**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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| FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.,<br><br>Appellants,<br><br>v.<br><br>DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, a Nevada Corporation, DOE Defendants I-X<br><br>Respondents. | Supreme Court No. 78358<br><br>District Court No. A-18-783054-C<br><br>**APPELLANT'S REPLY BRIEF** |



**APPEAL**

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

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# APPELLANT'S REPLY BRIEF

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## DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. ("Fielden Hanson") is a wholly owned subsidiary of USAP of Nevada (Isaacs), PLLC, which is managed by U.S. Anesthesia Partners, Inc. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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## INTRODUCTION

Tang's Answering Brief further demonstrates why this Court should reverse the district court's erroneous decision denying Fielden Hanson's request for a preliminary injunction.

First, Tang failed to dispute that the Non-Competition Clause only restricts him from working at a defined, limited subset of medical facilities in Clark County, Nevada. Instead of denying this uncontested fact, Tang argues that the Non-Competition Clause should have been based on physicians rather than facilities. However, the focus must be on what is provided for in the Non-Competition Clause, not some hypothetical "should have" argument. Indeed, a physician-based restriction, as argued by Tang, would inevitably create a much more wide-ranging and restrictive covenant than the facility-based covenant actually at issue in this matter.

Second, Tang concedes that Fielden Hanson's arguments relating to the plain language of NRS 613.195(5) are meritorious by failing to address them. Despite Fielden Hanson clearly identifying that the plain language of the statute mandates that it be applied in any action commenced after the statute's enactment date, Tang wholly fails to respond to the argument. Tang's silence must be construed as an admission that Fielden Hanson's position is valid and NRS 613.195(5) should have

been applied in this matter in the event the Non-Competition Clause is deemed unreasonable.

For these reasons and those that follow, the Court should reverse the district court's denial of Fielden Hanson's request for a preliminary injunction.

## ARGUMENT

### A. The Non-Competition Clause Is Not Overbroad

Tang first argues that the Non-Competition Clause is overbroad because it focuses on medical facilities rather than physicians.[1] Tang's own arguments elsewhere in the Answering Brief, however, undercut this argument and require that it be rejected. *See* Answering Brief at pp. 15-16 (asserting that a geographic restriction should "be reckoned by simple reference to a map" and should not be a "moving target.").

[1] Tang uses Sunrise Hospital as an example when stating that the mere fact that he performed anesthesia services on behalf of Fielden Hanson at Sunrise Hospital should not preclude him from working at Sunrise Hospital after terminating his employment with Fielden Hanson. Answering Brief at p. 16. Notwithstanding Tang's argument, this restriction is exactly what Tang agreed to when he executed the Employment Agreement. Moreover, Tang's example ignores another critical reason why the facility-based Non-Competition Clause is reasonable and, in fact, more practical than a physician-based non-compete agreement: Fielden Hanson has a contractual agreement with Sunrise Hospital to provide anesthesia at that facility. APP0000017, APP000060.

Here, Fielden Hanson crafted a narrow, reasonable geographic boundary that was tied solely to the relationships with facilities that Tang developed through his time working for Fielden Hanson. Indeed, the only facilities covered by the Non-Competition Clause are the ones Tang personally worked at on behalf of Fielden Hanson. As a result, Tang undoubtedly knew of the particular facilities that were restricted at the time he terminated his employment with Fielden Hanson. Furthermore, all of these subject facilities are stationary and thus can "be reckoned by simple reference to a map."[2]

The reasonableness of the Non-Competition Clause is further evidenced by the fact that other courts have concluded that a party can enforce a facility-based restriction on anesthesiologists. In *Anesthesia Servs., P.A. v. Winters*, No. CIV.A.10C-06-037RRC, 2010 WL 4056141, at *3 (Del. Super. Ct. Oct. 6, 2010), the plaintiff anesthesiology group sought to enforce a non-compete agreement that precluded the former employee anesthesiologist defendant from working in the field of anesthesiology within the "twenty-five (25) mile radius surrounding each facility serviced by" the plaintiff anesthesiology group. *Id.* at *1. Defendant moved to dismiss, arguing, *inter alia*, that the geographic scope of the restrictive covenant was unreasonable and overly broad. *Id.* The court denied the motion to dismiss based

[2] For example, Sunrise Hospital is located at 3186 S. Maryland Parkway, Las Vegas, NV 89109, which is easily identifiable on a map.

on its conclusion that the plaintiff anesthesiology group "established reasonable circumstances and inferences wherein it could recover." *Id.*

Notably, the non-compete agreement in *Winters*, which was not deemed unreasonable or overbroad, was significantly more restrictive than the Non-Competition Clause at issue here. Not only did Fielden Hanson limit the geographic scope of the Non-Competition Clause to the facilities themselves as opposed to the twenty-five mile radius surrounding each facility, but Fielden Hanson also went one step further by limiting the Non-Competition Clause to facilities where Tang personally worked as opposed to all facilities serviced by Fielden Hanson. As a result, there can be no doubt that the Non-Competition Clause at issue here is reasonable and should have been enforced by the district court.

