope of the activities prohibited. Each of those factors must be narrowly tailored to ensure the covenant is no broader than necessary to protect the employer's interest." *The Community Hosp. Group, Inc. v. Moore,* 183 N.J. 36, 869 A.2d 884, 897 (N.J.2005).

This Court finds that TPC has a legitimate interest in protecting its trade secrets, customer lists, and other proprietary information and insofar as the non-compete prevents Defendants from disclosing such information or engaging in direct competition with Plaintiff, the Agreement satisfies the first prong of the test established by the New Jersey Supreme Court.

Defendant argues that the Agreement is overly broad because it restricts Kantor from working in any state that Plaintiff and its several affiliated companies are doing business, and presumably could apply to all 50 states. In addition, the Agreement restricts Kantor from participating in any business competitive with TPC or its affiliates "heretofore now or hereafter carried on by the Group ." (Verified Complaint, Exh. B.) Under the Agreement, Kantor would be required to anticipate which business activities TPC and its affiliates intend to engage in so as not to run afoul of its provisions.

Defendant Kantor states that he met with John Metzger to discuss his new venture (POI) on December 31, 2008 to ensure that he did not run afoul of the Agreement. (Kantor Cert. at ¶ 18.)[4] Kantor showed Metzger a draft of an article that Kantor wrote for publication in the GMA-forum, which he (Kantor) states is the official publication of the Grocery Manufacturers Association. (*Id* . at ¶ 17, 869 A.2d 884.) In the article, Kantor described his idea for a post-graduate education or new educational credential for collaborative marketing. (*Id.*) Kantor's idea entailed a collaboration between POI and several food universities to offer a new certification program centered on trade marketing and merchandising and would provide a certification as a Certified Collaborative Marketer. (*Id.*) During the meeting, Kantor shared his idea with Metzger who told him that he had never conceived of such an idea. (*Id.* at ¶ 19, 869 A.2d 884.) Metzger told Defendant that

his idea was something that TPMA could be interested in pursuing in the future. (*Id.*)

***6** Three days later, on January 3, 2009, TPMA **changed** its website to reflect that it was also a think tank and educational resource for consumer goods trading partners. (*Id.* at ¶ 21, 869 A.2d 884.) Before the **change**, TPMA marketed itself as an organization dedicated to trade promotion professionals. (*Id.*) During oral argument, Plaintiff acknowledged that its website **changed** shortly after Metzger learned of Kantor's plans. (Tr. March 16, 2009 at 4:14–18.) As the Agreement is presently drafted, Kantor could conceivably enter into a business or profession that is not currently competing with Plaintiff's business or its affiliates only to find that months later, TPC or one of its affiliates has **changed** their business plan to encompass Defendant's chosen arena of employment. The **change** in Plaintiff's website only three days after Defendant shared his business plans with Metzger is precisely the kind of **change** in business activities by Plaintiff that might cause Defendant to be in violation of the Agreement without being able to anticipate such violation. The Agreement, by its very terms, places no limit on the activities that Plaintiff may restrict because restricted activities may be **changed** at anytime.

This Court finds that the geographical restrictions of the Agreement and the scope (or lack thereof) of the activities restricted, pursuant to the Agreement, place an undue burden on the Defendant. The Agreement is unenforceable as it pertains to restrictions on Defendant's employment activities and the geographic limitations placed on Defendant's employment.

Since this Court has determined that the Agreement is unenforceable due to its overbreadth in geographic terms, as well as the scope of the activities prohibited, this Court must also find that the Plaintiff is unlikely to prevail on the merits of its claim for breach of the non-compete agreement.

(2) Computer Fraud and Abuse Act Claim

This Court must also assess the likelihood of Plaintiff's success in showing that its has a reasonable probability of success against Defendants on its Computer Fraud and Abuse Act claim.

The Computer Fraud and Abuse Act, 18 U.S.C. § 1030, et seq. (CFAA) provides a private right of action for losses incurred due to violations of the Act. *See P.C. Yonkers, Inc. v. Celebrations: The Party and Seasonal Superstore, LLC,* 428 F.3d 504, 510–511 (3d Cir.2005). Specifically, 18 U.S.C. § 1030(g) provides that "any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief ." *Id.* at 510.

Plaintiff alleges that Defendant used its computers to e-mail to his personal e-mail account copies of TPC's member list and "other confidential proprietary information." (Verified Complaint at ¶ 28.) Plaintiff seeks relief under § 1030(a)(2)(c), which imposes liability upon any person who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from a protected computer." Plaintiffs computers are protected within the meaning of the statute because they are used in interstate commerce. *See Shurgard Centers, LLC v. Safeguard Self Storage, Inc.,* 119 F.Supp.2d 1121, 1124 (W.D.Wash.2000) (A "protected computer" means "a computer which is used in interstate commerce or foreign commerce or communication.").

***7** Defendant disputes Plaintiff's claim that he has misappropriated confidential proprietary information. Defendant avers that "Plaintiff does not have a customer list. What it has is about five paying customers, no pricing policy, and no confidential business plans. All the information on its clients is available to the public on their website, (www.vcfww.com), as well as their competitors' websites, in great detail." (Kantor Cert. at ¶ 34.)

In order to support his contention that Plaintiff's customer lists are public, Defendant directs this Court to the VCF/ TPMA Exhibit and Sponsorship Opportunities Guide 2008 (the "Guide"), which lists many of Plaintiff's members. (Kantor Cert., Exh. F.) A review of screen shots of web pages taken from Plaintiff's website, as of January 3, 2009, also indicates that many of Plaintiff's sponsors are publicly known since they appear on Plaintiff's website. (*Id.* at Exh. G.) Plaintiff is a membership organization and has provided an extensive list of its members to the public. This list is available in Plaintiff's promotional material such as in the Guide, and is also available on its website. This material is widely available in the public domain. The evidence offered by Defendant reveals that Plaintiff has touted its members publicly as well as its sponsors,

which contradicts Plaintiff's argument that its customer list is confidential. Plaintiff has not offered any evidence to this Court to show that Defendant misappropriated any confidential information.

This Court finds that Plaintiff is not likely to succeed on the merits of its Computer Fraud and Abuse Act claim because the Plaintiff has not demonstrated that Defendant misappropriated any confidential or proprietary information.

(3) New Jersey Computer Related Offenses Act Claim

This Court must assess the likelihood of Plaintiff's success in showing that it has a reasonable probability of success against Defendants on its claim for relief under the New Jersey Computer Related Offenses Act.

The New Jersey Computer Related Offenses Act, N.J. Stat Ann. § 2A:38A–3, provides that "A person or enterprise damaged in business or property as a result of any of the following actions may sue the actor therefor in the Superior Court and may recover compensatory and punitive damages as the cost of the suit, including a reasonable attorney's fee, costs of investigation and litigation: a. The purposeful or knowing, and unauthorized altering, damaging, taking or destruction of any data, data base, computer program, computer software or computer equipment existing internally or externally to a computer, computer system or computer network...." *Id.*

"The Computer Act imposes liability against an "actor" whose "purposeful or knowing" conduct is proscribed by the statute." *Fairway Dodge, L.L.C. v. Decker Dodge, Inc.*, 191 N.J. 460, 924 A.2d 517, 522 (N.J.2007). Although the term actor is not defined within the act, "[e]ach subsection of N.J.S.A. [§] 2A:38A–3 is independent of the other and each subsection requires that the conduct by the actor be 'purposeful or knowing' ". *Id.* at 523.

***8** Plaintiff states that Defendant, while an employee of TPMA, e-mailed confidential information to himself including customer lists, customer contact information, pricing information, and information pertaining to Plaintiff's customers' current payment status. (Tr. March 16, 2009 at 27:15–25–28:1.) Plaintiff refers this Court to Exhibits C and D, attached to Plaintiff's reply brief, which do not prove conclusively that Defendant took any confidential data without authorization. (Tr. March 16, 2009 at 27:18, Plaintiff's Reply Brief, Exhibits C and D.) Plaintiff has not offered sufficient evidence to support a finding that Defendant knowingly or purposefully took, without authorization, data from Plaintiff's computer while he was an employee of Defendant. Defendant Kantor has stated that he is not in possession of any confidential information from Plaintiff such as customer lists or pricing information, but has agreed to turn over any confidential information that he may have in his possession. (Tr. March 16, 2009 at 28:19–22.)

This Court finds that Plaintiff is not likely to succeed on the merits of its New Jersey Computer Related Offenses claim.

(4) Misappropriation of Trade Secrets

This Court must assess the likelihood of Plaintiff's success in showing that its has a reasonable probability of success against Defendants on its claim for misappropriation of trade secrets.

"A trade secret claim in the federal courts is governed not by federal common law but by state law. This is true regardless of whether jurisdiction is based upon diversity of citizenship." *Rohm and Haas Co. v. Adco Chemical Co.*, 689 F.2d 424, 429 (3d Cir.1982). New Jersey law applies in this case because the Agreement between Kantor and Plaintiff contains a choice of law provision designating New Jersey as the forum state for the resolution of claims. The Agreement states that it "shall be construed and enforced in accordance with the laws of the state of New Jersey, without regard to its conflict of laws principles." (Verified Complaint, Exh. B at ¶ 11.)

The basic elements of a trade secrets claim under New Jersey law are: (1) the existence of a trade secret, (2) communicated in confidence by the plaintiff to the employee, (3) disclosed by the employee in breach of that confidence, (4) acquired by the competitor with knowledge of the breach of confidence, and (5) used by the competitor to the detriment of the plaintiff. *Rohm and Haas Co.*, 689 F.2d at 429–30.

New Jersey Courts have held that trade secrets include customer lists and information relating to merchandising, costs and pricing. "In New Jersey, customer lists of service businesses have been afforded protection as trade secrets." *Lamorte Burns and Co., Inc. v. Walters*, 167 N.J. 285, 770 A.2d 1158, 1166 (N.J.2001) (citations omitted).

Plaintiff's customer lists and pricing information constitute trade secrets under New Jersey law. Plaintiff claims that Defendant gained access to its trade secrets while he was an employee of TPMA. Defendant acknowledges gaining access to Plaintiff's trade secrets but denies breaching Plaintiff's confidence by disclosing the information to third parties, or more specifically to POI, in order to compete with Plaintiff. Defendants maintain that Plaintiff's customer lists and pricing information are available to the public, and Defendants deny using this information to compete with Plaintiff. Defendants maintain that POI is not in competition with Plaintiff and that in any event Plaintiff is not in possession of any of Plaintiffs confidential information.

***9** This Court finds that Plaintiff's has not offered sufficient evidence for this Court to find in its favor on its claim for misappropriation of trade secrets. Plaintiff has not offered any evidence that would show that Defendant has conveyed its trade secrets to any third parties. Based on the evidence provided to this Court, Plaintiff cannot demonstrate that Defendant misappropriated its trade secrets nor has Plaintiff shown that the information has been acquired by a competitor of Plaintiff.

This Court finds that Plaintiff is not likely to succeed on its claim for misappropriation of trade secrets.

IV. *CONCLUSION*

For the reasons stated above, Plaintiff's motion seeking a temporary restraining order on its claims of breach of contract, violations of the Computer Fraud and Abuse Act, violation of the New Jersey Computer Related Offenses Act and for misappropriation of trade secrets, is denied.

All Citations

Not Reported in F.Supp.2d, 2009 WL 1653130

Footnotes

1 Under the Agreement, confidential information is defined as "all information acquired by Employee regarding the business and affairs of the Group or any of the Group's customers, employees, representatives, agents or consultants, including without limitation, the Group's customer lists, pricing policies, business plans, and operations, finances, books and records, instruments and reports, contracts, agreements, telephone and address lists or books, rolodexes, letters, trademarks, trade names, trade styles, service marks, service names, copyrights, trademark or copyright applications and registrations, all inventions, ideas, reports, and other creations and creative works (whether or not patentable or copyrightable), including, without limitation, advertising materials, designs, sketches, and art work together with all commercial and technical trade secrets, specifications, formula, technology computer and electronic data processing programs, software and related systems and procedures, processes and know how, as well as any other information designated by the Group as confidential." (Verified Complaint, Exh. B.)

2 This Court notes that the factors the Third Circuit requires this Court to weigh in order to determine whether it must grant injunctive relief are conjunctive. If this Court finds that Plaintiff fails on any one of the factors enumerated by the Third Circuit, the need to address the remaining factors is obviated.

3 As defined in the Agreement, the "Group" includes, but is not limited to, Trading Partners Collaboration, LLC, and its affiliates—Vendor Compliance Federation Worldwide, Smyth Groups Services, Bernard Sands, Leib Recovery Solutions, Smyth Solutions, Smyth Trade Credit, and Debtwatcher, Inc. (Verified Complaint, Exh. B.)

4 John Metzger is the owner of Trade Promotion Management Association. (Kantor Cert. at ¶ 6.) Metzger is responsible for hiring Kantor. (*Id.* at ¶ 7, 770 A.2d 1158.) Metzger possessed the authority to fire Kantor at will. (*Id.* at ¶ 8, 770 A.2d 1158.)

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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.: 16 **PLAINTIFF'S SUPPLEMENTAL REPLY RE: PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION 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 Supplemental Reply to Defendants' "Opposition to Plaintiff's Request for Hearing on Plaintiff's Motion for Preliminary Injunction." This Supplemental Reply is made pursuant to the court's oral directive on November 19, 2018 at 9:30 a.m.

Dated this 7th day of December 2018.

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I.

MEMORANDUM OF POINTS AND AUTHORITIES

On November 19, 2018, the Court heard oral argument on Plaintiff's Motion for Preliminary Injunction. At that hearing, the Court offered, and the parties accepted, an opportunity to provide supplemental briefing regarding a single question: is the term "facilities" a sufficiently clear and unambiguous geographical descriptor to the parties of the Employment Agreement to permit enforcement of the non-compete agreement ("NCA")contained therein? For the reasons set forth below, this Court must answer that question in the affirmative.

A. Enforcing the NCA as to the facilities where Plaintiff currently operates is a reasonable geographical restriction.

A threshold question regarding the enforceability of an NCA is whether the geographical restrictions set forth therein is reasonable. The Court has already indicated that the spirit of the parties here was to make a reasonable agreement, but has asked the parties for additional argument regarding the permissibility of the specific terms agreed to. At the outset, we note that the Nevada courts have never held that terms such as those used here are unenforceable. To the contrary, the body of law on the question of what terms are permissible suggests that structuring an NCA so that the employee is restricted from working only at the facilities where their former employer operates is preferable to, and less restrictive than, establishing broader geographical restrictions based municipal boundaries or large areas within a specific radius.

Nevada has consistently held that NCAs in employment contracts must not unreasonably restrain employees from competing with their former employers. See, e.g., Golden Road Motor Inn v. Islam, 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016); Camco, Inc. v. Baler, 113 Nev. 512, 936 P.2d 829 (1997); Ellis v. McDaniel, 95 Nev. 455, 596 P.2d 222 (1979); Jones v. Deeter, 112 Nev. 291, 913 P.2d 1272 (1996). However, the right of employers to bargain for NCAs and have

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those agreements enforced is well established, provided that the restrictions are reasonable in geographic and temporal scope. Id.

With respect to geography, territorial restrictions are reasonable when limited to the territory in which the former employer established customer contacts and goodwill. See Camco, 113 Nev. at 518-520, 936 P.2d at 832-834. The Nevada Supreme Court has ratified NCAs that include geographical restrictions defined as a distance from the city limits of a certain city where former employers established customer contacts and goodwill. And when nullifying other NCAs for non-geographical reasons, it has refused to nullify those same NCAs on geographical grounds when they provide a radius from the place of employment. See Ellis v. McDaniel (affirming a restriction of "5 miles from the city limits of Elko") and Golden Road v. Islam (holding an NCA unenforceable due to overbroad work *scope* restriction, and not as to the 150-mile radius restriction).

Employers must, therefore, negotiate carefully and limit an NCA to only the narrowest geographical restriction that they feel is necessary to protect their established contacts and goodwill. Golden Road, 376 P.3d at 156-160. The geographic restriction here is as narrow as possible: it cover only the grounds of specific facilities where Plaintiff is actively engaged in its business and where it has existing business relationships. The Nevada case law is clear that even a significantly broader restriction, covering the entirety of Clark County or a reasonable radius from each of the facilities, would be reasonable. Here, instead of placing a blanket ban on the entire county or establishing criteria that would effectively do the same, Plaintiff has only asked that Defendant be enjoined from practicing anesthesia at the specific facilities where Plaintiff has provided services in the last twelve months or is in active negotiations to supply such services.

Defendant does not point to any ambiguity in what constitutes a "facility" under the Employment Agreement, nor does Defendant claim any confusion, but rather merely asserts that the Employment Agreement, as written, is unreasonable. If preventing Defendant from

competing in the entirety of Clark County would have been reasonable because of the significant goodwill that Plaintiff has established throughout the county, no argument can be made that a substantially less restrictive term is unreasonable.

Because the inquiry into geographical restrictions is to be focused on those places where an employer has established goodwill, it logically follows that a facilities-based restriction is preferable to other ways that a geographic restriction can be defined. If an entire city or radius of miles is not unreasonably restrictive, then an NCA that includes only certain facilities in the city or a radius of miles is not only reasonable, but preferable as a minimally restrictive alternative.

B. "Facilities" is a sufficiently clear geographical descriptor to allow the Court to execute an enforceable, written order enjoining Defendant from the conduct he agreed not to engage in.

The Court has expressed concern regarding its ability to craft an enforceable Order enjoining Defendant from working at the restricted facilities. This concern is misplaced given the term "facilities" as defined in the Employment Agreement's section 2.1 is sufficiently clear and unambiguous. Indeed, the facilities where Plaintiff currently operates are clearly listed on its publicly available website.

The Employment Agreement entered into by Defendant Tang uses the term "facilities" to designate a reasonable restriction on both geography and contacts. Nevada case law suggests that such a restriction is reasonable. For instance, in Camco, Inc. v. Baker, 936 P.2d 829, 834 (1997), the Neveda Supreme Court found an NCA to be unreasonable to the extent that it covered areas where Plaintiff did not do business, but did not find that the NCA's other terms, restricting Defendant from employment within 50 miles of Defendants existing locations, to be overly broad. Ellis v. McDaniel, 95 Nev. 455, 459, 596 P.2d 222, 225 (1979), is also instructive. Although the covenant at issue in that case was geographically defined, the Nevada Supreme Court noted that it effectively applied to the practice of medicine at a single hospital. The Court held that it was reasonable to restrict defendant in that case from practicing general medicine,

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which was available from other providers, at that hospital. Here, each of the relevant facilities have alternate providers of anesthesia services from Plaintiff, and Plaintiff's interests in maintaining its relationships and good will at those facilities warrant protection.

While Nevada courts have never passed on a restrictive provision identical to the one at issue here, the following authorities all support the fact that a "facilities" based approach to an NCA is reasonable, sufficiently clear, and have been ratified in other jurisdictions:

Tennessee Code 63-1-148(a)(1)(A)(ii) (codifying that employment NCAs for healthcare providers "shall be deemed reasonable" if "[t]here is no geographic restriction, but the healthcare provider is restricted from practicing the healthcare provider's profession at *any facility* at which the employing or contracting entity provided services while the healthcare provider was employed or contracted with the employing or contracting entity.") (emphasis added).

This statute codified existing Tennessee case law on the reasonableness of NCAs, which is generally consistent with Nevada's on related issues. See e.g., All Right Auto Parks v. Berry, 219 Tenn. 280 (1966); Hasty v. Rent-A-Driver, 671 S.W. 2d 471 (1984).

Schott v. Beussink, 950 S.W.2d 621 (Mo. App. 1997) (holding an NCA without *any* geographic restriction was enforceable where it only restricted work for existing clients of an accountant's former employer); see also Sigma-Aldrich Corp. v. Vilkin, 451 S.W.3d 767 (Mo. App. 2014) (reasoning that if an NCA is specific enough to customer contacts and scope of work, then the restricted geography of the NCA can be reasonable even if not tangibly defined).

II.

CONCLUSION

The NCA's limitations are as narrowly tailored as possible while still protecting Plaintiff's legitimate economic interests. Plaintiff has satisfied all the requirements for a preliminary injunction. Plaintiff enjoys a strong likelihood of success on the merits, and will suffer irreparable harm if Defendant is not enjoined. Defendant Tang and his alter

ego Defendant Sun Anesthesia Solutions must be enjoined from providing anesthesia services in violation of the Employment Agreement's NCA, without bond as stated in the Employment Agreement.

Dated this 7th day of December 2018.

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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 7th day of December 2018, the foregoing ***PLAINTIFF'S SUPPLEMENTAL REPLY*** 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

ELECTRONICALLY SERVED
12/14/2018 1:22 PM

A-18-783054-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Employment Contract	**COURT MINUTES**	**December 14, 2018**

A-18-783054-C U.S. Anesthesia Partners, Plaintiff(s)
vs.
Devin Tang, M.D., Defendant(s)

December 14, 2018 **3:00 AM** **Minute Order: Plaintiff's Motion for Preliminary Injunction**

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

After a review and consideration of the Motion for Preliminary Injunction filed by Plaintiff U.S. Anesthesia Partners ("USAP") and oral argument of counsel, the Court determined as follows:

The "Facilities" referenced in the Non-Competition section of the Employment Agreement between USAP and Devin Chern Tang ("Tang") are so vague as to render the non-competition agreement unreasonable in its scope.

As defined the Employment Agreement, the facilities from which Tang would be prohibited from soliciting business include; all facilities with which USAP has a contract to supply healthcare providers, facilities at which such providers provided Anesthesiology and Pain Management services, and facilities with which USAP had active negotiations, all during the unspecified term of Tang's employment and the 12 months preceding his term of employment.

The non-competition agreement fails to designate facilities or a geographic boundary where Tang is prohibited from soliciting business with any specificity.

The non-competition agreement fails to consider whether USAP's active contracts survive or USAP's active negotiations yield active contracts by the end of Tang's term of employment. At the time of signing the agreement, this potentially prohibited Tang from soliciting any of USAP's current or future customers.

The non-competition agreement between USAP and Tang lacks both a geographic limitation and

qualifying language distinguishing the particular facilities or customers to which it applies. The non-competition agreement is therefore unreasonable in its scope.

Based on the foregoing, Plaintiff USAP's Motion for Preliminary Injunction shall be DENIED.

Counsel for Tang shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: This Minute Order was electronically served to the parties through Odyssey eFile

NEO
Martin A. Little, (#7067)
Ryan T. O'Malley (#12461)
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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 **NOTICE OF ENTRY OF ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

PLEASE TAKE NOTICE that an *ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION* was filed in the above-captioned matter on February 5, 2019. A true and correct copy of said order is attached hereto.

DATED this 8th day of February, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Ryan T. 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 **NOTICE OF ENTRY OF ORDER DENYING 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)
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 **February 8, 2019**, at Las Vegas, Nevada.

/s/ Anya Ruiz

An Employee of Howard & Howard Attorneys PLLC

4847-6462-7592, v. 1

ODM
Martin A. Little, (#7067)
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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 **ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

On October 19, 2018, Plaintiff U.S. Anesthesia Partners ("USAP" or "Plaintiff") filed its Motion for Preliminary Injunction. Defendants Devin Chern Tang ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") opposed the Motion on November 9, 2018. USAP submitted a Reply in support of its Motion on November 15, 2018. On November 16, 2018, Defendants submitted a supplemental Declaration in support of their Opposition.

The Court heard the Motion on November 19, 2018. After argument, the Court ordered supplemental briefing on the enforceability of covenants not to compete lacking a geographic limitation. The parties timely submitted their supplemental briefs on December 7, 2018.

Having considered the record, the briefing, and the arguments of counsel, and good cause appearing, the Court finds as follows:

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FINDINGS OF FACT

1. In August of 2016, Dr. Tang accepted a position with Premier Anesthesiology Consultants ("PAC"), which was a subsidiary of an entity called Anesthesiology Consultants, Inc. ("ACI").

2. In or around December of 2016, PAC/ACI was acquired by USAP.

3. In connection with this acquisition, Dr. Tang executed a Physician-Track Employment Agreement ("Employment Agreement") as a condition of his continued employment with USAP. (*Id.*)

4. The Employment 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.

5. The Employment Agreement defines "Facilities" as follows:

> 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"

6. In or around March of 2018, Dr. Tang provided 90 days' notice of his intent to terminate his employment with USAP in the manner provided by the Employment Agreement.

7. In or around June of 2018, Dr. Tang's notice period expired, and his employment with USAP was terminated.

8. Dr. Tang continued to work as an anesthesiologist after his departure from USAP by accepting overflow anesthesiology cases from University Medical Center and an anesthesiology practice called Red Rock Anesthesia Solutions ("Red Rock").

9. USAP became aware that Dr. Tang had performed anesthesia services at Southern Hills Hospital and St. Rose Dominican Hospital – San Martin Campus. USAP has contractual relationships with these facilities, and USAP therefore believed that Dr. Tang's conduct violated Employment Agreement. This lawsuit followed.

CONCLUSIONS OF LAW

1. The "Facilities" referenced in the Non-Competition Clause of the Employment Agreement between USAP and Dr. Tang is so vague as to render the non-competition agreement unreasonable in its scope. As defined by the Non-Competition Clause of the Employment Agreement, the Facilities from which Dr. Tang would be prohibited from providing anesthesia services and/or soliciting business include:

a. All Facilities with which USAP has a contract to supply healthcare providers;

b. Facilities at which those providers provided anesthesiology and pain management services; and

c. Facilities with which USAP had active negotiations;

all during the unspecified term of Dr. Tang's employment and the twelve months preceding his term of employment.

2. The Non-Competition Clause of the Employment Agreement fails to designate facilities or a geographic boundary where Dr. Tang is prohibited from working and/or soliciting business with any specificity.

3. The Non-Competition Clause of the Employment Agreement fails to consider whether USAP's active contracts with facilities survive or whether USAP's active negotiations yield active contracts by the end of Tang's term of employment. At the time of signing the Employment Agreement, this potentially prohibited Tang from working with and/or soliciting any of USAP's current or future customers.

4. The scope of the Non-Competition Clause is subject to change over the course of Dr. Tang's employment, and even after his departure, based upon relationships with facilities USAP establishes after execution of the Employment Agreement. Dr. Tang therefore could not reasonably ascertain or anticipate the geographic scope of the non-competition agreement at the time of its execution.

5. The Non-Competition Clause of the Employment Agreement between USAP and Dr. Tang lacks any geographic limitation or qualifying language distinguishing the particular Facilities or customers to which it applies.

6. The Court does not have authority to "blue pencil" the Non-Competition Clause of the Employment Agreement because the amendment to NRS Chapter 613, more particularly NRS 613.195(5), does not apply retroactively to agreements entered into prior to the enactment of the amendment, which agreements are governed by *Golden Rd. Motor Inn, Inc. v. Islam,* 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016).

7. The Non-Competition Clause of the Employment Agreement is therefore unreasonable in its scope.

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ORDER

Based upon the foregoing findings of fact and conclusions of law, and good cause appearing, the Court ORDERS, ADJUDGES, AND DECREES that USAP's Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED this _____ day of _____, 2019.

_____
HONORABLE TIMOTHY C. WILLIAMS

Respectfully submitted by:

HOWARD & HOWARD ATTORNEYS PLLC

_____
Martin A. Little (#7067)
Ryan T. O'Malley (#12461)
3800 Howard Hughes Parkway, Ste. 1000
Las Vegas, NV 89169
Attorneys for Defendants

Approved as to form and content by:

DICKINSON WRIGHT PLLC

_____
Michael N. Feder (#7332)
Gabriel A. Blumberg (#12332)
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113
Attorneys for Plaintiff

4837-9976-4613, v. 4

ORDER

Based upon the foregoing findings of fact and conclusions of law, and good cause appearing, the Court ORDERS, ADJUDGES, AND DECREES that USAP's Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED this 31 day of January, 2019.

HONORABLE TIMOTHY C. WILLIAMS II

Respectfully submitted by:

HOWARD & HOWARD ATTORNEYS PLLC

Martin A. Little (#7067)
Ryan T. O'Malley (#12461)
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Attorneys for Defendants

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DISTRICT COURT
CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., 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.: 16 **FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.'S MOTION FOR RECONSIDERATION ON ORDER SHORTENING TIME** **Date of Hearing:** **Time of Hearing:**

DEPARTMENT XVI
NOTICE OF HEARING
DATE 3-7-19 TIME 9:00 AM
APPROVED BY CL

Plaintiff FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD. ("Plaintiff"), by and through its counsel, the law firm of Dickinson Wright PLLC, hereby files its Motion for Reconsideration of the Court's February 5, 2019 Order Denying Motion for Preliminary Injunction. This motion is based on the following Memorandum of Points and Authorities; the papers and pleading already on file herein; the declaration of Gabriel A. Blumberg, Esq. set forth below and the exhibits attached thereto; and any

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02-19-19P12:59 RCVD

oral argument the Court may permit at the hearing of this matter.

DATED this 19th day of February 2019.

DICKINSON WRIGHT PLLC

MICHAEL N. FEDER
Nevada Bar No. 7332
GABRIEL A. BLUMBERG
Nevada Bar No. 12332
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Attorneys for Plaintiff

ORDER SHORTENING TIME

Good Cause Appearing Therefore,

IT IS HEREBY ORDERED that the time for hearing Plaintiff's Motion for Reconsideration is shortened to be heard on the 7 day of ~~February~~ March, 2019, at 9:00 a.m./p.m., or as soon thereafter as the parties may be heard.

Defendant's Opposition shall be filed by March 5, 2019.

Plaintiff's Reply shall be filed by _____, 2019.

Dated this 20 day of February 2019.

DISTRICT COURT JUDGE

Respectfully Submitted By:

DICKINSON WRIGHT PLLC

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GABRIEL A. BLUMBERG, NV Bar No. 12332
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Tel: (702) 382-4002
Attorneys for Plaintiff

DECLARATION OF GABRIEL A. BLUMBERG, ESQ. IN SUPPORT OF MOTION FOR RECONSIDERATION AND APPLICATION FOR ORDER SHORTENING TIME

Gabriel A. Blumberg, Esq., being first duly sworn, declares as follows:

1. I am an attorney licensed to practice law in the State of Nevada and I am an associate with the law firm of Dickinson Wright PLLC, counsel for Plaintiff. I have personal knowledge of the matters set forth herein and know them to be true except for matters set forth herein on information and belief, and as to those matters, I believe them to be true.

2. This declaration is submitted in support of the Motion for Reconsideration on Order Shortening Time (the "Motion").

3. The deadline for Plaintiff to appeal the Court's Order Denying Motion for Preliminary Injunction (the "Order") is March 11, 2019.

4. If this Motion is set in the ordinary course, the hearing on this Motion will not occur until after Plaintiff's deadline to appeal the Order. The outcome of the Motion, however, could obviate the need for an appeal and thus should be decided prior to deadline for Plaintiff to appeal the Order.

5. Furthermore, it has become apparent that this Court's ruling regarding the non-compete clause in Tang's Employment Agreement is emboldening other physicians to violate the terms of their non-compete agreements with Plaintiff.

6. Plaintiff therefore requests that the hearing be set on shortened time to be heard no later than March 6, 2019.

7. Attached hereto as Exhibit 1 is a true and correct copy of the Physician-Track Employment Agreement between Plaintiff and Dr. Tang.

EXECUTED this 19th day of February, 2019.

GABRIEL A. BLUMBERG, ESQ.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should reconsider its prior ruling because the subject non-compete clause contains a reasonable and unambiguous geographic limitation of the non-compete clause precluding Dr. Tang from servicing medical facilities where he performed services on behalf of Plaintiff. Dr. Tang undeniably knows which medical facilities he served on behalf of Plaintiff and therefore can easily discern how to comply with this narrowly tailored geographic restriction in the non-compete clause.

Alternatively, even if this Court still believes the geographic limitation in the non-compete clause is ambiguous or unreasonable, it must reconsider its decision refusing to blueline the non-compete clause. Both Nevada law and the parties' contractual agreement provide that this Court must reform any unreasonable non-compete conditions to render the non-compete clause enforceable. As a result, the Court should reconsider its prior ruling and issue a preliminary injunction enforcing either the original non-compete clause or a modified version of the non-compete clause.

II. FACTUAL BACKGROUND

In December 2016, Dr. Tang executed a Physician-Track Employment Agreement ("Employment Agreement") as a condition of his continued employment with Plaintiff. Judgment at ¶ 3. The Employment 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. 1 at ¶ 2.8.1.

The geographic restriction in the Non-Competition Clause reasonably seeks to prevent Dr. Tang from providing anesthesia and pain management services at medical facilities where he had performed services for Plaintiff during the term of the Employment Agreement. *Id.* Dr. Tang agreed that this Non-Competition Clause, including the geographic restriction, was reasonable and consented to entry of injunctive relief to enforce the Non-Competition Clause. *Id.* at ¶¶ 2.8.3; 2.10. Furthermore, the parties agreed that if a court ever determined any provision of the Non-Competition Clause was unreasonable, that court must enforce the remainder of the agreement and revise the offending provision such that it would become enforceable. *Id.* at ¶ 2.10.

During his employment with Plaintiff, Dr. Tang provided services at the following medical facilities (the "Non-Competition Facilities"): Desert Springs Hospital, Durango Outpatient, Flamingo Surgery Center, Henderson Hospital, Horizon Surgery Center, Institute of Orthopaedic Surgery, Las Vegas Surgicare, Mountain View Hospital, Parkway Surgery Center, Sahara Outpatient Surgery Center, Seven Hills Surgery Center, Southern Hills Hospital, Specialty Surgery Center, Spring Valley Medical Center, St. Rose- De Lima Campus, St. Rose- San Martin Campus, St. Rose- Siena Campus, Summerlin Hospital, Sunrise Hospital, Tenaya Surgical Center, Valley Hospital, and Valley View Surgery Center. *See* Complaint, on file herein, at ¶ 12.

In or around March 2018, Dr. Tang provided Plaintiff with 90 days' notice of his intent to terminate his employment with Plaintiff in the manner provided by the Employment Agreement. *See* Order, on file herein, at ¶ 6. In or around June 2018, Dr. Tang's notice period expired, and his employment with Plaintiff was terminated. *Id.* at ¶ 7.

After ceasing his employment with Plaintiff, Dr. Tang continued to work as an anesthesiologist in Clark County and performed anesthesia services at Non-Competition Facilities such as Southern Hills

Hospital and St. Rose Dominican Hospital – San Martin Campus. Complaint at ¶ 23; Answer, on file herein, at ¶ 23.

Plaintiff notified Dr. Tang that his actions violated the Non-Competition Clause and filed its Complaint and sought a preliminary injunction precluding Dr. Tang from continuing to violate the Non-Competition Clause during the pendency of the action. *See* Complaint; Motion for Preliminary Injunction, on file herein. Dr. Tang filed an answer and alleged the Non-Competition Clause was void because the geographic restrictions were vague. *See* Answer; Opposition to Motion for Preliminary Injunction, on file herein.

After a hearing on Plaintiff's Motion for Preliminary Injunction, the Court entered its Order Denying Preliminary Injunction. *See* Order. In its Order, the Court incorrectly concluded that the Employment Agreement: (1) "fails to designate facilities or a geographic boundary where Dr. Tang is prohibited from working and/or soliciting business with any specificity" and (2) "lacks any geographic limitation or qualifying language distinguishing the particular Facilities or customers to which it applies." *Id.* at ¶¶ 2, 5. These erroneous factual findings permeated the Court's incorrect decision to nullify the entirety of the Non-Competition Clause.

The Court then compounded its inaccurate factual finding by concluding that, as a matter of law, it could not blueline the Non-Competition Clause. *Id.* at ¶ 6. Based on this legal conclusion, the Court refused to modify the Non-Competition Clause to reflect a specific geographic restriction it would have found reasonable. *Id.* These errors merit reconsideration and imposing a preliminary injunction precluding Dr. Tang from working at the defined and ascertainable Non-Competition Facilities he personally worked at on behalf of Plaintiff.

III. ARGUMENTS & AUTHORITIES

A. Legal Standard for Reconsideration

A court has the inherent authority to reconsider its prior orders. *Trail v. Farretto*, 91 Nev. 401, 536 P.2d 1026 (1975) ("[A] trial court may, for sufficient cause shown, amend, correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the motion in the progress of the cause or proceeding"); *see also N. Main, LLC v. Eighth Judicial Dist. Court of State ex rel. Cty. of*

Clark, 128 Nev. 922, 381 P.3d 646 (2012) (citing *Masonry and Tile v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)) ("a district court may consider a motion for reconsideration concerning a previously decided issue if the decision was clearly erroneous."). This authority is also provided by Eighth Judicial District Court Rule ("EDCR") 2.24, which provides, in pertinent part:

> A party seeking reconsideration of a ruling of the court … must file a motion for such relief within 10 days after service of the written order or judgment unless the time is shortened or enlarged by order. A motion for rehearing or reconsideration must be served, noticed, filed and heard as is any other motion.

EDCR 2.24(b). For the reasons set forth more fully herein, reconsideration is appropriate.

B. Reconsideration is Warranted Because the Non-Competition Clause is Reasonable and the Court was Obligated to Enforce Some Version of the Non-Competition Clause

1. The Non-Competition Clause Is Narrowly Tailored to Protect Plaintiff's Legitimate Business Interests

"Nevada law allows for the enforcement of reasonable restrictive covenants in employment agreements, and recognizes that a valid, restrictive covenant may be enforced by way of temporary and permanent injunctive relief." *Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, No. 3:11-CV-00585-RCJ, 2011 WL 3678798, at *3 (D. Nev. Aug. 22, 2011) (citing NRS 613.200). Broad geographic restrictions are reasonable "so long as they are roughly consonant with the scope of the employee's duties." *Id.* (imposing temporary injunctive relief after finding non-compete clause reasonable and enforceable *with no geographic scope* because it prohibited employees from working in a similar position with a similar or competitive business). Nevada courts have found geographic restrictions reasonable when they are limited to areas serviced by the employer. *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222, 224 (Nev.1979); *Farmer Bros. Co. v. Albrecht*, No. 2:11-CV-01371-PMP, 2011 WL 4736858, at *2 (D. Nev. Oct. 6, 2011) (granting preliminary injunction where non-compete prohibited former employee from working "in the geographical area served by [Plaintiff's] Las Vegas, Nevada office.").

Here, the Non-Competition Clause contains a reasonable geographic restriction aimed at precluding Dr. Tang from performing anesthesia or pain management services at any medical facility he served while employed by Plaintiff. This narrowly tailored restriction is directly tied to Dr. Tang's

work for Plaintiff and seeks to protect Plaintiff's goodwill and established business relationships with medical facilities that Dr. Tang became familiar with by working for Plaintiff.

Contrary to this Court's finding, the restriction applies only to the twenty-two specific medical facilities listed above. The list of Non-Competition Facilities was fixed as of the date of Dr. Tang's separation from Plaintiff and therefore no additional facilities may be added. To the extent Dr. Tang contends that (i) additional unknown facilities might become Non-Competition Facilities in the future or (ii) there may be Non-Competition Facilities with which Dr. Tang is unfamiliar, those contentions are defeated by the plain language of the restriction. Furthermore, because the restriction is narrowly tailored, Dr. Tang can provide anesthesia or pain management services at numerous other medical facilities in Clark County, as well as facilities in other counties and states. Dr. Tang can even work at facilities in Clark County which are located in close proximity to the facilities where he provided services for Plaintiff. The only thing Dr. Tang cannot do is provide anesthesia or pain management services at the twenty-two designated Non-Competition Facilities.

The geographic restriction of the Non-Competition Clause therefore is not only reasonable and easily comprehended by Dr. Tang, but also is as narrowly tailored as possible to only restrict Dr. Tang from providing the exact services at the exact locations he served for Plaintiff. *See* NRS 613.195(5). This limited geographic restriction directly correlates with Plaintiff's recognized right to protect its developed business relationships and preclude Dr. Tang from capitalizing on the goodwill Plaintiff has spent years developing with the Non-Competition Facilities. Thus, the Court should reconsider its finding that the Non-Competition Clause lacked a clear or reasonable geographic scope.

2. The Court Must Blueline the Non-Competition Clause if it Nevertheless Concludes that the Non-Competition Clause Is Unreasonable

The Court misapplied the law when it refused to blue pencil the Non-Competition Clause, citing the Nevada Supreme Court's decision in *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016). In the legislative session immediately following the issuance of *Islam*, the Nevada Legislature amended NRS 613.195(5) to read as follows:

> If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit

> the restraint is imposed and impose undue hardship on the employee, *the court shall revise the covenant to the extent necessary and enforce the covenant as revised.* Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

NRS 613.195(5) (emphasis added). This revision of Nevada's non-compete statute was made in direct response to the *Islam* decision and intended to apply retroactively to agreements signed before the enactment of the statute. *See* Senate Committee on Commerce, Labor and Energy May 24, 2017 Minutes at p. 15 ("a specific lawsuit came forth in which an entire noncompete agreement was thrown out because on portion of it was excessive. Section 1, subsection 5 would allow a court to keep the good parts of a noncompete agreement and toss out or renegotiate the excessive parts").

Furthermore, NRS 613.195(5) directly contradicts the Nevada Supreme Court's basis for its decision in *Islam* and undercuts that decision's precedential value. In *Islam*, the Nevada Supreme Court based its decision on its belief that "[u]nder Nevada law, such an unreasonable provision renders the noncompete agreement wholly unenforceable." *Islam*, 376 P.3d at 156. The Nevada Supreme Court further justified its decision by noting that courts cannot modify or vary the terms of unambiguous contracts and "[u]nder Nevada law, this rule has no exception for overbroad noncompete agreements." *Id.* This reasoning, which formed the basis for the *Islam* decision, no longer passes muster because Nevada law clearly and unambiguously now requires district courts to modify or vary overbroad or unreasonable provisions of non-compete agreements. NRS 613.195(5).

