UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
No. 23-5750

ANTHONY MATTERA, ET AL.,

Plaintiffs – Appellants

v.

ROBERT BAFFERT, ET AL.,

Defendants – Appellees

On appeal from the United States District Court
for the Western District of Kentucky, No. 22-CV-156-DJH

APPELLEE BRIEF OF CHURCHILL DOWNS INCORPORATED

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case No.: 23-5750

Case Name: Anthony Mattera, et al. v. Robert Baffert, et al.

Counsel: Chadwick A. McTighe, Jeffrey S. Moad, and Alisa Micu

Pursuant to 6th Cir. R. 26.1, the defendant/appellee Churchill Downs Incorporated makes the following disclosure:

1. Are said parties a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No. Churchill Downs Incorporated is a publicly-owned corporation.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

Dated: November 14, 2023 /s/ *Jeffrey S. Moad*
Counsel for Churchill Downs Incorporated

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES / OTHER AUTHORITIES

STATEMENT AS TO ORAL ARGUMENT

The dismissal of the bettors' claims against Churchill Downs Incorporated and denial of the bettors' motion to amend were supported by directly-on-point regulations and well-settled principles of law. Churchill Downs believes that oral argument is unnecessary.

STATEMENT OF JURISDICTION

Churchill Downs properly removed this case under 28 U.S.C. §§ 1332, 1441, 1446, and 1453. Under the Class Action Fairness Act (CAFA), federal district courts have original jurisdiction over any class action in which: (a) the proposed class contains at least 100 members; (b) any class member is a citizen of a different state than any defendant (*i.e.*, minimal diversity); and (c) the amount in controversy, in the aggregate, exceeds $5 million, exclusive of interest and costs. 28 U.S.C. § 1332(d)(2), (d)(5), (d)(6). "CAFA was not to be read narrowly, but as a broad grant of jurisdiction in interstate class actions." *Davenport v. Lockwood, Andrews & Newman, Inc.*, 854 F.3d 905, 910 (6th Cir. 2017) (citing S. Rep. 109-14, at 43).

All of these criteria are satisfied here. A group of disappointed bettors who lost wagers on the 2021 Kentucky Derby filed this case as a class action, as defined in 28 U.S.C. § 1332(d)(1)(B). (Compl., R. 1-1, PageID# 7.) Their proposed class exceeds 100 members, as required by 28 U.S.C. § 1332(d)(5)(B). (*Id.*, PageID# 35, ¶¶ 142–43 ("All persons who placed pari-mutuel bets on the Kentucky Derby that based on the new, complete and official order of finish of the first five horses of the 147th running of the Kentucky Derby [*sic*]").) The parties are minimally diverse because at least one named plaintiff, Anthony Mattera, is a Florida citizen,

and at least one defendant, Churchill Downs, is a Kentucky citizen. (*Id.*, PageID# 7, 9, 33, ¶¶ 1, 22, 127.)

The amount in controversy exceeds $5 million, exclusive of interest and costs, as required by 28 U.S.C. § 1332(d)(2): the bettors allege that "[Churchill Downs] handled $159,278,366" across all pari-mutuel pools on the 2021 Kentucky Derby, and they seek "damages under Kentucky law based on the pari-mutuel principles as defined and described in 810 KAR 6:020 and 810 KAR 6:030E"—in other words, a payout to bettors of all the amounts wagered less a small percentage withheld as required by law. (Compl., R. 1-1, PageID# 35, ¶ 140.) Just one of the named plaintiffs claims "at least $1,000,000" in damages for himself and his partners. (*Id.*, PageID# 34, ¶ 136.) The bettors further seek disgorgement of "the wagers and revenues" (nearly $160 million), punitive damages, and an injunction that would prevent Churchill Downs from hosting any horse races until it can meet certain conditions that would also exceed $5 million in value. (*Id.*, PageID# 39, 42, 43–44, ¶¶ 189 (Mattera's claimed lost winnings), 164, 182, 191 (punitive damages), 195 (requesting, among other things, no further racing without "creation of a fund to settle pari-mutuel wagers that become correct following the disqualification of a horse in its races").)

CAFA's local controversy exception—which the bettors allude to now but did not raise below—does not apply. Contrary to the bettors' recitation of removal

principles from non-CAFA cases, "the party seeking to remand under an exception to CAFA bears the burden of establishing each element of the exception by a preponderance of the evidence." *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383, 389 (6th Cir. 2016). "[C]ourts agree that '[a]ny doubt about the applicability of the local-controversy exception [should be] resolved against the party seeking remand.'" *Davenport v. Lockwood, Andrews & Newman, Inc.*, 854 F.3d 905, 910 (6th Cir. 2017) (quoting *Hood v. Gilster-Mary Lee Corp.*, 785 F.3d 263, 265 (8th Cir. 2015)).

The bettors cannot meet their burden of establishing that this exception applies. The bettors cannot show that, "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A)(ii). Mattera filed a nearly identical class action complaint just ten months before he filed this case, *Mattera v. Baffert*, Case No. 3:21-CV-330-RGJ (W.D. Ky.) (removed 5/21/2021), and a different set of plaintiffs previously filed a class action complaint based on the same events at issue here against the Baffert defendants in the District of New Jersey, *Beychok v. Baffert*, No. 2:21-CV-14112 (filed 7/23/2021). The bettors also concede that they cannot show that "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of" Kentucky, 28 U.S.C. § 1332(d)(4)(A)(i)(I),

as they assert that it "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[.]" (Appellants' Br., at 7.)

In sum, the district court properly exercised jurisdiction over this action.

STATEMENT OF THE ISSUES

(1) **Winning Wagers:** The regulations governing horse racing in Kentucky provide that "[p]ayment of valid pari-mutuel tickets shall be made on the basis of the order of finish as declared 'official' by the stewards . . . . A subsequent change in the order of finish or award of purse money that could result from a subsequent ruling by the stewards . . . or commission shall not affect the pari-mutuel payout." 810 KAR 6:030 § 10(2). "The decision of the stewards as to the official order of finish for pari-mutuel wagering purposes shall be final." 810 KAR 4:040 § 17. "If a horse is disqualified after a race has been declared official for pari-mutuel payoff and causes revision of the order of finish . . . [t]he pari-mutuel payoff shall not be affected in any way." 810 KAR 4:060 § 7(1). The bettors here "claim damages in the form of unpaid winning wagers completely and solely due to the new official order of finish" after Medina Spirit was disqualified by the KHRC over nine months after the 2021 Kentucky Derby. (Appellants' Br., at 33; *see also, e.g.*, Compl., R. 1-1, PageID# 30, ¶¶ 105–06.) Did the district court properly conclude that the bettors did not have winning wagers and were not entitled to any payment in dismissing the bettors' claims?

(2) **Recovery Outside of Governing Regulations:** Those who wager on horse races consent to be bound by the state racing regulations, and cannot recover on a wager outside of those regulations. *See White v. Turfway Park Racing Ass'n*,

909 F.2d 941, 944–45 (6th Cir. 1990). The bettors acknowledge that "after declaration of a race as official on the day of a race, if a disqualification of an entrant occurs, Kentucky laws and regulations specific to Thoroughbred horse racing and pari-mutuel wagering provide no recourse for horseplayers who hold winning wagers but for the disqualification." (Compl., R. 1-1, PageID# 32, ¶ 121.) Can the bettors pursue common law and Kentucky Consumer Protection Act (KCPA) claims against Churchill Downs for alleged lost gambling winnings based on the February 2022 disqualification of Medina Spirit?

