IN THE SUPREME COURT OF THE STATE OF NEVADA

MM DEVELOPMENT COMPANY, INC., a Nevada corporation,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JESSICA PETERSON, DISTRICT COURT JUDGE,
Respondents,

and

TRYKE COMPANIES SO NV, LLC, A Nevada Limited Liability Company,
Real Parties in Interest.

Supreme Court Case No.:

District Court Case No.:
A-19-804883-C

Dept. VIII

PETITION FOR WRIT OF MANDAMUS

KEMP JONES, LLP
Will Kemp, Esq. (#1205)
Nathanael R. Rulis, Esq. (#11259)
Brook L. Jacobs, Esq. (#15470)
Alysa M. Grimes, Esq. (#15415)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Telephone: (702) 385-6000
n.rulis@kempjones.com
a.grimes@kempjones.com
Attorneys for Petitioner MM Development Company, Inc.

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 Petitioner MM Development Company, Inc. ("MM Development") is a wholly owned subsidiary of Planet 13 Holdings, Inc. Petitioner was represented by Will Kemp, Nathanael R. Rulis, Brook L. Jacobs, and Alysa M. Grimes of Kemp Jones, LLP in the district court, who 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 December 15, 2021.

KEMP JONES, LLP

/s/ Nathanael Rulis
Will Kemp, Esq. (#1205)
Nathanael R. Rulis, Esq. (#11259)
Brook L. Jacobs, Esq. (#15470)
Alysa M. Grimes, Esq. (#15415)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

ROUTING STATEMENT PER NRAP 21(a)(3)(A)

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 and legislatively-approved 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. Plaintiff/Real Party in Interest's claims against Petitioner are based upon alleged violations of state diversion laws, Nev. Rev. Stat. ("NRS") 706A.280(2) and Nev. Admin. Code ("NAC") 706.552(1)(c) (the "Diversion Laws") – laws which provide no private right of action to Plaintiff/Real Party in Interest.

Nevada's public policy is best served by this Court retaining this case pursuant to NRAP 17(a)(12) so that it can determine whether any legal basis exists to bring a private civil suit to enforce the Diversion Laws which underlie Plaintiff/Real Party in Interest's causes of action in the Complaint.

OVERVIEW AND RELIEF SOUGHT

The city of Las Vegas wasn't built on rock and roll, it was built on the hospitality industry—and, therefore, tipping. Yes, tipping is a culture in Las Vegas with visitors and residents alike giving gratuity to service workers of every variation. Businesses have also participated in this culture for decades, with adult nightclubs, liquor stores, gun ranges, law firms, and more recently, cannabis dispensaries, tipping taxi and rideshare drivers for dropping off customers at their respective establishments.

Plaintiff/Real Party in Interest Tryke Companies SO NV, LLC (Tryke), seeks to outlaw a business's ability to tip taxi and rideshare drivers in its lawsuit against Petitioner MM Development Company, Inc. (MM). Tryke owns and operates Reef Dispensaries (Reef), a retail marijuana dispensary in Las Vegas, Nevada.[1] MM owns and operates two retail marijuana dispensaries in Las Vegas, Nevada: Medizin and, at issue here, Planet 13 (Planet 13). Reef and Planet 13 are located across the street from each other. Planet 13 operates a program where it compensates both taxi and rideshare drivers for dropping off passengers at Planet 13.

On November 5, 2019, Tryke sued MM for intentional interference with prospective economic advantage, civil conspiracy, and aiding and abetting based on

[1] Though it was recently announced that Reef has entered into a deal to be acquired by Curaleaf Holdings, Inc.

MM's participation in the ubiquitous practice of tipping taxi and rideshare drivers. Tryke alleges that MM induces taxi and rideshare drivers to divert customers from Reef to Planet 13 because MM tips drivers and Reef does not. Tryke's complaint suffers from several deficiencies. First, Tryke seeks to enforce NRS Chapters 706 and 706A, neither of which provide for a private right of action. Second, even if there were some colorable private right of action available, Tryke must first exhaust its administrative remedies for its claims under NRS 706A before filing suit in the district court. And third, Tryke fails to allege facts sufficient to support its tort claims—most notably Tryke fails to allege that MM has engaged in any wrongful conduct because tipping taxi and rideshare drivers is legal.

Despite these flaws, the district court refuses to dismiss Tryke's claims. Most recently, on October 28, 2021, the district court denied MM's motion for judgment on the pleadings. Therefore, MM brings this petition for a writ of mandamus seeking this Court's extraordinary intervention. MM seeks an order from the Court directing the Respondent District Court to vacate its Order Denying MM's Motion for Judgment on the Pleadings, and to issue an order granting the motion.

