COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2024-CA-___

ZEDAN RACING STABLES, INC., *Appellant/ Movant*

V. On Appeal from Jefferson Circuit Court, No. 24-CI-002331

CHURCHILL DOWNS INCORPORATED. *Appellees/ Respondents*

APPELLANT'S RAP 20(B) MOTION FOR RELIEF

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INTRODUCTION

The 150th Kentucky Derby will be held May 4, 2024, and Plaintiff-Appellant Zedan Racing Stables, Inc.'s (Zedan) world-class thoroughbred, Muth, is right at the top of the list of horses that have qualified to race there. One thing stands in Muth's way: a bizarre ban that Defendant-Appellee Churchill Downs Incorporated (CDI) has unlawfully extended to exclude all horses (including Muth) trained by the legendary Bob Baffert, who is tied for the most Derby wins of all time. That extended Baffert ban is the subject of Zedan's urgent plea for a temporary injunction, which must be decided at least in part before all horses are due to be stabled at Churchill Downs Racetrack on Saturday, April 27, 2024, at 11 am Eastern, lest this pivotal dispute—freighted with larger public importance—become moot.

Baffert's ban began in 2021. After that year's Derby, CDI suspended Baffert from training horses that compete in the Derby for two years based on an alleged doping-rule violation (involving trace amounts of a non-performance-enhancing substance that had been used to treat a horse's skin lesion). With that suspension, CDI promised—and later confirmed its promise over and over in federal court—that Baffert-trained horses would be allowed to compete again beginning in the upcoming 2024 Derby so long as Baffert committed no "additional violations in any racing jurisdiction." Since then, Baffert undisputedly has steered clear of any such violation over the course of hundreds of ensuing races. And in reliance on CDI's promise, Zedan spent over $15 million dollars to purchase and have Baffert train horses for this year's Derby.

Now, even though Muth has qualified for and is among the favorites to win the Derby, CDI continues to close its gates to Muth (among other Baffert-trained and qualified horses) by enforcing an arbitrary and vindictive extension of its Baffert ban. That ban is at

the center of this dispute, and it is has been nakedly exposed as the twisted product of a petty, personal vendetta against an all-time-great horse trainer. No one should misperceive that the ban protects integrity, or safety, or fairness, or anything of the sort. To the contrary, CDI has announced to the world that its ban reflects CDI's "subjective" opinion about the public "narrative" it hears from Baffert and finds displeasing. Of course, racetracks should not be disqualifying would-be winners and skewing the results for the sake of censoring trainers and ensuring public "narratives" align with its self-serving spin. CDI's approach violates its own avowed principles, basic fairness, and, most importantly, governing law.

Without purporting to find any substantive justification for CDI's ban, the Jefferson Circuit Court (Division Three, Judge Perry presiding) denied Zedan's request for temporary injunctive relief. After rejecting several of CDI's defenses and determining that a dispute over standing did not prevent it from resolving Zedan's request, the lower court questioned the irreparable harm threatening Zedan. In particular, the court suggested that Zedan could have avoided its injuries by transferring its horses to a different trainer back in January—months before this year's Derby. But such harsh medicine would have rivaled the disease that this lawsuit seeks to cure. Trainers are not fungible and no one can substitute for the legendary Bob Baffert; Zedan's horses have been seriously hampered when they have had to transfer away from Baffert in prior years. Switching trainers mid-stream, in response to CDI's surprising, unwarranted extension of its ban, would have mooted this case while denying Zedan and Muth their rightful chance to contend for this year's Derby according to the undisputed record proof.

The Jefferson Circuit Court next reasoned that the balance of equities and the interests of the public weighed in favor of denying the injunction request because (1)

"Churchill Downs, as the host of one of the most preeminent sporting events in the world, has a duty to ensure that the rules and regulations put in place to guarantee an even playing field," (2) "[p]ublic trust and confidence in the integrity of the races run at Churchill Downs are essential to its business" and to "all those who attend or watch races at Churchill Downs," and (3) there are "third parties who will have their horses removed from the Derby field to make room for the Plaintiff's horse should the Court grant injunctive relief." Op. 7. . Zedan embraces those same premises. And Zedan is respectfully seeking relief because those vital considerations *favor granting* an injunction.

As things presently stand, fans and bettors are losing the chance to see the best, fastest thoroughbreds compete at the Derby. The 150th Kentucky Derby is relegating the winning horse to having an asterisk next to its name, at the expense of all the contending owners. Subsequent Derbies may be rendered largely irrelevant as industry leaders transition elsewhere. The Commonwealth of Kentucky and its citizens are seeing tax revenue, jobs, tourism, and external investment put at risk, alongside their venerable institution. And CDI and its shareholders are seeing its most valuable asset sacrificed to no good end.

Last, the Jefferson Circuit Court raised questions about certain aspects of Zedan's claims. But those questions are readily and resoundingly answered by the current evidentiary record, which well establishes substantial grounds for Zedan to prevail. The lower court first indicated that Zedan's promissory estoppel claim was unlikely to succeed because CDI's June 2021 statement "indicate[d] a more 'wait and see' approach to Mr. Baffert's suspension" and the "barebones" record did not make clear that CDI should have expected others to rely on that statement. Op. 8. But while the record cannot yet be as

developed as it will be post-discovery, it is hard to imagine how a record could be much stronger in the current preliminary posture—CDI issued a public statement with the guidance from its sophisticated top executives stating that absent "additional violations," Baffert's extension would be for just two years, such that competitors could safely employ Baffert in the years-long training process leading up to the 2024 Derby. That is no wait-and-see approach, but a green light for Derby hopefuls such as Zedan to enlist Baffert's help in campaigning towards this year's Derby, absent another violation, which never occurred.

In assessing Zedan's judicial-estoppel claim, the Jefferson Circuit Court determined that CDI's statements in a prior federal case that Baffert's ban was for just two years did "not rise to the level typically required for a finding of judicial estoppel." Op. 9. But judicial estoppel does not apply only to statements that reach a certain "level." It applies whenever a party receives an unfair benefit by espousing a position that is inconsistent with its successful submission. Here, there should be no question that the doctrine bars CDI now from contradicting its earlier statements—as understood by the court that relied on them—that "CDI's suspension [wa]s temporary and w[ould] expire in just a few months" during 2023. Ex. 17, *Baffert v. CDI*, No. 3:22-cv-123-RGJ (W.D. Ky.), Dkt. 70 at 29.

Finally, as to the controlling federal statute administered by HISA, establishing uniformity of regulation across racetracks, the Jefferson Circuit Court was "unpersuaded at this point that preemption extends as far as the Plaintiff suggests," such that there could be "a conflict between federal law and the actions or rights of a private entity." Op. 9. On that theory, every private race track remains free to do whatever it pleases, whereupon the

whole purpose of HISA—achieving uniformity of regulation securing the safety, integrity, and fairness of horse racing throughout the United States— would be eviscerated. Thankfully, it is well settled that federal law preempts private actors' state-law rights, per the Supremacy Clause.

Because Zedan's horse will be excluded from the Derby on May 4 absent the requested relief, Zedan respectfully submits that a temporary injunction should issue posthaste. At a minimum, a partial injunction should issue enabling Muth to be stabled under Derby rules at Churchill Downs Racetrack by 11:00 a.m. Eastern on Saturday, April 27, 2024. Such an approach will properly protect the rights and interests that hang in the balance and enable the upcoming Derby to proceed as it should, with all qualified horses racing and the very best horse winning.

STATEMENT OF THE CASE

I. Factual Background

A. The Zedan-Baffert Team

Plaintiff Zedan is a thoroughbred horse racing venture based in Lexington. VC ¶ 52. After its founding in 2016, Zedan initially struggled to succeed. It won no significant races in its first four years and racked up over $6.5 million in losses. *Id.* ¶ 53. The failures were so disheartening that Zedan's founder, Amr Zedan, came close to closing up shop and exiting the sport to which he had dedicated decades of his life. *Id.* But that all changed because of a February 2020 chance run-in with legendary horse trainer Bob Baffert. *Id.*

Few would deny that Baffert is among the greatest trainers of all time, and certainly in modern history. *Id.* ¶ 55. He is one of only two trainers in history to twice win the "Triple Crown"—the ultimate horse racing triumvirate consisting of the Kentucky Derby, the Preakness Stakes, and the Belmont Stakes. *Id.* ¶¶ 55-56. He also boasts an incredible 23%

win rate across all of his races, is tied for the most Derby wins of all time (six), has the most wins in the Preakness, and has the most wins (17) of any trainer in the three Triple Crown races. *Id.*

Since that February 2020 meeting, the Zedan-Baffert tandem has become a powerhouse. *Id.* ¶ 57. The duo won their first Graded Stakes[1] races in 2020, and months later, Zedan "caught lightning in a bottle" when the Baffert-trained Medina Spirit won the 2021 Derby. *Id.* In orchestrating this remarkable turnaround, Baffert proved himself indispensable to Zedan's past, current, and future success. *Id.* ¶ 59.

B. CDI's Sabotage

Unfortunately, Defendant CDI and its CEO Carstanjen have made it their mission to sabotage this successful venture. CDI is a publicly traded company that owns the Churchill Downs Racetrack, "an internationally known thoroughbred racing operation," and hosts the Kentucky Derby—the highest attended horse race in the nation and "Most Exciting Two Minutes in Sports," boasting a record $5 million purse this year. VC ¶¶ 29, 43, 47; Ex. 3, Excerpts of CDI's 2023 Annual Report (10-K) at 4.[2] The Derby's storied history and stature are inextricably intertwined with its status as the first leg of the ultimate horse racing triumvirate, the "Triple Crown." *Id.* ¶ 33. To win the Triple Crown, a three-year-old horse must win all three jewels, *i.e.*, the Derby, the Preakness Stakes, and the

[1] Races are given "Grades" by the American Graded Stakes Committee (the "Stakes Committee"), "[t]he purpose of [which] is to provide owners and breeders of Thoroughbred horses a reliable guide to the relative quality of Thoroughbred bloodstock by identifying those U.S. races whose recent renewals have consistently attracted the highest quality competition." *Id.* ¶ 34. The Stakes Committee "meets annually to evaluate and affirm the relative quality of these races, and issues its collective opinion in the form of ranked Grades: Grade I, Grade II, Grade III, and Listed, with Grade I being the highest." *Id.*

[2] Exhibit citations are to the exhibits to the Verified Complaint and reproduced in the attached Appendix.

Belmont Stakes. *Id*. As such, inability to compete at the Derby disqualifies a horse from contending for horse-racing's most coveted prize—the Triple Crown.