(3) **Causation and Damages:** Kentucky law allows a plaintiff to recover for damages only where the fact of damage is reasonably certain. The bettors' theory is that Churchill Downs should not have allowed Medina Spirit to run in the 2021 Kentucky Derby, and that they were injured in the form of lost gambling winnings as a result. Did the district court correctly conclude that the bettors' theory that they would have won their wagers if the horse that crossed the finish line first had not actually been allowed to run was too speculative?

(4) **Nevada Bettors:** Negligence, breach of contract, unjust enrichment, and KCPA claims all require either a cognizable legal duty or privity. Nevada law prohibits civil claims for alleged lost gambling winnings and only permits Nevada sports books to identify winners on the wagers they book on horse races. Plaintiffs sought leave to assert claims against Churchill Downs on behalf of Nevada bettors

who wagered on the 2021 Kentucky Derby at Nevada casinos, and not in any pari-mutuel pools handled by Churchill Downs. Did the district court properly deny leave to amend to add these claims as futile?

STATEMENT OF THE CASE

A. Medina Spirit was declared the official winner of the 147th Kentucky Derby by the KHRC stewards, and Churchill Downs paid out the pari-mutuel pools accordingly.

The 147th running of the Kentucky Derby took place at Churchill Downs Racetrack on May 1, 2021. Medina Spirit crossed the finish line first, followed by Mandaloun, Hot Rod Charlie, Essential Quality, O Besos, Midnight Bourbon, and thirteen other horses. (*See* Compl., R. 1-1, PageID# 21, ¶ 59.) The racing stewards declared this to be the "official order of finish for purposes of the pari-mutuel payoff," and Churchill Downs distributed all pari-mutuel wagering pools (i.e., all winning wagers) according to these results.[1] (*Id.*, PageID# 28, ¶ 96 (quoting 810 KAR 2:040 § 5(9)); ¶ 98.)

[1] The bettors' complaint alleged that Churchill Downs "declared and/or accepted" the "official" winner. (*Id.*, PageID# 28, ¶ 97.) As they chide the district court for making a similar statement, (Appellants' Br., at 12 n.2), they appear to have abandoned that theory on appeal. As the bettors now recognize, only the stewards appointed by the KHRC can declare official results for pari-mutuel payouts. 810 KAR 6:030 § 10(2); 810 KAR 2:040 § 5(9). Only the KHRC can adjudicate later disqualifications. 810 KAR 8:030 § 2. The stewards are agents of the KHRC, not Churchill Downs, and Churchill Downs cannot disqualify a horse or declare the official race results for pari-mutuel wagering. 810 KAR 2:001 § 1(58); 810 KAR 2:040 § 3–4.

In distributing pari-mutuel pools, Churchill Downs followed a strict set of statutory and regulatory rules. Bettors wagering on horse races under Kentucky law wager against one another, not the track—that is pari-mutuel wagering. 810 KAR 6:030 § 1(1)–(2); KRS 230.210(18). In this system of wagering, bettors place their wagers and receive tickets from the track. (Compl., R. 1-1, PageID# 25, ¶ 85.) Their money is collected in "pool[s]." (*Id.*); KRS 230.210(15). "After the race is run and declared official, the racetrack divides the money in each pool" in accordance with a regulatory formula. (*Id.*); 810 KAR 6:020. The pool is paid out to those with winning tickets, 810 KAR 6:030 § 10(2), (4), minus the "takeout"—an amount that includes taxes, fees, payments to various funds, and a commission for the racetrack. *See* 810 KAR 6:030 § 10(3), 810 KAR 6:001 § 1(83), and KRS 230.3615(4) (all describing various withholdings from the pool prior to paying winning wagers). Racetracks publish payouts after the KHRC's racing stewards declare the race results "official," and bettors "exchange their winning ticket for the money due to them." (Compl., R. 1-1, PageID# 25, ¶ 85.).

B. The stewards disqualified Medina Spirit in February 2022, nine months after the horse failed a post-race drug test.

After the 2021 Kentucky Derby was declared official and pari-mutuel pools were paid out as required, a post-race blood sample from Medina Spirit "tested positive for betamethasone," which is a "violation of Kentucky laws and regulations governing horse racing." (*Id.*, PageID# 21, ¶ 61.) Nine months and

twenty days later, on February 21, 2022, the KHRC's racing stewards disqualified Medina Spirit and set a new order of finish accordingly. (*Id.*, PageID# 23, ¶ 71.) Consistent with Kentucky regulations stating that "[a] subsequent change in the order of finish or award of purse money that could result from a subsequent ruling by the stewards . . . or commission shall not affect the . . . payout," 810 KAR 6:030 § 10(2), the stewards' ruling concluded: "Pari-mutuel wagering is not affected by this ruling." (Stewards Ruling, R. 6-1, PageID# 98.[2]) The ruling disqualifying Medina Spirit was appealed to the full KHRC under 810 KAR 9:010 § 1(10), and now has been appealed to a Kentucky state court, *see Amr Zedan, et al. v. KHRC*, Case No. 23-CI-824 (Franklin Circuit Ct.).

C. The bettors claim that Churchill Downs should not have permitted Medina Spirit to run in the race and ask the Court to treat them as winners because their tickets match the post-disqualification order of finish.

The bettors' claims against Churchill Downs are incongruous. Per the complaint, Churchill Downs should have exercised its "absolute right" to refuse Medina Spirit's entry into the Derby for two reasons. (Compl., R. 1-1, PageID# 17, 19, ¶¶ 41, 47.) First, the bettors contend that because of the trainer's public "history of medication violations," (*id.*, PageID# 19–20, ¶ 49), Churchill Downs was "negligent in choosing to accept the entry of Medina Spirit for the Kentucky

[2] The Stewards Ruling may be considered in a motion to dismiss because it is a public record that is referenced in the complaint and central to the bettors' allegations. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008).

Derby from [the Baffert] Defendants and allowing Medina Spirit to race . . . ." (*Id.*, PageID# 39, ¶ 160.) Second, they speculate that if Churchill Downs had employed a different system to "detect[] and scratch[] ineligible horses prior to them competing in races it conducts," then Medina Spirit "likely, but not necessarily" would not have run. (*Id.*, PageID# 25, 39, ¶¶ 81, 161.)

Though they base their claims on the premise that Medina Spirit should not have run, the bettors still try to rely on the order of finish set by the KHRC in a race in which Medina Spirit did run to claim that they have winning tickets. According to the bettors, Churchill Downs "should have calculated the payouts" and "settled any and all of the wagers it booked" based on the order of finish that resulted from the February 2022 disqualification of Medina Spirit, and *not* based on the order of finish that the KHRC stewards declared "official" for the purposes of pari-mutuel wagering nine months earlier on the day of the 2021 Kentucky Derby. (*See id.*, PageID# 29, ¶¶ 101–02.) Despite a regulation stating that "[a] subsequent change in the order of finish or award of purse money that could result from a subsequent ruling by the stewards . . . or commission shall not affect the . . . payout," 810 KAR 6:030 § 10(2), the bettors complain that "Defendant [Churchill Downs] has not settled any of the wagers it booked based on the new, complete and official order of finish of the first five horses of the 147th running of the Kentucky Derby or offered any refunds." (*Id.*, PageID# 30, ¶ 106.)

