IN THE SUPREME COURT OF THE STATE OF NEVADA

ZANE MICHAEL FLOYD, *Appellant*, *vs.* CARDINAL HEALTH, A PRIVATE CORPORATION; THE STATE OF NEVADA DEPARTMENT OF CORRECTIONS; AND JAMES DZURENDA, DIRECTOR, *Respondents*.	Electronically Filed Aug 23 2023 06:26 PM Elizabeth A. Brown Clerk of Supreme Court Case No. 85826

RESPONDENT CARDINAL HEALTH, INC.'S
ANSWERING BRIEF

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WHITE PINE

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NRAP 26.1 DISCLOSURE

The undersigned counsel certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Cardinal Health, Inc.[1] is a healthcare services company incorporated in Ohio. Cardinal Health, Inc. does not have any parent corporation or publicly held corporation that owns 10% or more of its stock.

2. The following persons and entities described in NRAP 26.1(a) have appeared for Cardinal Health, Inc. in this case: Crowell and Moring, LLP and Morris Law Group.

Dated this 23rd day of August 2023.

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[1] The complaint names "Cardinal Health" which is not a legal entity. Based on the information provided by Appellant, it is not possible to determine the appropriate legal entity. Accordingly, Cardinal Health, Inc. responds on behalf of all Cardinal Health entities while reserving its right to seek dismissal of any improperly named entities.

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(2) Whether the District Court properly dismissed Appellant's negligence claim for failure to allege any duty owed to Appellant by Cardinal Health.

(3) Whether the District Court properly dismissed Appellant's claims for declaratory and injunctive relief.

(4) Whether the District Court properly dismissed Appellant's claims against Cardinal Health without leave to amend because any amendment would be futile.

STATEMENT OF THE CASE

This is an appeal of the Seventh Judicial District Court's ("District Court") dismissal without leave to amend of Appellant Zane Floyd's ("Appellant") "Breach of Agreement – (Third Party Beneficiary)" and "Negligent Performance of an Undertaking" claims against Cardinal Health for failure to state a claim under Nev. R. Civ. P. 12(b)(5), and the District Court's denial of Appellant's requests for declaratory and injunctive relief against Cardinal Health.

INTRODUCTION

In this novel action, Appellant appeals the dismissal of claims that were never his to pursue. Appellant's complaint describes at length a business arrangement between certain entities in the pharmaceutical supply chain, including business dealings between the alleged pharmaceutical manufacturers (non-parties Alvogen, Inc., Sandoz, Inc., and Hikma Pharmaceuticals, Inc.); the alleged pharmaceutical distributor Appellee Cardinal Health; and the alleged pharmaceutical purchaser Appellee the Nevada Department of Corrections ("NDOC"). Appellant was not party to any of the alleged business dealings. The District Court dismissed Appellant's claims against Cardinal Health because, at bottom, Appellant did not have any legal basis to pursue claims premised on these contractual arrangements, to which he was not a party or a third-party contractual beneficiary. Because there is no set of facts that Appellant could plead in support of the causes of action he pursues

that would entitle him to relief, this Court should affirm the District Court's rulings and uphold the dismissal of Appellant's case.

STATEMENT OF FACTS

Cardinal Health sets forth below the Statement of Facts taking all facts alleged by Appellant as true for purposes of this appeal.[2]

I. Cardinal Health's Distribution Agreements with Pharmaceutical Manufacturers.

Cardinal Health is a pharmaceutical distributor and medical supply and distribution company that, among other things, enters into agreements with pharmaceutical manufacturers to distribute pharmaceutical products to end-customers. *See* R. 12, 95. These customers may include prison hospitals. *See* R. 15, 36-46. NDOC is one of Cardinal Health's customers. R. 133-34.

According to Appellant, "[b]etween 2006 and 2018," pharmaceutical manufacturers Alvogen, Inc. ("Alvogen"), Sandoz, Inc. ("Sandoz"), and Hikma

[2] Appellant's brief improperly cites to "facts" in the record that were not alleged in the complaint as though they have been pleaded. *See, e.g.*, App. Br. at 8-11 (citing statements made in deposition testimony attached in support of Appellant's Opposition to NDOC's Motion for Judgment on the Pleadings); App. Br. at 8-9 (citing statements made in NDOC's answer to Appellant's complaint). Appellant also improperly cites to materials that are not alleged in the complaint, are not in the record on appeal, and were not even before the District Court when it ruled on Cardinal Health's Motion to Dismiss. *See, e.g.*, App. Br. at 4 & n.3; 5 n.5. Nevertheless, even if Appellant were permitted leave to amend to include these allegations, his complaint would still fail to state claims against Cardinal Health, such that amendment would be futile. Cardinal Health thus treats such facts as alleged, and true, for purposes of this appellate brief.

Pharmaceuticals, Inc. ("Hikma") entered into "Wholesale Service Agreements" with Cardinal Health to "purchase and sell [the manufacturers' pharmaceutical] products." R. 12. "[B]etween 2013 and 2018" (R. 12), these agreements were amended to include "Controlled Distribution Programs," which restricted the distribution and sale of specifically enumerated medicines to certain customers, including U.S. prison hospitals, in exchange for a service fee paid by the manufacturers to Cardinal Health. R. 15, 36-46.

Appellant attached to his complaint the following agreements: (1) a May 28, 2018 Controlled Distribution Program Amendment to a March 1, 2010 Generic Wholesale Service Agreement with Alvogen, which listed Midazolam and Rocuronium Bromide as Controlled Distribution Products (R. 36-38); (2) a December 10, 2013 Controlled Distribution Program Amendment to a June 1, 2006 Generic Wholesale Service Agreement with Sandoz, which listed Rocuronium Bromide as Controlled Distribution Products (R. 39-40); (3) an August 28, 2017 Controlled Distribution Program Amendment to the June 1, 2006 Agreement with Sandoz, which listed Rocuronium Bromide and added Anectine as Controlled Distribution Products (R. 41-45); and (4) a May 15, 2018 Controlled Distribution Program Amendment to the July 1, 2006 Agreement with Sandoz, which listed Rocuronium Bromide, Anectine, and added Cis-atracurium as Controlled Distribution Products (R. 46-47). Appellant also attached invoices from Cardinal

Health to NDOC for: a March 30, 2018 order of Fentanyl; a December 14, 2017 order of Cis-atracurium; and May 9 and May 11, 2018 orders of Midazolam. R. 22-29.

Appellant alleges that the purpose of these Controlled Distribution Programs was "to ensure that [the manufacturer's] products are not sold to or misused by unapproved consumers, including state prisons, for purposes of lethal injections" (R. 15), and that "the sale of products to State institutions . . . intended for lethal injections were precluded, including the Products at issue here[.]" R. 17.

In support of his contention that these Controlled Distribution Programs were "designed and intended" to prohibit the sale of drugs for use in lethal injections, Appellant cites to various public and private statements made by the pharmaceutical manufacturers through which they have stated, for example, that they are "opposed to the use of their 'life-saving and life-enhancing' medicines for use in capital punishment," and that "a prison's use of the [m]anufacturer's medicines in an illegitimate manner . . . ha[s] created public confusion over the legitimate purpose of it's [sic] medicines." R. 12, 17. Appellant further points to statements from the pharmaceutical manufacturers expressing concerns with "public botched executions" that took place "between 2014 and 2016, harming the [m] anufacturer's [sic] reputation, and undermining their mission goals of protecting patient health" (R. 12, 17), as well as the manufacturers' public opposition to the planned execution

of Nevada inmate Scott Dozier in 2018, and subsequent litigation through which the pharmaceutical manufacturers sought to enjoin NDOC from using their medicines in Dozier's execution. R. 12-14; App. Br. at 4, 9-10.