1. *CDI Suspends Baffert For Two Years*

CDI's vendetta against Zedan began in May, 2021, when Medina Spirit won the 147th Derby. Pursuant to Kentucky Horse Racing Commission (KHRC) regulations, Medina Spirit had post-race blood and urine samples collected for testing and tested positive for a non-performance-enhancing substance called betamethasone, which is an accepted topical treatment. *See* 810 KAR 8:060; VC ¶ 60. Betamethasone was generally legal as a medicinal treatment under then-applicable KHRC regulations. 810 KAR 8:020 Section 1(4); VC ¶ 61; Ex. 9, New York Racing Association June 23, 2022 Panel Decision at 12-13 ("[T]he drugs for which use Baffert was cited ... are allowed and commonly used."). And Baffert issued a statement shortly after the positive test explaining that a skin lesion on Medina Spirit had been treated once a day leading up to the Derby with a topical antifungal ointment that contained betamethasone. VC ¶ 61. Regardless, CDI and KHRC maintained that, under then-applicable KHRC regulations, betamethasone could not be in a horse's bloodstream on race day. VC ¶ 62.

The next month, in June 2021, CDI issued an official statement announcing that it was suspending Baffert for two years, which vastly exceeded the 90-day ban imposed by three other jurisdictions as well as the one-year ban imposed by one other. *Id.* ¶¶ 75-80; Ex. 1, CDI's June 2, 2021 Official Statement at 2. The statement included the sentiments of Carstanjen that because of Baffert's alleged "record of testing failures … we firmly believe that asserting our rights to impose these measures is our duty and responsibility." *Id.* And CDI went on to state that "CDI reserves the right to extend Baffert's suspension if there are additional violations in any racing jurisdiction." *Id.*

The statement was carefully crafted and vetted by the highest levels of CDI's management. *Id*. ¶ 68. As CDI's President, Mike Anderson, explained: CDI had met with a core team consisting of CDI's "general manager, … PR person, … communications professional, … CEO, Mr. Bill Carstanjen" and its "general counsel." Ex. 11, Excerpts of M. Anderson Hearing Testimony at 92. And that illustrious group "decided to settle on two years 'cause [it] felt like it was a reasonable consequence to deter people from some actions in the future but not to prevent Mr. Baffert from continuing his business after that — that two-year span and not to be a part of the future of horse racing." *Id.* at 102.

It was with great deliberation, then, that CDI's statement enumerated one and only one circumstance in which CDI could extend the suspension: "if there are additional violations in any racing jurisdiction." Ex. 1, at 2. Indeed, the preceding sentence of the statement consists of a direct quote from Carstanjen—an Ivy League law school graduate, former attorney at a top New York City (and U.S.) law firm, and CDI's former General Counsel, VC ¶ 69—that, "we firmly believe that ***asserting our rights*** to impose these measures is our duty and responsibility." Ex. 1, at 2 (emphasis added). CDI therefore specifically invoked whatever legal rights it had to suspend Baffert and then knowingly and intentionally declared to all of the world—in an official statement on CDI letterhead with extensive quotes from its top-executive and under a bright spotlight—that CDI's

suspension of Baffert (however ill-advised and incommensurate with the offense) would be limited to two years unless there were "additional violations in any racing jurisdiction."[3]

In the years subsequent to that announcement, CDI repeatedly confirmed—including in filings before the United States District Court for the Western District of Kentucky—that the suspension was for only two years absent additional violations. *E.g.*, Ex. 31, CDI's May 2, 2022 Motion to Dismiss in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 36, at 1 ("Churchill Downs Incorporated ('CDI'), a private company that hosts the Derby, exercised its right to suspend the horse's trainer, Bob Baffert, from participating in races at its racetracks ***for two years***." (emphasis added)); Ex. 24, CDI's January 17, 2023 Response to Baffert's Renewed Motion for Preliminary Injunction in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 50, at 7 (citing Anderson Decl. ¶¶ 99-107) ("On June 2, 2021, after Baffert's attorney admitted the presence of betamethasone in Medina Spirit's blood—and a second test confirmed it—*CDI announced that Baffert's suspension* ***would last two years***.") (emphasis added)); VC ¶ 70, May 2022 interview with Mike Tirico of

[3] Since that suspension, CDI and Carstanjen have devoted inordinate resources to creating rules that target Baffert alone. For example, before the Baffert ban, a horse trained by a CDI-suspended trainer could be transferred to a non-suspended trainer just before the Derby and then transferred back to the suspended trainer after the Derby. VC ¶ 65. But a few months after suspending Baffert, CDI instituted a new rule providing that "points from any race in the 'Road to the Kentucky Derby'"—a series of qualifying races leading up to the Derby—"will not be awarded to any horse trained by any individual who is suspended from racing in the 2022 Kentucky Derby." *Id.* ¶ 66. So for the 2022 Derby, owners had to transfer their horses from Baffert to another trainer weeks before those races so that the horses could earn qualifying points. *Id.* ¶ 67. For the 2023 Derby, CDI instituted another new rule that required owners to transfer their horses by February 28, 2023, to be eligible for the Derby months later in May. Ex. 13, 2023 Nomination Form at 3. And in 2024, CDI set a deadline of January 29, 2024, to transfer horses from a suspended trainer to a non-suspended trainer for a horse to be eligible for that Derby. Ex. 15, The Triple Crown Terms and Conditions (Jan. 29, 2024) at 4; Ex. 16, CDI's 2024 Spring Meet Condition Book at 34. These novel rules—which targeted Baffert—materially harmed owners that partnered with him because transferring horses significantly decreases performance.

NBC Sports, ("[L]et's say there aren't [further drug violations] and [Baffert] completes his two-year suspension, well, then he's completed his suspension and then absent further facts, he should be free to race again here, if he chooses.").[4]

Moreover, in ruling against Baffert, the relevant court relied on CDI's representations that the Baffert ban was for just two years, specifically to find the ban would not cause irreparable harm. *E.g.*, Ex. 17, *Baffert v. CDI*, No. 3:22-cv-123-RGJ (W.D. Ky.), Dkt. 70, at 29 (finding that the plaintiffs would not suffer irreparable harm absent an injunction in part because "CDI's suspension is temporary and will expire in just a few months" and also because there was "no indication that owners would not continue to use Plaintiffs' services after the 2023 Kentucky Derby even if the Court did not enjoin CDI's ban"); *id*. at 29-30 ("[a]lthough horses are only eligible for the Kentucky Derby once, Baffert may enter horses again after CDI's suspension ends" such that the plaintiffs "have not demonstrated irreparable harm by losing their ability to compete in the 2023 Kentucky Derby"); *id*. at 32, n.6 (finding that CDI's suspension of Baffert did not constitute action by the Commonwealth of Kentucky in part because "CDI suspended Baffert for two years" but the KHRC suspended him for 90 days).

2. *Zedan Relies On CDI's Promise Of A Two-Year Suspension*

Since CDI's June 2021 announcement of a two-year suspension, Baffert has not violated applicable rules and regulations in any racing jurisdiction. VC ¶ 72. To the

[4] On February 28, 2022, Baffert and Bob Baffert Racing Stables, Inc., sued CDI, its CEO Carstanjen, and its Chairman, Alex Rankin, for suspending Baffert. *See generally Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 1. Zedan was never a party to that lawsuit, which was dismissed on May 24, 2023. *See Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 87.

contrary, since CDI's Baffert ban began, ***669*** Baffert-trained horses have raced without a violation; 55 of those were Zedan horses. *Id*. ¶ 128.

With that in mind, Zedan set its sights on using Baffert-trained horses and recapturing success in the upcoming 2024 Derby, the first after CDI's two-year Baffert ban was to expire. *Id*. ¶ 97. Specifically, Zedan purchased and assigned to Baffert for training seven horses that would be age-eligible for the 2024 Derby, *id*. ¶ 98:

Horse Name	Date Purchased	Cost at Auction ($)	Purchase Commission ($)	Total Cost ($)	Purchased From
Dua	7/20/2022	400,000.00	20,000.00	420,000.00	Fasig Tipton July Yearling Sale
Nafisa	8/16/2022	1,800,000.00	45,000.00	1,845,000.00	Fasig Tipton Saratoga Yearling Sale
Coach Prime	9/30/2022	1,700,000.00	42,500.00	1,742,500.00	Keeneland September Yearling Sale
Muth	4/2/2023	2,000,000.00	50,000.00	2,050,000.00	OBS March two-year Old Sale
Taif	5/8/2023	1,450,000.00	36,250.00	1,486,250.00	OBS April two-year Old Sale
Maymun	5/8/2023	900,000.00	22,500.00	922,500.00	OBS April two-year Old Sale
Coolmus	5/8/2023	2,200,000.00	55,000.00	2,255,000.00	OBS April two-year Old Sale
Total		10,450,000.00	271,250.00	10,721,250.00	

Id. Beyond the $10 million plus purchase price of those horses, Zedan spent an additional $4-million-plus before July 3, 2024, preparing them for the 2024 Derby. *Id*. ¶ 99. And Zedan would not have done any of this had it not reasonably believed, based on CDI's statements, that the world-renowned Baffert would be at the helm on race day, especially

considering the disappointing results Zedan had experienced in the Baffert-less 2022 and 2023 Derbies. *Id*.[5] Put simply, the Derby presents a unique challenge in which the competing horses must be stabled at Churchill Downs and interact with droves of media outlets for a week before racing in front of 150,000 patrons alongside nineteen other horses. *Id.* ¶ 103. Zedan knew that Baffert was uniquely positioned to guide its horses through this challenging environment after preparing its horses in the critical preceding months. *Id*.

3. *CDI Arbitrarily Extends The Baffert Ban*

Zedan's plans were dashed on July 3, 2023, when, without any prior notice or warning, CDI announced that Baffert's suspension was extended through 2024 and that "[a]fter such time, [it] w[ould] re-evaluate his status." CDI's stated basis for the extension was not that Baffert had committed some additional rule violation, but merely that he had declined to bend the knee to CDI. In CDI's words, Baffert "continue[d] to peddle a false narrative concerning the failed drug test of Medina Spirit," such that he purportedly showed a "continued disregard for the rules and regulations that ensure horse and jockey safety, as well as the integrity and fairness of the races conducted at [CDI's] facilities." Ex. 2, Doric Sam, *Bob Baffert's Churchill Downs Suspension Extended Through 2024*; *Safety Concerns*

[5] For the 2022 Derby, Zedan transferred its top horse from Baffert to another trainer so that it would be eligible for the Derby. *Id*. ¶ 105. That horse, Taiba, was a top prospect to win the Derby, but it underperformed, placing twelfth. *Id*. As a three-year-old, the only race in which Taiba placed outside of the top three was the 2022 Derby. *Id*. For the 2023 Derby, Zedan again transferred its top horse from Baffert. *Id*. ¶ 108. For 2023, as set forth above, CDI instituted a transfer deadline of February 28, 2023. *See supra* Part D. This earlier deadline had a major effect as no Baffert-trained horse (whether a Zedan horse or otherwise) even qualified for the Derby, *id*. ¶ 107, despite the fact that Zedan's Arabian Knight was as of March 1, 2023, the "current favorite to win the Derby at 5-1 odds, according to Caesar's Sportsbook." *Id*. ¶ 108.

Cited, Bleacher Report at 3 (Jul. 3, 2023), https://bleacherreport.com/articles/10081574-bob-bafferts-churchill-downs-suspension-extended-through-2024-safety-concerns-cited.