ISSUES PRESENTED

Whether the Respondent District Court should be directed to enter judgment on the pleadings because 1) Nevada's diversion statutes do not provide for a private right of action as a substitute for administrative remedies and 2) Tryke's complaint

fails to allege facts sufficient to support its tort claims and the time has run for Tryke to amend its complaint.

FACTS NECESSARY TO UNDERSTANDING THIS PETITION

On November 5, 2019, Tryke sued MM for intentional interference with prospective economic advantage ("IIPEA"), civil conspiracy, and aiding and abetting. Tryke's "lawsuit [sought] to prevent Planet 13 from violating Nevada's anti-diversion laws through paying kickbacks to Uber and Lyft drivers, as well as taxi drivers, in exchange for the drivers diverting passengers that intend to visit Reef to Planet 13." Appx. 2. Tryke alleges that a rideshare driver told an employee of Tryke that other rideshare drivers were diverting passengers from Reef to Planet 13 because MM tipped drivers and Tryke did not. *Id.* at 3. Tryke asserts that MM "widely publicizes that it offers kickback payments to all [rideshare] drivers who drop off [customers] at its dispensary." *Id.* at 8. Specifically, under its IIPEA claim, Tryke alleges that MM's "wrongful conduct" encouraged taxi and rideshare drivers to divert passengers to Planet 13. *Id.* at 11. And, MM's conduct, in conjunction with unidentified taxi and rideshare drivers' conduct, constitutes civil conspiracy and aiding and abetting "to violate Nevada's anti-diversion statutes and regulations, including NRS 706A.280(2) and NAC 706.552(1)." *Id.* at 9-10.

Since Tryke filed its complaint, MM has been fighting to obtain dismissal of Tryke's non-justiciable claims. Through various motions, MM argues that Tryke

has failed to state any claims upon which relief may be granted because: (1) NRS 706 and NRS 706A do not provide any private right of action, (2) although Tryke is required to exhaust its administrative remedies under NRS 706A prior to bringing its claims, it failed to do so (3) Tryke fails to allege that MM engaged in any wrongful conduct, and (4) Tryke fails to sufficiently allege facts supporting other elements of its claims. The district court simply refuses to recognize the defects of Tryke's claims.

After the deadline to amend the pleadings passed, on September 9, 2021, MM filed its motion for judgment on the pleadings. Appx. 108. During the hearing on the motion, the district court stated that it could not rule on the motion under NRCP 62.1. *Id.* at 194-95. However, the district court indicated that it was inclined to deny MM's motion because it was "a repackaged Motion to Dismiss." *Id.* at 195. The court continued that although Tryke cited to NRS 706 in its complaint, the "complaint is not predicated on there wholly being a violation of NRS 706." *Id.* at 200. Instead, the court posited that IIPEA does not require an underlying tort to survive and that IIPEA can serve as the underlying tort for Tryke's civil conspiracy and aiding and abetting claims. *Id.* at 200-01. The court elaborated, "[i]n other words, . . . you could strip out the violation of NRS 706 and 706A completely and you would still potentially have the claims there." *Id.* at 202. The district court filed its order denying judgment on the pleadings on October 28, 2021. *Id.* at 214.

MM's petition for a writ of mandamus now follows.

REASONS WHY THE WRIT SHOULD ISSUE

I. This court should grant MM's petition for a writ of mandamus.

"A writ of mandamus is available to compel the performance of an act which the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Barnes v. Eighth Judicial Dist. Court*, 103 Nev. 679, 681, 748 P.2d 483, 485 (1987). This court will review an order denying a motion for judgment on the pleadings when "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statue or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Chur v. Eighth Judicial Dist. Court*, 136 Nev. 68, 70, 458 P.3d 336, 339 (2020) (internal citation omitted). This petition meets the criteria to be heard because there are no factual disputes, the petition presents clear legal error by the Respondent District Court, presents an issue of first impression with statewide importance, and hearing the petition serves judicial economy.

A. This petition presents clear legal error by the District Court.

"[W]rit relief may be warranted if the record reflects clear legal error or manifest abuse of discretion by the district court, or when an important issue of law requires clarification." *McNamee v. Eighth Judicial Dist. Court*, 135 Nev. 392, 395,

450 P.3d 906, 908 (2019). As explained in more detail below, the district court has committed clear legal error by denying MM Development's motion for judgment on the pleadings because Tryke (1) seeks to enforce statutes for which there is no private right of action, (2) must first exhaust its administrative remedies before filing suit in the district court, and (3) fails to allege (i) that MM engaged in wrongful conduct and (ii) each element of its claims. Each of these points presents clear legal error warranting this court's extraordinary intervention.

