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

SCOTT VINH DUONG, M.D., ANNIE LYNN PENACO DUONG, M.D., DUONG ANESTHESIA, PLLC and DOE DEFENDANTS I-X,

Appellants,

vs.

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD.,

Respondent

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**No.: 79460**

From the Eighth Judicial District Court, Case No. A-19-789110-B

# APPELLANTS' REPLY BRIEF

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## INTRODUCTION

Respondent's Answering Brief fails to adequately establish and describe why the Non-Compete Agreements (the "NCAs") at issue are enforceable and why NRS 613.195(5) must be applied retroactively.

First, Respondent fails to accurately describe the expansive breadth of the anticompetitive restrictions set forth in the NCAs. The NCAs restrict Appellants from providing anesthesiology, pain management, management, administrative, or consulting services at "***Facilities***." (1 App. 184, emphasis added.) However, the term "Facilities" is defined so broadly that it renders the NCAs unreasonable and, therefore, unenforceable.

Under the NCAs, Appellants are restricted from, among other things, accepting work assignments form any surgeon at any "Facility" where Respondent previously had a contract to supply providers, and any facility where Respondent had active negotiations to supply providers, even if those negotiations never came to fruition. These restrictions are both overly broad and unenforceable as unreasonable restraints of trade.

Second, Respondent fails to properly analyze NRS 613.195(5) as it attempts to "blueline" the statute to engraft upon it a legislative intent to apply it retroactively where such intent is completely absent from the statute and legislative history. To be sure, the Legislature was silent as to whether NRS 613.195(5) applies

retroactively to contracts entered into before its effective date and that silence cannot be interpreted as blanket authority to apply the statute retroactively. Prior to the enactment of NRS 613.195(5), noncompetition agreements were "wholly unenforceable" if unreasonable as to their geography, time, and line of business restrictions. When the Legislature enacted NRS 613.195(5), it created a brand new, substantive right allowing courts to reform and enforce unreasonable noncompetition agreements—a substantive right that employers did not have before the statute's passage. It also created a brand new, substantive, restriction on employees who, after the statute's passage, were subject to court-imposed reformation and enforcement of what would otherwise have been unenforceable noncompetition agreements under *Golden Road, infra*. In the absence of any specific, textual, guidance from the Legislature, and because NRS 613.195(5) affects substantive rights, this Court should hold that it cannot be applied retroactively.

Accordingly, for the reasons in Appellants' Opening Brief and those that follow, the Court should: (1) reverse the District Court's April 4, 2019 and June 6, 2019 orders applying NRS 613.195(5), "blue penciling" the NCAs, and enforcing the NCAs; (2) hold the NCAs "wholly unenforceable" under *Golden Road*; and (3) hold that NRS 613.195(5) cannot be retroactively applied to non-competition agreements entered into before the statute's effective date.

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## STATEMENT OF RELEVANT FACTS ON REPLY

### *The Proper Definition of "Facilities" in the NCAs is Overly Broad, Not Limited to a Reasonable Geographic Location, and Misrepresented by Respondent.*

In its Answering Brief, Respondent attempts to narrow its own definition of "Facilities" under the NCAs by stating it only applies to the facilities that Appellants provided services at, known as the "Non-Competition Facilities." (Answering Br. at 11.) However, Respondent fails to acknowledge that its own definition of "Facilities" renders the NCAs' restrictions overly broad. The definition includes any:

(1) Facilities at which USAP/Fielden Hanson has a contract to supply healthcare providers during the term of the Agreement;

(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) Facilities 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) Facilities with which USAP/Fielden Hanson had "active negotiations" during the twelve months preceding the Agreement, even if those negotiations had unsuccessfully concluded prior to the term of the Agreement.

(1 App. 183–84.)

