UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ELECTRONICALLY FILED

ANTHONY MATTERA, et al. APPELLANTS v. ROBERT BAFFERT, et al. APPELLEES	CASE NO. 23-5750 APPEAL FROM THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY

BRIEF OF APPELLANTS – CORRECTED

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellants request the Court to schedule an oral argument for this appeal. They submit that oral argument would assist the Court in its consideration of the case. They recognize that the Court's review will be both factually and legally intensive, and, in the undersigned's experience, oral argument typically can aid in any necessary clarification and understanding.

STATEMENT OF JURISDICTION

Appellants provide the following in compliance with FRAP 28(a)(4):

1. The basis for district court's subject matter jurisdiction is a class action with an amount in controversy that exceeds $5,000,000.00 and minimal diversity among the parties, which gives the district court original subject matter jurisdiction under 28 U.S.C. § 1332(d)(2)(A). Appellants are citizens of either the State of Florida, the Commonwealth of Kentucky, Commonwealth of Pennsylvania, State of California, State of New York, State of West Virginia, State of Maryland, State of Nevada or State of Texas. (*Class Action Complaint*, R. 1-1, PageID #: 7-9). Appellee Robert A. Baffert is citizen of the State of California. (*Notice of Removal*, R. 1, PageID #: 3). Appellee Bob Baffert Racing, Inc. is citizen of the State of California with its principal place of business in the State of California. *Id.* Appellee Churchill Downs, Inc. is a citizen of the Commonwealth of Kentucky with its principal place of business in the Commonwealth of

Kentucky. (*Notice of Removal*, R. 1, PageID #: 3). Appellants' harms and losses stem from unsettled wagers, the amounts of which have yet to be calculated. Thus, the amount in controversy remains unknown at this time. If further remains unknown whether greater than two-thirds of the members of the proposed Plaintiff Class are citizens of the State in which the action was originally filed as contemplated in 28 U.S.C. § 1332(d)(4)(A)(i)(I). Of course, the removing party bears the burden of demonstrating that a complaint is subject to removal. *Syngenta Crop Protection Inc. v. Henson*, 537 U.S. 28, 33 (2002); *Gafford v. General Electric Co.*, 997 F.2d 150, 155 (6th Cir. 1993). In determining whether removal is proper, the Court should resolve all doubts against removal and in favor of remand. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 757 (6th Cir. 2000).

2. 28 U.S.C. §§ 1291 and 1295(a) provide the basis for the United States Court of Appeal's for the Sixth Circuit's ("6th Circuit") jurisdiction due to a final decision of a district court. The United States District Court, Western District of Kentucky issued a Memorandum and Order granting Appellees' motions to dismiss. (*Memorandum and Order*, R. 39, PageID #: 495-512).

3. The United States District Court, Western District of Kentucky issued a Memorandum and Order granting Appellees' motions to dismiss on July 20, 2023 (*Memorandum and Order*, R. 39, PageID #: 495-512). Appellants filed

Plaintiffs' Notice of Appeal to the United States Court of Appeal's for the 6th Circuit on August 18, 2023. (*Notice of Appeal*, R. 40, PageID #: 513-514).

4. The July 20, 2023 Memorandum and Order represents a final order that disposed of all of the Appellants' claims, making the matter ripe for appellate review.

STATEMENT OF ISSUES

Appellants provide the following in compliance with FRAP 28(a)(5):

1. Whether the district court erred in granting Appellees' motions to dismiss (*Memorandum and Order*, R. 39, PageID #: 495-512); and

2. Whether the district court erred in denying the Appellants' Motion for Leave to Amend Complaint (*Memorandum and Order*, R. 29, PageID #: 382-397).

STATEMENT OF THE CASE

I. General Facts

A. Appellees Robert A. Baffert and Bob Baffert Racing, Inc.

Prior to the 147th running of the Kentucky Derby ("Derby 147") on May 1, 2021, Appellee Robert A. Baffert ("Baffert") accumulated at least 32 documented medication violations in his career as a horse trainer. (*Complaint*, R. 1-1, PageID #: 10-15). Less than two months prior to the race, the Kentucky Horse Racing Commission ("KHRC") disqualified Appellee Baffert and Appellee Bob Baffert Racing, Inc. ("BBRI" or, collectively "Baffert Appellees") trainee Gamine from the 2020 running of the Kentucky Oaks at Churchill Downs Racetrack due to a positive test for betamethasone. (*Complaint*, R. 1-1, PageID #: 19).

Betamethasone is a corticosteroid used to treat inflammation in horses. (*Complaint*, R. 1-1, PageID #: 20). The KHRC Uniform Drug, Medication, and Substance Classification Schedule lists betamethasone as a Class C drug. *Id*.; 810 KAR 8:020 Sec. 1; KHRC 8-020-1. Kentucky law and regulations permit the use of betamethasone for therapeutic purposes. (*Complaint*, R. 1-1, PageID #: 20). "However, Class C drugs, like betamethasone, have the potential to enhance the performance of Thoroughbred horses in races as well act as a masking agent of inflammation, lameness and pain, thus jeopardizing the safety of the horse and any rider." *Id*. "Kentucky law and regulations forbid any amount of betamethasone in

Thoroughbred horses on race day because of its effects as a performance enhancer and masking agent and for the safety of the horse and any rider." (*Id*. at PageID #: 21).

The Baffert Appellees administered betamethasone to their trainee and Derby 147 entrant, Medina Spirit, leading up to Derby 147. (*Complaint*, R. 1-1, PageID #: 20). Medina Spirit crossed the finish line first in Derby 147, but post-race testing demonstrated a positive for betamethasone. (*Id*. at PageID #: 20-22). Ultimately, a Stewards Rulings disqualified Medina Spirit from Derby 147 and vacated his placing. (*Id*. at PageID #: 23; *CDI Motion to Dismiss,* 6-1, PageID #: 98).[1] Furthermore, the Stewards Ruling declared the official order of finish for Derby 147 as follows: Mandaloun (7), Hot Rod Charlie (9), Essential Quality (14), O Besos (6) and Midnight Bourbon (10), in that order. (*Complaint*, R. 1-1, PageID #: 23). Appellants placed winning wagers based on the official order of finish for Derby 147. (*Complaint*, R. 1-1, PageID #: 23, 30, 33-34.) However, Kentucky laws and regulations prevent the settlement of their wagers from pari-mutuel pools and no settlement of the wagers has otherwise occurred. (*Id*. at PageID #: 30, 32-35).

[1] The district court incorrectly states that *CDI* "disqualified Medina Spirit as the winner of the Kentucky Derby and ruled the new order of finish as Mandaloun, Hot Rod Charlie, Essential Quality, O Besos, and Midnight Bourbon." (*Memorandum and Order*, R. 39, PageID #: 498). The *KHRC* makes disqualification rulings, not racetracks (i.e. CDI).

B. Appellee Churchill Downs, Inc.

Appellee Churchill Downs, Inc. ("CDI") knew of the Baffert Appellees' medication violation history prior to the entry of Medina Spirt into Derby 147. (*Complaint*, R. 1-1, PageID #: 18-19). Specifically, at a bare minimum, it "knew that less than two months prior to the 147th running of the Kentucky Derby, the Kentucky Horse Racing Commission disqualified Baffert Defendants' trainee Gamine from the 2020 running of the Kentucky Oaks at Churchill Downs Racetrack due to a positive test for betamethasone." (*Id*. at PageID #: 18-19).

No Kentucky law or regulation "prevents Defendant CDI from implementing pre-race testing of Thoroughbred horses nominated to compete in races it conducts." (*Complaint*, R. 1-1, PageID #: 24.) Conducting pre-race testing "and getting the results all within just a matter of days before a race is possible." *Id*. Yet, Defendant CDI failed to have any pre-race testing system in place to detect horses ineligible, or potentially ineligible, to enter its races due to medication violations. (*Id*. at PageID #: 24-25).

Furthermore, CDI retains absolute discretion and the right of refusal to participants, both human and equine, in the races it conducts. (*Complaint*, R. 1-1, PageID #: 15-17). Armed with the knowledge of the Baffert Appellees long history of medication violations, including one of the very same kind in the Kentucky Oaks just months before Derby 147, and the ability to conduct testing to detect

unqualified or ineligible entrants, CDI did nothing but blindly choose to accept the entry of Medina Spirit into Derby 147. (*Id*. at PageID #: 18-20). "Because of the presence of betamethasone in Medina Spirit's system, he lacked eligibility and qualification to race in the 147th running of the Kentucky Derby and should never been entered or accepted as an entry." (*Id*. at PageID #: 27). CDI's failures resulted in an official order of finish leaving Appellants holding winning wagers that cannot be settled by and through the pari-mutuel wagering pools.[2] CDI has issued no refunds for the wager amounts by Appellants and claims that no cause of action exists against them by Appellants.

