IN THE SUPREME COURT OF THE STATE OF NEVADA

MM DEVELOPMENT COMPANY, INC., D/B/A PLANET 13, a Nevada Corporation, **Appellant,** **vs.** **TRYKE COMPANIES SO NV, LLC, A Nevada Limited Liability Company,** **Respondent.**	**Case No. 81938**

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Nevada Rules of Appellate Procedure, the undersigned counsel of record certifies that the Appellant MM Development Company, Inc. ("MM Development") is a wholly owned subsidiary of Planet 13 Holdings, Inc. Appellant was represented by Will Kemp, Nathanael R. Rulis, and Ian P. McGinn of Kemp Jones, LLP in the district court, who, along with Christopher W. Mixson, will continue to represent Appellant in this appeal. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted March 25, 2021.

KEMP JONES, LLP

/s/ Nathanael Rulis

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STATEMENT OF JURISDICTION

This Court has jurisdiction over MM Development's appeal from the district court's September 10, 2020, Order Granting Preliminary Injunction pursuant to Nev. R. App. P. (NRAP) 3A(b)(3). Pursuant to NRAP 4(a)(1), MM Development timely filed its Notice of Appeal from the district court on October 9, 2020, within thirty days of the September 11, 2020, Notice of Entry of the Order Granting Preliminary Injunction.

ROUTING STATEMENT

This case is presumptively retained by the Nevada Supreme Court because it raises a question of statewide public importance pursuant to NRAP 17(a)(12). This appeal raises for the first time the question whether a retail business enterprise in Nevada that participates in the widely-accepted practice of compensating drivers for bringing retail customers to the business's retail store is guilty of diversion, intentional interference with prospective contractual advantage, civil conspiracy, and aiding and abetting when the driver is operating through a rideshare company, even though it is decidedly not liable for the same tort(s) when the driver is operating a traditional taxi. Although this is an interlocutory appeal from the grant of a preliminary injunction, the district court erroneously determined that the Respondent is likely to prevail on the merits of its case.

Otherwise, this case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(12) because it challenges the grant of injunctive relief.

STATEMENT OF THE ISSUES

1. Whether the district court erred in issuing a preliminary injunction on the ground that Respondent Tryke Companies SO NV, LLC ("Tryke") is likely to prevail on the merits of its claims that MM Development's participation in the widespread and legal practice of compensating drivers for bringing passengers to MM Development's retail place of business constitutes unlawful diversion, intentional interference with prospective contractual advantage, civil conspiracy, and aiding and abetting.

2. Whether the district court erred by finding Tryke is threatened with irreparable harm.

3. Whether the district court erred by failing to hold an evidentiary hearing to take testimony and documentary evidence before issuing a preliminary injunction.

4. Whether the terms of the preliminary injunction are overly-broad as applied to MM Development and overly-narrow because they only apply to MM Development.

STATEMENT OF THE CASE

The underlying matter for which the parties are still conducting discovery is essentially a competitive business dispute between retail cannabis dispensaries in Las Vegas. MM Development owns and operates the Planet 13 dispensary, and Tryke owns and operates the Reef dispensary. At Planet 13, MM Development has a program for compensating taxi and rideshare drivers for bringing passengers to Planet 13, a legal practice that is widely used throughout the Las Vegas valley and much of the State of Nevada. Despite the legality of such compensation, and without evidence to support its allegations, Tryke alleges that MM Development's program for Planet 13 is specifically designed and intended to harm Tryke's retail

operations at the nearby Reef dispensary, and is therefore unlawful "diversion" of Reef's customers as that term is defined in NRS 706A.280(2).

Tryke's October 5, 2019, Complaint names MM Development and multiple Doe and Roe Defendants, alleging claims for civil conspiracy, aiding and abetting, and intentional interference with economic advantage, all of which is based on Tryke's theory that MM Development's practice of compensating rideshare drivers for delivering passengers to Planet 13 is intentionally designed to induce rideshare drivers to unlawfully divert Reef's customers. Appx. 01.[1] On December 6, 2019, MM Development filed a Motion to Dismiss, which the Court denied on March 25, 2020. Appx. 13, 73. MM Development sought reconsideration of the order denying dismissal on April 8, 2020 (Appx. 77), and filed its Answer to Tryke's Complaint on April 15, 2020 (Appx. 83). By Minute Order on May 7, 2020, the district court verbally denied MM Development's motion for reconsideration of the order denying its motion to dismiss (Appx. 103), which was followed by a written order (Appx. 105).