Similarly, the Nevada Supreme Court's other basis for refusing to blueline the non-compete agreement in *Islam*—that it would not comport with the parties' contractual intent—is similarly unavailing in this case. *Islam*, 376 P.3d at 157. The parties here specifically addressed this concern in the Employment Agreement, wherein the parties agreed:

> If any provision of 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.

Ex. 1 at ¶ 2.10. Therefore, neither of the Nevada Supreme Court's bases for its *Islam* decision withstand scrutiny in this case and NRS 613.195(5) applies to the Non-Competition Clause. The Court must blueline the Non-Competition Clause to the extent it finds it is unreasonable and enforce the terms of the modified Non-Competition Clause through a preliminary injunction in accordance with the Legislature and the parties' intent. NRS 613.195(5); Ex. 1 at ¶ 2.10.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that this Court reconsider its prior ruling and enforce the parties' bargained-for Non-Competition Clause. Alternatively, if the Court still concludes that the Non-Competition Clause is unreasonable, it must blueline the Non-Competition Clause and enforce a revised version.

DATED this 19th day of February 2019.

DICKINSON WRIGHT PLLC

MICHAEL N. FEDER
Nevada Bar No. 7332
GABRIEL A. BLUMBERG
Nevada Bar No. 12332
8363 West Sunset Road, Suite 200
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 21st day of February 2019, a copy of **FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.'S MOTION FOR RECONSIDERATION** to be transmitted by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey E-File & Serve system addressed to:

Martin A. Little, Esq.
mal@h2law.com
Ryan T. O'Malley
rto@h2law.com
HOWARD & HOWARD PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
Attornevs for Defendants

Wendy S. Rudnick
An Employee of Dickinson Wright PLLC

EXHIBIT 1

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.

OPPM
Martin A. Little, (#7067)
Ryan T. O'Malley (#12461)
Howard & Howard Attorneys PLLC
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Las Vegas, NV 89169
Telephone: (702) 257-1483
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E-Mail: mal@h2law.com; rto@h2law.com
Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBINSON YEH, LTD. 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 **OPPOSITION TO MOTION FOR RECONSIDERATION**

Devin Chern Tang ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") hereby oppose the Motion for Reconsideration filed in this matter by Fielden Hanson Isaacs Miyada Robinson Yeh, Ltd. ("USAP[1]").

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[1] On in formation and belief, Fielden Hanson is a subsidiary of U.S. Anesthesia Partners, who was originally the named Plaintiff in this case. The briefing of the underlying Motion referred to Plaintiff by that name, and Dr. Tang therefore refers to Plaintiff by that name here for consistency.

This Opposition is based upon the attached Memorandum of Points and Authorities, the attached Exhibits, the pleadings and papers on file in this case, and whatever argument the Court may entertain at hearing.

DATED this 4th day of March, 2019.

HOWARD & HOWARD ATTORNEYS PLLC

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

POINTS AND AUTHORITIES

I.
INTRODUCTION

The Court's initial ruling was correct, and Plaintiff's Motion for Reconsideration should be denied. The non-competition language at issue is not "narrowly tailored" to only those facilities at which Dr. Tang had performed anesthesia or pain management services because the Agreement requires Dr. Tang to terminate his staff privileges at every capital-'F' "Facility" as the Agreement broadly defines that term. This is tantamount to preventing Dr. Tang from working at those Facilities with no geographic limitation; therefore, the Court's initial reasoning stands. Even if the Court were to ignore that provision, the non-competition agreement is nevertheless overbroad because it purports to bar Dr. Tang from accepting cases even with providers who have no relationship with USAP. As Dr. Tang's declaration in support of his Opposition set forth at length, he is not competing with USAP, and he is not working with or soliciting business from any USAP clients. A non-competition agreement that purports to prevent him from working anyway is overbroad, and USAP cannot show irreparable harm (or any harm) in the absence of any actual competition. Finally, the revisions to NRS 613.195(5) do not apply retrospectively, and it does not allow blue-lining the Agreement at issue in this case. Statutes operate retroactively only where the legislature clearly manifests an intent that they do so, and neither the text of NRS 613.195(5) nor the legislative history underlying its enactment show any such intent. *Golden Rd. Motor Inn, Inc. v. Islam* is therefore the law that controls this case, and it prohibits redrafting the contract. 132 Nev. Adv. Op. 49, 376 P.3d 151, 153 (2016) ("[W]e do not modify or 'blue pencil' contracts.").

II.
STATEMENT OF FACTS

The Relevant Contractual Provisions

USAP's Agreement (with exhibits) spans about 23 single-spaced pages. (*See generally* Ex. A.) Many of the Agreement's provisions (including the non-competition provisions at issue in this case) cast their scope in terms of "Facilities," which are broadly defined as:

> 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[.]"

(*Id.* at pg. 1.) The definition of capital-'F' "Facilities" under the Agreement therefore includes the following classes of healthcare facilities:

(1) facilities at which USAP has a contract to supply healthcare providers;

(2) facilities at which USAP *had* a contract to supply healthcare providers at any time during the 12 months preceding the Agreement, even if it does no longer, and even if it did not have such a contract at any time during the term of the Agreement;

(3) facilities at which USAP had provided anesthesiology or pain management services at any time during the term of the Agreement;

(4) facilities at which USAP had provided anesthesiology or pain management services during the twelve months preceding the Agreement, even if it never did during the term of the Agreement;

(5) any facilities with which USAP had "active negotiations[2] to supply any [healthcare] providers" during the Term of the Agreement, even if those negotiations never ripened into a contract; and

(6) any facilities with which USAP had "active negotiations" during the twelve months preceding the Agreement, even if those negotiations never ripened into a contract, and even if those negotiations had unsuccessfully concluded prior to the term of the Agreement.

Subject to this broad definition of "Facilities," the Agreement contains the following Non-Competition Clause:

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[2] The Agreement does not define "active negotiations," which leaves ambiguous how "active" negotiations must be before they trigger any obligation under the Agreement. For example, if a healthcare facility contacts USAP expressing potential interest in forming a relationship and entertains a few meetings before concluding that it is not interested, it is entirely unclear under the Agreement whether these "negotiations" were sufficiently "active" to trigger the Agreement's various obligations.

> 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. A at § 2.8.1, emphases added.) The Agreement also provides that, upon termination, Dr. Tang must terminate his privileges at any "Facility" as defined by the Agreement, *without regard to whether he had ever provided services* at that Facility:[3]

> 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.

(Ex. A at § 6.3, emphases added.) The Agreement also includes a provision requiring a physician to "waive[] due process, notice, hearing, and review in the event his or her membership or

[3] Section 6.3 does not include the "twenty-four month period" limitation contained in the non-competition clause, and the Agreement does not articulate when, if ever, Dr. Tang may re-establish his privileges at the Facilities.

privileges at any Facility are terminated under the circumstances described in Section 6.3(ii) [*i.e.* the language quoted above]," which apparently contemplates a waiver of rights if someone *other than* Dr. Tang seeks to have his privileges terminated at any Facility following his departure. (*See id.* at § 6.4.) The Agreement's non-solicitation provision similarly applies to "any of the Facilities," without regard to whether Dr. Tang had ever actually practiced or provided services at any given facility. (*Id.* at § 2.8.2.)

USAP's Motion and the Court's Ruling

USAP commenced this action on October 18, 2018, and it filed its Motion for Preliminary Injunction on October 19, 2018. In its Motion, USAP took the position that Dr. Tang violated the non-competition agreement by providing services "at 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 [Agreement]." (See Plaintiff's Motion for Preliminary Injunction (*sans* exhibits), attached as **Exhibit B**, at 5:22–6:1.)

The Court heard the Motion on November 19, 2018. At the hearing, the Court noted that the lack of any geographic limitation in the definition of "Facilities" was relevant because USAP operates in multiple states:

> 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 [F]acilities are defined how they're defined.

(*See* Transcript of Hearing, attached as **Exhibit C**, at 30:3–19.) USAP also raised Section 6.3's requirement that Dr. Tang terminate his privileges as a basis for granting injunctive relief:

> MR. SCHNEIDER: It's only when [Dr. Tang is] essentially caught lying to my client wandering the halls of [F]acilities, which, by the way, would be in violation of Section 6.3 of the [A]greement because he had to terminate his privileges at those [F]acilities, does he then say, Oh well, I'm not – I'm actually not violating the contract[.]
>
> [* * *]
>
> MR. SCHNEIDER: [T]he 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.

(*Id.* at 11:7–19, 19:13–18.) At the conclusion of the hearing, the Court requested supplemental briefing, which the parties submitted on December 7, 2018.

The Court entered a written order on February 5, 2019 denying the Motion for Preliminary Injunction, correctly noting that the definition of "Facilities" under the Agreement "is so vague as to render the non-competition agreement unreasonable in its scope." (*See* Order Denying Preliminary Injunction, attached as **Exhibit D**, at 3:15–17.) Specifically, the definition of Facilities purports to include: (1) all facilities at which USAP has a contract to supply healthcare providers; (2) facilities at which those providers have provided anesthesiology and pain management services (even in the absence of a contract); and (3) facilities at which USAP has had "active negotiations," even in the absence of any resulting agreement. (*Id.* at 3:15–4:10.) The definition of "Facilities" also lacks any geographic limitation, and is subject to change after the execution of the Agreement. (*Id.* at 4:11–13.) Finally, the Court held that it lacks the authority to "blue pencil" the Agreement because it was executed prior to the amendments to NRS 613, which was not intended to be retroactive. (*Id.* at 4:14–18.)

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III.
ARGUMENT

Prior to its Motion for Reconsideration, USAP took the position that Section 2.8.2 barred Dr. Tang from working at any Facility with which USAP had any relationship (Ex. C at 5:22–6:1), and that Section 6.3 required Dr. Tang to terminate his privileges at every "Facility," as the Agreement broadly defines that term (*See* Ex. C at 11:7–19, 19:13–18). It now interprets Section 2.8.2 to apply only to "Facilities" at which Dr. Tang had provided anesthesiology services (Mot. at 8:3–13), and it disregards Section 6.3 entirely (*See generally id.*). But Section 6.3 is part of the Agreement, and it must be considered alongside the other non-competition provisions to determine whether the Agreement is enforceable. *See Golden Rd.*, 376 P.3d at 156 ("Under Nevada law . . . an unreasonable provision renders the noncompete agreement wholly unenforceable.") Section 6.3 broadly calls for Dr. Tang to terminate his privileges at every "Facility," which would obviously preclude him from providing any anesthesiology services at those Facilities, with no geographic limitation. (*See* Ex. A at § 6.3.) Thus, even if the Court were to accept USAP's revised construction of Section 2.8.2, the Court's analysis still applies because, as a practical matter, the Agreement precludes Dr. Tang from working at any "Facility" country-wide with no geographic limitation. Even if the Court were to ignore Section 6.3, Section 2.8.2 is nevertheless overbroad because, even under the revised definition, it bars Dr. Tang from providing services to *any* healthcare provider (even those who have never worked with USAP) at every major hospital and medical center in Las Vegas. Dr. Tang is in fact not competing with USAP,[4] and no rreparable harm exists which would support the granting of a preliminary injunction. Finally, the Court correctly held that AB 276's amendments to NRS 613.195(5) are not retroactive, and the Court therefore may not rewrite the Agreement to render it enforceable.

A. Section 6.3 Renders the Non-Competition Language Unenforceable and Fully Supports the Court's Ruling

Section 6.3 requires the Dr. Tang to terminate his staff privileges at *every single "Facility"* under the Agreement's broad definition of that term, regardless of whether Dr. Tang had ever

[4] *See generally* Dr. Tang's Declaration attached to his Opposition to USAP'S Motion for Preliminary Injunction, in which he describes his efforts to avoid soliciting or working with any USAP clients.

provided services there as a USAP employee, and with no indication of when (if ever) he may apply to reinstate his privileges at those Facilities. This means that, under the plain language of the Agreement, Dr. Tang must terminate his privileges at:

(1) every facility at which USAP has a contract to supply healthcare providers;

(2) every facility at which USAP *had* a contract to supply healthcare providers at any time during the 12 months preceding the Agreement, even if it does no longer, and even if it did not have such a contract at any time during the term of the Agreement;

(3) every facility at which USAP had provided anesthesiology or pain management services at any time during the term of the Agreement;

(4) every facility at which USAP had provided anesthesiology or pain management services during the twelve months preceding the Agreement, even if it never did during the term of the Agreement;

(5) every facility with which USAP had "active negotiations to supply any [healthcare] providers" during the Term of the Agreement, even if those negotiations never ripened into a contract; and

(6) every facility with which USAP had "active negotiations" during the twelve months preceding the Agreement, even if those negotiations never ripened into a contract, and even if those negotiations had unsuccessfully concluded prior to the term of the Agreement.

This stripping of staff privileges has no set duration in the Agreement; it is therefore apparently indefinite. Dr. Tang must also waive his due process rights in connection with his staff privileges at any USAP "Facility," again, apparently indefinitely. This sweeps far more broadly than is necessary to protect any legitimate business purpose of USAP.

Section 6.3 is clearly a non-competition provision; it has no plausible reason for being included in the Agreement except for preventing Dr. Tang from working at *all* USAP "Facilities," and it was raised by USAP at the hearing on its Motion as a breach of the Agreement (*See* Ex. D at 11:7–19, 19:13–18.) USAP cannot ignore it now, and pretending as though it does not exist to

save the remainder of the noncompete language is precisely the sort of "blue penciling" that *Golden Rd.* prohibits. *See* 376 P.3d at 153.

B. USAP's Revised Interpretation of Section 2.8.2 is Still Overbroad

Even if the Court were to ignore Section 6.3, Section 2.8.2 would nevertheless be overbroad. 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. 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 it provides an alternative basis for the Court's ruling. *Golden Rd.*, 376 P.3d at 156.

C. USAP Has Not Experienced *Any* Harm, Much Less Irreparable Harm

The Court's correct ruling that the non-compete language was unenforceable obviated any need to assess the harm that USAP faces in the absence of an injunction; however, the lack of any such irreparable harm constitutes another separate basis for denying injunctive relief.

USAP's briefing cited no evidence of irreparable harm to justify a preliminary injunction except for an invocation of Section 2.8.3 of the Agreement, which provides that "[i]n the event of any breach by Physician of the provisions of this Section 2.8, the practice would be irreparably harmed[.]" (Ex. A at § 2.8.3.) This is specious; a provision in an adhesion contract executed two years in the past is not evidence of real-world irreparable harm in the present, and courts recognize such provisions as the boilerplate that they are. *See, e.g.*, *Smith, Bucklin & Associates, Inc. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996) ("Although there is a contractual provision that states that the company has suffered irreparable harm if the employee breaches the covenant and that the employee agrees to be preliminarily enjoined, this by itself is an insufficient prop."); *Guttenberg v. Emery*, 26 F. Supp. 3d 88, 101 (D.D.C. 2014) ("Parties may agree beforehand that injunctive relief should issue in certain circumstances . . . but such agreements are not binding on

a court. Rather, [a court] must look to the standard guiding the issuance of a preliminary injunction.").

Contractual boilerplate aside, 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 performing surgeries at *any* hospital in which Dr. Tang had ever taken a case during his time at USAP, as well as requiring him to terminate his privileges at *every* "Facility" with which it has a relationship. It is indeed hard to imagine how Plaintiff 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.").

D. The Balance of Hardships Favors Dr. Tang

The court's finding of unenforceability also precluded it from considering the balance of the hardships, but that balance favors Dr. Tang and provides still another basis for denying a preliminary injunction.

While USAP does not face any significant harm if its Motion is denied, Dr. Tang faces 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. It would indeed terminate his privileges at all of these hospitals, and strip him of any due process right to regain them. 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 working while not soliciting any of USAP's clients. The balance of hardships therefore favors Dr. Tang.

E. Revised NRS 613.195(5) Does Not Apply Retroactively

Plaintiff's suggestion that the Court should construe AB 276 to operate retrospectively, if accepted, would violate Dr. Tang's due process rights. *See K-Mart Corp. v. State Indus. Ins. Sys.*, 101 Nev. 12, 21, 693 P.2d 562, 567 (1985). "Retroactivity is not favored in the law." *Cnty. of Clark v. LB Props., Inc.*, 129 Nev. 909, 912, 315 P.3d 294, 296 (2013) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). This is so because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). Legislative enactments therefore apply only prospectively unless their language requires that they be applied retrospectively. *See LB Props*, 129 Nev. at 912, 315 P.3d at 296; *accord Bowen*, 488 U.S. at 208.

AB 276 clearly affects the holding in *Golden Road*; however, it is not at all clear that the legislature intended that bill do so *retrospectively*. Indeed, the legislative history that Plaintiff cites does not say *anything* about retroactivity, nor does it even mention *Golden Road* by name. (*See* Senate Committee on Commerce, Labor, and Energy May 24, 2017 Minutes, attached as **Exhibit E**.) The only allusion to *Golden Road* comes from Misty Grimmer (a public affairs professional representing the Nevada Resort Association) expressing the Resort Association's support of A.B. 276 because "a specific lawsuit came forth" which prohibited blue-lining, and the bill "would allow a court to keep the good parts of a noncompete agreement and toss out or

renegotiate the excessive parts." (Ex. E at 15.) Ms. Grimmer certainly does not speak for the legislature, and even in her capacity as a lobbyist she says nothing about retroactivity. (*Id.*) Nor does any member of the legislature, nor does anyone else. (*See generally* Ex. E.)

In short, A.B. 276 was enacted after the Agreement was executed. *Golden Road* was the law at the time of execution, and it prohibited blue-lining an overbroad non-compete agreement. Dr. Tang had the right to expect that a court would analyze the Agreement under the state of the law as it existed when he executed the Agreement, and he has that right now, especially in the absence of any intent by the legislature that A.B. 276 operate retrospectively. The Court should decline to give the statute retroactive application.

IV.
CONCLUSION

The Court's holding was correct, and Plaintiff's Motion should be denied. Alternatively, the Court should modify its Order to include an explicit reference to Section 6.3 and/or findings in Dr. Tang's favor on irreparable harm and balance of hardships, and otherwise maintain its denial of a preliminary injunction.

DATED this 4th day of March, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

By: */s/Ryan O'Malley*
Martin A. Little (#7067)
Ryan T. O'Malley (#12461)
3800 Howard Hughes Parkway, #1000
Las Vegas, Nevada 89169
Attorneys for Defendants
4820-3337-8441, v. 2

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 attached **OPPOSITION TO MOTION FOR RECONSIDERATION** 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:

Michael N. Feder (#7332)
Gabriel A. Blumberg (#12332)
DICKINSON WRIGHT, PLLC
8363 West Sunset Road, Suite 200
Las Vegas, NV 89113
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 **March 4, 2019**, at Las Vegas, Nevada.

/s/ Karen Gomez

An Employee of Howard & Howard Attorneys PLLC

4847-6462-7592, v. 1

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

MOT
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Nevada Bar No. 5268
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Adam Schneider, Esq.
Nevada Bar No. 010216
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Attorneys for Plaintiff

hrg 11/29

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.

//

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

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

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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

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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

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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/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 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:

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/s/ Jody Foote
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EXHIBIT C

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

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, 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, 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.

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 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 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

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, 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 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 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 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 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

somewhat unique. And I'll hear what counsel has to say.

MR. O'MALLEY: I just feel more comfortable standing when I talk.

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 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.

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 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 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

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 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 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 --

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 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 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, management, and administrative services collectively

11:00:06

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

11:12:20 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

11:12:34 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

11:12:46 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

11:14:25 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?

11:14:39 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?

11:14:52 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

11:21:04 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
11:21:22 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.

11:21:41 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.

11:21:54 MR. SCHNEIDER: Nor are we saying that, Judge. Yeah.

THE COURT: Pardon?

MR. SCHNEIDER: Nor is the plaintiff saying that.

11:21:59 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
11:22:11 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

11:23:24 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.

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, 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 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?

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.

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, and like I said I don't need a lot of analysis other

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 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 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.

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

EXHIBIT D

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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 **ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION**

On October 19, 2018, Plaintiff U.S. Anesthesia Partners ("USAP" or "Plaintiff") filed its Motion for Preliminary Injunction. Defendants Devin Chern Tang ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") opposed the Motion on November 9, 2018. USAP submitted a Reply in support of its Motion on November 15, 2018. On November 16, 2018, Defendants submitted a supplemental Declaration in support of their Opposition.

The Court heard the Motion on November 19, 2018. After argument, the Court ordered supplemental briefing on the enforceability of covenants not to compete lacking a geographic limitation. The parties timely submitted their supplemental briefs on December 7, 2018.

Having considered the record, the briefing, and the arguments of counsel, and good cause appearing, the Court finds as follows:

...

...

...

FINDINGS OF FACT

1. In August of 2016, Dr. Tang accepted a position with Premier Anesthesiology Consultants ("PAC"), which was a subsidiary of an entity called Anesthesiology Consultants, Inc. ("ACI").

2. In or around December of 2016, PAC/ACI was acquired by USAP.

3. In connection with this acquisition, Dr. Tang executed a Physician-Track Employment Agreement ("Employment Agreement") as a condition of his continued employment with USAP. (*Id.*)

4. The Employment 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.

5. The Employment Agreement defines "Facilities" as follows:

> 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"

6. In or around March of 2018, Dr. Tang provided 90 days' notice of his intent to terminate his employment with USAP in the manner provided by the Employment Agreement.

7. In or around June of 2018, Dr. Tang's notice period expired, and his employment with USAP was terminated.

8. Dr. Tang continued to work as an anesthesiologist after his departure from USAP by accepting overflow anesthesiology cases from University Medical Center and an anesthesiology practice called Red Rock Anesthesia Solutions ("Red Rock").

9. USAP became aware that Dr. Tang had performed anesthesia services at Southern Hills Hospital and St. Rose Dominican Hospital – San Martin Campus. USAP has contractual relationships with these facilities, and USAP therefore believed that Dr. Tang's conduct violated Employment Agreement. This lawsuit followed.

CONCLUSIONS OF LAW

1. The "Facilities" referenced in the Non-Competition Clause of the Employment Agreement between USAP and Dr. Tang is so vague as to render the non-competition agreement unreasonable in its scope. As defined by the Non-Competition Clause of the Employment Agreement, the Facilities from which Dr. Tang would be prohibited from providing anesthesia services and/or soliciting business include:

a. All Facilities with which USAP has a contract to supply healthcare providers;

b. Facilities at which those providers provided anesthesiology and pain management services; and

c. Facilities with which USAP had active negotiations;

all during the unspecified term of Dr. Tang's employment and the twelve months preceding his term of employment.

2. The Non-Competition Clause of the Employment Agreement fails to designate facilities or a geographic boundary where Dr. Tang is prohibited from working and/or soliciting business with any specificity.

3. The Non-Competition Clause of the Employment Agreement fails to consider whether USAP's active contracts with facilities survive or whether USAP's active negotiations yield active contracts by the end of Tang's term of employment. At the time of signing the Employment Agreement, this potentially prohibited Tang from working with and/or soliciting any of USAP's current or future customers.

4. The scope of the Non-Competition Clause is subject to change over the course of Dr. Tang's employment, and even after his departure, based upon relationships with facilities USAP establishes after execution of the Employment Agreement. Dr. Tang therefore could not reasonably ascertain or anticipate the geographic scope of the non-competition agreement at the time of its execution.

5. The Non-Competition Clause of the Employment Agreement between USAP and Dr. Tang lacks any geographic limitation or qualifying language distinguishing the particular Facilities or customers to which it applies.

6. The Court does not have authority to "blue pencil" the Non-Competition Clause of the Employment Agreement because the amendment to NRS Chapter 613, more particularly NRS 613.195(5), does not apply retroactively to agreements entered into prior to the enactment of the amendment, which agreements are governed by *Golden Rd. Motor Inn, Inc. v. Islam,* 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016).

7. The Non-Competition Clause of the Employment Agreement is therefore unreasonable in its scope.

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ORDER

Based upon the foregoing findings of fact and conclusions of law, and good cause appearing, the Court ORDERS, ADJUDGES, AND DECREES that USAP's Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

DATED this _____ day of _____, 2019.

_____
HONORABLE TIMOTHY C. WILLIAMS

Respectfully submitted by:

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4837-9976-4613, v. 4

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EXHIBIT E

MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY

Seventy-ninth Session
May 24, 2017

The Senate Committee on Commerce, Labor and Energy was called to order by Chair Kelvin Atkinson at 8:35 a.m. on Wednesday, May 24, 2017, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Kelvin Atkinson, Chair
Senator Pat Spearman, Vice Chair
Senator Nicole J. Cannizzaro
Senator Yvanna D. Cancela
Senator Joseph P. Hardy
Senator James A. Settelmeyer
Senator Heidi S. Gansert

GUEST LEGISLATORS PRESENT:

Senator Aaron D. Ford, Senatorial District No. 11
Assemblyman Chris Brooks, Assembly District No. 10
Assemblywoman Ellen B. Spiegel, Assembly District No. 20
Assemblyman Justin Watkins, Assembly District No. 35

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Policy Analyst
Bryan Fernley, Counsel
Daniel Putney, Committee Secretary

OTHERS PRESENT:

Alanna Bondy, American Civil Liberties Union of Nevada
Wendy Stolyarov, Libertarian Party of Nevada
Janine Hansen, President, Nevada Families for Freedom

John Eppolito, President, Protect Nevada Children
Donald Gallimore, Sr., Protect Nevada Children; NAACP Reno-Sparks Branch 1112
Brian McAnallen, City of Las Vegas
Javier Trujillo, City of Henderson
Lea Tauchen, Retail Association of Nevada
Shannon Rahming, Chief Information Officer, Division of Enterprise Information Technology Services, Department of Administration
Misty Grimmer, Nevada Resort Association
Michael G. Alonso, Caesars Entertainment; International Game Technology
Jesse Wadhams, Las Vegas Metro Chamber of Commerce; Nevada Hospital Association; Nevada Independent Insurance Agents; MEDNAX, Inc.
Samuel P. McMullen, Association of Gaming Equipment Manufacturers
Jessica Ferrato, Solar Energy Industries Association
Travis Miller, Great Basin Solar Coalition
Casey Coffman, Sunworks
Natalie Hernandez
Allen Eli Smith, Black Rock Solar
Jerry Snyder, Black Rock Solar
David Von Seggern, Sierra Club, Toiyabe Chapter
Ender Austin III, Las Vegas Urban League Young Professionals
Larry Cohen, Sunrun
Naomi Lewis, Nevada Conservation League
Katherine Lorenzo, Chispa Nevada
Joshua J. Hicks, Sunstreet Energy Group
Daniel Witt, Tesla, Inc.
Kyle Davis, Nevada Conservation League
Tom Polikalas
Mark Dickson, Simple Power
Louise Helton, Founder, 1 Sun Solar
Jorge Gonzalez, Nevada Solar Owners Association
Joe Booker
Verna Mandez
Scott Shaw, 1 Sun Solar
Donald Gallimore, Sr., NAACP Reno-Sparks Branch 1112
Kevin Romney, Radiant Solar Solutions
Judy Stokey, NV Energy
Ernie Adler, International Brotherhood of Electrical Workers Local 1245

Danny Thompson, International Brotherhood of Electrical Workers Local Nos. 396 and 1245
Jeremy Newman, International Brotherhood of Electrical Workers Local 396
Rusty McAllister, Nevada State AFL-CIO

CHAIR ATKINSON:
I will open the hearing on Senate Bill (S.B.) 538.

SENATE BILL 538: Adopts provisions to protect Internet privacy. (BDR 52-1216)

SENATOR AARON D. FORD (Senatorial District No. 11):
Recently, Congress voted to repeal Internet privacy rules that were passed in 2016 by the Federal Communications Commission (FCC). These rules would have given Internet users greater control over what service providers can do with their data. President Trump signed Senate Joint Resolution 34 in April, and he did so through the Congressional Review Act. This Act allows Congress and the President to overturn recently passed agency regulations. Unfortunately, passage of Senate Joint Resolution 34 prohibits the FCC from implementing similar rules in the future. Under the repealed FCC rules, broadband companies providing Internet service would have been required to obtain permission from their customers to use their sensitive data, including browsing history, geolocation, financial information and medical information, to create targeted advertisements. These rules could have served as a bulwark against excessive data mining, which is the collection of personal information on the Internet as more devices become connected, such as refrigerators and washers.

Consumers in Nevada have little to no competitive choice for broadband access, which makes them vulnerable to data collection by Internet service providers. Broadband providers know their customers' identities. The providers' position gives them the unique technical capacity to surveil users in a way others cannot. Under the repealed FCC rules, customers would have had the ability to decide whether, and how much of, the information could be gathered and used by Internet service providers.

The lack of privacy rules are harmful to cybersecurity. Oftentimes, the injected advertising and tracking software used by marketers have security holes that can be exploited by hackers. Huge databases of consumer data are enticing targets for hackers. We have recently seen the effects of the WannaCry hack

worldwide. Senate Bill 538 is important because it provides guidelines for Internet Website or online service operators with respect to using consumers' information.

Section 3 defines consumer as "a person who seeks or acquires, by purchase or lease, any good, service, money or credit for personal, family or household purposes from the Internet website or online service of an operator."

Section 5 defines operator as a person who meets the following criteria:

> (a) Owns or operates an Internet website or online service for commercial purposes; (b) Collects and maintains covered information from consumers who reside in this State and use or visit the Internet website or online service; and (c) Purposefully directs it activities toward this State, consummates some transaction with this State or a resident thereof or purposefully avails itself of the privilege of conducting activities in this State.

A third party that operates, hosts or manages an Internet Website or online service on behalf of the owner is not included in the definition of operator.

Section 4 defines covered information as "personally identifiable information about a consumer collected by an operator through an Internet website or online service and maintained by the operator in an accessible form." Such information includes but is not limited to a first and last name, a home or physical address, an email address, a telephone number, and a social security number.

Section 6 requires an operator to make available a notice containing certain information relating to the privacy of covered information, which is collected by the operator through an Internet Website or online service, to a consumer. The notice must identify the categories of covered information the operator collects and the third parties with whom the operator may share the covered information. The notice must also include a description of the collection process, a description of the notification process, a disclosure as to whether a third party may collect covered information and the effective date of the notice. An operator may remedy any failure to make such notice available within 30 days after being informed of the failure. Section 7 prohibits an operator from knowingly and willfully failing to remedy such a failure within 30 days. In the event of improper actions, per section 8, the Attorney General is authorized to

seek an injunction or a civil penalty against an operator who engages in this conduct.

Proposed Amendment 4699 (Exhibit C) changes the effective date to October 1 and exempts certain small businesses that do not typically use the Internet for all of their services. This exemption was requested by Facebook.

The City of Las Vegas has proposed an amendment I have not yet determined whether to consider, but I would like a representative from the City of Las Vegas to present the amendment so that we could discuss it.

CHAIR ATKINSON:
Has a representative from the City of Las Vegas talked to you?

SENATOR FORD:
Yes.

SENATOR GANSERT:
Section 4 discusses the different things included under covered information. The sixth item listed is an identifier allowing a specific person to be contacted either physically or online. If an individual looks for an item on, say, Amazon, Amazon can contact the individual about that type of item. The individual is essentially targeted for whatever type of item the good is. This sort of marketing already happens, and it seems like a company would need an identifier to locate the individual again. Does the sixth item preclude such an activity?

SENATOR FORD:
This bill applies to more than just Internet service providers; it applies to edge providers such as Amazon and Facebook. All of the language in this bill was worked out with the industry. I accepted this language in an effort to address any possible concerns. The sixth item listed under covered information would not disallow an edge provider to continue contacting a customer with whom the edge provider already has a relationship.

SENATOR GANSERT:
This bill may not preclude edge providers from this activity, but would it preclude Internet service providers? Are the two types of providers treated differently?

SENATOR FORD:
Edge providers and Internet service providers are treated the same under this bill.

CHAIR ATKINSON:
Is S.B. 538 modeled after legislation from other states?

SENATOR FORD:
Two other states have enacted laws similar to S.B. 538: California and Delaware. Other states, I believe 19, are considering this sort of legislation because of the federal government's actions. Oregon, Illinois and Minnesota are three examples. Many states are looking at Internet privacy legislation because they see it as an opportunity to protect their consumers, even when the federal government has opted not to.

CHAIR ATKINSON:
I asked that question because I wanted to determine if there was a movement happening with this sort of legislation.

SENATOR SPEARMAN:
This bill is timely. There has been news of a certain metastore in Nevada that S.B. 538 directly speaks to.

If we wait until October, would there be remedies for people trying to circumvent the penalties of this bill?

SENATOR FORD:
To be frank, I do not know. I suspect our Attorney General could utilize a deceptive trade practice statute under *Nevada Revised Statutes* (NRS) 598 to intervene. However, the Attorney General is limited based on current statutes. Senate Bill 538 would provide more Internet privacy protections after October 1. The October 1 recommendation came from the Retail Association of Nevada because it is interested in the regulations of this bill, but it needs a little time to implement them.

SENATOR SETTELMEYER:
I am not concerned with who collects the information so much as what information is collected and what is done with such information. I might reach out to other states that have enacted similar laws to determine if these laws

have been able to be enforced. The Internet is so large that it goes beyond state lines and even national lines. How do we enforce a law like this?

I have a lot of constituents worried about the government. In light of this observation, how do you feel about the proposed amendment seeking to exempt the government from this bill?

SENATOR FORD:
I am reserving judgment on that particular amendment because I have not heard any discussion yet. You can specifically ask the sponsor of the amendment your question, and based on what the sponsor says, I can determine whether or not to accept the amendment. Illinois, for example, has a litany of exemptions, many of which I do not agree with. Some of these exemptions are for municipalities. In reference to the City of Las Vegas, it has services for its constituents that require the Internet. The City of Las Vegas is concerned that with the protections this bill provides, it would be unable to provide certain services for its constituents. However, I do not want to speak on behalf of the City of Las Vegas.

I do not disagree with you about what is done with the information collected. The repealed FCC rules went further than what my bill attempts to do. I am only requiring notice and information as to how a consumer may opt out. Other laws go further. The first iteration of this bill actually required permission before information was collected. If consumers said no, services could not have been denied to them for saying so. That requirement was onerous, so we have agreed to the language in front of you. We are hoping to take incremental steps toward providing notice to individuals so that they know what type of information has been collected.

ALANNA BONDY (American Civil Liberties Union of Nevada):
New technologies are making it easier for the government and corporations to learn the minutiae of our online activities. Corporations collect our information to sell to the highest bidder, while an expanding surveillance apparatus and outdated privacy laws allow the government to monitor us like never before. With more and more of our lives moving online, these intrusions have devastating implications for our right to privacy, but more than just privacy is threatened when everything we say, everywhere we go and everyone we associate with are fair game. We have seen that surveillance, whether by the government or corporations, chills free speech and free association, undermines

a free media and threatens the free exercise of religion. Americans should not have to choose between using new technologies and protecting their civil liberties. The ACLU works to promote a future where technology can be implemented in ways that protect civil liberties, limit the collection of personal information and ensure individuals have control over their private data. We support S.B. 538 because it provides notice to consumers about what data is being collected and allows consumers to make more informed decisions about sharing their private information online.

WENDY STOLYAROV (Libertarian Party of Nevada):
I strongly echo the ACLU's sentiments. Individual privacy is absolutely vital. However, we would oppose any amendment exempting the government from the notification requirement.

JANINE HANSEN (President, Nevada Families for Freedom):
We strongly support S.B. 538. This bill is critical to our State. According to a recent *Consumer Reports* survey, 65 percent of Americans lack confidence that their personal information is private and safe from distribution without their knowledge. The Internet privacy issue has moved to the states. One of the things the *Consumer Reports* survey mentions is the many states that are considering similar legislation. These states include Alaska, Connecticut, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, Rhode Island, Vermont and Washington. It is absolutely critical that our privacy be protected, as it is one of our most important civil liberties. We are all at risk for identity theft and data collection, not only from private enterprises but also from the government.

SENATOR HARDY:
Ms. Stolyarov, you made a comment about an amendment exempting the government. Could you clarify your comment?

MS. STOLYAROV:
Senator Ford had mentioned there was a forthcoming amendment that would exempt the government from the notification requirement.

SENATOR HARDY:
I am asking what you think.

MS. STOLYAROV:
I am not familiar with the text of the amendment, but if it does exempt the government from the notification requirement, the Libertarian Party of Nevada would be opposed to it. Everyone has the right to know who is collecting his or her data, even if the government is the one doing so.

SENATOR HARDY:
As you understand it, the government is included in this bill without any amendment, correct?

MS. STOLYAROV:
I would hope so.

JOHN EPPOLITO (President, Protect Nevada Children):
I will read from my written testimony in support of S.B. 538 (Exhibit D).

CHAIR ATKINSON:
Are you in favor of this bill?

MR. EPPOLITO:
Yes.

CHAIR ATKINSON:
From your testimony, it does not sound that way.

MR. EPPOLITO:
We would like to see more from S.B. 538.

CHAIR ATKINSON:
You should have testified in neutral then.

MR. EPPOLITO:
This bill is a start; we would like to build upon it.

I will continue reading from Exhibit D. We proposed an amendment to Senator Ford, but we do not think he is going to use it. We also proposed the same amendment to Senator Moises Denis for S.B. 467, but we are not sure if he is going to use it either.

SENATE BILL 467 (1st Reprint): Revises provisions relating to technology in public schools. (BDR 34-1120)

This amendment would at least do something to notify parents of what is going on.

DONALD GALLIMORE, SR. (Protect Nevada Children):
We have been working for seven years to make sure people understand the effects of the breaches of Internet privacy. I will read the rest of Exhibit D. In the amendment mentioned by Mr. Eppolito, we specify opt-in options for parents.

BRIAN MCANALLEN (City of Las Vegas):
We have talked to Senator Ford, and I believe he understands what the City of Las Vegas is trying to do, which is protect the personal information constituents supply to the City of Las Vegas. Our proposed amendment (Exhibit E) would amend the definition of consumer in section 3. The amended definition would include anyone who accesses constituent services from the Internet Website or online service of an operator or exchanges information regarding such services by means of such a Website or online service.

We are trying to develop a new platform for our constituents. We would collect data voluntarily from constituents who select a variety of programs and put personal information online. As a public entity, we are subject to public records requests under NRS 239. Our new platform might not be covered under the current definitions and prohibitions on gathering public data in S.B. 538. We are trying to protect this new platform as technology changes and moves forward. We do not believe constituents who visit our government Websites want their personal identification information to be public. If we do not provide specific protections for our constituents, they will not use our constituent services platform.

Our amendment further defines operator in section 5, subsection 1 to include a government entity. This provides protection for personal identification information. The amendment also adds subsection 3 to section 6, stating, "Notwithstanding any other provision of law, an operator is not required to disclose covered information regarding a consumer pursuant to a public records request made under chapter 239 of NRS."

The amendment was drafted by our attorneys in an attempt to cover new technology. If there is a better way to write the amendment that Senator Ford would accept, we are fine with that.

SENATOR HARDY:
Do you read this bill as not including the government? Do you propose the government be included to protect people's information?

MR. MCANALLEN:
Yes.

JAVIER TRUJILLO (City of Henderson):
We have communicated with Senator Ford in regard to local governments. We support this bill and its intent—we want to protect the personal information of individuals. We also support Senator Ford's and the City of Las Vegas' proposed amendments. We do not feel we are excluded because we have over one million visitors to our Websites. Our goal is to protect our constituents and to make sure their information is protected without being subject to NRS 239.

LEA TAUCHEN (Retail Association of Nevada):
As Senator Ford mentioned, we requested the amendment to postpone the effective date to October 1. This would allow us time to educate and assist our members with compliance. We appreciate Senator Ford's consideration and willingness to make S.B. 538 workable for the retail businesses conducting commerce online in Nevada.

SHANNON RAHMING (Chief Information Officer, Division of Enterprise Information Technology Services, Department of Administration):
I will read from my written testimony in neutral to S.B. 538 (Exhibit F).

SENATOR GANSERT:
What is your opinion on the amendment adding government to this bill?

MS. RAHMING:
I have not seen the amendment.

SENATOR GANSERT:
There is a fiscal note from the Attorney General. Why did you not include one?

MS. RAHMING:
I did not include a fiscal note because I could not tell whether S.B. 538 would affect the State.

SENATOR GANSERT:
We may find out if there is an effect on the State after we figure out the amendment.

CHAIR ATKINSON:
I have received a letter of opposition to S.B. 538 (Exhibit G) from Christopher Oswald, Data and Marketing Association.

I will close the hearing on S.B. 538. The Committee will give Senator Ford time to work on the proposed amendments.

I will open the hearing on A.B. 276.

ASSEMBLY BILL 276 (2nd Reprint): Revises provisions relating to employment practices. (BDR 53-289)

ASSEMBLYWOMAN ELLEN B. SPIEGEL (Assembly District No. 20):
This bill is about two things: disclosure and job termination.

About 30 years ago, I worked at a Fortune 100 company in New York City. My job got to be quite big; I was responsible for markets all over the place. As a result, my job was cut in half, and another person was hired to do the other half. Our jobs had the same responsibilities; we were simply responsible for different areas. We were putting in long hours. My colleague, whose name was Paul, turned to me and said, "I can't believe how hard we're working and how many late nights we're putting in, and they're only paying us $34,000 a year." I looked at him and said, "How much are you making?" He replied, "$34,000 a year." My salary was in the twenties.

