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D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC d/b/a SCORES

DISTRICT COURT
CLARK COUNTY, NEVADA

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, a Nevada limited liability company; LITTLE DARLINGS OF LAS VEGAS, LLC, Nevada limited liability company,

Plaintiffs,

vs.

SKY TOP VENDING , INC., a Nevada corporation d/b/a CAN CAN ROOM; TWO M., INC., a Nevada corporation d/b/a DIAMOND CABARET; C.P. FOOD & BEVERAGE, INC., a Nevada corporation d/b/a CLUB PARADISE; D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, a Nevada limited liability company d/b/a SCORES; SGC INVESTMENTS HOLDINGS, LLC, a Nevada limited liability company d/b/a SEAMLESS; K-KEL, INC., a Nevada corporation d/ba/a SPEARMINT RHINO; SHAC, LLC, a Nevada limited liability company d/b/a SAPPHIRE; CANDY APPLES, LLC, a Nevada limited liability company d/b/a PENTHOUSE EXECUTIVE GIRLS; O.G. ELIADES, A.D., LLC, a Nevada limited liability company d/b/a OLYMPIC GARDENS; PALOMINO CLUB INC., a Nevada corporation d/b/a PALOMINO CLUB; D.2801 WESTWOOD, INC., a Nevada corporation d/b/a TREASURES d/b/a SHERI'S CABARET; DOE EMPLOYEES 1-500; DOE CORPORATIONS 1-10, DOE LIMITED LIABILITY COMPANIES 1-10; DOES 1-500 ,

Defendants.

Case No. A574136
Dept. No. XI

DEFENDANT D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC'S MOTION TO DISMISS

DATE: March 30, 2009
TIME: 1:00 p.m.

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COMES NOW Defendant D.I. FOOD & BEVERAGE OF LAS VEGAS, LLC, a Nevada limited liability company d/b/a SCORES (hereinafter "D.I."), by and through its attorneys AARON D. LOVAAS, ESQ. and KRISTAN E. LEHTINEN, ESQ. of the law firm of LOVAAS & LEHTINEN, P.C., and pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure (hereinafter "NRCP"), moves this Court for dismissal of this matter as to D.I. for failure to state a claim upon which relief can be granted.

This Motion is made and based upon the Memorandum of Points and Authorities as set forth below, all papers and pleadings on file in this matter and the oral argument taken at the time of hearing of this matter, if any.

DATED this 20th day of February, 2009.

LOVAAS & LEHTINEN, P.C.

By: ______________________________

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As this Court has already been made aware, even at the early stages of this litigation, the causes of action asserted by Plaintiffs in this matter are simply another incarnation of the erstwhile otiose efforts by these Plaintiffs and other parties to seek damages and injunctive relief against D.I. and the several other Defendants upon untenable and footless claims wholly unsupported by evidence. In at least three (3)

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prior law suits,[1] these Plaintiffs and an association of which they were members, have brought the same claims as plead in this matter and on each previous occasion have suffered dismissals of those claims or have utterly abandoned the prosecution of them. Absolutely nothing has changed here. For the reasons set forth below, each and every cause of action asserted by Plaintiffs through their Third Amended Complaint must be dismissed, pursuant to NRCP 12(b)(5), for failure to state a claim upon which relief can be granted.

II. LEGAL STANDARD

A motion to dismiss is properly granted where the allegations in the complaint, "taken at face value... and construed favorably in the [plaintiff's] behalf, fail to state a cognizable claim for relief." *Morris v. Bank of Am. Of Nev.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994) (upholding trial court's dismissal of claims for fraud and conspiracy) (citation omitted). While a court will presume the truth of a plaintiff's factual allegations, it will not "necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in [the] Complaint.: *McMillan v. Dep't. of Interior*, 907 F. Supp. 322, 327 (D. Nev. 1995); *see also Foster Poultry Farms, Inc. v. Suntrust Bank*, 355 F. Supp. 2d 1145, 1148 (D. Nev. 2004) (stating that when deciding a Rule 12(b) motion, the court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.")