Nearly a year after filing its Complaint, Tryke filed an "Emergency" Motion for Preliminary Injunction, including an application for an order shortening time. Appx. 108. The Court granted the application for an order shortening time, giving MM Development only three (3) days to gather evidence and prepare its written opposition to the Motion for Preliminary Injunction. Appx. 111. MM Development filed its Opposition to the Motion for Preliminary Injunction on

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[1] Filed concurrently with this Opening Brief is a 3-volume Appellant's Appendix. Pursuant to NRAP 30(a), undersigned counsel conferred with counsel for Respondent regarding the potential to provide a joint appendix, and although Respondent's counsel did not request the addition of any documents to the appendix, he also did not agree to the submission of the joint appendix as proposed by Appellant.

August 28, 2020 (Appx. 384), and Tryke filed its Reply on September 1, 2020 (Appx. 479). The Court held a hearing on the Motion for Preliminary Injunction on September 3, 2020 (Appx. 497), where it verbally granted the Motion and directed Tryke's counsel to prepare and file a written order. The written Findings of Facts, Conclusions of Law and Order Granting Preliminary Injunction was filed on September 10, 2020, and entered on September 11, 2020. Appx. 518, 538.

Thereafter, MM Development filed a Motion for Reconsideration of the preliminary injunction on September 25, 2020 (Appx. 542), followed by its Notice of Appeal (Appx. 579) and Case Appeal Statement on October 9, 2020 (Appx. 569). Tryke filed an Opposition to the Motion for Reconsideration on October 9, 2020 (Appx. 596), and the district court denied the Motion for Reconsideration by Minute Order on October 23, 2020 (Appx. 614), followed by a written Order on November 7, 2020 (Appx. 616).

STATEMENT OF FACTS

Respondent Tryke owns and operates the Reef retail marijuana dispensary in Las Vegas, Nevada. Appx. 519. Appellant MM Development owns and operates two dispensaries, Medizin and the Planet 13 retail marijuana dispensary, both of which are in Las Vegas, Nevada. *Id*. The Reef dispensary and the Planet 13 dispensary are situated across the street from each other. Therefore, Tryke and MM Development are retail business competitors. Planet 13, however, has repeatedly been recognized as the best dispensary in Las Vegas and Nevada. Planet 13 received multiple honors recognizing its award-winning cannabis dispensary operations, including the following: in 2018, Planet 13 was given the Best Overall Dispensary in Nevada award; in 2019, Planet 13 was given as the 2019 US Market Leader Retail Award, 2019 Best Budtender Choice Award, and the 2019 Clio Best Brand Design; and on August 13, 2020, Planet 13 was named

All-Time Best Dispensary of Vegas. Appx. 399-401.

As part of being the best dispensary in Nevada and the "All-Time Best Dispensary of Vegas", Planet 13 operates a program whereby it compensates both taxi cab and independent rideshare drivers for dropping off passengers at Planet 13 (the "Driver Compensation Program"). *See, e.g.,* Appx. 393. There is nothing novel, and certainly nothing illegal, about the Driver Compensation Program, as demonstrated by its ubiquity as a practice throughout the Las Vegas valley, and the State of Nevada. *Id*.

Nearly ten months after filing its complaint, on August 24, 2020, Tryke filed its motion for a preliminary injunction seeking to enjoin Planet 13—and only Planet 13—from operating its Driver Compensation Program. Appx. 108. Tryke's motion included the supporting declaration of Adam Laiken, to which approximately 33 discrete exhibits were attached, consisting primarily of the cherry-picked evidence from a "secret shopper investigation" conducted for Tryke by a third party. Appx. 136.[2] With its motion, Tryke also made a request for an order shortening the time period for MM Development to respond to the motion, which the district court granted. Appx. 111. The district court provided MM Development with three (3) business days to gather evidence and file an opposition to Tryke's motion and evidence. *Id*. Subsequently at the hearing on Tryke's motion for a preliminary injunction, the district court cut off MM Development's counsel's legal argument and did not allow counsel to argue his full opposition to the motion. *See* Transc., Appx. 500–505.

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[2] Tryke's exhibits did not appear to include the entirety of its secret shopper investigation, and to date, Planet 13 has reason to believe Tryke has not disclosed the entirety of the evidence compiled by its "secret shopper" investigator.

SUMMARY OF THE ARGUMENT

The district court abused its discretion in issuing the preliminary injunction because Tryke failed to satisfy the requisite criteria. Tryke did not demonstrate that it is substantially likely to prevail on the merits of its claims because that cause of action can only be brought against rideshare drivers by the Nevada Transportation Authority—not against MM Development and not by Tryke. There is no private cause of action for diversion in Nevada. Tryke also did not satisfy the elements of intentional interference with contractual relations, which is fatal to both that claim and the related claims of civil conspiracy and aiding and abetting.