D. The bettors sued to recover alleged damages in unpaid wagers and to obtain sweeping injunctive relief.

The bettors proclaim that they "use sophisticated technology that rivals that of any Wall Street investor" to wager on horse races. (Compl., R. 1-1, PageID# 30–31, ¶¶ 107–13.) Anthony Mattera claims to have "been around horse racing his entire life" and to have competed in many handicapping competitions, making use of a "very sophisticated computer program" that assists him "in analyzing data and selecting wagers to place on races." (*Id.*, PageID# 33, ¶¶ 127–31.)

Mattera, "in partnership with others," claims to have placed more than a dozen wagers on the 2021 Kentucky Derby that would have paid out if pari-mutuel pools were paid out according to the February 2022 re-ordering of the race results instead of the order of finish that the KHRC's stewards declared to be "official" for the purposes of pari-mutuel pools on race day. (*Id.*, PageID# 33–34, ¶¶ 133–37.) He claims that if Churchill Downs had calculated payouts based on his preferred outcome, he and his partners would have won over $1 million. (*Id.*, PageID# 34, ¶ 136.) The other plaintiffs claim that they "similarly placed winning wagers" on the race "that remain unsettled." (*Id.*, PageID# 34, ¶ 137.)

Based on their dissatisfaction with the payouts mandated by Kentucky law, Mattera and eighteen others, on behalf of themselves and a putative class of bettors, sued Churchill Downs for negligence, breach of contract, violation of the KCPA, and unjust enrichment. They also sued the Baffert Defendants for

negligence. They claim they "do not seek a pari-mutuel payout as defined and described in 810 KAR 6:020 and 810 KAR 6:030E."[3] (*Id.*, PageID# 35, ¶ 139.) But they admit to seeking damages "based on the pari-mutuel principles as defined and described in 810 KAR 6:020" (entitled "Calculation of Payouts and Distribution of Pools") "and 810 KAR 6:030E" ("Pari-mutuel Wagering") "when applied to and calculated upon the pools for the 147th running of the Kentucky Derby." (*Id.*, PageID# 35, ¶ 140.) They seek a judgment "in an amount representing the payout of the winning pari-mutuel wagers as calculated on the new, complete and official order of finish of the first five horses of the 147th running of the Kentucky Derby." (*Id.*, PageID# 44, Prayer for Relief ¶ 3.)

The bettors also seek to establish their own regulatory scheme for Churchill Downs, by permanently enjoining Churchill Downs "from further conducting Thoroughbred racing" unless it meets the bettors' prescribed criteria. They demand that Churchill Downs (a) implement "an adequate system for detecting and scratching ineligible horses prior to them competing in races it conducts"; (b) enforce "its own internal rule to refuse entries to trainers and owners that it knows or should know enter unqualified and ineligible horses into Thoroughbred horse races"; (c) create "a fund to settle wagers that become correct following the

[3] Since May 2021, the KHRC has changed the numbering on some of its regulations, including this one. The current citation is 810 KAR 6:030.

disqualification of a horse in its races"; (d) maintain and disclose "all veterinarian records of entrants in its races within 48 hours of the scheduled post time"; (e) maintain and disclose "records of medication violations of trainers who enter horses in its races within 48 hours of the scheduled post time"; and (f) remove "forced arbitration provisions as it relates to wagering customers." (*Id.*, PageID# 43–44, ¶ 195.)

E. The district court dismissed the bettors' complaint and denied leave to amend to assert claims relating to wagers placed at Nevada casinos.

The district court dismissed the bettors' complaint, in its entirety, properly finding that the bettors failed to state a claim upon which relief can be granted. (*See* Dismissal Ord., R. 39, PageID# 495.) The court also denied the bettors leave to amend their complaint to add Nevada-specific claims against Churchill Downs and to add a negligence per se claim under KRS 446.070 against the Baffert defendants. (Ord. Denying Leave to Am., R. 29, PageID# 382.)

SUMMARY OF THE ARGUMENT

The only certainty in wagering on a horse race is that all wagers are made subject to the rules of the game. In more than 150 years of horse racing in Kentucky, no court has ever allowed an unhappy bettor to turn a ticket that the governing regulations say is a loser into a ticket that a court says is a winner by suing the racetrack. And this is true throughout the country. The district court correctly declined to allow the bettors here to be the first.

There is no dispute that, under the directly-on-point regulations, the bettors do not have winning wagers. Indeed, the bettors openly acknowledge that the Kentucky laws governing horse racing contemplate that there may be changes to the official order of finish after pari-mutuel wagering payouts are made—just like after the 2021 Kentucky Derby—and expressly provide that these later changes cannot impact the wagering payouts as a matter of law. The district court correctly found that this is exactly what the bettors seek here, and correctly held that they are not entitled to it: "[T]he 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." (Dismissal Ord., R. 39, PageID# 503 (emphasis in original).)

The bettors cannot rely on the laws that permit the KHRC to adjust the official order of finish based on a subsequent disqualification for the purposes of the purse money and the record books without also accepting that the same laws provide that such changes do not affect pari-mutuel payouts. To adapt the bettors' own words, "[s]tatutes and regulations are not a buffet. [The bettors] cannot just pick and choose the [parts they like] and leave the others that apply behind." (Appellants' Br., at 38.)

Beyond asking this Court to rewrite Kentucky law on horse racing, the bettors' claims rest on speculation. The bettors insist that their damages are not speculative because they now hold winning tickets if the Court will simply use the post-disqualification order of finish. Even setting aside that this is contrary to Kentucky law, the post-disqualification order of finish has no connection to the bettors' theory of the case—that Churchill Downs should not have allowed Medina Spirit to run. Had Churchill Downs denied Medina Spirit's entry for the 2021 Kentucky Derby, a different race would have occurred. To say that the bettors would have made the same wagers and that the same horses would have run and finished in the same order (just without Medina Spirit in first), as reflected in the post-disqualification order of finish, is the essence of speculation.

Even beyond these threshold flaws that plague the entirety of the complaint and proposed amended complaint, each claim fails for additional reasons. The Kentucky Supreme Court recently disposed of the bettors' theory that a universal duty of care can create a negligence claim. There can be no contract claim because a pari-mutuel wager is not a contract, and, even if it were, the district court correctly held that it would be subject to the laws governing horse racing that prohibit the recovery the bettors seek. A wager is not a consumer good or service subject to the KCPA, and, as the district court held, the bettors made no allegations that could support such a claim in any event. There was no unjust benefit retained

by Churchill Downs that could support an unjust enrichment claim. And the district court correctly denied leave to file an amended complaint that would have been futile in attempting to assert claims against Churchill Downs concerning wagers made at Nevada sports books with no connection to Churchill Downs. The Court should affirm the dismissal of the complaint and the denial of the bettors' motion for leave to file an amended complaint.

ARGUMENT

A. Standard of review.

To survive dismissal under Rule 12(b)(6), a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 622, 678 (2009) (citation omitted). This Court reviews an order granting a Rule 12(b)(6) motion *de novo*. *Bryant v. McDonough*, 72 F.4th 149, 151 (6th Cir. 2023) (citation omitted).

