COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
BUSINESS COURT/DIVISION THREE
CIVIL ACTION NO. 24-CI-002331

ZEDAN RACING STABLES, INC. **PLAINTIFF**

vs.

CHURCHILL DOWNS INCORPORATED **DEFENDANT**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR EXPEDITED RELIEF AND DISMISSAL PURSUANT TO KRS 454.464

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INTRODUCTION

The 150th Kentucky Derby will be held May 4, 2024, and Plaintiff Zedan Racing Stables, Inc. ("Zedan")'s world-class thoroughbred, Muth, is at or near the top of the list of horses that have qualified to race there. Only one thing stands in Muth's way: a bizarre, unjustified, unlawful ban that Defendant Churchill Downs Incorporated ("CDI") has extended on all horses (including Muth) trained by the legendary Bob Baffert. CDI's Baffert ban is squarely at issue in this case and the subject of Zedan's urgent request for a temporary injunction, which must be decided before all horses are due to be stabled at Churchill Downs on Saturday, April 27, 2024, at 11 am ET, lest this important dispute become moot. What is CDI's defense of its Baffert ban? CDI is trying to run, hide, and stall, in the hope that gamesmanship rather than merit wins the day.

CDI is doing everything it can to avoid having to defend the extension of the ban in this Court. Specifically, it is trying to stay this entire proceeding—and postpone for months a decision on Zedan's motion for temporary injunction—by invoking KRS 454.464 and arguing that this provision necessitates an automatic stay in this Court and throughout the pendency of an appeal, irrespective of anything this Court might decide. The cited statute is part of Kentucky's relatively new and untested Uniform Public Expression Protection Act ("UPEPA"), adopted in 2022. CDI's tactic is part and parcel of its longstanding vendetta against Bob Baffert and Zedan—and is nothing more than a transparent ruse to avoid judicial review, on the merits, of a ban that CDI knows it cannot justify.

CDI's invocation of UPEPA is not only meritless, but perverse. The statutory purpose is two-fold: "protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries." *Comments to UPEPA*, National Conference of Commissioners on Uniform State Laws (Oct. 2, 2020) at 7, available at https://medialaw.org/wp-content/uploads/2022/05/UPEPA-

with-comments.pdf. Yet CDI's motion is antithetical to both purposes. On the one hand, Zedan has filed this lawsuit *not to challenge speech* but simply to challenge CDI's *conduct* in *banning* Baffert-trained horses from its races and tracks. Zedan is not trying to muzzle or censor CDI in any way. On the other hand, CDI brings this motion *only* because CDI faults Baffert's *speech*—his public "narrative," CDI's Motion to Dismiss ("Mot."), at 1—which it regards as not sufficiently contrite. If anyone is trampling on rights "to petition and speak freely on issues of public interest," it is CDI, which is avowedly banishing an all-time-great trainer and all the horses he trains solely because the trainer has declined to parrot CDI's self-serving "narrative." In sum, it is CDI that is acting as a censor, while imposing its heavy-handed, never-ending Baffert ban as its cudgel. For CDI to be invoking UPEPA in these circumstances is an upside-down travesty.

For the reasons explained herein, CDI's motion is defective in every respect. This lawsuit does not trigger UPEPA. It also falls within an express, categorical statutory exception. Every count withstands review on the merits. And the automatic stay that CDI invokes is inapplicable to the requested temporary injunction as a matter of statutory construction, and is otherwise invalid and inoperative as a matter of settled constitutional law. Nothing CDI throws at the wall can stave off this Court's fair, considered judgment as to whether a temporary injunction should now issue.

Before turning to specifics, however, it should be noted that CDI has given away the game at the outset. In purporting to uphold the right "to petition and speak freely on issues of public interest," CDI has discredited its sole gripe against Baffert: far from acting on any substantive concerns about the health or safety of horses, CDI admits its extended ban is based only on its dissatisfaction with Baffert supposedly "pedd[ling] a false narrative," Mot. at 1, 6, 11, i.e., uttering words, in public interviews, that displease CDI. Based on CDI's admissions to this Court, it is impossible to fathom how CDI could believe its censorial agenda could justify its extension of a

two-year ban. Nor does CDI even pretend to have any objective factual basis for its extension of the ban, which it now admits represents its own "subjective" opinion. Mot. at 20. Of course, "subjective" opinions may vary from one racetrack to another (CDI is the only track banning Baffert) and be stubbornly indifferent to proven facts. As Zedan has explained, the safety, integrity, and fairness of horseracing is now subject to uniform regulation throughout the United States by the federal Horseracing Integrity and Safety Act ("HISA") Authority; in contrast, CDI's unilateral, anomalous actions directly undermine this national authority. CDI is sullying the upcoming Derby and plunging the sport into chaos by closing its gates to the best horses. As things stand, the results of the Derby will be skewed and the winning horse will be the product only of CDI's admittedly "subjective" opinion.