The district court also abused its discretion by failing to hold an evidentiary hearing prior to issuing the preliminary injunction and by refusing to allow sufficient time for MM Development to gather evidence, file its written opposition, or argue at the hearing. And the district court abused its discretion because the scope of the injunction is both overly broad as applied to MM Development, and overly narrow because it does not apply to any other retail cannabis dispensary in Las Vegas that also operates a driver compensation program.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY ISSUED THE PRELIMINARY INJUNCTION BECAUSE TRYKE IS NOT LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS AND BECAUSE TRYKE IS NOT THREATENED WITH IRREPARABLE HARM.

A. Standard of Review

Issuance of the extraordinary remedy of injunctive relief is appropriate only when: (i) the moving party shows a reasonable likelihood of success on the merits; and (ii) irreparable harm will be sustained by the moving party if the requested injunction is not issued. *Pickett v. Camanche Constr., Inc.*, 108 Nev. 422, 426, 836

P.2d 42, 44 (1992); *Number One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 780–81, 587 P.2d 1329, 1330 (1978); *see also* NRS 33.010. "Where, as here, a party seeks a mandatory preliminary injunction, forcing another party to take action that goes beyond maintaining the status quo, such relief is subject to heightened scrutiny and the injunction requested should not be issued unless the facts and law clearly favor the moving party." *Wal-Mart Stores, Inc. v. County of Clark*, 125 F. Supp. 2d 420, 424 (D. Nev. 1999) (citation omitted); *see also Mustafa v. Clark County Sch. Dist.*, 876 F. Supp. 1177, 1183 (D. Nev. 1995) ("Mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued in doubtful cases.") (citation omitted).

The burden of proof rests with the movant. *Hospitality International Group v. Gratitude Group, LLC*, 132 Nev. 980, *2 (2016) (unpublished) ("The moving party bears the burden of providing testimony, exhibits, or documentary evidence to support its request for an injunction."); *see also id*. ("[e]vidence that goes beyond the unverified allegations of the pleadings and motion papers must be presented.") (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil*, 2949, at 237 (2013)).

B. Tryke Is Not Likely to Prevail on the Merits of Its Claims

Tryke's complaint sets forth claims for diversion, tortious interference with prospective economic relations, civil conspiracy, and aiding and abetting. Appx. 01–12. Tryke claims that MM Development has committed these torts simply because of MM Development's Driver Compensation Program. Interestingly, Tryke's complaint does not allege that the Driver Compensation Program itself is illegal—the claim is that by operating the legal Driver Compensation Program, MM Development is conspiring with unidentified rideshare drivers and aiding and abetting those drivers' illegal diversion of customers from Reef to Planet 13, which

Tryke argues amounts to intentional interference with prospective economic advantage. But because the Driver Compensation Program is not itself contrary to law, there can be no such conspiracy and likewise no aiding and abetting. And because MM Development cannot possibly be aware of any potential contractual relationship between rideshare passengers and Reef, it cannot have the requisite intent to support Tryke's claim of *intentional* interference with prospective economic relations.

1. Tryke Cannot Prevail on Its 'Diversion' Allegation Against MM Development

First, the relevant statutes and regulations simply prohibit *drivers* from "diverting" passengers, defined in statute as "convey[ing] or attempt[ing] to convey any passenger to a destination other than one directed by the passenger." NRS 706A.280(2)(b); *see also* NAC 706.552(1) (prohibiting drivers of both taxi cabs and rideshare companies from "diverting or attempting to divert a prospective customer from any commercial establishment," or from accepting compensation for doing so). There is, of course, no law or regulation that prohibits a passenger from choosing her destination, or from changing her destination once she is in a taxi or rideshare. Nor is there any law or regulation that prohibits any retail business in Nevada from compensating drivers who bring passengers to their place of business.

The practice of compensating taxi and rideshare drivers for bringing passengers to places of business is ubiquitous—and legal—in Nevada. Indeed, not only do dispensaries tip taxicab, Uber, and Lyft drivers, but many other businesses such as nightclubs, casinos, attorneys, and restaurants do as well. *See, e.g.,* Michael Squires, *Taxicab Authority Repeals Tip Law*, Las Vegas Review-Journal, June 25, 2002 (Appx. 408); *see also* Adrienne Packer, *County Backs Away From*

Cabby Tipping Law, Las Vegas Review-Journal, Dec. 21, 2005 (Appx. 411). Some businesses offer cash, others offer rewards such as free food and drink tickets, free coffee and even free traffic ticket representation. *Id*.