II. Procedure

Appellants filed their Class Action Complaint ("Complaint") in Jefferson Circuit Court on February 21, 2022. (*Complaint*, R. 1-1, Page ID# 7-45). CDI filed

[2] The district court incorrectly states that Appellants "contend that [CDI] 'incorrectly calculated the [pari-mutuel] payouts and incorrectly settled losing [pari-mutuel] wagers'" and "argue that that all parimutuel wagers should have been settled based on the new order of finish." (*Memorandum and Order*, R. 39, PageID #: 498). As stated in their motion to dismiss response, "[c]ontrary to. . .assertions and arguments, Plaintiffs and Plaintiff Class do *not* seek relief under the statues and regulations that govern horse racing in Kentucky." (*Response to CDI Motion to Dismiss*, R. 35, PageID #: 441-442). "Plaintiffs and Plaintiff Class specifically make it clear they do *not* allege that Defendant CDI must withhold pari-mutuel payouts or seek to force Defendant CDI to reverse or claw back pari-mutuel payouts and make a redistribution based on the official order of finish." (*Id*. citing R. 1-1, PageID #: 35). "Instead, Plaintiffs and Plaintiff Class allege Defendant CDI's actions or inactions directly led to an official outcome that now leaves Plaintiff and Plaintiff Class holding winning wagers that cannot be settled by and through the pari-mutuel wagering pools." *Id*. Thus, they proceed, in part, under Kentucky common law, which applies to Defendant CDI." *Id*.

its Notice of Removal on March 16, 2022. (*Notice of Removal*, R. 1, Page ID #: 1-6).

The following represents the relevant procedural history and rulings that led to this appeal:

- **March 23, 2022** – CDI moved to dismiss the Complaint. (*Churchill Downs Incorporated's Motion to Dismiss*, R. 6, Page ID#: 69-98);
- **March 25, 2022** – Baffert Appellees moved to dismiss the Complaint. (*Motion to Dismiss "Class Action Complaint" by Defendants Robert A. Baffert and Bob Baffert Racing, Inc.*, R. 7, Page ID#: 100-118);
- **May 2, 2022** – Appellants filed their Motion for Leave to Amend Complaint, or an Extension of Time in the Alternative. (*Motion for Leave*, R. 15, Page ID#: 149-239);
- **March 23, 2023** – The district court denied the Appellants' Motion for Leave to Amend Complaint. (*Memorandum and Order*, R. 29, PageID #: 382-397);
- **July 20, 2023** – The district court granted Appellees' motions to dismiss. (*Memorandum and Order*, R. 39, PageID #: 495-512); and
- **August 18, 2023** - Appellees filed Plaintiffs' Notice of Appeal to the United States Court of Appeals for the 6th Circuit. (*Notice of Appeal*, R. 40, PageID #: 513-514).

SUMMARY OF THE ARGUMENT

Appellants' Complaint states plausible claims upon which relief may be granted. For that same reason, their motion to amend should have been granted.

ARGUMENT

I. Standard of Review

A. Motions to Dismiss

This Court "review[s] de novo a district court's order granting a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *Norris v. Stanley*, 73 F.4th 431, 435 (6th Cir. 2023). "In doing so, [this Court] must construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded factual allegations as true, and examine whether the complaint contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id*. (internal quotation marks and citations omitted). "The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint, not to resolve disputed facts or to decide the merits of the case." *Johnson v. Cullen*, 925 F.Supp. 244, 247 (D. Del. 1996).

B. Motion for Leave to Amend Complaint

This Court "review[s] the denial of a motion to amend under the abuse-of-discretion standard, unless the motion was denied because the amended pleading would not withstand a motion to dismiss, in which case the standard of review is de novo." *Colvin v. Caruso*, 605 F.3d 282, 294 (6th Cir. 2010). The district court denied the motion to amend denied Appellants' motion based on the latter.

(*Memorandum and Order*, R. 29, PageID #: 391, 393, 395). Thus, the standard of review for this Court is de novo.

II. The District Court Erred in Granting Appellees' Motions to Dismiss

A. Appellants State Plausible Claims for Negligence against the All Appellees under Kentucky Law

1. All Appellees Owed Appellants Legal Duties Under Kentucky Law

a. Kentucky Common Law Universal Duty of Ordinary Care

"Beginning in 2010, the Kentucky Supreme Court has effected 'seismic' change in the Commonwealth's negligence law. . .stating a desire to further Kentucky's slow, yet steady, progress to modernize [its] tort law and eliminate unfair obstacles to the presentation of legitimate claims." *Greer v. Kaminkow*, 401 F.Supp.3d 762, 770 (E.D. Ky. July 3, 2019) (citations omitted); *Ames v. Lowe's Home Centers, LLC*, 2021 WL 4097145, *3 (W.D. Ky. Sept. 8, 2021) (citations omitted).

Under Kentucky common law, "[t]he concept of liability for negligence expresses a universal duty owed by all to all." *Shelton v. Ky. Easter Seals Soc., Inc.*, 413 S.W.3d 901, 908 (Ky. 2013) (internal quotation and citation omitted). "[E]very person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *Ames v. Lowe's Home Centers, LLC*, 2021 WL 4097145, *3 (W.D. Ky. Sept. 8, 2021) (quoting *Shelton*, 413 S.W.3d at 908).

"**This duty is separate and distinct from. . .more specific dut[ies]. . . .**" *Id.* (citing *Shelton*, 413 S.W.3d at 910) (emphasis added). Indeed, federal courts in Kentucky describe the universal duty of ordinary care as a "second option" to more specific duties. *Greer*, 401 F.Supp.3d at 775.

In *Greer*, the Eastern District of Kentucky illustrated the recognition of the duty as an option under Kentucky law as follows:

> How, then, does the Court assess whether Defendants owed Greer a duty and, if so, its contours? The Court perceives it must evaluate, under Kentucky law, (1) the premises-liability duty, and (2) the universal duty, owed by all to all.

Id. at 773. In *Ames*, this Court confirmed the approach when it recognized that "[i]n addition [to the specific duty to an invitee], a landowner is also subject to a universal duty of care." *Id*. at *3. Furthermore, "[a]lthough the so-called universal duty is anything but universal, it undoubtedly applies to instances where the harm resulting from a defendant's act was foreseeable." *Greer*, 401 F. Supp.3d at 776 (citations and quotation marks omitted).

"[F]ederal courts applying Kentucky law, find that foreseeability is most always a fact specific analysis best suited for the jury." *Ames*, 2021 WL 4097145 at *3 (citations omitted). "Specifically, the *Shelton* Court directed that the foreseeability question was more appropriately a question of fact for the jury under the *breach analysis* (not to be mechanically applied under the duty analysis). . ." *Id*. (emphasis original). "The inquiry centers on whether injury of some kind to

some person within the natural range of effect of the alleged negligent act could have been foreseen." *Greer*, 401 F. Supp.3d at 776 (citations and quotation marks omitted).

In *Kendall v. Godbey*, 537 S.W.3d 326 (Ky. App. 2017), the Kentucky Court of Appeals explained that the *Shelton* Court "restructured the issue of foreseeability in relation to duty." *Id*. at 331; *Ames*, 2021 WL 4097145 at *3 (citing *Kendall*, 537 S.W.3d at 331-332). The *Shelton* Court "embraced the universal duty of care concept rather than the foreseeability analysis" and "[b]y removing foreseeability as part of the duty analysis, duty effectively becomes a given element in negligence actions." *Kendall*, 537 S.W.3d at 331-332; *Ames*, 2021 WL 4097145 at *3. "The Sixth Circuit in *Dunn*[*v. Wal-Mart Stores East, L.P.*, 724 Fed. Appx. 369, 374 (6th Cir. 2018)] recently noted: 'The Kentucky Supreme Court has repeatedly and explicitly declared that. . .the unreasonableness and foreseeability of risk of harm is normally a question for the jury to determine in deciding whether the defendant breached its duty of care in all but the rarest of circumstances.'" *Ames*, 2021 WL 4097145 at *4 (citation omitted).

