G. MARK ALBRIGHT, ESQ.
Nevada Bar 001394
JORGE L. ALVAREZ, ESQ.
Nevada Bar No. 014466
DANIEL R. ORMSBY, ESQ.
Nevada Bar No. 014595
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com
dormsby@albrightstoddard.com
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PAWS UP RANCH, LLC; and CAMEL, LLC Plaintiffs, vs. JONATHAN B. MARTIN, and individual, Defendant.	Case No. 2:18-cv-01101-RFB-GWF **PLAINTIFFS' MOTION TO CERTIFY QUESTIONS OF LAW TO THE SUPREME COURT OF NEVADA**

COMES NOW Plaintiffs PAWS UP RANCH, LLC ("Paws Up" or "The Resort"), and CAMEL, LLC ("Camel"), by and through their counsel of record, ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, hereby moves the Court to Certify the following state law questions to the Nevada Supreme Court:

(1) Whether prospective application of NRS 613.195(5) should be effective upon the date the noncompetition covenant was entered into, the date the alleged breach of the noncompetition covenant occurred, or the date the employer brings an action seeking enforcement.

(2) Whether NRS 613.195(5) is to be applied "retroactively" to noncompetition covenants written prior to the statute's enactment, or is the statute only to be applied prospectively to noncompetition covenants entered into after the statute's enactment.

(3) Whether NRS 613.195(5) provides an equitable remedy of reformation which is to be applied retroactively since it does not impair vested rights.

Plaintiff's motion is made pursuant to Rule 5 of the Nevada Rules of Appellate Procedure ("NRAP") and is supported by the following Memorandum of Points and Authorities.

DATED this ____ day of March, 2019.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By_____
G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 00394
JORGE L. ALVAREZ, ESQ.
Nevada Bar no. 014466
DANIEL R. ORMSBY, ESQ.
Nevada Bar No. 014595
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Phone: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com
dormsby@albrightstoddard.com
Attorneys for Plaintiffs

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

In November 2015, Martin received and accepted Plaintiffs' offer of employment as The Resort's General Manager – Guest Relations. *See,* Motion for Preliminary Injunction ("MPI"), **Exhibit 7** (Declaration of Natalie Lim) at ¶ 3. On November 24, 2015, Martin executed the Employment Agreement along with the Confidentiality, Non- Solicitation and Non-Compete Agreement ("Non-Compete Agreement")[1] that is integrated into and forms part of the Employment Agreement. *See,* MPI **Exhibit 1** (Agreements); Ex. 7 (Lim Dec.) at ¶ 4. The Employment Agreement became effective as of December 22, 2015. Ex. 7 (Lim Dec.) at ¶ 4. The Employment Agreement provides that Camel "is engaged in the business of hiring and employing personnel who may be leased through a service contract to Paws Up Ranch, LLC operating as The

[1] The Employment Agreement and Non-Compete Agreement will be referred to herein collectively as the "Agreements."

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

Resort at Paws Up in Greenough, MT . . . ." Ex. 1 at 1. Camel and Paws Up executed a service contract for Martin. *See,* MPI **Exhibit 2** (Service Contract). The Non-Compete Agreement provides that it "shall be construed and governed by and under the laws of the State of Nevada." *See* Ex. 1 at 16-17 (¶6).

Immediately preceding Martin's employment as The Resort's General Manager, he worked for less than a year as the Rooms Division Manager at a boutique hotel in Charleston, South Carolina. *See,* MPI **Exhibit 3** (Resume); Ex. 7 (Lim Dec.) at ¶ 5. Before that, Martin spent 16 years in management level positions at two different resorts in San Diego, California. Before becoming The Resort's General Manager, Martin had never worked as a general manager or for a luxury ranch resort in Montana or anywhere else. *See* Ex. 3 (Resume); Ex. 7 (Lim Dec.) at ¶ 6. The Resort's luxury ranch resort business materially differs from any of Martin's prior employers. *See* Ex. 7 (Lim Dec.) at ¶ 7. For that reason, The Resort provided Martin with specialized training and experiences and shared information unique to a luxury ranch-style resort. *Id*.