Of course, that complained-of "narrative" had nothing in fact to do with horse safety or integrity. Rather, CDI lashed out as it did because Baffert has not surrendered to CDI's preferred narrative and confessed to what CDI wants to paint as Baffert's past crimes. VC ¶ 132 (Baffert stating in an interview "I probably wouldn't have done anything different because everything we were doing was legal … . We didn't break any rules cause the rule was a 14-day corticosteroid injection (withdrawal period) and he wasn't injected."). For CDI, it is not enough that Baffert served out the ban and steered clear of subsequent violations; CDI wants to see him publicly admit that Medina Spirit's positive test violated then-applicable regulations and warranted the extreme punishment that CDI alone deemed warranted. Ex. 28, Eric Crawford (@EricCrawford), *Churchill Downs CEO Bill Carstanjen.…*, X (Jan. 12, 2022) (stating Baffert would be "held accountable for the damage he has caused our company and brought to the sport at large," and "I continue to hold out hope that Mr. Baffert will finally take responsibility for his actions.").

CDI thus pettily, capriciously, and cruelly deprived Zedan of the ability to reap a benefit from the $15 million Zedan sunk into the seven Baffert-trained horses it hoped would qualify for the 2024 Derby. VC ¶¶ 98-99. Amr Zedan reached out to Carstanjen in December 2023 and January 2024 to try to amicably rectify this harm and avoid burdening the courts with claims that at the time had not ripened and would be subject to a challenge for lack of standing (which is *still* being challenged, even *after* Zedan's horse has undisputedly qualified for the Derby but for the ban at issue). VC ¶ 96. But Carstanjen

never engaged. *Id*. By all indications, then, nothing short of legal action would hold CDI to its promise and permit a Baffert-trained horse to compete in the Derby.

By competing in non-CDI races that award Derby qualifying points, three Baffert-trained horses accrued enough points to qualify for the 2024 Derby but are not permitted to race because of the extended suspension. *Id*. ¶ 139. One of those horses is the Zedan-owned Muth, which qualified by running away with the Arkansas Derby on March 30, 2024, and has gained enough points to be ranked tied-for-second against the unrestricted field.[6] VC ¶ 139, n.178. But because CDI improperly extended Baffert's suspension, Muth will be ousted from the field, and Zedan will suffer incalculable and irreparable injury.[7]

C. Congress Passes The Horseracing Integrity And Safety Act To Bring Uniformity To The Sport

The events giving rise to this lawsuit unfolded as the seeds were being planted for the Horseracing Integrity and Safety Act, which marked a watershed and became effective as federal law on May 22, 2023. VC ¶ 82. Before HISA, thoroughbred horse racing was governed by a patchwork of state regimes. That patchwork forced competitors to navigate different rules, regulations, and operating procedures across 38 racing jurisdictions, many of which permitted racetracks to have their own rules, regulations, and operating procedures. *Id*. ¶ 83. The upshot left the industry in chaos. *Id*.

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[6] According to Equibase's Speed Figure, a horse racing statistics website, which Figure "tells you how fast a horse has been running in its past races with a single number" and even "equalize[s] for different tracks, distances and conditions," Muth ran at a 115 for the Arkansas Derby—***the fastest for any Derby-aged thoroughbred*** this year. VC ¶ 139, n.178.

[7] Ironically, the extension of Baffert's suspension for concerns about horse safety came mere weeks after CDI took the unprecedented step of suspending all racing operations at Churchill Downs in the wake of a dozen racehorse fatalities there in less than two months.

Despite recognizing for decades the dangers of state-by-state—and racetrack-by-racetrack—regulation and trying to address them itself, the industry never managed to reform itself. *See Jamgotchian v. Kentucky Horse Racing Comm'n*, 488 S.W.3d 594, 616-17 (Ky. 2016) (noting that "[e]ven when separate jurisdictions recognize the desirability of a uniform approach[,] ... giving expression to that uniformity is cumbersome at best."); Alexander M. Waldrop, Karl M. Nobert & John W. Polonis, *Horse Racing Regulatory Reform Through Constructive Engagement by Industry Stakeholders with State Regulators*, 4 Ky. J. Equine, Agric. & Nat. Resources L. 389, 397 (2012) (explaining that the lack of uniformity favored the "status quo" because of inter-state competition "whereby states compete for racing business from owners and trainers because they are capable of searching for the most favorable and least burdensome racing venues").

The lack of uniform standards and safety protocols attracted widespread public outcry, to a degree that imperiled the industry's future. *Id*. ¶ 86. This public pressure reached a tipping point in 2019 following an alarming spate of equine fatalities at racetracks across the country, particularly at Churchill Downs. *Id*. Many commentators specifically criticized the lack of overarching, uniform standards, pinpointing the lack of centralized regulation as posing a crisis for the sport. *Id*. This public condemnation sent clear warning that the industry might not survive, let alone flourish, absent reform. *Id*.

Responding to this problem, in 2020, in a bipartisan effort, Congress enacted the Horseracing Integrity and Safety Act ("HISA" or the "Act"), 15 U.S.C. §§ 3051 *et seq*. The purpose of the Act was to create uniform guidelines across the country, displacing the patchwork of state regulation with universal requirements administered by a single entity "exercis[ing] independent and exclusive national authority over the safety, welfare, and

integrity" of the sport. 15 U.S.C. § 3054(a)(2); *see also* H.R. Rep. No. 116-554, at 17-19 (2020) ("House Report") (noting the lack of uniformity in horse racing regulation despite past attempts at reform). The Act created an anti-doping and medication control program that became effective on May 22, 2023. *See* Ex. 19, Fed. Trade Comm'n, Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority (Mar. 27, 2023).

CDI and its CEO, Bill Carstanjen, lauded the Act as a "pivotal moment for the future of horse racing, a sport that will now be governed by world class, uniform standards across the United States." VC ¶ 90; *see also id.* ¶ 90 (Carstanjen statement: "The establishment of an independent, diverse and knowledgeable national authority represents another milestone for horse racing and brings us one step closer to the implementation of world class uniform standards across the United States."). And Carstanjen specifically acknowledged that the Authority established by the Act would have jurisdiction over any alleged medication violations: "The crux of the bill is this new entity, the authority, will have jurisdiction over the design, implementation and enforcement of anti-doping and medication controls as well as racetrack safety protocols." *Id.* ¶ 91.

Under HISA's now-controlling regulations, a trace level of betamethasone in a horse's urine (blood samples are not contemplated for betamethasone testing) on race day does not constitute a medication violation, even at Churchill Downs. Ex. 10, Excerpts of *HISA Prohibited Substances List, Controlled Medications*, (last updated Dec. 8. 2023) at 4 (designating the screening limit for betamethasone as 0.2 ng/mL in urine). If there is an overage for betamethasone, a Class C controlled substance, that will not result in a trainer's suspension. *See* HISA, Rule 3323(b), available at https://hisaus.org/regulations. And if a

trainer has a betamethasone overage after two or more prior Class C overages within a two-year period, the trainer will be suspended for only 30 days. *Id*.

II. PROCEDURAL HISTORY

Denied any other means of vindicating its rights and contending for the Triple Crown, Zedan informed CDI immediately after Muth qualified for the Derby that Zedan would be filing suit unless Muth was permitted to compete. Three days later on April 3, 2024, after CDI did not relent, Zedan filed the underlying complaint asserting three substantive claims: (1) a promissory-estoppel claim based on CDI's June 2021 promise and statements CDI made in court; (2) a defamation claim based on CDI's July 2023 press release announcing the extension and conduct of banning Zedan's Baffert-trained horses; and (3) a claim for "a declaration of rights" under Kentucky law. With its complaint, Zedan sought a temporary injunction that would prohibit CDI from enforcing its extended suspension of Baffert and enable the upcoming Derby to proceed as it should, with all qualified horses racing and the very best horse winning. Under Derby rules, to race in the 2024 Derby, horses must be stabled at Churchill Downs Racetrack by 11:00 a.m. Eastern on Saturday, April 27, 2024. Ex. 16, CDI's 2024 Spring Meet Condition Book at 34. Accordingly, Zedan requested that the Jefferson Circuit Court enter an injunction in time for this Court to review the case before that hard deadline.

In response, CDI conspicuously did not try to defend its actions or explain how Zedan's injunction request lacked merit. Instead, it filed a motion to dismiss in an effort to stall the proceedings and to avoid answering any hard questions, in the hope that gamesmanship rather than merit would win the day. Specifically, CDI wrongfully invoked part of Kentucky's new and untested Uniform Public Expression Protection Act ("UPEPA"), KRS 454.464, and argued that this provision necessitates an automatic stay of

this whole case. In addition, CDI argued that a subset of Zedan's claims should be dismissed on the merits.

On April 18, 2024, the Jefferson Circuit Court determined that UPEPA did not apply to this case, and that UPEPA's automatic stay provision was unconstitutional,[8] but it denied Zedan's request for a temporary injunction. The lower court first determined that Zedan's standing was no impediment to considering issuance of a temporary injunction. Then, as to the injunction factors, it determined that irreparable injury was in equipoise because Zedan supposedly could have transferred its horses to a different trainer three months before the Derby—which would have been contrary to Zedan's settled understanding and reliance, a proven recipe for failure, and another route to inflicting the injury this case seeks to avoid. The Jefferson Circuit Court perceived that the public interest and balance of equities weigh in CDI's favor because CDI "has a duty to ensure that the rules and regulations put in place to guarantee an even playing field are upheld and followed"—exactly what an injunction here is necessary to achieve. Finally, on the merits the Jefferson Circuit Court determined that Zedan's claims were likely to fail because

[8] The Kentucky Circuit Court's UPEPA decision was exactly correct. As the lower court held, UPEPA's automatic stay violates the Commonwealth's "strong and proud tradition of fiercely upholding the Separation of Powers, enshrined in Sections 27 and 28 of the Kentucky Constitution." Op. 4. That is, by "removing the traditional and inherent discretion that circuit courts deploy on a case-by-case basis, the General Assembly has forced a rigid and inflexible framework onto the judiciary." *Id.* 4-5; *see also Smothers v. Lewis*, 672 S.W.2d 62, 64-65 (Ky. 1984). Additionally, as set forth in Zedan's opposition to CDI's motion to dismiss, UPEPA also violates Kentucky's jural-rights doctrine, as set forth in Section 14 of Kentucky's Constitution. MTD Opp. 19-20. And it violates the United States Constitution's Due Process Clause by permitting one's litigation adversary to act as the decisionmaker on a time-sensitive request for injunctive relief. *Id.* 20-21. Finally, the Court need not reach these constitutional issues because Zedan is "seeking a special or preliminary injunction to protect against an imminent threat to public health or safety," KRS 454.466(7)(b), which is a carve-out to UPEPA's stay.

CDI's June 2021 statement suggested a "wait and see" approach to Baffert's suspension—contrary to the express terms of CDI's consistent statements and the natural understanding of same. And the lower court signaled its view that the uniform federal regulation that HISA is meant to achieve can in fact be departed from by one or another private race track—a view antithetical to HISA's defining mission.

Zedan hereby respectfully appeals that denial on an emergency basis for the sake of preventing impending irreparable harm not only to Zedan but also to everyone who wants to see the fastest thoroughbreds competing at the upcoming Derby, fair and square.