## ARGUMENT

### A. The NCAs Are Unreasonably Broad and Not Limited to a Reasonable Geographic Location.

In line with its misconstrued definition of "Facilities" in the NCAs, Respondent claims the NCAs contain an easily ascertainable geographic location. (Answering Br. at 9-10.) This may be the case if the NCAs explicitly limited Appellants from performing services *solely* at the facilities at which they worked during their time with USAP, however, as Appellants have previously stated, that is not the case. The NCA limits Appellants from performing services at any and all of the following:

(1) Facilities at which USAP/Fielden Hanson has a contract to supply healthcare providers during the term of the Agreement;

(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) Facilities 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) Facilities with which USAP/Fielden Hanson had "active negotiations" during the twelve months preceding the

> Agreement, even if those negotiations had unsuccessfully concluded prior to the term of the Agreement.

(2 App. 183–84.)

Such a list can hardly be considered narrowly tailored or an easily ascertainable geographic restriction because it fails to inform Appellants of the entirety of USAP's relationships with hospitals and other "facilities" in Nevada and elsewhere. It is entirely possible that USAP has relationships with every hospital, thereby restricting Appellants from practicing anesthesiology at ***any*** hospital in Nevada and possibly elsewhere. Such a possibility is simply overbroad, unfair, and not reasonably necessary to protect Respondent's interests. *See Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 483, 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).

Respondent further asserts that this case is comparable to *Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*, 2011 WL 3678798, at *3 (D. Nev. Aug. 22, 2011) and to *Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967). (Answering Br. at 9-11.) Appellants do not necessarily disagree as long as the restrictive covenant is *reasonable*, which is certainly not the case here.

In *Accelerated Care*, the restrictive covenant prevented the defendants from soliciting the plaintiff's employees, competing with the plaintiff, or inducing

customers to curtail their business with the plaintiff for one year from the date of termination. *Accelerated Care*, 2011 WL 3678798, at *3. The Court upheld the restriction as reasonable because the defendants had access to strategy, business models, and confidential information during their employment. *Id.* Further, the court held that the restriction was reasonable to protect the plaintiff's *legitimate* business interests due to the nature of the confidential business information obtained by the defendants during their employment and their identical roles with their new employer. *Id.* (emphasis added).

In *Hansen*, the parties entered into a non-compete agreement restricting the defendant from opening an identical medical practice within a 100-mile radius of Reno, Nevada. *Hansen*, 83 Nev. at 191, 426 P.2d at 793. The court was primarily concerned with the plaintiff losing patients as a result of the defendant opening a new office. *Id.* at 191-92, P.2d at 793-94. The court held that the restriction was reasonable to protect the goodwill and business of the employer as it was tied to geographic limits of the city of Reno, Nevada, and a one-year time period. *Id.*

Here, on the other hand, the restrictions set forth in the NCAs are in no way comparable to those at issue in *Accelerated Care* or *Hansen*. The definition of "Facilities" makes it impossible for Appellants to determine who they can or cannot perform work for. In addition, the requirement that they relinquish their staff privileges is unlimited as to time. It does not say for how long they must relinquish

their privileges. Moreover, here, there is no concern about the use or disclosure of proprietary of confidential business information. Rather, Appellants provided anesthesiology and pain management services for Respondent's customers, utilizing their own skills, education, and expertise.

Furthermore, the restriction in the instant matter is not tied to the legitimate business interests of Respondent. Plaintiffs in *Accelerated Care* were concerned about the disclosure of proprietary information falling into the hands of competitors which could then impact its business across the country. *Id.* at *4. The restriction was narrowly tailored to protect the interests of the business. Here, the laundry list of restrictions mentioned above are not narrowly tailored to protect the legitimate business interests of Respondent. The NCAs restrict Appellants from practicing at any "Facility" Respondent previously supplied health care providers to, even if it did so prior Appellants' employment and even if Respondent's contract with the "Facility" had expired. Even more unreasonable, the NCAs restrict Appellants from practicing at hospitals where there had been "active negotiations" without an agreement coming to fruition.