ARGUMENT

I. Zedan's Claims Cannot Fall Within The Scope Of UPEPA

At the threshold, CDI fails to carry its burden to "establish[ ] under KRS 454.462(1)" that the statute applies. KRS 454.472(1)(a). According to CDI, KRS 454.462(1)(c) applies because Zedan's at-issue claims are supposedly "based on the person's . . . [e]xercise of the right of freedom of speech . . . as guaranteed by the United States Constitution or Kentucky Constitution, on a matter of public concern." Mot. at 9 (ellipses and alteration in original). For the declaration of rights claim based on judicial estoppel, CDI also argues that it is "based on [CDI's] [c]ommunication in a legislative, executive, judicial, administrative, or other governmental proceeding." KRS 454.462(1)(a). But that entire theory is obviously flawed at the threshold.

None of Zedan's at-issue claims are "***based on***" CDI's "speech" or "[c]ommunication in a … judicial … proceeding." KRS 454.462(1). While no Kentucky court has yet addressed this requirement in this relatively new law, other courts have stressed the essential "distinction between speech that provides the basis for liability [which can support an "anti-SLAPP" motion] and speech

that provides evidence of liability [which cannot]." *Park v. Bd. of Trustees of Cal. State Univ.*, 2 Cal. 5th 1057, 1065 (Cal. 2017). Here, the "basis for liability" is CDI's *conduct* in the form of its *ban*, while CDI's *speech* "provides evidence of liability."

For example, in *Park*, the California Supreme Court rejected a California "anti-SLAPP" motion over a public university's denial of tenure to a professor. *Id*. at 1068, 1072. Under California's statute, a claim must in relevant part "aris[e] from any act of [the defendant] in furtherance of [the defendant's] right of petition or free speech." Cal. Civ. Proc. Code § 425.16(b)(1). The court reasoned that the "arising from" standard was not satisfied simply because the "tenure decision may have been communicated orally or in writing." 2 Cal. 5th at 1068. The same point was illustrated in *Graffiti Protective Coatings, Inc. v. City of Pico Rivera*, where "a company sued a city after its government contract was terminated and a new contract awarded without competitive bidding to a rival." *Id*. at 1065 (citing 181 Cal. App. 4th 1207 (Cal. Ct. App. 2010)). "While communications by the city preceding its decision might be helpful in establishing what events led to the change in contract, the contractor's claims were not based on them, *but on the award of a new contract* in alleged violation of laws regulating competitive bidding." *Id*. (citing *Graffiti*, 181 Cal. App. 4th at 1215, 1224 (emphasis added)).

The same reasoning is dispositive here. Although CDI's June 2, 2021 statement *evidences* Zedan's promissory estoppel and waiver claims, those claims are not based on the statement but are "based on" CDI's act of extending the suspension and, in particular, *barring CDI's gates* to Zedan's horse, Muth. *The ban itself* is what those claims challenge and seek relief from—not the statements. Nor is Zedan's judicial estoppel claim "based on" CDI's representations to the court in *Baffert v. CDI*; those representations merely evidence one element of the theory of relief that Zedan asserts. Again, the basis for liability is CDI's ban, which is what Zedan seeks to invalidate.

To be clear, CDI may continue to say what it pleases—in courts, in conversations, in press statements—provided it actually lets Baffert-trained horses race alongside all others that qualify. In short, CDI has not satisfied its burden under KRS 454.462(1) for any of the at-issue claims.

II. UPEPA's Statutory Exception For Commercial Activity Applies

Even if CDI met its initial burden, UPEPA expressly and categorically excludes claims "[a]gainst a person primarily engaged in the business of selling or leasing goods or services if the cause of action arises out of a communication or lack of communication related to the person's sale or lease of the goods or services." KRS 454.462(2)(a)(3). This exclusion squarely applies here.

CDI is primarily in the business of selling goods and services—namely, preeminent horseraces. As shown in the Verified Complaint, "the Derby is ***the*** defining asset of CDI." Verified Complaint ("VC") ¶¶ 48-50. As part of this business, CDI sells entries to its races, *see* Ex. 16[1] at 33 (setting forth the $50,000 entry fee per horse for the Derby), nomination applications, *see* Ex. 15, tickets to its races, *see* VC ¶ 48, and sponsorships, *id*. ¶ 50 (referencing CDI's "ability to retain sponsors"), alongside manifold revenue streams.

Zedan's claims arise out of communications surrounding CDI's commercial activities, i.e., its horseraces. Indeed, the gravamen of Zedan's complaint is that CDI is breaking its commitments to let Zedan apply for and have access to CDI's grounds and services. And all of Zedan's claims seek to enjoin CDI's ban of Baffert and, by extension, Zedan's horses. Accordingly, this entire case falls outside the plain terms of UPEPA as a result of the commercial activity exception in KRS 454.462(2)(a)(3).

[1] All exhibit citations are to the exhibits to the Verified Complaint.

III. Zedan Has Pleaded And Established Meritorious Claims

Even if UPEPA applied, Zedan has established a prima facie case on each claim at issue, and CDI has not shown that any claim fails on its merits.

A. Zedan Has Sufficiently Pleaded And Established Promissory Estoppel

Zedan has established a prima facie case of promissory estoppel, *see* VC ¶¶ 145-152; Zedan's Motion for Temporary Injunction ("TI Mot.") at 33-36, and CDI has not shown otherwise.