In its Memorandum and Order denying Plaintiffs' Motion for Leave to Amend Complaint, the district court states:

> Noticeably absent from the proposed amended complaint is any allegation that BBRI, Baffert, or Churchill Downs owed Plaintiffs a legally cognizable duty of care. (*See* D.N. 15-1)

This failure is fatal to their negligence claims. *See Johnson*, 326 S.W.3d at 815 (articulating that the negligence analysis ends when "no legal duty exists" (citing *James v. Wilson*, 95 S.W.3d 875, 889 (Ky. Ct. App. 2002))). And in the absence of a legally cognizable duty, there can be no breach or causation. *Bartlett v. Pfizer, Inc.*, No. 3:19-CV-280-RGJ, 2020 WL 896751, at *2 (W.D. Ky. Feb. 24, 2020), *aff'd*, No. 20-5322, 2020 WL 8994754 (6th Cir. Dec. 8, 2020) (citing *Patton*, 529 S.W.3d at 729); *see also id.* at *3.

(*Memorandum and Order*, R. 29, PageID #: 390). The district court took a much more measured approach in its Memorandum and Order granting the motions to dismiss, essentially retreating from its previous holding:

As an initial matter, the Court notes that there is no consensus among courts regarding the scope of the universal duty of care under Kentucky law. *Compare Monday-W. v. Wells Fargo*

(*Memorandum and Order*, R. 39, PageID #: 501). The district court further states:

and general 'universal duty of care.'"). The Court need not decide whether to apply the universal duty of care, however, because Plaintiffs have failed to plead all material elements of a negligence claim.

Even assuming that BBRI, Baffert, and Churchill Downs owed Plaintiffs a legally cognizable duty and breached that duty, Plaintiffs fail to adequately allege but-for causation and

(*Memorandum and Order*, R. 39, PageID #: 501-502).

Thus, the district court leaves it to this Court for an unequivocal holding.[3] This Court should rely on its prior holdings and Kentucky law and find that Appellees owed a recognized duty of ordinary care to Appellants. In construing the Complaint in the light most favorable to Appellants, accepting their well-pleaded factual allegations as true, and examining whether the Complaint contains sufficient factual matter, accepted as true, it should find that Appellants state a claim to relief plausible on its face. Examples of the factual matter include:

- CDI's failure to even attempt to detect whether the Baffert Appellees administered a prohibited drug to Medina Spirit despite its direct knowledge from previous experience with Baffert Appellees' entrants in its races;
- CDI held the right to refuse entries at its discretion, regardless of any attempt to detect a prohibited drug, but refused to exercise it at all; and
- Baffert Appellees entered an ineligible horse in the 147th running of the Kentucky Derby, a race they knew Appellants, at least as a class, would make wagers on.

This all created the risk of harm that occurred to Appellants. The harm (a new official order of finish resulting in unpaid winning wagers) to Appellants qualifies as within the natural range of effect of Appellees' conduct.

[3] Of course, this Court could certify the question to the Supreme Court of Kentucky.

b. Kentucky's Legislature Declared Standards of Care for Conduct Toward the Wagering Public for Their Protection

In addition to traditional common law principles, under Kentucky law, "statutes, ordinances, regulations and building codes may create a duty subject to liability as negligence per se." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky. App. 2001) (citations omitted). "A negligence per se claim is merely a negligence claim with a statutory standard of care substituted for the common law standard of care." *Id*. (quotation marks and citations omitted). "With negligence per se, the standard of care is legislatively declared by statute and a jury only determines whether the specified act prohibited or required by statute was committed." *Stivers v. Ellington*, 140 S.W.3d 599, 601 (Ky. App. 2004).

Standards of care for trainers and racetracks exist in multiple relevant statutes and regulations governing horse racing. KRS 230.215(1) provides that "[i]t is the policy and intent of the Commonwealth to foster and to encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane." *Id*. KRS 230.215(2) declares it is:

> [T]he purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth. . .to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to

> dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.

Id.

KRS 230.260(8) provides that "[t]he racing commission shall have full authority to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted in this state. . . ." *Id*. KRS Chapter 230 further requires mandatory compliance with regulations. All licenses granted under KRS Chapter 230 "[s]hall be subject to all administrative regulations and conditions as may from time to time be prescribed by the racing commission. . . ." KRS 230.290(2). Furthermore, KRS 230.320(1) provides that:

> Every license granted under this chapter is subject to denial, revocation, or suspension, and every licensee or other person participating in Kentucky horse racing may be assessed an administrative fine and required to forfeit or return a purse, by the racing commission in any case where it has reason to believe that any provision of this chapter, administrative regulation, or condition of the racing commission affecting it has not been complied with or has been broken or violated.

Id.

i. Trainers (Baffert Appellees)

810 KAR 4:100, the Kentucky Administrative Regulation specifically governing trainers, lists part of its statutory authority as KRS 230.215(2). *Id*. It provides that "a licensed trainer shall bear primary responsibility for the proper

care, health, training condition, safety, and protection against the administration of prohibited drugs or medication of horses in his or her charge." 810 KAR 4:100 Sec. 3(1). It further provides that a licensed trainer "shall bear primary responsibility for horses he or she enters as to. . .the. . .absence of prohibited drugs or medications. . . ." 810 KAR 4:100 Sec. 3(2)(d). Kentucky Administrative Regulations mandate that "[a] horse shall not be entered or raced that. . .[h]as been administered any drug in violation of 810 KAR 8:010. . . ." 810 KAR 4:010 Sec. 10(5). The prohibition of betamethasone is found in 810 KAR 8:010 Sec. 23(1)-(2).[4]

When reading Kentucky horse racing statutes, specifically KRS 230.215, and regulations in conjunction, by virtue of them, the following standards of conduct and care for trainers emerge:

- Trainers must conduct their business with the highest quality of care and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices;
- Trainers must maintain the appearance as well as the fact of complete honesty and integrity of horse racing; and
- Trainers must not enter or race horses that have been administered any prohibited drug.

[4] Prior version in effect at the time of the occurrence.

Kentucky horse racing statutes, and specifically KRS 230.215, indicate the following as some of the purposes and reasons for these obligatory standards:

- Fostering and encouraging legitimate horse racing with pari-mutuel wagering on the highest possible plane;
- Public health, safety, and welfare related to legitimate horse racing and wagering[5]; and
- Keeping wagering free of corrupt, incompetent, dishonest or unprincipled horse racing practices.

Thus, the Kentucky General Assembly directly connects and ties the standards of conduct for trainers to the protection of the wagering public as a main reason for those standards of conduct. By doing so, it pronounces that should a trainer breach one or more of these standards of conduct, it is entirely foreseeable that harm occurs to the wagering public. Therefore, Kentucky's horse racing statutory and regulatory scheme declares a legal duty owed by trainers to the wagering public. Under Kentucky law, this qualifies as a legally cognizable duty that may form the foundation of the first element of a negligence claim. Although included in Appellants' motion to dismiss response, the district court completely ignored, and failed to address, the argument at all in its *Memorandum and Order*.

[5] While the statutes and regulations may not relate to the *physical* safety of the public, they most definitely relate to the *financial* safety of it. No authority exists defining safety of the public solely as physical in nature. Appellants are members of the (wagering) public and make claims related to their financial welfare.

Appellants clearly and plainly detail the Baffert Appellees' breaches of their duties under this analysis. The Baffert Appellees' actions created the risk of harm that occurred to Appellants. The harm (a new official order of finish resulting in unpaid winning wagers) to Appellants qualifies as within the natural range of effect of Appellees' conduct.

i. Racetracks (CDI)

A racing association, such as CDI, must meet several criteria under the rules and regulations of horse racing to the satisfaction of the KHRC in order to obtain a license for operating, including that:

- "The applicant will conduct racing in accordance with KRS Chapter 230 and KAR Title 810";
- "The applicant will conduct racing in accordance with the highest standards and the greatest level of integrity"; and
- "The issuance of a license will ensure the protection of the public interest."

810 KAR 3:010 Sec. 4(1)(c)-(e).

Of these Licensing Criteria listed in 810 KAR 3:010 Sec. 4(1), in particular a racetrack must broadly "conduct racing in accordance with KRS Chapter 230 and KAR Title 810." 810 KAR 3:010 Sec. 4(1)(c). Kentucky Administrative Regulations mandate that "[a] horse shall not be entered or raced that. . .[h]as been

administered any drug in violation of 810 KAR 8:010. . . .” 810 KAR 4:010 Sec. 10(5). The prohibition of betamethasone is found in 810 KAR 8:010 Sec. 23(1)-(2).[6] Thus, 810 KAR 3:010 Sec. 4(1)(c)’s broad language includes and incorporates this as a racetrack’s responsibility.