B. This petition presents an issue of first impression of statewide importance.

This court will exercise its discretion and "entertain the merits" of a writ petition when a party "raises a matter of first impression with statewide importance," such as "whether a plaintiff has a private right of action" under a Nevada statute. *Neville v. Eighth Judicial Dist. Court*, 133 Nev. 777, 779, 406 P.3d 499, 501 (2017). This court will also review an order denying a motion for judgment on the pleadings when the issue "involves an unsettled and potentially significant, recurring question of law." *See Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 401, 373 P.3d 89, 93 (2016).

Other than the Respondent District Court's refusal to dismiss Tryke's claims, no other court in Nevada has ever held that there is a private right of action under NRS Chapters 706 or 706A. There is also no published Nevada law that explicitly states that tipping taxi and rideshare drivers is an illegal practice, yet the Respondent

District Court refuses to dismiss Tryke's claims. In fact, when previously considering the issue of businesses offering tips to taxi drivers, the Las Vegas City Council, the Clark County Commission, and the Governor of Nevada have all decided that the practice is acceptable and legal. Las Vegas is a hospitality mecca, and tipping goes hand-in-hand with hospitality. Tipping is arguably the lifeblood of the service industry in Las Vegas. The legality and consequences of tipping taxi and rideshare drivers is a reoccurring issue that will continue to rear its head. This Court should take this opportunity to clarify the law on a reoccurring issue of statewide importance.

C. Hearing this petition will serve judicial economy.

This Court may decide to consider a writ petition where doing so will serve judicial economy. *Dekker/Perich/Sabatini Ltd. v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 53, ___ P.3d ___, *2 (2021); *see also Chur*, 136 Nev. at 70, 458 P.3d at 339. Here, the district court is allowing claims to proceed for which there is no legal basis. Without this Court's intervention, the district court and parties will lose valuable time and resources engaging in futile litigation and trial. Petitioner MM asks this Court to save all involved a large amount of time and money by settling this important issue now.

II. The District Court Erred by Denying MM Development's Motion for Judgment on the Pleadings

The district court should have granted MM's motion for judgment on the pleadings because that court lacks jurisdiction over Tryke's claims. First, Tryke attempts to enforce statutes for which there is no private right of action. Second, Tryke must first exhaust its administrative remedies before filing suit in the district court. However, even if the district court had jurisdiction, the court still should have granted judgment on the pleadings because Tryke fails to allege facts sufficient to support its claims. Each of Tryke's claims require MM to have engaged in wrongful conduct. But Tryke has only alleged that MM tips taxi and rideshare drivers, a practice which is legal in Nevada. Tryke also fails to allege several other elements of its claims. Therefore, as explained further below, the district court should have granted MM's motion for judgment on the pleadings as a matter of law. It errored by failing to do so.

A. Standard of Review

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." NRCP 12(c). "Under NRCP 12(c), the district court may grant a motion for judgment on the pleadings when the material facts of the case are not in dispute and the movant is entitled to judgment as a matter of law." *Sadler v. PacifiCare of Nev.*, 130 Nev. 990, 993, 340 P.3d 1264, 1266 (2014) (internal quotation marks omitted). Because an order denying a motion for

judgment on the pleadings presents a question of law, this Court should employ de novo review. *See id.* "As with a dismissal for failure to state a claim, in reviewing a judgment on the pleadings, [this court] will accept the factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party." *Id.* When there is "an entire absence of some fact or facts essential to constituting a cause of action," judgment on the pleadings is proper. *See Lovelock Lands, Inc. v. Lovelock Land & Dev. Co.*, 544 Nev. 1, 7 P.2d 593, 594 (1932).

B. NRS 706 and NRS 706A Do Not Provide a Private Right of Action

The district court should have granted judgment on the pleadings for lack of jurisdiction because Tryke's claims are based on statutes for which there is no private right of action. Tryke's complaint specifically alleges that MM violated Nevada's anti-diversion laws, specifically NRS 706A.280(2)(a) and (b) and NAC 706.552(1)(c) and (f). NRS Chapter 706 regulates motor carriers such as taxicab drivers. See NRS 706.036 (defining "Common motor carrier"); NRS 706.126 (defining "Taxicab motor carrier"). NRS Chapter 706A applies to rideshare companies and their drivers. *See* NRS 706A.040 (defining "driver"); NRS 706A.050 (defining "Transportation network company"). Because Tryke cites to both NRS 706A and NAC 706, and because Tryke discusses both taxi and rideshare drivers, MM addresses both statutory schemes here.