CDI first argues that it "never made the promise" that its ban would expire as scheduled absent additional violations. We all know what a promise is, and CDI's quoted statement clearly amounts to a promise, which is defined as "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." *Blankenship v. Lexington-Fayette Urb. Cnty. Gov.*, 2016 WL 3900726, at *4 (Ky. App. July 8, 2016) (quoting Restatement (Second) of Contracts § 2(1)); *Fletcher v. Branch Banking & Tr. Corp.*, 2007 WL 2792186, at *3 (W.D. Ky. Sept. 21, 2007) (same). CDI's June 2, 2021 statement was clear: "CDI reserves the right to extend Baffert's suspension if there are additional violations in any racing jurisdiction." Ex. 1. CDI thereby manifested its intent to refrain from extending Baffert's suspension *absent* "additional violations in any racing jurisdiction." *Id.*; *see also Fox v. Grayson*, 317 S.W.3d 1, 11 (Ky. 2010) ("[T]here is generally an inference that omissions are intentional. This rule is based on logic and common sense. It expresses the concept that when people say one thing they do not mean something else." (citation omitted)).

CDI next argues that Zedan has no legal rights here and thus lacks standing. This, too, defies the record and reason itself. *Zedan's* horses are being barred from the Kentucky Derby (and any other CDI race). CDI compares Zedan to a sports fan that lacked standing to challenge penalties by the NCAA on a basketball team. Mot. at 15 (citing *Cotton v. Nat'l Collegiate Athletic*

Ass'n, 587 S.W.3d 356, 359 (Ky. App. 2019)). That wayward analogy might work if Zedan were complaining from the sidelines while idly watching other horses race, or, better yet, while watching Muth race at the Derby as Muth has qualified to do. But that is not this case. Zedan complains because *its* own horse is *banned* from competing in the Derby and all other CDI races *at great cost to Zedan*. To analogize, Zedan has just as much standing as the New York Yankees would have if they were, say, barred from the World Series because the host stadium harbors a vendetta against the State of New York.

Relatedly, CDI ignores that a "third person" can have a claim. *Sawyer v. Mills*, 295 S.W.3d 79, 89 (Ky. 2009) (citation omitted). There is no requirement that the promise be pointedly "made to" Zedan alone. Mot. at 15 (arguing "Zedan does not have standing to enforce a promise that, if it was made to anyone (and it was not), was made to Baffert").

CDI next argues it could not have expected Zedan to rely upon its promise by purchasing horses. But Zedan has shown the opposite, *see* TI Mot. at 34-35, and CDI again ignores Zedan's arguments along with a plethora of supporting evidence. CDI's promise was that Baffert, Zedan's all-time-great trainer, would not be banned as of the 2024 Derby (absent additional violations). Given CDI's sophistication and careful deliberations surrounding its statement,[2] it is implausible that CDI would not expect that Zedan and others would be investing money in horses and training by Baffert to attempt to qualify for and win the 2024 Derby.

[2] As authorized by KRS 454.466(4), Zedan issued three limited discovery requests hours after the hearing on April 8. One request asked CDI to identify persons with knowledge of CDI's internal discussions related to CDI's decision to extend Baffert's suspension through 2024. The other two requests asked for documents and internal communications related to CDI's decision to extend Baffert's suspension and related to the July 3, 2023 statement announcing the same. As of this filing, CDI has substantively responded to the interrogatory, and has advised Zedan that responsive documents exist and will be produced, but has not produced any documents.

CDI's fall back argument is that if Zedan did reasonably rely upon its promise, Zedan's reliance was "unreasonable." Mot. at 16. To show this, CDI invokes the following from *Baffert v. CDI*. First, CDI points two instances where the court *summarized* ***Baffert's*** *allegation in* ***Baffert's*** *complaint*, which was a clear reference to CDI's June 2, 2021 promise.[3] Second, CDI quotes an ambiguous, uninformative exchange between the court and CDI's counsel during the preliminary injunction hearing: "Q: And your suspension lasted as it currently stand[s] through the 2023 spring meet at Churchill Downs in July[,] correct? A. I think so."[4]

From these three statements, CDI argues that ***CDI*** had "made abundantly clear that" "Baffert's re-eligibility was [not] guaranteed." Mot. at 16. That is quadruply wrong. *First*, ***CDI*** itself did not make these statements. *Second*, they are in harmony with Zedan's promissory estoppel theory that CDI promised not to extend the ban absent additional violations. *Third*, CDI has not shown that Zedan was even aware of these statements when Zedan relied upon CDI's June 2, 2021 promise. *Fourth*, based upon this record, Zedan's reliance upon CDI's promise was reasonable in all events. *See* TI Mot. at 35. To be clear, Zedan purchased its first horse in reliance upon the statement on July 20, 2022, and the last horse on May 8, 2023. VC ¶ 98. Throughout this period—when Zedan was purchasing Derby-aged horses in reliance on CDI's June 2021 promise—Baffert-trained horses (including Zedan's) competed without additional violations hundreds of times. VC ¶ 128 ("[S]ince CDI's Baffert ban began on June 2, 2021, 669 Baffert-trained horses have raced without a violation; 55 of those were Zedan Racing horses.").

[3] *Baffert v. CDI*, No. 3:22-cv-00123, 2023 WL 2089221, at *2 (W.D. Ky. Feb. 17, 2023) (recounting in the Background section of the opinion Baffert's allegation that "CDI reserved the right to extend the period of its suspension" (citing Dkt. 1, Complaint, at 23)); 2023 WL 3637046, at *1 (W.D. Ky. May 24, 2023) (same).