When reading Kentucky horse racing statutes, specifically KRS 230.215, and regulations in conjunction, by virtue of them, the following standards of conduct and care for racetracks emerge:

- Racetracks must conduct their business with the highest quality of care and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices;
- Racetracks must conduct their business in accordance with the highest standards and the greatest level of integrity;
- Racetracks must maintain the appearance as well as the fact of complete honesty and integrity of horse racing;
- Racetracks must ensure the protection of the wagering public; and
- Racetracks must not allow the entry of horses into its races that have been administered any prohibited drug.

Kentucky horse racing statutes, and specifically KRS 230.215, indicate the following as some of the purposes and reasons for these obligatory standards:

[6] Prior version in effect at the time of the occurrence.

- Fostering and encouraging legitimate horse racing with pari-mutuel wagering on the highest possible plane;
- Public health, safety, and welfare related to legitimate horse racing and wagering;
- Keeping wagering free of corrupt, incompetent, dishonest or unprincipled horse racing practices; and
- Ensuring the protection of the wagering public.

Thus, the Kentucky General Assembly directly connects and ties the standards of conduct for racetracks to the protection of the wagering public as a main reason for those standards of conduct. By doing so, it pronounces that should a racetrack breach one or more of these standards of conduct, it is entirely foreseeable that harm occurs to the wagering public. Therefore, Kentucky's horse racing statutory and regulatory scheme declares a legal duty owed by racetracks to the wagering public. Under Kentucky law, this qualifies as a legally cognizable duty that may form the foundation of the first element of a negligence claim. Again, although included in Appellants' motion to dismiss response, the district court completely ignored, and failed to address, the argument at all in its *Memorandum and Order*.

Furthermore, CDI breached its duties to Appellants as detailed elsewhere in this brief as well as the Complaint by allowing a horse racing on a prohibited drug in Derby 147, which resulted in harm to Appellants.

c. CDI Owed Appellants a Duty as Its Business Invitees

Under Kentucky law, "an invitee is generally defined as one who enters upon the premises at the express or implied invitation of the owner or occupant on behalf of mutual interest to them both, or in connection with the business of the owner or occupant." *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 909 (Ky. 2013) (citations omitted). "Generally speaking, a possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them." *Id*. (citations omitted). No authority limits this duty to physical injuries on the premises.

Appellants qualify as invitees because they entered CDI's premises that day at its express or implied invitation on behalf of a mutual interest to them both and in connection with its business. As such, CDI owed a duty to Appellants to discover unreasonably dangerous conditions on the premises and eliminate them.[7]

Entry of a horse into one of CDI's races after administration of any prohibited drug presents an unreasonably dangerous condition. It qualifies as such

[7] Kentucky racing regulations prohibit the entry of a doped horse. 810 KAR 4:010 Sec. 10(5). Thus, knowingly allowing the entry of one and providing a warning to the wagering public violates horse racing regulations, and, therefore, is not an option.

because for the wagering public, such as Appellants, the presence of a horse racing illegally on performance enhancing drugs can, will and does impact the results of a race. That, in turn, alters the outcome of wagering results when the ineligible horse becomes disqualified, because that, in turn, creates a new official order of finish turning previously losing wagers (due to the finish of the ineligible horse) into wining wagers when the new official order of finish excludes the ineligible horse. Because this happens only after wager payouts, it causes financial harm and loss. By virtue of the new official order of finish after disqualification of the doped horse, the holders of those now-winning wagers have no recourse under the laws and regulations governing horse racing, so their winning wagers go unsettled. Kentucky common law requires CDI to identify the doped horses that attempt to enter its races and refuse their entry.

2. Appellees' Actions Constitute a Substantial Factor in Harm to Appellants

a. Law and District Court Analysis and Holdings

Under Kentucky law, "[t]o demonstrate that the defendant was negligent a plaintiff must show that (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; (3) a causal connection between the defendant's conduct and the plaintiffs [sic] damages; and (4) damages." *Gonzalez v. Johnson*, 581 S.W.3d 529, 532 (Ky. 2019) (citation and footnote omitted). Kentucky has "adopted the substantial factor test to determine legal causation." *Id*.

at 533 (citation and footnote omitted). Under this test, "negligent conduct is a legal cause of harm to another if [the] conduct is a substantial factor in bringing about the harm. . . ." *Id*. at 533-534 (citation and footnote omitted).

In its Memorandum and Order granting the motions to dismiss, the district court states in part:

> Even assuming that BBRI, Baffert, and Churchill Downs owed Plaintiffs a legally cognizable duty and breached that duty, Plaintiffs fail to adequately allege but-for causation and reasonably certain damages. (*See* D.N. 1-1; D.N. 34; D.N. 35) And such failure is fatal to any negligence claim. *See Patton*, 529 S.W.3d at 729–30. Plaintiffs' complaint is devoid of any facts showing that but for BBRI and Baffert's alleged negligence, their alleged injury would not have occurred. (*See* D.N. 1-1) And there is no allegation regarding but-for causation; Plaintiffs merely assert that "[a]s a direct and proximate result of Defendants' negligence, Plaintiffs and the Plaintiff Class suffered legal injuries and damages in the form of unsettled parimutuel wagers." (*Id.*, PageID.38–39 ¶¶ 156, 162) But "causation cannot be established solely by conjecture,

(*Memorandum and Order*, R. 39, PageID #: 502). The district court in discussing the subject of causation makes the following inaccurate assertions:

> Moreover, Plaintiffs seek damages in the form of "unsettled pari-mutuel wagers" based on an *unofficial order* of finish. (D.N. 1-1, PageID.38–39 ¶¶ 156, 162) But "[t]hese damages are

(*Memorandum and Order*, R. 39, PageID #: 502). This represents a factual inaccuracy. Appellants seek damages in the form of unsettled pari-mutuel wagers

based on *the **official** order* of finish. (*Complaint* ¶¶ 72-73, 105-106, 142-143, 156, 162, 169; *Prayer for Relief* ¶ 3, R. 1-1, PageID #: 23, 30, 35, 38, 39, 40, 44-45).

> mutuel payout." 810 Ky. Admin. Regs. 6:030 § 10(2). Thus, the only persons entitled to payment on pari-mutuel wagers are those who have tickets that match the stewards' *official order* of finish on the day of the race; the fact that Plaintiffs had "winning wagers" *after the disqualification* of Medina Spirit does not entitle them to damages. *See id.*; 810 Ky. Admin. Regs. 4:040 § 17.

(*Memorandum and Order*, R. 39, PageID #: 503). While this statement is true, it also ignores the fact that Appellants do not make their claim for damages under any regulation, including this one. They make their claim for damages under the Kentucky common law cause of action for negligence and negligence per se.

> an *unofficial order* of finish. (D.N. 1-1, PageID.38–39 ¶¶ 156, 162) But "[t]hese damages are remote, uncertain[,] and speculative and, thus, not recoverable." *Class Racing Stable, LLC v.*

(*Memorandum and Order*, R. 39, PageID #: 502-503). Appellants' damages are easily calculable and ascertainable. They offer a detailed explanation of how to calculate and ascertain the amounts in their Complaint. (*Complaint*, ¶ 85, R. 1-1, Page ID#: 25-26). Of course, only CDI possesses the complete information necessary to calculate the amount of damages.

b. Analysis

To the contrary of the district court's assertions, Appellants need not prove that the remaining horses in the Derby 147 field would have finished in exactly the

same order absent Medina Spirit's presence. Their success in this case does not depend on a mythical running or rerunning of Derby 147. Appellants must demonstrate that Appellees' actions or inactions causing the disqualification of Medina Spirit constituted a substantial factor in bringing about the harm – unpaid winning wagers or, alternatively, loss of the amounts wagered.

Indeed, Appellees' actions or inactions causing the disqualification of Medina Spirit directly led to the new official order of finish by operation of Kentucky horse racing regulations. This, in turn, left Appellants with winning wagers, but no recourse under Kentucky horse racing regulations because CDI paid out the money in the wagering pools directly after the race pursuant to the regulations, as they should have.

Appellants require no conjecture or speculation or a rerunning of the race to determine the order of finish. Appellants do not have to prove that they would have won their wagers without Medina Spirit in the race, but only that they correctly made winning wagers based on the *new* official order of finish. The official order of finish demonstrates that they did just that. While Kentucky law and regulations provide no recourse for payment of the winning wagers out of the pari-mutuel pools, Appellants maintain a claim for a legal injury due to negligence and nothing in Kentucky jurisprudence abrogates that.