A district court properly denies a motion to amend when it would be futile and could not withstand a motion to dismiss. *See Beydoun v. Sessions*, 871 F.3d 459, 469 (6th Cir. 2017) (quotation omitted). This Court reviews the denial of a motion to amend on futility grounds *de novo*. *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 430 (6th Cir. 2016).

B. The bettors do not hold "winning wagers," and so their complaint fails to state any claim.

The bettors now rely on a theory for all of their claims that is directly at odds with the governing law: the bettors allege that they hold "winning wagers" because their tickets match the "new" order of finish decreed by the stewards and KHRC after the disqualification of Medina Spirit. (Appellants' Br. at 33–34.) Directly-on-point Kentucky regulations defeat this theory. "Payment of valid pari-mutuel tickets shall be made on the basis of the order of finish as declared 'official' by the stewards . . . . A subsequent change in the order of finish or award of purse money that could result from a subsequent ruling by the stewards . . . or commission shall not affect the pari-mutuel payout." 810 KAR 6:030 § 10(2). "The decision of the stewards as to the official order of finish for pari-mutuel wagering purposes shall be final, and no subsequent action shall set aside or alter the official order of finish for the purposes of pari-mutuel wagering." 810 KAR 4:040 § 17. The regulations also provide: "If a horse is disqualified after a race has been declared official for pari-mutuel payoff and causes revision of the order of finish . . . [t]he pari-mutuel payoff shall not be affected in any way." 810 KAR 4:060 § 7(1).

In other words, subsequent events (like a positive drug test) can change the official order of finish for purposes of the record books and the purse money, but these later events "shall not affect the pari-mutuel payout." 810 KAR 6:030 § 10(2). These regulations underscore "the need for finality" in pari-mutuel

wagering on race day. *See White v. Turfway Park Racing Ass'n*, 909 F.2d 941, 944–45 (6th Cir. 1990).[4]

Even the bettors recognize that "after declaration of a race as official on the day of a race, if a disqualification of an entrant occurs, Kentucky laws and regulations specific to Thoroughbred horse racing and pari-mutuel wagering provide no recourse for horseplayers who hold winning wagers but for the disqualification." (*See* Compl., R. 1-1, PageID# 32, ¶ 121.)

When a race ends, racetracks *must* distribute the pari-mutuel pools based on the official order of finish declared by the KHRC's stewards. *See* 810 KAR 6:030 § 10(2) (payouts "shall be made" based on "the order of finish as declared 'official' by the stewards"); *see also* 810 KAR 6:020 § 4(2) ("The net win pool shall be distributed as a single price pool . . . based upon the official order of finish"); *id.* § 5(2) (same for place pool); *id.* § 6(2) (same for show pool). They cannot, as a matter of law, pay out pari-mutuel wagers based on a different order of

[4] This Court's decision in *White* was later overruled in part on other grounds. *See Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 217 n.4 (6th Cir. 1992). Before a 1991 Supreme Court opinion that held otherwise, the Sixth Circuit "gave some deference to the state law interpretations of district courts sitting in diversity," *id.*, and *White* cited that standard. The Sixth Circuit's discussion in *White* of the finality rule, and its conclusion that bettors consent to be bound by the state rules of racing and by the ruling of the stewards as to the order of finish, did not depend on any deference to the trial court decision that also squarely rejected the bettors' theories here.

finish, withhold payouts while the KHRC determines whether to disqualify any horses, or change payouts at a later time based on a subsequent disqualification.

After a race is declared official for the purposes of pari-mutuel wagers, owners, trainers, and jockeys can challenge race results, and their purses may be affected by a subsequent change. *E.g.*, 810 KAR 4:060 § 5 ("Dispute of a Race after Declared Official for Pari-mutuel Payoff"); *id.* § 6 ("Determination of a Disputed Race"); *id*. § 7 ("Revised Order of Finish After Race Declared Official for Pari-mutuel Payoff"); *id*. § 1(1)–(2). Bettors do not have the same rights. The regulations "specifically deny to bettors" like Plaintiffs "the standing to challenge the order of finish of a race." *White v. Turfway Park Racing Ass'n*, 718 F. Supp. 615, 620 (E.D. Ky. 1989).

The bettors' repeated contention that they need only establish "that they correctly made winning wagers based on the *new* official order of finish," (Appellants' Br. at 32 (emphasis in original)), and that they did in fact "place[] winning wagers based on the official order of finish for Derby 147," (*id.* at 10), is directly at odds with these governing regulations and with the entire concept of pari-mutuel wagering. They cannot claim that they placed winning wagers based on regulations that allow the KHRC to disqualify horses and re-distribute the purse money while ignoring that the same regulations specifically state that disqualifications and redistributions have no impact on pari-mutuel wagering.

As the district court correctly held, "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." (Dismissal Ord., R. 39, PageID# 503 (emphasis in original).) There is no dispute that Churchill Downs strictly followed the regulations when it paid out the pari-mutuel pools from the 2021 Kentucky Derby. Because the bettors do not hold winning wagers as a matter of law, and they rely "completely and solely" on the allegation that they do have winning wagers to pursue their entire case, (Appellants' Br., at 33), the bettors are not entitled to any payment from Churchill Downs and their claims were properly dismissed.

C. The bettors' claims all fail because they cannot recover outside of the rules that govern pari-mutuel wagering.

Whether they hold to their misguided notion that they have winning tickets post-disqualification or pivot back to one of their original theories that Churchill Downs should have determined a different payout or should have barred Medina Spirit, the bettors' claims fail because, as this Court and every other court to consider similar lawsuits have held, those who place wagers cannot recover anything beyond what the law permitting those wagers to be made in the first place allows. In *White*, the Sixth Circuit applied Kentucky law and rejected a disgruntled bettor's fraud and negligence claims against a racetrack based on an

alleged violation of a rule requiring racetracks to post workout times for the benefit of bettors. *See* 909 F.2d at 944. Just like the current KHRC regulations, the regulations in place at the time provided that "the stewards shall determine the placing of the horses in the official order of finish for purposes of pari-mutuel payoff," and "[a]ny subsequent change in the order of finish or award of purse money after the result of a race has been so declared official by the stewards shall in no way affect the pari-mutuel payoff." *Id.* at 944 (quoting former 810 KAR 6:030E § 10(2)). The court referred to this regulation as embodying the "finality rule." *Id.*

Based on the finality rule, this Court affirmed the decision refusing to allow claims premised on an order of finish that differed from the official race day results, explaining: "courts generally hold that when bettors place their bets they consent to be bound by the state rules of racing and by the ruling of stewards as to the order of finish." *Id.* (citing *Finlay v. E. Racing Ass'n*, 30 N.E.2d 859, 861 (Mass. 1941); *Salmore v. Empire City Racing Ass'n*, 123 N.Y.S.2d 688, 692 (N.Y. Sup. Ct. 1953)). That included the finality rule, which plainly stated that the "stewards' determination of the official winner [was] binding upon pari-mutuel bettors." *White*, 909 F.2d. at 945. The court rejected the argument that because there is a common law action for negligence in Kentucky, there must be a common law action to recover for gambling misfortune caused by negligence. *See id.*

(rejecting argument "that the plain language of the finality rule did not abrogate any existing cause of action"). As *White* concluded, this argument had never been accepted "in the entire history of modern Kentucky thoroughbred horse racing." *Id.* The court held that bettors cannot recover from a racetrack based on a re-ordering of the horses after the stewards declared the race official.[5] *Id.*