In recognition of this reality, over 15 years ago the Governor of Nevada vetoed Assembly Bill 505, amid mass protests by taxicab drivers across the state, because Section 133 of that bill banned taxicab driver gratuities. Appx. 415. The Governor vetoed Assembly Bill 505 because, among other things, "it singles out and hurts the financial well-being of taxicab drivers." *Id*.

Following the Governor's absolute refusal to ban such behavior, on March 28, 2006, the Clark County Liquor and Gaming Licensing Board followed suit and voted to repeal County Ordinance 8.20.297, in its entirety. This ordinance, for the brief time of its existence, made it unlawful for any liquor licensee "to pay any tip, gift, or gratuity of any kind to any taxicab driver for the delivery of any passenger to the business location of the licensee." Appx. 418. The Clark County Commission, in repealing County Ordinance 8.20.297, clearly indicated its intention—just like that of the former Governor—to permit the practice of compensating drivers for delivery of passengers to businesses in Nevada. "Commissioners agreed that the issue is one that can be sorted out by the free market. If businesses want to pay the drivers, the government shouldn't interfere." Appx. 412.

Notably, in 2002, the Nevada Taxicab Authority specifically repealed a regulation that banned taxicab drivers from accepting gratuities from anyone other than their employer or a passenger. Appx. 408. The Nevada Taxicab Authority did so even with the clear understanding that diversion may happen. When the Nevada Taxicab Authority repealed that regulation in 2002, then-administrator John Plunket said, "[w]e will monitor diversions and if we see it increase, we'll be out there to enforce the law. *But you just can't stop people from taking tips*." *Id*.

(emphasis added). Explaining driver compensation programs for taxicab drivers, then-administrator John Plunket went further: "For 30 years they've been accepting gratuities. It's almost like part of their salary." Appx. 409. That was two decades ago, meaning compensating drivers for delivering passengers is now a half-century Nevada tradition and practice.

Presently, no state or county law prohibits the tipping of taxicab, Uber, or Lyft drivers nor is there any law prohibiting taxicab, Uber, or Lyft drivers from accepting tips. Therefore, the underlying allegation of all of Tryke's claims against MM Development—that Planet 13's Driver Compensation Program is an unlawful diversion program—is without merit.

2. Tryke Cannot Prevail on Its Claim for Intentional Interference with Economic Advantage

Tryke is not likely to prevail on its claim for intentional interference with economic advantage because it cannot satisfy the mandatory elements for that cause of action. A claim for intentional interference with economic advantage, Tryke must prove the following elements:

(1) a prospective contractual relationship between the itself and a third party;
(2) knowledge by MM Development of the prospective contractual relationship;
(3) MM Development had intent to harm Tryke by preventing the contractual relationship;
(4) the absence of a privilege or justification by MM Development; and
(5) actual harm to Tryke as a result of MM Development's conduct.

Wichinsky v. Mosa, 109 Nev. 84, 88, 847 P.2d 727, 729-30 (1993); *Consolidated Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1255 (1998) (same).

Here, the district court erred in finding that Tryke was likely to succeed on

the merits of its intentional interference claim because Tryke cannot satisfy the necessary elements of that cause of action. First, there is no prospective *contractual* relationship at issue because a simple retail transaction for the purchase of legal cannabis products does not involve a contractual relationship, and Tryke provided no authority to the contrary. In its complaint, Tryke makes the summary claim that it has a prospective contractual relationship with passengers who may have requested to be driven to Reef. Appx. 11. A potential retail transaction, of course, does not rise to the level of a prospective contractual relationship. *See Crockett v. Sahara Realty Corp.*, 95 Nev. 197, 199, 591 P.2d 1135, 1136 (1979) (refusing to find tortious interference with prospective contractual relationship from the alleged loss of an anticipated commission from a sales transaction); *id.* ("all vendees are potential buyers of the products and services of all sellers in a given line, and success goes to him who is able to induce potential customers not to deal with a competitor").

Furthermore, this Court has made clear that competition in the marketplace is a privilege that destroys a claim for interference with prospective contractual relations. *Crockett*, 95 Nev. at 199 ("Perhaps the most significant privilege or justification for interference with prospective business advantage is free competition. Ours is a competitive economy in which business entities vie for economic advantage."). Here, given the ubiquity of driver compensation programs throughout Las Vegas in almost every nook and cranny of the service economy which is the economic engine of the State of Nevada, there is simply no legal support for Tryke's claim that MM Development's—and *only* MM Development's—Driver Compensation Program is not a privileged business activity that defeats Tryke's claim for intentional interference with prospective contractual relations with retail cannabis dispensary customers.