Martin agreed, in consideration for his employment, that he would protect Plaintiffs' confidential information and abide by the terms of the non-solicitation and non-compete provisions. *See* Ex. 1 (Agreements) at 15; Ex. 7 (Lim Dec.) at ¶ 8. Martin acknowledged that Plaintiffs would provide him with invaluable and beneficial training and experience as well as put him in contact with The Resort's trade secrets and other proprietary information. Martin agreed (1) the value of this training and experience would be difficult, if not impossible, to reasonably calculate; and (2) his use of such information by a competitor would damage Plaintiffs. *See* Ex. 1 (Agreements) at 16 (¶ 5); Ex. 7 (Lim Dec.) at ¶ 9.

To prevent these damages to Plaintiffs' legitimate business interests, Martin agreed, as a specific condition of his employment, 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 (Agreements) at 16 (¶ 5). In addition to agreeing not to compete following his termination, Martin agreed not to solicit, directly or indirectly, any employees or vendors and not to induce any third parties to cease or refrain from doing business with the Plaintiffs. *See id.* at 16 (¶ 4).

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

In April 2017, Martin voluntarily terminated his employment with Plaintiffs. *See* Ex. 7 (Lim Dec.) at ¶ 10. Initially, Martin complied with the terms of the Non-Compete Agreement and took a job at a resort in Newport, California. *Id.* at ¶ 11. However, after less than a year, Martin applied for and accepted an offer to become the General Manager of The Resort's main local competitor—The Ranch—which is located just 50 miles from The Resort. *Id.* at ¶ 12.

In March 2018, for "obvious reasons", Martin notified The Resort's owners of his decision to breach the Agreements and become the General Manager at The Ranch. *See,* MPI **Exhibit 4** (Email). The subject of Martin's email was simply, "The pull of Montana." *Id.* Martin did not and could not state that he was taking the job because he had no other options or because it was the only place that he could be gainfully employed (he already had a job in California), the only reasoning he provided was: "I'm afraid Montana has ruined California for me." *Id.*

Less than a week after receiving this email, Plaintiffs sent Martin a letter reminding him of his obligations under the Non-Compete Agreement. *See,* MPI **Exhibit 5** (Letter). Plaintiffs' letter notified Martin that (1) they consider his acceptance of the General Manager position at The Ranch as a breach of the Non-Compete Agreement, and (2) his acceptance of that position would compel Plaintiffs to take legal action to enforce the Non-Compete Agreement. *Id.* at 2.

Rather than complying with his contractual obligations, Martin provided Plaintiffs' letter to The Ranch and had their lawyers respond on his behalf. *See,* MPI **Exhibit 6** (Response Letter). To the detriment of Plaintiffs' legitimate business interests, The Ranch is benefitting and will continue to benefit from the invaluable training and information Martin received during his employment as The Resort's General Manager. *See* Ex. 7 (Lim Dec.) at ¶ 14. Further, neither Martin nor The Ranch dispute that Martin's actions constitute a breach of the Non-Compete. *Id.* at ¶ 15. Based on Martin's refusal to comply with his contractual obligations, Plaintiffs initiated this action to protect their business from suffering the precise irreparable harm that Martin agreed not to cause. *Id.* at ¶ 16.

II. PROCEDURAL BACKGROUND

A. Prior Pleadings.

1. December 20, 2018 -Complaint filed in the Eighth Judicial District Court (Business Court) by Paws Up Ranch LLC and Camel LLC (Case No. A-18-775982-B)

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-41
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

2. June 21, 2018 – Notice of Removal to Federal Court filed by Defendant Jonathan Martin

3. January 2, 2019 – Motion for Temporary Restraining Order filed by Plaintiffs Paws Up Ranch LLC and Camel LLC [Doc #27]

4. January 2, 2019 – Motion for Preliminary Injunction filed by Plaintiffs Paws Up Ranch LLC and Camel LLC [Doc #28]

5. January 6, 2019 - Response to Motion for Temporary Restraining Order filed by Defendant Jonathan B. Martin [Doc #33]

6. January 6, 2019 – Response to Motion for Preliminary Injunction filed by Defendant Jonathan B. Martin [Doc #34]

7. January 6, 2019 – Reply to Response to Motion for Temporary Restraining Order filed by Plaintiffs Paws Up Ranch LLC and Camel LLC [Doc #36]

8. January 15, 2019 – Minute Order in Chambers ordering additional briefing by both parties by February 15, 2019 and responses thereto due by March 1, 2019 [Doc #41]

9. February 15, 2019 – Supplemental Brief filed by Plaintiffs Paws Up Ranch LLC and Camel LLC [Doc #47]

10. February 15, 2019 – Response to Minute Order filed by Defendant Jonathan B. Martin [Doc #48]

III. ARGUMENT

A. The Non-Compete Agreement is Enforceable as Written But Even if it is Not, it Can Be Reformed and Limited to Protect What Was Intended Pursuant to NRS 613.195(5).