Next, Respondents rely on *Anesthesia Servs., P.A. v. Winters*, No. CIV.A.10C-06-037RRC, 2010 WL 4056141, at *3 (Del. Super. Ct. Oct. 6, 2010), to argue that facility-based restrictions have been "ratified" by courts. (Answering Br. at 12-13.) But *Winters* hardly provides the support Respondent seeks. In

*Winters*, the non-compete prohibited the defendant from working in the field of anesthesiology within a "twenty-five (25) mile radius surrounding each facility serviced by" the plaintiff anesthesiology group. *Winters*, 2010 WL 4056141, at *1. The defendant took a job at Lewes Surgery Center, a "facility" the plaintiff formerly had a business relationship with. *Id*. Thus, in *Winters*, one, and only one "facility" was at issue, it was a "facility" known to both the plaintiff and the defendant, and the court did not expressly pass on the reasonableness of facility-based geographic restrictions. Moreover, because *Winters* involved a motion to dismiss, the court accepted the facts in the complaint as true and drew all reasonable inferences in the plaintiff's favor in holding that the plaintiff stated a claim upon which relief could be granted. The *Winters* court did not "ratify" anything.

Respondent claims, however, that it limited "the geographic scope of the Non-Competition Clause to the facilities themselves . . . . [and] . . . went one step further [sic] by limiting the Non-Competition Clause to facilities where Scott and Annie personally worked as opposed to all facilities serviced by Fielden Hanson." (Answering Br. at 12.) This argument is, at best, a half-truth. The Non-Competition Clause states, in most relevant part, the following:

> [P]hysician covenants and agrees that Physician shall not . . . (i) provide Anesthesiology and Pain Management Services at any of the **Facilities** at which Physician has provided any Anesthesiology and Pain Management Services . . . (ii) call on, solicit or attempt to solicit any **Facility** serviced by the Practice . . . 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 App. 184, emphases added.)

While the language in (i) and (iii) is limited to "the **Facilities** at which Physician has provided . . . Services . . . .", the language in (ii) is not so limited, and reaches "any **Facility** serviced by the Practice." Under the definition of "Facilities," the restricted "Facilities" could be located anywhere. Due to the expansive definition of "Facilities," the Non-Competition Clause is unreasonable. It injects uncertainty into the parties' agreement, fails to put Appellants on notice of which "Facilities" they must avoid, and reaches much farther than necessary to protect Respondent's legitimate business interests.

Appellants contend that, a physician-based restriction would have been far more reasonable because it is physicians, not facilities, that hire anesthesiologists (2 App. 205-206, 210-211). Respondent argues that "a non-competition clause based solely on physicians would be exponentially more restrictive than one based on facilities." (Answering Br. at 13.) But this is flat wrong. Restrictions based on facilities are overly broad because they prevent anesthesiologists from working for ***every*** surgeon who performs surgeries at a particular facility even if the surgeon is one that the former employer had no prior business relationship with and, therefore, no relationship to protect. A physician-based restriction, on the other hand, would have allowed Appellants to know precisely who they could and count not accept

work from and, therefore, would have been more reasonable.

Next, Respondent argues that Appellants' argument concerning the NCAs' requirement that Appellants terminate their staff privileges is irrelevant because of a severability clause. (Answering Br. at 14.) But this argument is squarely relevant because the requirement that Appellants "withdraw from the medical staff of every Facility in which Physician holds medical staff privileges" is itself a restrictive covenant because Appellants cannot work as anesthesiologists at hospitals where they do not hold staff privileges. This restriction is particularly relevant because it highlights the highly offensive nature of the NCAs and their intrusion into Appellants' right to work and earn a living as physicians in the medical profession. Under *Golden Road*, this restrictive covenant, which is not limited as to time is unreasonable on its face and renders the NCAs "wholly unenforceable."

In sum, and as stated in Appellants' Opening Brief and above, the restrictive covenants set forth in the NCAs are anything ***but*** reasonable due to the overly broad and overarching definition of "Facilities." The restrictions are not specifically tied to Appellants' practice or the surgeons they performed services for while they were employed by Respondent, they are not limited to geographic areas serviced by Respondent, and apply to any possible relationship Respondent may or may not have with a "Facility." They are excessively broad and unnecessary to protect Respondents' legitimate business interests.

