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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PAWS UP RANCH, LLC; and CAMEL, LLC, Plaintiffs, vs. JONATHAN B. MARTIN, Defendant.	Case No. 2:18-cv-01101-RFB-GWF **PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF**

In response to the court's Minute Order dated January 15, 2019, wherein the Court requested a supplemental reply from both parties to be simultaneously filed on March 1, 2019, Plaintiffs submit the following:

INTRODUCTION

Defendant asserts three main arguments in his opposition to Plaintiffs' request for injunctive relief. First, Defendant argues that the noncompetition covenant at issue contains unreasonable limitations and restrictions and is therefore unenforceable as written. Second, Defendant argues that the recent addition of subsection 5 of NRS 613.195 (instructing Nevada courts to blue-line edit unreasonable limitations in noncompetition covenants) is inapplicable to the instant matter because the legislature enacted the addition after the Defendant entered into the noncompetition covenant with the Plaintiffs. Finally, Defendant argues that because a retroactive

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application of NRS 613.195(5) is prohibited, the Nevada Supreme Court's decision in *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016) (prohibiting blue-line editing of unreasonably restrictive noncompetition covenants) should control.

Defendants arguments are meritless for the following reasons: (1) the noncompetition covenant the parties entered into does not impose any restraint greater than required to protect the Plaintiffs and does not impose any undue hardship on the Defendant; (2) even if the limitations in the noncompetition covenant are unreasonable, NRS 613.195(5) instructs this Court to blue-line edit the noncompetition covenant to and subsequently enforce it; (3) NRS 613.195(5) does not require retroactive application to be utilized in this matter; (4) NRS 613.195(5) can be applied retroactively because the addition only involves a procedural remedy, not a substantive or vested right; and (5) the purpose and the legislative history demonstrate that the addition of NRS 613.195(5) was meant to be applied retroactively. Accordingly, and as demonstrated below, this Court should find the noncompetition covenant at issue is reasonable and enforceable, or apply the remedial measure of blue-line editing as NRS 613.195(5) instructs.

ARGUMENT

I. No *Golden Rd.* Analysis is Necessary in this Matter Because the Noncompetition Covenant is Enforceable as Written.

Defendant misconstrues the holding of *Golden Rd.* and incorrectly argues that any noncompetition covenant containing similar restraints as those involved in that case (150-mile restriction from seeking employment in any gaming establishment for one year) is unenforceable as matter of law. *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151 (2016). However, Defendant ignores that the *Golden Rd.* Court utilized a fact-intensive analysis to determine whether the statute was reasonable. *Id.* Indeed, the *Golden Rd*. Court held that a case-by-case basis would be necessary for each inquiry, stating that there is no "inflexible formula for deciding the ubiquitous question of reasonableness." *Id*. at 154.

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Certainly, it follows, that some noncompetition covenants can be enforceable with seemingly broad restraints – well beyond 50 miles or even nationwide, depending on the facts of the covenant at issue. *See Kramer v. Robec, Inc.*, 824 F. Supp. 508 (E.D. Pa. 1992) (noting that a noncompetition covenant that precluded an employee from working for direct competitors nationwide was not unreasonable).

Here, the restraints involved in the noncompetition covenant are not unreasonable because the industry involved in is highly specialized with niche clientele. In *SSA Architecture, Small Studio Associates, LLC v Hillyer*, the Court rejected the blanket application of *Golden Rd.* to a noncompetition covenant involving a specialized industry with a niche clientele. No. 18A771578, 2018 WL 5729032, at *1 (Nev.Dist.Ct. Sep. 28, 2018). In *SSA Architecture*, the noncompetition covenant contained very similar language, if not identical, to the covenant at issue here. *Id*. More specifically, in *SSA Architecture*, the noncompetition covenant precluded the employee from working in any capacity for a competitor in Las Vegas or Henderson for a period of three (3) years. *Id*. There, the *SSA Architecture* Court noted that the seemingly broad language of the noncompetition covenant was reasonable under the circumstances because the employer needed significant protection from the employee potentially sharing trade secrets or business secrets with competitors, even if only employed as a custodian. *Id*.