The next morning, I approached my boss and told her, "Paul and I were talking last night, and he told me he makes $34,000 a year. What's up with that?" She looked at me and said, "Well, Paul's a guy." I replied, "Yes, I know Paul's a guy, but what does that have to do with anything?" She said, "He needs more money. He wants to get engaged; he's saving up to buy a ring for his girlfriend. He's going to be supporting a family, and you're single, so you don't need as

much money as he does." At that point, I said, "I'm single, so that means I need more than he does because I'm supporting myself, and he's going to be part of a two-income household."

I told one of my friends, who happened to work in human resources, what had happened to me. She was incensed and said, "That can't be right." I then told her, "I'm telling you as my friend. Please don't do anything with this." The next thing I know, I am called into a corner office of a senior vice president of human resources. She told me, "There's the door." I then said, "Excuse me?" She replied, "There's the door; you're free to leave anytime. I will also tell you it is against company policy to be having these discussions about what you're earning and what your wages are. It's grounds for termination. It's pretty clear from what you told us—and yes, we spoke to Paul—that he initiated the conversation, so we're not going to fire you over this, but we are going to write you up and put it in your file so that if it happens again, you will be fired for having this conversation. By the way, we're not going to fire Paul because, well, he's a guy." I had heard there was wage discrimination, but it had never reached my consciousness that it was actually happening.

The wage gap still exists. In various hearings, you have probably heard that women earn about 78 cents on the dollar compared to men. For women of color, the disparity is even greater. As much as we like to tell ourselves the wage gap does not exist, it still does.

In December 2016, I read a story from Maddy Huffman:

> This summer, I started a job at a powder-coating warehouse working next to a 400-degree oven in 100-degree Texas weather. I was always the first one in and the last one to leave. I picked up the trade quick and produced good, quality work in a safe and timely manner. When the rest of the crew complained it was too hot to wear steel-toed boots and jeans, I never wavered. It was brought to my attention that even though I would media blast, prep and powder, and maintain job flow, I was getting paid a dollar under every male I worked beside. When I brought that to the attention of the manager, I was told that if I improved my attitude and smiled more, they would consider me for a raise in a month or so. I gave them my two weeks' notice at that point.

She went on to talk about what she did afterward, and she landed on her feet just fine. I wrote to her asking if I could share her story, and she wrote back:

> Hi, Ellen. Feel free to share my story. When I approached the manager with my pay concerns, I was told that talking wages was grounds for termination, too. It's funny though—I never brought up wages with the guys I worked with. I honestly didn't care or think twice about it. I was just happy to be working and learning something new, but when it reared its ugly head, I couldn't ignore it. Thank you for fighting for Nevada women and workers.

While I have been working on this bill this Session, I cannot tell you how many women who work in this building and are in this building have come to me and told me their stories. Most of them are afraid to come out and speak publicly because it is grounds for termination where they work. They are afraid of losing their jobs. Wage discrimination is something quiet.

Section 3 basically says somebody cannot be fired for having a discussion about his or her wages. If somebody cannot discuss his or her wages, then that person would not know if he or she were being discriminated against. The individual would not be able to make an informed decision about what to do, whether that be keeping the job, leaving it or trying to get an increase in pay.

Sections 1 and 2 address issues relating to termination and postemployment. These sections specify that an employer can ask an employee to sign a nondisclosure agreement provided it is supported by valuable consideration, is not too burdensome, does not make it impossible for the employee to obtain a new job and is appropriate for what the job is.

This bill has three other important clauses. The first one is what I call "the hairdresser clause." Many times in noncompete agreements, the employee agrees that he or she is not going to take clients away. This is perfectly reasonable from an employer's perspective because a business does not want an employee who leaves to take its entire book of business out the door. However, there is also the perspective of the clients. I am far more loyal to my hairdresser than I am to any hair salon. When my hairdresser has gone from one salon to another, regardless of what she has signed, I will seek her out. Many clients do this for all sorts of services. This clause states that if, say, a

client's hairdresser leaves and does not seek the client out but the client seeks the hairdresser out, then the hairdresser can provide services to that client.

The next clause provides layoff protection. If a company goes through something like a merger or a downturn and has to lay off employees, then those employees are only bound by their noncompete agreements while receiving severance pay. These individuals have to be able to get other jobs.

Another provision this bill contains is bluelining. If a court of law finds that provisions in the noncompete agreement are invalid, it can strike out the invalid components but leave in what is valid.

MISTY GRIMMER (Nevada Resort Association):
We support both portions of A.B. 276: the original part of the bill and the noncompete provisions Assemblywoman Spiegel was willing to add on our behalf. We are asking the Legislature to clarify in statute something that had been the practice of the courts for decades. However, a specific lawsuit came forth in which an entire noncompete agreement was thrown out because one portion of it was excessive. Section 1, subsection 5 would allow a court to keep the good parts of a noncompete agreement and toss out or renegotiate the excessive parts.

Assemblywoman Spiegel brought the other two scenarios she mentioned, which are absolutely legitimate, to our attention as well. An employer cannot lay somebody off and then say, "Oh, by the way, you can't go get a job either." Also, it is common practice that a business cannot tie the hands of its customers. A customer is allowed to go anywhere he or she wants. We support having all of these clarifications in Nevada law.

MICHAEL G. ALONSO (Caesars Entertainment; International Game Technology):
We support A.B. 276. This is a good bill. We like the provisions in it; they are reasonable.

JESSE WADHAMS (Las Vegas Metro Chamber of Commerce; Nevada Hospital Association; Nevada Independent Insurance Agents; MEDNAX, Inc.):
We support both components of A.B. 276. This is a good bill.

SAMUEL P. MCMULLEN (Association of Gaming Equipment Manufacturers):
Sections 1 and 2 are key to us. An innovative industry needs to be able to protect itself, and it needs reasonable tools. This bill provides reasonable tools. We would appreciate the Committee's support of A.B. 276.

CHAIR ATKINSON:
I will close the hearing on A.B. 276 and entertain a motion on this bill.

SENATOR SETTELMEYER MOVED TO DO PASS A.B. 276.

SENATOR GANSERT SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

CHAIR ATKINSON:
I will open the hearing on A.B. 405.

ASSEMBLY BILL 405 (1st Reprint): Establishes certain protections for and ensures the rights of a person who uses renewable energy in this State and revises provisions governing net metering. (BDR 52-959)

ASSEMBLYMAN CHRIS BROOKS (Assembly District No. 10):
As we have seen so far this Session, there are many important issues to discuss when it comes to customers' rights to generate and store energy in the State. Energy is constantly evolving, requiring renewed assessment and focus on energy policy in Nevada, which I am happy to say has been occurring these past few months. We have seen a lot of great legislation this Session that addresses customers' rights to renewable energy. Assembly Bill 405 goes hand in hand with these other bills, codifying some of the customers' rights into Nevada law. Assembly Bill 405 outlines what Nevada customers' fundamental rights around energy should be, setting a framework to protect Nevadans on what could be the biggest investments of their lives. This is especially necessary now as we move forward with new and potentially disruptive ways to access energy in Nevada.

This bill creates the contractual requirements for the lease, purchase or power purchase agreement of a distributed generation system. This bill establishes the

minimum warranty requirements for an agreement concerning a distributed generation system. Assembly Bill 405 also makes it a deceptive trade practice if a contractor fails to comply with these provisions.

Finally, A.B. 405 creates the Renewable Energy Bill of Rights, which applies to every Nevadan. As a pioneer in Nevada's solar energy industry, I know the experiences solar customers go through. It is one of the biggest purchases a person might make in his or her lifetime. The individual is signing a 20-year contract for complicated energy products. It is difficult to understand exactly what an individual is being asked to sign.

Nevada has a chance to be the Country's leader on solar energy. By creating a more streamlined process for customers, we make it that much more friendly to be a solar customer in the State.

I will read from a table explaining this bill's provisions (Exhibit H). This bill addresses three different models: the lease model, the purchase model and the power purchase agreement. Sections 9 through 11 address the lease model. Sections 12 through 14 mirror sections 9 through 11 but for the purchase model. Sections 15 through 17 mirror the previous sections but for a power purchase agreement.

In my career, I have seen people who sell distributed generation systems make wildly unrealistic claims about rates and savings. Section 18 prevents such claims from occurring by requiring a disclaimer on any contract or proposal in front of a customer. NV Energy suggested the inclusion of this section. This section is one of the more important components of A.B. 405.

Section 19 is also a critical component of this bill.

A lot of individuals read and speak Spanish but have to read complicated forms in English. Section 20 requires documents to be provided in Spanish if requested. NV Energy suggested the inclusion of this section as well.

Section 27 through the end of this bill deal with how we treat returned energy from a distributed generation system. This bill is essentially sections 1 through 26, which are the original parts of A.B. 405, and the provisions of A.B. 270, which take up the rest of this bill.

ASSEMBLY BILL 270: Revises provisions governing net metering. (BDR 58-686)

Assemblyman Justin Watkins was working on A.B. 270, but we decided to combine A.B. 405 and A.B. 270 into one bill. The provisions of A.B. 270 have been amended into A.B. 405.

The State's cumulative capacity for solar generation is currently 2.6 percent. It took Nevada 20 years to get to 2.6 percent. This bill offers a tiered reduction in the value of exported energy, referred to as a net metering adjustment charge, that is between 5 percent and 20 percent. The charge is dependent on the market penetration of solar energy in the State. As the market penetration increases, the charge increases.

In other words, we are basing the charge on peak demand. NV Energy has a peak demand of about 8,000 megawatts across the State. Capacity for solar generation is 2.6 percent of that peak, but this is only one part of the story; the rest of the story is about energy. NV Energy sold approximately 30 million megawatt-hours last year across the State. When we look at the capacity factor of distributed generation systems, it is around 22 percent if we aggregate all of the systems in the State. Considering we are only at 2.6 percent capacity, the capacity factor is 22 percent and only about 40 percent of the energy produced by a distributed generation system ever sees the grid, we are really talking about half of a percent of the grid's energy coming from distributed generation systems. When we talk about moving to a market penetration of 10 percent, that means roughly 2 percent of the energy in our grid would come from distributed generation systems.

It is important to keep these numbers in perspective. We are only moving from half of a percent to 2 percent, all the while creating jobs and giving Nevadans a choice of how they generate their electricity.

SENATOR SETTELMEYER:
I appreciate many aspects of this bill, but I have some concerns, mainly with the step-down process. What is the current exchange rate for solar?

ASSEMBLYMAN BROOKS:
There are two customer classes. One is for net metering. I am not sure where we are currently in the step-down process.

SENATOR SETTELMEYER:
You mentioned a market penetration of 5 percent. The concept of promoting renewable energy is important. I am willing to pay more for energy to do so, and many others are, too. However, how much would rates increase? Has there been an analysis of what this bill's provisions would do to a standard ratepayer?

ASSEMBLYMAN BROOKS:
Assembly Bill 405 would add a few pennies to the bills of average ratepayers, according to the calculations from NV Energy.

SENATOR SETTELMEYER:
How many pennies are you talking about?

ASSEMBLYMAN BROOKS:
I do not necessarily agree with the methodology used to calculate the costs. NV Energy considers lost revenue in what it would have sold to customers if it did not produce its own energy. This component is roughly half the calculation. I do not feel the calculation methodology is proper.

SENATOR SETTELMEYER:
I understand why you disagree with the calculations, but I would like you to find out what the costs would be. I am concerned about what this bill would do to the average ratepayer. Many businesses in my district use a lot of power, including myself.

The rate in this bill is based on 5 percent, but is that 5 percent of the total power sold in the State?

ASSEMBLYMAN BROOKS:
Are you talking about 5 percent on the rate side or the market penetration side?

SENATOR SETTELMEYER:
The market penetration side, if I am correct, takes into consideration the total power sold in the State. Are the percentages for market penetration based on the total power sold in the State or the power sold by Nevada energy companies?

ASSEMBLYMAN BROOKS:
Assembly Bill 405 is an expansion of current net metering law, which applies to NV Energy. We are basing the numbers on NV Energy's 2016 peak demand across the State.

SENATOR SETTELMEYER:
It seems to me that the total megawatts sold refers to the total amount sold in the State, which brings in the various co-ops.

ASSEMBLYMAN BROOKS:
This bill refers to NV Energy.

SENATOR SETTELMEYER:
I will try to find the answer in the bill text.

ASSEMBLYMAN BROOKS:
There are two components. One is the all-time peak, which is a moment in time. This component is separate from the amount of energy sold in the State. The all-time peak for 2016 was 8,000 megawatts, and the amount of energy sold in 2016 was 30 million megawatt-hours.

SENATOR SETTELMEYER:
Is the energy sold only by NV Energy?

ASSEMBLYMAN BROOKS:
It is sold by NV Energy or the companies referred to in this bill.

SENATOR SETTELMEYER:
I did not read A.B. 405 that way.

CHAIR ATKINSON:
Which section of this bill relates to consumer protection?

ASSEMBLYMAN BROOKS:
Consumer protection is addressed in sections 2 through 20.

CHAIR ATKINSON:
Do these sections apply to all scenarios? There was some debate about this before. Some individuals felt they were covered, but some were not covered.

ASSEMBLYMAN BROOKS:
Yes. Within sections 2 through 20, the three different models—purchase, lease and power purchase agreement—are addressed. There are more similarities among these models than differences, but the definition of each model is unique. All three models require making the customer aware of the recovery fund. Also, there cannot be false claims about savings.

CHAIR ATKINSON:
Are you saying the consumer protection provisions apply to all scenarios?

ASSEMBLYMAN BROOKS:
Yes.

CHAIR ATKINSON:
What is the typical warranty for a rooftop solar system?

ASSEMBLYMAN BROOKS:
In the industry, the warranty is all over the place. This bill states that the warranty must be a minimum of seven years.

CHAIR ATKINSON:
How can you or A.B. 405 define what the warranty is? The warranty comes from the manufacturer.

ASSEMBLYMAN BROOKS:
I misspoke earlier. The warranty is a minimum of ten years. Assembly Bill 405 states that the company must provide, at minimum, a ten-year warranty.

CHAIR ATKINSON:
It is ten years, not seven, correct?

ASSEMBLYMAN BROOKS:
Correct. In the industry, there are warranties between 10 years and 20 years.

CHAIR ATKINSON:
This bill refers to the minimum warranty a company must offer, but can the company offer a longer warranty?

ASSEMBLYMAN BROOKS:
Yes. There are companies that offer warranties longer than ten years.

CHAIR ATKINSON:
In regard to lease customers, does this bill protect them for the life of the system for the entire term of the lease? I assume the system would be covered for the entire term of the lease.

ASSEMBLYMAN BROOKS:
Regarding the purchase model, the process is fairly straightforward. The system must be covered by a warranty from the company for a certain number of years. In a lease, the process is a little different. Customers do not own the equipment. It is in the equipment owner's best interests to make sure the system is operating. We did, however, include roof penetration in the minimum ten-year warranty requirement. The system would be covered under the minimum ten years. The owner would be on the hook for the system to work after that period. If the system breaks down, the owner is not receiving any money, and the lease customer is not receiving any savings.

CHAIR ATKINSON:
Which agency is going to police this bill's provisions? How will customers know where to go to have their issues rectified?

ASSEMBLYMAN BROOKS:
Section 20 makes any violation of sections 2 through 20 a deceptive trade practice and consumer fraud. If a customer feels a company has violated any of these sections, he or she has the right to sue to recover any damages. Under the deceptive trade practice statutes, the Attorney General can prosecute these violations. Additionally, customers can go through the State Contractors' Board for contractor violations, and there is a recovery fund associated with that. When fraud took place a few years ago, many solar customers accessed the recovery fund to recover some of their money.

CHAIR ATKINSON:
Are you saying there is no simple answer in regard to who is going to police this bill because of the different variables? I am asking this because we might get to a point where the provisions of A.B. 405 become tasking.

ASSEMBLYMAN BROOKS:
There is no enforcement agency specific to this type of contract. These solar contracts would be similar to many other contracts in that if a company committed fraud, the consumer would have recourse, which, in this case, would be to approach the Attorney General or sue. The most important part of this bill is that any violation of sections 2 through 20 would be considered consumer fraud. This provides a consumer with all of the protections under the deceptive trade practice statutes.

CHAIR ATKINSON:
In the past, people who were aggrieved were not sure where to go to have their issues rectified. Your description of what a consumer would do is not clear to me. We need to provide clarity with respect to that. People need somewhere to go. We can talk about this and work on it, but we need to figure something out.

SENATOR SETTELMEYER:
Section 28 refers to the cumulative installed capacity of all net metering systems in the State. I am concerned with that. With the turnout on the Energy Choice Initiative last election, it is clear things will change in the future. I am concerned about forcing one group to pay for the entire State. We should consider rewording this section to ensure A.B. 405 only applies to the regulated industry. We have some unregulated energy providers in Nevada.

ASSEMBLYMAN BROOKS:
This bill is already targeted toward the regulated energy industry, but I am willing to clarify that language. This bill refers to NV Energy. I am also open to adding language that would predict where our State might be in the future.

SENATOR SETTELMEYER:
I do not want A.B. 405 to apply to the entire State. I do not want people to pay for something they are not a part of. This bill refers to the entire State, not just NV Energy.

SENATOR GANSERT:
Because the majority of Nevadans voted yes on the Energy Choice Initiative last election, there is a sense that our State's citizens want an open, competitive energy market. Currently, we only have one major provider: NV Energy.

Section 10, subsection 19, which is probably repeated for the purchase and power purchase agreement models, gives options when it comes to the sale of the property or the death of the lessee. If we have open, competitive markets and different providers of energy in the State, I am not sure how this bill would work. Right now, it sounds like individuals get 20-year contracts. If we have a major energy provider that decides to no longer be an energy provider, what would happen to the individuals in 20-year contracts with that provider?

ASSEMBLYMAN BROOKS:
The question of what are we going to do has come up over and over again on almost everything we have done regarding energy this Session. First of all, the Energy Choice Initiative has to pass again, and then the Legislature has to come up with what it wants to do to meet the intent of the Initiative. Assembly Bill 405 addresses some of what the Legislature has to do by giving people a choice in how they procure their electricity.

From where we are now to the complete deregulation of the energy market, we are going to be somewhere in that spectrum. There could be a provider of last resort that is responsible for the customers in the State who have made solar agreements. If a company came to the State wanting to do business, that company could look at customers with net metered systems and the rules in place and then decide these customers were good to have in its portfolio. The company could court these customers through rates or tariffs.

In future sessions, Legislators will have to address where Nevada wants to go as a State around the subject of energy choice. Depending on how far we go down the path of energy choice, A.B. 405 might survive, or we might rewrite every energy statute in NRS.

SENATOR GANSERT:
If somebody has a 20-year agreement with a power company, can that power company transfer the agreement to another entity?

ASSEMBLYMAN BROOKS:
Yes. There are currently 40 or 60 power purchase agreements in the State between NV Energy and other entities. Those agreements would have to be transferred and dealt with.

The lease transfer provision you mentioned is between a business and a Nevadan; the provision does not involve the utility.

SENATOR GANSERT:
I am concerned about the warranty. The minimum warranty requirement is 10 years, but some contracts last 20 years.

You also mentioned a recovery fund. Are we planning for recourse if contractors go out of business? Are there contributions to the recovery fund to guarantee money is available in the long term?

ASSEMBLYMAN BROOKS:
There is a mechanism whereby all contractors pay into the recovery fund. There are provisions for recovering money if there was fraud or the contractor went out of business in the middle of a customer's project. All installing contractors pay into the recovery fund.

CHAIR ATKINSON:
Everybody on this Committee believes the Energy Choice Initiative will pass again; 72 percent of Nevada voters voted yes last election. Nevadans have spoken, and they will speak again in a couple of years. I do not agree that every energy bill this Session would conflict with the Initiative. Some energy bills would stand alone. Assembly Bill 405 is not as specific, and it puts years on a customer. Some of the other energy bills do not put as many years on a customer.

There are individuals who have some concerns with this bill. We may have to do something, and we may need some language that addresses whether the Initiative becomes a reality in the State. We cannot ignore this; we have to talk about it as we go forward. It is not fair to our constituents to ignore it.

SENATOR SPEARMAN:
In one or two sentences, tell me what the purpose of this bill is.

ASSEMBLYMAN BROOKS:
This bill is meant to bring solar back to the State and to protect consumers while we do it.

SENATOR SPEARMAN:
The question of consumer protection is a recurring theme throughout all of the energy bills this Session. If we are talking about consumer protection and renewable energy, how do these two things intersect? People do not understand how much energy Nevada imports and what the exposure would be if our base load increased.

ASSEMBLYMAN BROOKS:
That is one important component of consumer protection that incorporating renewable energy is trying to address. Over 80 percent of Nevada's energy is imported in the form of fossil fuels. By giving a consumer the ability to generate and store his or her electricity, the consumer is protected from potential price increases in the future. That is one of the key components of the choice to generate one's energy.

SENATOR SPEARMAN:
What do you mean by 80 percent? Do you have a dollar figure regarding how much our State pays someplace else to get our energy?

ASSEMBLYMAN BROOKS:
NV Energy sold 30 million megawatt-hours last year. Of that 30 million, over 80 percent was generated from imported energy, namely natural gas. I do not have an exact dollar amount.

SENATOR SPEARMAN:
Although you do not have an exact figure, it is clearly 80 percent, correct?

ASSEMBLYMAN BROOKS:
Yes.

SENATOR SPEARMAN:
The closest business model I could find was Xcel Energy, which operates in eight states. One of those states is Texas, which is completely deregulated and has choice for all of its consumers. It would be my expectation, in terms of what the Chair has said, to determine a way in which this bill would work. We could learn from Texas. My major concern is the fact that the price of natural gas is expected to increase. We need to work on something to protect consumers. If 80 percent of the energy we receive is ready to increase in price, we need to determine how to use A.B. 405 and other energy legislation for the

benefit of consumers. This bill is mainly for solar, but anyone who has heard me talk over the last two or three years knows I am trying to get our State to a place where we have a good energy mix, including solar, wind, biofuels, geothermal, etc. How can this bill help move Nevada forward and protect our State's consumers should there be a spike in the price of natural gas?

ASSEMBLYMAN BROOKS:
Choice will provide protection to consumers. There is a tremendous amount of reliability associated with the ability to create and store one's energy. This also insulates consumers from rate increases such as price shocks from out-of-state commodities. If somebody is generating a good portion of his or her energy, the other portion of it, which has to be bought and is subject to price escalation, is minimized. The risks are mitigated.

SENATOR SPEARMAN:
Is the storage piece of A.B. 405 complementary to a bill the Chair is sponsoring, S.B. 204?

SENATE BILL 204 (1st Reprint): Requires the Public Utilities Commission of Nevada to investigate and establish biennial targets for certain electric utilities to procure energy storage systems under certain circumstances. (BDR 58-642)

ASSEMBLYMAN BROOKS:
Yes.

CHAIR ATKINSON:
Section 24, subsection 6 mentions priority. What do you mean by priority given to rooftop solar customers during the planning process?

ASSEMBLYMAN BROOKS:
The priority aspect is trying to address how we bring on new resources. Instead of potentially investing in a power plant where money is funneled elsewhere, we are looking at investing in and giving priority to Nevadans. If somebody is a Nevadan and that person has invested his or her money in a system, there is value to that. There is value to the system being a Nevada asset installed using Nevada labor. We would like to see that given priority in the planning process. "Given priority" is an intentionally vague statement meant to encourage planners when adding new resources.

CHAIR ATKINSON:
Some people place renewable energy and solar in different categories, but I look at them as one thing. Why would you not want the utility to look at all types of renewable energy?

ASSEMBLYMAN BROOKS:
We do look at all types of renewable energy. It is going to take all types of renewable energy to achieve our State's energy goals. Geothermal, wind, solar, distributed generation and storage are needed to achieve what most Nevadans feel our energy goals are. This bill addresses customer-generators. When we look at resource planning or the value of these systems, we want to make sure Nevadans receive priority in the planning process.

CHAIR ATKINSON:
Are you referring to Nevadans as a whole or Nevadans as the customers of these systems? Why would you not want the customer to pay for the least cost project?

ASSEMBLYMAN BROOKS:
We do want that. We are talking about half of a percent of the grid's energy. We want to increase that to 2 percent. When we look at the other 98 percent of our State's energy, there is room for everything. We want a small piece of the energy mix to receive priority in the planning process.

CHAIR ATKINSON:
Is this bill more about priority then?

ASSEMBLYMAN BROOKS:
Yes.

SENATOR SETTELMEYER:
I believe this bill gives priority to renewable energy in general. Assemblyman Brooks has used the term "rooftop solar," but I do not think that is the intent. Are you saying renewable energy in general receives a priority?

ASSEMBLYMAN BROOKS:
I am saying that customer-generators receive priority. Each Nevadan who generates his or her electricity receives priority.

SENATOR SETTELMEYER:
I appreciate and agree with that concept. You keep on referring to rooftop solar, but I feel that is incorrect.

ASSEMBLYMAN BROOKS:
I will stop using that term.

CHAIR ATKINSON:
Many of us have been involved with energy issues for a while. We are trying to get things right.

Section 24, subsection 7 mentions a change in rate class. Can you explain why you are changing the rate class rooftop customers are currently in?

ASSEMBLYMAN BROOKS:
A residential user is a residential user. We want all residential users to be in the same rate class. When people are divided into different rate classes based on their behaviors, they can be assessed different costs and fees. There are no two ratepayers in the entire system that are the same. To break people up into multiple rate classes within a rate class opens up an individual to discriminatory fees. We want to keep residential ratepayers in the same rate class, regardless of how much energy the utility sells them, and address the value or credit of any returned energy.

CHAIR ATKINSON:
Section 24, subsection 4 mentions fair credit. Who defines fair credit? In my district, 31 percent are Hispanic and 28 percent are African American. There are also a lot of low-income families. How would fair credit affect my constituents?

ASSEMBLYMAN BROOKS:
Fair credit is meant to be a guiding principle for regulators who come up with tariffs and statutes governing how energy is returned. Fair credit is intentionally vague rather than a defined amount.

CHAIR ATKINSON:
Senator Spearman mentioned Texas has choice, and it seems like Texas is doing well. We have this bill in front of us, and we may move to choice. I do not know how many states had energy mandates and then moved to choice. I do

not think that was the case in Texas. We are trying to avoid moving backward in two years.

JESSICA FERRATO (Solar Energy Industries Association):
We have a survey regarding states that have moved to some form of deregulation and how they have handled it. All of these states except for one still have net metering. Texas companies still offer net metering to their customers. We can get you this information.

CHAIR ATKINSON:
Are you saying you can get the information for us, or do you have it?

MS. FERRATO:
We have it. We will get it to you.

CHAIR ATKINSON:
I have asked quite a few people for information, but I have not received anything.

SENATOR CANNIZZARO:
How much does it cost for the installation of a solar project on a house? What are the upfront costs? What costs would customers pay over time?

ASSEMBLYMAN BROOKS:
It depends on the business model. The average solar system for purchase is around $12,000. The lease and power purchase agreement models have little to no upfront costs, and customers pay a recurring cost based on the amount of energy their systems produce. Usually, customers pay a discounted rate of what the retail energy would cost. I do not know the percentage of customers using each business model, but the average installed cost is around $12,000, which is considerably less than when I installed a system on my house about 15 years ago.

SENATOR CANNIZZARO:
If the $12,000 is paid up front, does the customer pay additional costs over time, or is the $12,000 the total cost?

ASSEMBLYMAN BROOKS:
An upfront purchase would be $12,000. For example, in my house, I paid the upfront cost of installation, and I have not spent another penny since. That is not always the case, but that is my case.

SENATOR CANNIZZARO:
I echo some of the concerns raised by my colleagues. I am curious to see how A.B. 405 would affect ratepayers who do not have these types of systems. It is important for us to see the cost differential.

ASSEMBLYMAN BROOKS:
The renewable energy components of an average ratepayer's bill are a little over 2 percent. These components cover everything our State has done in the past 10 to 15 years in regard to renewable energy.

CHAIR ATKINSON:
We realize these components exist, but we want to know what the cost of an addition would be. You may not agree with the calculations done by NV Energy, but we still need to see a number.

ASSEMBLYMAN BROOKS:
The components of all renewable energy in our State equal 2 percent of an average ratepayer's bill. We are at half of a percent in terms of renewable energy from distributed generation. We are able to draw conclusions from these numbers. The added cost to a ratepayer's bill would be negligible.

CHAIR ATKINSON:
Section 24, subsection 3, paragraph (c) states that anyone can install a rooftop solar system, but it also states that the person does not need to obtain permission from the utility. I find this dangerous. Who assumes liability for this? Why would somebody not obtain permission from the utility?

ASSEMBLYMAN BROOKS:
This subsection refers only to systems that do not return energy to the utility.

CHAIR ATKINSON:
That is not clear.

ASSEMBLYMAN BROOKS:
Subsection 3 uses the language, "on the customer's side."

CHAIR ATKINSON:
That is why this provision is dangerous.

SENATOR SETTELMEYER:
I believe Assemblyman Brooks is referring to people who are off the grid. If people do not rely on the grid, the utility should not have a say. However, the way this subsection reads, if a meter is tied to the grid but does not feed energy into the system, the utility does not have any input.

ASSEMBLYMAN BROOKS:
If a person's system does not have the ability to export energy to the utility, then that person should not need to obtain permission from the utility to install the system. That is the intent. If the language is not clear, we should clarify it.

SENATOR SETTELMEYER:
Are you indicating that if somebody is not exporting energy but is still tied to the grid, the power company should have no say?

ASSEMBLYMAN BROOKS:
Yes. If somebody generates energy on his or her system and it has no ability to get back to the utility, then why would permission be required from the utility?

SENATOR SETTELMEYER:
I hooked up a barbed-wire fence to an NV Energy fence. I did not think anything of it. I found out that if there were a short circuit in NV Energy's system, it could travel two miles down the barbed-wire fence and kill someone. This has happened before. It is a safety issue. If a person's system is tied to the grid, the utility should have some input into that system.

ASSEMBLYMAN BROOKS:
Section 24, subsection 3, paragraph (c), subparagraph (2) states that the system must meet "reasonable safety requirements." There are building codes and equipment listing agencies people have to comply with. The industry and technology are changing rapidly. For example, I have a 27-kilowatt battery I use to drive. I did not ask the utility to integrate this battery into my electric system, nor should I have had to. It is not my intention for the utility to not have input

on generators that can feed into the system; that would be ridiculous and unsafe. This subsection is meant specifically for technologies that do not interact with the utility.

CHAIR ATKINSON:
The language is unclear.

Does section 28 address the subsidy people are talking about?

ASSEMBLYMAN BROOKS:
Section 28 lays out how returned energy would be treated. The Public Utilities Commission of Nevada (PUCN), the Bureau of Consumer Protection, NV Energy and the industry all weighed in and were unable to determine what, if anything, the subsidy was. There are many opinions about the subsidy. Instead of constantly litigating the subsidy, I am trying to put into statute that the State wants to encourage distributed generation and renewable energy. There are a multitude of factors that need to be taken into consideration that have not been thoroughly addressed. Assembly Bill 405 is a public policy decision to encourage a technology and a type of implementation of that technology.

CHAIR ATKINSON:
Do you believe section 28 addresses the subsidy?

ASSEMBLYMAN BROOKS:
Yes. As technologies become more affordable over time, the issue of a subsidy should be addressed.

CHAIR ATKINSON:
None of the information about the subsidy was consistent. However, I believe there was a subsidy. I agree that the number may not have been consistent, but the subsidy was still there.

MS. FERRATO:
We support A.B. 405. The Solar Energy Industries Association (SEIA) is the national trade association for the solar industry. Through advocacy and education, SEIA and its member companies work to make solar energy a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public regarding the benefits of solar. Assembly Bill 405 encourages the deployment of

residential rooftop solar in Nevada. Our goal is to make it feasible for residents to put solar on their homes in a timely fashion and in a sustainable manner that is fair to all customers and puts people back to work. In addition, we would like to ensure consumers are protected and that solar companies are held to a higher standard as the solar industry returns to the State.

Legislation is necessary because the solar industry in Nevada is at a standstill, and customers are not getting what they want. The 2015 net metering decision increased charges on solar customers, making rooftop solar unaffordable for Nevadans and all but crushing the rooftop solar industry here. Statewide solar applications fell by 99 percent, from 21,923 in 2015 to 287 in 2016. Nevada's solar industry was effectively shut down, and over 2,600 Nevadans lost their jobs. Assembly Bill 405 would restore rooftop solar policies and make solar affordable to Nevadans, which would bring solar jobs back to the State. At SEIA, we are seeing this effect firsthand. We have a number of member companies that have laid off and transferred hundreds of employees throughout the State. Many long-term local solar businesses have closed up shop, and some are in the process of doing so. Others are holding on by a thread. We are here today to ask for your support in reestablishing this industry, as solar has the potential for tremendous job creation. Nearly 260,000 Americans work in solar, which is more than double the number from 2010. By 2021, the number is expected to increase by more than 360,000 workers. In 2015, Nevada was the No. 1 state for solar jobs per capita, but in 2016, Nevada was one of the few states to actually lose solar jobs. We would like Nevada to benefit from these solar jobs and the local investment that comes along with them.

This bill would allow Nevadans to benefit from our natural resource by setting up a long-term rate structure that provides certainty and predictability for consumers in the solar industry. We would also like to reestablish the solar industry in a way that is thoughtful and allows for long-term sustainability in the State. For the past two years, SEIA has worked to ensure consumer protection is at the forefront of our industry. There is a simple reason why: our industry survives based on satisfied customers telling family members, friends and neighbors about their experiences. The disclosures, as outlined in A.B. 405, would allow consumers to understand key terms in their agreements, easily compare offers and ask hard questions of potential solar providers. Solar customers would have transparency and certainty that companies are going to adhere to strong standards.

Every agreement, under the consumer protection language, would require a cover page telling customers what is outlined in the agreement. The cover page would direct customers to go to the Contractors' Board based on issues with their contractors.

CHAIR ATKINSON:
You mentioned this bill would bring solar back. Where did everybody go?

MS. FERRATO:
Many companies, based on the net metering decision, left the State. It was not feasible for customers to purchase rooftop solar anymore.

CHAIR ATKINSON:
When you say you want to bring solar back, you give the impression that solar does not exist in the State anymore. That is disingenuous. The solar industry came to a screeching halt; there is no doubt about that. Some of the actions we took last Session left some uncertainty, but we are trying to fix this.

MS. FERRATO:
This bill would allow us to bring new jobs to the State.

ASSEMBLYMAN JUSTIN WATKINS (Assembly District No. 35):
I support A.B. 405. My bill, A.B. 270, was amended into this bill.

If this bill were to pass, consumers would talk to a lawyer for their issues. Section 20 makes any violation of sections 2 through 20 consumer fraud. Attorney fees and costs would be awarded regardless of what the damages were. If a solar customer were ripped off for $50, as a lawyer, I could represent that client.

In regard to the ten-year warranty on the systems, that is four years longer than the statute of limitations on construction defects. A customer would be able to pursue legal action for four years longer than he or she would be able to pursue legal action for, say, the contractor that built his or her house.

CHAIR ATKINSON:
I think you misinterpreted my question about who would police this bill. When A.B. 405 is all said and done, there has to be a place where people go for their grievances. A customer can hire an attorney, but he or she still has to go to the

place that was designated. There has to be a place for a representative of a customer, such as a lawyer, to go to have the customer's concerns addressed.

SENATOR SETTELMEYER:
If people have problems with an energy company, they go to the PUCN because the company is regulated. Solar companies are not regulated, so customers are left with one option: hiring an attorney. I appreciate your comment about the attorney fees.

Everybody keeps on using the term "contractor." We should be saying "licensed contractor" because the Contractors' Board can only resolve issues for licensed contractors. If a contractor is not licensed, then a customer needs to talk to an attorney.

TRAVIS MILLER (Great Basin Solar Coalition):
We represent the majority of local installers in northern Nevada and well over 1,000 registered voters in the area as well. We tend to promote rate structures and energy options for consumers, especially in the energy field. We are in full support of A.B. 405. The Energy Choice Initiative won the support it did last election because of the issues that are being corrected in this bill. The Initiative should not be a cause for concern because it can go forward in the future.

As far as where somebody goes to correct an issue, the Contractors' Board is the first stop. There should not be any unlicensed contractors installing these systems. This bill provides the stability people in the community need to make an investment like this.

CASEY COFFMAN (Sunworks):
We support A.B. 405, especially because we support transparency in contracts. We also support best practices. The cost calculated for nonsolar customers is 26 cents per year. That is incredibly insignificant. Most people would be okay spending an additional 26 cents per year for the opportunity to have renewable energy in the State.

NATALIE HERNANDEZ:
I support A.B. 405. This bill would help put Nevada's clean energy economy back on track. It would promote the growth of innovative industries such as the rooftop solar industry, spur economic growth and create local jobs across our State. Renewable energy is where the Country is headed. Last year, solar

accounted for 1 out of every 50 jobs in the U.S. Nevada has the ability to lead the Country in solar and clean energy.

ALLEN ELI SMITH (Black Rock Solar):
I used to be an electrician at Black Rock Solar. Black Rock Solar chose to transition away from building solar systems in the State because of the business climate. I am encouraged by A.B. 405 because it provides the sort of accountability for an investment any homeowner would seek. It also provides for the Renewable Energy Bill of Rights, which is important. Empowering Nevadans to employ Nevada contractors to build solar arrays in Nevada and providing sustainability and independence for Nevadans are good things. These dollars stay in Nevada. I encourage you all to support A.B. 405.

JERRY SNYDER (Black Rock Solar):
Black Rock Solar was formed in 2007 and incorporated in 2008 to install solar systems on nonprofits and schools. We have been obliged to stop doing this because it no longer makes sense to do so on a nonprofit basis. However, we are going forward with trying to develop the solar field otherwise, and this bill is an important part of that. The 2015 PUCN decision has shown us how vital legislative leadership is in Nevada. I appreciate how seriously the Committee members are considering this bill.

DAVID VON SEGGERN (Sierra Club, Toiyabe Chapter):
I will read from my written testimony in support of A.B. 405 (Exhibit I).

ENDER AUSTIN III (Las Vegas Urban League Young Professionals):
This bill would not only encourage economic development and spur job creation but also have an invaluable environmental impact by increasing renewable energy generation. I am not here today as a dad, but if I were, I would tell you I am always thinking about what is next. Assembly Bill 405 looks at what is next. I am not necessarily here as a Nevadan, but as a Nevadan, I am concerned about the economy. This bill would strengthen a flooding industry that can diversify our State's economic base. As a social justice, economic and class justice fighter, I support destroying barriers to economic freedom for poor, disadvantaged and disenfranchised individuals. Assembly Bill 405 does this by opening the rooftop solar market to many who are on the lower rungs of the economic spectrum. As a preacher, I am charged to protect God's creation, and A.B. 405 does so by marching toward a greener Nevada. I hope the Committee considers passing this bill.

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. III OF III
APP00501-APP00675

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LARRY COHEN (Sunrun):
Sunrun is the largest dedicated residential solar company in the Country. We support A.B. 405, which would restore the rooftop solar industry in Nevada. I have managed Sunrun's Las Vegas branch since its inception in 2014, and I experienced the abrupt halt of the industry firsthand in 2015. After the 2015 PUCN decision, several hundred of our hardworking employees lost their jobs through no fault of their own. Many were forced to find work in other industries or move their families out of Nevada to keep their good-paying jobs working for Sunrun. Our employees have helped over 3,000 Nevadans take control of their electricity bills by going solar with Sunrun. Assembly Bill 405 establishes a fair approach to compensate families for the clean energy they generate and send to the grid. This bill offers Nevadans the freedom to choose rooftop solar to meet the energy needs of their homes. We appreciate the Committee's consideration of A.B. 405 and the opportunity to revitalize this innovative industry in the State.

NAOMI LEWIS (Nevada Conservation League):
I support A.B. 405. Almost everyone in Room 4412E of the Grant Sawyer State Office Building today supports A.B. 405.

Over 2,000 jobs were lost when the PUCN decided to change net metering rates. I have friends who were affected by this decision. Some of my friends had great-paying jobs with good benefits, but these jobs were taken away from them. Losing such a great job can be devastating, and when somebody is a college student who has to pay $400 for a textbook, losing a job can hit hard. Assembly Bill 405 would bring these jobs back to Nevada and then some.

The University of Nevada, Las Vegas, has some great opportunities for students who want to get involved with solar energy, such as the internationally recognized Solar Decathlon team and the minor in Solar and Renewable Energy. If opportunities for solar energy are not in the State, people will be forced to move, and Nevada will lose some talented and intelligent people who can bring innovative change to the State.

I urge the Committee to pass A.B. 405 because it is important to me, my future and thousands of other people's futures in the State.

KATHERINE LORENZO (Chispa Nevada):
We support rooftop solar for several reasons. The future of our electric grid is smart, flexible and decentralized. Having community members produce electricity from their homes makes them think more about their energy use and feel a sense of connection to their neighbors. By bringing the solar industry back to Nevada, we are opening the door for our communities to obtain new, good-paying jobs and are supporting the generation of solar entrepreneurs. Additionally, this bill protects consumers from being misled or ripped off. By generating more clean energy and moving away from fossil fuels, we can reduce air pollution that affects our health and the environment. Communities of color are often on the front lines dealing with these impacts. I urge you to support A.B. 405 to improve the well-being of Nevada's communities.

JOSHUA J. HICKS (Sunstreet Energy Group):
Sunstreet Energy Group is a provider of rooftop solar on new homes. It is a highly popular consumer choice issue to put solar on one's roof. There has been a lot of uncertainty in the last few years, and that has stalled rooftop solar installations. We support A.B. 405 because it creates certainty and predictability. These are important facets of the homebuilding process because they help consumers and get everyone on the right track.