### B. The Statute's "Plain Language" Says Nothing About Retroactivity.

Respondent claims that NRS 613.195(5)'s "plain language" requires that it be applied in "any action" seeking enforcement of a non-competition agreement. (Answering Br. at 15-17.) Respondent claims that the statute's application "turns on when an employer brings an action" rather than when the noncompetition agreement was formed. This argument borders on the frivolous, however, because the statute is completely silent as to whether it applies retroactively or prospectively. To overcome this inconvenience, Respondent relies on *Picetti v. State*, 124 Nev. 782, 793–94, 192 P.3d 704, 712 (2008) and *Stromberg v. Second Judicial Dist. Court*, 125 Nev. 1, 5–6, 200 P.3d 509, 511 (2009). But these cases do not provide the support Respondent seeks.

In both cases, a criminal statute, NRS 484.37941, had been amended to allow DUI offenders to apply for treatment programs when they entered their guilty pleas. The amended statute provided that, "[a]n offender who enters a plea of guilty or nolo contendere to a violation of NRS 484.379 or NRS 484.379778 that is punishable pursuant to paragraph (c) of subsection 1 of NRS 484.3792 may, ***at the time he enters his plea***, apply to the court to undergo a program of treatment." *Id*. (emphasis added). The State argued that the defendants could not apply for treatment because they ***committed their crimes*** before the statute went into effect. *Stromberg*, 125 Nev. at 5, 200 P.3d at 511. This Court disagreed and held as follows:

> ***This statutory language, as we explained in Picetti, "provides that anyone entering a plea of guilty or nolo contendere after the statute's effective date is eligible to apply for treatment***." *Id*. We reaffirm that decision. Because Stromberg attempted to plead guilty ***after the statute's effective date***, we conclude that the district court manifestly abused its discretion when it refused to consider his request to plead guilty and apply for treatment pursuant to NRS 484.37941.

*Stromberg*, 125 Nev. at 5-6, 200 P.3d at 511-512 (emphasis added). *Picetti* and *Stromberg* are distinguishable, and inapplicable to this case, because, unlike this case, NRS 484.37941 specifically states that an offender may apply for treatment "at the time he enters his plea." In this case, however, unlike the statute at issue in *Picetti* and *Stromberg*, NRS 613.195(5) contains no language indicating ***when*** it applies. It merely says, "[i]f an employer brings an action to enforce a noncompetition covenant . . . the court shall revise the covenant to the extent necessary and enforce the covenant as revised." NRS 613.195(5). The statute's plain language says nothing about retroactivity.

### C. This Matter Concerns Legislative Intent, Not Statutory Interpretation.

Respondent attempts to twist the issue at hand into one of statutory interpretation, while the real issue is one of retroactivity. Respondent claims that the statute is clear and allows for retroactive application. (Answering Br. at 17-19.) Appellants struggle to see what part of the statute Respondent is referring to as NRS 613.195(5) is silent on whether the statute is retroactively applied. Respondent's citation of the prefatory statement of NRS 613.195 as evidence of retroactivity is

thin at best. To be abundantly clear, Appellants are not disputing what NRS 613.195(5) ***means***. Rather, Appellants are challenging whether the Legislature intended for the statute to retroactively apply to contracts executed prior to its enactment. That analysis cannot be completed by a surface-level reading of the statute, the Legislature's intent must be analyzed and is pivotal to such a determination.

Alternatively, Respondent attempts to place words in the Legislature's figurative "mouth" by implying that if the Legislature's intent was to not apply the statute retroactively, it could have expressly stated that the statute does not apply retroactively. (Answering Br. at 17-18.) This line of reasoning is inherently flawed as it would allow the Legislature's silence on an issue to be construed as its implicit approval or consent. The argument is essentially, "the Legislature didn't say I can't do it, so that means I can." That is nonsense.

The Court must determine whether the Legislature intended NRS 613.195(5) to apply retroactively. *See 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").