[4] Mot. at 16 (citing Hearing Tr. at 183:23-25, *Baffert v. CDI*, No. 3:22-cv-00123 (W.D. Ky.), ECF No. 78-1).

CDI's next argument—that Zedan did not detrimentally rely upon CDI's promise—also ignores record evidence. An entire section of the Verified Complaint, *see* VC ¶¶ 97-109, is devoted to this topic, and CDI addresses none of those sworn particulars.[5]

For its final argument, CDI invokes the 202**4** Derby contract as though it somehow forecloses Zedan's claim based on CDI's 202**1** promise and 202**3** extension of Baffert's suspension. In an effort to backfill the glaring temporal gap, CDI invokes an inapposite federal case holding that "an oral promise made prior to the execution of a written agreement that is inconsistent with the unambiguous terms of the written agreement cannot form the basis of a promissory estoppel claim." *Davis v. Siemens Med. Sols. USA, Inc.*, 399 F. Supp. 2d 785, 799 (W.D. Ky. 2005), *aff'd*, 279 F. App'x 378 (6th Cir. 2008).[6] That case has no application on these facts because the 2024 Derby contract did not purport to revisit, let alone supersede, any prior understanding specifically surrounding the Baffert ban. In fact, that contract does not even reference the Baffert ban, its contours, or the rationale for the same. Read properly, the 2024 Derby contract has no application to this dispute. Consistent with its terms, this Court's invalidation of the 2023 extension would leave CDI estopped from enforcing its suspension of Baffert, and

[5] For example, CDI does not deny that the seven horses that Zedan identifies in the Verified Complaint were "purchased with an eye towards winning the Derby." VC ¶ 97. Nor does CDI deny that Zedan then spent an additional $4 million plus to have Baffert train these horses in "preparing these horses for the 2024 Derby." *Id.* ¶ 99. Nor does CDI deny that Zedan "is being denied the opportunity to gain favorable exposure and potentially win at the Derby with Baffert-trained horses and realize the desired return in its investment in those horses." *Id.* ¶ 100. Nor does CDI deny that Zedan "would not have sunk this much money (over $15 million from June 2, 2021 to July 3, 2023, the date CDI announced its extension) into these Baffert-trained horses, had it known that Baffert's suspension would be extended." *Id.* ¶ 99.

[6] CDI's two other cited cases are inapposite because the promise in both cases was part of a contract. Here, the 202**4** contract is far removed from CDI's 202**1** promise and 202**3** extension. *Sparks v. Rose* involved breach of a contract that covered the subject matter of the dispute, i.e., the failure to pay for the building and installation of cabinets. 681 S.W.3d 542, 546 (Ky. App. 2023). And in *Vogt, the Cleaners, Inc. v. Hamhed, LLC*, "the promise [the plaintiff] relied upon was the oral contract." 2021 WL 647118, at *6 (Ky. App. Feb. 19, 2021).

Zedan's horses would be eligible under the 2024 Derby contract because Baffert would *not* be a "Suspended Trainer" thereunder.

B. Zedan Has Sufficiently Pleaded And Established Defamation

It bears noting that Zedan's defamation claim—which is the only claim even colorably subject to the statutory protection CDI invokes, because it derives in part from CDI's public statements—is one that Zedan does *not* rely upon as a basis for the *temporary* injunction Zedan now exigently seeks. As such, any potential application KRS 454.472 may have, *arguendo*, to this one claim should be no impediment to considering the request for temporary injunction forthwith. That noted, Zedan has in any event pleaded and established its defamation claim under two theories: (1) certain language within CDI's July 3, 2023 official statement; and (2) CDI's conduct of banning Zedan's trainer, Baffert. *See* VC ¶¶ 153-58. CDI *does not* challenge the latter theory, i.e., that CDI's *conduct* in *banning* Baffert defames Zedan.

CDI first argues that CDI's challenged statements "do not concern Zedan," Mot. at 19-20, because the July 3, 2023 statement purportedly only references Baffert. But it does not follow that CDI did not defame Zedan, whose horses are trained by Baffert and thus directly subject to the asserted taint. *See, e.g.*, *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 274-75 (Ky. App. 1981) (recognizing that language can be defamatory "if the language employed is directed toward a comparatively small group of persons, or a restricted or local portion of a general class, and is so framed as to make defamatory imputations against all members of the small or restricted group" (citation omitted)). As Zedan alleged, "CDI's statements are necessarily directed not only at Baffert but at those owners using Baffert to train their horses, which are, after all, the immediate objects of the ban." VC ¶ 156. For the avoidance of doubt, the July 3, 2023 statement *specifically references* ***"Medina Spirit," Zedan's "horse*** [that] was disqualified" from the 2021 Derby. Ex. 2.

CDI argues next that its July 3, 2023 statements that Zedan's horses lack "integrity" and that their trainer "cannot be trusted" to abide by "rules and regulations that ensure horse … safety" are mere "subjective" opinion. Mot. at 20. That is astonishing. Observers to this point might have thought that CDI stands behind its ban—and CDI's professed concerns about an *actual* threat to "integrity" and "safety"—as reflecting hard, objective facts that CDI has diligently verified. But observers now know better. CDI has admitted to this Court that its banning of an all-time-great horse trainer was and is just a matter of CDI's casual, subjective opinion! Although CDI has given the lie to any notion that its ban is grounded in factual integrity issues, it has by no means absolved itself of defamation liability.