DANIEL WITT (Tesla, Inc.):
We support A.B. 405. We firmly believe this bill has the potential to reinvigorate the solar industry in the State. Tesla, through SolarCity, has more than 1,200 employees in the southern part of Nevada, 550 of whom had to be relocated after the 2015 PUCN decision. We especially support the tenets of this bill that provide transparency and consistency throughout the distributed energy resources industry to protect consumers who choose to invest in these technologies. Nevada has long considered itself a leader in the renewable energy space. The Chair and this Committee have been extremely vigorous in their pursuit of renewable energy with bills like S.B. 204, S.B. 145 and S.B. 146.

SENATE BILL 145 (1st Reprint): Revises provisions relating to energy. (BDR 58-54)

SENATE BILL 146 (2nd Reprint): Revises provisions governing the filing of an integrated resources plan with the Public Utilities Commission of Nevada. (BDR 58-15)

All of these bills work in collaboration with A.B. 405. This bill will advance reliable energy technologies like storage that will continue to make the grid more efficient over time.

KYLE DAVIS (Nevada Conservation League):
We support A.B. 405. This bill is a key piece to reestablish Nevada's reputation as a clean energy leader, which is well-deserved considering the clean energy policies that have been passed in the State over the last few years. We send a lot of natural gas out of State. This bill allows us to take more control of our clean energy future and gives Nevadans the option to control their own destinies through rooftop solar. We know Nevadans want to see more clean energy, and A.B. 405 is an important piece of everything we are doing this Session to help our State realize its potential as a clean energy leader.

TOM POLIKALAS:
I support A.B. 405. I would like to address the issue of risk. When we put all of our eggs in the natural gas basket, that could impact all of us as consumers. The U.S. Energy Information Administration reports natural gas prices will increase over the coming decades, and that is corroborated by private sector analysts who identify reasons why natural gas is going to increase in price. Liquefied natural gas terminals are being put in place so that U.S. producers can export to markets in Europe and Asia, where the price of natural gas is much higher. The expected economic impact is that natural gas prices will rise in the U.S.

I also support this bill because of jobs. On March 31, the Senate Subcommittee on Energy heard testimony from Jackie Kimble from the American Jobs Project. She identified solar and battery technologies as key sectors for an economic cluster that could bring 28,000 jobs to the State. The Subcommittee also heard testimony from Lee F. Gunn, a retired Vice Admiral of the U.S. Navy. He identified distributed generation as a key national security issue. Grid resiliency and international security are enhanced when we have more distributed generation.

Having worked for 15 years in utility marketing and communications, I can say that any customer is valuable. There is a tremendous value to acquiring a net metered customer.

MARK DICKSON (Simple Power):
We hope to increase our workforce with passage of A.B. 405. Last year, over 260,000 jobs were in the solar industry in the U.S., more than all of the other fossil-fuel industries combined. Our State also spent almost three quarters of a billion dollars purchasing outside energy. The solar industry is burgeoning, and we want to be a part of that. We echo the support of the other companies here today, and we fully support A.B. 405.

LOUISE HELTON (Founder, 1 Sun Solar):
I have seen colleagues lose their businesses and friends lose their jobs. I have seen suppliers close up shop and leave the State altogether. Distributors have lost money, and hardworking Nevadans have lost their solar careers. At the same time we were killing our solar industry, even though it was never our intention to do so, other places were building their solar companies, moving forward, adding lots of jobs and bringing economic diversification and development to their communities. The Clean LA Solar program was said to have created 4,500 jobs and generated $500 million in economic activity, according to the Los Angeles Business Council. In the Interim, while we were hoping to make a policy correction, Nevadans tried hard to have their voices be heard. It was incredible that over 100,000 Nevadans signed the petition to bring back net metering. That is a difficult thing to accomplish. I have been fortunate enough to have a diversified business that has allowed me to hang on. I am begging you to pass this bill to allow us to put hardworking Nevadans back to work and to help us be a leader in the solar field.

JORGE GONZALEZ (Nevada Solar Owners Association):
We support A.B. 405. I lost my job when the solar industry in Nevada went down, but that did not drive me away from the renewable energy field.

The warranty is covered in three issues. One is the product itself. The real question, however, is the labor warranty. What is that going to be? I would love to see a number at ten years so that it matches the warranty on the product.

The price of solar has dropped drastically. If somebody buys solar right now as a homeowner and that person has the credit, he or she will pay less for power going out 15 to 20 years. Solar is feasible, and if people are waiting to go solar, they are going to be in a much better position if A.B. 405 passes.

JOE BOOKER:
I worked at a solar company that closed down in 2015. I lost my family there; I considered my coworkers my family. I ask the Committee to support A.B. 405 to bring sanity back to my life. I have been on the "solarcoaster" for a long time, and I would like to get off.

VERNA MANDEZ:
Ever since I was young, I have wanted to work in the solar industry. It is disheartening to me that my State does not allow me to advance in this field. Solar energy is the energy of the future, and it will benefit generations to come. My community wants solar, and I want to own a home one day where I can have rooftop solar. I want to be able to lower my electric bill through the natural sunshine of this overwhelmingly warm and sunny State. It is my right to go solar. The State should not infringe upon this right in any way, shape or form. Renewable energy is where the Country is headed. Nevada has the ability to lead the Country in solar and clean energy. Assembly Bill 405 is instrumental to the progress of the State. I hope you all put Nevada back on the path to be a renewable energy leader.

SCOTT SHAW (1 Sun Solar):
My former company, Go Solar Energy Solutions, could not hold on. We had to close our doors as a result of the 2015 PUCN decision. I am fortunate enough to work at another solar company and look forward to possibly hiring 50 individuals this year. This bill addresses all of the uncertainty the 2015 PUCN decision set into the market.

I support the consumer protections this bill would put in place. If there are bad actors in an industry, that is going to color the whole industry. It is important to adhere to transparency and consumer protections. This bill sets certainty in the rate of exchange for net metering.

DONALD GALLIMORE, SR. (NAACP Reno-Sparks Branch 1112):
We support A.B. 405. My family has used solar since 1983. We believe in solar and the future of solar. Twenty-six hundred jobs is a significant number, and we want to see those jobs come back.

KEVIN ROMNEY (Radiant Solar Solutions):
We are a licensed installer of solar and storage in Henderson, Nevada. We support A.B. 405. This bill would provide wonderful protections to consumers

and allow our State to reignite the economic engine of rooftop solar. This bill would allow us to produce energy in Nevada that is sold to Nevadans, allowing us to not need to import energy from out of State or outside of the Country. There are also national security interests through the local production of energy. We hope the Committee passes A.B. 405 so that rooftop solar businesses can grow the economy and, in turn, grow other businesses.

JUDY STOKEY (NV Energy):
We are neutral to A.B. 405. Two major issues need to be addressed before anything moves forward. The first issue is what would happen in an energy choice environment. There would be 20-year commitments if this bill were to pass. We also have grandfathered customers with 20-year contracts. We do not know who would be responsible for these customers if the Energy Choice Initiative were to pass again. The second issue is cost. Everybody has his or her own number, but our number comes out to be over $60 million annually if this bill were to pass.

We want to make sure we go about this bill the right way. We would like to continue working with Assemblyman Brooks. The consumer protection piece of this bill is great. We need to make some minor modifications, but some unfortunate circumstances arose a few years ago.

ERNIE ADLER (International Brotherhood of Electrical Workers Local 1245):
We are neutral to A.B. 405 because we are trying to figure out how this bill works with all of the other renewable energy bills this Session. With the Energy Choice Initiative looming, people who sign up for leases need the ability to cancel their contracts if electricity is deregulated. Otherwise, they are going to be stuck with some fairly large monthly payments on something that does not benefit them. I have submitted an amendment (Exhibit J) to add a provision to allow people to get out of their leases before the 20-year period elapses.

DANNY THOMPSON (International Brotherhood of Electrical Workers Local Nos. 396 and 1245):
We are not against net metering, but we have concerns with the way this bill is written. It is prudent for people to have a mechanism to get out of their leases should the Energy Choice Initiative pass.

We are also concerned with section 24 regarding the permission aspect. This section talks about meters; people off the grid do not have meters. We fear that

some of our members would be killed by this. Without the permission of or information from the utility, a lineman could be putting his life at risk. This section includes the language "reasonable safety requirements," but we suggest replacing this with language conforming to all local and State requirements. I do not know what reasonable safety requirements are, but I do know what the codes are.

Unless these systems are installed by licensed contractors, the provision relating to the Contractors' Board does not mean anything. Requiring that both the installation and maintenance be done by licensed contractors is important.

JEREMY NEWMAN (International Brotherhood of Electrical Workers Local 396):
I appreciate the Chair and Senator Settelmeyer looking out for the well-being of myself and other linemen. There are good and bad contractors out there. We want to make sure the utility is notified to ensure the safety of linemen in the field.

RUSTY MCALLISTER (Nevada State AFL-CIO):
We are neutral to A.B. 405. We have heard people talk about the Renewable Energy Bill of Rights, but I am wondering if we could have a bill of rights for customers who receive their power from the utility. Although 26 cents per year may seem insignificant, somebody still has to pay it. The companies that lease these systems receive a 30 percent federal tax credit that they sell to tax equity funds. Somebody has to pay for that. Nevada taxpayers have paid $1.2 million in subsidies to bring one solar company to the State. Although the solar industry certainly needs to be brought back to Nevada, the average person is not going to be able to install these systems. Realistically, only a certain segment of the population is going to be able to have these systems. All of the people I represent have to pay for A.B. 405.

ASSEMBLYMAN BROOKS:
I have three examples of states that had net metering and then went to choice: California, Massachusetts and Maine. I will submit the document containing these examples to the Committee.

Mr. Thompson made a statement about licensed contractors. I agree that only licensed contractors should be able to install rooftop solar systems. That is currently the law.

In reference to section 24, I am not against people notifying the utility or displaying placards. I want utility workers to feel safe if they approach an energy system. Section 24, subsection 3, paragraph (c), subparagraphs (1) and (2) could be clarified for the protection of our utility workers.

CHAIR ATKINSON:
I am aware California had net metering and then went to choice, but the state did not know there was an impending ballot measure. Because we know the Energy Choice Initiative is looming, we have to put some safeguards in. We all recognize choice is coming.

SENATOR SPEARMAN:
I wanted to address Mr. McAllister's point about people not being able to afford solar systems. I took this into consideration when sponsoring S.B. 407.

SENATE BILL 407 (1st Reprint): Creates the Nevada Clean Energy Fund. (BDR 58-1133)

The Nevada Clean Energy Fund is designed to level the playing field for seniors and low- and moderate-income individuals. The Fund provides an investment opportunity for them so that they can participate in the renewable energy process.

Part of the renewable energy discussion is economic justice. Protecting the environment should not only be accessible to those with the right credit scores or those with cash lying around.

CHAIR ATKINSON:
I have received letters of support for A.B. 405 from Bo Balzar, Bombard Renewable Energy (Exhibit K); Laura Bennett, TechNet (Exhibit L); Janette Dean (Exhibit M); and Greg Ferrante, Nevada Solar Owners Association (Exhibit N).

I will close the hearing on A.B. 405 and open the meeting for public comment.

MR. EPPOLITO:
Senate Bill No. 463 of the 78th Session would have helped Nevada children. It was passed in the Senate 21 to 0. That would have been one of the strongest student data privacy protection bills in the Country. Unfortunately, the bill got

gutted with an amendment. The Senate tried to protect Nevada children, but we still have nothing to protect them.

Two states have policies to protect their children: California and Oklahoma. In February 2016, the ACLU and the Tenth Amendment Center agreed on model legislation that 16 states started working on.

Remainder of page intentionally left blank; signature page to follow.

CHAIR ATKINSON:
Hearing no more public comment, I adjourn the meeting at 11:47 a.m.

RESPECTFULLY SUBMITTED:

Daniel Putney,
Committee Secretary

APPROVED BY:

Senator Kelvin Atkinson, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	10		Attendance Roster
S.B. 538	C	5	Senator Aaron D. Ford	Proposed Amendment 4699
S.B. 538	D	66	John Eppolito / Protect Nevada Children	Written Testimony
S.B. 538	E	5	Brian McAnallen / City of Las Vegas	Proposed Amendment
S.B. 538	F	2	Shannon Rahming / Division of Enterprise Information Technology Services, Department of Administration	Written Testimony
S.B. 538	G	2	Christopher Oswald / Data and Marketing Association	Letter of Opposition
A.B. 405	H	16	Assemblyman Chris Brooks	Explanation Table
A.B. 405	I	1	David Von Seggern / Sierra Club, Toiyabe Chapter	Written Testimony
A.B. 405	J	1	Ernie Adler / International Brotherhood of Electrical Workers Local 1245	Proposed Amendment
A.B. 405	K	1	Bo Balzar / Bombard Renewable Energy	Letter of Support
A.B. 405	L	1	Laura Bennett / TechNet	Letter of Support
A.B. 405	M	3	Janette Dean	Letter of Support
A.B. 405	N	1	Greg Ferrante / Nevada Solar Owners Association	Letter of Support

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DISTRICT COURT
CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., Plaintiffs, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	Case No.: A-18-783054-C Dept.: 16 **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**

Plaintiff Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. ("Fielden Hanson") by and through its attorneys, the law firm of Dickinson Wright PLLC, hereby submits its Reply in Support of its Motion for Reconsideration.

This Reply is based on the following Memorandum of Points and Authorities, the declaration of Gabriel A. Blumberg attached hereto as Exhibit 1 and the exhibit attached thereto; the papers and pleadings already on file herein, and any oral argument the Court may entertain on this matter.

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...

...

DICKINSON WRIGHT ATTORNEYS AT LAW

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Dr. Tang's Opposition seeks to have this Court to ignore the plain language of the Employment Agreement, the law, and Nevada's public policy. Dr. Tang's position must be rejected because all three of these applicable guideposts justify reconsideration and entry of a preliminary injunction.

First, the Court must respect the parties' right and freedom to contract by enforcing the plain language of the Employment Agreement, which contains an unambiguous stipulation whereby Dr. Tang agreed to the entry of a preliminary injunction if he violated the Non-Competition Clause. Dr. Tang has never denied working at Non-Competition Facilities following the termination of his employment with Fielden Hansen and therefore concedes he breached the Non-Competition Clause. This breach mandates reconsideration and entry of a preliminary injunction pursuant to the parties' stipulation in the Employment Agreement.

Second, the Court must reject Dr. Tang's flawed argument that the Non-Competition Clause is wholly unenforceable because he believes certain provisions are unreasonable. Dr. Tang's premise is unsound because the Non-Competition Clause is narrowly tailored to protect Fielden Hanson's legitimate business interests. Indeed, it is so narrowly tailored that it permits Dr. Tang to continue performing anesthesia in Clark County for the duration of the two year temporal restriction, as opposed to imposing the broader restriction of precluding Dr. Tang from working in all of Clark County which this Court previously stated would have been reasonable.

Furthermore, even if the Court once again concludes that some portion of the Non-Competition Clause is unreasonable, Dr. Tang's request to nullify the entire Non-Competition Clause still must be denied because it relies on legislatively overruled case law that contradicts the parties' agreement and Nevada public policy. The Nevada Legislature clearly evidenced its intent in AB 276 to enforce non-competition agreements and requiring district courts to blueline any overly restrictive non-compete provisions. *See* NRS 613.195(5) (emphasis added) ("the court ***shall*** revise the covenant to the extent necessary and enforce the covenant as revised"). This statute effectuates long-standing Nevada public

policy and establishes a rule for construing contracts that must be applied to all cases including those arising after the Nevada Supreme Court's holding in *Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151 (2016). If the statute is not applied, the Legislature and the parties' intent will be overridden, thereby causing an impermissible absurd result that the Nevada Supreme Court has repeatedly cautioned should be prevented through reasonable, common sense application of Nevada statutes.

For all these reasons and those that follow, this Court should reconsider its prior ruling and preliminarily enjoin Defendants from performing anesthesia services at any of the Non-Competition Facilities or soliciting any business from any of the Non-Competition Facilities.

II.

LEGAL ARGUMENT

A. Dr. Tang Is Bound by His Contractual Agreement Acknowledging Irreparable Harm and Requiring Entry of Injunctive Relief

In the Employment Agreement, Dr. Tang stipulated that any breach of the Non-Competition Clause would cause Fielden Hanson irreparable harm and therefore entitle Fielden Hanson to injunctive relief to prevent further breaches of the Non-Competition Clause. Ex. A to Opposition at ¶ 2.8.3. Despite this unambiguous stipulation, Dr. Tang now begs the Court to ignore the plain language of the parties' agreement and determine that there is no irreparable harm. Opposition at pp. 10-11. Dr. Tang's plea must be rejected because he knowingly and voluntarily agreed to the entry of injunctive relief in this exact scenario and cannot now be heard to argue against injunctive relief. *Vitalink Pharmacy Servs., Inc. v. Grancare, Inc.*, 1997 WL 458494, at *9 (Del. Ch. Aug. 7, 1997) (holding that a contractual stipulation that breach of the non-compete clause would cause "substantial and irreparable harm" "alone suffices to establish the element of irreparable harm, and [defendant] cannot be heard to contend otherwise.").

A number of courts across the country have recognized that parties can stipulate to irreparable harm and entry of an injunction. *North Atlantic Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d. Cir. 1999) (citing *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir.1999)); *Cirrus Holding Co. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001) ("contractual stipulations as to irreparable harm alone suffice to establish that element for the purpose of issuing preliminary injunctive relief."); *True N.*

Commc'ns Inc. v. Publicis S.A., 711 A.2d 34, 44 (Del. Ch. 1997) ("The irreparable harm element of the injunction standard is established by [defendant's] own contractual stipulation" that its breach "will constitute irreparable harm to [plaintiff], entitling [plaintiff] to injunctive relief.").

It is likely that the Nevada Supreme Court would follow these jurisdictions, as opposed to the District of Columbia,[1] for two reasons. First, Nevada often relies on Delaware law in business cases where Nevada has not issued governing authority on a topic. *See, e.g., Green on Behalf of Smith & Wesson Holding Corp. v. Monheit*, 2010 WL 11579099, at *5 (D. Nev. Mar. 3, 2010) ("Nevada courts look to Delaware law for guidance on issues of corporate law"). Thus, the Nevada Supreme Court would likely find Delaware's law to be most instructive on this issue.

Second, enforcing the parties' agreed upon contractual terms best serves Nevada's "long-recognized public 'interest in protecting the freedom of persons to contract.'" *Izquierdo v. Easy Loans Corp.*, 2014 WL 2803285, at *3 (D. Nev. June 19, 2014) (citing *Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967)); *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009) ("Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy."). Indeed, Nevada courts are even willing to enforce parties' agreements that modify or constrict rights afforded by Nevada's default laws. *See, e.g., Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture*, 300 P.3d 124, 128 (Nev.2013) ("Nevada law allows parties to contractually agree to shorter limitations periods."). Thus, this Court should adhere to Nevada's long-standing policy of enforcing parties' contractual terms and enforce Dr. Tang's stipulation to entry of injunctive relief in this matter where he is knowingly violating the Non-Competition Clause.

B. The Non-Competition Clause Is Reasonable

If the Court does not reconsider its prior decision and grant injunctive relief based on the parties' agreement and Dr. Tang's stipulation that Fielden Hansen is entitled to obtain an injunction, the Court still should issue a preliminary injunction after reconsidering the geographic restriction in the reasonable Non-Competition Clause.

[1] The District of Columbia is the only jurisdiction Dr. Tang cited for the proposition that his stipulation to injunctive relief should be ignored.

1. The Non-Competition Clause Only Prohibits Dr. Tang from Working at 22 Specified and Unchanging Non-Competition Facilities

"The medical profession is not exempt from a restrictive covenant provided the covenant meets the tests of reasonableness." *Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967) (citing *Foltz v. Struxness*, 215 P.2d 133 (Kan.1950) (area of 100 miles for a period of ten years); *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (1962) (25 mile radius for three years); *Lovelace Clinic v. Murphy*, 76 N.M. 645, 471 P.2d 450 (1966) (county limits and three years)). This is because the "substantial risk of losing patients to an employee is itself an adequate basis for a reasonably designed restraint." *Id.* Furthermore, Nevada enforces reasonable restrictive covenants because it "has an interest in protecting the freedom of persons to contract, and in enforcing contractual rights and obligations." *Id.*

The Non-Competition Clause is valid and enforceable because it imposes reasonable restrictions that are narrowly tailored to protect Fielden Hanson's legitimate business interests. Rather than imposing broad territorial restrictions, the Non-Competition Clause only restricts Dr. Tang from performing anesthesia services at the specified Non-Competition Facilities. This very limited geographic restriction therefore only precludes Dr. Tang from working at the specific 22 locations that he serviced for Fielden Hansen. As a result, not only can Dr. Tang continue to work in the field of anesthesiology, but he can also do so at numerous locations within Clark County, Nevada, and elsewhere, including medical facilities adjacent to Non-Competition Facilities if he so desired. This fact is critical here where the Court previously stated it would have determined the Non-Competition Clause was reasonable had its geographic restriction been specifically limited to Clark County. Ex. C to Opposition at p. 23. The Non-Competition Clause undeniably restricts Dr. Tang from far less employment opportunities than it would have had it imposed a geographic limitation of all of Clark County.

2. Dr. Tang's Contention that the Non-Competition Clause Should Have Focused on Physicians Rather than Facilities Further Demonstrates the Reasonableness of the Non-Competition Clause

Dr. Tang also tries to portray the Non-Competition Clause as unreasonable because it focuses on facilities as opposed to physicians. In doing so, Dr. Tang once again confirms the reasonableness of

the Non-Competition Clause and further illustrates that Fielden Hanson crafted a very specific, narrowly tailored non-compete provision that should be enforced by this Court. Had the Non-Competition Clause prevented Dr. Tang from working with any physician he worked with during his time at Fielden Hanson, it would have resulted in an even more restrictive provision because it could create a geographic boundary that extends well past Clark County and potentially even into other states.[2] Rather than risking this extremely broad and constantly changing geographic restriction, Fielden Hansen instead formulated the Non-Competition Clause in a manner that only precluded Dr. Tang from working at 22 known and unchanging facilities. Thus, by focusing solely on the facilities where Dr. Tang worked for Fielden Hansen, the Non-Competition Clause provides a less restrictive, reasonable method of protecting Fielden Hansen's legitimate business interests while enabling Dr. Tang to remain working in Clark County in the field of anesthesiology, including with physicians he assisted while employed at Fielden Hanson.[3]

3. Dr. Tang's Argument Relating to Staff Privileges Is a Red Herring

In an attempt to distract the Court from the apparent reasonableness and limited scope of the Non-Competition Clause, Dr. Tang highlights the Employment Agreement's provision requiring him to withdraw his medical privileges at Non-Competition Facilities. Dr. Tang's arguments relating to this provision have no bearing on the Motion because Fielden Hansen is not requesting such relief as part of the preliminary injunction.

Indeed, as noted by Dr. Tang, the staff privileges issues was raised as an example of how Dr. Tang is breaching the Employment Agreement, rather than as part of a request for injunctive relief. Opposition at 9:26. Furthermore, even to the extent Dr. Tang's staff privileges argument was relevant to the Motion, it would still be baseless because the requirement to terminate staff privileges at Non-Competition Facilities is a logical extension of the Non-Competition Clause which prohibits Dr. Tang

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[2] Dr. Tang cites the Court to the November 19, 2018 hearing transcript to show that the Court was concerned about the Non-Competition Clause reaching into other states. Prior counsel's comments regarding the Non-Competition Clause's applicability to other states such as Colorado was incorrect because the Non-Competition Clause only bars Dr. Tang from working at the 22 Non-Competition Facilities he served for Fielden Hanson, all of which are in Clark County.

[3] The Non-Competition Clause as drafted does not actually bar Dr. Tang from working with any physician because Dr. Tang can work with any physician so long as it is done somewhere other than the Non-Competition Facilities. Thus, to the extent Dr. Tang is correct that physicians are responsible for employing anesthesiologists, the Non-Competition Clause is not precluding him from working because it is not tied to particular physicians.

from working at the Non-Competition Facilities. Indeed, if Dr. Tang is barred from working at the Non-Competition Facilities, then he obviously does not need to carry staff privileges at those locations.

C. The Court Must Blueline the Non-Competition Clause if it Nevertheless Concludes that the Non-Competition Clause Is Unreasonable

If the Court once again concludes that the current terms of the Non-Competition Clause are not reasonable, then it must enforce a bluelined version of the Non-Competition Clause that it deems reasonable. Despite Dr. Tang's hollow protests, it is undeniable that the Nevada Legislature clearly expressed its desire to overturn *Golden Road* and preclude courts from relying on its faulty reasoning in analyzing any non-compete clauses in future cases. In the legislative session immediately following the issuance of *Golden Road*, the Nevada Legislature amended NRS 613.195(5) to read as follows:

> If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, *the court shall revise the covenant to the extent necessary and enforce the covenant as revised.* Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

NRS 613.195(5) (emphasis added). This revision of Nevada's non-compete statute was made in direct response to the *Golden Road* decision and intended to apply to all cases, regardless of when the parties executed their non-compete agreement. *See* Senate Committee on Commerce, Labor and Energy May 24, 2017 Minutes at p. 15 ("a specific lawsuit came forth in which an entire noncompete agreement was thrown out because on portion of it was excessive. Section 1, subsection 5 would allow a court to keep the good parts of a noncompete agreement and toss out or renegotiate the excessive parts"); *see also* Legislative Counsel's Digest (noting that AB 276 changes existing law regarding non-compete clauses and requires courts to revise unreasonable restrictions to the extent necessary and enforce the covenant as revised).

Furthermore, NRS 613.195(5) directly contradicts the Nevada Supreme Court's basis for its decision in *Golden Road* and undercuts that decision's precedential value. In *Golden Road*, the Nevada Supreme Court based its decision on its belief that "[u]nder Nevada law, such an unreasonable provision

renders the noncompete agreement wholly unenforceable." *Golden Road*, 376 P.3d at 156. The Nevada Supreme Court further justified its decision by noting that courts cannot modify or vary the terms of unambiguous contracts and "[u]nder Nevada law, this rule has no exception for overbroad noncompete agreements." *Id.* This reasoning, which formed the basis for the *Golden Road* decision, no longer passes muster because Nevada law clearly and unambiguously now requires district courts to modify or vary overbroad or unreasonable provisions of non-compete agreements. NRS 613.195(5).

Similarly, the Nevada Supreme Court's other basis for refusing to blueline the non-compete agreement in *Golden Road*—that it would not comport with the parties' contractual intent—is similarly unavailing in this case. *Golden Road*, 376 P.3d at 157. The parties here specifically addressed this concern in the Employment Agreement, wherein the parties agreed:

> If any provision of 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.

Ex. A to Opposition at ¶ 2.10. Therefore, neither of the Nevada Supreme Court's bases for its *Golden Road* decision withstand scrutiny in this case and NRS 613.195(5) must be applied to the Non-Competition Clause.

For these same reasons, Dr. Tang's argument that application of NRS 613 to this case would implicate due process concerns must fall upon deaf ears. The cornerstones of due process are notice and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). Here, both of these elements are readily satisfied. At the time he entered into the Non-Competition Clause, Dr. Tang was put on notice that he was agreeing to allow a court to blueline any offending terms of the Non-Competition Clause. Ex. A to Opposition at ¶ 2.8.3. Dr. Tang had the opportunity to review and reject the Non-Competition Clause, but instead voluntarily assented to it, including the provision

permitting a court to blueline and modify the Non-Competition Clause.[4] Therefore, he cannot come before this Court arguing that application of a statute mirroring terms he agreed to in 2016 somehow violates his due process rights.

Thus, Dr. Tang was afforded proper notice and opportunity regarding the possibility of a court bluelining the Non-Competition Clause and the Court should blueline the Non-Competition Clause to the extent it finds any provision unreasonable and enforce the terms of the modified Non-Competition Clause through a preliminary injunction in accordance with the Legislature and the parties' intent. *Id.*; *see also* NRS 613.195(5).

D. Failing to Apply NRS 613 Would Lead to an Improper Absurd Result

The Court also must reject Dr. Tang's attempt to limit the applicability of NRS 613 to this case because Dr. Tang's argument would lead to an impermissible absurd outcome. The Nevada Supreme Court has routinely held that statutes must be applied in a manner that avoids "absurd or unreasonable results." *See Anthony Lee R. v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997) ("statutory language should not be read to produce absurd or unreasonable results."); *see also Las Vegas Police Protective Association Metro, Inc. v. District Court*, 122 Nev. 230, 130 P.3d 182 (2006) (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)) (a court should not apply a statute in a manner that would "violate[] the spirit of the act" or produce "absurd or unreasonable results"); *State v. Glusman*, 98 Nev. 412, 425, 651 P.2d 639, 648 (1982) ("The words of a statute should be construed, if reasonably possible, so as to accommodate the statutory purpose"); ; *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988) ("When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable").

Here, Dr. Tang's attempt to preclude the application of NRS 613 would produce a bizarre and unintended result that would contravene the clear intention of the Legislature and the parties. The

[4] Dr. Tang confirmed that he had alternative options to practice in the field of anesthesiology in Clark County, Nevada at the time he entered into the Non-Competition Clause if he did not want to execute it. Dr. Tang made it abundantly clear that he is performing anesthesia at facilities across Clark County for Red Rock Anesthesia Consultants, LLC ("Red Rock"). Red Rock was established in March 2016—approximately nine months prior to the date Dr. Tang executed the Non-Competition Clause—and therefore provided an alternative employment option for Dr. Tang had he not wanted to execute the Non-Competition Clause and work for Fielden Hanson. *See* Ex. 1-A. Despite this option, Dr. Tang willingly and voluntarily executed the Non-Competition Clause that he admitted was an essential element of the Employment Agreement and that absent such clause Fielden Hanson would not have entered into the Employment Agreement. Ex. A to Opposition at ¶ 2.10.

parties here specifically contracted to permit a court to blueline any offending provisions of the Non-Competition Clause. Ex. A to Opposition at 2.8.3. Thus, at the time the parties entered into the Employment Agreements, they both agreed and expected that a court would blueline the Non-Competition Clause to the extent any portion of it was deemed unreasonable. The parties' expectations were then codified in NRS 613 as being in accordance with Nevada's law and long-standing public policy. *See* NRS 613.195(5). Dr. Tang therefore is not only asking this Court to ignore the parties' contract, but also current Nevada law. Such a request is absurd because if the Court accepts Dr. Tang's argument, neither the law nor the parties' contractual expectations will be followed. This absurd result easily can be avoided by applying NRS 613, which the Legislature intended to apply to all cases filed after its enactment.

E. The Balance of Hardships Tips Significantly in Favor of Fielden Hanson

Dr. Tang makes the unsupported claim that Fielden Hanson will not suffer any significant harm without injunctive relief, while he will face "disastrous harm" if injunctive relief is granted because he will be prevented from "taking any anesthesiology cases for any provider at nearly every hospital in Las Vegas." This argument is specious. First, as noted above, Dr. Tang stipulated that his violation of the Non-Competition Clause would cause Fielden Hansen significant irreparable harm. Ex. A to Opposition at 2.8.3. As a result, he is barred from arguing that Fielden Hanson will not suffer any harm absent injunction relief. *Vitalink Pharmacy Servs., Inc. v. Grancare, Inc.*, 1997 WL 458494, at *9 (Del. Ch. Aug. 7, 1997) (holding that a contractual stipulation that breach of the non-compete clause would cause "substantial and irreparable harm" "alone suffices to establish the element of irreparable harm, and [defendant] cannot be heard to contend otherwise.").

Second, the evidence adduced thus far already provides sufficient proof that Fielden Hansen is suffering irreparable harm. The declaration of Dr. Isaacs explained that Dr. Tang's actions following the termination of his employment with Fielden Hansen are causing Fielden Hanson to suffer irreparable harm and that Dr. Tang is unfairly capitalizing on Fielden Hanson's ongoing relationships and goodwill with Non-Competition Facilities and exploiting valuable information he learned of solely through his work for Fielden Hansen. Ex. C to Motion for Preliminary Injunction at ¶¶ 10, 20; *see also Sobol v.*

Capital Management Consultants, Inc., 102 Nev. 444, 446, 726 P.2d 335, 337 (1986) ("acts committed without just cause which unreasonably interfere with a business or destroy its credit or profits, may do an irreparable injury and thus authorize issuance of an injunction"); *Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, 2011 WL 3678798, at *5 (D. Nev. Aug. 22, 2011) (citing *JAK Productions, Inc. v. Wiza*, 986 F .2d 1080, 1084 (7th Cir.1993)) ("Irreparable harm is easily shown when a former business associate uses the knowledge gleaned from a former business to compete against that business in violation of a non-compete.)

Dr. Tang confirmed these facts in his own declarations, wherein he admitted that he was diverting business away from Fielden Hanson by working with doctors and groups at Non-Competition Facilities who worked with Fielden Hansen during his employment with Fielden Hanson. *See* Ex. A to Opposition to Motion for Preliminary Injunction at ¶¶ 17-18. Rather than continuing to work with Fielden Hanson, these doctors and groups are now utilizing Red Rock, Dr. Tang's current employer, for their anesthesia needs at the Non-Competition Facilities. As a result, it is apparent that business and long-term relationships are being diverted away from Fielden Hansen to Red Rock in violation of the Non-Competition Clause.

Third, Dr. Tang overstates and misstates his potential harm in the event injunctive relief is granted. The Non-Competition Clause will not preclude Dr. Tang from performing anesthesiology in Clark County. This basic and incontrovertible fact was corroborated by Dr. Tang's declaration, which quite tellingly was devoid of any assertion that he would suffer any tangible, identifiable harm if he was prevented from working at the specific 22 Non-Competition Facilities during the pendency of this case. *See generally id.* The omission of such a statement speaks volumes. Not only does it render the Opposition bereft of any competent evidence demonstrating potential harm to Dr. Tang, but it also reveals that Dr. Tang knows there are viable opportunities for him to perform anesthesiology services in this jurisdiction even with an injunction in place. Thus, the balance of hardships weighs heavily in favor of granting an injunction.

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IV.

CONCLUSION

Based on the foregoing, Fielden Hansen respectfully requests that this Court reconsider its prior ruling and enforce the parties' bargained-for Non-Competition Clause. Alternatively, if the Court still concludes that the Non-Competition Clause is unreasonable, it must blueline the Non-Competition Clause and enforce a revised version.

DATED this 5th day of March 2019.

DICKINSON WRIGHT PLLC

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Nevada Bar No. 7332
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 5th day of March 2019, a copy of **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION** to be transmitted by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey E-File & Serve system addressed to:

Martin A. Little, Esq.
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HOWARD & HOWARD PLLC
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Las Vegas, NV 89169
Attornevs for Defendants

Wendy S. Ruckrick
An Employee of Dickinson Wright PLLC

EXHIBIT 1

DECLARATION OF GABRIEL A. BLUMBERG IN SUPPORT OF PLAINTIFF FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

I, Gabriel A. Blumberg, do hereby state and declare as follows:

1. I am an attorney with the law firm of Dickinson Wright, PLLC, counsel for FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD. ("Fielden Hanson"). I am duly licensed to practice before all courts in the State of Nevada and I have personal knowledge of all facts addressed herein, and if called upon to testify, could and would do so.

2. I make this declaration in support of Plaintiff's Reply in support of Motion for Reconsideration.

3. Attached hereto as Exhibit 1-A is a true and correct copy of the Nevada Secretary of State entity details for Red Rock Anesthesia Consultants, LLC.

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

EXECUTED this 5th day of March, 2019.

GABRIEL A. BLUMBERG

DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210

EXHIBIT 1-A

RED ROCK ANESTHESIA CONSULTANTS LLC

Business Entity Information

Status:	Active	File Date:	3/9/2016
Type:	Domestic Limited-Liability Company	Entity Number:	E0110532016-8
Qualifying State:	NV	List of Officers Due:	3/31/2020
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20161144402	Business License Exp:	3/31/2020

Additional Information

Central Index Key:	

Registered Agent Information

Name:	EDMOND GIFFORD JR.	Address 1:	10501 W GOWAN RD #210
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89129
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☐ Include Inactive Officers

Manager - ANDRES FELIPE SEPULVEDA ESTRADA			
Address 1:	6805 WILLOWCROFT ST	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89149	Country:	
Status:	Active	Email:	
Manager - HASAN SAJJAD KHAWAJA, MD			
Address 1:	10852 FISHERS ISLAND ST	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89141	Country:	
Status:	Active	Email:	
Manager - RANDY NOEL FLORES, DO			
Address 1:	901 VILLE FRANCHE STREET	Address 2:	

City:	LAS VEGAS	State:	NV
Zip Code:	89145	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20160109516-81	# of Pages:	2
File Date:	3/9/2016	Effective Date:	
(No notes for this action)			
Action Type:	Initial List		
Document Number:	20160109517-92	# of Pages:	1
File Date:	3/9/2016	Effective Date:	
(No notes for this action)			
Action Type:	Amended List		
Document Number:	20160137634-03	# of Pages:	1
File Date:	3/28/2016	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20160142014-11	# of Pages:	1
File Date:	3/29/2016	Effective Date:	
(No notes for this action)			
Action Type:	Amended List		
Document Number:	20160301934-29	# of Pages:	1
File Date:	7/6/2016	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20170136834-25	# of Pages:	1
File Date:	3/30/2017	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20170149772-40	# of Pages:	1
File Date:	4/4/2017	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20180084830-94	# of Pages:	1
File Date:	2/24/2018	Effective Date:	
(No notes for this action)			
Action Type:	Registered Agent Change		
Document Number:	20180205948-89	# of Pages:	1
File Date:	5/4/2018	Effective Date:	
(No notes for this action)			

Action Type:	**Annual List**		
Document Number:	**20190073253-92**	**# of Pages:**	**1**
File Date:	**2/19/2019**	**Effective Date:**	
(No notes for this action)			

TRAN

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, Limited, Plaintiff,	)	
vs.	)	CASE NO.
DEVIN TANG, M.D.,	)	A-18-783054-C
Defendant.	)	DEPT. NO. 16

REPORTER'S TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE TIMOTHY C. WILLIAMS

WEDNESDAY, MARCH 6, 2019

APPEARANCES:

For the Plaintiff:

GABRIEL BLUMBERG, ESQ.

For the Defendant:

RYAN O'MALLEY, ESQ.

REPORTED BY: DANA J. TAVAGLIONE, RPR, CCR No. 841

LAS VEGAS, NEVADA, WEDNESDAY, MARCH 6, 2019

* * * * *

THE COURT: Okay. So next we'll go to page 4. Fielden Hanson vs. Devin Tang, M.D.

All right. Good morning, Counsel.

MR. BLUMBERG: Good morning, Your Honor. Gabriel Blumberg on behalf of the plaintiff.

MR. O'MALLEY: And Ryan O'Malley for defendants.

THE COURT: All right. Let's see here. All right. It's my understanding this is a Motion for Reconsideration on an Order Shortening Time.

Do you want this reported or no?

MR. BLUMBERG: Yes, Your Honor.

MR. O'MALLEY: Yes, please.

THE COURT: Just want to make sure.

All right. You have the floor, sir.

MR. BLUMBERG: Thank you, Your Honor.

We're here respectfully requesting reconsideration of the Court's order denying preliminary injunction on a couple of grounds. The first ground is we think there was a bit of a misunderstanding as to the noncompetition clause in this matter.

Section 2.81 of the Employment Agreements specifically lays out that Dr. Tang is prohibited from providing anesthesiology or pain management services at any of the facilities -- and I think this is the key clause that wasn't exactly focused on at the last hearing -- "at which he has provided any anesthesiology and/or pain management services."

We think that language is clear.

THE COURT: What about this, though, and I remember this because I thought about this case, and one of the primary issues that concerned me was the lack of geographical limitation. Because when I looked at the agreement -- and it seemed to me that potentially under the agreement, you could have had a moving target as far as places he could work.

And there's certain information that would not and could not even be disclosed to him. And so when you go in and you have a Noncompete, such as this, and I'm just telling you what I think and you can disagree. That's okay. I just want you to have complete -- be at ease in that regard.

But that's what I was really focusing on because, you know, normally when you see these noncompetes, you might have a geographical area, and if it's not geographic or specifically especially

for physicians, it would name the facilities that there would be a prohibition for. And so when I looked at this, I couldn't grapple or get my hands around, okay, specifically what are we talking about.

And then last but not least, a lot of the information would be in the hands of the employer. You know, and these are a lot of things I talked about, I thought about when I went back. Because I don't think I ruled from the bench on this one. I took it back under advisement, and I just wanted to -- sometimes I just want to reflect. It's like a juror in deliberation. That's the best way to say it, you know.

But, Gerry, you have the floor. You could just tell me why I'm wrong, and that's okay. I just wanted to tell you that.

MR. BLUMBERG: We understand, Your Honor.

And we obviously substituted in after that first hearing, and we reviewed the transcript, and we noticed that that was one of the issues Your Honor was concerned about.

We do think that there actually is a geographic limitation in this agreement, however.

THE COURT: And explain to me why.

MR. BLUMBERG: Absolutely.

THE COURT: And I want to make sure I follow you.

MR. BLUMBERG: Sure. And so it's actually at that section 2.81 that we think gives a clear geographic restriction that Dr. Tang was aware of and could easily follow, following the termination of his employment with plaintiff in this matter.

THE COURT: And 2.8. Let me go there, sir.

All right. I'm following you.

MR. BLUMBERG: Okay. So there's a bit of a preamble in terms of being in consideration of the promises. But effectively, starting at the subsection little (i), which is at the end of the six lines, starting to the seventh line.

THE COURT: I am with you, sir.

MR. BLUMBERG: Effectively says: "Tang cannot provide anesthesiology and pain management services at any of the facilities at which physician has provided anesthesiology and pain management services."