II. NDOC's Purchase of Pharmaceuticals from Cardinal Health.

Appellant is an inmate presently incarcerated by the Nevada Department of Corrections at Ely State Prison. R. 11, 16. On March 26, 2021, the State of Nevada sentenced Appellant to execution by lethal injection "during the week of June 7, 2021 using a drug or combination of drugs chosen by NDOC[.]." R. 11, 16. On June 9, 2021, the NDOC published its Execution Manual, which identified the drugs to be used for Appellant's execution. R. 16. The listed drugs included Fentanyl, Alfentanil, Ketamine, Cis-atracurium, Potassium Chloride, and Potassium Acetate. R. 63.

According to Appellant, the above listed drugs "were purchased by NDOC from [Cardinal Health] between 2019 and 2021, without informing [Cardinal Health] of the letters by the [m]anufacturers stated above, or informing [Cardinal Health] that [NDOC] intended to use the drugs in lethal injections[.]" R. 16. Appellant also alleges that "[i]n 2017-2018," NDOC purchased Cis-atracurium, Fentanyl, and Midazolam[3] from Cardinal Health. R. 13.

[3] The complaint does not allege, nor do the exhibits demonstrate, that Fentanyl, Alfentanil, Ketamine, Potassium Chloride, or Potassium Acetate were

Though not alleged in the complaint, Appellant asserts that NDOC purchased these medicines via Cardinal Health's online "portal," wherein NDOC can order products directly from Cardinal Health. According to Appellant, "[i]f a product is eligible for purchase, NDOC may order the product," but if the "product is ineligible or 'blocked,' NDOC may not purchase the product." App. Br. at 8-9 (citing R. 228-29, 240-41). According to Appellant, NDOC has since been (at some unspecified time) "blocked" from purchasing the drugs listed in its June 2021 Execution Manual from Cardinal Health. App. Br. at 11 (citing R. 229-30).

III. Appellant's Claims Against Cardinal Health.

On November 9, 2021, Appellant filed a three-count complaint against Cardinal Health, the NDOC, and three pharmaceutical manufacturers: Alvogen, Sandoz, and Hikma, seeking declaratory and injunctive relief. On March 7, 2022, Appellant voluntarily dismissed the pharmaceutical manufacturer defendants from this case. R 160-62, 10-19. Appellant asserted two claims against Cardinal Health that are the subject of this appeal: (1) "Breach of Agreement—Third Party Beneficiary" (R. 18-19) and "Negligent Performance of an Undertaking" (R. 19), and sought declaratory relief and injunctive relief. R. 10-11. Appellant also asserted,

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listed on Cardinal Health's Controlled Distribution Program Amendments with the pharmaceutical manufacturers at the alleged time of their purchase by NDOC.

but does not appeal the dismissal of, a "false pretenses" claim against Cardinal Health.

The thrust of Appellant's allegations against Cardinal Health is that Appellant is a "nonincidental, third-party beneficiary" of Cardinal Health's Controlled Distribution Program agreements with the pharmaceutical manufacturers, such that "he may seek to enforce . . . any duty, right or obligation thereunder including . . . an Order directing the [m]anufacturers and [d]istributors [to] immediately retrieve improperly obtained medicines . . . ." R. 13, 16, 282. Appellant alleges that, given the pharmaceutical manufacturers' prior statements and actions to prevent use of their drugs for lethal injections, he "reasonably believed, and had a reasonable expectation, that [the manufacturers], and [Cardinal Health] would act to ensure that the Products and purchases would be tracked and not sold to NDOC for use in an execution[.]" R. 18.

In support of his contract claim, Appellant alleged that the agreements' "prohibition and restriction on the sale of any Product intended for use by State institutions in lethal injections was directly intended to benefit the named parties to the respective agreement(s) . . . and [Appellant] as a third-party beneficiary[,]"; that Cardinal Health and the pharmaceutical manufacturers "failed to track products [known by them to be] desired for use in capital punishment" and failed "to ensure [that the] products were not sold to state prisons for purposes of lethal injection";

and that as a result, Appellant "will suffer imminent injury or death." R. 17-19. In support of his negligence claim based on a theory of negligent undertaking, Appellant alleged that Cardinal Health "undertook an act . . . to render services by implementing a Controlled Distribution Program"; that Cardinal Health negligently performed this undertaking; and that, as a proximate result, Appellant faces imminent injury or death. R. 19.

Appellant sought: (A) a declaratory order finding that he is a third-party beneficiary to NDOC's Contract with Cardinal Health; (B) a declaratory order finding that he was a third-party beneficiary to the pharmaceutical manufacturers' agreements with Cardinal Health; (C) an order enforcing agreements to which he is a third-party beneficiary; and (D) injunctive relief directing the pharmaceutical manufacturers and Cardinal Health to demand and retrieve all products from NDOC purchased for use in lethal injection, and for NDOC to return all products to Cardinal Health identified in the Execution Manual. R. 19-20.[4]

[4] Appellant also asserted a claim against NDOC for "false pretenses," the dismissal of which is also now on appeal. R. 354. Because that claim is not against Cardinal Health, it is not addressed here.

IV. District Court Proceedings and Order Dismissing Appellant's Claims Against Cardinal Health.

On July 13, 2022, the District Court granted Cardinal Health's Motion to Dismiss without leave to amend, dismissing all of Appellant's claims against Cardinal Health. R. 280-86, 291-93.

In dismissing Appellant's breach of contract claim, the District Court found that, even accepting Appellant's allegations as true, Appellant could not "establish his status as a third[-]party beneficiary," and accordingly, Appellant "ha[d] no standing to bring a breach of contract action." R. 284. The District Court applied a two-prong test regarding whether Appellant had pleaded rights as a third-party beneficiary: "(1) a clear intent in the contract to benefit [Appellant], and (2) [Appellant's] foreseeable reliance on the contract." R. 283.

As to the first prong, the District Court stated that it did *not* find that the agreements were *actually* "intended to benefit [Appellant] or death row inmates." R. 284. Appellant's brief incorrectly claims that the District Court "concluded" or "conceded" that the Agreements expressed an intent to benefit Appellant. *See* App. Br. at 12, 31. Rather, the District Court found that Appellant sufficiently *alleged* that the "intent of the [Controlled Distribution Programs] was to inhibit or prevent the use of certain drugs in a lethal injection" and "to avoid 'botched executions." R. 283. The District Court found, however, that Appellant had not sufficiently pleaded the second prong (foreseeable reliance on the contract), and that it seemed "quite

impossible" for Appellant to allege reliance, because he "ha[d] not shown, nor adequately alleged how he has relied on the agreement." The District Court also observed that Appellant's "allegation that he relied on the fact that the [Controlled Distribution Program agreements] would be enforced is wholly insufficient." R. 284.

The District Court dismissed Appellant's negligence claim because an element of the claim had not been sufficiently alleged: Appellant "ha[d] not properly alleged *a duty to him*, or a duty that he is entitled to enforce." R. 284. The District Court also reiterated that Appellant "is not a [third-party beneficiary] and he has no standing." R. 285.

The District Court concluded that, because Appellant "ha[d] no standing to bring his claims, and has not properly alleged essential elements, he has not shown a likelihood of success on the merits," and was thus not entitled to declaratory or injunctive relief. R. 285. Noting that it could not "envision how [Appellant] could amend [his] complaint to overcome" the above insufficiencies and therefore amendment would be "futile," the District Court dismissed Appellant's claims without leave to amend. R. 285. The District Court also declared, **"IT IS HEREBY ORDERED** that Defendant Cardinal Health's Motion to Dismiss is **GRANTED**." R. 286.