Here, the seemingly broad language of the noncompetition covenant is appropriate and reasonable because Defendant may cause substantial damage or irreparable harm if employed by The Ranch even in a non-managerial position, like a custodian, because nothing would preclude Defendant from sharing highly coveted and valuable confidential information obtained while working for Plaintiff. Consequently, even if the noncompetition covenant's language appears broad on its face, the language is both necessary and reasonable to prevent Defendant from providing highly valuable trade secrets with Plaintiffs direct competitors.

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II. The Court Has Authority to Revise the Noncompetition Covenant to the Extent Necessary to Enforce the Covenant.

If this Court determines that the noncompetition covenant at issue imposes greater restraint than is necessary to protect Plaintiffs or determines that the covenant imposes an undue hardship on the Defendant, this Court has authority to blue-line edit the covenant to the extent necessary to enforce the same. NRS 613.195(5)

Defendant entered into a noncompetition agreement in which the Defendant specifically agreed to "not compete against [Plaintiffs] by performing services for hospitality organizations in any manner within 300 miles of Missoula, County, Montana for a period of (3) years from the date of the termination of his employment." *See* Ex. 1 attached to *Plaintiff's Motion for Temporary Restraining Order and for Preliminary Injunction*, ECF No. 28. Based upon the plain reading of NRS 613.195(5), this Court, if it were to find any of the above limitations unreasonable, is instructed by NRS 613.195(5) to reasonably *revise* the above noncompetition covenant and enforce it against the Defendant.

III. The Non-Compete Agreement is Still Enforceable Even If NRS 613.195(5) Applies Prospectively Because Enforcement of the Noncompetition Covenant Was Sought *After* the Statute was Enacted.

In any retroactivity analysis involving a statute, "retroactivity ought to be judged with regard to the act or event that the statute is meant to regulate." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 263 (2012) (emphasis added); *see Landgraf v. USI Film Prods.*, 511 U.S. 244, 286, 290-94 (1994) (Scalia, J., concurring in the judgment). NRS 613.195(5) is not seeking to regulate the act of creating a noncompetition covenant, nor does it seek to regulate whether the limitations included within that covenant are unreasonable. Instead, the "act or event the statute is meant to regulate" is the enforcement of the noncompetition covenant. Indeed, the first line of NRS 613.195(5) describes the "act or event the statute is meant to regulate" when it states: "… **an employer brings an action to enforce a**

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noncompetition covenant…." The "act or event" is the date the employer seeks to enforce the noncompetition covenant in a legal action.

Defendants erroneously argue that NRS 613.195(5) is inapplicable because the noncompetition covenant was entered into after subsection 5 was enacted. This is simply not the case, NRS 613.195(1) is meant to regulate the creation and appropriate limitations and restraints on noncompetition covenants, not NRS 613.195(5). NRS 613.195(1) says nothing about *how* a court is to deal with noncompetition covenants when the covenant's enforceability is unclear.

Here, Defendant signed the non-compete in November 2015 and resigned from Paws Up on April 2017. NRS 613.195(5) was enacted in June 2017. Defendant was employed by The Ranch and thus breached the non-compete on or about April 2018. More importantly, Paws Up sought enforcement of the noncompetition covenant through this action in June 2018. Thus, because both the breach and this action were brought *after* the enactment of NRS 613.195(5), this Court should follow the instructions therein and revise the noncompetition covenant if needed via the remedy of reformation.