And so had it stopped at simply "facilities," I think there may have been an issue saying: Okay. There could have been some issues as to what "facilities" means. But you have this

modifying clause here which limits it specifically to the subset of facilities of where he specifically has provided services during his term of employment with plaintiff.

I don't think there's any question that Dr. Tang knows which facilities he serviced while he was employed by plaintiff. We've laid that out in the moving papers. It's a very limited subset of medical facilities in Clark County.

THE COURT: What about No. 2 though? Because it doesn't stop there. It appears to me this is conjunctive; right? You have small (i)(1), a small (i)(2), where it says: "Call on, solicit, or attempt to solicit any facility serviced by the practice within a 24 month period."

How would he know that, and what does that mean? That's where it started getting -- I just started becoming concerned.

MR. BLUMBERG: Sure, Your Honor. And so that clause is in there, and he has the ability to -- Section 1 gives him a clear understanding of where he can work. Section 2 is he can't solicit the facilities.

And based on Your Honor's comments at the prior hearing and earlier this morning, I understand

there's a little bit of concern as to the definition of "facilities." I think the best way to address that in this matter is twofold, either, one --

THE COURT: Well, I think it's not just "facility," but it's also "practice" because it says "Serviced by the practice within 24 months." And I looked at that and how would he know, going in, specifically what facilities the practice has served, serviced; right?

And I think, for example, for me, would be a much closer point of fact that might be enforceable that, for example, they said: "Okay. You can't go to places you've worked, but also you can't go to these places that we have serviced," and they're listed out. Then, okay, maybe; right?

I'm just telling you what I was thinking when I was going through it, and you can respond to that. But that's what I was really -- I went back and looked at it. And I understand the general enforceability of these types of agreements and what the law requires, but that was really one of the issues I thought about.

MR. BLUMBERG: Sure. And I understand that, Your Honor. And I think the best way to address that issue is twofold: One, even in

Dr. Tang's opposition to the initial motion for P.I. and, again, I believe rehashing in the Opposition for the Motion for Reconsideration, he actually has no problem with the solicitation portion of the Noncompete. He said he's not soliciting. He thinks the nonsolicitation is the part that's actually reasonable.

Obviously, Mr. O'Malley can correct me if I'm misstating.

THE COURT: I think he might.

MR. BLUMBERG: It appeared to me his focus was on the fact that he is being prohibited from working at certain facilities, and I think that's the part that's incredibly unambiguous in the spot. The solicitation provision is a common provision in these agreements.

Did we specifically provide him with a list of where the practice served within 24 months? I understand Your Honor's concern there. But I think, for purposes of this P.I., he knows where he worked during it, and he knows that's really where he shouldn't be soliciting, and that was the scope of the P.I. we were seeking to enforce or have imposed during the pendency of the case. And I think that's an issue that may be addressed later on, at the end

of the case, if we decide to -- once you get into breach of the contract and the claims like that.

Alternatively, if that's a part of the Noncompete that Your Honor is still concerned about, at this point, that brings us to the blue lining issue that we think NRS 613 in the Nevada legislature is pretty clear on that, if Your Honor finds that some part of this Noncompete is unreasonable, Your Honor -- and the language is "shall" -- "shall modify it to become a reasonable and enforceable noncompetition clause."

That language was enacted specifically to enforce Nevada's longstanding public policy in favor of the parties' right to contract, and it was basically Nevada legislature saying: Hey, look, we like noncompetes. We're going to enforce them. If there's something in there that the Court doesn't like, we understand that may happen, but then the Court is obligated to strike that out or rephrase that in order to turn it into a reasonable provision that can be enforced. So we're not wholly striking noncompete clauses that the parties have agreed to in the contract.

And we think that's incredibly important in that case where the contract actually specifically

provided and the parties agreed, at the time of the contracting, that this Court can and shall modify any provision it finds unreasonable in the noncompetition clause.

So if, for example, this --

THE COURT: I don't remember this. It's been awhile. It's probably been four or five months. Was this issue even argued at the last hearing?

MR. BLUMBERG: It was touched on. In the order, it came out that --

THE COURT: I don't remember it at the hearing, but it's been a long time.

MR. O'MALLEY: Your Honor, if I may, my recollection is that it wasn't talked about, at least in any --

THE COURT: Or requested; right? Was it requested that I take my pen and --

MR. BLUMBERG: It was in the briefing.

MR. O'MALLEY: It was in the briefing. We footnoted it because we think it's a clear issue for reasons I'll talk about when it's my turn. But I don't remember there being a big substantive discussion about it at the hearing.

MR. BLUMBERG: And that's part of the

reason we're back here on reconsideration because we thought this was a bigger issue, that it should have taken more of, I guess, forefront of the argument if Your Honor was inclined to find that that specific nonsolicitation provision in the Noncompete was something that would render the entire provision unenforceable.

Because there's two things at play here. There's the Nevada legislature coming in and saying: "We saw this 'Golden Road' decision. We think it was completely wrong. That's not what we intended. That's not what this State's policy is regarding noncompetition clauses. We're here to specifically say 'Golden Road' was wrong. We've gone forth with blue line agreements if they find a specific provision unreasonable, and we want to enforce this State's policy saying parties have the right to contract and courts should enforce parties agreements."

And you see that specifically in section 2.10 of the Employment Agreement, which is entitled "Enforcement," and where it says: "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, which is the noncompete clause, 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' intentioned desire and request that the Court reform such portion in order to make it an enforceable."

I mean, this could not be more clear in terms of what the parties intended and expected at the time they signed this agreement, and it turned out this is exactly what the Nevada legislature codified in AB 276, which turned into NRS 613, saying: "The Court shall reform any portion of a Noncompete Agreement that it finds unreasonable."

There's no due process concern on behalf of Dr. Tang in this matter. I know he raised that in his opposition. He was clearly on notice that the Court would have the right and actually the parties were requesting that a Court reform or blue line this Noncompete provision if any part of it was found unreasonable.

The Nevada legislature then basically said: "Your parties' agreement is exactly what Nevada's public policy suggests is accurate. We don't adhere

to 'Golden Road.' We believe that decision was incorrect. This is what Nevada actually wants courts to do with noncompetes," and it's specifically in line with what the parties agreed to in this case. So if Your Honor finds that --

THE COURT: And here's my next question -- you notice I'm listening to you, and I understand what you're saying, but -- and I understand it's been a long time. It's been at least four or five months since I heard this matter, give or take.

And in looking at -- and this is my recollection. I could be wrong. It's my recollection that the defendant was saying: "Look, he was working at some place he had not worked before," something like that. Wasn't that true or not? As far as he's trying to work as an anesthesiologist at a place he had not worked while he was employed by the practice; is that true or not true?

MR. BLUMBERG: Well, we're actually specifically only seeking to prohibit him from working at places he did work. So I don't know if that was the case. But Mr. O'Malley can speak to that better than I can.

THE COURT: And you'll respond to that.

MR. O'MALLEY: Yeah, yeah. But very briefly, my recollection is that we pointed out that Dr. Tang was working for an anesthesiology practice and basically -- and accepting overflow cases for them, just being sent wherever they told him to go.

THE COURT: Okay.

MR. O'MALLEY: And then he was making -- he was taking affirmative efforts to not step on USAP's toes, so to speak, by taking -- by accepting any cases from USAP clients.

MR. BLUMBERG: And I guess, piggybacking off of that, that's the part of this noncompete clause that we're sort of seeking to clarify as to what the contract entails.

It's not saying that he can't work for Red Rock Anesthesiology Consultants, who is the people giving him the overflow cases. It's simply saying he has the duty to tell Red Rock: "I can't take cases at these 22 facilities. You can service or schedule me to work at any other facilities in Clark County" -- which allows Dr. Tang to continue making a living in his desired field of anesthesiology in Clark County.

He doesn't have to move. He doesn't have

to change jobs. He can keep working for Red Rock. He just simply has to tell Red Rock, "I can't work at these 22 facilities." Similarly, we're not saying you can't work for Dr. --

THE COURT: But I mean, 22 facilities, is it 22 facilities, or is it -- are we limiting it to the language and definition you raise under subpart (i), single (i)?

MR. BLUMBERG: They're one in the same, Your Honor. The 22 facilities are the facilities at which Dr. Tang has provided anesthesiology and pain management services during his time.

THE COURT: So he worked at all 22?

MR. BLUMBERG: Correct.

And so we specifically laid out those 22 in our Motion for Reconsideration.

THE COURT: Yeah, I saw that.

MR. BLUMBERG: And we think that's a clear way for Your Honor to make an order that is enforceable, that Dr. Tang could understand where it would basically say: Look, this is what the noncompete clause said:

"You can't work at the facilities you worked at for Fielden Hanson. Here are the 22 places where you've conceded you worked at during

your time at Fielden Hanson. For the next two years or from the two years dating back to the time you terminated his employment with Fielden Hanson, these are the only 22 places you can't work. You can still stay in Clark County. There's plenty of other facilities where you can work and provide anesthesiology. You can even work with any physician you want. You just have to tell the physician to schedule it at a different facility."

THE COURT: And, for the record, you're referring to the facilities listed on page 5 of the moving papers, starting from line 13.

MR. BLUMBERG: That's correct, Your Honor.

What we've labeled as the "noncompetition facilities."

THE COURT: I understand.

MR. BLUMBERG: So, Your Honor, I think that sums it up. Obviously, if Your Honor has more questions, I'm sure Mr. O'Malley will bring up some points that I'll need to respond to.

THE COURT: Okay. Thank you, sir.

MR. O'MALLEY: Before I address some of the points that counsel had raised, I want to draw the Court's attention to the fact that 2.8.2 is not the only noncompetition provision in the agreement.

If I could draw the Court's attention to 6.3 on page 13 of the agreement, which is Exhibit A to our opposition. It's entitled Effective Expiration or Termination: "Upon the expiration or earlier termination of this agreement, neither party shall have any further obligation hereunder except for," and then there's some verbiage here.

It says, "Immediately" -- starting on the next sentence: "Immediately upon the effective date of termination, a physician shall, one, surrender all keys, identification badges, telephones, pagers, et cetera; and then, two, withdraw from the medical staff of every facility in which the physician holds medical staff privileges."

Now, this provision, which was mentioned at the hearing on this matter -- it was brought up by USAP's counsel, and I believe I had a little something to say about it as well -- this provision is not limited to facilities at which Dr. Tang had worked. And I don't know if the interplay between these two sections is intentional, but if it is, it's got a certain diabolical genius to it.

Because section 2 -- you know, this allows USAP to point at section 2.8.2 and say: Hey, this is tailored. This is limited only to those

facilities at which Dr. Tang had worked and then just kind of leave unspoken that, elsewhere in the contract, he's required to terminate all of his privileges at any facility, whether he'd worked there or not, which charges him with knowing what those facilities are, you know.

And the definition of "facilities" as we set forth in our opposition to both the motion and the Motion for Reconsideration, it's a very broad definition. It covers events that occurred before Dr. Tang had ever worked at USAP. I believe it covers a 12-month period before he started working there. Conceivably covers cases -- it covers facilities that USAP forms relationships with after he leaves. There's no way for Dr. Tang to know where he's obligated to terminate his privileges.

And, of course, terminating his privileges is tantamount to barring him from working at the facility. He can't provide medical services anywhere where he doesn't hold staff privileges. So this is sort of a structure that is set up in such a way where USAP can have its cake and eat it.

You can have this provision under contract requiring blanket termination of all privileges everywhere. You can threaten a physician that

leaves with that provision in a Cease and Desist letter. You know, you can hope that the physician just is independently aware of it and terminates the privileges by themselves.

And then if you ever get challenged on it in court, you can just try to limit your argument to the part of the agreement that you think is enforceable while ignoring this other provision. And that is not the way the law works.

And it is one of the principal concerns that motivated the holding in the "Golden Road" case, this idea that blue lining basically allows an employer -- who holds all of the bargaining power in an employment negotiation regardless of what the job at issue is -- it lets the employer reach for the stars, in terms of burdensome provisions, and then ask the Court to either selectively apply it later or to fix it for them.

The Nevada Supreme Court thought that wasn't good public policy, looked at the "Golden Road" decision. Of course, the legislature ultimately had separate priorities and later enacted AB 276, which changed the law prospectively.

But "Golden Road" is the law that governs this case. It was enacted -- or, rather, it was

decided on July 21, 2016. This agreement was executed on December 2, 2016. AB 276 was enacted in 2017. And the statute does not -- well, this statute doesn't operate retroactively, and no statute operates retroactively absent a clear expression of intent by the legislature that it do so. In fact, I think that retroactivity isn't permissible even or unless the statute, by its expressed terms, applies retroactively.

But at the very least, need an expression of intent from the legislature. There's nothing in the legislative history that indicates that AB 276, which allows blue lining in some cases was intended to be retroactive. So "Golden Road" is the law.

"Golden Road" says there's one provision in a -- if there's one noncompetition provision that reaches too far, it takes the whole agreement. And even though the Court's order didn't specifically mention 6.3, I think that that provides -- this provision makes the Court's reasoning articulated in its order that definition of "facilities" is too broad and this thing can't -- is not reasonably limited and has no geographic limitation, that's all true. It's just there was no expressed mention of this provision.

And as for our position regarding the solicitation agreement, yeah, we do not concede that that provision is reasonable. What we do acknowledge is that a provision directed at soliciting current clients has a legitimate business purpose.

Our position in our opposition to the motion was that, even if you limit 2.8.2 to just facilities at which Dr. Tang had worked, there's no justifiable business purpose for preventing him from taking any procedures at that facility for any physician, even those who had never worked with USAP.

Yeah, the list of facilities in USAP's Motion for Reconsideration shows that he would basically be barred from every major hospital in Las Vegas. That's not reasonably related to a legitimate business purpose. Something that's targeted at USAP's clients is reasonably related. But that doesn't mean that we have no problem with the provision as a whole.

And our point was, you know, to whatever extent that there are legitimate aims in this agreement, Dr. Tang is doing the best that he possibly can to act in a manner that's consistent with that, to not compete with USAP by taking their

business.

Oh, and I don't know if the Court recalls, but Dr. Tang had initially taken cases at UMC after he departed from USAP, which he understood to not have any relationship with USAP. Then in the debriefing, in an argument, there was I think some suggestion that USAP does, in fact, have an arrangement with UMC, and I think that that little --

THE COURT: Well, I think that's what I was going to. I remember some discussion -- and understand, it's been probably 500 arguments ago.

MR. O'MALLEY: Sure.

THE COURT: I mean, it's been a long time.

But it was my impression, when I was reviewing this, that there was an issue regarding one facility that they had not serviced before and yet they're seeking to enforce it, and I was concerned about that.

MR. BLUMBERG: Yeah, and I don't know whether, to what extent USAP has a relationship with UMC. But I'm raising that little vignette to demonstrate that it is, in fact, very difficult for Dr. Tang to know which facilities USAP does or doesn't have a relationship with or which providers

he does -- that they do or don't have a relationship with. So I think the Court's concerns along those lines are well-founded and, you know, the course of events thus far bears them out.

And I think that that is all I have for now unless the Court has any additional questions.

THE COURT: Not at this time.

What about the retroactive application of the statute? What about that?

MR. BLUMBERG: Sure. I think there's two issues that explain why that is retroactive and why that should be applied to this case.

First, Tang is relying solely on this "Golden Road" case. "Golden Road," if you actually look at the case, it based its decision on two things: One, the law doesn't allow -- the law -- it believed there was no Nevada law allowing for blue lining. That reasoning has completely gone out the window as the Nevada legislature has clearly said --

THE COURT: But that's not my question.

My question is the retroactive application of the statute. Why should there be, under the facts of this case, in that the contract was entered into before the legislative change?

MR. BLUMBERG: Two things on that: One, if

it is that position that that is the applicable law, the parties specifically contracted around that. The parties have the ability to contract around the law. That's a well known principle.

THE COURT: They can, but it depends if it's in violation of the public policy.

But at the end of the day -- well, my question is this: It's my understanding, from a timing perspective, he signed his employment contract prior to the enactment of AB 276.

And so the question would be this: Does the AB 276 have retroactive application to a contract entered into before the effective date of the statute; right? Isn't that --

MR. BLUMBERG: And we believe the answer is yes, and real quickly before jumping into that, just to address one comment about that public policy Your Honor said: They can contract around so long as it doesn't violate public policy.

Now, the Nevada legislature has said public policy in this state is to allow and actually mandate blue lining. So it can't violate public policy of the state if it's actually --

THE COURT: No, no, no, no. That was just a general comment. That wasn't case specific.

But my question is retroactive application of the statute. That's essentially what it is.

MR. BLUMBERG: If it's Your Honor doesn't -- I guess Your Honor's hinting at the fact that the parties' agreement is insufficient to control the matter. So retroactively --

THE COURT: No, no. But we're in agreement. No, I think you're missing it because, you know, statutes have an effective date, and some statutes clearly set forth in the statute that this should have retroactive application. Some statutes don't.

There's a general principle as it relates to retroactive application that focuses on whether it's procedural in nature, it typically has retroactive application. If it specifically deals with taking away a substantive right, no. No retroactive application, unless it has to be specifically set forth. Even that can sometimes be challenged.

But, to me -- and it was brought up on page 12 of the opposition, and I do point that out that, okay, even if you do have AB 276, there's no retroactive application, as a matter of law, based upon the plain language of the statute. They didn't

really go into the substantive versus procedural discussion in any great length; but, nonetheless, that's part of it too.

And so here's the thing -- and I don't mind telling both of you going along on this, if I'm going to conduct an analysis like this regarding whether the statute is retroactive or not, I want to make sure we do have a little bit more of a roadmap for me. If I'm going to pull the trigger and say, look, and conduct statutory construction with the statute that doesn't appear to be any ambiguity so I would not look to the legislative history; right?

And so at the end of the day, I've got to decide what to do with this, and especially as it relates to contracts that were entered into before the AB 276 was effective. That's the issue. It really is. And we deal with that a lot in other cases. That was a big deal I had to deal with in construction defect, for example, was the change in Chapter 40, you know.

And so, anyway, tell me, what do you think? I mean, it's -- do you want more briefing on that?

MR. BLUMBERG: We can. But I think that's sort of why I keep circling back to the parties' intention because it didn't actually change the

substantive rights of the parties in this case. It essentially doesn't change any of the rights that the parties had when the contract was signed.

The parties agreed --

THE COURT: So what does it do?

Are you saying that it's a procedural statute? But if you're saying that -- this is my point: Maybe you're right. But it would be nice to have something to support that if I go down that road and accept it.

You see where I'm going?

MR. BLUMBERG: I do, Your Honor. And we'd be more than happy to provide supplemental briefing on whether or not this statute should be applied retroactively in this case.

THE COURT: Because there are contractual rights here, and I'm not going to tell you what I think or even tell you what to do. But I can see where there's an argument as far as the impacted statute on this case, and I'm trying to hit on it.

MR. BLUMBERG: And that's why we think -- and we put that in the reply brief that that's actually the No. 1 reason why we think the Supreme Court would say that NRS 613 is retroactive in this case because if you --

THE COURT: Go ahead.

MR. BLUMBERG: Because if you don't apply it, it leads to an absurd result. Where, in this case, the legislature says Courts would be blue lining. The parties in the case specifically address this issue at the time of contracting, saying the Court should blue line anything that's unreasonable.

And so, in effect, if the Court doesn't give credence to the parties' agreement or NRS 613, you're leading to a result that neither the public policy nor the parties requested. And so that's an absurd result that the Supreme Court has consistently said statutes must be interpreted in a manner to avoid absurd results. That's exactly what you get here if you --

THE COURT: Well, that -- I mean, I get that, but that's typically when you're looking at statutory scheme and whether there's some sort of conflict in that, between statutes. That's not what we're really dealing with here.

The question is this: How do I apply AB 276 to this case and should it be retroactive?

You did say that it has no impact on the substantive rights of the parties. I heard that.

And but why?

MR. BLUMBERG: Because the rights in this case were defined at the time they contract. And they, the parties, gave each other rights that's in the covenant saying, "We agree, we both expressly agree and request that a Court shall modify any offending provision." Those are the parties' substantive rights in this case regarding this matter.

So the fact that the legislature changed or enacted AB 276, it doesn't affect their substantive rights. In fact, it just confirms that what they agreed to is what the state should be enforcing.

THE COURT: So if it doesn't affect their substantive rights, how would you classify the statute?

MR. BLUMBERG: In that matter, it would almost have to be just a procedural matter, basically saying, as a rule, Courts should be doing this to follow parties' intents in this matter.

THE COURT: I kind of thought you were going to answer that way. I can't say it's a bad answer at all.

How about this: Should we have maybe do some supplemental briefing on that specific issue as

to what kind of statute it is?

Because there is no doubt that -- I mean, I haven't looked at this in a long time. But I've looked at this in great detail at points during my career. If it's procedural, it has retroactive application.

And then so what you're saying, you're saying all this -- I'm going to bottom-line what you're telling me -- "Look, Judge, this isn't going to impact their substantive rights. All this does is it informs the Court as to how to handle these scenarios."

MR. BLUMBERG: That's right, Your Honor. I think it's pretty clear.

THE COURT: Let's brief it.

MR. BLUMBERG: Pardon?

THE COURT: Let's brief it. All right?

MR. BLUMBERG: And just real quickly, while we're still on the record --

THE COURT: Oh, absolutely.

MR. BLUMBERG: -- Counsel made a few points about Section 6.3. I just want to make sure we address those on the record.

There's a few issues with that argument: One, it wasn't something that was raised or sought

or even sought to be enforced by plaintiffs as part of this P.I., and the reason for that is if you look at section 2.10 of the Employment Agreement, it specifically says sections 2.8, which is the noncompete clause, and 2.9 "Shall be construed as an agreement independent of any other provision in this agreement."

So 6.3 has nothing to do with what we're here for today. It doesn't impact our seeking preliminary injunction or enforcement of the noncompete clause. It isn't a related provision. That's why it's back in section 6 of the agreement, not in section 2, where all the noncompete language is. This is clearly enforced and addressed in the contract saying: "Look, these noncompete clauses are such a material part of this agreement," which it actually specifically says in the next paragraph, where it says:

"It is understood by and between the parties hereto that the covenant 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 addition to comply with such covenants of practice would not have entered into this agreement."

And because they're so important, they specifically set them apart in this section 2.1 saying: "These need to be construed independent of any other provision." Therefore, you can't look to this section 6.3 if it turns out the breaching -- that that's a separate breach of contract, but that doesn't impact the preliminary injunction, why we're here today, which is just for the limited purpose of seeking to enforce the Noncompete that Dr. Tang agreed to prohibiting him from working at just 22 facilities.

And then last thing I'm going to point, counsel brought up the claim that he thinks 22 facilities is unreasonable. I think that has been pretty well laid out in the briefing that many courts, the Supreme Court, even this Court has said noncompetes generally can say "Clark County" or radius around facilities. We didn't do either of that.

We limited it to the specific buildings instead of barring him from working in the entire county or even radiuses surrounding those 22 facilities. We took the most narrow approach we could. And we think the Court should be enforcing that limited provision, which is very specific and

tailored to protect the business interest of plaintiff in this case.

THE COURT: Thank you, sir.

Here's my question -- and I'll frame the issues for both of you fine gentlemen.

This is how I look at it: The issue comes down to retroactive versus prospective application of AB 276. And in a general sense -- and you can look at this in the record and make a determination whether I'm wrong or right on this -- but when it comes to substantive issues, statutes typically have prospective application only unless set forth in the body of the statute, No. 1.

No. 2, procedural statutes that are procedural in nature can have retroactive application. Consequently, I think the type of analysis we'll have to have in this case is where does this statute fit in, what box it fits in. And you can add to this, and you can say, "Judge, you're wrong," you know.

But I just, I'm looking at it from this perspective: How do we determine the impact of AB 276? Because if it can have retroactive application to this case, then it says -- it gives me guidance as to what I should do; right?

And if I remember correctly, there was some "shall" language in the statute; right?

MR. BLUMBERG: It does say "shall."

THE COURT: Yeah, it says "shall." That tells me I have no discretion. I'm going to follow the mandate of Nevada law; right? And that's what we'll do.

How much time do you fine gentlemen need for this? It can be -- and we can do blind briefing -- not blind briefing, but we both submit at the same time. I don't know.

Do we need a reply and supplement, I mean, opposition on that issue?

What do you want to do? Tell me.

MR. O'MALLEY: Unless counsel disagrees, I mean, the way we handled the briefing on the geographic, the supplemental briefing on the geographic restriction issue the first time around was we both submitted simultaneous briefs.

THE COURT: Yes.

MR. O'MALLEY: They were limited, I believe -- well, I believe the Court limited the substance to two pages.

THE COURT: We can go a little bit more. I'll let you use your discretion on that.

MR. O'MALLEY: And that's fine by me.

But I don't object to just doing it the same way where we submit simultaneously. I don't know if we --

THE COURT: Because I've read it, you know. And we know what the issue is.

And I think part of it is this, and I think it's important that, whatever way I go, I want to have a high degree of confidence because I anticipate there will be an appeal.

So any problem with that, simultaneous?

MR. BLUMBERG: No. I'm fine.

THE COURT: How much time do you need?

MR. O'MALLEY: Yeah, that's fine by me.

THE COURT: 30 days?

MR. BLUMBERG: We said two weeks, but I guess --

THE COURT: Two days -- whatever. It's up to you.

MR. O'MALLEY: We prefer two weeks or 30 days.

MR. BLUMBERG: Two weeks is fine.

THE COURT: Okay. And what I'll do then, I'll set it for a chambers decision. I don't do those very often. But I think I expect it this

time, right, and I issue a decision sometime after that. That will be the week after.

But as far as the simultaneous briefing, this is a little bit different issue. I'm not going to put an artificial page limitation on these. Because if you want to develop it, then develop a really good record on this, and you want certain things for me to look at and pages and the like, that is fine. And it is an important issue in this case.

So simultaneous brief -- exchange of briefing and filing in two weeks.

THE CLERK: So that's March 20th, on Wednesday.

THE COURT: We'll take it to the Friday.

THE CLERK: That's March 22nd.

THE COURT: Close of business. How's that? That extra two days matters.

MR. BLUMBERG: Perfect.

THE COURT: And then we'll set it for a chambers decision two weeks after that, which would be that Thursday.

THE CLERK: That Thursday, two weeks after then, is May 4th.

THE COURT: Is it? No, not May. April.

THE CLERK: Oh, I'm sorry. March. April 4th.

THE COURT: We're going pretty fast. I don't want time to go that fast.

Is that okay, Gentlemen?

MR. BLUMBERG: Fine with us.

MR. O'MALLEY: Works for us, Your Honor.

THE COURT: Enjoy your day.

(The proceedings concluded at 10:06 a.m.)

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
)SS:
COUNTY OF CLARK)

I, Dana J. Tavaglione, a duly commissioned and licensed Court Reporter, Clark County, State of Nevada, do hereby certify: That I reported the proceedings had in the above-entitled matter at the place and date indicated.

That I thereafter transcribed my said shorthand notes into typewriting and that the typewritten transcript of said proceedings is a complete, true and accurate transcription of said shorthand notes.

IN WITNESS HEREOF, I have hereunto set my hand, in my office, in the County of Clark, State of Nevada, this 9th day of April 2019.

/s/ Dana J. Tavaglione
_____
DANA J. TAVAGLIONE, RPR, CCR NO. 841

NOA

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DISTRICT COURT
CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., Plaintiffs, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	Case No.: A-18-783054-C Dept.: 16 **NOTICE OF APPEAL**

Notice is hereby given that Plaintiff Fielden Hanson Isaacs Miyada Robison Yeh, Ltd., by and through its attorneys, the law firm of Dickinson Wright PLLC, hereby appeals to the Supreme Court of Nevada from the February 5, 2019 Order Denying Motion for Preliminary Injunction. Notice of Entry the February 5, 2019 Order Denying Motion for Preliminary Injunction was filed on February 8, 2019.

DATED this 11th day of March 2019.

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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 11th day of March 2019, a copy of **NOTICE OF APPEAL** to be transmitted by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey E-File & Serve system addressed to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBINSON YEH, LTD. 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 BRIEF IN SUPPORT OF OPPOSITION TO MOTION FOR RECONSIDERATION**

Pursuant to the Court's request during the March 6, 2019 hearing on Plaintiff's Motion for Reconsideration, Devin Chern Tang ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") submit the following supplemental briefing on the issue of whether AB 276 applies retrospectively. For the reasons stated, it does not.

DATED this 22nd day of March, 2019.

HOWARD & HOWARD ATTORNEYS, PLLC

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POINTS AND AUTHORITIES

I. INTRODUCTION

Applying AB 276 retroactively would substantively modify the terms of the parties' non-compete agreement ("NCA"), which was entered into prior to its enactment; therefore, doing so would violate Dr. Tang's due process rights. Both USAP and Dr. Tang were presumed to know the state of the law when they executed the non-competition agreement ("NCA") at issue in this case. At the time of execution, Nevada's law of public policy required NCAs to be wholly reasonable, and held that reformation (or "blue penciling") was not available to rescue NCAs that were unreasonable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 158 (2016). The holding in *Golden Rd.* was itself based upon *decades* of Nevada precedent, which struck unreasonable NCAs in their entirety and prohibited judicial contract reformation as a matter of public policy.[1] Parties may not contract around the law of public policy. Thus, at the time of execution, both parties reasonably expected that the NCA would be enforced only if it were wholly reasonable, and that blue penciling would not be available, notwithstanding any contractual provision stating otherwise. Applying AB 276 retroactively upends the parties' reasonable expectations at the time of execution by effectively inserting severability and blue-lining clauses into the contract, which the parties knew was not legally permissible[2] when they agreed to the terms at issue.

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[1] *See, e.g.*, *Reno Club, Inc. v. Young Inv.* Co., 64 Nev. 312, 323, 182 P.2d 1011, 1016 (**1947**) (holding that blue penciling "would be virtually creating a new contract for the parties, which ... under well-settled rules of construction, the court has no power to do"); *Hansen v. Edwards*, 83 Nev. 189, 191, 426 P.2d 792, 793 (**1967**) ("An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable."). *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (**1996**) (holding that an unreasonable provision renders the noncompete agreement wholly unenforceable); *Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 278, 21 P.3d 16, 20 (**2001**) ("It has long been the policy in Nevada that absent some countervailing reason, contracts will be construed from the written language and enforced as written." (internal quotation omitted)); *All Star Bonding v. State*, 119 Nev. 47, 51, 62 P.3d 1124, 1126 (**2003**) ("We are not free to modify or vary the terms of an unambiguous agreement." All of these cases were cited with approval in *Golden Rd. See* 376 P.3d at 156–158.

[2] USAP's form contract included a severability clause and blue-lining clause at the time of execution, which is not surprising in a form adhesion contract used in a multiple states, at least some of which may have allowed reformation and blue penciling. However, at the time of

II. *GOLDEN RD.*, ITS ANTECEDENTS IN NEVADA LAW, AND AB 276

Golden Rd. was not some radical departure from Nevada law that was swiftly "corrected" by the legislature. Rather, it was a straightforward application of long-established legal principles that produced a result of which the newly-elected 2017 legislature did not approve. The legislature therefore statutorily changed Nevada's law of contracts to produce results more to its liking, as it is empowered to do. However, it was the *legislature* that departed from long-established Nevada law, and there is no indication either in the legislative history or the text of the enactment itself that it intended to do so retrospectively. The Court may therefore not apply AB 276 retroactively. *See Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988) (reversing and remanding district court's finding of retroactivity because "[t]he legislative history of [the statute] does not support the conclusion that [it] was meant to be applied retroactively"); *see also* Miller *v. Burk*, 124 Nev. 579, 589, 188 P.3d 1112, 1119 (2008) (holding enactments must have only "prospective application, unless the [enactment] specifically provides otherwise").

A. Golden Rd. was Supported by Decades of Nevada Public Policy Precedent

On July 21, 2016, the Nevada Supreme Court held in *Golden Rd.* that Nevada's established law of public policy precluded blue penciling an unreasonable NCA. 376 P.3d at 158. The case involved an NCA which prohibited the defendant (a casino host) from "employment, affiliation, or service" with any gaming operation within 150 miles of her former employer for a period of one year. *Id.* at 153. The district court held that the NCA was overbroad because it precluded the defendant from working for any casino in *any* capacity for its term, and the Nevada Supreme Court affirmed that ruling. *Id.*

The plaintiff employer urged the Supreme Court to "blue pencil" the agreement by narrowing its scope to render it enforceable. *See id.* at 156. The Supreme Court declined to do so, noting that, under long-standing Nevada precedent, "an unreasonable provision renders [a]

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execution, neither USAP nor Dr. Tang could have reasonably expected that provisions directly contrary to decades of Nevada law would have been enforced in a Nevada court. Indeed, ***if USAP had had intended to impose terms on Dr. Tang against then-existing public policy, the entire contract would be void.*** *Columbia/HCA Info. Services, Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 224 (2001) ("[T]his court will not enforce contracts that violate public policy.").

noncompete agreement wholly unenforceable." *Id.* (citing *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996)). Nevada's law of contracts had also long prohibited reformation or "blue penciling" of a contract where the terms were unambiguous. *Id.* (citing *Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947)). ("This would be virtually creating a new contract for the parties, which . . . under well-settled rules of construction, the court has no power to do.").

The *Golden Rd.* court made clear that its ruling was based on an application of Nevada's law of public policy as articulated in the Court's prior precedents:

> Our exercise of judicial restraint when confronted with the urge to pick up the pencil is sound public policy. Restraint avoids the possibility of trampling the parties' contractual intent. *See* Pivateau, supra, at 674 ("[T]he blue pencil doctrine ... creates an agreement that the parties did not actually agree to."); *Reno Club*, 64 Nev. at 323, 182 P.2d at 1016 (concluding that creating a contractual term operates beyond the parties' intent and the court's power). Even assuming only minimal infringement on the parties' intent, as the dissent suggests, a trespass at all is indefensible, as our use of the pencil should not lead us to the place of drafting. Our place is in interpreting. Moreover, although the transgression may be minimal here, ***setting a precedent that establishes the judiciary's willingness to partake in drafting would simply be inappropriate public policy as it conflicts with the impartiality that is required of the bench***, irrespective of some jurisdictions' willingness to overreach.
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> [* * *]
>
> ***We have been especially cognizant of the care that must be taken in drafting contracts that are in restraint of trade.*** *Hansen [v. Edwards]*, 83 Nev. [189], 191, 426 P.2d [792,] 793 [(1967)] ("An agreement on the part of an employee not to compete with his employer after termination of the employment is in restraint of trade and will not be enforced in accordance with its terms unless the same are reasonable."). ***A strict test for reasonableness is applied to restrictive covenants in employment cases because the economic hardship imposed on employees is given considerable weight.*** [Citation.] "One who has nothing but his labor to sell, and is in urgent need of selling that, cannot well afford to raise any objection to any of the terms in the contract of employment offered him, so long as the wages are acceptable." [Citation.]

Golden Rd., 376 P.3d at 158 (emphases added). The Court concluded by stating "***[i]n light of Nevada's caselaw and stated public policy concerns, we will not reform the contract*** to change the type of employment from which [the plaintiff] is prohibited." *Id.* at 159. The Court therefore struck the entire non-competition agreement. *Id.*

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B. AB 276 Changed Established Nevada Law by Revising NRS 613

On March 10, 2017 (and shortly following the 2016 elections), the newly-seated Nevada legislature introduced AB 276. The Bill proposed various amendments to NRS Chapter 613 (entitled "Employment Practices"). Notably, the text of the Bill as introduced said *nothing* about blue penciling – instead, it merely prohibited employers from discriminating against any person because the person inquired about, discussed, or disclosed his or her wages or the wages of another person.[3] (*See generally* Assembly Bill No. 276, March 10, 2017, attached as **Exhibit A**.) Nor was blue-penciling mentioned in the first reprint of the Bill, which made only minor wording changes to the initial draft without changing the substance. (*See generally* Assembly Bill No. 276, First Reprint, April 24, 2017, attached as **Exhibit B**.) It was only in the second reprint of the Bill, published on May 19, 2017 that the legislature proposed revising NRS 613.195(5) to state as follows:

> If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court shall revise the covenant to the extent necessary and enforce the covenant as revised. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

(*See* Assembly Bill No. 276, Second Reprint, May 19, 2017, attached as **Exhibit C**.) The second reprint of the Bill also protected employees subject to non-competition agreements if clients of their former employers seek them out without being solicited, and protected employees

[3] The Bill as introduced was entitled "AN ACT relating to employment; prohibiting an employer, employment agency or labor organization from discriminating against certain persons for inquiring about, discussing or voluntarily disclosing information about wages under certain circumstances; and providing other matters properly relating thereto," which illustrates that the Legislature's focus was on that issue rather than blue penciling when it introduced the bill. (*See* Ex. A at 1.)

subject to a NCA who are laid off by providing that they are bound only as long as they are receiving severance pay. (*See generally id.*)

Discussion of the newly-added blue penciling provision was sparse during the May 24, 2017 meeting of the Senate Committee on Commerce, Labor, and Energy. (*See generally* Minutes, attached as **Exhibit D**.) Assemblywoman Ellen B. Spiegel introduced the Bill, and she spoke at length about the Bill's primary purpose of protecting employees who share wage information from retaliation by their employers. (*See* Ex. D at 12–14.) She then spoke briefly about the protections for laid off employees and ex-employees who are sought out by clients of their former employer.[4] (*Id.* at 14-15.) She mentioned the blue penciling provision last, and the entirety of her remarks on the subject were as follows:

> Another provision this bill contains is bluelining. If a court of law finds that provisions in the noncompete agreement are invalid, it can strike out the invalid components but leave in what is valid.

(*Id.* at 15.) And that was all—no mention of the *Golden Rd.* decision, no fulminating about any "absurd result" or misapplication of the law, no expression of any intent to retroactively upend *Golden Rd.* or the decades of legal authority upon which it was based. Just a dry, two-sentence statement that the Bill, if enacted, would allow blue penciling (or "bluelining"). (*See id.*)

The only mention of the blue-penciling provision during the public comment period came from Misty Grimmer, a lobbyist for the Nevada Resort Association. (*Id.*) She thanked Assemblywoman Speigel for the addition of the blue penciling provision, which she said was "add[ed] on our [*i.e.* the Resort Association's] behalf." (*Id.* at 15.) She characterized the addition as "clarify[ing] in statute something that had been the practice of the courts for decades," apparently referring blue penciling, which had in fact been prohibited by Nevada law for over 40 years.[5] (*Id.*) She then inaccurately characterized *Golden Rd.* as a departure from established law, and expressed her enthusiasm for the Bill's "clarifications." (*Id.*) After three perfunctory

[4] Assemblywoman Spiegel referred to this latter protection as the "hairdresser clause," so-named because clients of hairdressers will often follow that hairdresser wherever they go after a departure, even without being solicited.

[5] *See* cases cited in note 1, *supra*.

statements of support by other lobbyists, Chair Atkinson called the Bill to a vote, and it was passed. (*Id.* at 15–16.)

AB 276 was read a third time on May 26, 2017, and passed once again. Governor Sandoval signed the Bill into law on June 3, 2017.

III. AB 276 CANNOT BE APPLIED RETROSPECTIVELY

When Dr. Tang executed USAP's form employment agreement in December of 2016, he did so relying upon the law is it then existed. At that time, both USAP and Dr. Tang had knowledge (whether actual or constructive) that: (1) an NCA is wholly void under Nevada law if any of its provisions are unreasonable; and (2) a Nevada court may not blue pencil an unreasonable NCA to render it enforceable. *Golden Rd.*, 376 P.3d at 158; *accord Deeter*, 112 Nev. at 296, 913 P.2d at 1275. USAP therefore presented its terms to Dr. Tang knowing that its form blue-lining and severability provisions were not enforceable, and Dr. Tang agreed to the NCA knowing that he would be bound only if a court found all of the terms to be reasonable. Applying AB 276 retroactively would upend those mutual expectations and substantively change the parties' agreement; therefore, retroactive application would violate Dr. Tang's due process rights. Even if due process were not an issue, Nevada law will only apply a statute retrospectively where the legislature manifests a clear intent that it do so. Here, neither the text of AB 276 nor its legislative history provide *any* indication that the legislature intended it to be retroactive. Thus, AB 276 does not apply retroactively.

A. Both USAP and Dr. Tang Were Bound by the State of Nevada Law at the Time of Executing the NCA, Which Means they were Bound by Golden Rd.

There is a non-rebuttable presumption that everyone who enters into a contract does so knowing the state of the law. *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915). Thus, it is a "well-established principle of contract law that statutes and laws in existence at the time a contract is executed are considered part of the contract. *Liccardi v. Stolt Terminals, Inc.*, 178 Ill. 2d 540, 549 (1997); *see also Williams v. Stone*, 109 F.3d 890, 896 (3d Cir. 1997) ("[P]arties to a contract are presumed to contract mindful of the existing law and . . . all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them."). This is sensible

and necessary because construing a contract as being formed *contrary* to applicable law (including the law of public policy) would render the entire contract unenforceable. *See Clark v. Columbia/HCA Info. Services, Inc.*, 117 Nev. 468, 480, 25 P.3d 215, 224 (2001) ("[T]his court will not enforce contracts that violate public policy."). Courts therefore assume that the parties intended to comply with the law and incorporate it into their agreement. *Clark County v. Bonanza No. 1*, 96 Nev. 643, 652, 615 P.2d 939, 945 (1980) ("To the extent the county's obligation is ambiguous, we must construe it to avoid conflict with public policy.").

