Martin A. Little (#7067)
Ryan T. O'Malley (#12461)
HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Parkway, Suite 1000
Las Vegas, NV 89169
Telephone: (702) 257-1483
Facsimile: (702) 567-1568
E-Mail: mal@h2law.com; rto@h2law.com
Attorneys for Respondents

IN THE SUPREME COURT OF NEVADA

FIELDEN HANSON ISAACS MIYADA ROBINSON YEH, LTD.

Appellant,

v.

DEVIN CHERN TANG, M.D.; SUN ANESTHESIA SOLUTIONS, a Nevada Corporation; and DOE DEFENDANTS I-X,

Respondents.

Case No. 78358

From the Eighth Judicial District
Case No. A-18-783054-C

ANSWERING BRIEF

HOWARD & HOWARD ATTORNEYS, PLLC
Martin A. Little (#7067)
Ryan T. O'Malley (#12461)
3800 Howard Hughes Pkwy, #1000
Las Vegas, Nevada 89169
Attorneys for Respondent

NRAP 26.1 DISCLOSURE

Sun Anesthesia Solutions is wholly owned by Devin Chern Tang, M.D.

Dated this 26th day of February, 2020.

HOWARD & HOWARD ATTORNEYS, PLLC

By: */s/ Ryan O'Malley*
Martin A. Little, Esq. (SBN 7067)
Ryan O'Malley, Esq. (SBN 12461)
3800 Howard Hughes Pkwy, Suite 1000
Las Vegas, Nevada 89169
Attorneys for Respondents

HOWARD & HOWARD ATTORNEYS PLLC

CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES

1. Is a non-competition agreement overbroad when it lacks any geographic limitation that purportedly bars a former physician employee from working at any "facility" with which his former employer has a relationship, and it requires the physician to indefinitely terminate his privileges at those same facilities upon the termination of his employment?

2. Can NRS 613.195(5) operate retrospectively to modify the terms of an non-competition agreement that was executed before the statute's enactment?

STATEMENT OF THE CASE

This appeal arises from a denial of a preliminary injunction in a non-compete case based upon two premises: (1) A non-competition agreement which lacks any definite geographic limitation is vague and overbroad under Nevada law; and (2) an unenforceable non-competition agreement executed prior to the enactment of NRS 613.195(5) cannot be modified (or "blue-penciled") under that statute.

The district court's ruling was correct on both accounts. A geographic limitation is necessary to make the scope of an employee's obligation reasonably ascertainable at the time that he or she is asked to execute an employment agreement. In the absence of a geographic limitation, the scope of an employee's obligations over the time set forth in the non-compete is either: (1) unlimited; or (2) unclear until the employee is already bound by the agreement. In either case, the scope of the non-compete is within the employer's control, and an employee cannot

reasonably evaluate whether the scope of the non-compete is acceptable at the time of execution. The non-compete at issue was executed prior to the enactment of NRS 613.195(5), and the district court therefore could retroactively apply that statute in order to add a geographic limitation. The sole purpose of NRS 613.195(5) is to change the *substance* of a private contract under certain circumstances. Statutes affecting substantive rights 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. NRS 613.195(5) therefore cannot be retroactively applied to rescue the non-compete at issue, and it is wholly unenforceable.

STATEMENT OF FACTS

Dr. Tang's Practice with Premier Anesthesiology Consultants

In August of 2016, Dr. Tang moved to Las Vegas and accepted a position with Premier Anesthesiology Consultants ("PAC"). (1 App. 111.) PAC was a subsidiary of an entity called Anesthesiology Consultants, Inc. ("ACI"). (*Id.*) Dr. Tang accepted a position with PAC because he perceived it to be one of the few groups that treated its employees fairly while offering a clear path to partnership for its physicians. (*Id.*)

USAP Acquires Premier Anesthesiology Consultants

In or around December of 2016, a multistate anesthesiology conglomerate called U.S. Anesthesia Partners ("USAP") came to Las Vegas in a merger deal

which involved PAC/ACI and another group called Summit Anesthesia Consultants. (1 App. 111.) Fielden Hanson Isaacs Miyada Robinson Yeh, Ltd. ("Fielden Hanson") is a subsidiary of USAP.

In connection with this acquisition, USAP/Fielden Hanson required Dr. Tang to execute Physician-Track Employment Agreements ("Agreement") if he wished to continue his employment. (1 App. 120–143.) The Agreement (with exhibits) spans about 23 single-spaced pages. (*Id.*) 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[.]"