If the Court finds there is no retroactive effect, the Statute would apply. *Sandpoint Apts. v. Eighth Jud. Dist. Ct*., 129 Nev. Adv. Op. 87, 313 P.3d 849 (2012). On the other hand, if there is a retroactive effect, the Court must determine whether the Statute was meant to be applied retroactively. *See id.*

Here, there is absolutely no evidence in the legislative history or revised text showing that the Legislature intended for NRS 613.195(5) to be applied retroactively. The Legislature was silent, evidencing its lack of intent to apply the statute retroactively. On other occasions, however, the Legislature has *expressly* stated its intent to have legislation apply retroactively with respect to other laws, and it certainly could have done so here if that was its intent. *See, e.g.*, NRS 278.4787(7) ("The provisions of this section apply retroactively . . . ."); NRS 176.025 (Laws 2005, c. 33, § 2, providing "this act becomes effective upon passage and approval and applies retroactively"); NRS 287.023 (Laws 2007, c. 496, § 16, as amended by Laws 2009, c. 369, § 15, eff. May 29, 2009, providing in part that "Section 2 of this bill becomes effective on July 1, 2007, and applies retroactively to October 1, 2003."). In this case, however, the Legislature made no statement indicating that NRS 613.195(5) is to apply retroactively. In the absence of any such language, it appears clear that the Legislature did not intend for NRS 613.195(5) to apply retroactively to contracts entered into before its enactment, the statute cannot be applied to the matter at hand.

### D. NRS 613.195(5) is Substantive, Not Procedural, and Not Remedial.

Respondent claims that NRS 613.195(5) is a procedural statute because it does not change the substantive rights between the parties and can be applied retroactively as it relates solely to procedure or the possible remedy between the parties. (Answering Br. at 19-20.) This position is meritless.

Substantive statutes, like the one at issue here, are presumed to only operate prospectively unless it is clear that the drafters intended the statute to be applied retroactively. *Sandpointe Apts*., 313 P.3d at 853 (citing *Landgraf v. USI Film Prods*., 511 U.S. 244, 273, 114 S.Ct. 1483 (1994); *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dept*., 124 Nev. 138, 154, 179 P.3d 542, 553 (2008); *Cnty. of Clark v. Roosevelt Title Ins. Co*., 80 Nev. 530, 535, 396 P.2d 844, 846 (1964)). Broadly speaking, "courts take a commonsense, functional approach in analyzing whether applying a new statute would constitute retroactive application." *Sandpointe Apts.*, 313 P.3d at 854 (internal quotations and citations omitted). "Central to this inquiry are fundamental notions of fair notice, reasonable reliance, and settled expectations." *Id*. (internal quotations and citations omitted). Thus, a statute "has a retroactive effect when it takes away or impairs vested rights acquired after existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already past." *Pub. Emps.' Benefits Program*, 179 P.3d at 553–54. In the context of retroactivity analysis, a

"remedial change" relates to practices, procedures, or remedies without affecting substantive or vested rights. *See In re Flint*, 277 P.3d 657 (Wash. 2012).

NRS 613.195(5) is substantive because it requires the court to adjust the parties' substantive rights with respect to one another. It provides employers with a new right they never had—the right to reform and enforce an unreasonable and otherwise unenforceable noncompetition agreement—and it provides employees with the possibility of restrictions on their employment that did not exist prior to the statute's enactment. In addition, it impairs Appellants' rights in having the NCAs declared unenforceable under *Golden Road*, which was the settled law when Appellants entered into the NCAs. These rights were neither contemplated nor available to the parties at the time they entered into the NCAs. *See, e.g., Paws UP Ranch, LLC v. Martin*, 2:18-cv-01101-RFB-EJY, 2020 WL 2858004, *5-6 (D. Nev. May 31, 2020).[1]

In *Paws UP*, the defendant's employment agreement, executed prior to the enactment of NRS 613.195(5), contained a non-compete agreement that restricted

[1] While this Court is not required to follow federal decisions on questions of Nevada law, *Blanton v. N. Las Vegas Mun. Ct.*, 103 Nev. 623, 633, 748 P.2d 494, 500 (1987), this Court should consider District Judge Boulware's decision in *Paws UP* persuasive authority as the opinion addresses precisely the same question this Court is presented with—whether NRS 613.195(5) is substantive or procedural and, therefore, whether it must be applied prospectively only or may be applied retroactively.