LEGAL STANDARD

"Appellate courts review a trial court's grant or denial of a temporary injunction for abuse of discretion. A trial court abuses its discretion when its decision 'was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.'" *Cameron v. EMW Women's Surgical Center, P.S.C.*, 664 S.W.3d 633, 659 (Ky. 2023) (citing *Maupin v. Stansbury*, 595 S.W.2d 695, 698 (Ky. Ct. App 1978); *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999)). Aggrieved parties may seek appellate review of interlocutory orders granting or denying temporary injunctions pursuant to Rule of Appellate Procedure 20 (formerly CR 65.07). RAP 20 allows a party adversely affected by a temporary injunction to seek immediate relief here. *Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 38 (Ky. 2014).

If a trial court makes an error of law in ruling on a temporary injunction, that affords basis for relief on appeal. *Cameron v. Beshear,* 628 S.W.3d 61, 71-72 (Ky. 2021). While "an appellate court may not disturb a trial court's decision on a temporary injunction unless the trial court's decision is a clear abuse of discretion," *Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 162 (Ky. 2009), "the appellate court may properly determine

that findings are clearly erroneous if they are occasioned by an erroneous application of the law." *Cameron*, 628 S.W.3d at 72 (citing *Rogers v. Lexington-Fayette Urb. Cnty. Gov't*, 175 S.W.3d 569, 571 (Ky. 2005)) (determining "that the trial court's issuance of injunctive relief was unsupported by sound legal principles occasioned by an erroneous application of the law.").

RAP 20(B)(6) permits this Court to grant affirmative relief under the standard enumerated in CR 65.04(1). "A temporary injunction may be granted … if it is clearly shown … that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual." CR 65.04(1). To be entitled to injunctive relief, a movant must show: "(1) that the movant's position presents 'a substantial question' on the underlying merits of the case, *i.e.* that there is a substantial *possibility* that the movant will ultimately prevail; (2) that the movant's remedy will be irreparably impaired absent the extraordinary relief; and (3) that an injunction will not be inequitable, *i.e.* will not unduly harm other parties or disserve the public." *Price v. Paintsville Tourism Comm'n*, 261 S.W.3d 482, 484 (Ky. 2008) (emphasis added).

As to the first element, "one must [only] show that a substantial question exists that tends to create a 'substantial possibility' that the Appellant will ultimately prevail on the merits." *Norsworthy v. Kentucky Bd. of Med. Licensure*, 330 S.W.3d 58, 63 (Ky. 2009); *see also Eubanks & Marshall of Lexington, PSC v. Commonwealth ex rel. Cabinet for Health & Family Servs.*, 2016 WL 4555927, at *4 (Ky. Aug. 25, 2016) (stating that this factor requires the court "to handicap the [plaintiff's] chances of prevailing" and finding it

satisfied where there was "enough substance to the [plaintiff's] underlying claim reasonably to foresee its success on the merits"). "[A] motion for a temporary injunction does not call for, or justify, an adjudication of the ultimate rights of the parties." *Com. ex rel. Conway v. Thompson*, 300 S.W.3d 152, 161 (Ky. 2009) (cleaned up).

ARGUMENT

III. ZEDAN HAS SHOWN A SUBSTANTIAL POSSIBILITY THAT IT WILL ULTIMATELY PREVAIL

Zedan has established its substantial possibility of prevailing on multiple grounds. Notably, although the Jefferson Circuit Court expressed doubts about certain aspects of Zedan's counts, it did not find any of them insubstantial. For purposes of this appeal, it would suffice if ***just one*** of Zedan's claims affords a substantial prospect of invalidating the ban. For the reasons noted herein, ***all*** of them do, especially given CDI's abject failure to advance any creditable justification for banning Muth from the upcoming Derby.

As an initial matter, it bears emphasizing that the Jefferson Circuit Court was correct to overcome CDI's challenge to standing and proceed to analyze the merits. The record is clear that Zedan has established: (1) an injury, "with its horses being barred from competing in the upcoming Kentucky Derby," Op. 6; (2) traceability, "[t]his harm was caused by [CDI]'s ban on the Plaintiff's trainer, Bob Baffert," *id.*; and (3) redressability, if a court "were to rule in the Plaintiff's favor the harm would be cured," *id.*

From there, there was no occasion for the lower court to express "doubts" regarding whether the "prudential" bar against "third-party standing" may apply. *Id.* The Jefferson Circuit Court misperceived that Zedan is "essentially challeng[ing] Churchill Down's ban on behalf of Mr. Baffert." *Id.* In fact, as the lower court found, Zedan "has carefully pled its case to ensure that it touches only upon its rights and the injuries, and not the rights or

grievances of any other party or non-party." *Id*. 7. This is not "a close call," *id*., as Zedan is seeking relief as to only one horse—namely, Muth, ***Zedan's*** horse. Granting this injunction will not affect CDI's Baffert ban in any other circumstances. Nor would this case continue proceeding if CDI let Muth run in the Derby, while otherwise maintaining its Baffert ban as to *other* horses implicating *other* owners' interests. Zedan's assertion of ***its own*** rights cannot fairly be characterized a generalized bid to overturn the Baffert ban in the abstract. To analogize, Zedan has as much standing as the New York Giants would have if they were, say, barred from the Super Bowl because the host stadium harbors a vendetta against the State of New York. Just as the Jefferson Circuit Court noted, Zedan's injury here is concrete, particularized, traceable to the challenged action, and redressable by the requested relief. In such circumstances, standing should be straightforward and beyond serious question.

A. Zedan Is Likely To Prevail On Its Promissory Estoppel Claim

The basis for promissory estoppel is similarly straightforward, following from the plain terms of CDI's articulation of its two-year ban combined with the reliance that naturally resulted. Under the doctrine of promissory estoppel, "[1] [a] promise [2] which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person"—such as Zedan here—"and [3] which does induce such action or forbearance is binding if [4] injustice can be avoided only by enforcement of the promise." *Sawyer v. Mills*, 295 S.W.3d 79, 89 (Ky. 2009) (citation omitted). Some Kentucky courts have also required that the promisee's reliance be "reasonable." *See*, *e.g.*, *Rivermont Inn v. Bass Hotels Resorts*, 113 S.W.3d 636, 642 (Ky. Ct. App. 2003) ("The circuit court correctly held that promissory estoppel cannot be invoked here because the element of reasonable reliance is missing."). In applying the doctrine, "[a] promise is 'a

manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *Fletcher v. Branch Banking & Tr. Corp.*, 2007 WL 2792186, at *3 (W.D. Ky. Sept. 21, 2007) (quoting Restatement (Second) of Contracts § 2(1) (1981)). All of the requirements are met here.

Indeed, this is a paradigmatic case for promissory estoppel. *First*, CDI made a clear and definite promise. In June 2021, CDI released an official statement on CDI letterhead announcing a "suspension" "through the conclusion of the 2023 Spring Meet at Churchill Downs Racetrack" prohibiting "Baffert, or any trainer directly or indirectly employed by Bob Baffert Racing Stables, from entering horses in races or applying for stall occupancy at all CDI-owned racetracks." Ex. 1. In that same statement, CDI clarified that it "reserve[d] the right to extend Baffert's suspension if there are additional violations in any racing jurisdiction." *Id*. The statement also provided a lengthy quote from CDI's CEO—showing approval by its top executive. *Id*. With this statement, CDI made a clear "manifestation" that it would "refrain" from extending the suspension absent "additional violations," i.e., it made a "promise" that Baffert-trained horses could compete in this year's Derby unless Baffert proceeded to violate the rules, which he undisputedly has not done. *Fletcher*, 2007 WL 2792186, at *3 (citation omitted); *see also Fox v. Grayson*, 317 S.W.3d 1, 11 (Ky. 2010) ("[T]here is generally an inference that omissions are intentional." (citation omitted)). Lest there be any doubt, CDI then continued to reiterate, and reiterate again—including in federal court—that the Baffert ban would last only for two years absent an additional violation, which never occurred. *See* Statement of the Case ("SOC") Part I.B.1.

This case is indistinguishable from a hypothetical in which CDI said that Baffert's suspension would be for two years and then added that it "reserved the right to extend

Baffert's suspension if he fails to complete 100 hours of community service." No one could think it was open to CDI, after Baffert duly completed 100 hours of community service, *nevertheless* to extend his ban for a *different, newly-invented* reason—say, because CDI did not like the clothes Baffert was wearing. It is no more open for CDI, after Baffert undisputedly steered clear (in the course of over 600 of his horses competing in races) of any "additional violations in any racing jurisdiction," to invent some *new* reason. According to CDI, it is today banning Baffert-trained horses because it does not like the words Baffert has been uttering. By doing that, CDI is going back on its own words and breaking its promise. CDI made a classic, binding promise under Kentucky law when it invoked its rights and then immediately and unequivocally conditioned the future exercise of those rights. Logic and common sense dictate that "omissions are intentional … when people say one thing they do not mean something else." *Fox*, 317 S.W.3d at 11.

Second, CDI should have reasonably expected to induce action or forbearance on the part of owners of horses that wished to train with Baffert, generally, and Zedan as such an owner, specifically. When it announced the suspension and promised it would not be extended absent additional violations, CDI knew of Baffert's successes, e.g., that Baffert was tied for the most Derby wins and had the most Triple Crown wins in history. CDI also well knew that owners invest millions upon millions of dollars in trainers like Baffert, together with the horses that train with them. And CDI had every reason to expect that racehorse owners would rely upon CDI's promise that Baffert's suspension would last only two years (absent additional violations) by purchasing horses and having Baffert train those horses as part of a campaign to win the 2024 Derby, the first after the two-year ban. All of

these relevant facts are set forth in a Verified Complaint, and CDI has not offered any contrary evidence suggesting it is likely to overcome them.

As to Zedan specifically, CDI knew at the time it announced the two-year suspension that Baffert trained Zedan's horses. Indeed, CDI awarded the Kentucky Derby trophy to Amr Zedan a month prior. *See* Ex. 30, March 29, 2022 Declaration of CDI President Michael Anderson ¶ 75. As such, CDI should have reasonably expected that its announcement of a two-year suspension of Zedan's trainer, with whom Zedan had just finished first in the 2021 Derby, would induce Zedan to purchase Baffert-approved horses and have Baffert train them in anticipation of the 2024 Derby. Moreover, given that CDI is a sophisticated player in the thoroughbred horse racing industry, it necessarily understood that Zedan's purchase and training of horses for the 2024 Derby would occur well before July 3, 2023 (the day CDI reneged on its promise), and that millions of dollars in investment would have been sunk before then. VC ¶ 149.