IV. The Presumption Against Retroactive Application Does Not Apply to Remedial Statutes like NRS 613.195(5)

Defendant erroneously argues that a presumption against retroactive applications of statutes applies to the instant matter. However, the Nevada Supreme Court has long recognized a common law exception for statutory amendments that are remedial or procedural. *Holdaway-Foster v. Brunell*, 130 Nev. 478, 330 P.3d 471 (2014) (holding that a statute applies retroactively when the statute affects only remedies and procedure and does not create substantive rights); *see also Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 179–80, 162 P.3d 148, 154 (2007) ("We have also held that courts should apply statutes retroactively when the statute affects only remedies and procedure and does not create new substantive rights"); *Madera v. State Indus. Ins. System*, 114 Nev. 253 (1998) (holding that revision to workers' compensation statute—NRS 616D.030—applied retroactively because it was restricted in its effect to **remedies** available to

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employees against third party administrators and insurance carriers and did not abridge vested rights).

a. Recently Enacted Statutes Apply Retroactively When the Statute Only Involves a Remedy, Not Substantive or Vested Right.

In order for a court to determine whether a statute applies retroactively, Courts first must determine whether the statute at issue involves a vested or substantive right, rather than a mere procedural remedy. *Sandpointe Apts. v. Eighth Jud. Dist. Ct.,* 129 Nev. 813, 313 P.3d 849 (2013).

In that regard, Defendants, although entirely relying on the *Sandpointe* decision, ignores the first part of any retroactive analysis: determine whether a substantive or vested right is involved. *Id*. In *Sandpointe*, the Nevada Supreme Court first made a threshold determination of whether the legislation at issue was remedial or substantive. *Id*. at 821, 854. After determining that the legislation at issue (i.e. NRS 40.459(1)(c)-new limitations to deficiency judgments) was substantive, the Nevada Supreme Court ruled that the legislation should apply prospectively because: (1) the Legislature did not manifest an intent to apply the statute retroactively and (2) the plain language of the statute provided that the legislation became effective only upon passage and approval. *Id*. at 827, 858. Indeed, the Nevada Supreme Court made it clear in *Sandpointe* that the presumption against retroactive legislation applies only to statutes or statutory amendments that relate to substantive or vested rights. In doing so, the Court noted: "Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively". *Id*. at 821, 853.

An affirmative showing that the Legislature intended for a statute to apply retroactively is not required when the legislation merely involves the application of a remedy, like the blue pencil doctrine. *Id*; *see also Greenawalt v. Sun City W. Fire Dist.*, 23 F. App'x 650 (9th Cir. 2001) ("rule that statutes are presumed not to apply retroactively unless they contain an express statement of retroactive intent only applies to substantive enactments; statutorily enacted procedural

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requirements may be given retroactive application, because litigants have no vested rights in the application of particular procedures").

b. Defendant's Three Statutory Examples Do Not Prevent Retroactive Application for NRS 613.195(5).

Defendant cited to three examples of legislation (*i.e.* NRS 278.478(7), NRS 176.025, NRS 287.023) wherein the Legislature manifested a clear intent to apply statutory amendments retroactively to bolster his argument that NRS 613.195(5) should not apply retroactively because unlike the cited examples, the Legislature in this case did not expressly indicate an intent to have the legislation apply retroactively. *See Defendant's Supplemental Brief* pg. 7 ln 21-26. In other words. Defendant argues that because NRS 613.195(5) does not contain explicit language that indicates the Legislature intended for the statute to apply retroactively, this Court should assume that the Legislature intended for the statute to apply prospectively because the Legislature has manifested its intent to apply other legislation like NRS 278.478(7), NRS 176.025, NRS 287.023 retroactively. However, all of these examples are not relevant to NRS 613.195(5) because all of them specifically related to legislation that involved substantive or vested rights rather than remedial or procedural amendments, like the blue pencil reformation doctrine at issue in this case.

NRS 278.478(7) dealt specifically with planning and zoning provisions that allowed developers to request the governmental body to assume the maintenance and/or improvements of the common areas in new development areas. NRS 176.025 involved modifications to sentencing guidelines and NRS 287.023 made modifications to the public employee's health and retirement plans. Again, all of these statutes are clear examples of legislation that addressed substantive rights, rather than procedural remedies. As such, the Legislature included explicit language that the modifications or amendments to the legislation applied retroactively to overcome the judicial presumption against retroactive legislation of substantive statutes.