At the time of entering into the NCA, both USAP and Dr. Tang knew that the holding in *Golden Rd.* precluded blue penciling of the non-competition clause or severability of unenforceable provisions. 376 P.3d at 159. Any provisions of the NCA which purport to allow blue penciling or severability[6] were therefore legally irrelevant because they *must* be—otherwise, USAP would have entered into a contract with a term expressly violating Nevada's public policy, which would render the entire contract void. *Columbia/HCA*, 117 Nev. at 480, 25 P.3d at 224; *accord Johnson v. PPI Tech. Services, L.P.*, 3 F. Supp. 3d 553, 560 (E.D. La. 2014) ("[A] contract against public policy [is void and] cannot be made valid by ratification."); *see also Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 217 (1997) ("[W]e recognize that a construction of a contract which renders the agreement enforceable rather than void is preferred.").

In short, at the time of execution, both of the parties knew that Nevada law required the non-competition agreement to be reasonable as a whole and that blue penciling would not be available to rescue the agreement if it overreached, and they implicitly agreed to abide by those rules. *Bonanza No. 1*, 96 Nev. at 652, 615 P.2d at 945.

B. Applying AB 276 Retroactively Would Materially Alter the Parties' Rights and Obligations Under the NCA, Which Would Violate Due Process and the Federal Contracts Clause

"[T]he protection afforded by the due process clause of the Fourteenth Amendment to the United States Constitution extends to prevent retrospective laws from divesting vested rights."

[6] *See, e.g.*, Section 2.8.3 of the NCA ("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.")

Ettor v. Tacoma, 228 U.S. 148, 155–56, 33 S.Ct. 428, 430–31 (1913); *accord Public Emp. Ret. v. Washoe Co.*, 96 Nev. 718, 721–23, 615 P.2d 972, 974 (1980). Moreover, Article I, § 10, of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." If applied retrospectively, AB 276 would materially affect Dr. Tang's rights and obligations under the NCA. At the time of execution, Dr. Tang reasonably relied upon Nevada's law of public policy as articulated in *Golden Rd.* and its antecedents, and was secure in the knowledge that: (1) the NCA would not be enforced against him if a court held it unreasonable; and (2) a reviewing court would not rewrite the contract. Retroactively applying AB 276 would upend these bedrock assumptions and place Dr. Tang in a contractual relationship fundamentally different than the one he had entered into. This is not permissible under the Constitution, and AB 276 cannot be applied retroactively.

C. AB 276 Cannot Be Applied Retroactively Because the Legislature Manifested no Intent that it Do So

Even if Due Process or the Contracts Clause were not an issue, AB 276 could nevertheless not be applied retrospectively because Nevada law requires a clear manifestation of intent by the legislature that an enactment work retroactively for a court to give it retroactive operation. There is no such expression of intent here.

"Retroactivity is not favored in the law." *Cnty. of Clark v. LB Props., Inc.*, 129 Nev. 909, 912, 315 P.3d 294, 296 (2013) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). This is so because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Sandpointe Apts. v. Eighth Jud. Dist. Ct.*, 129 Nev. 813, 820, 313 P.3d 849, 854 (2013) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)). Thus, absent clear legislative intent to make a statute retroactive, courts must interpret statutes as having only a prospective effect. *Nevada Power Co. v. Metropolitan Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163 (1988) (reversing and remanding district court's finding of retroactivity because "[t]he legislative history of [the statute] does not support the conclusion that [it] was meant to be applied retroactively"); *see also* Miller *v. Burk*, 124 Nev. 579,

589, 188 P.3d 1112, 1119 (2008) (holding enactments must have only "prospective application, unless the [enactment] specifically provides otherwise").

Here, there is absolutely nothing in either the legislative history or the text of revised NRS 613.195(5) indicating that the legislature intended that the statute operate retroactively. The statutory text says nothing about retroactivity. The legislative history says nothing about retroactivity, nor does it state that the legislature believed that *Golden Rd.* was a departure from then-existing Nevada law. Indeed, the legislative history supports a conclusion that the "blue penciling" provision was thrown into AB 276 as a near-afterthought, as the first two drafts of the Bill included no reference to blue penciling whatsoever. In any case, there is simply no basis for concluding that the legislature intended AB 276 to apply retroactively; therefore, it must apply only prospectively.

IV.
CONCLUSION

AB 276 does not apply retroactively, and the NCA cannot be blue penciled. The Court should deny Plaintiff's Motion for Reconsideration.

DATED this 22nd day of March, 2018.

HOWARD & HOWARD ATTORNEYS PLLC

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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 this day I served the attached **SUPPLEMENTAL BRIEF IN SUPPORT OF OPPOSITION TO MOTION FOR RECONSIDERATION** 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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I certify under penalty of perjury that the foregoing is true and correct, and that I executed this Certificate of Service on **March 22, 2019**, at Las Vegas, Nevada.

/s/ Anya Ruiz

An Employee of Howard & Howard Attorneys PLLC

4812-6996-1102, v. 1

EXHIBIT A

Assembly Bill No. 276–Assemblymen Spiegel, Joiner, Diaz; Bilbray-Axelrod, Carlton, Cohen, Miller, Swank, Thompson and Yeager

Joint Sponsors: Senators Parks; Manendo and Segerblom

CHAPTER.....

AN ACT relating to employment; prohibiting an employer, employment agency or labor organization from discriminating against certain persons for inquiring about, discussing or voluntarily disclosing information about wages under certain circumstances; revising provisions governing noncompetition covenants; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain employment practices as unlawful and prohibits certain employers, employment agencies and labor organizations from engaging in such practices. (NRS 613.330) With certain exceptions, this prohibition only applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks, either in the same or the preceding calendar year as when an unlawful employment practice occurred. (NRS 613.310) **Section 3** of this bill prohibits such an employer, an employment agency or a labor organization from discriminating against a person with respect to employment or membership, as applicable, for inquiring about, discussing or voluntarily disclosing information about wages. This provision does not apply to any person who has access to information about the wages of other persons as part of his or her essential job functions and discloses the information to a person who does not have access to that information, except as ordered by the Labor Commissioner or a court of competent jurisdiction.

Existing law also prohibits a person, association, company or corporation, or agent or officer thereof, from preventing any person who for any cause left or was discharged from their employ from obtaining employment elsewhere in this State. However, under existing law, a person, association, company or corporation, or agent or officer thereof, is not prohibited from negotiating, executing and enforcing an agreement with an employee which, upon termination of employment, prohibits the former employee from pursuing a similar vocation in competition with or becoming employed by a competitor of the former employer. (NRS 613.200) **Section 2** of this bill removes this provision from existing law, allowing for noncompetition agreements. **Section 1** of this bill adds requirements governing noncompetition covenants, providing that such covenants are void and unenforceable unless the covenant: (1) is supported by valuable consideration; (2) does not impose any restraint that is greater than is required for the protection of the employer; (3) does not impose any undue hardship on the employee; and (4) imposes restrictions that are appropriate in relation to the valuable consideration supporting the covenant. **Section 1** further provides that a noncompetition covenant may not restrict a former employee of an employer from providing service to a former customer or client if: (1) the former employee did not solicit the former customer or client; (2) the customer or client voluntarily chose to leave and seek the services of the former employee; and (3) the former employee is otherwise complying with the noncompetition covenant. **Section 1** also provides that if an

employee is terminated because of a reduction in force, reorganization or similar restructuring, a noncompetition covenant is only enforceable during the time in which the employer is paying the employee's salary, benefits or equivalent compensation. Finally, **section 1** provides that if an employer brings an action to enforce a noncompetition covenant and the court finds the covenant contains limitations that are not reasonable and impose a greater restraint than is necessary, the court shall revise the covenant to the extent necessary and enforce the covenant as revised.

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 613 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A noncompetition covenant is void and unenforceable unless the noncompetition covenant:

(a) Is supported by valuable consideration;

(b) Does not impose any restraint that is greater than is required for the protection of the employer for whose benefit the restraint is imposed;

(c) Does not impose any undue hardship on the employee; and

(d) Imposes restrictions that are appropriate in relation to the valuable consideration supporting the noncompetition covenant.

2. A noncompetition covenant may not restrict a former employee of an employer from providing service to a former customer or client if:

(a) The former employee did not solicit the former customer or client;

(b) The customer or client voluntarily chose to leave and seek services from the former employee; and

(c) The former employee is otherwise complying with the limitations in the covenant as to time, geographical area and scope of activity to be restrained, other than any limitation on providing services to a former customer or client who seeks the services of the former employee without any contact instigated by the former employee.

➥ Any provision in a noncompetition covenant which violates the provisions of this subsection is void and unenforceable.

3. An employer in this State who negotiates, executes or attempts to enforce a noncompetition covenant that is void and unenforceable under this section does not violate the provisions of NRS 613.200.

4. If the termination of the employment of an employee is the result of a reduction of force, reorganization or similar restructuring of the employer, a noncompetition covenant is only enforceable during the period in which the employer is paying the employee's salary, benefits or equivalent compensation, including, without limitation, severance pay.

5. If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court shall revise the covenant to the extent necessary and enforce the covenant as revised. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

6. As used in this section:

(a) "Employer" means every person having control or custody of any employment, place of employment or any employee.

(b) "Noncompetition covenant" means an agreement between an employer and employee which, upon termination of the employment of the employee, prohibits the employee from pursuing a similar vocation in competition with or becoming employed by a competitor of the employer.

Sec. 2. NRS 613.200 is hereby amended to read as follows:

613.200 1. Except as otherwise provided in this section ~~[,]~~ ***and section 1 of this act,*** any person, association, company or corporation within this State, or any agent or officer on behalf of the person, association, company or corporation, who willfully does anything intended to prevent any person who for any cause left or was discharged from his, her or its employ from obtaining employment elsewhere in this State is guilty of a gross misdemeanor and shall be punished by a fine of not more than $5,000.

2. In addition to any other remedy or penalty, the Labor Commissioner may impose against each culpable party an administrative penalty of not more than $5,000 for each such violation.

3. If a fine or an administrative penalty is imposed pursuant to this section, the costs of the proceeding, including investigative

costs and attorney's fees, may be recovered by the Labor Commissioner.

4. The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from ~~[:~~

~~(a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or~~

~~(b) Disclosing]~~ ***disclosing*** any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation ~~[,~~ ~~➥]~~ if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.

Sec. 3. NRS 613.330 is hereby amended to read as follows:

613.330 1. Except as otherwise provided in NRS 613.350, it is an unlawful employment practice for an employer:

(a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin; ~~[or]~~

(b) To limit, segregate or classify an employee in a way which would deprive or tend to deprive the employee of employment opportunities or otherwise adversely affect his or her status as an employee, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin ~~[.]~~ ***; or***

(c) Except as otherwise provided in subsection 7, to discriminate against any employee because the employee has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another employee.

2. It is an unlawful employment practice for an employment agency ***:*** ~~[to:]~~

(a) ~~[Fail]~~ ***To fail*** or refuse to refer for employment, or otherwise to discriminate against, any person because of the race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin of that person; ~~[or]~~

(b) ~~[Classify]~~ ***To classify*** or refer for employment any person on the basis of the race, color, religion, sex, sexual orientation, gender

identity or expression, age, disability or national origin of that person ~~.~~ ***; or***

(c) Except as otherwise provided in subsection 7, to discriminate against any person because the person has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another person.

3. It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any person because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin;

(b) To limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any person, in any way which would deprive or tend to deprive the person of employment opportunities, or would limit the person's employment opportunities or otherwise adversely affect the person's status as an employee or as an applicant for employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin; ~~or~~

(c) ***Except as otherwise provided in subsection 7, to discriminate or take any other action prohibited by this section against any member thereof or any applicant for membership because the member or applicant has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another member or applicant; or***

(d) To cause or attempt to cause an employer to discriminate against any person in violation of this section.

4. It is an unlawful employment practice for any employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining, including, without limitation, on-the-job training programs, to discriminate against any person because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

5. Except as otherwise provided in subsection 6, it is an unlawful employment practice for any employer, employment agency, labor organization or joint labor-management committee to discriminate against a person with a disability by interfering, directly or indirectly, with the use of an aid or appliance, including, without limitation, a service animal, by such a person.

6. It is an unlawful employment practice for an employer, directly or indirectly, to refuse to permit an employee with a disability to keep the employee's service animal with him or her at all times in his or her place of employment, except that an employer may refuse to permit an employee to keep a service animal that is a miniature horse with him or her if the employer determines that it is not reasonable to comply, using the assessment factors set forth in 28 C.F.R. § 36.302.

7. ***The provisions of paragraph (c) of subsection 1, paragraph (c) of subsection 2 and paragraph (c) of subsection 3, as applicable, do not apply to any person who has access to information about the wages of other persons as part of his or her essential job functions and discloses that information to a person who does not have access to that information unless the disclosure is ordered by the Labor Commissioner or a court of competent jurisdiction.***

8. As used in this section, "service animal" has the meaning ascribed to it in NRS 426.097.

Sec. 4. This act becomes effective upon passage and approval.

EXHIBIT B

ASSEMBLY BILL NO. 276–ASSEMBLYMEN SPIEGEL, JOINER, DIAZ; BILBRAY-AXELROD, CARLTON, COHEN, MILLER, SWANK, THOMPSON AND YEAGER

MARCH 10, 2017

JOINT SPONSORS: SENATORS PARKS; MANENDO AND SEGERBLOM

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to employment practices. (BDR 53-289)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to employment; prohibiting an employer, employment agency or labor organization from discriminating against certain persons for inquiring about, discussing or voluntarily disclosing information about wages under certain circumstances; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain employment practices as unlawful and prohibits certain employers, employment agencies and labor organizations from engaging in such practices. (NRS 613.330) With certain exceptions, this prohibition only applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks, either in the same or the preceding calendar year as when an unlawful employment practice occurred. (NRS 613.310) This bill prohibits such an employer, an employment agency or a labor organization from discriminating against a person with respect to employment or membership, as applicable, for inquiring about, discussing or voluntarily disclosing information about wages. This provision does not apply to any person who has access to information about the wages of other persons as part of his or her essential job functions and discloses the information to a person who does not have access to that information, except as ordered by the Labor Commissioner or a court of competent jurisdiction.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 613.330 is hereby amended to read as follows:

613.330 1. Except as otherwise provided in NRS 613.350, it is an unlawful employment practice for an employer:

(a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin; ~~[or]~~

(b) To limit, segregate or classify an employee in a way which would deprive or tend to deprive the employee of employment opportunities or otherwise adversely affect his or her status as an employee, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin ~~[.]~~ ***; or***

(c) Except as otherwise provided in subsection 7, to discriminate against any employee because the employee has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another employee.

2. It is an unlawful employment practice for an employment agency ***:*** ~~[to:]~~

(a) ~~[Fail]~~ ***To fail*** or refuse to refer for employment, or otherwise to discriminate against, any person because of the race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin of that person; ~~[or]~~

(b) ~~[Classify]~~ ***To classify*** or refer for employment any person on the basis of the race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin of that person ~~[.]~~ ***; or***

(c) Except as otherwise provided in subsection 7, to discriminate against any person because the person has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another person.

3. It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any person because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin;

(b) To limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any person, in any way which would deprive or tend to deprive the person of employment

opportunities, or would limit the person's employment opportunities or otherwise adversely affect the person's status as an employee or as an applicant for employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin; ~~[or]~~

(c) ***Except as otherwise provided in subsection 7, to discriminate or take any other action prohibited by this section against any member thereof or any applicant for membership because the member or applicant has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another member or applicant; or***

(d) To cause or attempt to cause an employer to discriminate against any person in violation of this section.

4. It is an unlawful employment practice for any employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining, including, without limitation, on-the-job training programs, to discriminate against any person because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

5. Except as otherwise provided in subsection 6, it is an unlawful employment practice for any employer, employment agency, labor organization or joint labor-management committee to discriminate against a person with a disability by interfering, directly or indirectly, with the use of an aid or appliance, including, without limitation, a service animal, by such a person.

6. It is an unlawful employment practice for an employer, directly or indirectly, to refuse to permit an employee with a disability to keep the employee's service animal with him or her at all times in his or her place of employment, except that an employer may refuse to permit an employee to keep a service animal that is a miniature horse with him or her if the employer determines that it is not reasonable to comply, using the assessment factors set forth in 28 C.F.R. § 36.302.

7. ***The provisions of paragraph (c) of subsection 1, paragraph (c) of subsection 2 and paragraph (c) of subsection 3, as applicable, do not apply to any person who has access to information about the wages of other persons as part of his or her essential job functions and discloses that information to a person who does not have access to that information unless the disclosure is ordered by the Labor Commissioner or a court of competent jurisdiction.***

8. As used in this section, "service animal" has the meaning ascribed to it in NRS 426.097.

Sec. 2. This act becomes effective upon passage and approval.

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EXHIBIT C

ASSEMBLY BILL NO. 276–ASSEMBLYMEN SPIEGEL, JOINER, DIAZ; BILBRAY-AXELROD, CARLTON, COHEN, MILLER, SWANK, THOMPSON AND YEAGER

MARCH 10, 2017

JOINT SPONSORS: SENATORS PARKS; MANENDO AND SEGERBLOM

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to employment practices. (BDR 53-289)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to employment; prohibiting an employer, employment agency or labor organization from discriminating against certain persons for inquiring about, discussing or voluntarily disclosing information about wages under certain circumstances; revising provisions governing noncompetition covenants; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain employment practices as unlawful and prohibits certain employers, employment agencies and labor organizations from engaging in such practices. (NRS 613.330) With certain exceptions, this prohibition only applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks, either in the same or the preceding calendar year as when an unlawful employment practice occurred. (NRS 613.310) **Section 3** of this bill prohibits such an employer, an employment agency or a labor organization from discriminating against a person with respect to employment or membership, as applicable, for inquiring about, discussing or voluntarily disclosing information about wages. This provision does not apply to any person who has access to information about the wages of other persons as part of his or her essential job functions and discloses the information to a person who does not have access to that information, except as ordered by the Labor Commissioner or a court of competent jurisdiction.

Existing law also prohibits a person, association, company or corporation, or agent or officer thereof, from preventing any person who for any cause left or was

discharged from their employ from obtaining employment elsewhere in this State. However, under existing law, a person, association, company or corporation, or agent or officer thereof, is not prohibited from negotiating, executing and enforcing an agreement with an employee which, upon termination of employment, prohibits the former employee from pursuing a similar vocation in competition with or becoming employed by a competitor of the former employer. (NRS 613.200) **Section 2** of this bill removes this provision from existing law, allowing for noncompetition agreements. **Section 1** of this bill adds requirements governing noncompetition covenants, providing that such covenants are void and unenforceable unless the covenant: (1) is supported by valuable consideration; (2) does not impose any restraint that is greater than is required for the protection of the employer; (3) does not impose any undue hardship on the employee; and (4) imposes restrictions that are appropriate in relation to the valuable consideration supporting the covenant. **Section 1** further provides that a noncompetition covenant may not restrict a former employee of an employer from providing service to a former customer or client if: (1) the former employee did not solicit the former customer or client; (2) the customer or client voluntarily chose to leave and seek the services of the former employee; and (3) the former employee is otherwise complying with the noncompetition covenant. **Section 1** also provides that if an employee is terminated because of a reduction in force, reorganization or similar restructuring, a noncompetition covenant is only enforceable during the time in which the employer is paying the employee's salary, benefits or equivalent compensation. Finally, **section 1** provides that if an employer brings an action to enforce a noncompetition covenant and the court finds the covenant contains limitations that are not reasonable and impose a greater restraint than is necessary, the court shall revise the covenant to the extent necessary and enforce the covenant as revised.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 613 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A noncompetition covenant is void and unenforceable unless the noncompetition covenant:

(a) Is supported by valuable consideration;

(b) Does not impose any restraint that is greater than is required for the protection of the employer for whose benefit the restraint is imposed;

(c) Does not impose any undue hardship on the employee; and

(d) Imposes restrictions that are appropriate in relation to the valuable consideration supporting the noncompetition covenant.

2. A noncompetition covenant may not restrict a former employee of an employer from providing service to a former customer or client if:

(a) The former employee did not solicit the former customer or client;

(b) The customer or client voluntarily chose to leave and seek services from the former employee; and

(c) The former employee is otherwise complying with the limitations in the covenant as to time, geographical area and scope of activity to be restrained, other than any limitation on providing services to a former customer or client who seeks the services of the former employee without any contact instigated by the former employee.

➥ Any provision in a noncompetition covenant which violates the provisions of this subsection is void and unenforceable.

3. An employer in this State who negotiates, executes or attempts to enforce a noncompetition covenant that is void and unenforceable under this section does not violate the provisions of NRS 613.200.

4. If the termination of the employment of an employee is the result of a reduction of force, reorganization or similar restructuring of the employer, a noncompetition covenant is only enforceable during the period in which the employer is paying the employee's salary, benefits or equivalent compensation, including, without limitation, severance pay.

5. If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court shall revise the covenant to the extent necessary and enforce the covenant as revised. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

6. As used in this section:

(a) "Employer" means every person having control or custody of any employment, place of employment or any employee.

(b) "Noncompetition covenant" means an agreement between an employer and employee which, upon termination of the employment of the employee, prohibits the employee from pursuing a similar vocation in competition with or becoming employed by a competitor of the employer.

Sec. 2. NRS 613.200 is hereby amended to read as follows:

613.200 1. Except as otherwise provided in this section ~~[,]~~ ***and section 1 of this act,*** any person, association, company or corporation within this State, or any agent or officer on behalf of the person, association, company or corporation, who willfully does anything intended to prevent any person who for any cause left or

was discharged from his, her or its employ from obtaining employment elsewhere in this State is guilty of a gross misdemeanor and shall be punished by a fine of not more than $5,000.

2. In addition to any other remedy or penalty, the Labor Commissioner may impose against each culpable party an administrative penalty of not more than $5,000 for each such violation.

3. If a fine or an administrative penalty is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the Labor Commissioner.

4. The provisions of this section do not prohibit a person, association, company, corporation, agent or officer from negotiating, executing and enforcing an agreement with an employee of the person, association, company or corporation which, upon termination of the employment, prohibits the employee from ~~[:~~

~~(a) Pursuing a similar vocation in competition with or becoming employed by a competitor of the person, association, company or corporation; or~~

~~(b) Disclosing]~~ ***disclosing*** any trade secrets, business methods, lists of customers, secret formulas or processes or confidential information learned or obtained during the course of his or her employment with the person, association, company or corporation ~~[,~~ ~~"~~~~]~~ if the agreement is supported by valuable consideration and is otherwise reasonable in its scope and duration.

Sec. 3. NRS 613.330 is hereby amended to read as follows:

613.330 1. Except as otherwise provided in NRS 613.350, it is an unlawful employment practice for an employer:

(a) To fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin; ~~[or]~~

(b) To limit, segregate or classify an employee in a way which would deprive or tend to deprive the employee of employment opportunities or otherwise adversely affect his or her status as an employee, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin ~~[.]~~ ***; or***

(c) Except as otherwise provided in subsection 7, to discriminate against any employee because the employee has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another employee.

2. It is an unlawful employment practice for an employment agency ***:*** ~~[to:]~~

(a) ~~[Fail]~~ ***To fail*** or refuse to refer for employment, or otherwise to discriminate against, any person because of the race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin of that person; ~~[or]~~

(b) ~~[Classify]~~ ***To classify*** or refer for employment any person on the basis of the race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin of that person ~~[.]~~ ***; or***

(c) Except as otherwise provided in subsection 7, to discriminate against any person because the person has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another person.

3. It is an unlawful employment practice for a labor organization:

(a) To exclude or to expel from its membership, or otherwise to discriminate against, any person because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin;

(b) To limit, segregate or classify its membership, or to classify or fail or refuse to refer for employment any person, in any way which would deprive or tend to deprive the person of employment opportunities, or would limit the person's employment opportunities or otherwise adversely affect the person's status as an employee or as an applicant for employment, because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin; ~~[or]~~

(c) ***Except as otherwise provided in subsection 7, to discriminate or take any other action prohibited by this section against any member thereof or any applicant for membership because the member or applicant has inquired about, discussed or voluntarily disclosed his or her wages or the wages of another member or applicant; or***

(d) To cause or attempt to cause an employer to discriminate against any person in violation of this section.

4. It is an unlawful employment practice for any employer, labor organization or joint labor-management committee controlling apprenticeship or other training or retraining, including, without limitation, on-the-job training programs, to discriminate against any person because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, age, disability or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

5. Except as otherwise provided in subsection 6, it is an unlawful employment practice for any employer, employment agency, labor organization or joint labor-management committee to discriminate against a person with a disability by interfering, directly or indirectly, with the use of an aid or appliance, including, without limitation, a service animal, by such a person.

6. It is an unlawful employment practice for an employer, directly or indirectly, to refuse to permit an employee with a disability to keep the employee's service animal with him or her at all times in his or her place of employment, except that an employer may refuse to permit an employee to keep a service animal that is a miniature horse with him or her if the employer determines that it is not reasonable to comply, using the assessment factors set forth in 28 C.F.R. § 36.302.

7. ***The provisions of paragraph (c) of subsection 1, paragraph (c) of subsection 2 and paragraph (c) of subsection 3, as applicable, do not apply to any person who has access to information about the wages of other persons as part of his or her essential job functions and discloses that information to a person who does not have access to that information unless the disclosure is ordered by the Labor Commissioner or a court of competent jurisdiction.***

8. As used in this section, "service animal" has the meaning ascribed to it in NRS 426.097.

Sec. 4. This act becomes effective upon passage and approval.

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EXHIBIT D

MINUTES OF THE
SENATE COMMITTEE ON COMMERCE, LABOR AND ENERGY

Seventy-ninth Session
May 24, 2017

The Senate Committee on Commerce, Labor and Energy was called to order by Chair Kelvin Atkinson at 8:35 a.m. on Wednesday, May 24, 2017, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Kelvin Atkinson, Chair
Senator Pat Spearman, Vice Chair
Senator Nicole J. Cannizzaro
Senator Yvanna D. Cancela
Senator Joseph P. Hardy
Senator James A. Settelmeyer
Senator Heidi S. Gansert

GUEST LEGISLATORS PRESENT:

Senator Aaron D. Ford, Senatorial District No. 11
Assemblyman Chris Brooks, Assembly District No. 10
Assemblywoman Ellen B. Spiegel, Assembly District No. 20
Assemblyman Justin Watkins, Assembly District No. 35

STAFF MEMBERS PRESENT:

Marji Paslov Thomas, Policy Analyst
Bryan Fernley, Counsel
Daniel Putney, Committee Secretary

OTHERS PRESENT:

Alanna Bondy, American Civil Liberties Union of Nevada
Wendy Stolyarov, Libertarian Party of Nevada
Janine Hansen, President, Nevada Families for Freedom

John Eppolito, President, Protect Nevada Children
Donald Gallimore, Sr., Protect Nevada Children; NAACP Reno-Sparks Branch 1112
Brian McAnallen, City of Las Vegas
Javier Trujillo, City of Henderson
Lea Tauchen, Retail Association of Nevada
Shannon Rahming, Chief Information Officer, Division of Enterprise Information Technology Services, Department of Administration
Misty Grimmer, Nevada Resort Association
Michael G. Alonso, Caesars Entertainment; International Game Technology
Jesse Wadhams, Las Vegas Metro Chamber of Commerce; Nevada Hospital Association; Nevada Independent Insurance Agents; MEDNAX, Inc.
Samuel P. McMullen, Association of Gaming Equipment Manufacturers
Jessica Ferrato, Solar Energy Industries Association
Travis Miller, Great Basin Solar Coalition
Casey Coffman, Sunworks
Natalie Hernandez
Allen Eli Smith, Black Rock Solar
Jerry Snyder, Black Rock Solar
David Von Seggern, Sierra Club, Toiyabe Chapter
Ender Austin III, Las Vegas Urban League Young Professionals
Larry Cohen, Sunrun
Naomi Lewis, Nevada Conservation League
Katherine Lorenzo, Chispa Nevada
Joshua J. Hicks, Sunstreet Energy Group
Daniel Witt, Tesla, Inc.
Kyle Davis, Nevada Conservation League
Tom Polikalas
Mark Dickson, Simple Power
Louise Helton, Founder, 1 Sun Solar
Jorge Gonzalez, Nevada Solar Owners Association
Joe Booker
Verna Mandez
Scott Shaw, 1 Sun Solar
Donald Gallimore, Sr., NAACP Reno-Sparks Branch 1112
Kevin Romney, Radiant Solar Solutions
Judy Stokey, NV Energy
Ernie Adler, International Brotherhood of Electrical Workers Local 1245

Danny Thompson, International Brotherhood of Electrical Workers Local Nos. 396 and 1245
Jeremy Newman, International Brotherhood of Electrical Workers Local 396
Rusty McAllister, Nevada State AFL-CIO

CHAIR ATKINSON:
I will open the hearing on Senate Bill (S.B.) 538.

SENATE BILL 538: Adopts provisions to protect Internet privacy. (BDR 52-1216)

SENATOR AARON D. FORD (Senatorial District No. 11):
Recently, Congress voted to repeal Internet privacy rules that were passed in 2016 by the Federal Communications Commission (FCC). These rules would have given Internet users greater control over what service providers can do with their data. President Trump signed Senate Joint Resolution 34 in April, and he did so through the Congressional Review Act. This Act allows Congress and the President to overturn recently passed agency regulations. Unfortunately, passage of Senate Joint Resolution 34 prohibits the FCC from implementing similar rules in the future. Under the repealed FCC rules, broadband companies providing Internet service would have been required to obtain permission from their customers to use their sensitive data, including browsing history, geolocation, financial information and medical information, to create targeted advertisements. These rules could have served as a bulwark against excessive data mining, which is the collection of personal information on the Internet as more devices become connected, such as refrigerators and washers.

Consumers in Nevada have little to no competitive choice for broadband access, which makes them vulnerable to data collection by Internet service providers. Broadband providers know their customers' identities. The providers' position gives them the unique technical capacity to surveil users in a way others cannot. Under the repealed FCC rules, customers would have had the ability to decide whether, and how much of, the information could be gathered and used by Internet service providers.

The lack of privacy rules are harmful to cybersecurity. Oftentimes, the injected advertising and tracking software used by marketers have security holes that can be exploited by hackers. Huge databases of consumer data are enticing targets for hackers. We have recently seen the effects of the WannaCry hack

worldwide. Senate Bill 538 is important because it provides guidelines for Internet Website or online service operators with respect to using consumers' information.

Section 3 defines consumer as "a person who seeks or acquires, by purchase or lease, any good, service, money or credit for personal, family or household purposes from the Internet website or online service of an operator."

Section 5 defines operator as a person who meets the following criteria:

> (a) Owns or operates an Internet website or online service for commercial purposes; (b) Collects and maintains covered information from consumers who reside in this State and use or visit the Internet website or online service; and (c) Purposefully directs it activities toward this State, consummates some transaction with this State or a resident thereof or purposefully avails itself of the privilege of conducting activities in this State.

A third party that operates, hosts or manages an Internet Website or online service on behalf of the owner is not included in the definition of operator.

Section 4 defines covered information as "personally identifiable information about a consumer collected by an operator through an Internet website or online service and maintained by the operator in an accessible form." Such information includes but is not limited to a first and last name, a home or physical address, an email address, a telephone number, and a social security number.

Section 6 requires an operator to make available a notice containing certain information relating to the privacy of covered information, which is collected by the operator through an Internet Website or online service, to a consumer. The notice must identify the categories of covered information the operator collects and the third parties with whom the operator may share the covered information. The notice must also include a description of the collection process, a description of the notification process, a disclosure as to whether a third party may collect covered information and the effective date of the notice. An operator may remedy any failure to make such notice available within 30 days after being informed of the failure. Section 7 prohibits an operator from knowingly and willfully failing to remedy such a failure within 30 days. In the event of improper actions, per section 8, the Attorney General is authorized to

seek an injunction or a civil penalty against an operator who engages in this conduct.

Proposed Amendment 4699 (Exhibit C) changes the effective date to October 1 and exempts certain small businesses that do not typically use the Internet for all of their services. This exemption was requested by Facebook.

The City of Las Vegas has proposed an amendment I have not yet determined whether to consider, but I would like a representative from the City of Las Vegas to present the amendment so that we could discuss it.

CHAIR ATKINSON:
Has a representative from the City of Las Vegas talked to you?

SENATOR FORD:
Yes.

SENATOR GANSERT:
Section 4 discusses the different things included under covered information. The sixth item listed is an identifier allowing a specific person to be contacted either physically or online. If an individual looks for an item on, say, Amazon, Amazon can contact the individual about that type of item. The individual is essentially targeted for whatever type of item the good is. This sort of marketing already happens, and it seems like a company would need an identifier to locate the individual again. Does the sixth item preclude such an activity?

SENATOR FORD:
This bill applies to more than just Internet service providers; it applies to edge providers such as Amazon and Facebook. All of the language in this bill was worked out with the industry. I accepted this language in an effort to address any possible concerns. The sixth item listed under covered information would not disallow an edge provider to continue contacting a customer with whom the edge provider already has a relationship.

SENATOR GANSERT:
This bill may not preclude edge providers from this activity, but would it preclude Internet service providers? Are the two types of providers treated differently?

SENATOR FORD:
Edge providers and Internet service providers are treated the same under this bill.

CHAIR ATKINSON:
Is S.B. 538 modeled after legislation from other states?

SENATOR FORD:
Two other states have enacted laws similar to S.B. 538: California and Delaware. Other states, I believe 19, are considering this sort of legislation because of the federal government's actions. Oregon, Illinois and Minnesota are three examples. Many states are looking at Internet privacy legislation because they see it as an opportunity to protect their consumers, even when the federal government has opted not to.

CHAIR ATKINSON:
I asked that question because I wanted to determine if there was a movement happening with this sort of legislation.

SENATOR SPEARMAN:
This bill is timely. There has been news of a certain metastore in Nevada that S.B. 538 directly speaks to.

If we wait until October, would there be remedies for people trying to circumvent the penalties of this bill?

SENATOR FORD:
To be frank, I do not know. I suspect our Attorney General could utilize a deceptive trade practice statute under *Nevada Revised Statutes* (NRS) 598 to intervene. However, the Attorney General is limited based on current statutes. Senate Bill 538 would provide more Internet privacy protections after October 1. The October 1 recommendation came from the Retail Association of Nevada because it is interested in the regulations of this bill, but it needs a little time to implement them.

SENATOR SETTELMEYER:
I am not concerned with who collects the information so much as what information is collected and what is done with such information. I might reach out to other states that have enacted similar laws to determine if these laws

have been able to be enforced. The Internet is so large that it goes beyond state lines and even national lines. How do we enforce a law like this?

I have a lot of constituents worried about the government. In light of this observation, how do you feel about the proposed amendment seeking to exempt the government from this bill?

SENATOR FORD:
I am reserving judgment on that particular amendment because I have not heard any discussion yet. You can specifically ask the sponsor of the amendment your question, and based on what the sponsor says, I can determine whether or not to accept the amendment. Illinois, for example, has a litany of exemptions, many of which I do not agree with. Some of these exemptions are for municipalities. In reference to the City of Las Vegas, it has services for its constituents that require the Internet. The City of Las Vegas is concerned that with the protections this bill provides, it would be unable to provide certain services for its constituents. However, I do not want to speak on behalf of the City of Las Vegas.

I do not disagree with you about what is done with the information collected. The repealed FCC rules went further than what my bill attempts to do. I am only requiring notice and information as to how a consumer may opt out. Other laws go further. The first iteration of this bill actually required permission before information was collected. If consumers said no, services could not have been denied to them for saying so. That requirement was onerous, so we have agreed to the language in front of you. We are hoping to take incremental steps toward providing notice to individuals so that they know what type of information has been collected.

ALANNA BONDY (American Civil Liberties Union of Nevada):
New technologies are making it easier for the government and corporations to learn the minutiae of our online activities. Corporations collect our information to sell to the highest bidder, while an expanding surveillance apparatus and outdated privacy laws allow the government to monitor us like never before. With more and more of our lives moving online, these intrusions have devastating implications for our right to privacy, but more than just privacy is threatened when everything we say, everywhere we go and everyone we associate with are fair game. We have seen that surveillance, whether by the government or corporations, chills free speech and free association, undermines

a free media and threatens the free exercise of religion. Americans should not have to choose between using new technologies and protecting their civil liberties. The ACLU works to promote a future where technology can be implemented in ways that protect civil liberties, limit the collection of personal information and ensure individuals have control over their private data. We support S.B. 538 because it provides notice to consumers about what data is being collected and allows consumers to make more informed decisions about sharing their private information online.

WENDY STOLYAROV (Libertarian Party of Nevada):
I strongly echo the ACLU's sentiments. Individual privacy is absolutely vital. However, we would oppose any amendment exempting the government from the notification requirement.

JANINE HANSEN (President, Nevada Families for Freedom):
We strongly support S.B. 538. This bill is critical to our State. According to a recent *Consumer Reports* survey, 65 percent of Americans lack confidence that their personal information is private and safe from distribution without their knowledge. The Internet privacy issue has moved to the states. One of the things the *Consumer Reports* survey mentions is the many states that are considering similar legislation. These states include Alaska, Connecticut, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Montana, New York, Pennsylvania, Rhode Island, Vermont and Washington. It is absolutely critical that our privacy be protected, as it is one of our most important civil liberties. We are all at risk for identity theft and data collection, not only from private enterprises but also from the government.

SENATOR HARDY:
Ms. Stolyarov, you made a comment about an amendment exempting the government. Could you clarify your comment?

MS. STOLYAROV:
Senator Ford had mentioned there was a forthcoming amendment that would exempt the government from the notification requirement.

SENATOR HARDY:
I am asking what you think.

MS. STOLYAROV:
I am not familiar with the text of the amendment, but if it does exempt the government from the notification requirement, the Libertarian Party of Nevada would be opposed to it. Everyone has the right to know who is collecting his or her data, even if the government is the one doing so.

SENATOR HARDY:
As you understand it, the government is included in this bill without any amendment, correct?

MS. STOLYAROV:
I would hope so.

JOHN EPPOLITO (President, Protect Nevada Children):
I will read from my written testimony in support of S.B. 538 (Exhibit D).

CHAIR ATKINSON:
Are you in favor of this bill?

MR. EPPOLITO:
Yes.

CHAIR ATKINSON:
From your testimony, it does not sound that way.

MR. EPPOLITO:
We would like to see more from S.B. 538.

CHAIR ATKINSON:
You should have testified in neutral then.

MR. EPPOLITO:
This bill is a start; we would like to build upon it.

I will continue reading from Exhibit D. We proposed an amendment to Senator Ford, but we do not think he is going to use it. We also proposed the same amendment to Senator Moises Denis for S.B. 467, but we are not sure if he is going to use it either.

SENATE BILL 467 (1st Reprint): Revises provisions relating to technology in public schools. (BDR 34-1120)

This amendment would at least do something to notify parents of what is going on.

DONALD GALLIMORE, SR. (Protect Nevada Children):
We have been working for seven years to make sure people understand the effects of the breaches of Internet privacy. I will read the rest of Exhibit D. In the amendment mentioned by Mr. Eppolito, we specify opt-in options for parents.

BRIAN MCANALLEN (City of Las Vegas):
We have talked to Senator Ford, and I believe he understands what the City of Las Vegas is trying to do, which is protect the personal information constituents supply to the City of Las Vegas. Our proposed amendment (Exhibit E) would amend the definition of consumer in section 3. The amended definition would include anyone who accesses constituent services from the Internet Website or online service of an operator or exchanges information regarding such services by means of such a Website or online service.

We are trying to develop a new platform for our constituents. We would collect data voluntarily from constituents who select a variety of programs and put personal information online. As a public entity, we are subject to public records requests under NRS 239. Our new platform might not be covered under the current definitions and prohibitions on gathering public data in S.B. 538. We are trying to protect this new platform as technology changes and moves forward. We do not believe constituents who visit our government Websites want their personal identification information to be public. If we do not provide specific protections for our constituents, they will not use our constituent services platform.

Our amendment further defines operator in section 5, subsection 1 to include a government entity. This provides protection for personal identification information. The amendment also adds subsection 3 to section 6, stating, "Notwithstanding any other provision of law, an operator is not required to disclose covered information regarding a consumer pursuant to a public records request made under chapter 239 of NRS."

The amendment was drafted by our attorneys in an attempt to cover new technology. If there is a better way to write the amendment that Senator Ford would accept, we are fine with that.

SENATOR HARDY:
Do you read this bill as not including the government? Do you propose the government be included to protect people's information?

MR. MCANALLEN:
Yes.

JAVIER TRUJILLO (City of Henderson):
We have communicated with Senator Ford in regard to local governments. We support this bill and its intent—we want to protect the personal information of individuals. We also support Senator Ford's and the City of Las Vegas' proposed amendments. We do not feel we are excluded because we have over one million visitors to our Websites. Our goal is to protect our constituents and to make sure their information is protected without being subject to NRS 239.

LEA TAUCHEN (Retail Association of Nevada):
As Senator Ford mentioned, we requested the amendment to postpone the effective date to October 1. This would allow us time to educate and assist our members with compliance. We appreciate Senator Ford's consideration and willingness to make S.B. 538 workable for the retail businesses conducting commerce online in Nevada.

SHANNON RAHMING (Chief Information Officer, Division of Enterprise Information Technology Services, Department of Administration):
I will read from my written testimony in neutral to S.B. 538 (Exhibit F).

SENATOR GANSERT:
What is your opinion on the amendment adding government to this bill?

MS. RAHMING:
I have not seen the amendment.

SENATOR GANSERT:
There is a fiscal note from the Attorney General. Why did you not include one?

MS. RAHMING:
I did not include a fiscal note because I could not tell whether S.B. 538 would affect the State.

SENATOR GANSERT:
We may find out if there is an effect on the State after we figure out the amendment.