"Causation presents a mixed question of law and fact." *Patton v. Bickford*, 529 S.W.3d 717, 729 (Ky. 2016) (citations omitted). It "consists of two distinct components: 'but-for' causation, also referred to as causation in fact, and proximate causation." *Id*. at 730. "But-for causation requires the existence of a direct, distinct, and identifiable nexus between the defendant's breach of duty (negligence) and the plaintiff's damages such that the event would not have occurred 'but for' the defendant's negligent or wrongful conduct in breach of a duty." *Id*. However, "[b]ut-for causation is a factual question to be answered in an individual case by the factfinder deciding if the defendant's conduct was a 'substantial factor'. . . ." *Id*.

Thus, under Kentucky law, a but-for determination presents a question of fact and belongs to the finder of fact. As such, a determination at this stage qualifies as premature at best and made by the incorrect fact-finding entity at worst. However, even if this Court undertook such an analysis, the district court's ruling still fails. Appellants claim damages in the form of unpaid winning wagers completely and solely due to the new official order of finish. Without that, they have no damages claim to make because they would have no winning wagers. That event, the new official order of finish, could not and would not ever have occurred but for Appellees' negligent or wrongful conduct in breach of a duty. Therefore, a

direct, distinct and identifiable nexus exists between Appellees' negligence and Appellants damages.

c. CDI Specific Conduct

CDI failed to even attempt to detect whether the Baffert Appellees administered a prohibited drug to Medina Spirit despite its direct knowledge from previous experience with Baffert Appellees' entrants in its races. Moreover, it held the right to refuse entries at its discretion, regardless of any attempt to detect a prohibited drug, but refused to exercise it at all.

CDI held direct knowledge that the Baffert Appellees enter horses into its races that compete on prohibited substances, not to mention the long list of medication violations at other racetracks. Despite that, it failed to attempt to detect whether the Baffert Appellees administered a prohibited drug to Medina Spirit prior to racing or, regardless of that, use its absolute discretion to refuse Medina Spirit's entry based on its knowledge and experience.

CDI knew the risks of a disqualification. Specifically, it knew that a disqualification would result in a new official order of finish, leaving its customers placing wagers based on that order of finish with unpaid winning tickets. It knew the very outcome in this case could happen, and it let it happen. Its failure to act led to a disqualification, which led to a new order of finish, which led to Appellants holding unpaid winning wagers. Therefore, Defendant CDI's conduct

constitutes a substantial factor in bringing about the harm (unpaid winning wagers based on the new order of finish).

B. Appellants State a Plausible Claim for Breach of Contract

1. Law and District Court Analysis and Holdings

Under Kentucky law, "[t]he elements of a contract are: offer and acceptance, full and complete terms, and consideration." *Collins v. Kentucky Lottery Corp.*, 399 S.W.3d 449, 455 (Ky. 2012) (citation omitted). "The purchase of a lottery ticket is the acceptance of an offer" and "[t]he terms of the contract are the rules and regulations of the lottery." *Id*.

A racing association, such as CDI, must meet several criteria under the rules and regulations of horse racing to the satisfaction of the KHRC in order to obtain a license for operating, including that:

- "The applicant will conduct racing in accordance with KRS Chapter 230 and KAR Title 810";
- "The applicant will conduct racing in accordance with the highest standards and the greatest level of integrity"; and
- "The issuance of a license will ensure the protection of the public interest."

810 KAR 3:010 Sec. 4(1)(c)-(e).

Furthermore, enabling legislation for the promulgation of administrative regulations governing horse racing includes the following purposes, policies and intents:

- Fostering and encouraging legitimate horse racing with pari-mutuel wagering on the highest possible plane;
- Public health, safety, and welfare related to legitimate horse racing and wagering;
- Regulation and maintenance of horse racing of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices; and
- Maintenance of the appearance as well as the fact of complete honesty and integrity of horse racing.

KRS 230.215 (1)-(2).

Similar to the purchase of a lottery ticket in Kentucky, the placement of a wager constitutes a contract with the rules and regulations of horse racing providing the terms.[8] Appellants allege facts that indicate CDI breached the terms of the contract by not meeting its responsibilities under the rules and regulations of

[8] The Baffert Appellees admit this in their motion. (*Motion to Dismiss "Class Action Complaint" by Defendants Robert A. Baffert and Bob Baffert Racing, Inc.*, R. *7*, PageID #: 113, n.8.) ("A wager is, of course, a contract. *See Holberg v. Westchester Racing Ass'n*, 53 N.Y.S.2d 490, 492 (N.Y. App. 1945) ("A pari-mutuel ticket is the contract itself")).

horse racing, and it will be a question for the trier of fact to determine if it agrees. CDI's suspension of the Baffert Appellees from entering horses at its racetracks for at least three years by itself acts as an admission that it failed in its duties and responsibilities.

Nevertheless, the district court held as follows with Appellants' response and argument:

> 6:030 § 10(2). Thus, Plaintiffs cannot show breach of contract or resulting damages. At bottom, because Plaintiffs have both failed to adequately plead two essential elements of a breach-of-contract claim and alleged facts that plead the claim out of court, the claim will be dismissed. *See*

(*Memorandum and Order*, R. 39, PageID #: 506).

The district court reached its conclusion regarding breach of contract essentially by analyzing two regulations to come to the determination of something Appellants agree with – pari-mutuel payouts are final regardless of whether a subsequent disqualification occurs. Appellants could not more clearly state in their Complaint and throughout their briefing in this action that they do not seek a claw back and redistribution of the pari-mutuel payouts, but damages based on what would have been the pari-mutuel payouts.

Next, Appellants identified and presented the above-referenced statute and regulation to the district court as applicable as a basis to forming the contract alleged. Nevertheless, the district court, as with the negligence per se argument

referenced *supra*, completely ignored both and failed to address them at all in its *Memorandum and Order*. Statutes and regulations are not a buffet. A district court cannot just pick and choose the ones it likes and leave the others that apply behind. Under Kentucky law, "[i]n the event of a conflict between a statute on the one hand and an ordinance or regulation or the other hand, the statute is superior and must be followed." *Moore v. Louisville/Jefferson Co. Metro.*, 2022 WL 67441, *4 (Ky. App. 2022) (citations omitted). Part of the terms of a pari-mutuel contract can come from the regulations cited by the district court, but nothing suggests that other statutes and regulations cannot form other, separate terms, and just like any other contract, Kentucky law does not require a breach of every term in a contract, but just one.

For the forgoing reasons, this Court should reverse the district court's dismissal. At a minimum, this Court should permit Appellants leave to amend their Complaint and cure any deficiencies.

C. Appellants State a Plausible Claim for Kentucky Consumer Protection Act Violation

1. Law and District Court Analysis and Holdings

The Kentucky Consumer Protection Act, KRS 367.110, *et seq.*, was enacted upon the finding "that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services. . .

." KRS 367.120. CDI conducts trade and/or commerce as defined in KRS 367.110 by advertising, offering and distributing wagers on Thoroughbred horse racing. *Id*. KRS 367.170 prohibits unfair, false, misleading or deceptive acts and/or practices in the conduct of any trade or commerce, including any unconscionable activities. *Id*. Furthermore, "when the evidence creates an issue of fact that any particular action is unfair, false, misleading, or deceptive it is to be decided by a jury." *M.T. v. Saum*, 7. F.Supp.3d 701, 705 (W.D. Ky. Mar. 12, 2014) (quoting *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819, 820 (Ky. 1988)). "[T]he question is inappropriate for the Court to determine [as a matter of law]." *Id*.

CDI's actions and practices as described in the Complaint and highlighted in this brief qualify as unfair, false, misleading, deceptive and/or unconscionable in violation of the Kentucky Consumer Protection Act. Specifically, they include, *inter alia*:

- "Defendant CDI makes the choice, and has the final say, to accept or refuse entries to any of its proposed races from those submitting entries or their horses to compete in the races, including the 147th running of the Kentucky Derby." (*Complaint*, ¶ 42, R. 1-1, Page ID#: 18);
- "CDI knew of Defendants BBRI and Baffert's history of medication violations prior to the submission of the entry of Medina Spirit into the 147th running of the Kentucky Derby." (*Complaint*, ¶ 45, R. 1-1, Page ID#:

18-19);

- "Most significantly, Defendant CDI knew that less than two months prior to the 147th running of the Kentucky Derby, the Kentucky Horse Racing Commission disqualified Defendants BBRI and Baffert trainee Gamine from the 2020 running of the Kentucky Oaks at Churchill Downs Racetrack due to a positive test for betamethasone." (*Complaint*, ¶ 46, R. 1-1, Page ID#: 19);
- "Under its own rules and pursuant to Kentucky law and regulations, Defendant CDI could have refused the entry of Medina Spirit into the 147th running of the Kentucky Derby." (*Complaint*, ¶ 47, R. 1-1, Page ID#: 19); and
- "Despite its knowledge of Defendants BBRI and Baffert's history of medication violations, which, in turn, results in ineligible horses competing in races, Defendant CDI made the choice to accept the entry of Medina Spirit into the 147th running of the Kentucky Derby." (*Complaint*, ¶ 49, R. 1-1, Page ID#: 19-20).