If anything, CDI's position confirms that the extension of its ban is based on pretext rather than genuine, fact-based concerns about health and safety. It remains the case that the statements at issue, taken by their own terms (different from CDI's revisionism) can be proven false, as Zedan has done. *See* VC ¶¶ 125-29. Whether Zedan's horses lack "integrity" because they do not abide by HISA's "rules and regulations" is an ascertainable fact. To the extent CDI wants to recast its statements as mere opinion, that (disingenuous) effort would at best be the subject of a factual dispute that should be resolved at a later stage. *See, e.g.*, *Master Replicas, Inc. v. Levitation Arts, Inc.*, 2008 WL 11338694 at *3 (C.D. Cal. May 28, 2008) ("[W]here there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury." (citation omitted)).

CDI's final argument is that Zedan's claims are not "actionable per se" because CDI's statements do not attribute to Zedan "conduct which is incompatible with his business, trade, profession, or office." Mot. at 21. For this, CDI rehashes its spurious argument that the statements are about Baffert, not Zedan. Again, CDI's statements implicate Zedan and its product, its horses:

CDI has been telling the world that Zedan's horses, as trained by Baffert, are compromised. Such statements are defamatory in the extreme and utterly "incompatible with [Zedan's] business, trade, profession, or office," particularly when it comes to racing, and selling and breeding horses that come with an assurance of integrity. *See House v. Players' Dugout, Inc.*, 440 F. Supp. 3d 673, 680, 688-89 (W.D. Ky. 2020) (finding baseball coaches had valid defamation *per se* claim where their adversary emailed others alleging that the coaches' training program was not "safe and effective" and had left players injured, thereby damaging the defendants' business).

C. Zedan Has Sufficiently Pleaded And Established His Declaration Of Rights Theories

1. Zedan has sufficiently pleaded and established waiver.

Zedan has sufficiently pleaded and proved that waiver applies here and that it is entitled to a declaration of rights declaring CDI's extension of Baffert's suspension void *ab initio*. *See* VC ¶¶ 173-79; TI Mot. at 44-46. CDI has not shown otherwise.

CDI's sole responsive argument is that, "by listing one circumstance under which CDI would extend Baffert's suspension, CDI did not disavow extending the suspension in other circumstances." Mot. at 22. But CDI did not merely list one of many circumstances for which it could extend the suspension. CDI "***reserve[d] the right*** to extend Baffert's suspension" in one circumstance: "if there are additional violations in any racing jurisdiction." Ex. 1. And in the preceding sentence, CDI's CEO (an attorney and CDI's former general counsel) explicitly invoked CDI's "***rights*** to impose these measures." Ex. 1.

This case is no different from if CDI had said that Baffert's extension would be for two years, 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 the new reason it offers here—because it does not like the words Baffert has been uttering. Suffice it to note that CDI committed a classic waiver under Kentucky law when it invoked its rights and then immediately and unequivocally conditioned the future exercise of those rights. Again, 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.

2. Zedan has sufficiently pleaded and established judicial estoppel.

Zedan has pleaded and shown that judicial estoppel applies here, *see* VC ¶¶ 180-86; TI Mot. at 46-48, such that the Court should void CDI's extension of Baffert's suspension.

CDI first tries to reconcile its position in *Baffert v. CDI* that the Baffert ban was for two years with its present position that the ban is longer. But that math does not work. A two-year suspension is not a three-plus-year suspension. Courts regularly apply judicial estoppel to prevent a party from taking inconsistent factual positions such as we have here. In *Kotevska v. Fenton*, a party was judicially estopped where it took inconsistent factual positions in separate litigations. 2019 WL 1313410, at *5-7 (Ky. App. Mar. 22, 2019). In the first action, Dr. Kotevska took the position that "she only considered properties located *at least fifteen miles away* from" her former employer. *Id*. at *6. In the second action, Dr. Kotevska took the position that she "only looked at properties *at least 14.5 miles away* from" her former employer. *Id*. And in *Countryway Ins. Co. v. Oakes*, an insurer first took the position that its policy provided a certain type of coverage but later took the position that it provided a different type of coverage. 2010 WL 2787915, at *5 (Ky. App. July 16, 2010).

Contrary to CDI's argument, the inconsistency is highlighted, not obviated, by the fact that CDI's statements in *Baffert v. CDI* never mentioned any prospect of extending the suspension. Here, CDI cannot point to a single statement or representation that ***CDI*** made in *Baffert v. CDI* that the suspension might extend beyond two years (because of additional violations or otherwise). Accordingly, the court there not only accepted CDI's position of a two-year ban but repeatedly relied upon the ban only being two years in ruling in CDI's favor. *See* TI Mot. at 47.