(1 App. 120.) The definition of capital-'F' "Facilities" under the Agreement therefore includes the following classes of healthcare facilities:

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

(2) facilities at which USAP/Fielden Hanson *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/Fielden Hanson had provided anesthesiology or pain management services at any time during the term of the Agreement;

(4) facilities at which USAP/Fielden Hanson 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/Fielden Hanson had "active negotiations[1] 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/Fielden Hanson 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.

(*Id.*) Subject to this broad definition of "Facilities," the Agreement contains the following Non-Competition Clause:

[1] 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/Fielden Hanson 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.

(1 App. 124, 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:[2]

> 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.

(1 App. 132–33.) The Agreement also includes a provision requiring Dr. Tang to "waive[] 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) [*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. (1 App. 133.) The Agreement's

[2] 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.

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. (1 App. 124–25.)

Dr. Tang's Post-Merger Working Conditions Deteriorate

In the time following the USAP acquisition, the conditions of Dr. Tang's employment deteriorated. (1 App. 111.) Surgeons who had previously worked with PAC increasingly became dissatisfied. (*Id.*) For example, Las Vegas Surgical Associates ("LVSA"), a prior client of PAC, was unhappy with some of the anesthesiologists[3] that USAP had provided to cover procedures, and it therefore withdrew its business from USAP in February of 2018. (1 App. 117–18.) Former PAC client Tarek Ammar, M.D. encountered issues with scheduling failures, and similarly withdrew his business. (1 App. 96). Other physicians and physician groups similarly withdrew or curtailed their business with USAP/Fielden Hansen following the acquisition. (*Id.*)

Dr. Tang Separates from USAP

Dr. Tang became uncomfortable with the prospect of continuing to work with USAP/Fielden Hansen. (1 App. 111.) Thus, in or around March of 2018, he provided 90 days' notice of his intent to terminate his employment with

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

USAP/Fielden Hansen, as provided in Paragraph 6.2.9 of the Agreement. (*See* 1 App. 111; *accord* 1 App. 132.) In April of 2018 (and after providing his 90 days' notice), Dr. Tang created Sun Anesthesia Solutions ("Sun Anesthesia"), which was to serve as his professional corporation following his departure. (1 App. 112.)

Appellant's Motion for Preliminary Injunction

On October 19, 2018, Appellant filed a Motion for Preliminary Injunction seeking enforcement of the non-competition agreement. (1 App. 14–69.) Respondents opposed the Motion on November 9, 2018. (1 App. 93–145.)

The district court heard the Motion on November 19, 2018. (1 App. 176–227.) After argument, the district court ordered supplemental briefing on the enforceability of covenants not to compete lacking a geographic limitation. (1 App. 212.) The parties timely submitted their supplemental briefs on December 7, 2018. (1 App. 228–2 App. 303.) On February 8, 2019, the district court denied Appellant's motion, and held that the non-competition agreement is unreasonable and unenforceable as a matter of law. (2 App. 306–313.)

Appellant's Motion for Reconsideration/Arguments Regarding NRS 613.195(5)

On February 21, 2019, Appellant moved the district court for reconsideration on an order shortening time. (2 App. 314–349.) Appellant's motion was based in part on an argument that NRS 613.195(5) should be invoked to modify the Agreement if the district court believed it was unenforceable as drafted. (2 App. 321–23.) That statute provides 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).

Respondents opposed the motion on March 4, 2019, arguing that NRS 613.195(5) was enacted on June 3, 2017, approximately six months *after* Dr. Tang's noncompetition agreement was executed, and that the statute cannot be applied retrospectively. (2 App. 350–3 App. 511.) Appellants submitted a reply in support of their Motion for Reconsideration on March 5, 2019. (3 App. 512–530.)

The district court heard the motion on March 6, 2019. (3 App. 531–568.) At hearing, the district court requested supplemental briefing regarding retroactive application of NRS 613.195(5) to be submitted by March 22, 2019. (3 App. 559–60.) On March 22, 2019, the parties submitted timely supplemental briefing on Plaintiff's Motion for Reconsideration. (3 App. 571–665.) The Court denied Plaintiff's Motion for Reconsideration on August 28, 2019, holding that NRS 613.195(5) is substantive and cannot be applied retroactively in the absence of any statement of intent from the legislature that it do so. (3 App. 668–673.)

SUMMARY OF THE ARGUMENT

Non-competition agreements are disfavored restraints of trade, and they require definite and narrowly-tailored terms in order to be enforceable. Sufficiently definite non-competition agreements must contain express and reasonable limitations as to time and geographic scope. These criteria (and their reasonableness) are clear and easily ascertainable; the extent of the restriction may be reckoned by simple reference to a map and a calendar.