Third, Zedan detrimentally and reasonably relied upon CDI's promise. Before CDI's July 2023 reneging of its promise, Zedan had spent over $15 million to purchase and have Baffert train seven horses for the purpose of winning the 2024 Derby and Triple Crown. *See* SOC Part 1.B.2. Zedan would never have invested such vast sums if CDI had not promised that Baffert's ban was for two years. *Id*. And that investment was reasonable because CDI is a respected American institution that publicly announced the conditions of Baffert's suspension on official CDI letterhead, after weeks of deliberating over what exactly to do with Medina Spirit's positive test—a hot-button topic that commanded national attention. Especially because the June 2, 2021 statement extensively quoted CDI's CEO, Zedan had every indication that CDI's promise had been approved by the highest

levels of CDI's management. And then over the ensuing years, CDI repeatedly affirmed—without qualification or modification—that the suspension was limited to two years, in accordance with unbroken industry consensus that Baffert and the horses he trains are now fit to be competing in racetracks all throughout the United States. *See* SOC Part I.B.1.

Fourth, the only way to avoid injustice is by voiding CDI's expansion of the suspension. CDI promised that Baffert's suspension would end on July 3, 2023, and, accordingly, that Zedan could thereafter enter its Baffert-trained horses in CDI races, including the 2024 Derby. By denying Zedan the opportunity to have Muth enter the 2024 Derby (and other CDI races), CDI is unfairly denying Zedan the benefit of CDI's promise.[9] *See McCarthy v. Louisville Cartage Co., Inc.*, 796 S.W.2d 10, 12 (Ky. Ct. App. 1990) ("The whole theory of a promissory estoppel action is that detrimental reliance becomes a substitute for consideration under the facts of a given case.").

Notably, switching trainers in January 2024, prior to CDI's arbitrary deadline, was not a viable option for avoiding injustice. Such action would not only have deprived Zedan of the benefit of CDI's promise but injured Zedan and its horses while mooting this case. Baffert is irreplaceable as a trainer, and switching trainers is detrimental to a racehorse, especially where the original trainer is Baffert, the greatest in modern history. The proof of this is in the pudding: horses that switched from Baffert in anticipation of the 2022 Derby and the 2023 Derby performed materially worse. Conversely, Baffert has trained Muth to be among the fastest Derby-aged horse in thoroughbred racing.

[9] Avoiding injustice likewise requires that CDI be prohibited from refusing to recognize Derby qualifying points that Zedan's horses have earned but that have not been recognized only because of CDI's unlawful extension of its Baffert ban.

The Jefferson Circuit Court decided that Zedan's promissory estoppel claim was unlikely to succeed because the June 2021 statement "indicate[d] a more 'wait and see' approach to Mr. Baffert's suspension" and the "barebones" record did not make clear that CDI should have expected others to rely on that statement. Op. 8. Although the record at this initial stage necessarily lacks the full benefit of discovery (still ahead), it well establishes that CDI should have expected owners like Zedan to rely on a public statement that CDI issued with the guidance from its sophisticated top executives stating that, absent "additional violations," Baffert's extension would be for just "two years," such that owners could safely employ Baffert in the years-long training process leading up to the 2024 Derby. That is no wait-and-see approach, but a green light for Derby hopefuls such as Zedan to enlist Baffert's help for subsequent Derbies, starting with this one. What is more, CDI necessarily understood that it was speaking specifically to Zedan, considering that Zedan's horse, Medina Spirit, had otherwise won the 2021 Derby and was the express subject of the disqualification that CDI announced in tandem with the terms and duration of the prospective ban.

The Jefferson Circuit Court also observed that CDI "never expressly said ... that Bob Baffert would be reinstated for the 2024 Kentucky Derby," Op. 8, but seemingly overlooked repeated, consistent, unequivocal statements by CDI that were precisely to that effect substantively, if not semantically. In particular, the record reflects:

- VC ¶ 70, Carstanjen Interview with Mike Tirico of NBC Sports posted on May 7, 2022
    - "[Baffert]'s got to complete his suspension and he has to behave during that suspension.… [C]ertainly it's the case that we will be watching his behavior in [other] races and certainly we hope that there aren't further drug violations and certainly we'll be paying attention if there are. But let's say there aren't and he completes his two-year suspension, well, then he's completed his suspension and then absent further facts, he should be free to race again here, if he chooses."

- Ex. 30, March 29, 2022 Declaration of CDI President Michael Anderson filed in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 31-67
    - ¶ 95 ("After Medina Spirit's split sample confirmed the presence of betamethasone, *CDI decided to suspend Mr. Baffert for* ***two years***. CDI's decision was based on Mr. Baffert's recent, high-profile drug violations and the resulting harm to CDI." (emphasis added));
    - ¶ 99 ("Taking all of these facts into account, *CDI determined that* ***two years*** *would be an appropriate time period to suspend Mr. Baffert* from racing on CDI tracks. It would provide meaningful deterrence and protect the Kentucky Derby and Churchill Downs brands, but would not prohibit Mr. Baffert from participating in future races at CDI-owned race tracks. In short, *it was a reasoned balance that imposed a meaningful consequence while stopping short of a much longer*—or even lifetime—*ban*." (emphasis added));
    - ¶ 100 ("After *CDI decided to suspend Mr. Baffert* ***for two years***, I volunteered to notify him of the suspension....I told Mr. Baffert that CDI would shortly be issuing a statement suspending him for two years." (emphasis added));
    - ¶ 102 ("*CDI reached its decision to suspend Mr. Baffert* ***for two years*** independently, without consulting with the KHRC or any state official." (emphasis added)).
- Ex. 31, CDI's May 2, 2022 Motion to Dismiss in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 36
    - P. 1 ("Churchill Downs Incorporated ('CDI'), a private company that hosts the Derby, exercised its right to suspend the horse's trainer, Bob Baffert, from participating in races at its racetracks ***for two years***." (emphasis added)); *Id*. at 4.
- Ex. 24, CDI's January 17, 2023 Response to Baffert's Renewed Motion for Preliminary Injunction in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 50
    - P. 7 ("On June 2, 2021, after Baffert's attorney admitted the presence of betamethasone in Medina Spirit's blood—and a second test confirmed it—*CDI announced that Baffert's suspension* ***would last two years***." (citing Anderson Decl. ¶¶ 99-107) (emphasis added)).

- Ex. 32, Statement of Tom Dupree, counsel for Defendants, to the court in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), during the February 2, 2023 Preliminary Injunction Hearing, Excerpts of Dkt. 68
    - P. 86 ("Now, *after Churchill Downs learned of what happened, we imposed a* ***two-year suspension*** *on Mr. Baffert*." (emphasis added)).
- Ex. 11, Excerpts of Testimony of M. Anderson to the court in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), during Feb. 3, 2023 Preliminary Injunction Hearing. Dkt. 71
    - P. 102 ("*We decided to settle on* ***two years*** 'cause we felt like it was a reasonable consequence to deter people from some actions in the future but not to prevent Mr. Baffert from continuing his business after that—*that* ***two-year span*** and not to be a part of the future of horse racing.");
    - P. 103 ("It was the same suspension. The May 9th was indefinite until we had more information; more facts. So that was temporar[y] until we got the second independent lab results or the split sample test results. And when we did receive those in June, *we further clarified or defined the suspension* ***with a definitive time frame of two years*** and made it for all of CDI-owned properties and other—other facilities outside of just Churchill Downs… in June I actually talked to Mr. Baffert directly on the telephone and informed him of our two-year suspension plans at that time." (emphases added));
    - P. 111 ("***A two-year suspension*** was our way of showing a consequence for a horse racing participant with repeated drug violations." (emphasis added)).
- Ex. 33, CDI's March 14, 2023 Motion for Summary Judgment in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 78
    - P. 5 ("On June 2, 2021, after Baffert's attorney admitted the presence of betamethasone in Medina Spirit's blood—and a second test confirmed it—*CDI announced that Baffert's suspension* ***would last two years***." (citing June 2, 2021 official statement) (emphasis added)).

Those statements by CDI are neither flimsy nor few. They make the case for promissory estoppel and they make it powerfully (more than just substantially).

A. Zedan Is Likely To Prevail On Its Alternative Declaration Of Rights Claim

Per Kentucky's Declaratory Judgment Act, a plaintiff may ask for, and a court may grant, a binding "declaration of rights." KRS 418.040. Persons with standing to seek such a declaration include "[a]ny person … whose rights are affected by statute … or other government regulation," who "is concerned with any … status or relation," or who is "interested … in a contract." KRS 418.045. The "Act is broad, flexible, and almost unlimited in its scope." *Maas v. Maas,* 204 S.W.2d 798, 800 (Ky. 1947). Even when a claimant has no underlying cause of action other than a declaration of rights claim, the statute provides a cause of action as long as there is a "justiciable controversy." *Board of Education of Boone County v. Bushee, Ky.*, 889 S.W.2d 809, 811 (Ky. 1994) (quoting *Dravo v. Liberty Nat'l Bank Trust Co.*, 267 S.W.2d 95, 97 (Ky. 1954)); *see also Schell v. Young*, 640 S.W.3d 24, 34 (Ky. Ct. App. 2021) (holding that "the circuit court erred to the extent that it dismissed [the plaintiffs'] declaratory judgment claims based upon an erroneous conclusion that no private right of action may *ever* lie for alleged violations of ordinances" where the plaintiffs brought a declaration-of-rights claim).

Here, Zedan is likely to succeed under three separate theories for a declaration of rights under Kentucky law: (1) CDI waived any rights it had to extend the suspension absent additional violations by Baffert; (2) in the alternative, CDI is judicially estopped from taking the position that its suspension of Baffert was for longer than two years; and (3) in all events, HISA preempted any rights CDI had under Kentucky law to extend Baffert's suspension and any contractual right CDI had is void as against public policy for violating HISA. Further, there is an actual, justiciable controversy regarding the validity of CDI's extended suspension of Baffert on July 3, 2023 because CDI is presently enforcing

the extended suspension at the expense of Zedan and its horses. The above legal questions are thus all properly subject to a claim for declaration of rights. *See, e.g.*, *Samuel T. Isaac & Associates, Inc. v. Federal National Mortgage Ass'n*, 647 S.W.2d 495, 499 (Ky. Ct. App. 1983) (citations omitted) ("It is well settled in Kentucky that the entire contractual controversy may be determined in a declaratory judgment action."); *Marcum v. Marcum*, 377 S.W.2d 62, 64-65 (Ky. 1964) (adjudicating declaration of rights claim based on federal law that "govern[ed] the rights of the parties"); *Werner v. Crowe*, 2023 WL 128037, at *1 (Ky. Ct. App. Jan. 6, 2023) (adjudicating declaration of rights claim involving waiver).

1. *CDI Waived Any Right To Extend Baffert's Suspension*

Even if CDI had a contractual or common law right to extend Baffert's suspension, CDI waived those and any other such right. "The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an advantage which the party at his option might have demanded or insisted upon." *Greathouse v. Shreve*, 891 S.W.2d 387, 390 (Ky. 1995) (quoting *Barker v. Stearns Coal Lumber Co.*, 291 Ky. 184, 163 S.W.2d 466, 470 (1942)). "[W]aiver may be implied 'by a party's decisive, unequivocal conduct reasonably inferring the intent to waive,' as long as 'statements and supporting circumstances [are] equivalent to an express waiver.'"[10] *Moore v. Asente*, 110 S.W.3d 336, 360 (Ky. 2003) (citing *Greathouse*, 891 S.W.2d at 391). "[W]aiver is a question of law, not fact."