White is far from alone in its reasoning. For instance, in *Cramer v. New York State Racing Ass'n, Inc.* 136 A.D.2d 104, 105–06 (N.Y. App. Div. 1988), bettors sued because the defendants distributed pari-mutuel payouts in accordance with an "official" order of finish in a horse race when, "later that afternoon," the stewards admitted that they had declared the wrong horse to be the "official" winner. The court rejected the claim, in part because—as in Kentucky—"the Stewards [had] been granted the final word concerning the official outcome of a race insofar as the pari-mutuel payoff is concerned." *Id.* at 107. The "rule of finality" controlled and did not allow for common law claims. *Id.* at 108; *see also Gardner v. N.Y. State Racing Ass'n, Inc.*, 137 Misc.2d 645, 647–48 (N.Y. App. Div. 1988) (rejecting a different bettor's claim based on the same race, and

[5] Both the trial court and this Court rejected another argument that the bettors have made here: that they are "not seeking to redistribute the pari-mutuel payoff, but to use that payoff solely as a measure of damages for his economic loss caused by defendant's negligence." *White*, 718 F. Supp. at 620; *compare with* Appellants' Br. at 47 ("Appellants . . . do not seek a . . . redistribution of the pari-mutuel payout, but damages based on what would have been the pari-mutuel payouts.").

concluding that "[a]lthough we can readily sympathize with the plaintiff's situation, we do not think it unreasonable to require plaintiff to abide by the decision of the stewards").

There are sound public policy reasons for the finality rule: "if every losing bettor could challenge the eligibility of winning horses, the racetracks, owners, stewards, racing officials and [KHRC] would be subject to endless disputes and litigation. Additionally, pari-mutuel wagering, particularly pari-mutuel payoffs, would be impossible to administer." *White*, 718 F. Supp. at 620; *see also Cramer*, 136 A.D.2d at 108 (finality is "necessary to preserve the financial integrity of the pari-mutuel system"); *Vaccaro v. Joyce*, 154 Misc. 2d 643, 647 (N.Y. Sup. Ct. 1991) ("There must be one final and determinative call, no matter what a subsequent review may show."). Many patrons wager anonymously and in cash. Shortly after a race, the stewards declare the results "official," and those with winning tickets can exchange them for cash. If bettors could seek damages against racetracks based on later disqualifications, the system of pari-mutuel wagering would be "inoperable." *See Cramer*, 136 A.D.2d at 108. The racetracks effectively would become the insurers of pari-mutuel pools in each race and could not comply with their obligation to timely distribute winning wagers. *White*, 718 F. Supp. at 620. Without the finality rule, those who wagered on the 2021

Kentucky Derby still would be awaiting payouts, as Medina Spirit's ownership and trainer continue to appeal the disqualification.

Beyond the finality rule, *White*, *Cramer*, and *Gardner* fall in an unbroken line of cases declining to allow bettor suits to recover damages on lost wagers outside of the governing regulations. Disappointed bettors' civil claims fail because the regulations provide the only means by which bettors can wager on horse races and recover, and "[o]ne who gambles must do so in accordance with the rules of the game." *Hochhalter v. Dakota Race Mgmt.*, 524 N.W.2d 582, 583 (N.D. 1994) (citation omitted) (rejecting negligence and contract claims for bettor who claimed that racetrack issued the wrong ticket). "Gambling differs from other business transactions and ordinary remedies are not usually available to enforce gambling debts. Where there is a statute applicable to a gambling contract, recovery is enforceable only in accordance with its provisions." *Id.* at 584 (citations and quotations omitted); *see also, e.g.*, *Seder v. Arlington Park Race Track Corp.*, 481 N.E.2d 9, 11–12 (Ill. App. Ct. 1st Dist. 1985) (affirming dismissal of claims for alleged lost winnings where wagering on horse races was only permitted by statutes and regulations that denied recovery); *Register v. Oaklawn Jockey Club*, 821 S.W.2d 475, 476–78 (Ark. 1991) (holding that bettors cannot assert claims for alleged lost winnings because before the regulation of pari-mutuel wagering by the state's legislature, a winning wager was void); *id.* at

477 ("All other jurisdictions that have considered similar statutes and regulations have concluded that common law negligence claims such as the one now before us are barred."); *Valois v. Gulfstream Park Racing Ass'n*, 412 So. 2d 959, 960 (Fla. Dist. Ct. App. 1982) (affirming dismissal of claims based on wagers lost due to malfunctioning machines).

These rules apply in Kentucky today, and they bar the bettors' claims against Churchill Downs. The finality rules in place for the 2021 Kentucky Derby are materially identical to the rule in *White*, *compare* 810 KAR 6:030 § 10(2) *and* 810 KAR 4:040 § 17 *with White*, 909 F.2d at 944 (quoting finality regulation), and there still has never been a decision "in the entire history of modern Kentucky thoroughbred horse racing" allowing claims like the bettors' here. *White*, 909 F.2d at 945. Pari-mutuel wagers on horse races are not allowed at common law, *see Bollinger v. Commonwealth*, 35 S.W. 553, 553 (Ky. 1896), but are only permitted by statute and regulation, and those statutes and regulations only allow wagers under certain rules. *See* KRS 230.215(2) (KHRC has "plenary power to promulgate administrative regulations prescribing conditions under which *all* legitimate horse racing and wagering thereon is conducted in the Commonwealth"); 810 KAR 6:030 § 1(1)–(2) (the "only wagering permitted on . . . horse races shall be under the pari-mutuel system of wagering" conducted "in conformity with KRS Chapter 230 and KAR Title 810"). Bettors cannot

recover outside of the governing regulations that allowed them to wager in the first place. *White*, 909 F.2d at 944–45.

When they chose to wager on the Kentucky Derby, the bettors "consent[ed] to be bound by the state rules of racing and by the ruling of stewards as to the order of finish." *Id.* at 944. The bettors here do not even dispute that the governing Kentucky rules do not allow payouts to bettors based on a post-race disqualification. The district court should be affirmed on these grounds, too.

D. The bettors' claims fail because they are impermissibly speculative.

Even if the bettors had a general common law right of recovery that contradicted the laws governing wagering on horse racing, the bettors' claims would fail because they cannot establish causation or damages. "[R]emote, uncertain and speculative damages are not recoverable." *Schork v. Huber*, 648 S.W.2d 861, 863 (Ky. 1983); *see also Twombly*, 550 U.S. at 557–58 ("something beyond the mere possibility of loss causation must be alleged"). "A thing not susceptible of being proved cannot be made the basis for a recovery in a lawsuit." *Barley's Adm'x v. Clover Splint Coal Co.*, 150 S.W.2d 670, 671 (Ky. 1941) (affirming dismissal where allegations of damages in negligence claim, even though articulated in the complaint, "depend[] on numberless unknown contingencies, and can be nothing more than a matter of conjecture").

"There is no certainty in horse racing." *Class Racing Stable v. Breeders' Cup Ltd.*, No. 5:16-200, 2017 WL 562175, at *2–3 (E.D. Ky. Feb. 10, 2017) (rejecting a claim that if a horse had run, it would have finished in the top five because "[t]here is simply no evidence that could be presented to [the] Court or to a jury that would permit a finding that [the plaintiff's horse] or any other horse would have finished in the top five" in a hypothetical re-running of the race). As such, "[i]t is a well-settled general tort principle that interference with the *chance* of winning a contest, such as the horserace at issue here, usually presents a situation too uncertain upon which to base tort liability." *Youst v. Longo*, 43 Cal. 3d 64, 67 (1987); *see id.* at 83 ("Deprivation of the *chance* of winning a horserace or any sporting event does not present a basis for tort liability for interference with prospective economic advantage. . . . [T]he probability that plaintiff's horse would have won the race is simply too speculative a basis for tort liability.").