Appellant filed his Notice of Appeal from the District Court's order on November 28, 2022. R. 354-59.

SUMMARY OF ARGUMENT

The Court should affirm the District Court's dismissal of Appellant's breach of contract and negligence claims, and requests for declaratory and injunctive relief, without qualification because, as the District Court held, "it would be futile to allow an amendment."

First, the District Court's dismissal of Appellant's breach of contract claim should be affirmed because Appellant can prove no set of facts that could establish his status as a third-party beneficiary of Cardinal Health's Controlled Distribution Program agreements with the pharmaceutical manufacturers. To enforce a contract as a third-party beneficiary, Appellant must allege: (1) an intent in the contract to benefit him, and (2) that he foreseeably relied on the agreement. Appellant can allege neither. For one, Cardinal Health's Controlled Distribution Program agreements with the pharmaceutical manufacturers do not evince an intent to benefit third parties such as Appellant. Rather, Appellant is a mere "incidental beneficiary" of the agreements, which does not confer status as a third-party beneficiary. Nor can Appellant establish reliance, because he cannot allege that he has either acted or refrained from acting in reliance on the agreements. Appellant's argument that the District Court erred by failing to consider the "foreseeability" of Appellant's reliance is a non-sequitur, because without actual reliance, which the District Court held the Appellant did not show, "foreseeable reliance" does not exist.

Second, the District Court's dismissal of Appellant's negligence claim should be affirmed because he has not established—nor could he—a duty owed to him by Cardinal Health. To state a claim in tort for negligent undertaking requires the existence of a duty, breach, causation, and damages, which are absent here. Appellant has not shown that Cardinal Health caused him damages because he cannot allege that he sustained *physical* harm from Cardinal Health's alleged negligence. Nor has Appellant made the threshold showing that Cardinal Health owed any duty to him in tort. Appellant's complaint alleged only that Cardinal Health undertook services in performance of its contractual duties to pharmaceutical manufacturers to implement a Controlled Distribution Program. To show that Cardinal Health had a duty to protect Appellant, he must allege an additional, affirmative undertaking by Cardinal Health intended to protect Appellant, which he cannot do. The District Court did not err by considering Appellant's lack of status as a third-party beneficiary in determining that no tort duty existed. To determine whether a duty exists under a negligent undertaking theory premised on contractual services, the District Court must consider the contract. And the Controlled Distribution Program agreements did not establish a duty owed to Appellant.

Third, the District Court's dismissal of Appellant's requests for declaratory or injunctive relief should be affirmed because he is not entitled to either. Declaratory relief is only available to parties who have actionable rights under a contract, which

Appellant lacks because he is not a third-party contract beneficiary, or a person with enforceable rights under the Controlled Distribution Program agreements. Moreover, whether declaratory judgment is proper is a matter for the District Court's discretion and will not be disturbed on appeal absent an abuse of discretion, which has not been shown. Similarly, injunctive relief is only available to parties who have an underlying, cognizable claim likely to succeed on the merits. Appellant has no such claim; thus, he cannot obtain injunctive relief against Cardinal Health.

Finally, the District Court did not err by failing to specify which claims were dismissed with prejudice. All were. Cardinal Health's Motion to Dismiss requested dismissal with prejudice, and without leave to amend, and the District Court granted the motion, explicitly providing Appellant with no leave to amend. It did so without exception, saying that the "Court cannot envision how [Appellant] could amend to overcome" that he is not a third-party beneficiary to any contract or the Controlled Distribution Programs. Even if the District Court did not use the words, "with prejudice," it is unmistakable that in dismissing Appellant's complaint, the Court was articulating its expectation that Appellant is out of court permanently. Thus, a reversal or remand to add "with prejudice" to its July 13, 2022 order would be of no legal consequence.

ARGUMENT

I. Standard of Review.

Review of an order granting a Nev. R. Civ. P. 12(b)(5) motion is de novo. The Court "will accept a plaintiff's factual allegations as true[;] however, these 'allegations must be legally sufficient to constitute the elements of the claim asserted.'" *Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 19, 293 P.3d 869, 871-72 (2013) (quoting *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823, 221 P.3d 1276, 1280 (2009)). This Court should affirm a district court's dismissal for failure to state a claim where "it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him . . . to relief." *Conway v. Circus Casinos, Inc*., 116 Nev. 870, 873-74, 8 P.3d 837, 839 (2000) (quoting *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)). The Court may affirm a district court's order on any ground supported by the record, as long as "the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

When a district court dismisses a complaint without leave to amend under Nev. R. Civ. P. 15(a), this Court reviews the district court's determination for abuse of discretion. *See Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993); *Stephens v. S. Nev. Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139

(1973). A district court's denial of leave to amend should be upheld where "the proposed amendment would be 'futile.'" *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 289, 357 P.3d 966, 973 (Nev. Ct. App. 2015) (citation omitted). *See Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 402, 302 P.3d 1148, 1154 (2013); *Allum*, 109 Nev. at 287; 849 P.2d at 302. "A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under [Nev. R. Civ. P.] 12(b)(5)." *Nutton*, 131 Nev. at 289; 357 P.3d at 973 (citation omitted).

II. The District Court's Dismissal of Appellant's Breach of Contract Claim Should Be Affirmed.

Appellant can prove no set of facts that could establish his status as a third-party beneficiary of Cardinal Health's Controlled Distribution Program agreements with the pharmaceutical manufacturers. The District Court applied the correct legal standard and thus, this Court should affirm the District Court's dismissal of Appellant's breach of contract claim based on this incurable deficiency.

To enforce a contract as a third-party beneficiary, a non-party to a contract must allege: (1) an intent in the contract to benefit the plaintiff, and (2) that the non-party foreseeably relied on the agreement. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 197-98, 444 P.3d 436, 441 (2019); *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 825 (1977). The second "reliance" prong consists of both actual reliance, *and* that the reliance was foreseeable. Whether Appellant is a third-party

beneficiary of a contract is a question of law that can be resolved by principles of contract interpretation. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 604-05 (2005) (deciding whether non-parties were third-party beneficiaries as a matter of law on a motion to dismiss).

Whether a party has alleged status as a third-party beneficiary is a matter of contract interpretation that can be resolved as a matter of law. *See, e.g.*, *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) ("[C]ontract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo, looking to the language of the agreement and the surrounding circumstances.") (internal quotation marks and citation omitted); *Feingold v. John Hancock Life Ins. Co. (USA)*, 753 F.3d 55, 61 n.4 (1st Cir. 2014) ("Whether [plaintiff] is a third-party beneficiary . . . is a question of law resolved by contract interpretation—even" at the motion to dismiss stage).

A. The District Court applied the correct legal standard.

Appellant argues that the District Court applied the incorrect legal standard by failing to evaluate Appellant's *foreseeable* reliance on the Controlled Distribution Program agreements. App. Br. at 32. This argument fails, because the District Court correctly determined that Appellant had not pleaded, nor could he possibly plead, that he *actually* relied on the agreements. R 284. The District Court thus did not need to decide whether Appellant's reliance was foreseeable—it found that there was no

reliance at all. In other words, the District Court did not "ignore" the reliance prong, it simply did not find that there was any reliance on which to assess foreseeability.