The subject agreement at issue here is reasonable as to scope, time and space. It limits Mr. Martin from only working with direct competitors, clients, consultants or subcontractors of Paws Up, which includes only direct competitors of Paws Up in Montana for a period of 3 years. Given the reasonableness of this provision and the fact that it does not prohibit more than what is reasonably necessary to protect Paws Up's interests, this court should find it is both reasonable and enforceable. Plaintiff's Motion for Injunctive Relief is warranted without modifying the non-compete agreement.

However, if this Court is not inclined to enforce the non-compete agreement as written, the court is required as a mandatory procedural remedy, pursuant to NRS 613.195(5), to blue-pencil it to protect what was intended by the parties. The Nevada Legislature explicitly overturned the

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

Nevada Supreme Court's "all or nothing" ruling in *Golden Road* by passing NRS 613.195 in June 2017, since it provides a new procedural remedy.

The blue-pencil remedy is an equitable doctrine, that does not create a new substantive right but rather provides the court with an additional procedural remedy to enforce a non-compete agreement pursuant to its intended purpose. *See Holdaway-Foster v. Brunell*, 130 Nev. 478, 330 P.3d 471 (2014)(noting 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 employees against third party administrators and insurance carriers and did not abridge vested rights).

Defendant argues that NRS 613195(5) should apply prospectively because there is a strong presumption against retroactive legislation. Nonetheless, the Nevada Supreme Court made it clear in *Sandpointe Apts* 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.** *See Id*; *see also Greenawalt v. Sun City W. Fire Dist.*, 23 F. App'x 650 (9th Cir. 2001)("rule statutes are presumed not to apply retroactively unless they contain an express statement of retroactive intent only applies to substantive enactments; statutorily enacted procedural requirements may be given retroactive application, because litigants have no vested rights in the application of particular procedures").

Moreover, it is well-settled jurisprudence that the blue-pencil doctrine constitutes a procedural remedy 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

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

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 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). Hence, in light of the remedial nature of the blue-pencil doctrine, the presumption against retroactive legislation does not apply to NRS 613.195(5).

B. The Court in *SSA Architecture* was willing to apply NRS 613.195(5) retroactively.

The ruling of the Nevada trial court in *SSA Architecture* in 2018 indicates that the blue-pencil remedy would have been utilized by the trial court had the trial judge made a finding that the non-compete agreement was not enforceable as written despite the fact that the employee signed the non-compete agreement in 2016, before the Nevada Legislature passed NRS 613.195(5). *See SSA Architecture,* No. 18A771578, 2018 WL 5729032, at *1-2 (Nev.Dist.Ct. Sep. 28, 2018). However, Defendant cited to a different Nevada trial court ruling that rejected the retroactive application of NRS 613.195(5). *Braun Productions, LLC v Mosley*, No. 16A739112, 2017 WL 6551068, at *3 (Nev.Dist.Ct. Nov. 14, 2017). It is important to note that in that case, the remedial nature of the statute was not raised as an issue or considered by the trial court in its ruling. *Id*.

In both cases, the noncompete agreements were executed prior to the enactment of NRS 613.195(5). However, in *Braun Productions, LLC,* the noncompete was breached and the employer filed suit seeking enforcement in 2016, before NRS 613.195(5) became effective in June 2017. *Id*. Conversely, in *SSA Architecture*, the noncompete was breached in October 2018 and the employer brought suit to enforce it in February 2018.[2] Both events took placed more than a year after NRS 613.195(5) came into effect. *SSA Architecture, Small Studio Associates, LLC* WL

[2] See SSA ARCHITECTURE, Small Studio Associates, LLC, Plaintiff, v. Christie HILLYER, an individual; Does I through X; and Roe Corporations 1 through 10, Defendants, 2018 WL 5831065 (Nev.Dist.Ct.).