The foregoing reality may be why the bettors strive to convince the Court that they hold winning wagers based on a changed order of finish. The bettors' theory is that Churchill Downs never should have allowed Medina Spirit to run—either because of Baffert's reputation or because it should have used different drug testing policies than what the KHRC employs—and that they would have won wagers if Medina Spirit had not raced. (Compl., R. 1-1, PageID# 38–39, ¶¶ 160–61; Appellants' Br., at 20.) Without the false prop that the post-disqualification

order of finish renders their wagers winners, the bettors' case is incurably speculative: it supposes that if Medina Spirit had not run in the race, the other horses would have finished in the exact same order, and the pari-mutuel wagering pools would have been exactly the same.

This is conjecture upon conjecture: first as to the outcome of the race, and then on the question of damages. As to the race, if Churchill Downs had barred Medina Spirit from the 2021 Derby, a different race would have been run. There could have been different horses allowed in the race, and post positions would have differed. There could have been a different break from the gate. Without the horse that finished first, the pace would have been set by a different horse (and possibly multiple horses). Perhaps a horse stuck on the rail at an inopportune time would have found a lane. Maybe another horse would have been bumped or boxed in or pushed too wide on a turn. Trainers and jockeys might have employed different strategies. Indeed, it is difficult to imagine a more speculative exercise than picking the order of finish of a hypothetical re-running of the Kentucky Derby—with up to twenty horses running a mile-and-a-quarter—in the alternative world in which the horse that finished first did not run.

Beyond the myriad ways in which the running of the Derby would have differed, the second leap of speculation inherent in Plaintiffs' complaint concerns damages, *i.e.*, what the payout would have been in a hypothetical race without

Medina Spirit. The handicapping, wagering, and payouts would have been different. The opening odds would have differed. Different wagering decisions would have been made, changing the size of the pari-mutuel pools and thus the odds. The payouts in this hypothetical race would be purely speculative.

The district court properly concluded that the bettors could not plausibly allege damages or causation under a theory that Medina Spirit should never have run in the race. (Dismissal Ord., R. 39, PageID# 502–03 ("These damages are remote, uncertain, and speculative and, thus, not recoverable.") (cleaned up).) The bettors' theory that they would have cashed in on particular wagers if Churchill Downs had not allowed Medina Spirit to run in the Kentucky Derby—incorporated into all of their claims against Churchill Downs—is impermissibly speculative.

E. Every claim fails for additional reasons.

The governing regulations, the unanimous case law that limits bettors' recoveries to the racing commissions' rules, and the incurably speculative nature of the claims provide ample grounds to affirm the district court's dismissal of the complaint. There are additional and independent reasons to dismiss each of the claims asserted against Churchill Downs. The negligence claim fails because there is no amorphous, "universal duty of care," the bettors did not assert a negligence *per se* claim against Churchill Downs and did not identify any statute or regulation that could support one, and the business invitee rule does not apply. The breach of

contract claim was properly dismissed because the bettors cannot identify a contract that Churchill Downs breached. The KCPA does not apply here, and even if it did, the bettors have not alleged conduct that would constitute a violation of it. Unjust enrichment claims cannot be based on a wager and, in any event, Churchill Downs was not unjustly enriched under the bettors' own obligations.

1. The bettors' negligence theories against Churchill Downs fail.

a. Churchill Downs owed the bettors no cognizable duty of care.

The Kentucky Supreme Court has affirmatively disposed of the bettors' first argument that a "universal duty of care" can support their negligence claim. In *New Albany Main Street Properties, LLC v. Stratton*, 2022-SC-0254-DG, 2023 WL 5444324, at *4 (Ky. Aug. 24, 2023) (final and to be published), the court affirmed the dismissal of a negligence claim for lack of a duty.[6] In declining to apply the so-called "universal duty of care" in the way that the bettors seek here, the Court concluded that "such a duty 'is not boundless'" and does "not 'allow for new causes of action to arise that did not previously exist.'" *Id.* Consistent with other decisions declining to overstate prior holdings so as to effectively necessitate a jury trial for every negligence claim, the court held: "[T]he 'universal duty of care' has no meaning in Kentucky jurisprudence beyond the most general

[6] Particularly given this August 2023 decision, there is no need to "certify the question" of whether a universal duty of care applies here "to the Supreme Court of Kentucky," as the bettors suggest. (Appellants' Br., at 20 n.3.)

expression of negligence theory, and certainly none absent a relational context as evidenced by the circumstances of each case." *Id.* (quoting *Jenkins v. Best*, 250 S.W.3d 680, 691 (Ky. App. 2007)). The court therefore concluded that the duty element in Kentucky requires a "'legally cognizable relationship' between the parties." *Id.* at *5 (quoting *Jenkins*, 250 S.W.3d at 692).

The *Stratton* case defeats the bettors' efforts to use a "universal duty of care" to create a "new cause[] of action to arise that did not previously exist." *Id.* at *4. The bettors have not identified a single case from any jurisdiction in which a disappointed bettor was allowed to recover from a race track. There is no legal relationship between the bettors and Churchill Downs that could give rise to a legally cognizable duty owed to the bettors, and the bettors have identified none. As was true in *White*, there still has never been a decision in the history of Kentucky horse racing that allows for bettors to recover for alleged lost gambling winnings against a racetrack. No legal duty exists that would allow the bettors to recover gambling losses against Churchill Downs under a negligence theory.

b. Churchill Downs cannot be negligent *per se*.

In a new theory that they did not include in their complaint, the bettors now claim that Churchill Downs could be negligent *per se* under various racing statutes and regulations that say nothing about a racetrack's liability to the "wagering public" and that Churchill Downs did not even allegedly violate. As the bettors did

not allege negligence *per se* against Churchill Downs at any point below (doing so only against the Baffert Defendants in their proposed amended complaint), they cannot now argue a negligence *per se* claim. *See Bates v. Green Farms Condo. Ass'n*, 958 F.3d 470, 483 (6th Cir. 2020) ("Plaintiffs cannot . . . ask the court to consider new allegations (or evidence) not contained in the complaint.").

Even if the bettors had alleged negligence *per se*, dismissal would have been proper. None of the cited statutes or regulations impose a legal duty on Churchill Downs owed to the bettors, and there is no allegation that Churchill Downs violated any of the cited statutes or regulations. The bettors cite the KHRC's enabling statutes, (Appellants' Br. at 21–22 (citing KRS 230.215(1), (2), and KRS 230.260(8)); a statute subjecting all licensees to "all administrative regulations" of the KHRC, (*id.* at 22 (citing KRS 230.260(8)); a statute enabling the KHRC to deny, revoke, or suspend licenses or impose discipline "where it has reason to believe any provision of this chapter, administrative regulation, or condition of the racing commission affecting it has not been complied with," (*id.* at 22 (quoting KRS 230.320(1)); regulations outlining the KHRC's requirements for a racetrack to obtain a license, (*id.* at 25 (quoting 810 KAR 3:010 § 4(1)(c)-(e)); and some of the KHRC's drug regulations, (*id.* at 25–26 (quoting 810 KAR 8:010, 4:010, and 3:010)). The bettors do not, and cannot, allege that these statutes or regulations impose a duty of care that Churchill Downs possibly could have violated with

respect to the betting public. They also do not allege any plausible violation of these general statutes or regulations. Indeed, ironically, the bettors' entire theory of this case appears to be that Churchill Downs should not have followed the statutes and regulations that required it to distribute pari-mutuel pools according to the stewards' determination as to the "official" order of finish on race day.

c. The business invitee rule is inapplicable.