CHAIR ATKINSON:
I have received a letter of opposition to S.B. 538 (Exhibit G) from Christopher Oswald, Data and Marketing Association.

I will close the hearing on S.B. 538. The Committee will give Senator Ford time to work on the proposed amendments.

I will open the hearing on A.B. 276.

ASSEMBLY BILL 276 (2nd Reprint): Revises provisions relating to employment practices. (BDR 53-289)

ASSEMBLYWOMAN ELLEN B. SPIEGEL (Assembly District No. 20):
This bill is about two things: disclosure and job termination.

About 30 years ago, I worked at a Fortune 100 company in New York City. My job got to be quite big; I was responsible for markets all over the place. As a result, my job was cut in half, and another person was hired to do the other half. Our jobs had the same responsibilities; we were simply responsible for different areas. We were putting in long hours. My colleague, whose name was Paul, turned to me and said, "I can't believe how hard we're working and how many late nights we're putting in, and they're only paying us $34,000 a year." I looked at him and said, "How much are you making?" He replied, "$34,000 a year." My salary was in the twenties.

The next morning, I approached my boss and told her, "Paul and I were talking last night, and he told me he makes $34,000 a year. What's up with that?" She looked at me and said, "Well, Paul's a guy." I replied, "Yes, I know Paul's a guy, but what does that have to do with anything?" She said, "He needs more money. He wants to get engaged; he's saving up to buy a ring for his girlfriend. He's going to be supporting a family, and you're single, so you don't need as

much money as he does." At that point, I said, "I'm single, so that means I need more than he does because I'm supporting myself, and he's going to be part of a two-income household."

I told one of my friends, who happened to work in human resources, what had happened to me. She was incensed and said, "That can't be right." I then told her, "I'm telling you as my friend. Please don't do anything with this." The next thing I know, I am called into a corner office of a senior vice president of human resources. She told me, "There's the door." I then said, "Excuse me?" She replied, "There's the door; you're free to leave anytime. I will also tell you it is against company policy to be having these discussions about what you're earning and what your wages are. It's grounds for termination. It's pretty clear from what you told us—and yes, we spoke to Paul—that he initiated the conversation, so we're not going to fire you over this, but we are going to write you up and put it in your file so that if it happens again, you will be fired for having this conversation. By the way, we're not going to fire Paul because, well, he's a guy." I had heard there was wage discrimination, but it had never reached my consciousness that it was actually happening.

The wage gap still exists. In various hearings, you have probably heard that women earn about 78 cents on the dollar compared to men. For women of color, the disparity is even greater. As much as we like to tell ourselves the wage gap does not exist, it still does.

In December 2016, I read a story from Maddy Huffman:

> This summer, I started a job at a powder-coating warehouse working next to a 400-degree oven in 100-degree Texas weather. I was always the first one in and the last one to leave. I picked up the trade quick and produced good, quality work in a safe and timely manner. When the rest of the crew complained it was too hot to wear steel-toed boots and jeans, I never wavered. It was brought to my attention that even though I would media blast, prep and powder, and maintain job flow, I was getting paid a dollar under every male I worked beside. When I brought that to the attention of the manager, I was told that if I improved my attitude and smiled more, they would consider me for a raise in a month or so. I gave them my two weeks' notice at that point.

She went on to talk about what she did afterward, and she landed on her feet just fine. I wrote to her asking if I could share her story, and she wrote back:

> Hi, Ellen. Feel free to share my story. When I approached the manager with my pay concerns, I was told that talking wages was grounds for termination, too. It's funny though—I never brought up wages with the guys I worked with. I honestly didn't care or think twice about it. I was just happy to be working and learning something new, but when it reared its ugly head, I couldn't ignore it. Thank you for fighting for Nevada women and workers.

While I have been working on this bill this Session, I cannot tell you how many women who work in this building and are in this building have come to me and told me their stories. Most of them are afraid to come out and speak publicly because it is grounds for termination where they work. They are afraid of losing their jobs. Wage discrimination is something quiet.

Section 3 basically says somebody cannot be fired for having a discussion about his or her wages. If somebody cannot discuss his or her wages, then that person would not know if he or she were being discriminated against. The individual would not be able to make an informed decision about what to do, whether that be keeping the job, leaving it or trying to get an increase in pay.

Sections 1 and 2 address issues relating to termination and postemployment. These sections specify that an employer can ask an employee to sign a nondisclosure agreement provided it is supported by valuable consideration, is not too burdensome, does not make it impossible for the employee to obtain a new job and is appropriate for what the job is.

This bill has three other important clauses. The first one is what I call "the hairdresser clause." Many times in noncompete agreements, the employee agrees that he or she is not going to take clients away. This is perfectly reasonable from an employer's perspective because a business does not want an employee who leaves to take its entire book of business out the door. However, there is also the perspective of the clients. I am far more loyal to my hairdresser than I am to any hair salon. When my hairdresser has gone from one salon to another, regardless of what she has signed, I will seek her out. Many clients do this for all sorts of services. This clause states that if, say, a

client's hairdresser leaves and does not seek the client out but the client seeks the hairdresser out, then the hairdresser can provide services to that client.

The next clause provides layoff protection. If a company goes through something like a merger or a downturn and has to lay off employees, then those employees are only bound by their noncompete agreements while receiving severance pay. These individuals have to be able to get other jobs.

Another provision this bill contains is bluelining. If a court of law finds that provisions in the noncompete agreement are invalid, it can strike out the invalid components but leave in what is valid.

MISTY GRIMMER (Nevada Resort Association):
We support both portions of A.B. 276: the original part of the bill and the noncompete provisions Assemblywoman Spiegel was willing to add on our behalf. We are asking the Legislature to clarify in statute something that had been the practice of the courts for decades. However, a specific lawsuit came forth in which an entire noncompete agreement was thrown out because one portion of it was excessive. Section 1, subsection 5 would allow a court to keep the good parts of a noncompete agreement and toss out or renegotiate the excessive parts.

Assemblywoman Spiegel brought the other two scenarios she mentioned, which are absolutely legitimate, to our attention as well. An employer cannot lay somebody off and then say, "Oh, by the way, you can't go get a job either." Also, it is common practice that a business cannot tie the hands of its customers. A customer is allowed to go anywhere he or she wants. We support having all of these clarifications in Nevada law.

MICHAEL G. ALONSO (Caesars Entertainment; International Game Technology):
We support A.B. 276. This is a good bill. We like the provisions in it; they are reasonable.

JESSE WADHAMS (Las Vegas Metro Chamber of Commerce; Nevada Hospital Association; Nevada Independent Insurance Agents; MEDNAX, Inc.):
We support both components of A.B. 276. This is a good bill.

SAMUEL P. MCMULLEN (Association of Gaming Equipment Manufacturers):
Sections 1 and 2 are key to us. An innovative industry needs to be able to protect itself, and it needs reasonable tools. This bill provides reasonable tools. We would appreciate the Committee's support of A.B. 276.

CHAIR ATKINSON:
I will close the hearing on A.B. 276 and entertain a motion on this bill.

SENATOR SETTELMEYER MOVED TO DO PASS A.B. 276.

SENATOR GANSERT SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

CHAIR ATKINSON:
I will open the hearing on A.B. 405.

ASSEMBLY BILL 405 (1st Reprint): Establishes certain protections for and ensures the rights of a person who uses renewable energy in this State and revises provisions governing net metering. (BDR 52-959)

ASSEMBLYMAN CHRIS BROOKS (Assembly District No. 10):
As we have seen so far this Session, there are many important issues to discuss when it comes to customers' rights to generate and store energy in the State. Energy is constantly evolving, requiring renewed assessment and focus on energy policy in Nevada, which I am happy to say has been occurring these past few months. We have seen a lot of great legislation this Session that addresses customers' rights to renewable energy. Assembly Bill 405 goes hand in hand with these other bills, codifying some of the customers' rights into Nevada law. Assembly Bill 405 outlines what Nevada customers' fundamental rights around energy should be, setting a framework to protect Nevadans on what could be the biggest investments of their lives. This is especially necessary now as we move forward with new and potentially disruptive ways to access energy in Nevada.

This bill creates the contractual requirements for the lease, purchase or power purchase agreement of a distributed generation system. This bill establishes the

minimum warranty requirements for an agreement concerning a distributed generation system. Assembly Bill 405 also makes it a deceptive trade practice if a contractor fails to comply with these provisions.

Finally, A.B. 405 creates the Renewable Energy Bill of Rights, which applies to every Nevadan. As a pioneer in Nevada's solar energy industry, I know the experiences solar customers go through. It is one of the biggest purchases a person might make in his or her lifetime. The individual is signing a 20-year contract for complicated energy products. It is difficult to understand exactly what an individual is being asked to sign.

Nevada has a chance to be the Country's leader on solar energy. By creating a more streamlined process for customers, we make it that much more friendly to be a solar customer in the State.

I will read from a table explaining this bill's provisions (Exhibit H). This bill addresses three different models: the lease model, the purchase model and the power purchase agreement. Sections 9 through 11 address the lease model. Sections 12 through 14 mirror sections 9 through 11 but for the purchase model. Sections 15 through 17 mirror the previous sections but for a power purchase agreement.

In my career, I have seen people who sell distributed generation systems make wildly unrealistic claims about rates and savings. Section 18 prevents such claims from occurring by requiring a disclaimer on any contract or proposal in front of a customer. NV Energy suggested the inclusion of this section. This section is one of the more important components of A.B. 405.

Section 19 is also a critical component of this bill.

A lot of individuals read and speak Spanish but have to read complicated forms in English. Section 20 requires documents to be provided in Spanish if requested. NV Energy suggested the inclusion of this section as well.

Section 27 through the end of this bill deal with how we treat returned energy from a distributed generation system. This bill is essentially sections 1 through 26, which are the original parts of A.B. 405, and the provisions of A.B. 270, which take up the rest of this bill.

ASSEMBLY BILL 270: Revises provisions governing net metering. (BDR 58-686)

Assemblyman Justin Watkins was working on A.B. 270, but we decided to combine A.B. 405 and A.B. 270 into one bill. The provisions of A.B. 270 have been amended into A.B. 405.

The State's cumulative capacity for solar generation is currently 2.6 percent. It took Nevada 20 years to get to 2.6 percent. This bill offers a tiered reduction in the value of exported energy, referred to as a net metering adjustment charge, that is between 5 percent and 20 percent. The charge is dependent on the market penetration of solar energy in the State. As the market penetration increases, the charge increases.

In other words, we are basing the charge on peak demand. NV Energy has a peak demand of about 8,000 megawatts across the State. Capacity for solar generation is 2.6 percent of that peak, but this is only one part of the story; the rest of the story is about energy. NV Energy sold approximately 30 million megawatt-hours last year across the State. When we look at the capacity factor of distributed generation systems, it is around 22 percent if we aggregate all of the systems in the State. Considering we are only at 2.6 percent capacity, the capacity factor is 22 percent and only about 40 percent of the energy produced by a distributed generation system ever sees the grid, we are really talking about half of a percent of the grid's energy coming from distributed generation systems. When we talk about moving to a market penetration of 10 percent, that means roughly 2 percent of the energy in our grid would come from distributed generation systems.

It is important to keep these numbers in perspective. We are only moving from half of a percent to 2 percent, all the while creating jobs and giving Nevadans a choice of how they generate their electricity.

SENATOR SETTELMEYER:
I appreciate many aspects of this bill, but I have some concerns, mainly with the step-down process. What is the current exchange rate for solar?

ASSEMBLYMAN BROOKS:
There are two customer classes. One is for net metering. I am not sure where we are currently in the step-down process.

SENATOR SETTELMEYER:
You mentioned a market penetration of 5 percent. The concept of promoting renewable energy is important. I am willing to pay more for energy to do so, and many others are, too. However, how much would rates increase? Has there been an analysis of what this bill's provisions would do to a standard ratepayer?

ASSEMBLYMAN BROOKS:
Assembly Bill 405 would add a few pennies to the bills of average ratepayers, according to the calculations from NV Energy.

SENATOR SETTELMEYER:
How many pennies are you talking about?

ASSEMBLYMAN BROOKS:
I do not necessarily agree with the methodology used to calculate the costs. NV Energy considers lost revenue in what it would have sold to customers if it did not produce its own energy. This component is roughly half the calculation. I do not feel the calculation methodology is proper.

SENATOR SETTELMEYER:
I understand why you disagree with the calculations, but I would like you to find out what the costs would be. I am concerned about what this bill would do to the average ratepayer. Many businesses in my district use a lot of power, including myself.

The rate in this bill is based on 5 percent, but is that 5 percent of the total power sold in the State?

ASSEMBLYMAN BROOKS:
Are you talking about 5 percent on the rate side or the market penetration side?

SENATOR SETTELMEYER:
The market penetration side, if I am correct, takes into consideration the total power sold in the State. Are the percentages for market penetration based on the total power sold in the State or the power sold by Nevada energy companies?

ASSEMBLYMAN BROOKS:
Assembly Bill 405 is an expansion of current net metering law, which applies to NV Energy. We are basing the numbers on NV Energy's 2016 peak demand across the State.

SENATOR SETTELMEYER:
It seems to me that the total megawatts sold refers to the total amount sold in the State, which brings in the various co-ops.

ASSEMBLYMAN BROOKS:
This bill refers to NV Energy.

SENATOR SETTELMEYER:
I will try to find the answer in the bill text.

ASSEMBLYMAN BROOKS:
There are two components. One is the all-time peak, which is a moment in time. This component is separate from the amount of energy sold in the State. The all-time peak for 2016 was 8,000 megawatts, and the amount of energy sold in 2016 was 30 million megawatt-hours.

SENATOR SETTELMEYER:
Is the energy sold only by NV Energy?

ASSEMBLYMAN BROOKS:
It is sold by NV Energy or the companies referred to in this bill.

SENATOR SETTELMEYER:
I did not read A.B. 405 that way.

CHAIR ATKINSON:
Which section of this bill relates to consumer protection?

ASSEMBLYMAN BROOKS:
Consumer protection is addressed in sections 2 through 20.

CHAIR ATKINSON:
Do these sections apply to all scenarios? There was some debate about this before. Some individuals felt they were covered, but some were not covered.

ASSEMBLYMAN BROOKS:
Yes. Within sections 2 through 20, the three different models—purchase, lease and power purchase agreement—are addressed. There are more similarities among these models than differences, but the definition of each model is unique. All three models require making the customer aware of the recovery fund. Also, there cannot be false claims about savings.

CHAIR ATKINSON:
Are you saying the consumer protection provisions apply to all scenarios?

ASSEMBLYMAN BROOKS:
Yes.

CHAIR ATKINSON:
What is the typical warranty for a rooftop solar system?

ASSEMBLYMAN BROOKS:
In the industry, the warranty is all over the place. This bill states that the warranty must be a minimum of seven years.

CHAIR ATKINSON:
How can you or A.B. 405 define what the warranty is? The warranty comes from the manufacturer.

ASSEMBLYMAN BROOKS:
I misspoke earlier. The warranty is a minimum of ten years. Assembly Bill 405 states that the company must provide, at minimum, a ten-year warranty.

CHAIR ATKINSON:
It is ten years, not seven, correct?

ASSEMBLYMAN BROOKS:
Correct. In the industry, there are warranties between 10 years and 20 years.

CHAIR ATKINSON:
This bill refers to the minimum warranty a company must offer, but can the company offer a longer warranty?

ASSEMBLYMAN BROOKS:
Yes. There are companies that offer warranties longer than ten years.

CHAIR ATKINSON:
In regard to lease customers, does this bill protect them for the life of the system for the entire term of the lease? I assume the system would be covered for the entire term of the lease.

ASSEMBLYMAN BROOKS:
Regarding the purchase model, the process is fairly straightforward. The system must be covered by a warranty from the company for a certain number of years. In a lease, the process is a little different. Customers do not own the equipment. It is in the equipment owner's best interests to make sure the system is operating. We did, however, include roof penetration in the minimum ten-year warranty requirement. The system would be covered under the minimum ten years. The owner would be on the hook for the system to work after that period. If the system breaks down, the owner is not receiving any money, and the lease customer is not receiving any savings.

CHAIR ATKINSON:
Which agency is going to police this bill's provisions? How will customers know where to go to have their issues rectified?

ASSEMBLYMAN BROOKS:
Section 20 makes any violation of sections 2 through 20 a deceptive trade practice and consumer fraud. If a customer feels a company has violated any of these sections, he or she has the right to sue to recover any damages. Under the deceptive trade practice statutes, the Attorney General can prosecute these violations. Additionally, customers can go through the State Contractors' Board for contractor violations, and there is a recovery fund associated with that. When fraud took place a few years ago, many solar customers accessed the recovery fund to recover some of their money.

CHAIR ATKINSON:
Are you saying there is no simple answer in regard to who is going to police this bill because of the different variables? I am asking this because we might get to a point where the provisions of A.B. 405 become tasking.

ASSEMBLYMAN BROOKS:
There is no enforcement agency specific to this type of contract. These solar contracts would be similar to many other contracts in that if a company committed fraud, the consumer would have recourse, which, in this case, would be to approach the Attorney General or sue. The most important part of this bill is that any violation of sections 2 through 20 would be considered consumer fraud. This provides a consumer with all of the protections under the deceptive trade practice statutes.

CHAIR ATKINSON:
In the past, people who were aggrieved were not sure where to go to have their issues rectified. Your description of what a consumer would do is not clear to me. We need to provide clarity with respect to that. People need somewhere to go. We can talk about this and work on it, but we need to figure something out.

SENATOR SETTELMEYER:
Section 28 refers to the cumulative installed capacity of all net metering systems in the State. I am concerned with that. With the turnout on the Energy Choice Initiative last election, it is clear things will change in the future. I am concerned about forcing one group to pay for the entire State. We should consider rewording this section to ensure A.B. 405 only applies to the regulated industry. We have some unregulated energy providers in Nevada.

ASSEMBLYMAN BROOKS:
This bill is already targeted toward the regulated energy industry, but I am willing to clarify that language. This bill refers to NV Energy. I am also open to adding language that would predict where our State might be in the future.

SENATOR SETTELMEYER:
I do not want A.B. 405 to apply to the entire State. I do not want people to pay for something they are not a part of. This bill refers to the entire State, not just NV Energy.

SENATOR GANSERT:
Because the majority of Nevadans voted yes on the Energy Choice Initiative last election, there is a sense that our State's citizens want an open, competitive energy market. Currently, we only have one major provider: NV Energy.

Section 10, subsection 19, which is probably repeated for the purchase and power purchase agreement models, gives options when it comes to the sale of the property or the death of the lessee. If we have open, competitive markets and different providers of energy in the State, I am not sure how this bill would work. Right now, it sounds like individuals get 20-year contracts. If we have a major energy provider that decides to no longer be an energy provider, what would happen to the individuals in 20-year contracts with that provider?

ASSEMBLYMAN BROOKS:
The question of what are we going to do has come up over and over again on almost everything we have done regarding energy this Session. First of all, the Energy Choice Initiative has to pass again, and then the Legislature has to come up with what it wants to do to meet the intent of the Initiative. Assembly Bill 405 addresses some of what the Legislature has to do by giving people a choice in how they procure their electricity.

From where we are now to the complete deregulation of the energy market, we are going to be somewhere in that spectrum. There could be a provider of last resort that is responsible for the customers in the State who have made solar agreements. If a company came to the State wanting to do business, that company could look at customers with net metered systems and the rules in place and then decide these customers were good to have in its portfolio. The company could court these customers through rates or tariffs.

In future sessions, Legislators will have to address where Nevada wants to go as a State around the subject of energy choice. Depending on how far we go down the path of energy choice, A.B. 405 might survive, or we might rewrite every energy statute in NRS.

SENATOR GANSERT:
If somebody has a 20-year agreement with a power company, can that power company transfer the agreement to another entity?

ASSEMBLYMAN BROOKS:
Yes. There are currently 40 or 60 power purchase agreements in the State between NV Energy and other entities. Those agreements would have to be transferred and dealt with.

The lease transfer provision you mentioned is between a business and a Nevadan; the provision does not involve the utility.

SENATOR GANSERT:
I am concerned about the warranty. The minimum warranty requirement is 10 years, but some contracts last 20 years.

You also mentioned a recovery fund. Are we planning for recourse if contractors go out of business? Are there contributions to the recovery fund to guarantee money is available in the long term?

ASSEMBLYMAN BROOKS:
There is a mechanism whereby all contractors pay into the recovery fund. There are provisions for recovering money if there was fraud or the contractor went out of business in the middle of a customer's project. All installing contractors pay into the recovery fund.

CHAIR ATKINSON:
Everybody on this Committee believes the Energy Choice Initiative will pass again; 72 percent of Nevada voters voted yes last election. Nevadans have spoken, and they will speak again in a couple of years. I do not agree that every energy bill this Session would conflict with the Initiative. Some energy bills would stand alone. Assembly Bill 405 is not as specific, and it puts years on a customer. Some of the other energy bills do not put as many years on a customer.

There are individuals who have some concerns with this bill. We may have to do something, and we may need some language that addresses whether the Initiative becomes a reality in the State. We cannot ignore this; we have to talk about it as we go forward. It is not fair to our constituents to ignore it.

SENATOR SPEARMAN:
In one or two sentences, tell me what the purpose of this bill is.

ASSEMBLYMAN BROOKS:
This bill is meant to bring solar back to the State and to protect consumers while we do it.

SENATOR SPEARMAN:
The question of consumer protection is a recurring theme throughout all of the energy bills this Session. If we are talking about consumer protection and renewable energy, how do these two things intersect? People do not understand how much energy Nevada imports and what the exposure would be if our base load increased.

ASSEMBLYMAN BROOKS:
That is one important component of consumer protection that incorporating renewable energy is trying to address. Over 80 percent of Nevada's energy is imported in the form of fossil fuels. By giving a consumer the ability to generate and store his or her electricity, the consumer is protected from potential price increases in the future. That is one of the key components of the choice to generate one's energy.

SENATOR SPEARMAN:
What do you mean by 80 percent? Do you have a dollar figure regarding how much our State pays someplace else to get our energy?

ASSEMBLYMAN BROOKS:
NV Energy sold 30 million megawatt-hours last year. Of that 30 million, over 80 percent was generated from imported energy, namely natural gas. I do not have an exact dollar amount.

SENATOR SPEARMAN:
Although you do not have an exact figure, it is clearly 80 percent, correct?

ASSEMBLYMAN BROOKS:
Yes.

SENATOR SPEARMAN:
The closest business model I could find was Xcel Energy, which operates in eight states. One of those states is Texas, which is completely deregulated and has choice for all of its consumers. It would be my expectation, in terms of what the Chair has said, to determine a way in which this bill would work. We could learn from Texas. My major concern is the fact that the price of natural gas is expected to increase. We need to work on something to protect consumers. If 80 percent of the energy we receive is ready to increase in price, we need to determine how to use A.B. 405 and other energy legislation for the

benefit of consumers. This bill is mainly for solar, but anyone who has heard me talk over the last two or three years knows I am trying to get our State to a place where we have a good energy mix, including solar, wind, biofuels, geothermal, etc. How can this bill help move Nevada forward and protect our State's consumers should there be a spike in the price of natural gas?

ASSEMBLYMAN BROOKS:
Choice will provide protection to consumers. There is a tremendous amount of reliability associated with the ability to create and store one's energy. This also insulates consumers from rate increases such as price shocks from out-of-state commodities. If somebody is generating a good portion of his or her energy, the other portion of it, which has to be bought and is subject to price escalation, is minimized. The risks are mitigated.

SENATOR SPEARMAN:
Is the storage piece of A.B. 405 complementary to a bill the Chair is sponsoring, S.B. 204?

SENATE BILL 204 (1st Reprint): Requires the Public Utilities Commission of Nevada to investigate and establish biennial targets for certain electric utilities to procure energy storage systems under certain circumstances. (BDR 58-642)

ASSEMBLYMAN BROOKS:
Yes.

CHAIR ATKINSON:
Section 24, subsection 6 mentions priority. What do you mean by priority given to rooftop solar customers during the planning process?

ASSEMBLYMAN BROOKS:
The priority aspect is trying to address how we bring on new resources. Instead of potentially investing in a power plant where money is funneled elsewhere, we are looking at investing in and giving priority to Nevadans. If somebody is a Nevadan and that person has invested his or her money in a system, there is value to that. There is value to the system being a Nevada asset installed using Nevada labor. We would like to see that given priority in the planning process. "Given priority" is an intentionally vague statement meant to encourage planners when adding new resources.

CHAIR ATKINSON:
Some people place renewable energy and solar in different categories, but I look at them as one thing. Why would you not want the utility to look at all types of renewable energy?

ASSEMBLYMAN BROOKS:
We do look at all types of renewable energy. It is going to take all types of renewable energy to achieve our State's energy goals. Geothermal, wind, solar, distributed generation and storage are needed to achieve what most Nevadans feel our energy goals are. This bill addresses customer-generators. When we look at resource planning or the value of these systems, we want to make sure Nevadans receive priority in the planning process.

CHAIR ATKINSON:
Are you referring to Nevadans as a whole or Nevadans as the customers of these systems? Why would you not want the customer to pay for the least cost project?

ASSEMBLYMAN BROOKS:
We do want that. We are talking about half of a percent of the grid's energy. We want to increase that to 2 percent. When we look at the other 98 percent of our State's energy, there is room for everything. We want a small piece of the energy mix to receive priority in the planning process.

CHAIR ATKINSON:
Is this bill more about priority then?

ASSEMBLYMAN BROOKS:
Yes.

SENATOR SETTELMEYER:
I believe this bill gives priority to renewable energy in general. Assemblyman Brooks has used the term "rooftop solar," but I do not think that is the intent. Are you saying renewable energy in general receives a priority?

ASSEMBLYMAN BROOKS:
I am saying that customer-generators receive priority. Each Nevadan who generates his or her electricity receives priority.

SENATOR SETTELMEYER:
I appreciate and agree with that concept. You keep on referring to rooftop solar, but I feel that is incorrect.

ASSEMBLYMAN BROOKS:
I will stop using that term.

CHAIR ATKINSON:
Many of us have been involved with energy issues for a while. We are trying to get things right.

Section 24, subsection 7 mentions a change in rate class. Can you explain why you are changing the rate class rooftop customers are currently in?

ASSEMBLYMAN BROOKS:
A residential user is a residential user. We want all residential users to be in the same rate class. When people are divided into different rate classes based on their behaviors, they can be assessed different costs and fees. There are no two ratepayers in the entire system that are the same. To break people up into multiple rate classes within a rate class opens up an individual to discriminatory fees. We want to keep residential ratepayers in the same rate class, regardless of how much energy the utility sells them, and address the value or credit of any returned energy.

CHAIR ATKINSON:
Section 24, subsection 4 mentions fair credit. Who defines fair credit? In my district, 31 percent are Hispanic and 28 percent are African American. There are also a lot of low-income families. How would fair credit affect my constituents?

ASSEMBLYMAN BROOKS:
Fair credit is meant to be a guiding principle for regulators who come up with tariffs and statutes governing how energy is returned. Fair credit is intentionally vague rather than a defined amount.

CHAIR ATKINSON:
Senator Spearman mentioned Texas has choice, and it seems like Texas is doing well. We have this bill in front of us, and we may move to choice. I do not know how many states had energy mandates and then moved to choice. I do

not think that was the case in Texas. We are trying to avoid moving backward in two years.

JESSICA FERRATO (Solar Energy Industries Association):
We have a survey regarding states that have moved to some form of deregulation and how they have handled it. All of these states except for one still have net metering. Texas companies still offer net metering to their customers. We can get you this information.

CHAIR ATKINSON:
Are you saying you can get the information for us, or do you have it?

MS. FERRATO:
We have it. We will get it to you.

CHAIR ATKINSON:
I have asked quite a few people for information, but I have not received anything.

SENATOR CANNIZZARO:
How much does it cost for the installation of a solar project on a house? What are the upfront costs? What costs would customers pay over time?

ASSEMBLYMAN BROOKS:
It depends on the business model. The average solar system for purchase is around $12,000. The lease and power purchase agreement models have little to no upfront costs, and customers pay a recurring cost based on the amount of energy their systems produce. Usually, customers pay a discounted rate of what the retail energy would cost. I do not know the percentage of customers using each business model, but the average installed cost is around $12,000, which is considerably less than when I installed a system on my house about 15 years ago.

SENATOR CANNIZZARO:
If the $12,000 is paid up front, does the customer pay additional costs over time, or is the $12,000 the total cost?

ASSEMBLYMAN BROOKS:
An upfront purchase would be $12,000. For example, in my house, I paid the upfront cost of installation, and I have not spent another penny since. That is not always the case, but that is my case.

SENATOR CANNIZZARO:
I echo some of the concerns raised by my colleagues. I am curious to see how A.B. 405 would affect ratepayers who do not have these types of systems. It is important for us to see the cost differential.

ASSEMBLYMAN BROOKS:
The renewable energy components of an average ratepayer's bill are a little over 2 percent. These components cover everything our State has done in the past 10 to 15 years in regard to renewable energy.

CHAIR ATKINSON:
We realize these components exist, but we want to know what the cost of an addition would be. You may not agree with the calculations done by NV Energy, but we still need to see a number.

ASSEMBLYMAN BROOKS:
The components of all renewable energy in our State equal 2 percent of an average ratepayer's bill. We are at half of a percent in terms of renewable energy from distributed generation. We are able to draw conclusions from these numbers. The added cost to a ratepayer's bill would be negligible.

CHAIR ATKINSON:
Section 24, subsection 3, paragraph (c) states that anyone can install a rooftop solar system, but it also states that the person does not need to obtain permission from the utility. I find this dangerous. Who assumes liability for this? Why would somebody not obtain permission from the utility?

ASSEMBLYMAN BROOKS:
This subsection refers only to systems that do not return energy to the utility.

CHAIR ATKINSON:
That is not clear.

ASSEMBLYMAN BROOKS:
Subsection 3 uses the language, "on the customer's side."

CHAIR ATKINSON:
That is why this provision is dangerous.

SENATOR SETTELMEYER:
I believe Assemblyman Brooks is referring to people who are off the grid. If people do not rely on the grid, the utility should not have a say. However, the way this subsection reads, if a meter is tied to the grid but does not feed energy into the system, the utility does not have any input.

ASSEMBLYMAN BROOKS:
If a person's system does not have the ability to export energy to the utility, then that person should not need to obtain permission from the utility to install the system. That is the intent. If the language is not clear, we should clarify it.

SENATOR SETTELMEYER:
Are you indicating that if somebody is not exporting energy but is still tied to the grid, the power company should have no say?

ASSEMBLYMAN BROOKS:
Yes. If somebody generates energy on his or her system and it has no ability to get back to the utility, then why would permission be required from the utility?

SENATOR SETTELMEYER:
I hooked up a barbed-wire fence to an NV Energy fence. I did not think anything of it. I found out that if there were a short circuit in NV Energy's system, it could travel two miles down the barbed-wire fence and kill someone. This has happened before. It is a safety issue. If a person's system is tied to the grid, the utility should have some input into that system.

ASSEMBLYMAN BROOKS:
Section 24, subsection 3, paragraph (c), subparagraph (2) states that the system must meet "reasonable safety requirements." There are building codes and equipment listing agencies people have to comply with. The industry and technology are changing rapidly. For example, I have a 27-kilowatt battery I use to drive. I did not ask the utility to integrate this battery into my electric system, nor should I have had to. It is not my intention for the utility to not have input

on generators that can feed into the system; that would be ridiculous and unsafe. This subsection is meant specifically for technologies that do not interact with the utility.

CHAIR ATKINSON:
The language is unclear.

Does section 28 address the subsidy people are talking about?

ASSEMBLYMAN BROOKS:
Section 28 lays out how returned energy would be treated. The Public Utilities Commission of Nevada (PUCN), the Bureau of Consumer Protection, NV Energy and the industry all weighed in and were unable to determine what, if anything, the subsidy was. There are many opinions about the subsidy. Instead of constantly litigating the subsidy, I am trying to put into statute that the State wants to encourage distributed generation and renewable energy. There are a multitude of factors that need to be taken into consideration that have not been thoroughly addressed. Assembly Bill 405 is a public policy decision to encourage a technology and a type of implementation of that technology.

CHAIR ATKINSON:
Do you believe section 28 addresses the subsidy?

ASSEMBLYMAN BROOKS:
Yes. As technologies become more affordable over time, the issue of a subsidy should be addressed.

CHAIR ATKINSON:
None of the information about the subsidy was consistent. However, I believe there was a subsidy. I agree that the number may not have been consistent, but the subsidy was still there.

MS. FERRATO:
We support A.B. 405. The Solar Energy Industries Association (SEIA) is the national trade association for the solar industry. Through advocacy and education, SEIA and its member companies work to make solar energy a mainstream and significant energy source by expanding markets, removing market barriers, strengthening the industry and educating the public regarding the benefits of solar. Assembly Bill 405 encourages the deployment of

residential rooftop solar in Nevada. Our goal is to make it feasible for residents to put solar on their homes in a timely fashion and in a sustainable manner that is fair to all customers and puts people back to work. In addition, we would like to ensure consumers are protected and that solar companies are held to a higher standard as the solar industry returns to the State.

Legislation is necessary because the solar industry in Nevada is at a standstill, and customers are not getting what they want. The 2015 net metering decision increased charges on solar customers, making rooftop solar unaffordable for Nevadans and all but crushing the rooftop solar industry here. Statewide solar applications fell by 99 percent, from 21,923 in 2015 to 287 in 2016. Nevada's solar industry was effectively shut down, and over 2,600 Nevadans lost their jobs. Assembly Bill 405 would restore rooftop solar policies and make solar affordable to Nevadans, which would bring solar jobs back to the State. At SEIA, we are seeing this effect firsthand. We have a number of member companies that have laid off and transferred hundreds of employees throughout the State. Many long-term local solar businesses have closed up shop, and some are in the process of doing so. Others are holding on by a thread. We are here today to ask for your support in reestablishing this industry, as solar has the potential for tremendous job creation. Nearly 260,000 Americans work in solar, which is more than double the number from 2010. By 2021, the number is expected to increase by more than 360,000 workers. In 2015, Nevada was the No. 1 state for solar jobs per capita, but in 2016, Nevada was one of the few states to actually lose solar jobs. We would like Nevada to benefit from these solar jobs and the local investment that comes along with them.

This bill would allow Nevadans to benefit from our natural resource by setting up a long-term rate structure that provides certainty and predictability for consumers in the solar industry. We would also like to reestablish the solar industry in a way that is thoughtful and allows for long-term sustainability in the State. For the past two years, SEIA has worked to ensure consumer protection is at the forefront of our industry. There is a simple reason why: our industry survives based on satisfied customers telling family members, friends and neighbors about their experiences. The disclosures, as outlined in A.B. 405, would allow consumers to understand key terms in their agreements, easily compare offers and ask hard questions of potential solar providers. Solar customers would have transparency and certainty that companies are going to adhere to strong standards.

Every agreement, under the consumer protection language, would require a cover page telling customers what is outlined in the agreement. The cover page would direct customers to go to the Contractors' Board based on issues with their contractors.

CHAIR ATKINSON:
You mentioned this bill would bring solar back. Where did everybody go?

MS. FERRATO:
Many companies, based on the net metering decision, left the State. It was not feasible for customers to purchase rooftop solar anymore.

CHAIR ATKINSON:
When you say you want to bring solar back, you give the impression that solar does not exist in the State anymore. That is disingenuous. The solar industry came to a screeching halt; there is no doubt about that. Some of the actions we took last Session left some uncertainty, but we are trying to fix this.

MS. FERRATO:
This bill would allow us to bring new jobs to the State.

ASSEMBLYMAN JUSTIN WATKINS (Assembly District No. 35):
I support A.B. 405. My bill, A.B. 270, was amended into this bill.

If this bill were to pass, consumers would talk to a lawyer for their issues. Section 20 makes any violation of sections 2 through 20 consumer fraud. Attorney fees and costs would be awarded regardless of what the damages were. If a solar customer were ripped off for $50, as a lawyer, I could represent that client.

In regard to the ten-year warranty on the systems, that is four years longer than the statute of limitations on construction defects. A customer would be able to pursue legal action for four years longer than he or she would be able to pursue legal action for, say, the contractor that built his or her house.

CHAIR ATKINSON:
I think you misinterpreted my question about who would police this bill. When A.B. 405 is all said and done, there has to be a place where people go for their grievances. A customer can hire an attorney, but he or she still has to go to the

place that was designated. There has to be a place for a representative of a customer, such as a lawyer, to go to have the customer's concerns addressed.

SENATOR SETTELMEYER:
If people have problems with an energy company, they go to the PUCN because the company is regulated. Solar companies are not regulated, so customers are left with one option: hiring an attorney. I appreciate your comment about the attorney fees.

Everybody keeps on using the term "contractor." We should be saying "licensed contractor" because the Contractors' Board can only resolve issues for licensed contractors. If a contractor is not licensed, then a customer needs to talk to an attorney.

TRAVIS MILLER (Great Basin Solar Coalition):
We represent the majority of local installers in northern Nevada and well over 1,000 registered voters in the area as well. We tend to promote rate structures and energy options for consumers, especially in the energy field. We are in full support of A.B. 405. The Energy Choice Initiative won the support it did last election because of the issues that are being corrected in this bill. The Initiative should not be a cause for concern because it can go forward in the future.

As far as where somebody goes to correct an issue, the Contractors' Board is the first stop. There should not be any unlicensed contractors installing these systems. This bill provides the stability people in the community need to make an investment like this.

CASEY COFFMAN (Sunworks):
We support A.B. 405, especially because we support transparency in contracts. We also support best practices. The cost calculated for nonsolar customers is 26 cents per year. That is incredibly insignificant. Most people would be okay spending an additional 26 cents per year for the opportunity to have renewable energy in the State.

NATALIE HERNANDEZ:
I support A.B. 405. This bill would help put Nevada's clean energy economy back on track. It would promote the growth of innovative industries such as the rooftop solar industry, spur economic growth and create local jobs across our State. Renewable energy is where the Country is headed. Last year, solar

accounted for 1 out of every 50 jobs in the U.S. Nevada has the ability to lead the Country in solar and clean energy.

ALLEN ELI SMITH (Black Rock Solar):
I used to be an electrician at Black Rock Solar. Black Rock Solar chose to transition away from building solar systems in the State because of the business climate. I am encouraged by A.B. 405 because it provides the sort of accountability for an investment any homeowner would seek. It also provides for the Renewable Energy Bill of Rights, which is important. Empowering Nevadans to employ Nevada contractors to build solar arrays in Nevada and providing sustainability and independence for Nevadans are good things. These dollars stay in Nevada. I encourage you all to support A.B. 405.

JERRY SNYDER (Black Rock Solar):
Black Rock Solar was formed in 2007 and incorporated in 2008 to install solar systems on nonprofits and schools. We have been obliged to stop doing this because it no longer makes sense to do so on a nonprofit basis. However, we are going forward with trying to develop the solar field otherwise, and this bill is an important part of that. The 2015 PUCN decision has shown us how vital legislative leadership is in Nevada. I appreciate how seriously the Committee members are considering this bill.

DAVID VON SEGGERN (Sierra Club, Toiyabe Chapter):
I will read from my written testimony in support of A.B. 405 (Exhibit I).

ENDER AUSTIN III (Las Vegas Urban League Young Professionals):
This bill would not only encourage economic development and spur job creation but also have an invaluable environmental impact by increasing renewable energy generation. I am not here today as a dad, but if I were, I would tell you I am always thinking about what is next. Assembly Bill 405 looks at what is next. I am not necessarily here as a Nevadan, but as a Nevadan, I am concerned about the economy. This bill would strengthen a flooding industry that can diversify our State's economic base. As a social justice, economic and class justice fighter, I support destroying barriers to economic freedom for poor, disadvantaged and disenfranchised individuals. Assembly Bill 405 does this by opening the rooftop solar market to many who are on the lower rungs of the economic spectrum. As a preacher, I am charged to protect God's creation, and A.B. 405 does so by marching toward a greener Nevada. I hope the Committee considers passing this bill.

LARRY COHEN (Sunrun):
Sunrun is the largest dedicated residential solar company in the Country. We support A.B. 405, which would restore the rooftop solar industry in Nevada. I have managed Sunrun's Las Vegas branch since its inception in 2014, and I experienced the abrupt halt of the industry firsthand in 2015. After the 2015 PUCN decision, several hundred of our hardworking employees lost their jobs through no fault of their own. Many were forced to find work in other industries or move their families out of Nevada to keep their good-paying jobs working for Sunrun. Our employees have helped over 3,000 Nevadans take control of their electricity bills by going solar with Sunrun. Assembly Bill 405 establishes a fair approach to compensate families for the clean energy they generate and send to the grid. This bill offers Nevadans the freedom to choose rooftop solar to meet the energy needs of their homes. We appreciate the Committee's consideration of A.B. 405 and the opportunity to revitalize this innovative industry in the State.

NAOMI LEWIS (Nevada Conservation League):
I support A.B. 405. Almost everyone in Room 4412E of the Grant Sawyer State Office Building today supports A.B. 405.

Over 2,000 jobs were lost when the PUCN decided to change net metering rates. I have friends who were affected by this decision. Some of my friends had great-paying jobs with good benefits, but these jobs were taken away from them. Losing such a great job can be devastating, and when somebody is a college student who has to pay $400 for a textbook, losing a job can hit hard. Assembly Bill 405 would bring these jobs back to Nevada and then some.

The University of Nevada, Las Vegas, has some great opportunities for students who want to get involved with solar energy, such as the internationally recognized Solar Decathlon team and the minor in Solar and Renewable Energy. If opportunities for solar energy are not in the State, people will be forced to move, and Nevada will lose some talented and intelligent people who can bring innovative change to the State.