"The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). Mere vague, conclusory and general allegations will not overcome a rule 12(b) motion. *See N. Star*

[1] D.I. adopts and incorporates by reference the historical description and characterization of the prior law suits as set forth in "Defendants SGC Investment Holdings, LLC d/b/a Seamless and Highland Street Group, LLC d/b/a Sheri's Cabaret's Motion to Dismiss," filed in this matter on or about November 17, 2008, at pp. 4-6.

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Int'l v. The Ariz. Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983) ("Because the complaint is vague, conclusory and general and does not set for the any material facts in support of the allegations, theses claims were properly dismissed [under Rule 12(b) Fed. R. Civ.P.]."). For the reasons set forth below, D.I.'s Motion should be granted.

III. CAUSES OF ACTION

For the purposes of this Motion to Dismiss, D.I. will set forth the arguments and grounds for dismissal of the Second through Fifth Claims for Relief plead through the Third Amended Complaint, addressing the First Claim for Relief, Respondeat Superior, last.

A. The Plaintiffs Have Failed To State A Proper Claim For Intentional Interference With Prospective Economic Advantage (Second Claim for Relief) and Negligent Interference with Prospective Economic Advantage (Third Claim for Relief).

The Plaintiffs' Second and Third Claims for Relief (Intentional Interference with Prospective Economic Advantage and Negligent Interference with Prospective Economic Advantage, respectively) are without legal or factual merit. In order to state a proper claim for Intentional Interference with Prospective Economic Advantage,[2] Plaintiffs must allege and prove the following elements:

> (1) a **prospective contractual relationship between the plaintiff and a third party;** (2) the defendant's knowledge of this prospective relationship; (3) the intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and, (5) actual harm to the plaintiff as a result of the defendant's conduct.

Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 114 Nev. 1304, 1311, 971 P.2d 1215 (1998) (emphasis added). The Plaintiffs claim that they "had a reasonable probability of future business opportunities and economic benefit in

[2] It is unclear whether "Negligent Interference with Prospective Economic Advantage" is a recognized tort in Nevada. However, D.I. seeks dismissal of the Second and Third Claims for Relief on the same grounds, i.e. that Plaintiffs cannot show the existence of a prospective contractual relationship, which would necessarily be an element of that tort if it indeed exists.

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connection with those taxicab passengers who requested to be taken to Plaintiffs' establishments." Third Amended Complaint, ¶ 53. Despite the language of Plaintiffs' specific allegation, the elements of this tort are clearly set forth by Nevada case law, as cited above. The notion that Plaintiffs enjoy a "prospective *contractual* relationship" with an unknown third party at the time that third party steps into a taxi, without ever knowing whether the passenger requested to be taken to one of Plaintiffs' establishments or not, is absurd. The absurdity of the allegation is magnified when one considers the veritable plethora of reasons that a passenger, after requesting transportation to one of Plaintiffs' establishments, might never arrive. In the event the taxi were in a traffic accident, or the passenger received an emergency telephone call and had to go elsewhere, or the passenger suffered some sort of medical emergency while in the cab, the passenger, who Plaintiffs would never be able to specifically identify as a potential customer, would never arrive on that occasion to either of Plaintiffs' establishments. The absurdity continues when one considers that the elements of this tort require D.I. to have knowledge of the prospective contractual relationship. It is impossible for D.I. to know of any request made by any taxi cab passenger for any destination.

Given that Plaintiffs cannot establish that they had a prospective contractual relationship with any third party, whether that third party desired to travel to Plaintiffs' establishments or otherwise, they have failed to establish the very basic element of this tort. Therefore, the Second and Third Claims for Relief must be dismissed for failure to state a claim upon which relief can be granted.