Appellant does not cite any law requiring a court to reach a foreseeability analysis if actual reliance is not adequately alleged. Instead, Appellant cites *Lear v. Bishop*, 86 Nev. 709, 714, 476 P.2d 18, 22 (1970), which found that the plaintiff could assert a claim based on a theory of promissory estoppel where the third-party was not only made aware of the agreement it sought to enforce, but also "relied on it and changed its position" by selling its property. Appellant does not, and cannot, allege any similar change in position or other such action. And *Lear* says nothing about whether the District Court was compelled to undertake a foreseeability analysis once it found that Appellant did not allege actual reliance.

Appellant's argument that the District Court applied the incorrect legal standard to the third-party beneficiary analysis lacks merit.

B. Appellant failed to state a claim for relief against Cardinal Health as a "third-party beneficiary."

1. There are no facts Appellant could prove to demonstrate that he relied on Cardinal Health's agreements.

Appellant's sole allegation about his reliance on Cardinal Health's Controlled Distribution Program agreements was that he "reasonably *believed*, and had a reasonable expectation" (emphasis added) that Cardinal Health would not sell products to NDOC for use in executions. R. 18. Appellant does not allege any action

or omission on his part in reliance on those agreements. Nor can he plausibly do so. This alone dooms his third-party beneficiary claim. *See Herman v. Venetian Casino Resort LLC*, No. 82064, 2021 WL 5276637, at *2, 498 P.3d 776, 776 (Nev. 2021) (unpublished disposition) (affirming grant of summary judgment on third-party beneficiary contract claims where the "contracts neither indicated an intent to benefit appellants as third-party beneficiaries, nor did appellants show that they *did anything in reliance* on those contracts") (emphasis added).

Appellant points to various letters, lawsuits, and media coverage regarding the pharmaceutical manufacturers' opposition to the use of their pharmaceutical products for lethal injection to demonstrate that his claimed reliance on these agreements was "foreseeable." App. Br. at 32-33. The most these allegations show is that Appellant was aware of Cardinal Health's agreements with the manufacturers, and hoped, or even expected, that those agreements would be enforced by the parties to those agreements. This does not show reliance. As the District Court explained, Nevada decisions finding reliance show that the third-party beneficiary *acted or refrained from acting* in reliance on the agreement, not that he was merely aware of the agreement. R. 284. *See, e.g.*, *Herman*, 2021 WL 5276637, at *2, 498 P.3d 776, 776; *Lear*, 86 Nev. at 714, 476 P.2d at 22.

Because Appellant did not act or refrain from acting, he cannot prove any set of facts that would confer third-party beneficiary status on him with respect to

Cardinal Health's Controlled Distribution Program agreements. The District Court's dismissal of his contract claim should be sustained.

2. There are no facts Appellant could prove to show that the intent of Cardinal Health's Controlled Distribution Program agreements was to benefit Appellant.

To state a claim as a third-party beneficiary, a plaintiff must allege that *the contract itself evinced and was made with* an intent to benefit the third-party. *See Wyatt v. Bowers*, 103 Nev. 593, 595-96, 747 P.2d 881, 882-83 (1987) (claimants were not third-party beneficiaries of an agreement where it could not "be clearly discerned from the . . . [a]greement that [the contracting parties] intended to benefit [the claimants] when the . . . [a]greement was entered into") (emphasis omitted); *GW Grundbesitz AG v. A. Invs. LLC*, No. 20-cv-00572, 2021 WL 3878293, at *8 (D. Nev. July 28, 2021) (finding no third-party beneficiary status where "[t]he plain terms of the indemnification agreement . . . demonstrate[d] that the parties did not intend for any party other than [the party to the agreement] to receive a benefit[.]").

The District Court found Appellant sufficiently pleaded that "the intent of the [Controlled Distribution Programs] was to inhibit or prevent the use of certain drugs in a lethal injection" and "to avoid 'botched executions,'" such that he was "at least an incidental beneficiary" of those agreements. R. 283. But allegations about the intent or purpose of the agreements do not establish that the intent of the agreements was to benefit Appellant. The *agreements themselves* must evince an intent to benefit

him, and that benefit must be *more than* incidental. As the court explained in *Olson v. Iacometti*, 91 Nev. 241, 245-46, 533 P.2d 1360, 1363 (1975), the lower court properly found that the plaintiff could not enforce an agreement as a third-party beneficiary "unless it appear[ed] that the agreement *was made for his benefit*" (emphasis added). The court noted that the "fact that he might incidentally benefit by the performance of the agreement is insufficient." *Id.* Under that circumstance, "[a]t best [he] was an incidental beneficiary rather than a third-party intended beneficiary" because "[t]here [wa]s nothing in the . . . agreement indicating that either party intended to confer any rights on appellant[.]" *Id. See also Lipshie*, 93 Nev. at 379, 566 P.2d at 825 (explaining that "although [the party claiming beneficiary status] was mentioned in the agreement and he would indeed receive a benefit," "there was no promise to benefit" him, and "*that he might only have incidentally benefitted by the performance of the agreement [was] insufficient*" to confer third-party beneficiary status on him) (emphasis added).

Appellant does not, and cannot, allege that the Controlled Distribution Program agreements intended to confer rights on (or even referred to) Appellant. Rather, the agreements appended to the complaint reflect a contractual arrangement where Cardinal Health agreed to implement programs to restrict the sale of certain pharmaceutical products to certain customers in exchange for service fees from the pharmaceutical manufacturers. R 15, 36-46. The best Appellant can allege from

these agreements is that their purpose was to prevent use of such pharmaceuticals in lethal injections, and that he might incidentally benefit because NDOC could not purchase the drugs for use in his execution from Cardinal Health. This does not confer third-party beneficiary status on Appellant. His complaint thus failed to plead or otherwise show that the agreements' "clear intent" was to benefit Appellant. Appellant is constrained by the language (or lack thereof) in the agreements, and no amendment could cure this defect. *See Boesiger*, 135 Nev. at 197-98, 444 P.3d at 441.

III. The District Court's Dismissal of Appellant's Negligence Claim Should be Upheld.

"Negligent performance of an undertaking," as the District Court recognized, is not a separate cause of action in Nevada. Rather, it is a theory of negligence that Nevada courts have occasionally recognized as "a narrow exception to the general rule" that "[t]he common law generally does not impose a duty of care to control" the conduct of third persons. *See PetSmart, Inc. v. Eighth Jud. Dist. Ct*., 137 Nev. 726, 730, 499 P.3d 1182, 1187 (2021).

In these narrow circumstances, courts have found a duty based on the Restatement (Second) of Torts § 324A's articulation of liability for "negligent performance of an undertaking," where there would otherwise be no duty in tort:

> One who undertakes, gratuitously or for consideration, to render services to another *which he should recognize as necessary for the protection* of a third person or his things, is subject to liability to the third person for *physical harm*

> resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care *increases the risk of such harm*, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Appellant asserts a theory of liability under § 324A(a), the "increased risk of harm" theory. App. Br. at 20-21.

To plead a negligence claim premised on a "negligent undertaking" theory, however, the plaintiff must allege the core elements of a negligence claim—duty, breach, causation, and damages, which Appellant has not done. *See Artiglio v. Corning Inc.*, 18 Cal. 4th, 604, 613-14, 957 P.2d 1313, 1318 (Cal. 1993). A duty under § 324A can arise when a defendant affirmatively undertakes to render services to another that it knows or reasonably should know is necessary to protect a third-party. Restatement (Second) Torts § 324A; *PetSmart*, 137 Nev. at 731, 499 P.3d at 1187. In addition to proving that a duty existed, the proponent of an "increased risk of harm" negligent undertaking theory must also demonstrate that the defendant failed to exercise reasonable care in performing that undertaking (*i.e.*, breach), and that the failure to exercise reasonable care actually increased the risk of physical harm and physical harm resulted from the defendant's negligence (*i.e.*, causation and damages). *See*, *e.g.*, *Noel v. Bayer Corp.*, 481 F. Supp. 3d 1111, 1124 (D. Mont. 2020) (recognizing that claims premised on § 324A require a claimant to allege facts establishing injuries were a proximate cause of the negligent undertaking).