"[W]hen a statute does not expressly provide for a private cause of action, the absence of such a provision suggests that the Legislature did not intend for the statute to be enforced through a private cause of action." *Richardson Const., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 23 (2007). "[W]hen no clear statutory language authorizes a private right of action, one may be implied if the Legislature so intended." *Neville*, 133 Nev. at 781, 406 P.3d at 502. But, "when a statute provides an express remedy, courts should be cautious about reading additional remedies into the statute." *Richardson*, 123 Nev. at 65, 156 P.3d at 23 (concluding there was no private cause of action where the statute expressly provided a remedy in administrative proceedings).

1. NRS 706 Expressly Delegates Civil Enforcement to the Attorney General.

Under NRS 706, the Attorney General will "[p]rosecute in the name of the [NTA] all civil actions for the enforcement of this chapter." NRS 706.1715(1)(b). The Legislature also codified its intent that the NTA would solely regulate taxi drivers and the Department of Motor Vehicles and the Department of Public Safety would enforce those regulations. NRS 706.151(1)(a). NRS 706 does not provide for a private right of action because the statutory scheme expressly charges civil enforcement to the Attorney General and other government agencies. And, the Legislature clearly indicated its intent that government agencies, not private

individuals, would enforce NRS Chapter 706. Therefore, Tryke may not enforce NRS 706, et seq., and its claims based on NRS 706 must fail.

2. NRS 706A Provides Express Administrative Remedies.

NRS 706A states that the Nevada Transportation Authority is charged with regulating rideshare drivers and companies. NRS 706A.110(3). Not only does NRS 706A lack any express provision granting an individual a right to file a civil lawsuit to enforce statutes or regulations, but the NTA has expressed in legislative hearings that it alone enforces NRS 706 and 706A. *See* Overview of Nevada Transportation Authority: Before the S. Comm. On Transportation, 2017 Leg., 79th Sess. 2-3 (Feb. 16, 2017) (statements by Chair Alaina Burtenshaw, including presentation marked as Exhibit C). In fact, the NTA issues citations to enforce these statutes.[2]

Moreover, the statutory scheme provides an express administrative remedy for allegations of diversion. An individual may submit a complaint to the NTA, which will be investigated and prosecuted by the NTA and its staff in an

[2] *See* Minutes of the November 10, 2016 General Session (e.g., Administrative Citation Item 17, Citations 18503 and 18504 "for violations of NRS 706.386, NRS 706.758 and NRS 706A.280") (https://nta.nv.gov/uploadedFiles/ntanvgov/content/About/Meetings/2016-11-10_Minutes_NTA.pdf); Minutes of the December 17, 2020 General Session (e.g., Administrative Citation Item 12, Citations 21799 and 21800 "for violations of NRS 706.386 and NRS 706A.280") (https://nta.nv.gov/uploadedFiles/ntanvgov/content/About/Meetings/2020/12-Decembere/17_December_2020_GSM_minutes_ADA.pdf).

administrative proceeding. *See* NAC 706A.420[3] (written complaint requirements); NAC 706A.440 (Authority staff investigate complaint and make a recommendation); NAC 706A.450 (unresolved complaints submitted to the Authority for review); NAC 706A.470-640 (rules for hearings and effective date of order); NAC 706A.660-770 (rules for the administrative proceedings). Tryke may not enforce NRS 706A, and its claims must fail. Accordingly, the district court should have granted MM's motion for judgment on the pleadings for lack of jurisdiction.

C. Tryke Must Exhaust its Administrative Remedies for Claims Under NRS 706A.

The district court should have granted MM's motion for judgment on the pleadings for lack of jurisdiction because Tryke failed to exhaust its administrative remedies. This Court has made clear that a party must "exhaust all available administrative remedies before initiating a lawsuit." *Mesagate Homeowners Ass 'n v. City of Fernley,* 124 Nev. 1092, 1099, 194 P.3d 1248, 1252 (2008). "[F]ailure to do so renders the controversy nonjusticiable." *Id*. If a party fails to exhaust its administrative remedies, the district court lacks subject matter jurisdiction over that action. *Nevada v. Scotsman Manufacturing Co.,* 109 Nev. 252, 254, 849 P.2d 317, 319 (1993).

[3] *See also* hal.nv.gov/form/NTA/TNC_Complaint. There, any person may file a complaint with the Authority against a rideshare company and its driver.