B. <u>The Plaintiffs Have Failed to State A Proper Claim for Civil Conspiracy (Fourth Claim for Relief).</u>

An actionable civil conspiracy "consists of a combination of 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." *Consolidated Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1311, 971

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1 P.2d 1251, 1256 (1998). Plaintiffs allege that a civil conspiracy exists among D.I., the
2 taxi drivers, the taxi companies (none of which are named Defendants), and the other
3 Defendants, "by their above described actions[.]" Third Amended Complaint, ¶ 67.
4 Presumably, Plaintiffs refer to the prior factual allegations and alleged claims for relief
5 in their Third Amended Complaint. D.I. has already established above why the torts of
6 Intentional and Negligent Interference with Prospective Economic Advantage should
7 be dismissed. Therefore, the alleged Civil Conspiracy would seem to consist of the
8 alleged disparagement of the Plaintiffs (Third Amended Complaint, ¶¶ 16-41), and
9 alleged violations of NRS 706.8846 and NAC 706.552 (Third Amended Complaint, ¶¶
10 42-43).[3]

11 ***1. Alleged Disparagement***

12 Nowhere in the Third Amended Complaint is it alleged that D.I. disparaged
13 either Plaintiff. Tellingly, the Third Amended Complaint is absolutely devoid of any
14 allegation that D.I. instructed any taxi driver or taxi company to disparage either
15 Plaintiff. There appear no allegations that D.I. agreed to any plan or scheme with any
16 taxi driver or taxi company to disparage either Plaintiff. Indeed the denigration that is
17 alleged to have occurred is alleged on the part of the individual taxi drivers and no one
18 else. Therefore, if the civil conspiracy is alleged to exist on the basis of the alleged
19 disparagement, then there is no conspiracy at all. Indeed, "[t]he cause of action [for
20 civil conspiracy] is not created by the conspiracy but by the wrongful acts done by the
21 defendants to the injury of the plaintiff." *Eikelberger v. Tolotti,* 96 Nev. 525, 611 P.2d
22 1086 (1980). Considering that in the context of the alleged disparagement of
23 Plaintiffs, D.I. is alleged to have done absolutely nothing, no conspiracy exists.
24 / / /
25 / / /
26

27 [3] While no violation of the cited NRS and NAC on the part of D.I. is specifically alleged, D.I. will address the issue in this Motion to Dismiss nonetheless. No taxi drivers or taxi companies are named as
28 Defendants in this matter, so D.I. assumes that it or the other Defendants are alleged to have some liability under the cited NRS and NAC since their existence and terms are alleged at ¶¶ 42-43.

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2. *NRS 706.8846 and NAC 706.552*

In order to present an actionable claim for civil conspiracy on this basis, Plaintiffs would have had to properly allege that: (1) NRS 706.8846 and 706.8847 apply to D.I.; (2) the statutes create a private right of action; and (3) the statutes were violated. Plaintiffs have failed to allege any of these elements.

a. *NRS 706.8846, and NAC 706.552 Apply Only to Taxicab Drivers.*

On their face, NRS 706.8846 and 706.8847, and NAC 706.552 apply to and regulate taxicab drivers, not clubs such as D.I. NRS 706.8846 provides, in pertinent part:

> With respect to a passenger's destination, a driver shall not:
>
> 1. Deceive or attempt to deceive any passenger who rides or desires to ride in his taxicab.
>
> 2. Convey or attempt to convey any passenger to a destination other than the one directed by the passenger.

(emphasis added). Similarly, NRS 706.8847(1)(a) provides that, among other things, "[a] driver shall not refuse or neglect to transport any orderly person to that person's destination if [t]hat person requests the driver to transport him." (emphasis added). Likewise, NAC 706.552 prohibits taxicab drivers from receiving compensation only for "diverting or attempting to divert a prospective customer from any commercial establishment." Nothing about these provisions applies to D.I.; only to taxi cab drivers. In other words, only the taxicab drivers (who are not named as Defendants in this action – specifically or fictitiously) can be found liable for violating these provisions. Notwithstanding the fact that D.I. could not be charged or cited for violating any of these statutes, the Plaintiffs still appear to request that this Court hold that D.I. can be held liable for *conspiring* to violate these statutes. As pled, Plaintiffs' claim for civil conspiracy fails.

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b. Neither NRS 706.8846 nor NAC 706.552 Create A Private Right Of Action.

Furthermore, the cited statutes do not create any private right of action for private litigants, such as the Plaintiffs, to sue civilly for an alleged violation of these statutes. Instead, NRS 706.8846 and 706.8847, along with NAC 706.552, are enforced by the Nevada Taxicab Authority. *See, e.g.,* NRS 706.885. As such, the Plaintiffs have failed to state a civil conspiracy claim for relief against D.I.

c. The Plaintiffs Have Failed to Offer Any Factual Assertions That The Statutes Were Violated.