Defendant has not cited to a single case wherein a remedial statute was not applied retroactively because the Legislature failed to include explicit language to that effect. In cases

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involving remedial statutes, an explicit directive from the Legislature to apply the legislation retroactively is not needed, in fact said directive is implicitly included. For example, in *Holdaway-Foster v. Brunell*, the legislation at issue did not contain language indicating that the statute should apply retroactively, yet, the Nevada Supreme Court applied the statute retroactively because the statute was "remedial in nature." 130 Nev. 478, 330 P.3d 471 (2014). Similarly, in *Madera v. State Indus. Ins. System*, 114 Nev. 253 (1998) and *Valdez v. Emp'rs Ins. Co. of Nev.*, 123 Nev. 170, 179–80, 162 P.3d 148, 154 (2007); the Nevada Supreme Court applied the statutes at issue retroactively because they were remedial and not substantive in nature.

In sum, this Court must first make a threshold determination of whether the application of the blue pencil doctrine is remedial or substantive in nature before even looking into the underlying legislative intent. Only if this Court determines that the NRS 613.195(5) involves a substantive right, this Court must consider whether the Legislature explicitly intended for the statute to have a retroactive application. Since NRS 613.195(5) clearly involves a judicial remedy and not a substantive right as set forth below, the underlying Legislative intent is irrelevant.

V. The Blue Pencil Doctrine is Remedy, Not a Substantive Right

The blue-pencil or reformation doctrine has been historically recognized as an equitable remedy in virtually every jurisdiction in the U.S. *See e.g.*, *Schmidl v. Cent. Laundry & Supply Co.*, 13 N.Y.S.2d 817, 824–25 (Sup. Ct. 1939) (referring to the blue-pencil doctrine as an equitable remedy to modify and enforce restrictive covenants).

Since the blue-pencil or reformation doctrine allows courts to modify or alter the terms of contract to enforce the same, it constitutes one of multiple equitable remedies available to courts to resolve contractual disputes. *N. Am. Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 416, 526 N.E.2d 621, 625 (1988); *see e.g.*, *Great Lakes Anesthesia, P.C. v. O'Bryan*, 99 N.E.3d 260 (Ind. Ct. App. 2018) (blue-pencil doctrine constitutes an equitable remedy) Courts routinely employ the blue-pencil doctrine to modify restrictive covenants and non-compete agreements to enforce them

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in an equitable manner against the employee. *See e.g.*, *N. Am. Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 416, 526 N.E.2d 621, 625 (1988); *Ins. Ctr., Inc. v. Taylor*, 94 Idaho 896, 899-900, 499 P.2d 1252, 1255-56 (1972); *Cambridge Eng'g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 456-57, 879 N.E.2d 512, 529-30 (2007). Indeed, the dissent in *Golden Road* noted: "**Reformation [blue-pencil doctrine]** is an **equitable remedy."** *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 163 (2016).

Defendant has not cited to a single case that stands for the proposition that the blue pencil doctrine-an equitable remedy that allows courts to enforce contracts- is substantive. The only explanation Defendant offers in support of this conflicting proposition is that: "[NRS 613.195(5)] created a new right-namely, the right of the courts to blue-pencil otherwise unenforceable restrictive covenants… it instead provides the courts with a new right to blue-pencil non-competes, a right that Nevada courts long refrained from employing." *See Defendant's Supplemental Brief*, at 8, ln. 5-9.