The non-competition agreement at issue here lacks any geographic limitation, and instead casts its scope in terms of medical "Facilities[4]" at which Fielden Hansen provides services (or may provide services) and at which Dr. Tang has

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[4] "Facilities" is a broadly-defined term under the contract at issue, and purportedly includes:

> [1] All facilities with which [USAP] 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 [of the contract] or during the preceding twelve (12) months; [2] facilities at which any such [healthcare] providers have provided Anesthesiology and Pain Management Services at any time during the Term or during the preceding twelve (12) months, and (3) facilities with which [USAP] 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[.]

[1 App. 120, emphases added.] The definition of "Facilities" therefore includes, among other things, hospitals with whom USAP had "actively negotiated" with at any point in the year *prior to* a physician's employment with the practice, even if those negotiations never ripened into a relationship.

worked. Non-competition agreements cast in these terms present indefinite and moving targets in which departing physicians cannot confidently know where they can or cannot work, and they require courts to conduct fact-specific inquiries in every disputed case. Moreover, there is no reasonable nexus between: (1) the hospitals at which an anesthesiology group provides services; and (2) which surgeons who conduct procedures at those hospitals have a relationship with that anesthesiology group. In Nevada, surgeons may generally conduct procedures at any hospital at which they have privileges, and those surgeons may retain the services of any anesthesiologist that they choose.[5] The mere fact that USAP has provided anesthesiology services for a surgeon at Sunrise Hospital (for example) should not bar a departing anesthesiologist from providing services to *any* surgeon at that same facility, regardless of whether or not those surgeons have ever worked with USAP. Nevertheless, this is exactly how the non-competition agreement at issue here is constructed.

Because the overbroad non-competition agreement at issue here predated the enactment of NRS 613.195(5), it cannot be "blue-penciled" under that statute. Prior to the enactment of NRS 613.195(5), Nevada law held that an overbroad non-competition agreement was wholly unenforceable, and that an employee purportedly subject to such an agreement would not be bound. NRS 613.195(5)

[5] Provided, of course, that the surgeon's chosen anesthesiologist also has privileges at the same hospital.

allows a court to rescue an otherwise unenforceable non-competition agreement by modifying its terms in order to render it enforceable, thereby modifying the terms of the deal between an employer and employee. The sole purpose of NRS 613.195(5) is to change the *substance* of a private contract under certain circumstances. Statutes affecting substantive rights 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. NRS 613.195(5) therefore cannot be retroactively applied to rescue the non-compete at issue, and it is wholly unenforceable.

ARGUMENT

I. THE NON-COMPETE AT ISSUE HERE IS OVERBROAD AND UNENFORCEABLE

The non-compete at issue here is overbroad and not reasonably related to any legitimate business purpose; therefore, it is wholly unenforceable. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 156 (2016) (holding that a non-compete that extends beyond what is necessary to protect the employer's interest renders the provision wholly unenforceable). The plain language of the provision states that if Dr. Tang had ever taken a case at a hospital during his time at USAP, he is barred from accepting *any* cases from *any* provider at that *entire facility* for a two-year period, even for providers with whom USAP had never worked, and even if USAP later ceases providing any services at that facility. The

non-compete's focus on entire *facilities* rather than individual *physicians* is nonsensical because, generally speaking, physicians (and not hospitals) hire anesthesiologists. The non-compete is therefore overbroad and invalid.

A. Non-Competition Agreements are Strictly Construed

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

Post-employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business. *Hotel Riviera*, 97 Nev. at 404, 632 P.2d at 1158–59. Thus, noncompetition agreements are strictly limited to the protection of a legitimate business interest of the employer. *Duneland Emergency Physician Med. Corp. v. Brunk*, 723 N.E. 2d 963 (Ind. Ct. App. 2000). In order for a plaintiff to enjoy a probability of success on the merits of its case to enforce a non-compete clause, the Court must consider whether the provisions of

the non-compete would likely be found reasonable at trial. *Hanson v. Edwards*, 83 Nev. 189, 191-92, 426 P.2d 792, 793 (1967).

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

B. USAP's Non-Competition Agreement is Overbroad as Drafted

The plain language of the non-compete at issue here purports to prevent Dr. Tang from "provid[ing] Anesthesiology and Pain Management Services at any of the Facilities at which [he] has provided any Anesthesiology and Pain Management Services . . . within the twenty-four month period prior to the date of . . . termination" of the Agreement. (1 App. 124.) On its face, this provision prevents Dr. Tang from accepting cases at any "Facility" at which he had even taken a case

during his time at USAP, even if USAP were to later cease providing anesthesiology services at those "Facilities."