CDI points to two sentences in which the *Baffert v. CDI* court restated (in the background section of two orders) ***Baffert's*** complaint allegations. *Baffert v. CDI*, No. 3:22-cv-00123, 2023 WL 2089221, at *2 (W.D. Ky. Feb. 17, 2023) (recounting in the Background section of the opinion the plaintiffs' allegation that "CDI reserved the right to extend the period of its suspension." (citing Dkt. 1, Complaint, at 23)); 2023 WL 3637046, at *1 (W.D. Ky. May 24, 2023) (same). This does not somehow nullify that court's repeated reliance upon ***CDI's representations*** about its "two year" suspension *in ruling as CDI urged*.

Finally, CDI argues that Zedan suffers no serious detriment and that CDI gains no unfair advantage from any inconsistency, but the facts amply refute that. CDI's bait-and-switch tactics have cost Zedan millions of dollars in sunk costs while enabling CDI successfully to defend a two-year ban against legal challenge, *only thereafter* to extend the ban indefinitely (in ways that could have profoundly swayed the legal analysis in *Baffert v. CDI*).

IV. The Court Can And Should Rule On Zedan's Pending Temporary Injunction Motion

In no event can UPEPA's invocation of an automatic stay, *ipse dixit*, defeat Zedan's request for a temporary injunction. It should be noted at the outset that CDI's reading of the statute, whereby mere invocation of it effectively forecloses temporary relief in exigent circumstances like these, would be patently unconstitutional. Once read properly and with an eye towards avoiding

grave constitutional concerns, the statute by its terms enables this Court to grant the requested relief, without ado, because the relief falls within two exceptions set forth in the statute, it: (1) protects public health or safety or (2) furthers an unrelated motion (that is, aspects of the temporary injunction that do not, even according to CDI, implicate the statute). *See* KRS 454.466(7) (providing exceptions to the stay for a "preliminary injunction to protect against an imminent threat to public health or safety" or a "motion unrelated to the motion" to dismiss). To the extent that CDI reads UPEPA differently, it becomes readily apparent that the automatic stay flouts both the Kentucky Constitution and the United States Constitution such that the provision cannot validly constrain this Court's exercise of its venerable powers and discretion to issue prompt, equitable relief as appropriate.

Both statutory exceptions to the stay apply here by their terms. And their application becomes even more imperative once this Court accounts for the obvious, profound constitutional problems that otherwise loom. As elaborated below, UPEPA's automatic stay provision would be unconstitutional insofar as it limits the Court's discretion to rule on Zedan's pending temporary injunction motion. *A fortiori*, therefore, the exceptions to UPEPA's automatic stay should be read broadly for the sake of avoiding "an unconstitutional result." *Ky. Utils. Co. v. Jackson Cnty. Rural Elec. Coop.*, 438 S.W.2d 788, 790 (Ky. App. 1969); *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (adopting a "construction [of a city ordinance] that avoids constitutional difficulties"); *Garter Belt, Inc. v. Twp. of Van Buren*, 366 F. App'x 608, 609 (6th Cir. 2010) (adopting between two plausible constructions of a city ordinance the one that avoids "a multitude of constitutional problems" (citation omitted)). Alternatively, this Court should not hesitate to hold that the stay provision is unconstitutional for multiple reasons.

A. The Court Can Grant A Temporary Injunction Based On Public Health Or Safety

Zedan's temporary injunction motion is rightly characterized as "seeking a special or preliminary injunction to protect against an imminent threat to public health or safety," as reflected in the Verified Complaint and Motion for a Temporary Injunction. KRS 454.466(7)(b). In particular, it seeks to vindicate the Horseracing Integrity and ***Safety*** Act ("HISA") at a *critical* stage—less than a year after it has become fully effective. As recounted in the Verified Complaint, public pressure reached a tipping point in 2019 following an alarming spate of equine fatalities at racetracks across the country, particularly at Churchill Downs. VC ¶ 86; TI Mot. at 20. Stakeholders recognized that the crux of this ***safety crisis*** was the lack of overarching, uniform standards and attendant decentralized regulation. *Id*. "Congress faced a stark decision: enact HISA or watch the sport disintegrate." VC ¶ 86, n.121 (citing Brief Amici Curiae of Senator Mitch McConnell and Representatives Paul Tonko and Andy Barr, *Oklahoma v. United States*, No. 22-5487, Dkt. 62 at 3 (6th Cir. 2022)).

Congress passed HISA in response to the ***safety crisis*** arising from 38 racing jurisdictions having their own rules and regulations. VC ¶ 86; TI Mot. at 19. The result is a single entity that is meant to "exercise ***independent and exclusive*** national authority over the ***safety***, welfare, and integrity" of the sport, 15 U.S.C. § 3054(a)(2) (emphasis added). And the whole point of the statute, as emphasized by Zedan in seeking a temporary injunction, is that "racetracks no longer have authority over horseracing integrity and safety issues." TI Mot. at 6; *see also* VC ¶ 126. The threat CDI is posing to HISA's goal of ensuring safety is especially stark, as "HISA is being disregarded right out of the gate." TI Mot. at 7; VC ¶ 19.