I urge the Committee to pass A.B. 405 because it is important to me, my future and thousands of other people's futures in the State.

KATHERINE LORENZO (Chispa Nevada):
We support rooftop solar for several reasons. The future of our electric grid is smart, flexible and decentralized. Having community members produce electricity from their homes makes them think more about their energy use and feel a sense of connection to their neighbors. By bringing the solar industry back to Nevada, we are opening the door for our communities to obtain new, good-paying jobs and are supporting the generation of solar entrepreneurs. Additionally, this bill protects consumers from being misled or ripped off. By generating more clean energy and moving away from fossil fuels, we can reduce air pollution that affects our health and the environment. Communities of color are often on the front lines dealing with these impacts. I urge you to support A.B. 405 to improve the well-being of Nevada's communities.

JOSHUA J. HICKS (Sunstreet Energy Group):
Sunstreet Energy Group is a provider of rooftop solar on new homes. It is a highly popular consumer choice issue to put solar on one's roof. There has been a lot of uncertainty in the last few years, and that has stalled rooftop solar installations. We support A.B. 405 because it creates certainty and predictability. These are important facets of the homebuilding process because they help consumers and get everyone on the right track.

DANIEL WITT (Tesla, Inc.):
We support A.B. 405. We firmly believe this bill has the potential to reinvigorate the solar industry in the State. Tesla, through SolarCity, has more than 1,200 employees in the southern part of Nevada, 550 of whom had to be relocated after the 2015 PUCN decision. We especially support the tenets of this bill that provide transparency and consistency throughout the distributed energy resources industry to protect consumers who choose to invest in these technologies. Nevada has long considered itself a leader in the renewable energy space. The Chair and this Committee have been extremely vigorous in their pursuit of renewable energy with bills like S.B. 204, S.B. 145 and S.B. 146.

SENATE BILL 145 (1st Reprint): Revises provisions relating to energy. (BDR 58-54)

SENATE BILL 146 (2nd Reprint): Revises provisions governing the filing of an integrated resources plan with the Public Utilities Commission of Nevada. (BDR 58-15)

All of these bills work in collaboration with A.B. 405. This bill will advance reliable energy technologies like storage that will continue to make the grid more efficient over time.

KYLE DAVIS (Nevada Conservation League):
We support A.B. 405. This bill is a key piece to reestablish Nevada's reputation as a clean energy leader, which is well-deserved considering the clean energy policies that have been passed in the State over the last few years. We send a lot of natural gas out of State. This bill allows us to take more control of our clean energy future and gives Nevadans the option to control their own destinies through rooftop solar. We know Nevadans want to see more clean energy, and A.B. 405 is an important piece of everything we are doing this Session to help our State realize its potential as a clean energy leader.

TOM POLIKALAS:
I support A.B. 405. I would like to address the issue of risk. When we put all of our eggs in the natural gas basket, that could impact all of us as consumers. The U.S. Energy Information Administration reports natural gas prices will increase over the coming decades, and that is corroborated by private sector analysts who identify reasons why natural gas is going to increase in price. Liquefied natural gas terminals are being put in place so that U.S. producers can export to markets in Europe and Asia, where the price of natural gas is much higher. The expected economic impact is that natural gas prices will rise in the U.S.

I also support this bill because of jobs. On March 31, the Senate Subcommittee on Energy heard testimony from Jackie Kimble from the American Jobs Project. She identified solar and battery technologies as key sectors for an economic cluster that could bring 28,000 jobs to the State. The Subcommittee also heard testimony from Lee F. Gunn, a retired Vice Admiral of the U.S. Navy. He identified distributed generation as a key national security issue. Grid resiliency and international security are enhanced when we have more distributed generation.

Having worked for 15 years in utility marketing and communications, I can say that any customer is valuable. There is a tremendous value to acquiring a net metered customer.

MARK DICKSON (Simple Power):
We hope to increase our workforce with passage of A.B. 405. Last year, over 260,000 jobs were in the solar industry in the U.S., more than all of the other fossil-fuel industries combined. Our State also spent almost three quarters of a billion dollars purchasing outside energy. The solar industry is burgeoning, and we want to be a part of that. We echo the support of the other companies here today, and we fully support A.B. 405.

LOUISE HELTON (Founder, 1 Sun Solar):
I have seen colleagues lose their businesses and friends lose their jobs. I have seen suppliers close up shop and leave the State altogether. Distributors have lost money, and hardworking Nevadans have lost their solar careers. At the same time we were killing our solar industry, even though it was never our intention to do so, other places were building their solar companies, moving forward, adding lots of jobs and bringing economic diversification and development to their communities. The Clean LA Solar program was said to have created 4,500 jobs and generated $500 million in economic activity, according to the Los Angeles Business Council. In the Interim, while we were hoping to make a policy correction, Nevadans tried hard to have their voices be heard. It was incredible that over 100,000 Nevadans signed the petition to bring back net metering. That is a difficult thing to accomplish. I have been fortunate enough to have a diversified business that has allowed me to hang on. I am begging you to pass this bill to allow us to put hardworking Nevadans back to work and to help us be a leader in the solar field.

JORGE GONZALEZ (Nevada Solar Owners Association):
We support A.B. 405. I lost my job when the solar industry in Nevada went down, but that did not drive me away from the renewable energy field.

The warranty is covered in three issues. One is the product itself. The real question, however, is the labor warranty. What is that going to be? I would love to see a number at ten years so that it matches the warranty on the product.

The price of solar has dropped drastically. If somebody buys solar right now as a homeowner and that person has the credit, he or she will pay less for power going out 15 to 20 years. Solar is feasible, and if people are waiting to go solar, they are going to be in a much better position if A.B. 405 passes.

JOE BOOKER:
I worked at a solar company that closed down in 2015. I lost my family there; I considered my coworkers my family. I ask the Committee to support A.B. 405 to bring sanity back to my life. I have been on the "solarcoaster" for a long time, and I would like to get off.

VERNA MANDEZ:
Ever since I was young, I have wanted to work in the solar industry. It is disheartening to me that my State does not allow me to advance in this field. Solar energy is the energy of the future, and it will benefit generations to come. My community wants solar, and I want to own a home one day where I can have rooftop solar. I want to be able to lower my electric bill through the natural sunshine of this overwhelmingly warm and sunny State. It is my right to go solar. The State should not infringe upon this right in any way, shape or form. Renewable energy is where the Country is headed. Nevada has the ability to lead the Country in solar and clean energy. Assembly Bill 405 is instrumental to the progress of the State. I hope you all put Nevada back on the path to be a renewable energy leader.

SCOTT SHAW (1 Sun Solar):
My former company, Go Solar Energy Solutions, could not hold on. We had to close our doors as a result of the 2015 PUCN decision. I am fortunate enough to work at another solar company and look forward to possibly hiring 50 individuals this year. This bill addresses all of the uncertainty the 2015 PUCN decision set into the market.

I support the consumer protections this bill would put in place. If there are bad actors in an industry, that is going to color the whole industry. It is important to adhere to transparency and consumer protections. This bill sets certainty in the rate of exchange for net metering.

DONALD GALLIMORE, SR. (NAACP Reno-Sparks Branch 1112):
We support A.B. 405. My family has used solar since 1983. We believe in solar and the future of solar. Twenty-six hundred jobs is a significant number, and we want to see those jobs come back.

KEVIN ROMNEY (Radiant Solar Solutions):
We are a licensed installer of solar and storage in Henderson, Nevada. We support A.B. 405. This bill would provide wonderful protections to consumers

and allow our State to reignite the economic engine of rooftop solar. This bill would allow us to produce energy in Nevada that is sold to Nevadans, allowing us to not need to import energy from out of State or outside of the Country. There are also national security interests through the local production of energy. We hope the Committee passes A.B. 405 so that rooftop solar businesses can grow the economy and, in turn, grow other businesses.

JUDY STOKEY (NV Energy):
We are neutral to A.B. 405. Two major issues need to be addressed before anything moves forward. The first issue is what would happen in an energy choice environment. There would be 20-year commitments if this bill were to pass. We also have grandfathered customers with 20-year contracts. We do not know who would be responsible for these customers if the Energy Choice Initiative were to pass again. The second issue is cost. Everybody has his or her own number, but our number comes out to be over $60 million annually if this bill were to pass.

We want to make sure we go about this bill the right way. We would like to continue working with Assemblyman Brooks. The consumer protection piece of this bill is great. We need to make some minor modifications, but some unfortunate circumstances arose a few years ago.

ERNIE ADLER (International Brotherhood of Electrical Workers Local 1245):
We are neutral to A.B. 405 because we are trying to figure out how this bill works with all of the other renewable energy bills this Session. With the Energy Choice Initiative looming, people who sign up for leases need the ability to cancel their contracts if electricity is deregulated. Otherwise, they are going to be stuck with some fairly large monthly payments on something that does not benefit them. I have submitted an amendment (Exhibit J) to add a provision to allow people to get out of their leases before the 20-year period elapses.

DANNY THOMPSON (International Brotherhood of Electrical Workers Local Nos. 396 and 1245):
We are not against net metering, but we have concerns with the way this bill is written. It is prudent for people to have a mechanism to get out of their leases should the Energy Choice Initiative pass.

We are also concerned with section 24 regarding the permission aspect. This section talks about meters; people off the grid do not have meters. We fear that

some of our members would be killed by this. Without the permission of or information from the utility, a lineman could be putting his life at risk. This section includes the language "reasonable safety requirements," but we suggest replacing this with language conforming to all local and State requirements. I do not know what reasonable safety requirements are, but I do know what the codes are.

Unless these systems are installed by licensed contractors, the provision relating to the Contractors' Board does not mean anything. Requiring that both the installation and maintenance be done by licensed contractors is important.

JEREMY NEWMAN (International Brotherhood of Electrical Workers Local 396):
I appreciate the Chair and Senator Settelmeyer looking out for the well-being of myself and other linemen. There are good and bad contractors out there. We want to make sure the utility is notified to ensure the safety of linemen in the field.

RUSTY MCALLISTER (Nevada State AFL-CIO):
We are neutral to A.B. 405. We have heard people talk about the Renewable Energy Bill of Rights, but I am wondering if we could have a bill of rights for customers who receive their power from the utility. Although 26 cents per year may seem insignificant, somebody still has to pay it. The companies that lease these systems receive a 30 percent federal tax credit that they sell to tax equity funds. Somebody has to pay for that. Nevada taxpayers have paid $1.2 million in subsidies to bring one solar company to the State. Although the solar industry certainly needs to be brought back to Nevada, the average person is not going to be able to install these systems. Realistically, only a certain segment of the population is going to be able to have these systems. All of the people I represent have to pay for A.B. 405.

ASSEMBLYMAN BROOKS:
I have three examples of states that had net metering and then went to choice: California, Massachusetts and Maine. I will submit the document containing these examples to the Committee.

Mr. Thompson made a statement about licensed contractors. I agree that only licensed contractors should be able to install rooftop solar systems. That is currently the law.

In reference to section 24, I am not against people notifying the utility or displaying placards. I want utility workers to feel safe if they approach an energy system. Section 24, subsection 3, paragraph (c), subparagraphs (1) and (2) could be clarified for the protection of our utility workers.

CHAIR ATKINSON:
I am aware California had net metering and then went to choice, but the state did not know there was an impending ballot measure. Because we know the Energy Choice Initiative is looming, we have to put some safeguards in. We all recognize choice is coming.

SENATOR SPEARMAN:
I wanted to address Mr. McAllister's point about people not being able to afford solar systems. I took this into consideration when sponsoring S.B. 407.

SENATE BILL 407 (1st Reprint): Creates the Nevada Clean Energy Fund. (BDR 58-1133)

The Nevada Clean Energy Fund is designed to level the playing field for seniors and low- and moderate-income individuals. The Fund provides an investment opportunity for them so that they can participate in the renewable energy process.

Part of the renewable energy discussion is economic justice. Protecting the environment should not only be accessible to those with the right credit scores or those with cash lying around.

CHAIR ATKINSON:
I have received letters of support for A.B. 405 from Bo Balzar, Bombard Renewable Energy (Exhibit K); Laura Bennett, TechNet (Exhibit L); Janette Dean (Exhibit M); and Greg Ferrante, Nevada Solar Owners Association (Exhibit N).

I will close the hearing on A.B. 405 and open the meeting for public comment.

MR. EPPOLITO:
Senate Bill No. 463 of the 78th Session would have helped Nevada children. It was passed in the Senate 21 to 0. That would have been one of the strongest student data privacy protection bills in the Country. Unfortunately, the bill got

gutted with an amendment. The Senate tried to protect Nevada children, but we still have nothing to protect them.

Two states have policies to protect their children: California and Oklahoma. In February 2016, the ACLU and the Tenth Amendment Center agreed on model legislation that 16 states started working on.

Remainder of page intentionally left blank; signature page to follow.

CHAIR ATKINSON:
Hearing no more public comment, I adjourn the meeting at 11:47 a.m.

RESPECTFULLY SUBMITTED:

Daniel Putney,
Committee Secretary

APPROVED BY:

Senator Kelvin Atkinson, Chair

DATE:

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	1		Agenda
	B	10		Attendance Roster
S.B. 538	C	5	Senator Aaron D. Ford	Proposed Amendment 4699
S.B. 538	D	66	John Eppolito / Protect Nevada Children	Written Testimony
S.B. 538	E	5	Brian McAnallen / City of Las Vegas	Proposed Amendment
S.B. 538	F	2	Shannon Rahming / Division of Enterprise Information Technology Services, Department of Administration	Written Testimony
S.B. 538	G	2	Christopher Oswald / Data and Marketing Association	Letter of Opposition
A.B. 405	H	16	Assemblyman Chris Brooks	Explanation Table
A.B. 405	I	1	David Von Seggern / Sierra Club, Toiyabe Chapter	Written Testimony
A.B. 405	J	1	Ernie Adler / International Brotherhood of Electrical Workers Local 1245	Proposed Amendment
A.B. 405	K	1	Bo Balzar / Bombard Renewable Energy	Letter of Support
A.B. 405	L	1	Laura Bennett / TechNet	Letter of Support
A.B. 405	M	3	Janette Dean	Letter of Support
A.B. 405	N	1	Greg Ferrante / Nevada Solar Owners Association	Letter of Support

SB
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Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., Plaintiffs, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	Case No.: A-18-783054-C Dept.: 16 **FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

Plaintiff Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. ("Fielden Hanson") by and through its attorneys, the law firm of Dickinson Wright PLLC, hereby files its Supplemental Brief in Support of its Motion for Reconsideration as requested by this Court to address the issue of whether NRS 613.195 was a procedural or substantive change of the law that existed prior to the enactment of the statute.

This Supplement is based on the following Memorandum of Points and Authorities, the declaration of Gabriel A. Blumberg attached hereto as **Exhibit 1** and the exhibit attached thereto; the papers and pleadings already on file herein, and any oral argument the Court may entertain on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Nevada Legislature enacted the procedural statute NRS 613.195(5) to remedy the Nevada Supreme Court's erroneous holding in *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016), that noncompete agreements must be voided in their entirety if even one provision was found unreasonable. In enacting the statute, the Legislature clearly signaled its disapproval of *Golden Road* and reaffirmed Nevada's public policy in favor of enforcing noncompete agreements. To further this policy, and avoid the improper effects of *Golden Road*, the Legislature identified a procedure for district courts to implement when faced with an employer's request to enforce a noncompete agreement.

The procedure requires the district court to revise any unreasonable provision of a noncompete agreement to the extent necessary to make it reasonable. This procedure does not affect employees' substantive rights because it does not alter the substantive law requiring noncompete agreements to be reasonable. Rather, it maintains employees' substantive rights by ensuring restrictions are enforced only to the extent that they are reasonable, while at the same time guaranteeing employers receive the benefit of their bargained-for noncompete agreements.

NRS 613.195(5) therefore is a remedial and procedural statute, which is exactly the type of statute the Nevada Supreme Court has repeatedly held should be applied retroactively. For these reasons and those that follow, the Court should declare that NRS 613.195(5) operates retroactively and requires this Court to blueline the noncompete agreement to render it reasonable.

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II.

LEGAL ARGUMENT

A. NRS 613.195(5) Applies Retroactively Because it Is Remedial and Procedural[1]

Based on prior briefing, Fielden Hansen anticipates that Tang will again argue that newly enacted statutes are generally presumed to apply prospectively unless there is clear legislative intent to the contrary. This argument, however, suffers from two fatal flaws: (1) it fails to take into account the full text of the presumption, which provides "[t]here is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent *or unless the intent of the legislature cannot otherwise be satisfied*," *McKellar v. McKellar*, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994) (emphasis added) and (2) the presumption in favor of prospective application of statutes "does not apply to statutes that do not change substantive rights and instead relate solely to remedies and procedure." *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 179–80, 162 P.3d 148, 154–55 (2007). In cases where the statute relates to remedies and procedure, "a statute will be applied to any cases pending when it is enacted." *Id.* This principle was stated over a century ago by the Nevada Supreme Court in *Truckee River General Electric Co. v. Durham*, 38 Nev. 311, 149 P. 61 (1915), and was recently reiterated in *Holdaway-Foster v. Brunell*, 130 Nev. 478, 330 P.3d 471 (2014).

In *Brunell*, the Nevada Supreme Court was tasked with determining whether the Full Faith and Credit for Child Support Orders Act, enacted in 1994, could be applied retroactively to orders entered in 1989 and 1992. *Brunell*, 130 Nev. at 482. The Nevada Supreme Court began its analysis by noting the general rule that "courts apply statutes prospectively unless the legislature clearly manifests an intent for retroactive application or the statute's purpose cannot otherwise be satisfied." *Id.* at 473. It then also noted the principle that "courts should apply statutes

[1] The Court need not reach the issue of retroactivity of NRS 613.195(5) if it finds that the parties validly contracted around *Golden Road*. Here, the parties explicitly and unambiguously agreed and requested that the Court blueline the noncompete agreement if it found any portion of it to be unreasonable. *See* Employment Agreement at Section 2.10. This provision mirrors Nevada's public policy in favor of enforcing noncompete agreements and thus should be enforced in accordance with Nevada's longstanding principle allowing parties to contract around default rules. *See, e.g., Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412, 254 P.3d 617, 621 (2011); *Farmers Ins. Group v. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994).

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retroactively when the statute affects only remedies and procedure and does not create new substantive rights." *Id.*

Following the recitation of these general principles, the Court observed that the "Act is silent as to whether it applies retroactively" and, as such, stated it "must look to the purposes behind the Act, which we conclude mandate retroactive application."[2] *Id.* The Court determined that the Act had three purposes: (1) to facilitate enforcement of orders among states; (2) discourage continuing interstate controversies over child support; and (3) avoid jurisdictional competition and conflict among state court orders. *Id.* In addressing the first purpose, the Court concluded that a "strict prospective application would frustrate the Act's purpose because the very issues that Congress designed the Act to resolve would persist" regarding orders entered prior to the Act's enactment. *Id.* In addressing the second purpose, the Court found that, without retroactivity, enforcing orders would be made "more difficult because orders entered before the Act's effective date would be subject to different procedural rules than those entered after that date." *Id.* Lastly, in addressing the third purpose, the Court concluded that the Act was "remedial in nature because it was designed to assist in collecting past child support arrears." *Id.* Based on these conclusions, the Court found that the "Act must be retroactively applied." *Id.*

The reasoning applied by the Nevada Supreme Court in *Brunell* applies equally here to NRS 613.195(5).

1. A Failure To Apply NRS 613.195(5) Retroactively Would Create an Absurd Result that Defeats the Statute's Purpose

A strict prospective application of NRS 613.195(5) would undoubtedly frustrate the statute's purpose and contravene Nevada's strong public policy in favor of enforcing noncompete agreements. Indeed, if NRS 613.195(5) were not applied in this case, the exact problem the Legislature sought to fix—Courts wholly nullifying noncompete agreements due to one unreasonable provision—would persist.

[2] Tang has previously argued that because the statute is silent as to whether it applies retroactively it must be applied only prospectively. This conclusory argument clearly cannot pass muster as evidenced by the Nevada Supreme Court's approach in *Brunell*.

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Additionally, the failure to apply NRS 613.195(5) to Tang's noncompete agreement would be particularly troubling because it would contravene the parties' stated intent in their agreement. The parties here specifically contracted to permit a court to blueline any offending provisions of the noncompete agreement. *See* Employment Agreement at Section 2.8.3. Thus, at the time the parties entered into the noncompete agreement, they both agreed and expected that a court would blueline the noncompete agreement to the extent any portion of it was deemed unreasonable. The parties' expectations were then codified in NRS 613 as being in accordance with Nevada's law and long-standing public policy. *See* NRS 613.195(5). Tang's request therefore not only asks this Court to ignore current Nevada law, but also the parties' contract. Simply put, Tang's request would produce an unacceptable, absurd result. *See Anthony Lee R. v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997) ("statutory language should not be read to produce absurd or unreasonable results."); *see also Las Vegas Police Protective Association Metro, Inc. v. District Court*, 122 Nev. 230, 130 P.3d 182 (2006) (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)) (a court should not apply a statute in a manner that would "violate[] the spirit of the act" or produce "absurd or unreasonable results"); *State v. Glusman*, 98 Nev. 412, 425, 651 P.2d 639, 648 (1982) ("The words of a statute should be construed, if reasonably possible, so as to accommodate the statutory purpose"); *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988) ("When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable").

Thus, this Court should conclude that NRS 613.195(5) applies retroactively in order to avoid an improper, absurd result that would frustrate the Legislature's purpose in enacting the statute.

2. NRS 613.195(5) Must Be Applied Retroactively To Ensure Uniform Application of the Law

Second, the Nevada Supreme Court's concern regarding different agreements being subjected to different procedural rules would be borne out if NRS 613.195(5) were not applied retroactively. For example, an employee who signed a noncompete in December 2016 and terminated his employment in June 2018 (Tang) would be subjected to a wholly different set of

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procedural mechanisms than an employee who signed a noncompete in December 2017 and terminated his employment in June 2018, despite the fact that both prior employers could have filed a lawsuit seeking enforcement of the respective noncompete agreements on October 18, 2018. This result is the exact unjust outcome the *Brunell* Court sought to avoid and explained should favor retroactive application of statutes.[3]

3. NRS 613.195(5) Is a Remedial and Procedural Statute

Similar to the statute at issue in *Brunell*, NRS 613.195(5) is remedial in nature that only affects procedure. As such, it must be applied retroactively to the noncompete agreement at issue.

a. NRS 613.195(5) Is a Remedial Statute

"[A] remedial statute is defined 'as one designed to cure a mischief or remedy a defect in existing laws, common or statutory, however arising.'" *Nix v. James*, 7 F.2d 590, 592 (9th Cir. 1925); *see also* 73 Am. Jur. 2d Statutes § 7 (citing *Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers*, 13 S.W.3d 606 (Ky. 2000)) ("Legislation which has been regarded as 'remedial' in its nature includes statutes which abridge superfluities of former laws, remedying defects therein, or mischiefs thereof, whether the previous difficulties were statutory or a part of the common law."). When construing a remedial statute, a court should "consider the preexisting state of the law and what 'mischief' Congress intended to remedy when it enacted the remedial statute." *Khatib v. Cty. of Orange*, 639 F.3d 898, 906–07 (9th Cir. 2011). This is because "it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy." *Id.*; *see also Alexander v. Archer*, 21 Nev. 22, 24 P. 373, 375 (1890) ("There are two points to be considered in the construction of all remedial statutes—the mischief and the remedy; and it is the duty of courts so to construe acts of the legislature as to suppress the mischief and advance the remedy.").

Here, the legislative history of NRS 613.195(5) clearly reveals that the statute was designed to cure the defects of *Golden Road* by requiring courts to blueline unreasonable provisions in

[3] The policy of maintaining uniform application of the law would also be furthered by declaring that NRS 613.195(5) operates retroactively because Judge Denton recently applied NRS 613.195(5) to a noncompete agreement that was practically identical to the one executed by Tang and that was entered into prior to the effective date of NRS 613.195(5). *See* Ex. 1-A (entering a preliminary injunction after concluding that the Fielden Hansen noncompete agreement "is amenable to blue penciling under NRS 613.195(5).").

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noncompete agreements. *See* Senate Committee on Commerce, Labor and Energy May 24, 2017 Minutes at p. 15 ("a specific lawsuit came forth in which an entire noncompete agreement was thrown out because one portion of it was excessive. Section 1, subsection 5 would allow a court to keep the good parts of a noncompete agreement and toss out or renegotiate the excessive parts"); *see also id.* ("Another provision this bill contains is bluelining. If a court of law finds that provisions in the noncompete agreement are invalid, it can strike out the invalid components but leave in what is valid."). This Court therefore should apply NRS 613.195(5) retroactively to advance the Legislature's desired remedy and suppress the "mischief" of wholly voiding noncompete agreements simply because a portion of the agreement is deemed unreasonable.

b. NRS 613.195(5) Is a Procedural Statute

In addition to being a remedial statute, NRS 613.195(5) also is procedural because it merely identifies the proper procedure district courts should implement when an employer seeks a remedy for its prior employee's breach of a noncompete agreement. This is confirmed by the plain language of the statute, which begins by noting this subsection only applies "[i]f an employer brings an action to enforce a noncompetition covenant." *Id.* This prefatory clause signals that the section is aimed at informing district courts of the *procedure* to follow when asked to enforce a noncompete agreement. The remainder of NRS 613.195(5) then lays out the *procedure*, which only comes into effect upon a determination that a provision in the noncompete is unreasonable, providing that "the court *shall* revise the covenant to the extent necessary and enforce the covenant as revised."[4] *Id.*

What NRS 613.195(5) does not do is change any substantive aspects of the law governing noncompete agreements. Prior to the enactment of NRS 613.195(5), Nevada law required restrictions in noncompete agreements to be reasonable. *See, e.g., Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967) ("The medical profession is not exempt from a restrictive

[4] NRS 613.195(5) also requires that the noncompete agreement be supported by consideration. This has always been a requirement of all contract, including noncompete agreements, and therefore does not alter or change the substantive rights of the parties. Furthermore, Tang has conceded that there was sufficient consideration for the noncompete agreement in this matter.

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covenant provided the covenant meets the tests of reasonableness"); *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996) ("The amount of time the covenant lasts, the territory it covers, and the hardship imposed upon the person restricted are factors for the court to consider in determining whether such a covenant is reasonable"); *Ellis v. McDaniel*, 95 Nev. 455, 458–59, 596 P.2d 222, 224 (1979) ("There is no inflexible formula for deciding the ubiquitous question of reasonableness"). Following the enactment of NRS 613.195(5), courts are still directed to determine whether or not restrictions in a noncompete agreement are reasonable. *See, e.g., Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. Adv. Op. 61, 422 P.3d 1238, 1241 (2018) ("In order to establish that a party is likely to succeed in enforcing a noncompete agreement for the purpose of a preliminary injunction, the court must look to whether the terms of the noncompete agreement are likely to be found reasonable at trial . . . . We consider (1) the duration of the restriction, (2) the geographical scope of the restriction, and (3) the hardship that will be faced by the restricted party in determining whether a noncompete agreement is reasonable.")

Thus, at all times a former employee has had the right not to be subjected to an unreasonable restriction in a noncompete clause. That is the substantive right Tang was entitled to and that right remains unchanged by NRS 613.195(5). NRS 613.195(5) simply outlines a procedure which district courts must follow to ensure that Nevada's strong policy of enforcing noncompete agreements is implemented while at the same time not hindering or altering Tang's substantive right to be subjected only to reasonable restrictions.

Thus, NRS 613.195(5) undoubtedly is a remedial and procedural statute that should be applied retroactively to the noncompete agreement executed by Tang.

B. The Nevada Supreme Court Has Engaged in Bluelining

The Nevada Supreme Court's prior decisions concerning preliminary injunctions enforcing noncompete agreements further evidences the likelihood of the Court determining that NRS 613.195(5) should be applied retroactively. For example, in *Hansen v. Edwards*, 83 Nev. 189, 426 P.2d 792 (1967), a former doctor employee appealed the district court's entry of preliminary injunctive relief precluding him from practicing in the field of surgical chiropody within a radius

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of 100 miles of Reno for an indefinite period. *Hansen*, 83 Nev. at 191. The Nevada Supreme Court found both the geographic and temporal restrictions of the noncompete covenant to be unreasonable. *Id.* at 193. Rather than vacate the preliminary injunction and deem the noncompete agreement entirely void, the Nevada Supreme Court instead modified the preliminary injunction such that it barred the former employee from practicing within the city limits of Reno for a period of one year. *Id.*

Similarly, in *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222 (1979), a specialist in orthopedic surgery appealed a preliminary injunction enforcing a noncompete agreement that precluded him from practicing medicine within five miles of the city limits of Elko for a period of two years. *Ellis*, 95 Nev. at 456-57. The Nevada Supreme Court determined that the geographic and temporal restrictions were reasonable, but the attempt to prohibit the former employee from practicing orthopedic surgery was unreasonable because the former employer did not engage in orthopedic surgery. *Id.* at 459. Thus, the Nevada Supreme Court modified the preliminary injunction to enforce the noncompete with a small carve-out for the specialty of orthopedic surgery. *Id.* Again, rather than vacate the preliminary injunction and deem the entire noncompete agreement void because of the limited offending provision, the Nevada Supreme Court instead modified the terms of the preliminary injunction and enforced a modified version of the noncompete agreement. *Id.*

Just a few months ago, the Nevada Supreme Court reaffirmed its past precedent and noted that it still was able "to modify preliminary injunctions enforcing noncompete agreements after finding the agreements to be unreasonable." *Shores v. Global Experience Specialists, Inc.*, 422 P.3d 1238, n.2, 134 Nev. Adv. Op. 61 (2018) (citing *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016)).[5]

Thus, the Nevada Supreme Court has repeatedly indicated its willingness to enforce noncompete agreements by modifying the scope of a preliminary injunction and would likely apply

[5] Indeed, even the *Golden Road* Court noted that an order improperly granting a preliminary injunction can be modified to render the terms of a noncompete agreement reasonable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016).

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NRS 613.195(5) retroactively to maintain its precedent and Nevada public policy favoring enforcement of noncompete agreements.

III.

CONCLUSION

Based on the foregoing, Fielden Hansen respectfully requests that this Court: (1) declare that NRS 613.195(5) applies retroactively and (2) blueline the subject noncompete agreement to render it enforceable in a preliminary injunction.

DATED this 22nd day of March 2019.

DICKINSON WRIGHT PLLC

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Nevada Bar No. 7332
GABRIEL A. BLUMBERG
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CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 22nd day of March 2019, a copy of **FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** to be transmitted by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey E-File & Serve system addressed to:

Martin A. Little, Esq.
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HOWARD & HOWARD PLLC
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EXHIBIT 1

DECLARATION OF GABRIEL A. BLUMBERG, ESQ. IN SUPPORT OF FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Gabriel A. Blumberg, Esq., being first duly sworn, declares as follows:

1. I am an attorney licensed to practice law in the State of Nevada and I am an associate with the law firm of Dickinson Wright PLLC, counsel for Plaintiff Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. ("Plaintiff"). I have personal knowledge of the matters set forth herein and know them to be true except for matters set forth herein on information and belief, and as to those matters, I believe them to be true.

2. This declaration is submitted in support of Plaintiff's Supplemental Brief in support of Motion for Reconsideration.

3. Attached hereto as Exhibit 1-A is a true and correct copy of Judge Denton's March 19, 2019 minute order in Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. v. Duong et al., Case No. A-19-789110-B.

EXECUTED this 22nd day of March, 2019.

GABRIEL A. BLUMBERG, ESQ.

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EXHIBIT 1-A

ELECTRONICALLY SERVED
3/19/2019 7:42 AM

A-19-789110-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Business Court Matters	COURT MINUTES	March 19, 2019

A-19-789110-B Fielden Hanson Isaacs Miyada Robison Yeh, Ltd., Plaintiff(s)
vs.
Scott Duong, M.D., Defendant(s)

March 19, 2019 **7:00 AM** **Minute Order**

HEARD BY: Denton, Mark R. **COURTROOM:** Chambers

COURT CLERK: Madalyn Kearney

JOURNAL ENTRIES

HAVING further considered the Matter of Plaintiff s Motion for Preliminary Injunction heard on March 11, 2019, and then taken under advisement, the Court determines that the confidentiality aspects are entirely enforceable and that, while the non-compete agreement aspect is overbroad in the first instance, it is amenable to blue penciling under NRS 613.195(5), and that the other requisites for preliminary injunctive relief as briefed and argued by Plaintiff have been demonstrated. Accordingly, the Court GRANTS Plaintiff s Motion IN PART as follows:

- The confidentiality aspect is entitled to full enforcement.
- The non-compete/non-solicitation aspect shall be blue penciled to reflect the restraints set forth in Defendants Opposition to the Motion at: page 9, line 22 through USAP at page 10, line 1; page 10, lines 5 through 9, to include declination of coverage requests from any facilities having an on-going relationship with USAP/Fielden Hanson; and page 10, lines 10 through 13 (ending with the word provider). With regard to the last reference, Defendants shall be enjoined from encouraging Red Rock Anesthesia Consultants from inducing facilities and physicians to divert their business away from Plaintiff, but such injunction shall not preclude Defendants from fulfillment of assignments by Red Rock to physicians and health care providers which have requested its services.

Security shall be set in the sum of $1,000.00.

Counsel for Plaintiff is directed to submit a proposed order consistent with the foregoing and including preliminary findings of fact/conclusions of law. NRCP 65(d)(1) and 52(a)(2), as both were amended effective March 1, 2019. Prior to submission of such proposed order to the Court, the same

should be submitted to opposing counsel for signification of approval/disapproval. Instead of seeking to clarify or litigate meaning or any disapproval through correspondence directed to the Court or to counsel with copies to the Court, any such clarification or disapproval should be the subject of appropriate motion practice.

CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Madalyn Kearney, to all registered parties for Odyssey File & Serve. /mk 3/19/19

ELECTRONICALLY SERVED
5/13/2019 11:23 AM

A-18-783054-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Employment Contract	**COURT MINUTES**	**May 13, 2019**

A-18-783054-C Fielden Hanson Isaacs Miyada Robison Yeh Ltd., Plaintiff(s)
vs.
Devin Tang, M.D., Defendant(s)

May 13, 2019 **11:15 AM** **Minute Order re: Plaintiff's Motion for Reconsideration**

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

After a review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, the Court determined as follows:

A central issue to this matter is whether NRS 613.195(5) as amended by AB 276, which mandates revision of unreasonable limitations in noncompetition covenants, should be applied retroactively to the Employment Agreement between Plaintiff and Defendant Tang.

While there is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied, this rule does not apply to statutes that do not change substantive rights and instead relate solely to remedies and procedure.

Clearly NRS 613.195(5) requires the Court to rewrite the contract, and more specifically, the noncompetition clause if the Court determines that it contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee.

Here, Plaintiff and Defendant Tang entered into the noncompetition agreement knowing that it would only be binding if a court found all of its terms to be reasonable. Applying NRS 613.195(5) retroactively would upend their mutual expectations and require the Court to substantially change the parties' rights under their agreement and violate Defendant Tang's due process rights. Due to this potential alteration of the parties' substantive rights, a clear manifestation of legislative intent is

required for retroactive application of NRS 613.195(5). As neither the text of NRS 613.195(5) nor its legislative history show such clear intent, NRS 613.195(5) as amended by AB 276 should not be applied retroactively.

Consequently, Plaintiff's Motion for Reconsideration is DENIED.

Counsel for Defendant shall prepare a detailed Order, Findings of Facts, and Conclusions of Law, based not only on the foregoing Minute Order, but also on the record on file herein. This is to be submitted to adverse counsel for review and approval and/or submission of a competing Order or objections, prior to submitting to the Court for review and signature.

CLERK'S NOTE: This Minute Order has been electronically served to the parties through Odyssey eFile.

NEO
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBINSON YEH, LTD. 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 **NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION**

PLEASE TAKE NOTICE that an *Order Denying Motion for Reconsideration* was filed in the above-captioned matter on August 28, 2019. A true and correct copy of said order is attached hereto.

DATED this 28th day of August, 2019.

HOWARD & HOWARD ATTORNEYS, PLLC

By: */s/Ryan O'Malley*
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 attached **NOTICE OF ENTRY OF ORDER DENYING MOTION FOR RECONSIDERATION** 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:

Michael N. Feder (#7332)
Gabriel A. Blumberg (#12332)
DICKINSON WRIGHT, PLLC
8363 West Sunset Road, Suite 200
Las Vegas, NV 89113
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 **August 28, 2019**, at Las Vegas, Nevada.

/s/ Anya Ruiz

An Employee of Howard & Howard Attorneys PLLC

4821-1145-5651, v. 1

HOWARD & HOWARD ATTORNEYS PLLC

ODM
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DISTRICT COURT

CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., 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 **ORDER DENYING MOTION FOR RECONSIDERATION**

On February 21, 2019, Plaintiff Fielden Hanson Isaacs Miyada Robinson Yeh, Ltd. ("Fielden Hanson" or "Plaintiff") filed its Motion for Reconsideration on an Order Shortening Time ("Motion"), which moved the Court to reconsider its February 5, 2019 Order denying Plaintiff's Motion for a Preliminary Injunction. Defendants Devin Chern Tang ("Dr. Tang") and Sun Anesthesia Solutions ("Sun Anesthesia") (collectively "Defendants") opposed the Motion on March 4, 2019. Fielden Hanson submitted a Reply in support of its Motion on March 5, 2019.

The Court heard the Motion on March 6, 2019. After argument, the Court ordered supplemental briefing on whether NRS 613.195(5) may be applied retroactively to covenants not to compete that were executed prior to the statute's enactment. The parties timely submitted their supplemental briefs on March 22, 2019.

Having considered the record, the briefing, and the arguments of counsel, and good cause appearing, the Court finds as follows:

. . .

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FINDINGS OF FACT:

1. In or around December of 2016, Dr. Tang executed a Physician-Track Employment Agreement ("Employment Agreement").

2. The Employment 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.

3. On June 3, 2017 the Nevada legislature enacted AB 276, a portion of which was codified as NRS 613.195(5). That statute requires a court to blue pencil an unreasonably restrictive non-competition clause in order to render it enforceable:

> If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, the court shall revise the covenant to the extent necessary and enforce the covenant as revised. Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

4. In or around March of 2018, Dr. Tang provided 90 days' notice of his intent to terminate his employment with Fielden Hanson in the manner provided by the Employment Agreement.

5. In or around June of 2018, Dr. Tang's notice period expired, and his employment with Fielden Hanson was terminated.

6. Dr. Tang continued to work as an anesthesiologist after his departure from Fielden Hanson by accepting overflow anesthesiology cases from University Medical Center and an anesthesiology practice called Red Rock Anesthesia Solutions.

7. Fielden Hanson became aware that Dr. Tang had performed anesthesia services at Southern Hills Hospital and St. Rose Dominican Hospital – San Martin Campus. Fielden Hanson has contractual relationships with these facilities, and Fielden Hanson therefore believed that Dr. Tang's conduct violated Employment Agreement. This lawsuit followed.

CONCLUSIONS OF LAW:

1. A central issue to this matter is whether NRS 613.195(5), which mandates revision of unreasonable limitations in noncompetition covenants, should be applied retroactively to the Employment Agreement between the parties.

2. There is a general presumption in favor of prospective application of statutes unless the legislature clearly manifests a contrary intent or unless the intent of the legislature cannot otherwise be satisfied.

3. The general presumption described above does not apply to statutes that do not change substantive rights and instead relate solely to remedies and procedure.

4. Clearly, the statute requires the Court to rewrite the contract—and more specifically the Non-Competition Clause—if the Court determines that it: (1) contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable; (2) imposes a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed; or (3) imposes undue hardship on the employee.

5. Fielden Hanson and Dr. Tang entered into the Non-Competition Clause in the Employment Agreement knowing that it would be binding only if a court found all of its terms to

be reasonable.

6. Applying NRS 613.195(5) retroactively would upend the parties' mutual expectations and require the Court to substantially change the parties' rights under their agreement and violate Dr. Tang's due process rights.

7. Due to this potential alteration of the parties' substantive rights, a clear manifestation of legislative intent is required for retroactive application of NRS 613.195(5).

8. As neither the text of NRS 613.195(5) nor its legislative history show a clear manifestation of intent that it apply retroactively, the statute should not be applied retroactively.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and good cause appearing, Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED this 27 day of August, 2019.

HONORABLE TIMOTHY C. WILLIAMS

Respectfully submitted by:

HOWARD & HOWARD ATTORNEYS PLLC

Martin A. Little (#7067)
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Attorneys for Defendants

Approved as to form and content by:

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4843-8137-8210, v. 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., Plaintiffs, vs. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, A Nevada Corporation, DOE Defendants I-X, Defendants.	Case No.: A-18-783054-C Dept.: 16 **NOTICE OF APPEAL**

Notice is hereby given that Plaintiff Fielden Hanson Isaacs Miyada Robison Yeh, Ltd., by and through its attorneys, the law firm of Dickinson Wright PLLC, hereby appeals to the Supreme Court of Nevada from the August 28, 2019 Order Denying Motion for Reconsideration. Notice of Entry the August 28, 2019 Order Denying Motion for Reconsideration was filed on August 28, 2019.

DATED this 19th day of September 2019.

DICKINSON WRIGHT PLLC

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned, an employee of Dickinson Wright PLLC, hereby certifies that on the 19th day of September 2019, a copy of **NOTICE OF APPEAL** to be transmitted by electronic service in accordance with Administrative Order 14.2, to all interested parties, through the Court's Odyssey E-File & Serve system addressed to:

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