Moreover, even if NRS 706.8846 and 706.8847, and NAC 706.552 did apply to D.I. and the Plaintiffs could assert a private right of action based upon these statutes, the Plaintiffs have still failed to state a claim for relief. As noted above, the Third Amended Complaint contains only allegations as to the existence and the terms and provisions of these statutes (¶¶ 42-43). Nowhere in the Third Amended Complaint is D.I. alleged to have violated these statutes and there is no factual allegation that can be read to imply that D.I. has violated them – even if it could. As such, Plaintiffs have failed to state a claim of civil conspiracy against D.I.

3. D.I.'s Doe Employees Cannot Be Liable Under a Theory of Civil Conspiracy.

Plaintiffs allege that "Defendants," collectively, engaged in a civil conspiracy. Third Amended Complaint, ¶ 67. Defendants DOE Employees 1-500 are alleged to be employed in various capacities by the CLUBS, collectively, one of which is D.I. Third Amended Complaint, ¶ 46. Defendants DOE Employees 1-500 are also alleged to have been acting within the course and scope of their employment "at all times relevant to the events described above[.]" *Id.* Therefore, via the transitive property, Defendants DOE Employees 1-500 are alleged to be conspirators in the civil conspiracy. "Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as

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individuals for their individual advantage." *Laxalt v. McClatchy*, 622 F.Supp. 737 (D. Nev. 1985); *Collins v. Union Fed. Sav. & Loan Ass'n.*, 99 Nev. 284, 662 P.2d 610 (1983). Therefore, whether or not the claim of civil conspiracy survives this Motion, the same must be dismissed as to any of D.I.'s employees incorporated within the designation Defendants DOE Employees 1-500.

In short, Plaintiffs have articulated no factual or legal basis to state or allege that D.I. has done anything *wrong*, much less that D.I. engaged in some pinchbeck conspiracy with someone else to violate laws that do not apply to D.I. The Plaintiffs have failed to state a claim for civil conspiracy. The Fourth Claim for Relief should be dismissed.

C. The Plaintiffs Have Failed to State a Claim for Injunctive Relief (Fifth Claim for Relief).

Plaintiffs' claim for injunctive relief must be dismissed as well. Plaintiffs allege that "[t]hese continued wrongful actions of all Defendants and the continued disparagement of Plaintiffs' businesses have caused and will continue to cause substantial damages to Plaintiffs' businesses." Third Amended Complaint, ¶ 76. Plaintiffs seek to enjoin "all Defendants" from "disparaging Plaintiffs and diverting or attempting to divert taxicab passengers from Plaintiffs' establishments to the Defendants CLUBS[.]" *Id.*, ¶¶ 77-78. As has been demonstrated above, Plaintiffs have failed to state a claim against D.I. for Intentional or Negligent Interference With Prospective Economic Advantage or Civil Conspiracy. More specifically, Plaintiffs cannot demonstrate and have not even pled that D.I. is performing any of underlying acts that (1) would sustain such causes of action; and (2) that Plaintiff seeks to enjoin.

D.I. incorporates the arguments above as to the lack of any allegation that it is committing any act which is subject to injunctive relief. Interestingly, nowhere in the Third Amended Complaint is it alleged that D.I. ever denigrated either Plaintiff. Indeed, all such statements are attributed to unnamed taxi drivers. *Id.*, ¶¶ 16-41. Now, however, Plaintiffs seek to enjoin D.I. from disparaging Plaintiffs. *Id.*, ¶¶ 77-78.