Lastly, Tang's suggestion that the Non-Competition Clause should have been tied to physicians further demonstrates the reasonableness of the Non-Competition Clause. Physicians are literally moving targets because they can work at any facility in any state. As such, a non-compete based solely on physicians would be exponentially more restrictive. Thus, to the extent Tang is claiming a physician-based restriction would have been reasonable, then he must concede that the less

onerous facility-based restriction in the Non-Competition Clause is likewise reasonable and, thus, enforceable.[3]

### B. The Employment Agreement's Provision Regarding Staff Privileges Is Irrelevant

In an attempt to distract the Court from the reasonableness of the Non-Competition Clause, Tang argues that Section 6.3 of the Employment Agreement unreasonably requires him to terminate his privileges at certain facilities. Answering Brief at pp. 20-22 (referencing Section 6.3 of the Employment Agreement). Pursuant to Section 2.10 of the Employment Agreement, however, Section 6.3 of the Employment Agreement has no bearing on, or application to, the Non-Competition Clause and thus cannot be used to invalidate the reasonable Non-Competition Clause. As set forth in Section 2.10 of the Employment Agreement:

> 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.

APP000035 at Section 2.10.

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[3] To the extent Tang is contending that anesthesiologists can never be subject to non-compete agreements, that position is meritless. *See Hansen v. Edward*s, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967) ("The medical profession is not exempt from a restrictive covenant provided the covenant meets the tests of reasonableness."); *see also Winters*, 2010 WL 4056141, at *3 (Del. Super. Ct. Oct. 6, 2010).

Since Section 2.10 renders Tang's reliance on Section 6.3 of the Employment Agreement meaningless, Tang's argument must be rejected.[4]

### C. NRS 613.195(5) Applies to the Non-Competition Clause

In its Opening Brief, Fielden Hanson argued that the plain language of NRS 613.195(5) mandates that it be applied to this action because it specifically provides that it should be implemented any time "an employer brings an action to enforce a noncompetition covenant." *See* Opening Brief at pp. 12-15. Tang failed to address this argument in his Answering Brief and, thus, Tang must be deemed to have conceded the merit of Fielden Hanson's position. *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious).

Instead of addressing Fielden Hanson's multiple pages of argument on this topic, Tang instead purposefully avoids it by repeatedly, and mistakenly, asserting that there is absolutely nothing in either the legislative history or the text of NRS 613.195(5) indicating that the legislature intended that the statute operate retrospectively or retroactively. Answering Brief at pp. 24, 30, 34. This simply is not true.

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[4] Similar to his later arguments regarding bluelining, Tang's argument regarding Section 6.3 is another example of his bad faith in presenting arguments that are directly contravened by the plain language of the Employment Agreement.

The plain language of the statute establishes that its application turns on when an employer brings an action to enforce a non-competition agreement rather than when the employer entered into the non-competition agreement. *See* NRS 613.195(5). The plain language is clear and conclusive, and this Court need not even engage in an analysis of whether the statute is procedural or substantive to determine whether it applies to this action. *See Richardson Const., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 64, 156 P.3d 21, 23 (2007) ("In determining the Legislature's intent, we may look no further than any unambiguous, plain statutory language"); *State v. Sargent*, 122 Nev. 210, 213, 128 P.3d 1052, 1054 (2006) (citing *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)) (same).

In order to accept Tang's position, the Court not only would have to violate this cannon of statutory construction, but also the cannon barring interpretations that render language meaningless or superfluous. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011) (citing *Butler v. State*, 120 Nev. 879, 892–93, 102 P.3d 71, 81 (2004)) ("Our initial inquiry focuses on the language of the statute, and we avoid statutory interpretation that renders language meaningless or superfluous.")

Indeed, under Tang's interpretation of NRS 613.195(5), the Court would have to ignore, and render superfluous, the prefatory clause of the statute which indicates it applies when "an employer brings an action to enforce a noncompetition covenant." Had the legislature desired to limit NRS 613.195(5) only to non-compete

agreements executed after the enactment of the statute, it could have done so by having the statute provide "if an employer brings an action to enforce a noncompetition covenant executed after June 3, 2017." But that is not what the statute provides. Instead, the legislature crafted a statute that applied to any *action* filed after the enactment of NRS 613.195(5). Since this case was filed after enactment of NRS 613.195(5), this Court must reverse Judge Williams' refusal to apply NRS 613.195(5) and remand this matter back for consideration under NRS 613.195(5).