[10] Waiver, as relevant here, can be of contractual or common law rights. *See, e.g.*, *Water Mgmt. Servs., LLC v. City of Edmonton*, 2020 WL 5121402, at *4 (W.D. Ky. Aug. 31, 2020) ("A party may waive or relinquish rights to which he is entitled under a contract, and having done so may not reverse his position to the prejudice of another party to the contract." (quoting *Stamper v. Ford's Adm'x*, 260 S.W.2d 942, 943 (Ky. Ct. App. 1953)); *Gov't Emps. Ins. Co. v. Sanders*, 569 S.W.3d 923, 929 (Ky. 2018) (recognizing that "the parties have waived their common-law tort remedies").

Louisville/Jefferson Cnty. Metro Gov't v. Abdullah, 2022 WL 12122125, at *2 (Ky. Ct. App. Oct. 21, 2022); *Eaton v. Trautwein*, 288 Ky. 97, 104 (Ky. Ct. App. 1941) (same).

CDI voluntarily and intentionally surrendered any right it had to extend Baffert's suspension by disseminating a carefully crafted, official statement announcing a two-year suspension of the greatest horse trainer in modern history alongside the historic disqualification of the winner of the Kentucky Derby. *See* Ex. 11, *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 71 at 92, 102. The statement included a lengthy quote from CDI's CEO, an Ivy League law school graduate, former attorney at a top New York City (and U.S.) law firm, and CDI's former General Counsel,[11] that ended: "we firmly believe that asserting our rights to impose these measures is our duty and responsibility." Ex. 1, CDI's June 2, 2021 Official Statement at 2. In the very next sentence, CDI "reserve[d] the right to extend Baffert's suspension" in one situation only: "if there are additional violations in any racing jurisdiction." *Id.*

CDI's omission of any other circumstance that might trigger an extension is conspicuous and dispositive; CDI invoked its rights and then immediately conditioned the future exercise of those rights.[12] *Cf. Edmondson v. Pa. Nat. Mut. Cas. Ins. Co.*, 781 S.W.2d 753, 756 (Ky. 1989). This unequivocal conduct amounts to a waiver whereby CDI relinquished any right to extend its Baffert ban on newly minted grounds. *See, e.g., Unifund CCR Partners v. Harrell*, 509 S.W.3d 25, 31 31 (Ky. 2017) (where party "waived its [contractual and statutory] right to collect the … interest," it and its assignee

[11] VC ¶ 69.

[12] Baffert has not had violations in any racing jurisdiction since the June 2, 2021 suspension was imposed. VC ¶ 72.

"ha[d] no legal right to collect [that] interest on [the defendant's] account, be it contractual or statutory").

Accordingly, Zedan has established at least a substantial possibility that it is entitled to a declaration of rights that CDI expressly waived any rights it had to extend its Baffert ban absent additional violations, such that the extension was void. The Jefferson Circuit Court did not conclude otherwise.

2. *CDI Is Judicially Estopped From Extending The Suspension*

Judicial estoppel also applies here. "The doctrine of judicial estoppel ... can be applied to prohibit a party from taking inconsistent positions in judicial proceedings." *Hisle v. Lexington-Fayette Urban Cty. Gov't*, 258 S.W.3d 422, 434 (Ky. Ct. App. 2008) (citing 28 Am. Jur. 2d *Estoppel and Waiver* § 74; *Colston Inv. Co. v. Home Supply Co.*, 74 S.W.3d 759 (Ky. App. 2001)). Judicial estoppel asks: "(1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept the earlier position; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Parrish v. Schroering*, 636 S.W.3d 133, 143 (Ky. Ct. App. 2021). Zedan has shown a substantial possibility that the doctrine applies here.

As to the first factor, the inconsistency in CDI's positions is stark. In federal court, CDI repeatedly emphasized that its suspension would last for two years only. *See* SOC Part 1.B.1.

As to the second, CDI succeeded in persuading that court to accept its position. The court expressly relied upon CDI's representation in resolving issues in favor of CDI, particularly to deny the plaintiffs' request for an injunction for want of irreparable harm.

Ex. 17, *Baffert v. CDI*, No. 3:22-cv-123-RGJ (W.D. Ky.), Dkt. 70 at 29-30, 32, n.6. The court's reliance on CDI's representations was explicit and recurring::

- Ex. 17, *Baffert v. CDI*, No. 3:22-cv-123-RGJ (W.D. Ky.), Dkt. 70
    - P. 3 ("On June 2, 2021, CDI announced that Baffert, and any trainer directly or indirectly employed by Plaintiffs, was suspended from entering horses in races or applying for stall occupancy at all CDI-owned racetracks for two years.");
    - P. 29 (finding that the plaintiffs would not suffer irreparable harm absent an injunction in part because "CDI's suspension is temporary and will expire in just a few months" and also because there was "no indication that owners would not continue to use Plaintiffs' services after the 2023 Kentucky Derby even if the Court did not enjoin CDI's ban");
    - P. 29-30 ("[a]lthough horses are only eligible for the Kentucky Derby once, Baffert may enter horses again after CDI's suspension ends" such that the plaintiffs "have not demonstrated irreparable harm by losing their ability to compete in the 2023 Kentucky Derby");
    - P. 32, n.6 (finding that CDI's suspension of Baffert did not constitute action by the Commonwealth of Kentucky in part because "CDI suspended Baffert for two years" but the KHRC suspended him for 90 days).

As to the third factor, CDI stands to derive an unfair advantage by having staved off earlier requests based on its "two years only" account of the ban and then defending itself as though the ban extends to a third year, to cover the 2024 Derby. CDI thus squarely contradicts the position it took—and that the court accepted—in *Baffert v. CDI*. Moreover, CDI's inconsistent position is what places Zedan in an unfair, impossible position and inflicts the injury complained of here. *See Kotevska v. Fenton*, 2019 WL 1313410, at *5-7 (Ky. Ct. App. Mar. 22, 2019) (affirming application of judicial estoppel where party took inconsistent factual positions in separate actions, finding that the "fact that the two cases concerned different issues does not mean that judicial estoppel cannot apply and does not work to change inconsistent statements into consistent ones," and rejecting the argument that there must be mutuality of parties between the two actions).

In ruling on this issue, the Jefferson Circuit Court determined that CDI's statements did "not rise to the level typically required for a finding of judicial estoppel." Op. 9. But the test for whether judicial estoppel applies does not inquire into a statement's "level." Instead it asks simply whether a party is deriving an unfair benefit by espousing a position that is inconsistent with a previous position that it successfully advanced before another court. Here, it is clear that the doctrine applies to bar CDI's position contradicting its earlier statements—as understood by the court that relied on them—that "CDI's suspension [wa]s temporary and w[ould] expire … just a few months" later in 2023. Ex. 17, *Baffert v. CDI*, No. 3:22-cv-123-RGJ (W.D. Ky.), Dkt. 70 at 29.

Accordingly, it is more than substantially possible that CDI is judicially estopped from extending the Baffert ban beyond two years so as to disqualify Muth.

3. *Any Contractual Right CDI Otherwise Held To Extend The Suspension Is Void As Against Public Policy, And Any Kentucky Law Right Is Preempted By HISA*

Even if nothing else stood in the way of CDI's anomalous, unreasoned extension of its ban, HISA now should. "[T]he Supremacy Clause of the United States Constitution instructs that federal law is the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Matthews v. Centrus Energy Corp*., 15 F.4th 714, 720 (6th Cir. 2021) (quoting U.S. Const. art. VI, cl. 2.). "This unequivocal command affords Congress the power to preempt state law." *Id*. Here, Congress has done precisely that with respect to racetracks disciplining thoroughbred horse racing trainers for perceived violations. Therefore, once HISA became effective on May 22, 2023, CDI lost whatever rights it purports it otherwise had under Kentucky law to suspend Baffert as CDI did.

There can be no doubt that uniformity—particularly as to anti-doping and medication control matters—is ***the*** defining purpose of HISA. To ensure and achieve uniformity, Congress created and vested the Authority with "***independent and exclusive national authority*** over—… ***all*** … ***anti-doping and medication control matters*** for covered horses, covered persons, and covered horseraces." 15 U.S.C. § 3054(a)(2) (emphases added). And it required that ***independent*** and ***exclusive national*** Authority to promulgate ***uniform*** rules and regulations that would control ***all*** aspects of anti-doping and medication control issues.[13] *See, e.g.*, *id*. § 3055(b)(3) (requiring that "[r]ules, standards, procedures, and protocols regulating medication and treatment methods for covered horses and covered races should be ***uniform*** *and* ***uniformly administered nationally***" (emphases added)); *id*. § 3057(d)(1) ("The Authority shall establish ***uniform*** rules … imposing civil sanctions against covered persons or covered horses for safety, performance, and ***anti-doping and medication control rule violations***." (emphases added)). The Authority has proceeded to do precisely what it was established to do. *See, e.g.*, HISA Rule[14] 3000 Series (setting forth HISA's anti-doping and medication control protocol); HISA Rule 4000 Series (regulating prohibited and controlled substances, including betamethasone); HISA Rule 5000 Series (regulating testing and investigations standards); HISA Rule 6000 Series

[13] Congress required that these uniform rules and regulations be truly comprehensive. For example, as part of the anti-doping and medication control program, Congress directed HISA to develop uniform standards for: the administration of medication to covered horses by covered persons, 15 U.S.C. § 3055(c)(1)(A)(i); laboratory testing accreditation and protocols, *id*. § 3055(c)(1)(A)(ii); anti-doping and medication control rules, protocols, policies, and guidelines, *id.* § 3055(c)(4)(A); anti-doping and medication control results management, including investigations, adjudications, and enforcement of civil sanctions, *id.* § 3055(c)(4)(B); and in-competition and out-of-competition testing, *id.* § 3055(c)(4)(C).

[14] HISA's rules and regulations can be accessed at https://hisaus.org/regulations.

(regulating laboratory standards); HISA Rule 8000 Series (setting forth penalties and procedures for violations of the anti-doping and medication control protocol).

Mere weeks after the anti-doping and medication control program went into effect, in July 2023, CDI indefinitely banned Baffert based on anti-doping and medication control concerns. *See* Ex. 2 ("Mr. Baffert ***continues*** to peddle a false narrative concerning the *failed* ***drug test*** of Medina Spirit…. The results of the tests clearly show that he did not comply, and his ***ongoing*** *conduct* reveals his ***continued*** *disregard* for the rules and regulations…. A trainer who is unwilling to *accept responsibility for multiple* ***drug test*** *failures* in our highest-profile races cannot be trusted to *avoid* ***future*** *misconduct*." (emphases added)); TI Opp. 12-13 (quoting Carstanjen Affidavit explaining that CDI extended Baffert's ban because Carstanjen saw a *June 2023* interview by Baffert: "Based on Mr. Baffert's public statements and failure to respect the ***rules of racing***, CDI had no confidence that Mr. Baffert *would avoid* ***drug violations*** or other misconduct *in the* ***2024*** *Kentucky Derby*." (emphasis added)). Simply stated, CDI cannot be doing what it is now doing unilaterally, in flagrant contravention of HISA, at HISA's formative stage.