A. The District Court applied the correct legal standard.

Appellant argues that the District Court's dismissal of his negligence claim should be reversed, seemingly because the District Court's order did not explicitly reference the Restatement (Second) § 324A. App. Br. at 20-30. Appellant asserts that the District Court (1) "misapplied the appropriate legal standard for assessing whether a party owes a duty under Section 324A[,]" and (2) "included third-party beneficiary principles arising under contract law to assess tort liability." App. Br. at 22. Both arguments lack merit.

The District Court correctly decided that Appellant had not properly alleged a duty to him or a duty that he may enforce. R. 284. As with any negligence claim, the existence of a duty is a threshold for a "negligent undertaking" theory, and is a question of law. *See Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777, 291 P.3d 150, 153 (2012); *Artiglio*, 18 Cal. 4th at 615, 957 P.2d at 1318 ("[W]hether [defendant's] alleged actions, if proven, would constitute an 'undertaking' sufficient, within the meaning of section 324A's negligent undertaking theory, to give rise to an actionable duty of care is a legal question for the court.").

The District Court did not err by considering Appellant's lack of status as a third-party beneficiary in determining that no tort duty existed. By so arguing, Appellant misunderstands the intertwined relationship between a finding of third-

party beneficiary status and a negligent undertaking claim where the duty is based on fulfillment of contractual obligations. *See* App. Br. at 15, 22, 28-30.

An alleged "negligent undertaking" may be based on performance of a contractual obligation—*i.e.*, the "undertaking" is the contractual obligation. To determine whether a *duty* exists, the District Court must determine whether the defendant should recognize that its performance of contractual services "was necessary for the protection of a third person[.]"[5] Restatement (Second) of Torts § 324A. In other words, the inquiry into the purpose of the contract overlaps with the inquiry of whether a plaintiff has status as a third-party beneficiary. The § 324A analysis necessarily implicates an assessment of the purpose of the contract, of who (if anyone) the contract was intended to protect, and whether the services contemplated by the contract were intended to benefit a third-party. *See, e.g.*, *PetSmart, Inc.*, 137 Nev. at 729, 499 P.3d at 1187 (finding no duty under a negligent undertaking theory asserted by dog bite victim in part because defendant's contract with adoption agency did not contemplate the actual harm that occurred or include

[5] Even if all of Appellant's alleged facts were true, the record shows that Cardinal Health *could not have even known* that the pharmaceuticals purchased by NDOC were to be used in Appellant's execution (and thus that implementing restrictions were necessary for Appellant's protection), because NDOC did not publish its proposed method of execution until *after* such drugs were allegedly purchased from Cardinal Health. *See* R. 11, 14, 16; App. Br. at 11 (citing R. 224, 228, 239). Cardinal Health's lack of knowledge is underscored by Appellant's own argument that NDOC defrauded Cardinal Health by concealing its true purpose for ordering the pharmaceuticals at issue. App. Br. at 44.

provisions related to the dangerous propensity of adopted pets); *DeLorenzo v. HP Enter. Servs., LLC*, 207 F. Supp.3d 26, 74 (D.D.C. 2016), *order vacated in part on reconsideration by DeLorenzo v. HP Enter. Servs., LLC*, No. 15-cv-0216, 2016 WL 6459550 (D.D.C. Oct. 31, 2016) (interpreting Restatement (Second) § 324A and noting that courts look "'to the contract to determine the scope of the [negligent] undertaking as it relates to the protection of the third party.'") (citations omitted).

Even Appellant's cases demonstrate that determining whether the performance of a contractual obligation gives rise to a duty requires an inquiry into whether the contract contemplated protection of the specific third-party. *See Grogan v. Uggla*, 535 S.W.3d 864, 874-75 (Tenn. 2017) (finding no duty of care owed by home inspector to plaintiff injured by a collapsed deck, because the defendant did not inspect for purposes of evaluating safety, and looking to contractual language to determine scope of undertaking).

Appellant is correct that a negligent undertaking theory "does not require Appellant to demonstrate a contractual agreement between the parties or standing as a third-party beneficiary." App. Br. at 28. But Appellant cannot escape that *his* negligent undertaking claim is based on the contract at issue. The District Court took this into account, and found that Appellant did not allege a *duty owed to him* by Cardinal Health that he may enforce. And finding no basis for an existing duty at common law or otherwise, the District Court correctly held that no duty existed in

the contract either, because Appellant had failed to properly allege that he was a third-party beneficiary. *See Williams v. Emeritus Corp.*, No. 11-cv-01497, 2012 WL 3562774, at *2 (D. Nev. Apr. 17, 2012) (holding that a claimant who is *not* a party to the contract is not a "real party in interest" as to not only traditional breach-of-contract claims, but also to any claims that are "premised on the existence of [the] contract."). Given that the District Court also assessed tort duties more broadly, it appropriately considered Appellant's lack of third-party beneficiary status in support of its broader finding that Appellant did not sufficiently allege any duty.[6]

B. Appellant failed to state a claim against Cardinal Health under a "negligent undertaking" theory of liability.

Beyond Appellant's failure to properly plead duty and breach, a § 324A claim requires actual physical harm arising from a negligent undertaking that increased the risk of that harm. There are no allegations that Appellant suffered any physical harm here. Moreover, as the District Court properly determined, Appellant did not, and could not, establish *a duty owed to him—i.e.*, that Cardinal Health undertook services for Appellant's protection beyond the performance of its contractual duties to implement a Controlled Distribution Program. Appellant must allege an additional, affirmative undertaking by Cardinal Health with the intent to protect Appellant, which he has not done and cannot do. His claim was properly dismissed.

[6] *See* discussion of the District Court's duty analysis *infra* at Section III.A.

1. Appellant cannot show causation and injury to him.

Although the District Court did not need to reach the other elements of a "negligent undertaking" to conclude that no legal duty to Appellant could exist, the record shows that he also failed to plead causation or injury because Cardinal Health's alleged negligence did not result in any physical harm to him. The District Court's order can be affirmed on this independent basis.

Section 324A specifically creates liability only for "physical harm" resulting from a defendant's failure to exercise reasonable care. *See Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1091 (D. Nev. 2012) ("Under Nevada law, physical harm is required to support a claim under § 324A.") (citing *Wright v. Schum*, 105 Nev. 611, 781 P.2d 1142, 1144 (1989)). The overwhelming majority of other jurisdictions also hold that recovery under Section 324A requires actual physical harm. *See, e.g.*, *Schaefer v. Indymac Morg. Servs.*, 731 F.3d 98, 104-06 (1st Cir. 2013); *Laborers' & Operating Eng'rs' Utility Agreement Health. & Welfare Tr. Fund for Ariz. v. Phillip Morris, Inc.*, 42 F. Supp. 2d 943, 951 (D. Ariz. 1999); *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F. Supp. 2d 70, 92-93 (D.D.C. 1999), *affirmed in part, reversed in part on other grounds*, 249 F.3d 1068 (D.C. Cir. 2001); *Audio Odyssey, Ltd. v. U.S.*, 243 F. Supp. 2d 951, 965 (S.D. Iowa 2003); *McCants v. NCAA*, 201 F. Supp. 3d 732, 742 (M.D.N.C. Aug. 12, 2016); *Or. Laborers-Employers Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 17 F. Supp.