### D. Applying NRS 613.195(5) Would Not Violate Tang's Due Process Rights

#### 1. The Parties Consented to Bluelining

Tang argues that application of NRS 613.195(5) "upends the parties' reasonable expectations at the time of execution by effectively inserting severability and blue-lining clauses into the contract." Answering Brief at p. 23. Tang attempts to advance this argument by stating that applying NRS 613.195(5) would "place Dr. Tang in a contractual relationship fundamentally different than the one he had executed." Answering Brief at p. 32. Nothing could be further from the truth. Fielden Hanson simply seeks to enforce the terms of the Employment Agreement that the parties actually executed. Tang, on the other hand, is attempting to fundamentally change the contractual relationship. Indeed, the Employment Agreement clearly and unambiguously provides for bluelining:

> 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 the 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.

APP000034 at ¶ 2.8.3 (emphasis added).

> 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, case, or otherwise.

APP000035 at ¶ 2.10 (emphasis added).

Thus, Tang's argument that applying NRS 613.195(5) to this case would implicate due process concerns is without merit. 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. As

illustrated above, at the time he entered into the Non-Competition Clause, Tang received notice that he was agreeing to allow a court to blueline any unreasonable or unenforceable terms of the Non-Competition Clause. APP000034 at ¶ 2.8.3; APP000035 at ¶ 2.10. By signing the Employment Agreement, Tang also acknowledged he had the opportunity to review the Non-Competition Clause, including the provision permitting a court to blueline and modify the Non-Competition Clause. Therefore, he cannot come before this Court arguing that application of a statute mirroring the terms he agreed to in 2016 somehow violates his due process rights or would "upend" the parties' reasonable expectations.[5] To the contrary, applying the statute further enforces the parties' reasonable expectations.

**2. Tang's Unsupported Factual Assertions Must Be Rejected**

In an attempt to overcome the unambiguous language in the Employment Agreement permitting bluelining, Tang asserts that: (1) he executed the Employment Agreement "relying upon the law as it then existed;" (2) both parties entered into the Employment Agreement knowing that its Non-Competition Clause could not be bluelined; and (3) both parties expected that the Non-Competition Clause would be

[5] Similarly, the Court must reject Tang's brief, alternative argument that the Employment Agreement's bluelining provisions violated public policy given that the Employment Agreement's terms wholly align with Nevada's public policy as set forth in NRS 613.195(5).

deemed wholly void if any part of it were found unreasonable. Answering Brief at pp. 29, 31-32. Tellingly, nowhere in the Answering Brief is there any citation to the record for these unsupported factual allegations. That is because it does not exist. Indeed, the record is devoid of any evidence demonstrating that Tang knew of *Golden Road* or that the parties expected a reviewing court to void the Non-Competition Clause in its entirety if any portion of it were deemed unreasonable.

The lack of any such evidence is unsurprising given that, as explained above, the parties unequivocally agreed that the Non-Competition Clause should be revised, i.e. bluelined, to the extent necessary to ensure it was reasonable. *See* APP000034-APP000035 at Sections 2.8.3 and 2.10. These sections of the Employment Agreement unambiguously and explicitly provided that the parties, including Tang, expected and requested that a reviewing court blueline any offending provisions of the Non-Competition Clause to render it enforceable.

Thus, this Court must reject Tang's assertions because they are unsupported by the record and, in fact, belied by the plain language of the Employment Agreement. *See* NRAP 28(e).

## CONCLUSION

Based on the foregoing, Fielden Hanson respectfully requests that this Court reverse the district court's decision denying Fielden Hanson's request for a preliminary injunction because the Non-Competition Clause was reasonable and

therefore should have been enforced as drafted. Alternatively, if this Court determines that the Non-Competition Clause was unreasonable, this Court should reverse the district court's error in refusing to apply NRS 613.195(5) to the Employment Agreement or to enforce the terms of the Employment Agreement requiring the district court to blueline any unreasonable provision in the Non-Competition Clause, and remand this matter for entry of a preliminary injunction based on a bluelined version of the Non-Competition Clause.

Respectfully submitted this 9th day of April 2020.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 2635 words. Finally, 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 Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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

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that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 9th day of April 2020.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of April 2020, I submitted the foregoing **APPELLANT'S REPLY BRIEF** for filing via the Court's eFlex electronic filing system.

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