Even if Tryke's retail transactions are deemed sufficiently contractual in

nature to support the cause of action, there was no evidence provided by Tryke below that established MM Development had any *actual knowledge* of such prospective contractual relations, or that MM Development had the requisite intent to interfere with any such contracts. This Court has explained that the intent element of interference with prospective contractual relations requires that the defendant "*desires* to bring [the interference] about or [that] he *knows* that the interference is *certain or substantially certain to occur* as a result of his action." *Las Vegas-Tonopah-Reno Stage Line, Inc. v. Gray Line Tours of S. Nevada*, 106 Nev. 283, 287–88, 792 P.2d 386, 388 (1990) (quoting Restatement (Second) of Torts, § 766B(d) (1979)) (emphasis added). Here, it is impossible for MM Development to have any such certainty that the Driver Compensation Program would interfere with the prospective contractual relations between Tryke and any rideshare passengers because MM Development has no knowledge of such a relationship with respect to any specific passenger who is brought to Planet 13 by a rideshare driver. And Tryke did not present one iota of evidence to the contrary. MM Development intended only to compensate drivers for bringing passengers to its place of business, not to interfere with any prospective contractual relationship of Tryke's.

Tryke's allegations are based on nothing more than its assumption that MM Development had actual knowledge of some prospective contractual relationship between Reef and every rideshare passenger who entered Reef as his or her original destination in a rideshare app before changing her destination to Planet 13, and that MM Development knew that its Driver Compensation Program was substantially certain to result in interference with Reef's alleged prospective contractual relationship with each such passenger. There is simply no evidence in the record to support the requisite findings of this specificity. *See e.g. K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088–89 (9th Cir. 1972) (court should not grant

the extraordinary remedy of injunctive relief if the motion consists "largely of general assertions"); *Dermody v. City of Reno*, 113 Nev. 207, 211, 931 P.2d 1354, 1357 (1997) ("A party cannot manufacture a genuine issue of material fact by making assertions in its legal memorandum.").

To allege a claim of interference with prospective economic advantage, a plaintiff must also show that the defendant interfered with the plaintiff's relationship with *a particular individual*. *Rimini Street, Inc. v. Oracle International Corp.,* 2017 WL 5158658, *8 (D. Nev. Nov. 7, 2017) (citing *Damabeh v. 7–Eleven, Inc.*, 2013 U.S. Dist. LEXIS 66565, at *29, 2013 WL 1915867 (N.D. Cal. 2013)) ("Allegations that a defendant interfered with the plaintiff's relationship with an *unidentified customer are not sufficient*, nor are general allegations that the plaintiff had ongoing expectations in continuing economic relationships with current or prospective customers.") (emphasis added); *see also Damabeh*, 2013 WL 1915867 at *30 (holding that "[w]ithout an existing relationship with an identifiable buyer, [plaintiff's] expectation of a future sale was 'at most a hope for an economic relationship and a desire for future benefit.' ") (internal citations omitted). Here, of course, Tryke has not alleged that MM Development interfered with Reef's prospective contractual relationship with any specific rideshare passenger who was dropped off at Planet 13.

The district court abused its discretion in finding that Tryke is likely to succeed on the merits of its claim for intentional interference with prospective contractual relations because Tryke failed to provide evidence that its potential retail transactions rise to the level of a prospective *contractual* relationship with any specific rideshare passenger, and because Tryke failed to provide evidence that MM Development had any actual knowledge of such prospective contractual relationships or any specific intent to interfere with them if they existed. The district court also abused its discretion because the free market competition

between Tryke and MM Development is a privilege that destroys the cause of action and further makes Tryke highly unlikely to prevail on its intentional interference claim.

3. Because Tryke Is Not Likely to Prevail on Its Underlying Claim for Diversion, It Is Not Likely to Prevail on Its Claims for Civil Conspiracy and/or Aiding and Abetting

Tryke has no private right of action against MM Development for the alleged diversion of rideshare passengers by rideshare drivers. NRS Chapter 706A governs claims of diversion, and such claims can only be brought in the first instance by the Nevada Transportation Authority ("NTA") for a *rideshare driver's* alleged diversion. *See, e.g.,* NRS 706A.280(2) (defining diversion is an act done by a driver); NRS 706A.300(1) (penalty for violation of provisions of NRS Ch. 706A are suspension of rideshare company permit or prohibition of allowing driver to operate).