2d 1170, 1182-83 (D. Or. 1998); *Myers v. Garfield & Johnson Enters., Inc.*, 679 F. Supp. 2d 598, 616 (E.D. Pa. 2010); *Simms v. Jones*, 879 F. Supp.2d 595, 604 (N.D. Tex. 2012); *Galley Schuler v. Rainforest Alliance, Inc.*, 161 F. Supp. 3d 298, 309 (D. Vt. 2016). *See also* Restatement (Second) of Torts § 7(3) (defining "physical harm" as "the physical impairment of the human body, or of land or chattels."). Where the Supreme Court has not yet directly spoken to an issue, Nevada courts consider the majority rules in other states. *See, e.g.*, *Poole v. Nev. Auto Dealership Invests., LLC*, 135 Nev. 280, 289, 449 P.3d 479, 486-87 (Nev. Ct. App. 2019) (noting that court's approach to application of Restatement principles was "consistent with a majority of other jurisdictions"). Appellant's argument that any negligence by Cardinal Health "increased the risk of harm" to Appellant is thus irrelevant because the Restatement—under a negligent undertaking theory—requires the increased risk of harm to actually cause *physical* harm.

Appellant argues that "[a]n increased risk of harm . . . does not necessarily require a party to establish a 'present physical injury.'" App. Br. at 26. But Appellant's allegations of "imminent injury and death" are insufficient to allege physical harm under a negligent undertaking theory. Appellant does not (and cannot) contend that Cardinal Health's alleged negligence caused him physical harm. The cases Appellant cites in support of his contention that "imminent injury and death" is sufficient merely show that Nevada allows recovery for potential future injury for

certain *other* claims. *See Sadler v. PacifiCare of Nev., Inc*., 130 Nev. 990, 993–94, 340 P.3d 1264, 1266–67 (2014) (negligent infliction of emotional distress); *Lerner Shops v. Marin*, 83 Nev. 75, 79, 423 P.2d 398, 401 (1967) (false imprisonment). Claims based on a "negligent undertaking" theory fall into the category of torts that require physical harm. *Sadler*, 130 Nev. at 994, 340 P.3d at 1267.

For these reasons, Appellant cannot recover under a negligent undertaking theory.

2. There are no facts Appellant could prove to demonstrate the existence of a legal duty owed to him by Cardinal Health.

Appellant's negligent undertaking claim also fails because Cardinal Health's implementation of the pharmaceutical manufacturers' Controlled Distribution Programs does not rise to the level of "rendering of contractual services for Appellant's protection" that is required to establish a duty to him. To establish a duty under a negligent undertaking theory, Appellant must allege that Cardinal Health not only performed contractual services, but also that Cardinal Health undertook an additional, affirmative undertaking with the intent to protect him. *See, e.g.*, *Saline River Props., LLC v. Johnson Controls, Inc.*, 823 F. Supp. 2d 670, 677 (E.D. Mich. 2011) ("[I]n order for [a] duty to arise [under § 324A], it is not enough for the actor merely to act; rather, the actor must have undertaken to render services to another.")

(quoting *Nalepa v. Plymouth-Canton Cmty. Sch. Dist.*, 207 Mich. App. 580, 592, 525 N.W.2d 897, 903)). Appellant cannot make this showing.

Generally, courts allow § 324A claims when "the plaintiff and defendant have a relationship that inherently implicates safety and protection," such as a landlord for tenant safety or a security company for resident safety. *See, e.g.*, *Underwood v. Jensen Farms*, No. 11-cv-348, 2013 WL 6903751, at *6 (E.D. Okla. Dec. 31, 2013). Without such a relationship, courts will only find the existence of a duty where the defendant has undertaken additional, affirmative steps expressing an intent to render services for the protection of the third-party. *See PetSmart*, 137 Nev. at 731, 499 P.3d at 1187 (finding PetSmart did not owe duty of care under negligent undertaking theory where nothing in record suggested that PetSmart "undertook affirmative steps to prevent the type of harm that ensued"); *Burwell v. Peyton*, 131 F. Supp. 3d 268, 301 (D. Vt. 2015) (rejecting § 324A liability where "there [could] be no reasonable claim that" defendant police officers "were rendering services for the protection of Plaintiff" by investigating his premises, because there was no allegation of any promise to plaintiff, or additional steps / concrete actions to follow up on the performance of ensuring plaintiff's protection); *South ex rel. South v. McCarter*, 119 P.3d 1, 17-18 (Kan. 2005) (rejecting plaintiff's "liability to third person for negligent performance of undertaking" theory under § 324A, when the defendants, who

entered into an agreement to enforce community guidelines, "did not undertake or display a willingness to undertake services for the benefit of a third party").

Appellant argues that he demonstrated a duty by alleging that Cardinal Health "undertook services to restrict the distribution of medications used for executions" and was "paid by the Manufacturers to implement protocols to prevent the distribution of lethal injection drugs," and that once it did so, it "assumed a duty" to him. App. Br. at 23-25. But this argument misstates the law. *See* App. Br. at 15, 22-23, 25. As his cited cases demonstrate, something *more* is required to establish the existence of a duty. *See Wright*, 105 Nev. at 615-619, 781 P.2d at 1145-47 (finding liability where landlord in dog bite case used power of eviction to protect tenants from aggressive dog by *affirmatively* telling owners to keep the dog chained up and expressing intent by *promising* tenants that he would "take care of the problem"); *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1491-1503, 970 P.2d 98, 113-121 (1998) (holding jury could have found Dow Chemical liable under negligent undertaking theory where it *affirmatively* "undertook to render testing, advisory, laboratory and personnel services for the purpose of promoting the safety of . . . [breast implant] silicone fluid in order to benefit third persons and had significant control over the development of this fluid[,]" and where evidence of Dow Chemical's undertaking included entering into agreements to test safety of silicone and providing consulting services for advice on safety-related testing and protocol design); *King v. Nat'l Spa*

& Pool Inst., Inc., 570 So.2d 612, 615-16 (Ala. 1990) (finding pool trade association *affirmatively* undertook duty to third persons by promulgating standards for the design and construction of pools that were explicitly based on safety considerations, not because trade association was required to formulate standards, but because it undertook such promulgation "for the purpose of influencing [swimming pool] design and construction practices").

Indeed, *Derosia v. Liberty Mut. Ins. Co*., 583 A.2d 881, 885 (Vt. 1990), cited by Appellant, is instructive. In *Derosia,* the court held that a contract between an insurer and workplace did not establish an undertaking to protect a worker who was injured in the workplace, even though the contract allowed for the insurer to conduct safety inspections. *Id.* In finding that the insurer *had* a duty under § 324A, however, the court relied on substantial record evidence of non-contractual conduct by the defendant that established that it affirmatively and intentionally undertook a duty to the injured worker by taking on the safety inspection duties of the employer. The insurer's conduct that went above and beyond what the contract required is what satisfied the requirements of § 324A(b). *Id.* at 185-87. Appellant does not point to any non-contractual conduct by Cardinal Health to "perform a duty owed by another person" and does not even point to § 324A(b) as a basis for liability. Instead, he relies solely on the contract at issue.