As for the bettors' argument that Churchill Downs owed them a legal duty to stop Medina Spirit from running and pay out their wagers because they were "business invitees," the bettors' own brief demonstrates that the "business invitee" rule does not apply: "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." (Appellants' Br. at 28 (quoting *Shelton v. Kentucky Easter Seals Soc., Inc.*, 413 S.W.3d 901, 909 (Ky. 2013) (emphasis added).) This is not a slip-and-fall case, and the complaint identifies no "dangerous condition," much less one "on the land" requiring a warning to the bettors, nor do they allege an injury resulting from some hidden danger on the property.

2. The bettors had no contract with Churchill Downs that would entitle them to the payment they seek.

The district court properly dismissed the breach of contract claim because pari-mutuel bettors have no contract with a racetrack. "Pari-mutuel betting differs from other types of betting in that the betting transaction is not between the bettor

and the racetrack, but between the bettor and all other bettors. The racing association is merely a stakeholder as regards pari-mutuel funds: collecting bets, deducting the tax, and distributing the pari-mutuel pools." *Discenza v. N.Y. City Racing Ass'n, Inc.*, 509 N.Y.S.2d 454, 455 (1986). Absent a contract between the racetrack and the bettor that allows for the recovery sought, breach of contract claims fail. *See id.*; *Bourgeois v. Fairground Corp.*, 480 So.2d 408, 409–10 (La. Ct. App. 1985) (dismissing bettor's contract claim).

As the district court held, even if the bettors had contracted with Churchill Downs, the terms of that agreement would include the regulations that specifically address the bettors' professed plight and deny them payment. (Dismissal Ord., R. 39, PageID# 505.) "When a person places a bet, he is presumed to know the rules, and his bet is subject to those rules. The rules are part of the bettor's contract." *DePasquale v. Ogden Suffolk Downs, Inc.*, 564 N.E.2d 584, 661 (Mass. App. 1990) (internal citations omitted); *see also Salmore*, 123 N.Y.S.2d at 692 ("If [they] wished to place a bet, [they were] presumed to know that as every sport has its rules, so equally every participant must abide by rules. If plaintiff[s] did not like the rules, [they were] at liberty to refrain from betting. If notwithstanding [their] dislike of the rules, [they] placed a bet, then obviously the wagering was subject to all the then existing rules and regulations prescribed by the State Racing Commission."). If pari-mutuel wagers were contracts, part of the bettors' bargain

is that they can only recover in accordance with the horse racing statutes and regulations—as any other recovery would violate Kentucky law.[7] 810 KAR 6:030 § 1(1)–(2). Because any contract would include the KHRC regulations that specifically reject the bettors' claim for payment based on a later re-ordering of the horses, and Churchill Downs indisputably complied with those regulations, the contract claim fails.

3. There is no "false, misleading, or deceptive" conduct by Churchill Downs, and the KCPA does not apply.

A KCPA claim requires bettors to show that: (1) they "purchase[d] or lease[d] goods or services primarily for personal, family or household purposes"; (2) "as a result of" an "unfair, false, misleading, or deceptive act[] or practice[] in the conduct of any trade or commerce"; and (3) suffered an "ascertainable loss of money or property" as a result. KRS 367.220(1); KRS 367.170(1); *Collins v. Ky. Lottery Corp.*, 399 S.W.3d 449, 452 (Ky. App. 2012). The bettors cannot satisfy any of these elements, and the district court properly dismissed this claim. (Dismissal Ord., R. 39, PageID# 508.)

The bettors first cannot allege the "purchase" or "lease" of "goods or services." The Kentucky Court of Appeals has held that a wager is not a good or

[7] *See also Hochhalter*, 524 N.W.2d at 583 ("Where there is a statute applicable to a gambling contract, recovery is enforceable only in accordance with its provisions.").

service in the context of the lottery. *See Collins*, 399 S.W.3d at 452–53. Like an individual who plays the lottery, a bettor who places a pari-mutuel wager on a horse race is not purchasing a "good," as a "chance to win money is intangible and cannot be physically moved at the time that it is purchased." *Id.* at 453. Nor is he purchasing a "service" because "the purchase of a lottery ticket does not create any ongoing contractual relationship." *Id.* A pari-mutuel wager, like a lottery ticket, merely represents "a chance to win an unknown amount of money." *Id.* at 452–53. Without a "good" or "service," the KCPA does not apply. *Id.* at 453.

Nor do the bettors plausibly allege that Churchill Downs engaged in any "unfair, false, misleading, deceptive and/or unconscionable" conduct. In fact, the bettors' chief grievance is that Churchill Downs followed the governing law in handling payouts. The complaint does not allege that Churchill Downs allowed Medina Spirit to run despite some sort of insider information about failed drug tests. To the contrary, the bettors—allegedly sophisticated "horseplayers"—specifically rely on news articles and "public records from various horse racing commissions." (Compl., R. 1-1, PageID# 10–11, ¶¶ 26–27.) As the district court aptly held, there is no law that supports the bettors' contention that Churchill Downs was required to reject the entry of Medina Spirit because of public information regarding the past medication violations of its trainer. (Dismissal Ord., R. 39, PageID# 508.)

The KCPA claim also fails because the bettors do not allege that they placed wagers based on any representations by Churchill Downs. (*Id.*) KCPA claims require reliance on defendant's representations, which the bettors failed to plead in their complaint, much less with the requisite specificity under Rule 9(b). (*See id.* at PageID# 508–09 (citing *Kempf v. Lumber Liquidators, Inc.*, No. 3:16-CV-492, 2017 WL 4288903, at *5 (W.D. Ky. Sept. 27, 2017) and *Naiser v. Unilever U.S., Inc.*, 730 F. Supp. 2d 683, 741–44 (W.D. Ky. 2010) (applying Rule 9(b)'s heightened pleading standard to a KCPA claim); *see also* Compl., R. 1-1, PageID# 40–42, ¶¶ 170–82) (failing to identify any representations by Churchill Downs on which bettors relied).)

4. The unjust enrichment claim fails because the bettors cannot show that Churchill Downs inequitably retained a benefit.

"There are three elements that a party must meet in order to prevail on a claim of unjust enrichment: (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." *Collins*, 399 S.W.3d at 455 (affirming summary judgment as to unjust enrichment claims asserted by purchasers of lottery tickets). The bettors base this claim on their belief that Churchill Downs erred in allowing Medina Spirit to run in the race, and that their "unsettled wagers . . . should have been calculated and paid based on the new official order of finish." (Appellants' Br. at 47.)

Kentucky law does not allow unjust enrichment claims based on wagers. *Collins*, 399 S.W.3d at 455. Bettors "chose to purchase the tickets with the understanding that they might not receive any benefit, essentially risking that they would throw away" the full amount of their wager. *Collins*, S.W.3d at 455. That the wager did not actually pay out because of the governing regulations is a risk that they accepted.