the defendant from "performing services for hospitality organizations in any manner within 300 miles of Missoula County, Montana for three years from the date of the termination of his employment." *Id.* at *1. The defendant terminated his employment in April of 2017 and began working at a resort less than 50 miles away from the plaintiff's location in March of 2018, in apparent breach of the non-compete agreement. *Id.*

The plaintiff claimed that NRS 613.195(5) was remedial in nature and should be applied retroactively as it did not create a substantive right. *Id.* at *2. The *Paws UP* court disagreed. It held, in line with this Court's precedents that:

> [A]n unreasonable provision renders a noncompete wholly unenforceable, Thus, at the time Section 613.195(5) was drafted and enacted, there existed no substantive right for which there was a remedy or relief for noncompete clauses that contained an unenforceable aspect. Consequently, it cannot be argued that the statute [NRS 613.195(5)] was enacted simply to create a remedy for the violation of an existing substantive or vested right.

*Id.* at *5-6.

In so holding, the *Paws UP* court refused to construe NRS 613.195(5) as remedial holding that no remedy or relief could follow from the breach of an unenforceable agreement. *Id.* The *Paws UP* court determined that the statute creates a substantive right because it requires a court, not the parties, to define the "contours" of the rights to be enforced. *Id.* Specifically, the court must consider the nature of the industry, what would be a reasonable restriction, rewrite the restriction, and

enforce the new agreement which was not a reflection of the underlying substantive rights between the parties. *Id.* Here, NRS 613.195(5) is substantive and cannot be applied retroactively for the ***identical*** reasons stated in *Paws UP*, as the statute imposes new duties under the law that did not exist and were not available under well-established law prior to its enactment.

*Paws UP* squarely applies here. In *Paws UP* and in this case, the non-competition agreements were executed prior to the enactment of NRS 613.195(5), the parties in both cases claimed/claim that the statute is remedial, and the defendants in both cases allegedly breached an unreasonable and otherwise unenforceable non-compete agreement. In both cases, the plaintiff asked the trial court to rewrite and unreasonable restrictions, thereby creating new agreements, and enforce the new agreements, creating new substantive rights between the parties that they did not contemplate at the time of execution. If the District Court were to rewrite the NCAs, the District Court would need to understand the anesthesiology industry, consider the way such practice is performed throughout the state, and draft a reasonable agreement in line with that newfound knowledge. This new restriction would ***not*** be what the parties considered when the NCAs were executed, yet the parties would be bound to new restrictions that would substantively change their respective rights. Thus, for the identical reasons in *Paws UP*, NRS 613.195(5) is substantive in nature and is ***not*** procedural or remedial as one cannot remedy the breach of an invalid and

unenforceable agreement. *See also, e.g., Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475, 477-479 (Fla. 1995) (amendment to non-competition statute eliminating presumption of irreparable harm and requiring evidence of irreparable harm to enforce noncompete agreements held substantive in nature and only applied prospectively); *Hixson Autoplex of Alexandria, Inc. v. Lewis*, 6 So.3d 423, 426 (La. Ct. App. 2009) (amendment to non-competition statute prohibiting employers from contractually restraining automobile salesmen from selling automobiles held a substantive change in the law that had prospective application only); *Sola Commun'cs, Inc. v. Bailey*, 861 So.2d 822, 827-828 (La. Ct. App. 2003) (holding legislature's amendment of statute governing enforcement of non-competition agreements in response to decision of Louisiana Supreme Court substantive and could not be applied retroactively).

### E. Applying the Statute Retroactively Would Produce an Absurd Result.

Respondent claims that a prospective application of NRS 613.195(5) would produce an absurd result, yet fails to address that applying the statute retroactively, without any indication of Legislative intent is inherently absurd itself. (Answering Br. at 21.) Here, the Legislature was silent. If the Legislature intended for NRS 613.195(5) to apply retroactively, the minutes, history, and committee hearings would have revealed as much. By arguing that the failure to apply NRS 613.195(5) retroactively would create an absurd result, Respondent glosses over the fact that

applying the statute retroactively, without express authorization from the Legislature and in direct contravention of the law at the time the parties entered into the NCAs, would be an absurd result in and of itself.