Even assuming all facts asserted by Appellant were true and properly before the Court, any "undertaking" to prevent the sale of certain drugs for use in executions was not Cardinal Health's. *See* App. Br. at 23-24. As Appellant himself alleges in his complaint, the *pharmaceutical manufacturers* "undertook an act to separately enter a strict Controlled Distribution Program designed and intended to ensure that the manufacturer's medicines were not . . . sold . . . for purposes of an execution." R. at 12. Cardinal Health's involvement in implementing these programs was only performing its services to its contractual partners, the pharmaceutical manufacturers. There is no allegation that Cardinal Health affirmatively or intentionally undertook any duty beyond its contractual obligations, much less that it intended to undertake services for Appellant's protection.[7]

Appellant also makes much of the pharmaceutical manufacturers' public proclamations opposing the use of their drugs for executions. App. Br. at 32-33. At most, the record shows that Cardinal Health would have known that these restrictions were "intended to ensure that the manufacturer's medicines were not prospectively sold . . . to [any prison] . . . for purposes of execution." R. at 12. But even Cardinal Health's knowledge of the *purpose* behind the Controlled Distribution

[7] As explained above, the District Court was incorrect to the extent that it found Appellant sufficiently alleged that Cardinal Health's contracts with the pharmaceutical manufacturers intended to benefit Appellant. *See supra* Section II.B.2

Programs is not enough to establish a duty to Appellant. Courts do not find public statements such as the pharmaceutical manufacturers' letters espoused by Appellant "to create a legal duty based on a voluntary undertaking" under § 324A. *See, e.g.*, *McCants*, 201 F. Supp. 3d at 741-42 (rejecting plaintiffs' argument that the "NCAA held itself out as safeguarding the educational opportunities of student-athletes" sufficient to constitute a negligent undertaking, based on public statements made by the defendant in speeches and on its website) (citing cases). More to the point, however, these statements were *not made* by Cardinal Health and do not indicate any undertaking by *Cardinal Health* to implement services to protect Appellant. Cardinal Health's role was to fulfill its contractual obligations to the pharmaceutical manufacturers. Cardinal Health undertook these services at the request of its business partners. Thus, Cardinal Health did not owe any duty to Appellant.

Appellant's complaint does not and cannot plead facts to show the existence of a duty. This Court can also affirm the District Court's dismissal of his negligence claim on this basis. *See Sanchez*, 125 Nev.at 823-26, 221 P.3d at 1280-83.

IV. The District Court Appropriately Denied Appellant's Requests for Declaratory and Injunctive Relief.

In dismissing Appellant's requests for declaratory and injunctive relief, the District Court concluded that because Appellant "has no standing to bring his claims, and has not properly alleged essential elements, he has not shown a likelihood of success on the merits." R. at 285. This dismissal should be affirmed.

NRS § 30.040(1) only permits declaratory relief for parties who have actionable rights under a contract. *See Nat'l Ass'n of Mut. Ins. Cos. v. State Dep't of Bus. & Indus*., 139 Nev. Adv. Op. 3, 524 P.3d 470, 477 (2023) ("Nevada's "Uniform Declaratory Judgments Act *does not . . . grant jurisdiction to the court when it would not otherwise exist* . . . ."") (alteration in original) (emphasis added). The District Court properly found that Appellant does not have third-party beneficiary status. *See supra* Section II. As such, the District Court properly concluded that Appellant could not pursue declaratory relief related to Cardinal Health's contracts with pharmaceutical manufacturers. *See Wells v. Bank of Nev.*, 90 Nev. 192, 198, 522 P.2d 1014, 1017-18 (1974) (explaining that section 30.040 of the Uniform Declaratory Judgment Act is "directed only to those who enjoy a legal interest in the agreement under scrutiny"; if a party does not have any "rights, duties or obligations under the . . . agreement[,]" they "do not have standing as interested persons to challenge the contract in a declaratory judgment action"). Moreover, "whether a determination in an action for a declaratory judgment is proper is a matter for the district court's discretion and will not be disturbed on appeal unless the district court abused that discretion." *Cnty. of Clark, ex rel., Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998). Because it properly found that Appellant did not have third-party beneficiary status, and thus had no legal interest in the

agreement, the District Court did not abuse its discretion by declining to entertain declaratory relief.

Similarly, the District Court correctly denied Appellant's request for injunctive relief. NRS § 33.010 permits injunctive relief when it "appear[s] by the complaint that the plaintiff is entitled to the relief demanded[.]" The District Court properly concluded that Appellant failed to demonstrate that he is entitled to state any of the claims he alleged against Cardinal Health. *See supra* Sections II, III. On this basis, the District Court appropriately denied Appellant's request for injunctive relief. *See State Farm Mut. Auto Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) ("[A]n injunction will not issue 'to restrain an act which does not give rise to a cause of action. . . . .'") (citing 48 C.J.S. § 18 (1978)). Moreover, a movant must show a likelihood of success on the merits to obtain injunctive relief. *State Farm*, 109 Nev. at 928, 860 P.2d at 178. As the District Court correctly found, Appellant could not do so, because he did not state a cognizable claim against Cardinal Health. R. at 285.

Further, to obtain injunctive relief, a movant must also show that, without the injunction, he would suffer "irreparable harm for which compensatory damage is inadequate." *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). Here, Appellant cannot plausibly allege that he will suffer irreparable injury if Cardinal Health does not demand return of the drugs

purchased by NDOC for use in lethal injection and/or identified in NDOC's Execution Manual, because any drugs allegedly purchased by NDOC from Cardinal Health have now expired. In a federal case by Appellant regarding the constitutionality of the NDOC's execution protocol, the court required NDOC to disclose the expiration date for each of the drugs referenced in the June 2021 Execution Manual. In a July 6, 2021 decision also cited by Appellant, the federal court noted that, as of July 2021, NDOC only "ha[d] a sufficient inventory of unexpired drugs to be able to carry out an execution pursuant to the [June 2021 Execution] protocol *through November of [2021]*." *Floyd v. Daniels*, No. 21-cv-00176, 2021 WL 287291, at *7 (D. Nev. July 6, 2021) (emphasis added). To the extent necessary, this Court can take judicial notice of this finding. *See Mack v. Est. of Mack*, 125 Nev. 80, 206 P.3d 98 (2009) ("[U]nder some circumstances, we will invoke judicial notice to take cognizance of the record in another case."); *Sharpe v. Grundy*, No. 17-cv-01905, 2019 WL 692815, at *2 n.1 (D. Nev. Jan. 31, 2019) ("Judicial notice is properly taken of proceedings in other courts . . . if those proceedings have a direct relation to matters at issue.") (citing *Byrd v. Phoenix Police Dep't*, 885 F.3d 639 n.3 (9th Cir. 2018)); *Donnell v. Fidelity Nat'l Title Agency, Inc.*, No. 07-cv-0001, 2009 WL 10692729, at *1 (D. Nev. Jan. 26, 2009) ("A court may take judicial notice of another court's opinion.").

Appellant has identified no reversible error with respect to the District Court's rulings on his requests for declaratory and injunctive relief. The District Court's rulings on these requests should be affirmed.

V. The District Court Properly Dismissed Appellant's Claims With Prejudice and Without Leave to Amend.

Appellant also argues that, even if his claims were properly dismissed, the District Court's order "should be 'corrected to a dismissal without prejudice' permitting leave to amend." App. Br. at 20. Appellant misconstrues the District Court's order. The District Court stated it could not "envision how Plaintiff could amend the complaint" to overcome the insufficiencies it identified and, as such, "it would be futile to allow an amendment." R. 285. It then ordered that "Cardinal Health's Motion to Dismiss is GRANTED"—without specifying if the dismissal was "with" or "without prejudice." R. 286.