Accordingly, Zedan has already demonstrated in seeking a temporary injunction that, "[a]n injunction would only benefit the public because it would secure equine safety and integrity as

uniformly superintended by HISA, without permitting rogue deviations." TI Mot. at 63 (citing *Boone Creek Props., LLC v. Lexington-Fayette Urb. Cnty. Bd. of Adjustment*, 442 S.W.3d 36, 40 (Ky. 2014) (recognizing that a federal "statute's enactment constitutes Congress's implied finding that violations will harm the public and ought, if necessary, be restrained" (citation omitted)). It follows that CDI is "imminent[ly] threat[ening] [ ] public health or safety," KRS 454.466(7)(b), by undermining HISA at a watershed juncture, by deviating from uniform safety regulation, and by plunging the industry back into racetrack-by-racetrack deviations and chaos that imperil health and safety. For this reason alone, a temporary injunction can issue consistent with UPEPA.

B. In The Alternative, The Court Can Rule On The Non-Implicated Counts In Zedan's Temporary Injunction Motion Based On UPEPA's Unrelated Motion Exception

Independent of the above, the Court could at the very least address certain grounds for Zedan's temporary injunction motion. CDI's UPEPA motion does not contend that UPEPA is implicated by Zedan's request for a declaration of rights on the theories that CDI lacked any legal right to suspend Baffert, *see* VC ¶¶ 163-72; TI Mot. at 39-44, or that CDI's extension of Baffert's suspension was preempted by and violative of HISA, *see* VC ¶¶ 187-94; TI Mot. at 48-55. Accordingly, even if the Court stayed *other* aspects of these proceedings (which, to be clear, the Court need not and should not do), the Court could find that Zedan's temporary injunction motion is "unrelated" to CDI's motion to dismiss as it relates to these two theories, KRS 454.466(7)(a), which supply substantial and sufficient grounds for Zedan's requested injunctive relief.

C. UPEPA's Automatic Stay Violates The Kentucky Constitution And The United States Constitution

The unconstitutionality of the statute is manifest. According to CDI, its unilateral (and frivolous) invocation of UPEPA bars this Court from ruling on Zedan's temporary injunction motion until the Court rules on CDI's pending motion to dismiss and the time for appeal lapses

(30 days later), KRS 454.466(2), or else an appeal concludes (months later), *id*. 454.466(3). If UPEPA is so read, Zedan is denied the benefit of the above-referenced exceptions, and the Court is denied the ability otherwise to call upon its legal and equitable discretion, then UPEPA is constitutionally indefensible. In no event can UPEPA bar this Court from timely addressing and potentially granting Zedan's request for a temporary injunction as and if the Court sees fit.

First, UPEPA trespasses past Kentucky's Separation of Powers Clauses.[7] As the Kentucky Supreme Court has long recognized, once a "court [has] obtained jurisdiction of a cause of action," as this Court incontrovertibly has here, it obtains, as "incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984). The Legislature lacks authority to curtail this inherent judicial power, which includes the "inherent power to issue injunctions"—especially when, as is true here, doing so is necessary "to protect or preserve the subject matter of the litigation" or the court's "jurisdiction." *Id.* at 64-65. Based on these precepts, the Kentucky Supreme Court has invalidated a statute that purported to revoke courts' ability to "enjoin the operation" of certain administrative orders while an appeal was pending. *Id.*

UPEPA should meet the same fate as it is designed to impose legislative strictures disabling a court's ability to enter a temporary injunction. *See generally* KRS 454.466. Under *Smothers*, such limitation is unconstitutional. *See Smothers*, 672 S.W.2d at 64; *see also Arkk Props., LLC v. Cameron*, 681 S.W.3d 133, 143 (Ky. 2023) ("The *Smothers* court interpreted §§ 27 and 28 of the

[7] Section 27 of the Kentucky Constitution divides the powers of the Commonwealth "into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." And Section 28 provides that "[n]o person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Kentucky Constitution as terminating the power of the legislature to dictate rulings and policy over the practice and procedure of the case after a lawsuit has been filed." (citing 672 S.W.2d at 65)).

Stated differently, UPEPA's automatic stay "invades [the Kentucky Supreme] Court's authority over the rules and practices of the courts by mandating certain action be taken by … circuit courts across the Commonwealth." *Arkk*, 681 S.W.3d at 142 (Ky. 2023). In *Arkk*, the Kentucky Supreme Court invalidated a statute that "create[d] a new mechanism for automatic transfer of [a certain type of] action." *Id*. at 140. Following its longstanding precedent, the Court reasoned that a "circuit court with jurisdiction over a case is vested with 'inherent' authority to administer justice, including deciding whether a case should be transferred to another venue," *id*. at 141 (citing KY. CONST. § 112(5)), and the statute at issue "divest[ed] the circuit court of its inherent power to administer justice in a case," *id*. That statute's "robotic transfer process violates [the separation of powers] doctrine by usurping the circuit court's role in determining whether recusal or change of venue are necessitated and halts any appeal of that ruling." *Id*. at 142.

So too, here. UPEPA's "robotic" automatic stay "violates [the separation of powers] doctrine by usurping the circuit court's role in determining whether" to—among other things—decide whether to grant temporary injunctive relief on claims at issue in a UPEPA motion prior to ruling on the UPEPA motion. *Id*.; *see also True v. Danville/Boyle Cnty. Bd. of Adjustments*, 2005 WL 791252, at *2 (Ky. App. Apr. 8, 2005) ("Although we find no language in KRS Chapter 100 purporting to interfere with the inherent power of the court to issue injunctions, we point out that such an infringement by the legislature would be an unconstitutional legislative encroachment onto the power of the judiciary." (citing *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984))).