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

5729032, at *1. Hence, a dispositive distinction between both cases is that in *SSA Architecture* unlike *Braun Productions, LLC*, the noncompete was breached and the employer brought suit to enforce it after NRS 613.195(5) became effective. Again, the court *SSA Architecture* was willing to blue-line the noncompetition covenant, while the court in *Braun Productions, LLC* outright rejected to do so, which suggests that any prospective application of NRS 613.915(5) should be effective upon the date Defendant breached the noncompete in April 2018 or when Paws Up brought suit to enforce the noncompete in June 2018.

Furthermore, since the statute aims to regulate the enforcement rather than formation noncompete restrictive covenants, the noncompete agreement at issue is still enforceable because Paws Up sought enforcement of the noncompete after the statute was enacted. 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).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." *Id*. 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 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. However, NRS 613.195(1) is meant to regulate the creation and appropriate limitations and restraints on noncompetition covenants. NRS 613.195(1) says nothing about the "act or event" where a Court is confronted with a noncompetition covenant that should blue-lined to make it enforceable.

Here, Defendant signed the non-compete in November 2015 and resigned from Paws Up on April 2017. NRS 613.195(5) was enacted on 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,

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

because this action was brought *after* the enactment of NRS 613.195(5), should follow the instructions therein and blue-line edit the noncompetition covenant if needed.

It is clear that Plaintiff's Motion for Preliminary Injunction falls within the purview of NRS 613.195(5) because it was filed in June 2018, a year after the Nevada Legislature adopted the blue-pencil doctrine as a procedural remedy for courts to review and enforce non-compete agreements.

C. The Legislative History and the Dissent in *Golden Road* Mandate for the Retroactive Application of the Blue-Pencil Procedural Remedy to all Pending Disputes.

Indeed, the legislative history of the 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. The statute was passed in 2017 in direct response to the Nevada's Supreme Court's ruling in *Golden Road* which threw out an entire non-compete provision without providing the employer with any blue-pencil 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 non-compete agreement is unenforceable is unsound and contrary to Nevada law. The *Golden*

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

Road court's holding that an overly broad non-compete agreement is unenforceable is no longer applicable.

Essentially, the Nevada legislative strongly agreed with dissent in *Golden Road* 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. I also dissent from the majority's determination that GSR did not violate the Uniform Trade Secret Act. GSR had knowledge of the Islam/Atlantis non-compete and trade secret agreements soon after GSR hired Islam. As a result, GSR had reason to know that its new employee had acquired trade secrets by "improper means." NRS 600A.030(2)(a)-(c).
>
> 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). (Emphasis added.)

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

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

> 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.)

This Court should certify these important questions to the Nevada Supreme Court. Any revisions to the non-compete agreement should be limited to encompass at least a 125-mile restriction from Paws Up. Additionally, if the court is uncomfortable with the scope provisions, then it could bar Mr. Martin from working in senior management positions at any luxury ranch style resorts in Western Montana, or within 125 miles from Paws Up. But clearly, the new procedural remedy should be immediately applied retroactively.

D. Proposed Question to be Certified.

Plaintiffs respectfully request this Court certify the following questions to the Nevada Supreme Court:

> **(1) Whether prospective application of NRS 613.195(5) should be effective upon the date the noncompetition covenant was entered into, the date the alleged breach of the noncompetition covenant occurred, or the date the employer brings an action seeking enforcement.**
>
> **(2) Whether NRS 613.195 is to be applied "retroactively" to noncompetition covenants written and entered into prior to the statute's enactment, or is the statute only to be applied prospectively to noncompetition covenants entered into after the statute's enactment on October 1, 2017.**
>
> **(3) Whether NRS 613.195(5) provides an equitable remedy of reformation which is to be applied retroactively since it does not impair vested rights.**

E. This Court Has Power to Grant Certification.

The Nevada Supreme Court may answer questions of law certified by a United States District Court upon request of the certifying court. *Croket & Myers, Ltd. v. Napier, Fitzgerald & Kierby, LLP*, 401 F. Supp.2d 1120, 1128 (D. Nev. 2005). Questions of law are certified to the Nevada Supreme Court pursuant to NRAP 5. NRAP 5 states in relevant part:

> (a) **Power to Answer**. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or of the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying courts, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state.
>
> (b) **Method of Invoking**. This Rule may be invoked by an order of any of the courts referred to in Rule 5(a) upon the court's own motion or upon the motion of any party to the cause.