In recognition of the lack of a meritorious cause of action against MM Development for diversion, Tryke instead claims that MM Development has conspired and aided and abetted with those rideshare drivers to commit diversion. Appx. 09–10. But civil conspiracy can only attach if there is an underlying violation of law. *See e.g. Paul Steelman Ltd. V. HKS, Inc.*, 2007 WL 295610, *3 (D. Nev. Jan. 26, 2007) ("Civil conspiracy is not an independent cause of action—it must arise from some underlying wrong."); *Kramer v. Perez*, 595 F.3d 825, 830 (8th Cir. 2010) ("We refuse to create a private cause of action for civil conspiracy" where the underlying statute did not provide for such a right). Further, a claim for civil conspiracy must identify at least "two or more persons." *Consol. Generator-Nevada Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311 (1998). *See also GES, Inc. v. Corbitt*, 117 Nev. 265, 271, 21 P. 3d 11, 15 (2001) ("the conduct of each tortfeasor [must] be in itself tortious"). But here, MM Development cannot

commit diversion because it is not a rideshare driver, and furthermore, Tryke has failed to name as a party even a single driver that MM Development allegedly conspired with. Therefore, Tryke cannot allege a conspiracy because MM Development has committed no wrong.

Similarly, Tryke is not likely to prevail on its claim of aiding and abetting because it cannot satisfy the three necessary elements: 1) the *acting defendant* (i.e., the unidentified and unnamed rideshare drivers) committed a tort that injured Tryke; 2) the aiding defendant was aware of its role in promoting the tort at the time it provided assistance; and 3) the aiding defendant *knowingly and substantially assisted the acting defendant*. *Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 1490–91, 970 P.2d 98, 112 (1998). "Substantial assistance" in aiding and abetting the tort of another requires a showing of direct communication or conduct in close proximity to the tortfeasor. *Id*. at 1491. Tryke has provided no evidence of the requisite direct communication or close proximity among MM Development and the unidentified and unnamed rideshare drivers, and therefore it is not likely to prevail on its aiding and abetting claim.

The district court abused its discretion by finding Tryke is likely to prevail on the merits of its civil conspiracy claim because MM Development is not guilty of any underlying crime or tort for which Tryke has a private right of action against MM Development, so there cannot be a civil conspiracy as a matter of law. And the district court abused its discretion by finding that Tryke is likely to prevail on its aiding and abetting claim because Tryke failed to produce any evidence of the requisite direct communication between MM Development and any rideshare driver who allegedly committed unlawful diversion.

C. Tryke Did Not Make the Requisite Showing That It Is Threatened with Irreparable Harm

As set forth above, a party seeking an injunction bears the burden of showing that absent the requested injunction, it will sustain irreparable harm. *Infra* Part I.A. (citing *Pickett v. Camanche Constr., Inc.*, 108 Nev. 422, 426, 836 P.2d 42, 44 (1992); *Number One Rent-A-Car v. Ramada Inns, Inc.*, 94 Nev. 779, 780–81, 587 P.2d 1329, 1330 (1978); NRS 33.010). However, the law is clear that purely economic harm is not irreparable. *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029–30 (1987) (irreparable harm is harm for which compensatory damages are inadequate); *Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650, 658, 6 P.3d 982, 987 (2000) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended" are not irreparable).

Recognizing that allegations of purely economic harm are not irreparable, Tryke instead argued that it was threatened with "irremediable loss of brand value, consumer loyalty, and inherent goodwill…." Appx. 113, 130. Tryke presented no admissible evidence of any of this alleged non-economic harm, instead relying on anonymous statements made on internet chat rooms. Appx. 123. Tryke also never identified which specific drivers, or even which anonymous internet chat room participants, *actually made disparaging remarks about Reef*. Neither did Tryke ever demonstrate which, if any, alleged statements were not absolutely privileged as either true statements or opinions of the drivers. Nonetheless, in the Order granting the preliminary injunction, the district court expressly found—despite the lack of any such evidence—that drivers were unlawfully diverted passengers to Planet 13 "by means of disparaging and/or providing false information…." Appx. 520–21; *see also id*. at 524 (stating conclusion of law, without reference to any evidence or facts, that Planet 13 was causing irreparable harm to Tryke's "customer acquisitions" and causing the "irremediable loss of Tryke's brand value,

consumer loyalty, and inherent goodwill").

The district court abused its discretion in finding that such non-compensatory harm was occurring because Tryke failed to provide any admissible evidence that such reputational harm is occurring. *See supra* Part II. All of the evidence presented by Tryke in its motion and reply was inadmissible hearsay, and MM Development was not provided the opportunity to cross-examine the persons who Tryke alleges made disparaging remarks about Reef. Furthermore, Tryke's claim that statements made on anonymous internet chat boards amounts to harm to its reputation is based on its unproven assumption that such statements were actually made to any specific rideshare passengers who had chosen Reef as their initial destination. Tryke's claim was nothing more than conjecture, and the district court abused its discretion by relying on it to support a finding of a threat of irreparable harm. *K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1088–89 (9th Cir. 1972) (court should not grant injunctive relief based on movant's claims consisting of "largely of general assertions"); *Dermody v. City of Reno*, 113 Nev. 207, 211, 931 P.2d 1354, 1357 (1997) ("A party cannot manufacture a genuine issue of material fact by making assertions in its legal memorandum.").