Second, UPEPA violates Kentucky's jural-rights doctrine as applicable here and guaranteed by the Kentucky Constitution. The doctrine flows from constitutional provisions such

as Section 14, which provides that "[a]ll courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Under the doctrine, "[t]he right of every individual in society to access a system of justice to redress wrongs is basic and fundamental to our common law heritage, protected by Section[ ] 14 … of our Kentucky Constitution." *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995). Here, CDI would be weaponizing UPEPA to deny Zedan its constitutional right to an "open" court and to its "remedy [of a temporary injunction] by due course of law … ***without*** sale, denial or ***delay***."

Finally, CDI's attempted use of UPEPA offends the Due Process Clause of the Fourteenth Amendment. The Supreme Court of the United States has long and consistently held that due process prohibits a self-interested decisionmaker from adjudicating a litigant's rights. As the Supreme Court held in *Caperton v. A.T. Massey Coal Co.*, recusal of a decisionmaker is required when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." 556 U.S. 868, 872 (2009) (citation omitted); *see also Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." (citing *In re Murchison*, 349 U.S. 133, 136-37 (1955)); *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927) ("That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule."). It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton*, 556 U.S. at 876 (quoting *Murchison*, 349 U.S. at 136). What constitutes a "fair tribunal" "cannot be defined with precision," but requires consideration of "[c]ircumstances and relationships." *Murchison*, 349 U.S. at 136.

Here, it is not a close call as to whether CDI is a fair-minded decisionmaker. Indeed, no one could deny that CDI—Zedan's litigation adversary, which stands potentially to be held liable and discredited in court—holds a direct, personal stake in the resolution of Zedan's request for a temporary injunction. Yet CDI is claiming unilateral, unchecked authority effectively to deny Zedan's meritorious request for a temporary injunction just by incanting "UPEPA" and dragging out the appellate process until after the Derby has run and Zedan's request has been mooted in critical part. Such abuse denies Zedan its rights to a fair tribunal and violates due process.

* * *

Notably, Zedan is not attacking a straw person. CDI's reading of UPEPA makes it a monstrosity—carrying an automatic, sweeping stay that becomes operative as soon as a defendant files a UPEPA motion and then lasts until the appellate process concludes. Such stay would be subject to obvious, incurable abuse, as vividly illustrated here. The most exigent, well-founded injunctive relief request could be defeated by a bad-faith defendant that: (i) invokes UPEPA and its stay without any basis; (ii) asserts that UPEPA applies to all counts; (iii) and does that solely for the sake of delaying the entire case throughout pendency of appeal, while inflicting irreparable harm in the interim. It follows *a fortiori* from *Caperton*, *Williams*, *Murchison*, *Tumey,* and a string of Kentucky precedents applying the jural-rights doctrine that Zedan's rights are violated if its ***litigation adversary*** can unilaterally nix a request for temporary relief in this fashion.

Of course, such abuse and due-process violations would not end with this case. Various and sundry bad actors could adopt the same tactic CDI is attempting to employ here. Buildings could be wrongfully demolished. *SM Newco Paducah, LLC v. Ky. Oaks Mall Co.*, 499 S.W.3d 275, 277 (Ky. 2016). Trade secrets could be stolen and exploited, and hard-earned marketplace advantages lost forever. *See, e.g.*, *Oakwood Labs. LLC v. Thanoo*, 999 F.3d 892, 913 (3d Cir.

2021) ("The trade secret's economic value depreciates or is eliminated altogether upon its loss of secrecy when a competitor obtains and uses that information without the owner's consent."). Assets could be wrongfully transferred, becoming irretrievable. *See, e.g.*, *NCR Corp. v. Feltz*, 983 F.2d 1068 (6th Cir. 1993); *Purple Innovation v. Foshan Dirani Design Furniture*, 2024 WL 1347356 (D. Utah Mar. 29, 2024). Entire businesses could be lost. *See, e.g.*, *Gateway E. Ry. Co. v. Terminal R.R. Ass'n of St. Louis*, 35 F.3d 1134, 1140 (7th Cir. 1994) (wrongfully refusing to permit the plaintiff from utilizing the defendant's railroad tracks in alleged violation of contractual rights "would drive [movant] out of business" within months). Or an artist's work could be permanently devalued by a flood of forgeries. *See Cheairs v. Thomas*, 2020 WL 12918276, at *1 (W.D. Tenn. July 14, 2020). The permutations are endless, and all are susceptible to the same device of a defendant crying "UPEPA" just to inoculate against an urgently-needed injunction. Neither the Kentucky Constitution nor the United States Constitution permits any such miscarriage of justice. Wrongful invocation of UPEPA cannot prevent this Court from issuing rightful injunctive relief when it is justified and timely.

CONCLUSION

For the foregoing reasons, the Court should deny CDI's motion to dismiss, lift any stay, and promptly decide the merits of Zedan's temporary injunction motion, or, alternatively and at a minimum, decide those aspects of Zedan's motion that concededly do not implicate UPEPA.

Date: April 11, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was e-filed through the KCOJ eFiling system and/or sent by means of either electronic mail this 11th day of April, 2024 to the following:

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