Actions or Rights of a Private Entity. Without denying that CDI's unilateral, anomalous ban conflicts with HISA, the Jefferson Circuit Court seemed to dismiss the conflict as irrelevant. According to the lower court, Zedan is "arguing a conflict between federal law and the actions or rights of a private entity," and the Court was "unpersuaded at this point that preemption extends as far as the Plaintiff suggests." Op. 9. But HISA's preemptive force ***necessarily*** extends this far: The ultimate question here is whether CDI's actions are legally authorized or not, and removing HISA from the analysis would deny force to federal law that is meant to be Supreme. Indeed, if the Jefferson Circuit Court were

correct, then ***every*** private race track would be free to regulate questions of safety or integrity—and anti-doping and medication control—however it pleases, without regard for HISA. In other words, uniformity of regulation would become illusory under this view of the law.

Nor should there be any doubt that federal law can preempt state law ***rights*** of ***private actors***. *See, e.g.*, *Wells v. Kentucky Airmotive, Inc.*, 2014 WL 4049894 (Ky. Ct. App. Aug. 15, 2014) (affirming dismissal of state law claims based on plaintiff's asserted state law property rights allegedly violated by aircraft flying low over plaintiff's property, where the rights were preempted by the Federal Aviation Act). The Supremacy Clause preempts the "Laws of any State"; it is not limited to "claims" or "causes of action." Accordingly, preemption applies to state laws themselves. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 401 (2012) (holding that Arizona's statutes were preempted by federal law and not involving any preemption of claims or causes of action). In other words, when a private actor relies upon state law rights that are squarely foreclosed by federal statute, that private actor lacks any legal basis to act contrary to federal law. The private actors' rights are abolished; they are preempted. *See, e.g.*, *Blockbuster Videos, Inc. v. City of Tempe*, 141 F.3d 1295, 1305 (9th Cir. 1998) (recognizing that the federal Copyright Act brought about "a new uniform federal copyright system … preempting and abolishing rights under the common law or statutes of a State that are equivalent to copyright" (cleaned up)). As shown below, HISA has preemptive force under three theories, each sufficient.

Express Preemption. HISA expressly preempts any state law right CDI had to extend Baffert's suspension because of anti-doping and medication control concerns—

which is exactly what CDI based its extension on.[15] The Act expressly preempts any state law that falls within the jurisdiction of HISA: "The rules of the Authority promulgated in accordance with this chapter shall preempt any provision of State law or regulation with respect to matters within the jurisdiction of the Authority under this chapter." 15 U.S.C. § 3054(b). And as shown above, there can be no doubt that the HISA Authority has promulgated rules as to anti-doping and medication control issues, and that such rules fall within the jurisdiction of the Authority as established by the Act.[16] Because that is the precise ground CDI is trespassing upon when purporting to justify its July 3, 2023 extension of its ban, the ban cannot stand.

Field Preemption. HISA established a "scheme of federal regulation [ ] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *State Farm Bank v. Reardon*, 539 F.3d 336, 342 (6th Cir. 2008) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). HISA's regulations are

[15] Because Zedan has shown a substantial possibility that CDI's extension of the suspension contravenes HISA, there is a substantial possibility that any contractual right CDI had to extend Baffert's suspension is void as against public policy. *See, e.g., Yeager v. McLellan*, 177 S.W. 3d 807, 809 (Ky. 2005) ("[A] court may refuse to enforce a contract on grounds of illegality where the contract has a direct objective or purpose that violates the federal or a state Constitution, a statute, an ordinance, or the common law.").

[16] It is not disputed that CDI's Churchill Downs Racetrack is a covered person and racetrack. *See* 15 U.S.C. § 3051(6) (defining "covered persons" as "all trainers, owners, breeders, jockeys, racetracks, veterinarians, persons (legal and natural) licensed by a State racing commission"); *id*. § 3051(15) (defining a "racetrack" as "an organization licensed by a State racing commission to conduct covered horseraces"); *id*. § 3051(5) (defining a "covered horserace" as "any horserace involving covered horses that has a substantial relation to interstate commerce"); *id*. § 3051(4) (defining "covered horse" as "any Thoroughbred horse"); CDI's Annual Report (Form 10-K) (Dec. 31, 2023), https://tinyurl.com/ysb848v8 ("In Kentucky, horse racing racetracks … are subject to the licensing and regulation of the Kentucky Horse Racing Commission ('KHRC'). Licenses to conduct live thoroughbred and standardbred racing meets … are approved annually by the KHRC based upon applications submitted by the racetracks in Kentucky.").

expansive within the field of anti-doping and medication control. Because HISA's "federal statutory directives provide a full set of standards governing [horse racing safety and integrity], including the punishment for noncompliance," *Arizona v. United States*, 567 U.S. 387, 401 (2012), allowing individual racetracks "independent authority" to address matters of horse racing safety and integrity would "diminish[] the Federal Government's control over enforcement and detract[] from the integrated scheme of regulation created by Congress," *id*. at 402.

Conflict Preemption. HISA impliedly preempted any right CDI might otherwise invoke to extend Baffert's suspension because the extension "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"—particularly the Act's intended scheme of uniform, consistent regulation across the United States with respect to anti-doping and medication control matters. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). By unilaterally imposing an indefinite ban on the basis of horse racing safety and integrity and involving issues of anti-doping and medication control, CDI has supplanted the Authority 's *exclusive* and *national* authority over the same and torn asunder HISA's *uniformity* of regulations and enforcement—the defining purposes of HISA. The Supremacy Clause does not permit this. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (finding state law rights preempted where the federal scheme allowed the agency "to achieve a somewhat delicate balance of statutory objectives" that would be "skewed by allowing" enforcement under state law).

IV. ZEDAN WILL BE IRREPARABLY HARMED ABSENT AN INJUNCTION

The impending irreparable harm to Zedan is clear, imminent, and momentous. As the Jefferson Circuit Court found, "The Plaintiff makes a compelling argument that failure to grant this injunction will result in its horse being barred from running in the Kentucky

Derby. This is an event that a horse is only eligible for once in its lifetime." Op. 7. Muth will only be three-years-old once. If Muth cannot race alongside the other qualified thoroughbreds at this year's Derby, then he ***never*** can, which is why the lower court acknowledged the "once-in-a-horse's-lifetime nature of the Derby." Op. 7.

The only reason the Jefferson Circuit Court found that "[t]his factor is neutral at best," was that Zedan supposedly could have transferred its horses to another trainer. *Id*. When a horse is transferred to another trainer, however, the transfer "creates uncertainty in the training and potential health of the horse," which "must adjust to a new environment, a new routine, and training style." VC ¶ 102. These problems are at their zenith when scrambling to replace a trainer like Baffert—the greatest trainer in modern history—and knowing that the horses' performance is bound to suffer as a result. *Id*. And these problems are compounded because the months leading into the Derby are the most important when training a horse to win the Derby. *Id*. It is undisputed that switching trainers three months prior to the 2024 Derby—as would be required under 2024 Derby rules for a formerly-Baffert-trained horse to become eligible—would result in diminished performances and heightened dangers, e.g., not qualifying for, performing poorly in, or even potentially getting injured at the Derby. *Id*. ¶ 104. Although the Jefferson Circuit Court noted that Zedan had "transferred its horses to a different trainer" in prior years, Op. 7, Zedan did so in response to broader discipline of Baffert and longer time to plan. Even then, Zedan and like-situated owners experienced disappointing results after switching trainers prior to the 2022 Derby and the 2023 Derby, where their horses' performances materially declined. *Id*. After returning to Baffert, most of these horses returned to form. *Id*. Simply put, trainers are not fungible, and there is no ready substitute for Baffert. Indeed, the whole point of

this lawsuit is to vindicate Zedan's deep, longstanding investment in Baffert-trained horses as Derby contenders. It cannot be right that Zedan needed to ***moot*** this case (as it would have done by voluntarily switching trainers) in order to preserve its claim for relief.

Nor is it satisfying to posit that switching trainers could theoretically have maintained Derby eligibility. *See* Op. 7. That substitutes one irreparable injury with a self-inflicted injury that is just as bad. The undisputed evidence is that switching trainers hurts horses and diminishes performance, and that no one can substitute for Baffert in readying horses for the Derby. By all indications, switching to a different trainer would have left Muth handicapped and ultimately ineligible for the Derby—at which point CDI (which even now challenges Zedan's standing) would again observe that any quarrel with the Baffert ban is moot. The "Catch-22" nature of CDI's position is palpable and perverse.

Once the 150th Derby runs, it can never be re-run, and Zedan's horses will have forever been denied the fair chance to compete there—along with all the unique rewards that could ultimately follow, including any shot at contending for the ultimate prize, the Triple Crown. It is difficult to imagine a more clearcut case in which "the injury resulting absent injunctive relief would be immediate and irreparable." *Price v. Paintsville Tourism Com'n*, 261 S.W.3d 482, 484 (Ky. 2008). Zedan purchased and paid to have Muth trained by the best trainer in modern history for the overriding purpose of winning the 2024 Derby (and Triple Crown), at great expense, and Muth has earned enough points to qualify for the 2024 Derby absent CDI's unlawful suspension of Baffert; unless this Court intervenes, Muth cannot race in the Derby. *Id*. ***This horse is among the fastest in horse racing*** and would be a top Derby contender. *Id.*

Courts regularly find, due to an athlete's limited career window, irreparable harm in such circumstances where an athlete is barred or hampered from competing. *See, e.g.*, *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991) (forcing golfers not to use the club of their choice would cause irreparable harm because it would "have an immediately discernible but unquantifiable adverse impact on their earnings … and for endorsement contracts"); *Jackson v. NFL*, 802 F. Supp. 226, 231-35 (D. Minn. 1992) ("The existence of irreparable injury is underscored by the undisputed brevity and precariousness of the players' careers…"); *Z.H. v. Kentucky High School Athletic Association*, 359 F. Supp. 3d 514, 525 (W.D. Ky. 2019) ("[W]hile the injury may seem trivial—the inability to participate in varsity athletics. It is no doubt irreparable.").

V. THE BALANCE OF EQUITIES STRONGLY FAVORS AN INJUNCTION

The Jefferson Circuit Court recognized that is "is in the public interest to ensure that all those who attend or watch races at Churchill Downs can be confident in the fairness and integrity of the sport." Op. 7. It also noted that, "as the host of one of the most preeminent sporting events in the world, [CDI] has a duty to ensure that the rules and regulations put in place to guarantee an even playing field are upheld and followed. Public trust and confidence in the integrity of the races run at Churchill Downs are essential to its business." *Id.* Zedan wholeheartedly shares those sentiments, which well capture why Zedan is pursuing this appeal and why an injunction would serve the public interest. By excluding a horse based on a trainer's public "narrative" rather than actual qualifications, compliance, and merit. CDI is betraying its principles, upending fairness, skewing the Derby, and casting a cloud over the ultimate "winner," which would now be a mere artifact of CDI's petty caprice. No one should want to see the Derby unfold this way.