"In deciding whether a statute has retroactive application, courts are guided by fundamental notions of fair notice, reasonable reliance, and settled expectations." *Pub. Employees' Benefits Program*, 124 Nev. at 155, 179 P.3d at 554. Here, the fundamental notions of fair notice, reasonable reliance, and settled expectations all weigh heavily in Appellants' favor. Indeed, Appellants merely ask this Court to enforce the law as it existed at the time they entered into the NCAs with Respondent. Appellants signed the NCAs on December 2, 2016 (1 App. 43, 68) and resigned from Respondent's employment on November 26, 2018 (2 App. 204, 209).

Nonetheless, Respondent argues for retroactive application of NRS 613.195(5), which did not become effective until June 3, 2017, some 18 months after Appellants entered into the NCAs. Stated differently, Respondent asks this Court to retroactively enforce a law that was completely contrary to the law as it stood when Appellants entered into the NCAs. But Appellants had no notice that a new law would be enacted some 18 months after they entered into the NCAs or that it would drastically impact their enforceability. Here, the retroactive application of NRS 613.195(5) produces absurd results.

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### F. Respondent's Expectations Were Contrary to Nevada Law.

Respondent argues that the NCAs should be enforced as written because Appellants consented to reformation (or "blue penciling") of the NCAs in the NCAs themselves and because blue penciling would allegedly comport with the parties' reasonable expectations at the time of contracting. (Answering Br. at 25-27.) But at the time Respondent required Appellants to sign its form NCAs as a condition of their continued employment (2 App. 203-204, 208-209) Nevada law required non-competes to be wholly reasonable, and held that blue penciling was not available to rescue non-competes that were unreasonable. *See Golden Rd.*, 132 Nev. at 483, 376 P.3d at 158 ("Under Nevada law, such an unreasonable provision renders the noncompete agreement wholly unenforceable"). The holding in *Golden Road* 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.[2]

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[2] *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

Every person is ***presumed*** as a matter of law to know the state of the law at the time that they perform an action with potential legal consequences, and this legal fiction is necessary to maintain the rule of law. *See, e.g.*, *Smith v. State*, 38 Nev. 477, 151 P. 512, 513 (1915) (holding that there is a ***non-rebuttable*** presumption that everyone who enters into a contract does so knowing the state of the law); *cf. Whiterock v. State*, 112 Nev. 775, 782, 918 P.2d 1309, 1314 (1996) (holding that a party's ignorance of the law is irrelevant to application of those laws in a criminal prosecution); *see also Roldan v. Callahan & Blaine*, 161 Cal. Rptr. 3d 493, 498 (Cal. App. 2013) ("[W]e are required to presume that parties to a contract both know and have in mind all applicable laws in existence when an agreement is made . . . necessarily enter into the contract and form a part of it without any stipulation to that effect as if they were expressly referred to and incorporated.") (internal quotations omitted).

Thus, at the time of execution, both Respondent and Appellants were presumed to know the state of Nevada law, including what anticompetitive terms were enforceable and what anticompetitive terms were not. In other words, notwithstanding the actual (and unlawful) terms of the NCAs, both Respondent and

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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 Road*. *See* 376 P.3d at 156–158.

Appellants were presumed, as a matter of law, to know that the NCAs contained unreasonable and "wholly unenforceable" terms that ran afoul of *Golden Road*.

Respondent asks this Court to ignore that non-rebuttable legal presumption and retroactively enforce a law that is completely contrary to the state of the law as it stood when the parties entered into the NCAs on December 2, 2016 (1 App. 43, 68) simply because doing so serves its interests. But Appellants had no notice that a new law would be enacted on June 3, 2017, some 18 months ***after*** they entered into the NCAs, that would, if applied retroactively, allow the District Court to rewrite the agreements' restrictions and enforce new, and unknown, restrictions upon their ability to work and earn a living.