Nevada's Administrative Procedure Act, NRS Chapter 233B, reflects this requirement that administrative remedies be exhausted before seeking judicial review. It states, for example, that an aggrieved party to a final administrative agency decision is entitled to judicial review of that decision. *See* NRS 233B.130(1). But, "[w]here appeal is provided within an agency, only the decision at the highest level is reviewable unless a decision made at a lower level in the agency is made final by statute." *Id.*

NAC 706A.390 through 706A.770 detail the administrative process that Tryke must have exhausted before filing any lawsuit in the district court. NAC 706A.420 provides the general requirements for a complaint against a rideshare company or its driver. These complaints must be in writing and submitted to the NTA. *Id.* If the NTA determines that the complaint demonstrates probable cause, it will set a date for a public hearing on the complaint. NAC 706A.470. A hearing officer will preside over the hearing, and the parties may present evidence and witness testimony. NAC 706A.510-600. "[A] matter stands submitted for decision by the [NTA] at the close of the hearing." NAC 706A.610. The "hearing officer shall . . . [p]repare a proposed decision for review by the [NTA]." NAC 706A.730(f).

Next, "[t]he [NTA] will review the decision of a hearing officer and enter a final order affirming, modifying or setting aside the decision." NAC 706A.750. All

administrative proceedings before the NTA, under NAC 706A, are conducted "pursuant to the provisions of chapter 233B of NRS and those provisions of chapter 706A of NRS which do not conflict with the provisions set forth in chapter 233B of NRS regarding notice to parties and the opportunity of parties to be heard." NAC 706A.700. Once the NTA enters its final order, the aggrieved party may then petition for judicial review. NRS 233B.130(1).

Therefore, Tryke must first pursue its claims under NRS 706A with the NTA. And because Tryke has failed entirely to either seek or obtain any decision from the NTA, it has failed to exhaust its administrative remedies. As such, Nevada law mandates dismissal of Tryke's claims because the district court lacks subject matter jurisdiction over Reef's grievances. *See* NRS 233B.130(1); *see also Mesagate*, 124 Nev. at 1099, 194 P.3d at 1248; *Scotsman*, 109 Nev. at 254, 849 P.2d at 319.

D. Tryke Fails to Sufficiently Allege Facts to Support its Claims.

The district court should have granted MM's motion for judgment on the pleadings because Tryke failed to allege facts sufficient to state a claim upon which relief may be granted. Tryke claims IIPEA, civil conspiracy, and aiding and abetting. Each of these claims require MM to have engaged in wrongful conduct, which Tryke did not allege. Even if it had, Tryke does not allege facts sufficient to sustain the remaining elements of its claims.

1. Tryke Fails to Allege that MM Engaged in Wrongful Conduct

Claims for IIPEA, civil conspiracy, and aiding and abetting each require Tryke to allege that MM did something wrong, improper, or unlawful. For example, to succeed on a claim for IIPEA, Tryke must allege that MM engaged in independent, wrongful conduct. *See Crockett v. Sahara Realty Corp.*, 95 Nev. 197, 199-200, 591 P.2d 1135, 1136-37 (1979) (concluding appellants' IIPEA claim failed because they "neither alleged nor offered any facts from which an inference could be drawn of any resort by respondents to unlawful or improper means"); *see also Panter v. Marshall Field & Co.*, 646 F.2d 271, 298 (7th Cir. 1981) ("It is hornbook law that the actions complained of in a claim for intentional interference with prospective advantage must be wrongful.") (citing W. Prosser, Torts, § 130 at 951 (4th ed. 1971)).

Similarly, "[c]ivil conspiracy is not an independent cause of action – it must arise from some underlying wrong." *Paul Steelman Ltd. v. HKS, Inc*., No. 2:05-CV-01330-BES-RJJ, 2007 WL 295610, at *3 (D. Nev. Jan. 26, 2007); *see, e.g.*, *McPheters v. Maile*, 64 P.3d 317, 321 (Idaho 2002) ("Civil conspiracy is not, by itself, a claim for relief. The essence of a cause of action for civil conspiracy is the civil wrong committed as the objective of the conspiracy, not the conspiracy itself.") (internal citations omitted); *Raimi v. Furlong*, 702 So. 2d 1273, 1284 (Fla. Ct. App. 1997) ("[A]n actionable conspiracy requires an actionable underlying tort or

wrong."); *Sahara Gaming Corp. v. Culinary Workers Union Local* 226, 115 Nev. 212, 984 P.2d 164 (1999) (affirming summary judgment on a conspiracy claim, which was "derivative of the defamation claim," where the claim for defamation was dismissed). "[T]here can be no conspiracy to do a legitimate act—an act which the law allows." *Carlton v. Manuel*, 64 Nev. 570, 587, 187 P.2d 558, 566 (1947).