To the contrary, the public interest is served by letting the public watch and cheer the very best horses at the Derby—as opposed to having CDI arbitrarily exclude a potential winning horse. Racetracks, competitors, fans, and all of horse racing benefit from robust competition in which the fastest thoroughbred wins the Derby—not when horses are excluded based on objections to their trainers' pubic commentary. Indeed, CDI itself has already announced its considered view that a two-year ban amply sufficed to address any perceived issues surrounding Medina Spirit. Against that backdrop, CDI cannot plausibly claim it faces any appreciable injury from the prospect that Baffert-trained horses may return to racing on its racetracks (just as they do on all other racetracks) even as Baffert declines to recite CDI's preferred script. To the contrary, CDI is hurting itself, its shareholders, and all other stakeholders by denying entry to the fastest qualifying thoroughbreds—and thereby undermining the value of the Derby and even calling into question its continuing relevance. *See* VC ¶¶ 47-51; 137-44.

Nor can the public be expected to doubt the safety and integrity of a race that HISA is regulating and safeguarding, just as HISA does for all other horse races throughout the United States, including the other two legs in the Triple Crown. Larger interests throughout the Commonwealth of Kentucky and beyond are also inextricably linked to and dependent upon the Derby's status as a race that features the world's elite thoroughbreds racing against one another. Absent the requested relief, that hallowed status is imperiled. *See, e.g.*, *Bowman v. Nat'l Football League*, 402 F. Supp. 754, 756 (D. Minn. 1975) ("The public interest is not harmed, and well may be advanced, by the grant of a preliminary injunction. Professional sports and the public are better served by open unfettered competition for playing positions.").

The Jefferson Circuit Court expressed concern with purported unfairness that other horses will not be able to race if Muth qualifies. But such harm is a phantom—there is no evidence that any competitor will suffer. Absent the unlawful ban, Muth would be waltzing into the Derby as the winner of the Arkansas Derby and no one would think twice about that. That's how horse racing—indeed, any competition—properly works. The Jefferson Circuit Court noted that other competitors "have done nothing wrong, have followed the rules, and worked hard only to be denied the opportunity to compete at the last moment." Op. 7. But there was no showing or finding that any other horse would be ousted from the Derby if Muth is afforded his points, or that any other owner would be aggrieved.[17] If anything should bother other owners, it is the fact that none of them will be able to claim their horse as the deserving winner of this year's Derby without having an asterisk next to its name and the lingering, unanswerable question, "would that thoroughbred have outrun Muth"?

In any event, the dispositive point is that Zedan has done nothing wrong beyond sponsoring an exceptionally talented thoroughbred. Once a horse like Muth earned more qualifying points than other thoroughbreds, it became only fitting and fair that Muth would come ahead of them and displace them if necessary. Simply upholding the immutable

[17] When Baffert-trained horses placed in the top five in designated races, and thus would have earned qualifying points, these points were not redistributed amongst other horses in each race. Accordingly, recognizing these points now would not result in points being retroactively redistributed. VC ¶ 138, n. 177. And although the Circuit Court noted the filing of an amicus brief by the owner of another Baffert-trained horse, Imagination, whose points would have qualified it for the Derby, Op. 8, the Court overlooked the clear statement that Imagination cannot possibly run in the Derby given its condition. Brief Amici Curiae Br. of Dianne Bashor ¶ 8. Tellingly, the one declaration from the one owner that CDI enlisted did not speak to the Derby, as opposed to the Oaks, which is not at issue. Sones Aff.

principles of fair competition does not unduly harm anyone. In *Jackson v. Nat'l Football League*, 802 F. Supp. 226 (D. Minn. 1992), the court granted a TRO against the NFL, enjoining it from enforcing a rule that limited the ability of players to move to other teams and rejecting the argument that doing so would harm existing teams that had the players. The court found that there would be no overall impact to competition, there was no justifiable interest in preserving an illegal status quo, and that the hardship to the NF was outweighed by the impact on plaintiffs.

All Zedan seeks is to compete on the same playing field that extends throughout the other two Triple Crown races. Letting that happen does not harm anyone in any cognizable way. The calculus would be no different if CDI had wrongfully and artificially declared the second-place winner of the Derby to be the true winner: while the owner of the second-place horse might celebrate, no one would credit the notion that the second-place winner suffered a wrong if this a court reinstated the true winner. An amicus below, another horse owner wishing to compete whom the circuit court credited, Op. 8, agreed that the best horse should win the Derby. Amici Curiae Br. of Dianne Bashor ¶ 8. No witness disagrees.

Nor should the Jefferson Circuit Court's account of the status quo sway the analysis. *See* Op. 8. "In a typical case between private parties, the status quo is the last uncontested status existing between the parties," *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 664 S.W.3d 633, 702 (Ky. 2023) (Nickell, J., concurring in part and dissenting in part), which here was before the ban's extension. It was CDI that altered the parties' positions by suddenly prolonging what it had always framed as a two-year ban. It cannot now complain of harm from being returned to lawful bounds. Courts have repeatedly

agreed that lifting a racetrack's arbitrary ban against a trainer's horses does not harm the racetrack.[18]

Finally, it bears noting that the "eleventh hour" nature of Zedan's request, Op. at 8, is a function of when Muth qualified for the Derby, not any gamesmanship by Zedan. Prior to Muth winning the Arkansas Derby, Zedan went to great lengths trying to resolve this dispute with CDI, only for CDI to refuse each time even to engage. VC ¶ 96, 4/17/24 Hrg. Zedan did not want to unnecessarily burden the courts with this dispute until it became clear Zedan had no other options. Nor would Zedan have burdened any court were it not for the fact that, after Zedan bought seven horses to attempt to qualify for the Derby, one and only one horse did so qualify, and only on the second-to-last weekend of qualifying races. Had Muth not come through, then there would be no suit. Indeed, this case was brought three business days after Muth won the Arkansas Derby, which earned him enough points to qualify absent the ban on Baffert.[19] Had Zedan brought this case before Muth qualified, CDI would undoubtedly be arguing that its claims were too speculative to be ripe. Even now, CDI challenges Zedan's standing and the lower court expressed "serious

[18] For example, in *Fitzgerald v. Mountain Laurel Racing, Inc.*, the Third Circuit affirmed a preliminary injunction enjoining a racetrack from excluding a licensed horse trainer, noting "[t]here is no evidence that [the racetrack] will be adversely affected if [the trainer] is allowed to continue racing." 607 F.2d 589, 601 (3d Cir. 1979). Similarly, in *Moreno v. Penn Nat. Gaming, Inc.*, a racetrack was enjoined from denying a trainer's horses entry to their tracks; the court found that the racetrack had "presented no evidence of grave harm to [the racetrack] or to the public if [the trainer] continues activities at the track, aside from the stated desire to maintain a positive public perception" which was insufficient. 2012 WL 3637316, at *7 (M.D. Pa. Aug. 22, 2012) (vacated on other grounds); *see also Crissman v. Dover Downs Entertainment Inc.*, 289 F.3d 231, 254 (3d Cir. 2002) (Rosenn, J., dissenting) (on issue not addressed by majority opinion, finding no evidence that owner of horse racing facility would be harmed if suspended horse owners and trainers were allowed to race).

[19] The day after Muth won, Zedan shared with CDI a draft complaint, which was substantially the same as what Zedan filed when CDI yet again refused to engage.

doubts" before proceeding. Op. 6. It cannot be true that this case was brought both too early and too late.

Stripping away the clutter, this Court should see with clear eyes why the balance of equities supports seeing the fastest thoroughbreds race on May 4 and letting the fastest of them win. Nothing but the challenged ban stands in the way of that happening, and nothing other than a petty, personal quibble over public "narratives' underlies the ban. All who value the Derby should be dismayed to see the field, and thus the event itself, diminished on its 150th Anniversary. The upshot imperils tourism, jobs, and revenues that stand to rise or fall with the Derby's long-term fortunes. The interests of these many stakeholders suffuse the public interest that is now implicated; all such stakeholders should cheer for issuance of a temporary injunction.

CONCLUSION

The Court should vacate the Jefferson Circuit Court's order and issue a temporary injunction, starting with an order enabling Muth to be stabled at Churchill Downs on Saturday, April 27, 2024, at 11 am ET, pending further deliberation and decision.

Date: April 19, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 19, 2024, a copy of the above was electronically filed with the Court and served as indicated below:

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/s/ William H. Brammell, Jr.
William H. Brammell, Jr.

APPENDIX

Exhibit	Description
A	Opinion & Order Denying Motion to Dismiss and Denying Temporary Injunction, entered April 18, 2024 ("Op.")
B	Verified Complaint for a Declaration of Rights, a Temporary Injunction, and a Permanent Injunction, filed April 3, 2024 ("VC")
1[20]	CDI's June 2, 2021 Official Statement
2	Doric Sam, *Bob Baffert's Churchill Downs Suspension Extended Through 2024; Safety Concerns Cited*, Bleacher Report at 3 (Jul. 3, 2023), https://bleacherreport.com/articles/10081574-bob-bafferts-churchill-downs-suspension-extended-through-2024-safety-concerns-cited
3	Excerpts of CDI's 2023 Annual Report (10-K)
9	New York Racing Association June 23, 2022 Panel Decision
10	Excerpts of *HISA Prohibited Substances List*, *Controlled Medications* (last updated Dec. 8. 2023)
11	Excerpts of Testimony of M. Anderson during Feb. 3, 2023 Preliminary Injunction Hearing, Baffert v. CDI, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 71.
13	2023 Nomination Form
15	The Triple Crown Terms and Conditions (Jan. 29, 2024)
16	CDI's 2024 Spring Meet Condition Book
17	April 3, 2024 Memorandum Opinion and Order in *Baffert v. CDI*, No. 3:22-cv-123-RGJ (W.D. Ky.), Dkt. 70
19	Fed. Trade Comm'n, Order Approving the Anti-Doping and Medication Control Rule Proposed by the Horseracing Integrity and Safety Authority (Mar. 27, 2023)
24	CDI's January 17, 2023 Response to Baffert's Renewed Motion for Preliminary Injunction in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 50
28	Eric Crawford (@EricCrawford), *Churchill Downs CEO Bill Carstanjen…*, X (Jan. 12, 2022)
30	March 29, 2022 Declaration of CDI President Michael Anderson filed in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 31-67
31	CDI's May 2, 2022 Motion to Dismiss in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 36
32	Statement of Tom Dupree, Counsel for Defendants, to the Court in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.),

[20] Numbered appendix exhibits refer to exhibits to the Verified Complaint.

Exhibit	Description
	During the February 2, 2023 Preliminary Injunction Hearing, Excerpts of Dkt. 68
33	CDI's March 14, 2023 Motion for Summary Judgment in *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), Dkt. 78
C	Plaintiff's Response in Opposition to Defendant's Motion for Expedited Relief and Dismissal Pursuant to KRS 454.464, filed April 11, 2024 ("MTD Opp.")
D	Defendant's Opposition to Plaintiff's Motion for a Temporary Injunction, filed April 12, 2024 ("TI Opp.")
E	Amicus Brief of Dianne Bashor, filed April 12, 2024
F	Affidavit of Aaron Sones, filed April 12, 2024