First, the District Court's dismissal of Appellant's breach of contract and negligence claims against Cardinal Health without leave to amend was proper. There is no reversible error and the Order does not warrant correction.

Second, even if Appellant were correct that the District Court's order should be amended to a dismissal "without prejudice" (and he is not), Appellant's only remedy would be for this Court to remand with instructions that the District Court so clarify. But because Nevada law does not provide "clarification" to contradict the

District Court's unambiguous holding that "it would be futile" to allow an amendment, the District Court's order should be affirmed.

A. The District Court properly dismissed Appellant's claims without leave to amend on the grounds that amendment would be futile.

"Under [Nev. R. Civ. P.] 15(a), a party should be granted leave to amend a pleading 'when justice so requires' and the proposed amendment is not futile." *Nutton*, 131 Nev. at 281, 357 P.3d at 968 (quoting Nev. R. Civ. P. 15(a)(2)). A district court may deny leave to amend when it finds that amendment would be futile—*i.e.*, if the plaintiff could plead no set of facts that would entitle him to relief. *Hung v. Genting Berhad*, 138 Nev. Adv. Op. 50, 513 P.3d 1285, 1289 (Nev. Ct. App. 2022) ("[B]ecause the . . . proposed amendment would have been futile, the district court did not abuse its discretion in denying . . . [the] motion for leave to amend.").

Leave to amend is a separate concept from dismissal with or without prejudice. A court may deny leave to amend *even if* a complaint is dismissed without prejudice, especially where a jurisdictional defect like lack of personal jurisdiction calls for a dismissal without prejudice. *See, e.g.*, *Brereton v. Bountiful City Corp*., 434 F.3d 1213, 1219 (10th Cir. 2006) (interpreting nearly identical Fed. R. Civ. P. 41(b) and 15(a) and noting that denial of leave to amend and dismissal with prejudice are "two separate concepts," such that "[a] denial of leave to amend to repair a jurisdictional defect, even on futility grounds, does not call for a dismissal with

prejudice"). "Where a Nevada rule is similar to an analogous federal rule, the cases interpreting the federal rule provide persuasive authority as to the meaning of the Nevada rule." *Yount v. Criswell Radovan, LLC*, 136 Nev. 409, 414-15, 469 P.3d 167, 172 (2020).

Appellant offers no support or even argument why the District Court order should be corrected to allow leave to amend under Nev. R. Civ. P. 15. *See* App. Br. at 20. Having found that "Plaintiff has not shown he is a TPB to any of the agreements or [Controlled Distribution Program]" and "[a]ll his claims against Cardinal are dependent on such a showing, and without TPB status he has no standing and his complaint does not state a claim upon which relief can be granted," the District Court properly concluded that it could not "envision how Plaintiff could amend the complaint to overcome" these insufficiencies and "it would be futile to allow an amendment." R. 285. The Court should affirm the District Court's correct decision to deny leave to amend on futility grounds.

B. The District Court's order should not be reversed for omitting to state whether dismissal was with or without prejudice.

The District Court did not err by failing to specify which claims were dismissed with prejudice, or by dismissing all claims with prejudice. Nevada law addresses how to interpret trial court orders that do not specify whether a dismissal is "with" or "without" prejudice and does not mandate reversal or remand.

1. The District Court had jurisdiction over Appellant's contract claim and thus its dismissal was with prejudice.

Absent exceptions that are not applicable here, when a court order dismissing a complaint under Nev. R. Civ. P. 12(b)(5) is otherwise silent, it is deemed to be with prejudice and operates as "an adjudication on the merits." Nev. R. Civ. P. 41(b); *see also Five Star Cap. Corp. v. Ruby*, 124 Nev. 1048, 1057, 194 P.3d 709, 715 (2008) (a dismissal based on a rule other than Nev. R. Civ. P. 41 and not based on lack of jurisdiction, improper venue, or failure to join a party was "with prejudice").

Appellant argues that claims dismissed on standing grounds "must be dismissed without prejudice" and thus the District Court erred. App. Br. at 18. But Appellant's argument that the District Court's dismissal was jurisdictional is contrary to Nevada law. Unlike federal law, standing is not a jurisdictional pre-requisite in Nevada. *See Superpumper v. Leonard*, 137 Nev. Adv. Op. 43, 495 P.3d 101, 106 n.2 (2021) (noting that the Nevada Supreme Court has never "subscribed to the view that standing is an aspect of subject matter jurisdiction"). Even adopting Appellant's view that the District Court dismissed his claims on standing grounds, that decision would not implicate jurisdiction. The District Court did not err.

The only Nevada authority Appellant cites for the proposition that a dismissal for lack of third-party beneficiary standing is jurisdictional is *Smaellie v. City of Mesquite*, 133 Nev. 1075, 393 P.3d 660 (2017) (unpublished disposition). But *Smaellie* is an unpublished and non-binding decision in the context of federal labor

law claims, which was decided before the Nevada Supreme Court's footnote in *Superpumper* clarified that the Nevada Supreme Court has never found that dismissal on standing grounds is jurisdictional, and should be disregarded.

Appellant also cites federal court decisions for the proposition that dismissals on jurisdictional grounds should be *without prejudice*. App. Br. at 18. But each of these cases addressed dismissals on grounds that were undisputedly jurisdictional—lack of Article III standing, personal jurisdiction, or subject-matter jurisdiction. Even federal courts, however, dismiss claims for lack of standing to enforce a contract as a third-party beneficiary *with prejudice*. *See, e.g.*, *Whatley v. Ohio Nat'l Life Ins. Co.*, 851 F. App'x 910, 918-19 (11th Cir. 2021) (affirming dismissal of breach of contract claim for lack of third-party standing *with prejudice* and without leave to amend); *Balsam v. Tucows Inc.*, 627 F.3d 1158, 1163 & n.3 (9th Cir. 2010) (same); *Bucher & Christian Consulting, Inc. v. Novitex Enters. Sols., Inc.*, No. 15-cv-10, 2015 WL 5210668, at *18 (S.D. Ind. May 22, 2015) (finding contract did not create third-party beneficiary rights and recommending dismissal *with prejudice*). So too state courts. *See, e.g.*, *Marque Medicos Fullerton, LLC v. Zurich Am. Ins. Co.*, 83 N.E.3d 1027, 1042, 1045 (Ill. App. 1st 2017) (affirming dismissal of third-party beneficiary claim *with prejudice*).

2. Appellant's negligent undertaking claim should be deemed dismissed with prejudice.

In any event, the District Court did not dismiss Appellant's negligent undertaking claim on third-party-beneficiary standing grounds. Rather, the District Court found that Appellant "ha[d] not properly alleged *a duty to him*, or a duty that he is entitled to enforce." R. 284 (emphasis in original); *see supra* Section III.A. In other words, the District Court dismissed for failure to state a claim because Appellant did not allege an essential element of his claim—a duty owed to him by Cardinal Health. Such a dismissal is not based on an absence of jurisdiction. Thus, under Nev. R. Civ. P. 41(b), the District Court's dismissal of Appellant's negligent undertaking claim would be *with prejudice*.

For these reasons, the District Court dismissed all of Appellant's claims against Cardinal Health with prejudice. Appellant's argument that the District Court should be made to clarify that its dismissal was without prejudice is thus without merit and should be disregarded.

CONCLUSION

The District Court's order dismissing Appellant's claims against Cardinal Health without leave to amend should be affirmed.

DATED this 23rd day of August, 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with a 14-point, double-spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 10,397 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of August, 2023.

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I hereby certify that on August 23, 2023, I submitted the foregoing for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the all counsel of record including:

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