As a result, "CDI's actions and practices as described in this Amended [sic] Complaint are unfair, false, misleading, deceptive and/or unconscionable, in violation of the Kentucky Consumer Protection Act." (*Complaint*, ¶ 174, R. 1-1, Page ID#: 41). KRS 367.220(1) allows any person who suffers any ascertainable

loss of money or property as a result of unfair, false, misleading or deceptive acts and/or practices to bring an action to recover actual damages and equitable relief. *Id*.

In dismissing the claim, the district court states the following in part followed by Appellants' response and argument:

> As an initial matter, Plaintiffs do not direct the Court to any case law to support their allegation that Churchill Downs should not have accepted the entry of Medina Spirit for the Kentucky Derby because of its knowledge of past medical violations by BBRI and Baffert (D.N. 1-1, PageID.18–19 ¶¶ 42–47), and Kentucky's horse-racing regulations do not impose such a requirement. *See* 810 Ky. Admin. Regs. 4:030. Moreover, Plaintiffs do not allege that Churchill

(*Memorandum and Order*, R. 39, PageID #: 508). Appellants need not provide case law because, as indicated *supra* and presented as argument in their motions to dismiss responses, Kentucky Administrative Regulations mandate that "[a] horse shall not be entered or raced that. . .[h]as been administered any drug in violation of 810 KAR 8:010. . . ." 810 KAR 4:010 Sec. 10(5). This regulation applies to racetracks through the Licensing Criteria listed in 810 KAR 3:010 Sec. 4(1), which provides that a racetrack must broadly "conduct racing in accordance with KRS Chapter 230 and KAR Title 810." 810 KAR 3:010 Sec. 4(1)(c). Thus, 810 KAR 3:010 Sec. 4(1)(c)'s broad language includes and incorporates this as a racetrack's responsibility.

requirement. *See* 810 Ky. Admin. Regs. 4:030. Moreover, Plaintiffs do not allege that Churchill Downs or its representatives failed to disclose material facts or misrepresented information regarding the horses running in the Kentucky Derby. (*Compare* D.N. 1-1, PageID.40–42 ¶¶ 170–82 (failing to allege that Churchill Down did not disclose material facts or misrepresented information), *with Kempf v. Lumber Liquidators, Inc.*, No. 3:16-CV-492-DJH, 2017 WL 4288903,

(*Memorandum and Order*, R. 39, PageID #: 508). KRS 367.170 contemplates "[u]nfair, false, misleading, ***or*** deceptive acts or practices in the conduct of any trade or commerce, including any unconscionable activities" *disjunctively*. *Id*. (emphasis added). At a bare minimum, Appellants' allegations infer the failure to disclose material facts or misrepresented information by CDI. Even if this Court finds they do not, Appellants' explicitly allege unfair *or* deceptive acts or practices. Moreover, as indicated *supra*, whether they qualify as such is a question for a jury to decide.

Furthermore, if an explicit allegation of failure to disclose material facts or misrepresentation represents the only component lacking in the Complaint, the district court simply should have allowed Appellants to amend given the massive amount of factual allegations constituting those very things. As this Court previously held, "[w]hen a motion to dismiss a complaint is granted, courts typically permit the losing party leave to amend." *Brown v. Matauszak*, 415 Fed.Appx. 608, 614 (6th Cir. 2011) (quoting *PR Diamonds, Inc. v. Chandler*, 364

F.3d 671, 698 (6th Cir. 2004)). "Under Federal Rule of Civil Procedure 15(a)(2), a party may amend its pleading only with the opposing party's consent or the court's leave, but the court should freely give leave when justice so requires." *Id*. (internal brackets and quotation marks omitted.) "[G]enerally, if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend." *Id*.

> the defendant's salesperson when purchasing the product)) In fact, Plaintiffs acknowledge that the information regarding "BBRI and Baffert's history of medical violations" is publicly available. (D.N. 1-1, PageID.10–15 ¶¶ 26–27 (citing public records of Baffert's medical violations between August 1977 and September 2020)) Plaintiffs also do not allege that they placed pari-mutuel wagers based on any representations made by Churchill Downs or their representatives. (*Compare id.*, PageID.40–42 ¶¶ 170–82 (failing to allege that they relied on any representations made by Churchill Downs), *with Naiser*, 975 F. Supp. 2d at 741–44 (finding that the plaintiffs' KCPA

(*Memorandum and Order*, R. 39, PageID #: 508). First, the district court makes an improper factual and merits-based ruling. The district court's point more appropriately belongs in front of a jury, not in a dismissal motion ruling. Second, Appellants do allege at a minimum that CDI utilized unfair ***or*** deceptive acts or practices under KRS 367.170's disjunctive language. Finally, and again, if an explicit allegation represents the only component lacking in the Complaint, the district court simply should have allowed Appellants to amend.

false, misleading, or otherwise deceptive)) And there is nothing in the complaint to suggest that Churchill Downs knew of any medical violations related to Medina Spirit on the day of or in the days leading up to the 147th running of the Kentucky Derby. (*See* D.N. 1-1) Rather, as set forth

(*Memorandum and Order*, R. 39, PageID #: 509). The district court answers the wrong question. The question is not whether CDI knew of medical violations. As indicated *supra*, Kentucky regulations required CDI to ensure that horses administered a prohibited drug not gain entry to race. 810 KAR 4:010 Sec. 10(5). Thus, the question is whether CDI failed to disclose that it failed to follow Kentucky law and regulations, which it did not.

Plaintiffs' KCPA claim also fails to meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). Under that rule, when "alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Naiser*, 975 F. Supp. 2d at 733

(*Memorandum and Order*, R. 39, PageID #: 509). Again, Appellants pled their KCPA claim in the alternative to include "unfair, false, misleading, deceptive and/or unconscionable [acts or practices], in violation of the Kentucky Consumer Protection Act." (*Complaint*, ¶ 174, R. 1-1, Page ID#: 41). Thus, even if this Court finds the Complaint insufficient for false and misleading acts or practices, Appellants allege a plethora of facts sufficient for unfair, deceptive or unconscionable acts or practices. Even though not sounding in fraud, Appellants still plead the unfair, deceptive or unconscionable acts or practices claims with

particularity.

> Here, Plaintiffs' complaint does not specify the time, the place, or the content of the alleged misrepresentation. (*See* D.N. 1-1) Plaintiffs' complaint also fails to identify the fraudulent scheme and fraudulent intent of Churchill Downs (*see id.*), and thus cannot identify any injury resulting from such fraud. *See SFS Check,* LLC, 774 F.3d at 358 (citing *SNAPP, Inc.*, 532 F.3d at 504).

(*Memorandum and Order*, R. 39, PageID #: 509). Appellants allege in the Complaint the time (May 1, 2021), the place (Churchill Downs Racetrack) and the content (CDI purposefully failed to disclose that it failed to follow Kentucky law and regulations to prevent illegally drugged horses from entering to race in Derby 147).

2. Additional Argument

Consistent with other parts of its ruling, the district court construes the KCPA and the Complaint in the narrowest terms possible and in the most unfavorable light to Appellants. As this Court knows, whether Appellants state a claim upon which relief may be granted constitutes the standard, not whether it will ultimately be successful. Yet over and over, the Memorandum and Order dismissing the claims reads like a judgment on the merits disguised as a judgment as a matter of law. Appellants take no issue with judges acting as umpires calling balls and strikes. The problem arises when a judge moves or shrinks the strike zone so as to make it impossible to hit. It becomes merely conclusions in search of support and reasons to dismiss.

This Court should reverse the district court's dismissal of this claim for the reasons indicated *supra*. At a minimum, this Court should permit Appellants leave to amend their Complaint and cure any deficiencies.