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While Plaintiffs do not allege that D.I. is even engaging in this activity, even if it were, such an injunction is blatantly unconstitutional. "Temporary restraining orders and permanent injunctions – *i.e.*, court orders that actually forbid speech activities – are classic examples of prior restraints." *See Alexander v. U.S., 509 U.S. 544, 550* (1993). Prior restraints on speech carry a "heavy presumption" of constitutional invalidity. *See Org. for a Better Austin v. Keefe,* 402 U.S. 415, 418-19 (1971); *Near v. Minnesota,* 283 U.S. 697, 716 (1931) (stating that prior restraints are invalid in all but the most extreme circumstances). Thus, "[i]t is black letter law that injunctions are not available to suppress defamatory speech." *New Era Publ'ng Int'l v. Henry Holt and Co.*, 695 F. Supp. 1493, 1525 (S.D.N.Y. 1988). Consequently, a consideration of First Amendment principles leads to the inescapable conclusion that Plaintiffs enjoy no likelihood of success in their efforts to enjoin allegedly defamatory speech. *See Jordan v. Metro. Life Ins. Co.*, 280 F. Supp. 2d 104, 111-12 (S.D.N.Y. 2003) (refusing to issue a preliminary injunction to prevent alleged defamatory speech that allegedly interfered with the Plaintiffs' business because doing so would place an unconstitutional prior restraint on speech); *Bihari v. Gross,* 119 F. Supp. 2d 309, 324-27 (S.D.N.Y. 2000) (refusing to issue a preliminary injunction prohibiting allegedly defamatory statements on a website because doing so would be unconstitutional).

Therefore, because the requested injunction seeks to enjoin activity which has not be established to be occurring and would act as an unconstitutional prior restraint on D.I., the Fifth Claim for Relief must be dismissed.

D. <u>In Light of the Dismissal of the Second through Fifth Claims for Relief, D.I. Cannot Be Liable Under a Theory of Respondeat Superior (First Claim for Relief).</u>

Plaintiffs' First Claim for Relief must be dismissed. The theory of respondeat superior would impose vicarious liability upon D.I. for the tortious conduct of its

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employees and agents.[4] Through Plaintiffs' continuous reference to "Defendants," generally, in the Third Amended Complaint, Defendants DOE Employees 1-500 are alleged to have engaged in every act of wrongful conduct alleged to have been committed by D.I. as well. Thus, all of the reasons argued above for the dismissal of the Second through Fifth Claims for Relief as to D.I. apply equally to any individual employee of D.I. that might be contained within the designation of Defendants DOE Employees 1-500. Given that Plaintiffs have failed to state a claim upon which relief can be granted in the Second through Fifth Claims for Relief as to D.I., they have equally failed to do so as to any of D.I.'s employees contained within the designation of Defendants DOE Employees 1-500. Hence, none of D.I.'s employees who might be contained within the designation of Defendants DOE Employees 1-500 have committed any of the torts alleged in the Third Amended Complaint. Without any underlying tort of an employee or agent, it is axiomatic that D.I. cannot be held vicariously liable under a theory of respondeat superior. Therefore, Plaintiffs have failed to state a claim upon which relief can be granted as to the First Claim for Relief and the same must be dismissed.

IV. CONCLUSION

Through at least three (3) prior law suits and three (3) amendments to their Complaint in this matter, Plaintiffs have attempted to control competition among the various participants in their industry by trying to shift a potential liability of the taxi drivers and taxi companies to D.I. and other clubs. Time and time again the Plaintiffs have faced the reality that their claims are baseless, as they have been the subject of prior dismissals. Plaintiffs' previous abandonment of the prosecution of one of these prior suits demonstrates that the Plaintiffs themselves realize this litigious legerdemain is wearing thin.

[4] The unnamed taxi drivers referenced in the Third Amended Complaint have not been alleged to be agents of D.I.

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D.I. has demonstrated that Plaintiffs fail to state a claim upon which relief can be granted as to all of their Claims for Relief. To deny this Motion and provide Plaintiffs a fourth bite of the apple would constitute an unwarranted guerdon, a waste of judicial resources and simply a prolonging of the inevitable. Pursuant to the Points and Authorities set forth above, D.I. requests that this matter be dismissed, in its entirety, as to D.I. and any of its employees contained within the identification of DOE Employees 1-500, under NRCP 12(b)(5) for failure to state a claim upon which relief can be granted.

DATED this 20th day of February, 2009.

LOVAAS & LEHTINEN, P.C.

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CERTIFICATE OF MAILING

I hereby certify that on the 20th day of February, 2009, service of the foregoing **MOTION TO DISMISS** was made, by depositing a true and correct copy of the same in the United States mail, postage prepaid, addressed to the following:

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