And finally, to succeed on a claim for aiding and abetting Tryke must allege an underlying tort. *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1490, 970 P.2d 98, 112 (1998) (citing *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1495 (8th Cir. 1997)), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001) (reciting the elements of aiding and abetting); *see also Nasrawi v. Buck Consultants LLC*, 179 Cal.Rptr.3d 813, 825 n.7 (Cal.Ct.App. 2014) ("[T]here can be no aiding and abetting liability absent the commission of an underlying tort."); *see also* Restatement (Third) of Torts § 28(b) (2021) ("Liability for aiding and abetting depends, first, on a showing that a tort has been committed by another party.").

Here, Tryke alleges in its complaint: "This lawsuit seeks to prevent Planet 13 from *violating Nevada's anti-diversion laws* through paying kickbacks to [rideshare] drivers, as well as taxi drivers, in exchange for the drivers diverting passengers that intend to visit Reef to Planet 13." Appx. 2 (emphasis added). Tryke further alleges that a rideshare driver told Tryke that other rideshare drivers were diverting

passengers from Reef to Planet 13 because MM tipped drivers and Tryke does not. *Id.* at 3. And Tryke alleges that MM "widely publicizes that it offers kickback payments to all [rideshare] drivers who drop off [customers] at its dispensary." *Id.* at 8. Specifically, under its IIPEA claim, Tryke alleges that MM's "wrongful conduct" encouraged taxi and rideshare drivers to divert passengers to Planet 13. *Id.* at 11. And, MM's conduct, in conjunction with unidentified taxi and rideshare drivers' conduct, constitutes civil conspiracy and aiding and abetting "to violate Nevada's anti-diversion statutes and regulations, including NRS 706A.280(2) and NAC 706.552(1)." *Id.* at 9-10. Tryke merely alleges that MM tips taxi and rideshare drivers, which is not wrongful conduct.

The practice of compensating taxi and rideshare drivers for bringing passengers to places of business is ubiquitous—and legal—in Nevada. It is not and cannot, by itself, be "wrongful" as Tryke alleges. Not only do a whole host of 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. 37-38); *see also* Adrienne Packer, *County Backs Away From Cabby Tipping Law*, Las Vegas Review-Journal, Dec. 21, 2005 (Appx. 40-42). 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. 44-45. 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. 47. 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. 41.

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. 37-38. 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. 38. That was two decades ago, meaning compensating drivers for delivering passengers is now a half-century Nevada tradition and practice.

Most recently, a federal lawsuit challenged Las Vegas adult nightclubs' practice of tipping taxi drivers who delivered customers to their establishments. *Trapp v. Big Poppa's, LLC*, No. 2:09-cv-00995-LDF (PAL), 2011 WL 2112001 (D. Nev. May 26, 2011). The plaintiff claimed racketeering and deceptive trade practices, alleging that by tipping drivers, the adult nightclubs induced the drivers to divert customers to establishments that tipped the most. *Id.* at *1-2. In dismissing the complaint, the court stated that tipping taxi drivers was not illegal, finding "[t]hat some taxi drivers engage in unlawful [diversion] to obtain a lawful payment from an adult nightclub does not cause the adult nightclub's payment to be unlawful." *Id.* at *4.

Presently, no state or county law prohibits the tipping of taxi or rideshare drivers nor is there any law prohibiting drivers from accepting these tips. Therefore,

Tryke fails to allege that MM engaged in any underlying wrong, which is a required element of each of its claims. As such, Tryke's claims must fail, and the district court erred by denying MM's motion for judgment on the pleadings. However, if this court is still not convinced, Tryke also failed to allege other elements of its claims.

2. Intentional Interference with Prospective Economic Advantage

Tryke fails to allege facts sufficient to support its IIPEA claim. IIPEA requires Tryke to prove: (1) a prospective contractual relationship existed between Tryke and each taxi and rideshare driver, (2) MM knew about each prospective relationship, (3) MM intended to prevent the relationship and harm Tryke, (4) there was no justification or privilege for MM's conduct, and (5) Tryke suffered actual harm because of MM's conduct. *Wichinsky v. Mosa*, 109 Nev. 84, 87-88, 847 P.2d 727, 729-30 (1993). Tryke fails to allege the absence of privilege.

"Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition." *Crockett*, 95 Nev. at 199, 591 P.2d at 1136. Indeed, "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." *Id.* More specifically, even if MM intentionally prevents a taxi or rideshare driver from forming a prospective contractual relationship with Tryke, MM's actions do not constitute IIPEA when (1)

the thwarted relationship concerns the economic competition between MM and Tryke, (2) MM does not use wrongful means to thwart the relationship, (3) MM does not unlawfully restrain trade, and (4) MM's purpose is at least in part to compete with Tryke. *See* Restatement (Second) of Torts § 768 (2021).