At the time of execution, the parties could not have reasonably expected that a new law would be enacted containing provisions directly contrary to decades of Nevada law and that the new law would be enforced retroactively by the District Court. Indeed, if Respondent had intended at the time of contracting to impose unlawful restrictive covenants on Appellants that ran contrary to then-existing public policy, the entire contract would be void. *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."). But that appears to be exactly what Respondent's intention was.

While Respondent may have maintained the unreasonable or mistaken

expectation that a Nevada court would blue pencil its form non-competition agreement, contrary to decades of Nevada law, Respondent's unreasonable or mistaken expectations must give way to the then-existing public policy of this State. *See, e.g.*, *Mertz v. Pharmacists Mut. Ins. Co*., 261 Neb. 704, 625 N.W.2d 197, 203–04 (2001) ("Although protecting parties' expectations is always a central policy consideration in contracts, that interest does not supersede all other public policies. [T]his court has refused to enforce postemployment covenants not to compete which are broader than reasonably necessary to protect legitimate business interests on the ground that such covenants are against public policy and void. Iowa's interest in protecting the expectations of the parties is outweighed by Nebraska's strong public policy considerations on this issue."); *Thrasher v. Grip-Tite Mfg. Co*., 535 F. Supp. 2d 937, 946 (S.D. Iowa 2008) ("Thrasher, embracing Nebraska law, asserts the public policy in protecting the expectations of contracting parties is outweighed by the interest in preventing the enforcement of overly broad non-compete clauses . . . While the public also has an interest in the enforcement of valid non-compete agreements, the Court has already determined the non-compete clause at issue here is so broad its validity is suspect under either Iowa or Nebraska law, and therefore the public interest likely weights in favor of Thrasher") (internal citation omitted).

**G. Appellants Are Not Relying on "Unsupported Factual Assertions."**

Respondent claims Appellants are relying on unsupported factual allegations

to argue that: (1) Appellants executed the NCAs "relying upon the law as it then existed;" (2) the parties entered into the NCAs knowing that their non-competition clauses could not be blue penciled; and (3) the parties expected that the non-competition clause would be deemed wholly void if any part of it were found unreasonable. (Answering Br. at 28-29.)

Respondents imply that for Appellants' arguments concerning their reasonable expectations to be valid, Appellants must have had a subjective, belief as to the state of existing law and the enforceability of the NCAs. But this is wrong. As set forth above, the law creates a non-rebuttable legal presumption that parties know the state of the law when contracting. *See Smith*, 151 P. at 513; *cf. Whiterock*, 112 Nev. at 782, 918 P.2d at 1314; *see also Roldan*, 161 Cal. Rptr. 3d at 498. Appellants reasonably relied on the law as it had been for decades under the well-settled expectation that Nevada courts have "long refrained from reforming or 'blue penciling' private parties' contracts," not on unsupported factual allegations. *See Golden Rd.*, 132 Nev. 476, 483, 376 P.3d 151, 158 (2016) (citing *Reno Club, Inc.*, 64 Nev. at 323, 182 P.2d at 1016)); *Kaldi*, 117 Nev. at 278, 21 P.3d at 20.

## CONCLUSION

For reasons stated above and fully discussed in Appellants' Opening Brief, this Court should: (1) reverse the District Court's April 4, 2019 and June 6, 2019 orders applying NRS 613.195(5), "blue penciling" the NCAs, and enforcing the

NCAs; (2) hold the NCAs "wholly unenforceable" under *Golden Road*; and (3) hold that NRS 613.195(5) cannot be retroactively applied to non-competition agreements entered into before the statute's effective date.

Dated: this 9th day of July, 2020.

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## CERTIFICATE OF COMPLIANCE

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.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7)(A)(ii) 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 6,196 words.

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

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

Dated: this 9th day of July, 2020.

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

I served the foregoing **APPELLANTS' REPLY 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:

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I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on July 9, 2020 at Las Vegas, Nevada.

*/s/ Jonathan. W. Fountain*

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