(Emphasis added.)

Here, the issue to be certified is ripe for certification because these proceedings involve an interpretation of an important Nevada statute for which there is no controlling precedent from the Nevada Supreme Court and the answer sought may be outcome determinative in this case. Accordingly, this Court has authority to certify the above-stated legal question to the Nevada Supreme Court to avoid state and federal cases pursing different legal remedies.In addition, the Nevada Supreme Court ought to clarify the competing rulings of two different Nevada trial courts, which have reached completely different conclusions with respect to the retroactive application of NRS 613.195(2).

The United States Supreme Court recognized the wisdom and efficiency of certification when it stated that "novel or unsettled questions of state law for authoritative answers by a State's highest court . . . may save time, energy, and resources and help build a cooperative judicial federalism." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997). Questions regarding the interpretation of unresolved issues of state law are most appropriate for certification. *Rivera v. Philip Morris, Ind.*, 209 P.3d 271 (Nev. 2009) (appropriate for federal district court to certify question of whether Nevada law recognizes a heeding presumption in strict products liability failure-to-warn cases); *Chaffee v. Roger*, 311 F.Supp.2d 962 (D.Nev. 2004) (certifying question to Nevada Supreme Court as to the definitions of the terms "threat" and "intimidate" under NRS 199.300(1)(b); *Life Ins. Co. Of North America v. Wollett*, 766 P.2d 893 (Nev. 1988) (appropriate for federal district court to certify question of whether state statute barring beneficiaries convicted of murder from recovering life policy benefits was exclusive basis under Nevada law for denying entitlement to insurance proceeds). Furthermore, certifying a question for

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

law to the Supreme Court of Nevada is proper if one of the possible answers will conclude the federal case, or if the answer may resolve one of the pending claims, if not the entire case. *Volvo Cars of North America, Inc., v. Ricci*, 137 P.3d 1161, 1164 (Nev. 2006).

The court in *Ricci* pointed out the wisdom of certifying "important questions of law," which best serves "federalism, comity and judicial efficiency." *Id.*

IV. ENFORCEMENT OF NON-COMPETE CLAUSES CONSTITUTE AN IMPORTANT PUBLIC POLICY

This is an important matter of Nevada public policy. The U.S. Department of Treasury, Office of Economic Policy recently produced an estimate that nearly 18 percent of all workers, or nearly 30 million people, are subject to non-compete agreements in the United States. *See,* Non-compete Contracts, Economic Effects and Policy Implications, March 2016 https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf. This means that tens of thousands of employers and employees in Nevada would benefit from retroactive application of this new procedural remedy of reformation to be applied retroactively.

It is estimated that Nevada has a civilian labor force of approximately 1,446,800 employees. *See,* Bureau of Labor Statistics, Nevada, at https://www.bls.gov/eag/eag.nv.htm. Eighteen percent (18%) of that figure means that approximately 260,424 employees in Nevada may be subjected to some type of non-compete agreement. A quick review of Court House News Services indicates that approximately 54 separate non-compete cases have been filed in Nevada (state and federal courts) just since 2014.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

V. CONCLUSION

This newly adopted procedural remedy of reformation should be certified by the Nevada Supreme Court to apply retroactively to the thousands of employment agreements which pre-date the October, 2017 adoption of NRS 613.195(5), particularly where the breach occurs after October 1, 2017.

DATED this 1st day of March, 2019.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

By _____

G. MARK ALBRIGHT, ESQ., #001394
JORGE L. ALVAREZ, ESQ., #014466
DANIEL R. ORMSBY, ESQ., #014595
801 South Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com
dormsby@albrightstoddard.com
Attorneys for Plaintiffs

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' MOTION TO CERTIFY QUESTIONS OF LAW TO THE SUPREME COURT OF NEVADA** upon all counsel of record by electronically serving the document using the Court's electronic filing system.

An employee of Albright, Stoddard, Warnick & Albright

LAW OFFICES
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
A PROFESSIONAL CORPORATION
QUAIL PARK, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106