II. THE DISTRICT COURT FAILED TO HOLD AN EVIDENTIARY HEARING PRIOR TO ISSUING THE PRELIMINARY INJUNCTION

As recounted above, along with its August 24, 2020, motion for a preliminary injunction, Tryke also requested that its motion be heard on an order shortening time. Appx. 109–11. On August 24, 2020, the district court granted the request for an order shortening time, and required that MM Development prepare and file its opposition by August 27, 2020, *only three days later*.[3] *Id*. In addition

[3] MM Development reached out to Tryke to request additional time to

to only allowing MM Development three business days to gather evidence and prepare a written opposition to the motion for a preliminary injunction, the district court also failed to hold an evidentiary hearing for the motion.

A motion for a preliminary injunction normally requires that the district court hold an evidentiary hearing. *Hospitality International Group v. Gratitude Group, LLC*, 132 Nev. 980, *2 (2016) (unpublished) ("an evidentiary hearing is normally appropriate"). However, "a preliminary injunction motion [may be decided] on written evidence *when no conflict about the facts* requires illumination by live testimony." *Id*. (quoting 11A Charles Alan Wright, Arthur M. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil*, § 2949, at 249) (emphasis added); *see also The Lexus Project, Inc. v. City of Henderson*, 129 Nev. 1133, *1–2 (2013) (unpublished) ("evidentiary hearings are generally contemplated for preliminary injunction motions when there are disputed facts"). Here, there is very much a conflict about the facts, and therefore the district court erred by not holding an evidentiary hearing before issuing the preliminary injunction.

The factual allegations from Tryke's motion for a preliminary injunction, which were ultimately found by the district court to support the order granting the preliminary injunction, were strongly disputed by MM Development. The order granting the preliminary injunction made the following factual findings:

- An unidentified Reef "customer" alerted Tryke that an Uber driver took that customer to Planet 13 even though he stated Reef as his destination in the Uber app. Appx 519.
- An unidentified Uber driver informed Reef that "another dispensary" compensates drivers, and that same unidentified Uber driver told Reef that if Reef refused to compensate drivers then the drivers will take their passengers elsewhere. Appx. 519.

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respond. Tryke agreed to give MM Development until 5:00pm on August 28, 2020, to respond.

- Tryke has received similar statements to the above from "other drivers" as well, including via voicemail message. Appx. 519.
- Tryke's 'secret shopper' investigation in August and September 2019 "confirmed" unlawful diversion was occurring. Appx. 519.
- Two-thirds (20 out of 30) of 'secret shopper' rides resulted in unlawful diversion. Appx. 520.
- Tryke received two 'diversion incident reports' from passengers who were unlawfully diverted. Appx. 520.
- Anonymous internet message board postings claiming unlawful diversion from Reef was taking place. Appx. 520.
- Rideshare drivers "divert and alter a passenger's previously selected destination by means of disparaging and/or providing false information regarding Reef Dispensary, cajoling and/or pressuring the passenger to go to Planet 13 instead, and/or simply dropping the passenger off at Planet 13 instead of the specified destination of Reef Dispensary." Appx. 520–21.
- Tryke has prospective contractual relationships with potential customers that use rideshare services, and MM Development is aware of this prospective contractual relationship and "purposefully incentivizes" drivers to unlawfully divert customers from Reef to Planet 13. Appx. 522.
- Even if MM Development is not itself guilty of diversion, it's co-conspirator rideshare drivers are, which guilt is imputed to MM Development. Appx. 523.
- The alleged diversion by MM Development is "causing substantial damage and irreparable harm to Tryke's sales and customer acquisitions…." Appx. 524.
- MM Development's Driver Compensation Program is "inducing conduct prohibited by Nevada statute and regulation" and is "deceiving customers and violating their right to choose which dispensary to patronize." Appx. 525.

In support of these factual findings, the district court relied only on Tryke's motion for a preliminary injunction and the hearsay exhibits attached to the motion. Indeed, because the order granting the preliminary injunction was

prepared by Tryke, the above-listed factual findings in the order are identical to the statement of facts set forth in the motion and the corresponding written declaration of Tryke's employee. *See, e.g.,* Appx. 113–23; Appx. 142–53 (Laiken Decl.).