Here, MM's practice of tipping taxi and rideshare drivers is in the spirit of economic competition. Tryke's view appears to be that once it catches the attention of a customer, it is the only dispensary that may "develop that interest into an actual business transaction." *Crockett*, 95 Nev. at 200, 591 P.2d at 1137. Unfortunately for Tryke, that is not the American way. "Ours is a competitive economy in which business entities vie for economic advantage." *Id.* at 199, 591 P.2d at 1136. And "where a loss occurs by reason of lawful competition however sharp, the loss is one for which the law affords no redress." *Id.* Tryke is free to itself participate in the longstanding legal practice of tipping taxi and rideshare drivers if it wishes to. In summary, Tryke has failed to allege the absence of justification or privilege where a significant one exists. MM's legal conduct is otherwise sanctioned by economic competition and, therefore, Tryke's claim for IIPEA must fail.

MM must also address an issue that arose at the hearing on MM's motion for judgment on the pleadings. The district court stated that IIPEA was the underlying tort for civil conspiracy and aiding and abetting. The court reasoned that those claims must survive on that basis. The district court cannot rewrite Tryke's

complaint as a plaintiff is bound by the allegations in their pleadings. *See Kingsbury v. Copren*, 43 Nev. 448, 189 P. 676, 676 (1920) ("it appeared from the complaint itself, as a matter of law, that there was no uncertainty as to the capacity in which plaintiff seeks to hold the defendant responsible," and that the plaintiff "is bound by the material allegations of her complaint"). Tryke's complaint clearly relies on purported violations of NRS 706A and NAC 706 to support its civil conspiracy and aiding and abetting claims. The district court's flagrant actions aside, whether Tryke relies on NRS 706A or IIPEA, its claims for civil conspiracy and aiding abetting fail. These claims fail for the reasons already stated above as well as the additional reasons detailed below.

3. Civil Conspiracy

Tryke fails to allege facts sufficient to support its claim for civil conspiracy. Civil conspiracy requires "two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts." *Consol. Generator Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (internal quotation marks and citation omitted). A plaintiff must allege that there was "an explicit or tacit agreement between the alleged conspirators." *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 813, 335 P.3d 190, 198 (2014).

Tryke fails to allege that MM made an agreement with rideshare drivers to accomplish an unlawful objective. Tryke alleged that rideshare and taxi drivers were diverting customers from its business to MM's business because MM pays "kickbacks" to drivers. Appx. 2-8. Crucially, Tryke does not allege that MM made an agreement with rideshare or taxi drivers to divert customers from Reef to Planet 13. Instead, Tryke alleges that MM's "kickback program is specifically designed to encourage the diversion of passengers" and allows MM to "openly offer[] cash kickbacks to persons whom it knows are thus incentivized to illegally divert customers." *Id.* at 8. Tryke's allegations are insufficient. MM's tipping program is not an agreement with each and every taxi and rideshare driver to divert passengers.

At most, Tryke has alleged that *the rideshare and taxi drivers* are engaging in unlawful conduct by diverting customers. As explained above, Tryke needs to file a complaint with the NTA to resolve that issue, not sue MM for drivers' alleged conduct over which MM has no control. And, importantly, "[t]hat some taxi drivers engage in unlawful [diversion] to obtain a lawful payment from [a dispensary] does not cause the [dispensary's] payment to be unlawful." *See Trapp*, No. 2:09-cv-00995-LDF (PAL), 2011 WL 2112001, at *4. Therefore, Tryke's claim for civil conspiracy must fail.

4. Aiding and Abetting

Tryke fails to allege facts sufficient to support its claim for aiding and abetting. Aiding and Abetting has three elements: (1) the primary actor commits a tort that injures plaintiff, (2) the aider and abettor is aware that it is encouraging the tort when it provides assistance, and (3) the aider and abettor knowingly and substantially assists the primary actor in committing the tort. *See Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1490, 970 P.2d 98, 112 (1998) (citing *In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig.*, 113 F.3d 1484, 1495 (8th Cir. 1997)), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11 (2001). Tryke fails to allege any underlying tort or substantial assistance.