Stated differently, Defendant argues that the blue-pencil doctrine as articulated in NRS 613.195(5) provides the court with a "new right" to reform or modify non-competes to enforce them against employees who have breached them. Defendant's argument mirrors the legal description of a remedy, which is defined as "anything a court can do for a litigant who has been wronged or is about to be wronged." REMEDY, Black's Law Dictionary (10th ed. 2014). The blue pencil doctrine as articulated in NRS 613.195(5) allows Nevada courts to reform or re-write non-competes as mean to exercise their inherent **equity** powers to the extent necessary to protect the employer's legitimate business interest. *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. Adv. Op. 49, 376 P.3d 151, 163 (2016). Hence, this purported "new right" given to the courts by operation of NRS 613.195(5), constitutes nothing more than one of many remedies courts have long employed to resolve contractual disputes.

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Furthermore, the vested rights inquiry focuses on the rights or legal duties that have direct effect on the parties to the litigation, not on the rights or duties of the court. Thus, the proper inquiry is whether Defendant's rights or legal duties would be impaired if NRS 613.195(5) applies retroactively. Well-settled Nevada law defines a vested right as a property or legal interest that has become constitutionally guaranteed and permanent. *See Application of Filippini,* 66 Nev. 17, 22,202 P.2d 535,537 (1949). Thus, a vested right refers to fixed, settled, and absolute legal interests, not contingent or subject to be defeated by a condition precedent. *Modzelewski v. Resolution Tr. Corp.*, 14 F.3d 1374, 1380 (9th Cir. 1994).

Here, the retroactive application of NRS 613.195(5) has no bearing on Defendant's vested rights. Defendant incorrectly assumes that he had a right to breach the non-compete agreement and that the retroactive application of the statute would impair this alleged vested right. Even if Defendant had the "right" to breach the non-compete, said right would certainly be contingent upon a judicial ruling that the non-compete is unreasonable or overbroad. The statute does not impair Defendant's ability to challenge the non-compete or to render it unenforceable. The statute merely provides courts with an additional procedural remedy to resolve Defendant's claims relating to the enforcement of non-compete.

Finally, Defendant relies on *Braun Productions, LLC v Mosley*, a 2017 Nevada state court case that rejected the retroactive application of NRS 613.195(5). No. 16A739112, 2017 WL 6551068, at *2 (Nev.Dist.Ct. Nov. 14, 2017). However, none of the parties even addressed the well-settled common law exception that allows retroactive application of remedial statutes. The court did not address or even consider the remedial nature of the statute in its opinion/order nor was the issue raised in any of the underlying motions. Conversely, the court in *SSA Architecture, Small Studio Associates, LLC v Hillyer*, a 2018 Nevada state court case, was willing to apply the NRS 613.195(5) retroactively. No. 18A771578, 2018 WL 5729032, at *1 (Nev.Dist.Ct. Sep. 28, 2018). The court noted that NRS 613.195(5) required for the court to blue-pencil the non-compete.

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Id. However, since the court found the non-compete was enforceable as written, the court did not apply the blue-pencil doctrine to modify the agreement. *Id.*

In sum, since the blue-pencil doctrine has long been recognized as a procedural remedy and Defendant has no vested right to breach the agreement, this Court should apply NRS 613.195(5) retroactively. The only Nevada state court case cited in support of Defendant's proposition that the statute should not apply retroactively is not dispositive because the remedial nature of the statute was not even raised by the parties and its ruling is contradicted by a different state court case that was willing to apply the statute retroactively.

VI. The Purpose of NRS 613.195(5) Allows for Retroactive Application.

The legislative history and purpose of NRS 613.195(5) supports a finding that the blue-pencil remedy applies retroactively. Assemblywoman Spiegel, who was one of the bill's sponsors, noted that the main purpose of NRS 613.195(5) was to return courts back to the traditional practice of blue-lining. Indeed, the NRS 613.195(5) was adopted in 2017 in direct response to the Nevada's Supreme Court's ruling in *Golden Rd.* which threw out an entire noncompetition covenant without allowing the Court to apply a blue-line remedy. *See* NV A.B. 276 (NS), NV S. Comm. Min., at *15 (May 24, 2017). Consequently, Nevada case law and the legislative history of NRS 613.195(5) mandate for the retroactive application of the blue-pencil procedural remedy to all pending disputes.