D. Appellants State a Plausible Claim for Unjust Enrichment

1. Law and District Court Analysis and Holdings

Under Kentucky law, "the equitable doctrine of unjust enrichment is applicable as a basis of restitution to prevent one person for keeping money or benefits belonging to another." *Lipson v. Univ. of Louisville*, 556 S.W.3d 18, 32 (Ky. App. 2018) (citations and internal brackets omitted). "Whenever, by a clear or palpable mistake of law or fact essentially bearing upon and affecting the contract, money has been paid without consideration, which in law, honor, or conscience was not due and payable, and which in honor or good conscience ought not to be retained, it may and ought to be recovered." *Id*. (citations and internal brackets omitted).

"For a party to prevail under the theory of unjust enrichment, they must prove three elements: (1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Jones v. Sparks*, 297 S.W.3d 73, 78 (Ky. App. 2009).

In dismissing the claim, the district court states the following, in part, followed by Appellants' response and argument:

> benefit without payment for its value." (D.N. 1-1, PageID.42 ¶¶ 184–86) These allegations are based on Plaintiffs' belief that after Medina Spirit's disqualification, the pari-mutuel payouts should have been calculated and paid based on the new order of finish (*see id.*, PageID.29 ¶ 101), and that because they were not, Churchill Downs inequitably retained a benefit. (*Id.*, PageID.42 ¶¶ 185–86) Churchill Downs argues that Plaintiffs "do not and cannot allege" that it inequitably

(*Memorandum and Order*, R. 39, PageID #: 510). The district court again displays a fundamental misunderstanding of Appellants' allegations and arguments and mischaracterizes them. Appellants base their allegations on the practice of CDI collecting literally hundreds of millions of dollars from the public, failing to take any action to prevent doped horses from competing in its races despite having knowledge of it happening and its obligations under Kentucky statutory law and regulations to prevent it. Then, due to its own failures, it experiences disqualifications of entrants in its races due to doping that, in turn, results in new official orders of finish and unpaid winning tickets, but then it bears no accountability even though its failures contribute to the outcomes.

Appellants allege that their *unsettled wagers*, not the pari-mutuel payouts, should have been calculated and paid based on the new official order of finish. Again, Appellants clearly state in their Complaint and throughout their briefing in

this action that they do not seek a claw back and redistribution of the pari-mutuel payouts, but damages based on what would have been the pari-mutuel payouts.

2. Additional Argument

CDI only challenged the third element of the test (inequitable retention of benefit without payment for its value) in its motion to dismiss. Appellants allege facts to support this element. As detailed *supra*, they allege that CDI enabled and contributed to causing a disqualification that directly led to an official order of finish that now leaves them holding winning wagers that cannot be settled by and through the pari-mutuel wagering pools or refunded. CDI most definitely retained the benefit of the wagers without payment for their value under the official order of finish. The only question, which is one for the trier of fact, is whether that retention qualifies as inequitable. Thus, this Court should reverse the district court's dismissal of this claim. At a minimum, this Court should permit Appellants leave to amend their Complaint and cure any deficiencies.

III. The District Court Erred in Denying Appellants' Motion for Leave to Amend Complaint

A. Factual and Procedural Background

Appellants moved to amend their Complaint on May 2, 2022 and included a proposed Amended Class Action Complaint ("Amended Complaint"). (*Amended Class Action Complaint ("Amended Complaint")*, R. 15-1, Page ID#: 152-195). The Amended Complaint contains new factual allegations and causes of action

found in paragraphs 142-160 (Nevada Wagers), 163 (Class Allegations), 175-177 (Count I – Negligence (Baffert Defendants)), 182-187 (Count II – Statutory Violation (Baffert Defendants)) and 189-191 (Count III – Negligence (Defendant CDI)). *Id*. The other causes of action contained in the Amended Complaint that remained unchanged from the Complaint include:

- Count IV – Breach of Contract (Defendant CDI);
- Count V – Kentucky Consumer Protection Act Violation (Defendant CDI);
- Count VI – Unjust Enrichment (Defendant CDI); and
- Count VII – Permanent Injunctive Relief (Defendant CDI).

(Amended Complaint, R. 15-1, Page ID#: 189-194).

In short, the district court ruled the proposed amendments as futile because they could not withstand a Rule 12(b)(6) motion to dismiss:

Counts I and III

> Ky. 2019). Accordingly, the Court finds that Plaintiffs' proposed amended negligence claims are futile and will deny the motion to amend as to these claims. *See Beydoun*, 871 F.3d at 469.

(*Memorandum and Order*, R. 29, Page ID#: 391).

Count II

> Accordingly, the Court finds that Plaintiffs' negligence per se claim is futile and will deny the motion to amend as to this claim. *See id.*

(*Memorandum and Order*, R. 29, Page ID#: 393).

Nevada Wagers

claims against Churchill Downs. Accordingly, the Court finds that any claims based on the Nevada wagers could not survive a motion to dismiss, and leave to amend will therefore be denied as to those allegations. *See Beydoun*, 871 F.3d at 469. In sum, the Court will deny Plaintiffs leave to file their proposed amended complaint as the allegations therein would not survive a Rule 12(b)(6) analysis and thus are futile. *See id.*

(*Memorandum and Order*, R. 29, Page ID#: 395).

B. Law and Argument

1. Counts I and III

With respect to the Counts I and III, Appellants incorporate their arguments in Sec. A, *supra*, demonstrating they state claims upon which relief may be granted.

2. Count II – Statutory Violations

Under Kentucky statutory law, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." KRS 446.070. "[I]n accord with traditional legal principles related to the common law concept of negligence per se, KRS 446.070 applies when the plaintiff comes within the class of persons intended to be protected by the statute alleged to have been violated." *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 227 (Ky. 2015)

(brackets, ellipsis and citation omitted). Kentucky "case law also recognizes two other conditions which must be satisfied for the application of KRS 446.070." *Id*. "First, the statute must have been specifically intended to prevent the type of occurrence that took place." *Id*. at 227-228 (quoting *Hargis v. Baize,* 168 S.W.3d 36, 46 (Ky. 2005)) (internal quotation marks and brackets omitted). "Second, the violation of the statute must have been a substantial factor in causing the result." *Id.* at 228 (quoting *Hargis v. Baize,* 168 S.W.3d 36, 46 (Ky. 2005)) (internal quotation marks and brackets omitted).

"When the violation of an administrative regulation is at issue, KRS 446.070 creates a cause of action in these narrow circumstances. . .(1) the regulation must be consistent with the enabling legislation and (2) it must apply to the safety of the citizenry." *McCarty*, 476 S.W.3d at 228 (internal quotation marks and brackets omitted) (citations omitted). "Furthermore, when a provision of the enabling statute for the promulgation of administrative regulations expressly mandates compliance with those regulations, the violation of the regulation is the equivalent of a violation of a statute, thereby bringing the regulation within the scope of KRS 446.070." *Id*.

Enabling legislation for the promulgation of administrative regulations governing horse racing exists in multiple relevant statutes. KRS 230.215(1) provides that "[i]t is the policy and intent of the Commonwealth to foster and to

encourage the business of legitimate horse racing with pari-mutuel wagering thereon in the Commonwealth on the highest possible plane." *Id*. KRS 230.215(2) declares it is:

> [T]he purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to promulgate administrative regulations prescribing conditions under which all legitimate horse racing and wagering thereon is conducted in the Commonwealth. . .to regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.

Id.

KRS 230.260(8) provides that "[t]he racing commission shall have full authority to prescribe necessary and reasonable administrative regulations and conditions under which horse racing at a horse race meeting shall be conducted in this state. . . ." *Id*. KRS Chapter 230 further requires mandatory compliance with regulations. All licenses granted under KRS Chapter 230 "[s]hall be subject to all administrative regulations and conditions as may from time to time be prescribed by the racing commission. . . ." KRS 230.290(2). Furthermore, KRS 230.320(1) provides that:

> Every license granted under this chapter is subject to denial, revocation, or suspension, and every licensee or other person participating in Kentucky horse racing may be assessed an administrative fine and required to forfeit or

> return a purse, by the racing commission in any case where it has reason to believe that any provision of this chapter, administrative regulation, or condition of the racing commission affecting it has not been complied with or has been broken or violated.

Id.