The Laiken Declaration in support of the motion for a preliminary injunction is the definition of double hearsay because it is nothing more than Tryke's employee's written recitation (the first level of hearsay) of statements that were told to him by others (the second level of hearsay), and not based upon any events or statements of alleged prospective customers or rideshare drivers that Mr. Laiken actually witnessed himself. *Johnstone v. State*, 92 Nev. 241, 246, 548 P.2d 1362 (1976) ("The recital of a statement of others in a police report is hearsay within hearsay or 'double hearsay'") (dissenting opinion). *See, e.g.,* Appx. 142 (describing alleged incidents that others described to Mr. Laiken); Appx. 143 (Mr. Laiken's description of a "sample" of the results of the 'secret shopper' investigation); Appx. 151–53 (Mr. Laiken's recounting of the "online research" of anonymous internet message boards conducted by others). Some of Mr. Laiken's declaration recounts statements from unidentified persons. *See, e.g.,* Appx. 142 ("Reef has received similar statements from other Lyft and Uber drivers as well…"). Despite it being inadmissible double hearsay, the Laiken Declaration formed the entire universe of facts alleged by Tryke in its motion for a preliminary injunction. Appx. 113–24.

In its opposition to the motion for a preliminary injunction, MM Development strongly disputed and objected to the double hearsay evidence from Mr. Laiken's written declaration. Appx. 114–15 (objecting to Mr. Laiken's double hearsay evidence and describing how that evidence nonetheless fails to show that any *actual customers* of Reef's were diverted to Planet 13 in violation of the relevant law and statute because the 'secret shopper' transcripts show that the 'secret shopper' passengers were overly deferential to the rideshare drivers'

suggestions to change destinations).

Despite the obvious double hearsay evidence presented by Tryke and MM Development's objections and challenges to it, the district court did not hold an evidentiary hearing to take live testimony, instead relying entirely on the written hearsay evidence from Tryke's motion. The district court therefore abused its discretion by failing to hold an evidentiary hearing, and the order granting the preliminary injunction should therefore be vacated.

III. THE TERMS OF THE PRELIMINARY INJUNCTION ARE OVERLY BROAD

The district court agreed with Tryke that *all rideshare passengers* who change their mind during the course of their trip between pickup and drop-off are victims of unlawful diversion, and therefore entered an injunction prohibiting MM Development from compensating drivers for bringing passengers to Planet 13, even those passengers who changed their location of their own free will. The district court's injunction, and Tryke's arguments, conflate the illegal practice of diversion—defined as a *driver* deceptively taking a passenger to a location other than the passenger's choice—with the perfectly legal practice of compensating drivers for bringing passengers to Planet 13 *who (1) identified Planet 13 as their original destination; or (2) willingly changed their destination*.

Furthermore, the injunction applies only to MM Development, but not to the other cannabis dispensaries in Las Vegas who also operate their own driver compensation programs. This is particularly telling because of Tryke's claim, and the district court's finding, that Reef is threatened with irreparable harm in the form of reputational damage. Appx. 520–21, 524. If the irreparable harm that justifies the preliminary injunction is the impending damage to Reef and/or Tryke's reputation, then the preliminary injunction does nothing to address that

irreparable harm because it only enjoins Planet 13, but not the actual rideshare drivers who Tryke claims are the direct cause of its alleged reputational harm.

The scope of the injunction is therefore both overly-broad in application to MM Development's Driver Compensation Program because it improperly enjoins legal activity, and overly-narrow in its lack of application to any other dispensary's driver compensation programs.

CONCLUSION

Appellant MM Development requests that this Court reverse the district court's order and vacate the preliminary injunction because the district court abused its discretion in finding that Respondent Tryke is likely to prevail on the merits of its causes of action, because the district court abused its discretion by failing to hold an evidentiary hearing or providing MM Development with sufficient time to oppose the motion for a preliminary injunction, and because the preliminary injunction is both overly broad as applied to MM Development and overly narrow because it only applies to MM Development.

Respectfully submitted March 25, 2021.

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NRAP 28.2 CERTIFICATE OF COMPLIANCE

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, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the Record on Appeal or Appendix where the matter relied on is to be found. I hereby certify that this brief also complies with NRAP 32(a)(4)–(6), that the typeface is Times New Roman in 14-point font and that it complies with the type-volume limitation of NRAP 32(a)(7) because it contains approximately 6,327 words. I understand I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted March 25, 2021.

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CERTIFICATE OF SERVICE

I certify that on the 25th day of March. 2021, I served a copy of this Appellant's Opening Brief upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es):

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