But Appellant'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. *See Golden Rd.*, 376 P.3d at 156.

The Agreement also requires 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 provided services there as USAP employees, and with no indication of when (if ever) they may apply to reinstate their 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/Fielden Hanson has a contract to supply healthcare providers;

(2) every facility at which USAP/Fielden Hanson *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/Fielden Hanson had provided anesthesiology or pain management services at any time during the term of the Agreement;

(4) every facility at which USAP/Fielden Hanson 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/Fielden Hanson 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/Fielden Hanson 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 their 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/Fielden Hanson.

II. NRS 613.195(5) CANNOT BE APPLIED RETROACTIVELY

Applying NRS 613.195(5) retroactively would substantively modify the terms of the parties' non-compete, 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 at issue in this case. At the time of execution, Nevada's law of public policy required non-competes to be wholly reasonable, and held that reformation (or "blue penciling") was not available to rescue non-competes that were unreasonable. *See Golden Rd.*, 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 non-competes in their entirety and prohibited judicial contract reformation as a matter of public policy.[6] Parties may not contract

[6] *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

around the law of public policy. Thus, at the time of execution, both parties reasonably expected that the non-compete 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[7] when they agreed to the terms at issue.

C. Golden Road, its Antecedents Under 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,

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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.

[7] 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 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.").

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").

1. Golden Rd. was Supported by Decades of Nevada Public Policy Precedent

On July 21, 2016, this Court held in *Golden Rd.* that Nevada's established law of public policy precluded blue penciling an unreasonable non-compete. 376 P.3d at 158. The case involved a non-compete 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 non-compete 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 Court to "blue pencil" the agreement by narrowing its scope to render it enforceable. *See id.* at 156. This Court declined to do so, noting that, under long-standing Nevada precedent, "an unreasonable

provision renders [a] 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 Court's ruling in *Golden Rd.* 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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> [* * *]
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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.*

2. AB 276 Substantively Changed Nevada Law

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.[8] (*See generally* 3 App. 583–588) Nor was blue-penciling mentioned in the

[8] 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.)

first reprint of the Bill, which made only minor wording changes to the initial draft without changing the substance. (*See generally* 3 App. 590–593.) 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* 3 App. 590–600.) 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 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. (3 App. 602–48.) 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. (3 App. 613–15.)

She then spoke briefly about the protections for laid off employees and ex-employees who are sought out by clients of their former employer.[9] (3 App. 616–17.) 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.

(3 App. 616.) 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. (3 App. 616) 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.*) 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

[9] 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.

40 years.[10] (*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 statements of support by other lobbyists, Chair Atkinson called the Bill to a vote, and it was passed. (3 App. 616–17.)

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.

D. 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

[10] *See* cases cited in note 1, *supra*.

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.

1. Both USAP and Dr. Tang were Bound by the State of Nevada Law at the Time of Executing the Non-Compete, 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[11] 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

[11] *See, e.g.*, Section 2.8.3 of the non-compete ("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.")

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.

2. 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." *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 executed This is not permissible under the Constitution, and AB 276 cannot be applied retroactively.

3. 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

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. *Nev. 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.

CONCLUSION

The Court should affirm the ruling below.

Dated this 26th day of February, 2020.

HOWARD & HOWARD ATTORNEYS, PLLC

By: */s/ Ryan O'Malley*
Martin A. Little, Esq. (SBN 7067)
Ryan O'Malley, Esq. (SBN 12461)
3800 Howard Hughes Pkwy, Suite 1000
Las Vegas, Nevada 89169
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 7,913 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of February, 2020.

HOWARD & HOWARD ATTORNEYS PLLC

By: */s/ Ryan T. O'Malley*
Martin A. Little, Esq. (SBN 7067)
Ryan O'Malley, Esq. (SBN 12461)
3800 Howard Hughes Pkwy, Suite 1000
Las Vegas, Nevada 89169
Attorneys for Respondents

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 that of Howard & Howard Attorneys PLLC, 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, Nevada, 89169.

I served the foregoing **ANSWERING BRIEF** in this action or proceeding electronically with the Clerk of the Court via the E-Flex system, which will cause this document to be served upon the following counsel of record:

DICKINSON WRIGHT PLLC
Michael N. Feder (#7332)
Gabriel A. Blumberg (#12332)
8363 W. Sunset Road, Suite 200
Las Vegas, NV 89501
Attorneys for Appellant

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on February 26, 2020 at Las Vegas, Nevada.

/s/ Ryan O'Malley

An Employee of HOWARD & HOWARD ATTORNEYS PLLC