That statute provides that:

> 5. If an employer brings an action to enforce a noncompetition covenant and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, ***the court shall revise the covenant to the extent necessary and enforce the covenant as revised.*** Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed. (Emphasis added).

NRS 613.195(5). This is clearly a procedural remedy offered to judges to be applied retroactively. As a result of the foregoing change in Nevada statutory law, Defendant's argument that the entire

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non-compete agreement is unenforceable is unsound and contrary to Nevada law. The *Golden Rd.* Court's holding that an overly broad noncompetition covenant is unenforceable is no longer applicable.

Essentially, the Nevada legislative agreed with dissent in *Golden Rd*. penned by Justices Hardesty, Parraguirre, and Pickering, that Nevada needs this equitable remedy of reformation:

> While I agree that the non-compete agreement was written too broadly, there is no doubt that Islam and Atlantis agreed to restrict Islam's future employment as a casino host and that such a restriction is reasonable. Absent some showing of bad faith on Atlantis' part, of which there was none, *I would follow the approach taken by this court and a majority of other courts and preserve the non-compete agreement by modifying or severing the overly broad provision and thereby maintain the restriction on Islam's future employment in a competing casino host position.* ***Reformation*** *is an* ***equitable remedy****, and here, the* ***equities*** *run in favor of Atlantis* and against the employee who admittedly stole trade secret information from her employer to use in her new casino host job for a competitor. I therefore dissent from the majority's adoption of a minority view to invalidate the entire agreement.
>
> . . .
>
> Contrarily, the draconian all-or-nothing rule invalidates the entire contract if any part of the non-compete agreement is overly broad. 17A C.J.S. *Contracts* § 381 (2011). Only a few jurisdictions still use this approach. *See, e.g., Rector–Phillips–Morse, Inc. v. Vroman,* 253 Ark. 750, 489 S.W.2d 1, 5 (1973); *Rollins Protective Servs. Co. v. Palermo,* 249 Ga. 138, 287 S.E.2d 546, 549 (1982).

The dissent also pointed out the importance of balancing the interests of both the employer and the employee.

> Finally, while the majority focuses on the unfairness to the employee, it is important to note that non-compete agreements are intended to balance the employer's and the employee's interests. *See Employers May Face New Challenges in Drafting Noncompetes,* 19 No. 2 Nev. Emp. L. Letter 4 (2013) ("[R]estrictive covenants strike a delicate balance between employers' interests—protecting confidential information and institutional knowledge, preserving hard-won customer and client relationships, and incentivizing key talent to remain loyal—and employees' interests in maintaining work mobility and the freedom to command competitive compensation for their skills."). *Thus, we must not forget that non-compete agreements are extraordinarily important to Nevada businesses, especially in industries that rely on proprietary client lists, such as Atlantis. See Traffic Control Servs., Inc. v. United Rentals Nw., Inc.,* 120 Nev. 168, 172, 87 P.3d 1054, 1057 (2004) ("Employers commonly rely upon restrictive covenants ... to safeguard important business interests."). On this note, the majority also contends that modification favors the employer. *While the all-or-nothing rule ultimately favors the employee—to the extreme disadvantage of the employer—by removing any*

restriction placed on future employment, modification also favors the employee by appropriately limiting the restriction.

(Emphasis added).

For the foregoing reasons, this Court should either enforce the noncompetition covenant as written because it is reasonable on its face or, in the alternative, this Court should apply the blue-line remedy provided in NRS 613.195(5) and subsequently enforce it as reformed.

DATED this 5th day of March, 2019.

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CERTIFICATE OF SERVICE

I certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on the 1ST day of March, 2019, I served a true and correct copy of the foregoing **PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF** upon all counsel of record by electronically serving the document using the Court's electronic filing system.

An employee of Albright, Stoddard, Warnick & Albright

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