First, to succeed on a claim for aiding and abetting Tryke must allege an underlying tort. *See Nasrawi v. Buck Consultants LLC*, 179 Cal.Rptr.3d 813, 825 n.7 (Cal.Ct.App. 2014) ("[T]here can be no aiding and abetting liability absent the commission of an underlying tort."); *see also* Restatement (Third) of Torts § 28(b) (2021) ("Liability for aiding and abetting depends, first, on a showing that a tort has been committed by another party."). Here, Tryke alleges that MM aided and abetted unknown defendants "to violate Nevada's anti-diversion statutes and regulations, including NRS 706A.280(2) and NAC 706.552(1)." Appx. at 10. A violation of Nevada's anti-diversion statutes and regulations is not a tort. Therefore, Tryke has failed to allege this element and its claim must fail.

Second, Tryke must allege that MM *substantially* assisted the commission of the underlying tort. Liability for civil aiding and abetting only attaches "if the defendant substantially assists or encourages another's conduct in breaching a duty to a third person." *See Dow Chem. Co.*, 114 Nev. at 1490, 970 P.2d at 112 (citing Restatement (Second) of Torts § 876(b) (1979). "To amount to substantial assistance, such encouragement must take the form of a direct communication, or conduct in close proximity, to the tortfeasor." *Id.* at 1491, 970 P.2d at 113. Substantial assistance "means active participation; the passive receipt of benefits from a tort, or a decision not to report wrongdoing, does not ordinarily support a claim" for aiding and abetting, especially when the primary actor has no fiduciary or other legal duty to the plaintiff. Restatement (Third) of Torts § 28(d) (2021).

Here, Tryke alleges that MM aided and abetted taxi and rideshare drivers' diversion of customers from Reef to Planet 13 by tipping drivers who brought customers to Planet 13. Tryke also alleges that MM "widely publicizes" its tipping program. Tryke does not allege that (1) MM had direct communication with each individual driver or the taxi and rideshare companies, (2) MM actively participated in the drivers' alleged tort, or (3) the drivers had a fiduciary or other legal duty to Tryke. Tryke's allegations more describe a situation where MM is engaging in legal conduct and is the passive beneficiary of the taxi and rideshare drivers' individual

choices. Therefore, Tryke's allegations are insufficient to sustain a claim for aiding and abetting, and the district court should have granted judgment on the pleadings.

CONCLUSION

Economic competition is part of running a business in the American marketplace. Tryke seeks to eliminate that competition through the court system without first exhausting its administrative remedies, and by failing to allege facts sufficient to support any of its tort claims against MM. Therefore, Tryke's claims should have been denied by the district court. Based on the foregoing, MM respectfully requests this Court exercise its discretion to grant this petition and issue a writ of mandamus ordering the district court to vacate its order denying judgment on the pleadings and ordering the district court to enter judgment on the pleadings in favor of Petitioner.

Respectfully submitted December 15, 2021.

KEMP JONES, LLP

/s/ Nathanael Rulis
Will Kemp, Esq. (#1205)
Nathanael R. Rulis, Esq. (#11259)
Brook L. Jacobs, Esq. (#15470)
Alysa M. Grimes, Esq. (#15415)

NRAP 21(a)(5) VERIFICATION

The undersigned counsel for Petitioner MM Development hereby verifies pursuant to NRAP 21(a)(5) that the facts stated in the foregoing Petition are within my knowledge.

Respectfully submitted December 15, 2021.

KEMP JONES, LLP

/s/ Nathanael Rulis
Will Kemp, Esq. (#1205)
Nathanael R. Rulis, Esq. (#11259)
Brook L. Jacobs, Esq. (#15470)
Alysa M. Grimes, Esq. (#15415)

NRAP 28.2 CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this petition, 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(3), which requires every assertion regarding matters in the record to be supported by a reference to the page of the 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 21(d) because it contains approximately 6,126 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 December 15, 2021.

KEMP JONES, LLP

/s/ Nathanael Rulis
Will Kemp, Esq. (#1205)
Nathanael R. Rulis, Esq. (#11259)
Brook L. Jacobs, Esq. (#15470)
Alysa M. Grimes, Esq. (#15415)

CERTIFICATE OF SERVICE

I certify that on the 15th day of December. 2021, I electronically filed and served a copy of this Petition for Writ of Mandamus 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):

Court:

Judge Jessica Peterson
Eighth Judicial District Court, Dept. 8
Phoenix Building
330 S. Third St.
Las Vegas, NV 89101

Real Parties in Interest

Eric D. Hone, Esq.
Joel Z. Schwarz, Esq.
H1 LAW GROUP
701 N. Green Valley Parkway, Suite 200
Henderson, NV 89074

Paul A. Conant, Esq.
CONANT LAW FIRM
2398 East Camelback Road
Phoenix, AZ 85016

Attorneys for Tryke Companies SO NV, LLC

Dated this 15th day of December, 2021.

/s/ Jessica Lopez
An employee of Kemp Jones, LLP