The claim also fails because, as the district court properly held, the bettors do not and cannot plausibly allege that Churchill Downs inequitably retained a benefit. (Dismissal Ord., R. 39, PageID# 510–11.) In pari-mutuel wagering, Churchill Downs receives the same portion of total wagers *regardless of who wins the race*. *See* 810 KAR 6:030 § 10(3) ("Each association shall deduct from each pari-mutuel pool a commission. . . . The remainder of the pari-mutuel pool after the deduction of the commission shall be the net pool for distribution as payouts to ticket holders."); 810 KAR 6:001 § 1(83) (defining "takeout"); (Compl., R. 1-1, PageID# 26, ¶ 85 ("The racetrack association collects a percentage of each pool as its fee for booking the bet, known as the takeout.").) Its commission cannot vary based on which horse wins the race. *See* 810 KAR 6:030 § 10(3); KRS 230.3615; KRS 230.750. "Thus, regardless of who finished first in the stewards' official order of finish for the Kentucky Derby, Churchill Downs would have retained the same commission percentage. . . . And Plaintiffs' complaint is devoid of any

allegation that Churchill Downs deducted a commission that exceeded the statutory limits." (Dismissal Ord., R. 39, PageID# 511.)

F. The district court properly denied leave to amend.

The district court also properly denied the bettors' motion for leave to assert claims against Churchill Downs on behalf of Nevada bettors who wagered in Nevada sports books (and not in the pari-mutuel pools) as futile.[8] (Ord. Denying Leave to Am., R. 29, PageID# 387.) The bettors' proposed amendment would not have altered any of the grounds for dismissal relied upon by the trial court or discussed above. (Appellants' Br. at 56–57 ("Nevada Appellants made some of the same claims . . . as the other Appellants, including Kentucky common law causes of action . . . .").) The Nevada plaintiffs' claims failed under the Rule 12(b)(6) standard for these reasons and more.

1. Nevada statutes and regulations bar all claims arising out of wagers placed in Nevada casinos.

Nevada bettors "cannot maintain a civil action to recover" alleged lost winnings "but instead are limited to an administrative proceeding"—against the licensed facility in Nevada—"followed by judicial review." *Erickson v. Desert Palace, Inc.*, 942 F.2d 694, 696 (9th Cir. 1991) (affirming motion to dismiss claim for an unpaid jackpot because plaintiff filing suit to collect gambling winnings is

[8] This was the only aspect of the proposed amended complaint applicable to Churchill Downs.

limited to an administrative proceeding under NRS 463.461). The Nevada bettors do not claim to have followed this administrative process to collect on their Nevada wagers, and so their claims here are barred.

Furthermore, the Nevada regulations that purported to permit the bettors to wager with Nevada sports books provided that the sports books—not Churchill Downs—were responsible for identifying winners on the wagers that they booked based on the live telecast. Nev. Gam. Reg. 22.060(4) (allowing Nevada-licensed sports pools to accept wagers on events that are televised live at a sports book and monitored by a book employee); Nev. Gam. Reg. 22.080(1) ("[B]ooks shall make payment on a winning wager to the person who presents the patron's copy of the betting ticket representing the wager."); (Am. Compl., R. 15-1, PageID# 181, ¶ 153.) Those were the rules of the game that the Nevada Plaintiffs chose to play, and, like Kentucky bettors, they cannot recover in a civil suit outside of them—particularly against a third party that was not even responsible for accepting their wagers, paying out wagers, or deciding who won.

2. Nevada Plaintiffs did not transact with or have any legal relationship with Churchill Downs.

The Nevada bettors also cannot state claims against Churchill Downs based on wagers that they lost at a Nevada casino because Churchill Downs did not owe these bettors a duty, and there was no privity between these bettors and Churchill Downs that could support a breach of contract, KCPA, or unjust enrichment claim.

A negligence claim based on Nevada casino wagers fails because Churchill Downs did not owe Nevada bettors who wagered with a Nevada sports book a legal duty or proximately cause them any harm. *See Olson v. Major League Baseball*, 447 F. Supp. 3d 159, 170 (S.D.N.Y. 2020), aff'd, *Olson v. Major League Baseball*, 29 F.4th 59 (2d Cir. 2022) (dismissing daily fantasy sports gamblers' claims that sports leagues and teams "negligently failed to take more action to prevent player misconduct" for lack of duty "absent any transaction or other relationship" between the parties). The Nevada bettors disclaim any transaction or other relationship with Churchill Downs. (*See* Am. Compl., R. 15-1, PageID# 182, ¶¶ 155–60.) And in fact, public records demonstrate that Churchill Downs opposed the Nevada sports books taking wagers on the 2021 Derby.[9] Those who wagered at Nevada sports books that Churchill Downs did not approve and that did not participate in the pari-mutuel pools cannot state a negligence claim against Churchill Downs.

The Nevada bettors also cannot maintain claims for breach of contract and unjust enrichment against Churchill Downs because Churchill Downs did not contract with or retain a benefit from those who wagered at a Nevada sports book.

[9] *See* Lt. from B. Blackwell to the Nev. Gaming Comm'n, Mtg. Materials from the April 22, 2021 Mtg. of the Nev. Gaming Comm'n, at 40 *available at* https://gaming.nv.gov/modules/showdocument.aspx?documentid=17645 (last visited Nov. 13, 2023) (R. 18-1, PageID# 310.)

See Presnell Constr. Mgrs., Inc. v. EH Constr., LLC, 134 S.W.3d 575, 579 (Ky. 2004) (no contract claim absent privity); *Collins*, 399 S.W.3d at 455 (Ky. App. 2012) (unjust enrichment requires retention of benefit at plaintiff's expense); *cf. Oliver v. Houston Astros, LLC*, No. 2:20-cv-APG-VCF, 2020 WL 1430382, at *4 (D. Nev. Mar. 23, 2020) (dismissing unjust enrichment claim asserted by sports gambler against baseball teams).

Like the other claims, the Nevada plaintiffs have even more problems under the KCPA than those who wagered in Kentucky. The Nevada bettors did not purchase or lease goods or services *from Churchill Downs* and, therefore, cannot establish the required privity. *See Williams v. Chase Bank USA, N.A.*, 390 S.W.3d 824, 829 (Ky. App. 2012) ("[A]n individual must be a purchaser with privity of contract in order to have standing to bring an action under the [KCPA]."); *Skilcraft Sheetmetal, Inc. v. Ky. Mach., Inc.*, 836 S.W.2d 907, 909–10 (Ky. App. 1992) (same); *see also Olson*, 29 F.4th at 83–85 (affirming dismissal of consumer protection act claims asserted under five states' statutes by sports gamblers against Major League Baseball and two teams).

The district court properly denied leave to amend the complaint because every claim asserted against Churchill Downs fails as a matter of law for all the reasons already set forth above, and for additional reasons that render futile the proposed Nevada allegations.

CONCLUSION

The bettors' dissatisfaction with the rules of the game they chose to play cannot support a cause of action. The district court properly denied the bettors' motion for leave to amend their complaint and properly dismissed their claims. This Court should affirm those decisions.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,016 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 it has been prepared using a proportionately-spaced typeface in Microsoft Word in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2023, I electronically filed the foregoing brief through the CM/ECF system.

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