810 KAR 4:100, the Kentucky Administrative Regulation specifically governing trainers, lists part of its statutory authority as KRS 230.215(2). *Id*. It provides that "a licensed trainer shall bear primary responsibility for the proper care, health, training condition, safety, and protection against the administration of prohibited drugs or medication of horses in his or her charge." 810 KAR 4:100 Sec. 3(1). It further provides that a licensed trainer "shall bear primary responsibility for horses he or she enters as to. . .the. . .absence of prohibited drugs or medications. . . ." 810 KAR 4:100 Sec. 2(d). Kentucky Administrative Regulations mandate that "[a] horse shall not be entered or raced that. . .[h]as been administered any drug in violation of 810 KAR 8:010. . . ." 810 KAR 4:010 Sec. 10(5). The prohibition of betamethasone is found in 810 KAR 8:010 Sec. 23(1)-(2).[9]

First, the regulations violated by the Baffert Appellees find consistency with the enabling legislation related to:

- Fostering and encouraging legitimate horse racing with pari-mutuel wagering on the highest possible plane;

[9] Prior version in effect at the time of the occurrence.

- Keeping wagering free of corrupt, incompetent, dishonest or unprincipled horse racing practices;
- Public health, safety, and welfare related to legitimate horse racing and wagering;
- Regulation and maintenance of horse racing of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices; and
- Maintenance of the appearance as well as the fact of complete honesty and integrity of horse racing.

Second, the regulations apply to the safety of the citizenry. 810 KAR 4:100 specifically references KRS 230.215(2) as a statute from which it draws its authority. KRS 230.215(2) specifically states that its "purpose and intent [is] the interest of the public health, safety, and welfare." *Id*. It further references keeping wagering free of corrupt, incompetent, dishonest, or unprincipled horse racing practices. *Id*. Thus, while these statutes and regulations may not relate to the *physical* safety of the citizenry, they most definitely relate to the *financial* safety of it. No authority exists defining safety of the citizenry solely as physical in nature. Appellants qualify as members of the (wagering) public and make claims related to their financial welfare.

While the statutes and regulations most certainly apply and relate to the safety and welfare of the direct participants in races, such as the horses and jockeys, they also make clear that they exist to protect the public wagering on the races. Thus, the regulations violated by the Baffert Appellees exist, in part, to protect the integrity of wagering by preventing unqualified and ineligible entrants in races, which results in disqualifications. This runs counter to the policy and intent of the Commonwealth in conducting horse racing. Thus, prevention of the type of occurrence that took place in this case – the disqualification of a wagering interest in a horse race – constitutes at least one of the specific intents of the regulations.

In denying leave to amend, the district court states the following in part followed by Appellants' response and argument:

> However, Plaintiffs proposed amended complaint (D.N. 15-1) and reply (D.N. 22) fail to "make any statement regarding whether the cited statute is penal in nature or whether the statute provide for a civil remedy." *Sims*, 349 F. Supp. 3d at 642. And "[b]y failing to provide any factual content on those elements, [Plaintiffs] cannot satisfy the pleading requirement of *Twombly* and *Iqbal*." *Id.* Accordingly, the Court finds that Plaintiffs' negligence per se claim is futile and will deny the motion to amend as to this claim. *See id.*

(*Memorandum and Order*, R. 29, Page ID#: 393). First, other than the case cited by the district court, Appellants can find no other authority for the proposition that a Complaint alleging a statutory violation must make a statement regarding whether

the cited statute is penal in nature or whether the statute provides for a civil remedy, and the case cited by the district court cites no authority. Appellants maintain *McCarty v. Covol Fuels No. 2, LLC*, 476 S.W.3d 224, 227 (Ky. 2015), quoted *supra*, contains the correct legal standard.

Second, KRS 230.320(1), relied upon by Appellants, specifically and unequivocally states that trainers granted a license under chapter KRS 230 "may be assessed an administrative fine and required to forfeit or return a purse, by the racing commission in any case where it has reason to believe that any provision of this chapter, administrative regulation, or condition of the racing commission affecting it has not been complied with or has been broken or violated." *Id*. Thus, although the district court relies on the wrong standard, Appellants still meet it. Again, the district court apparently ignored this argument.

Thus, this Court should reverse the district court. Alternatively, even if this Court agrees that Appellants failed to include the narrow statement the district court relies upon, as argued *supra*, it should permit Appellants leave to amend their Complaint and cure the minor deficiency.

3. Nevada Wagers

In short, Nevada wagers on Derby 147 collected in pari-mutuel pools separate from those pools handled by CDI. (*Amended Complaint*, R.15-1, Page ID#: 180-183). Nevada Appellants made some of the same claims against CDI as

the other Appellants, including Kentucky common law causes of action for negligence and negligence per se against the Baffert Appellees and CDI and violation of the Kentucky Consumer Protection Act, because their actions resulted in the exact same outcome for Nevada Appellants as the other Appellants who wagered in CDI's pari-mutuel pools.

The district court held that Nevada law barred the claims residents of Nevada proposed in the Amended Complaint. (*Memorandum and Order*, R. 29, Page ID#: 394). It reasoned that based on "the factual allegations, it is clear that the Nevada wagers have no impact on the Kentucky state-law claims against Churchill Downs." (*Id*. at Page ID#: 395.). However, the district court provided no authority for the proposition that a resident of one state cannot pursue claims in another where the alleged conduct forming the basis of the claims occurred and under the other state's available common law and statutory causes of action. This Court should reverse the district court's order and allow the proposed amendment.

CONCLUSION

Appellants respectfully requests this Court reverse the district court's Memorandum and Order denying their Motion for Leave to Amend Complaint, reverse its Memorandum and Order granting the Appellees' Motions to Dismiss, and remand the case to the district court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellants certifies pursuant to Fed. R. App. P. 32(g) that the Brief of Appellants complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,408 words including footnotes and excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).[10] In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.66.1, Times New Roman font in 14 point size, with footnotes in Times New Roman font 14 point size.

[10] The body of the brief contains several embedded images with words that the application cannot and does not count.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been served electronically via the court's CM/ECF system, on the 18th day of October 2023. Notice of this filing will be sent by operation of the ECF system to all parties indicated on the electronic filing receipt.

/s/ William D. Nefzger
Counsel for Appellants

ADDENDUM

1. *Complaint*, R. 1-1, PageID #: 7-45;

2. Other pleadings or motions relevant to the arguments on appeal;

   a. *Churchill Downs Incorporated's Motion to Dismiss*, R. 6, PageID #: 69-98;

   b. *Motion to Dismiss "Class Action Complaint" by Defendants Robert A. Baffert and Bob Baffert Racing, Inc.*, R. 7, PageID #: 100-118;

   c. *Proposed Amend Complaint*, R. 15-1, Page ID#: 152-195;

   d. *Baffert Response and Objection to the Plaintiff's Motion for Leave to Amend Complaint*, R. 16;

   e. *Churchill Downs Incorporated's Response to Plaintiff's Motion for Leave to File Amended Complaint*, R. 18, Page ID#: 263-313;

   f. *Appellants' Reply to Baffert's Response and Objection to the Plaintiff's Motion for Leave to Amend Complaint*, R. 22, Page ID#: 320-335;

   g. *Appellants' Reply to Churchill Downs Incorporated's Response to Plaintiff's Motion for Leave to File Amended Complaint*, R. 23, Page ID#: 336-352;

h. *Churchill Downs Incorporated's Motion for Leave to File Sur-Reply in Opposition to Plaintiffs' Motion for Leave to Amend Complaint*, R. 25, Page ID#: 356-370;

i. *Appellants' Response to Churchill Downs Incorporated's Motion for Leave to File Sur-Reply in Opposition to Plaintiffs' Motion for Leave to Amend Complaint*, R. 26, Page ID#: 372-375;

j. *Churchill Downs Incorporated's Reply in Support of Its Motion for Leave to File Sur-Reply in Opposition to Plaintiffs' Motion for Leave to Amend Complaint*, R. 27, Page ID#: 376-377;

k. *Appellants' Response to Motion to Dismiss "Class Action Complaint" by Defendants Robert A. Baffert and Bob Baffert Racing, Inc.*, R. 34, Page ID#: 416-436;

l. *Appellants' Response to Churchill Downs Incorporated's Motion to Dismiss*, R. 35, Page ID#: 438-463;

m. *Baffert' Reply in Response to Motion to Dismiss*, R.36, Page ID# 466-475; and

n. *Churchill Downs Incorporated's Reply in Support of Motion to Dismiss*, R. 38, Page ID#: 478-494.

3. Judgment from which the appeal is taken: Not applicable.

4. Relevant orders, memorandum opinions, etc.;

a. *Memorandum and Order Denying Motion to Amend*, R. 29, PageID #: 382-397;

b. *Memorandum and Order Granting Motions to Dismiss*, R. 39, PageID #: 495-512

5. *Notice of Appeal*, R. 40, PageID #: 513-514.

6. Other parts of the record and relevant documents in order of appearance in brief: None.