BEFORE THE IOWA SUPREME COURT

No. 21-0649

ROBERT BENDA, on behalf of himself
and all others similarly situated,
Plaintiff- Appellant,
v.
PRAIRIE MEADOWS RACETRACK AND
CASINO, INC.,
Defendant-Appellee.

IOWA HORSEMEN'S BENEVOLENT AND
PROTECTIVE ASSOCIATION
and
IOWA THOROUGHBRED BREEDERS AND
OWNERS ASSOCIATION,
Intervenors.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY CASE NO. LACL143202
Hon. Scott D. Rosenberg

APPELLANT'S AMENDED FINAL REPLY BRIEF

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I. INTRODUCTION

Benda asks this Court to allow owners and breeders of Iowa-bred racehorses to decide *for themselves* if they want to recover money that Prairie Meadows shortchanged them.

This brief first addresses factual errors that permeate Appellees' briefs. Then we address certain procedural disputes. We next reply to arguments common to Appellees' briefs, and finally we address issues raised uniquely by each Appellee.[1]

II. APPELLEES' FACTUAL ERRORS.

Appellees' defenses of the district court's ruling are predicated on several demonstrably inaccurate assertions.

A. Benda Is Still Part Of The Horseracing Industry.

Appellees falsely claim that Benda is "no longer part of the [horseracing] industry," IHBPA Br. 30 & 35, and that Benda and his lawyers have no "concern about negative effects that may happen to breeders and owners going forward because they have no current 'skin in the game.'" PMRC Br. 37. Horses that Benda bred in Iowa *still* race

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[1] ITBOA, IHBPA, and Prairie Meadows are referred to collectively as "Appellees," and their briefs are referred to as "ITBOA Br.", "IHBPA Br.", and "PMRC Br.", respectively. Benda's initial brief is "Benda Br."

at Prairie Meadows and earn breeder's awards for him through 2020 and 2021. App. v.3, p. 244; App. v.4, p. 169. Appellees focus exclusively on whether Benda holds a license *as an owner*. As a breeder, Benda still has "skin in the game" concerning future horseracing meets in Iowa.

Benda's continuing status as a breeder of Iowa-bred horses makes IHBPA's cases inapposite. In *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), and *Audio-Video World of Wilmington, Inc. v. MHI Hotels Two, Inc.*, 2010 WL 6239353 (E.D.N.C. Dec. 8, 2010), the representative plaintiffs had exited the business relationship that would be affected by the class action lawsuit, and therefore the courts found a troublesome conflict between the representative plaintiffs' backward-looking interests and the current members' forward-looking interests. Unlike those plaintiffs, Benda is still involved in and affected by the business of horseracing in Iowa.

B. <u>Benda Raced More Than Iowa-Bred Horses.</u>

ITBOA asserts that Benda owned only Iowa-bred horses, trying to make him different from other class members who also owned non-Iowa-bred horses. ITBOA Br. 49, 54. ITBOA is wrong; Benda also owned and raced non-Iowa-bred horses. The record shows that Benda

won purses in open races (not restricted to Iowa-bred horses) for which he did not receive any purse supplement money, which means he was racing non-Iowa bred horses. App. v.4, p. 74 (compare "Open Purse" and "Open Supplement" columns). Trying but failing to distinguish Benda from other class members, ITBOA incorrectly assumes without any evidence that all of Benda's purse winnings from 2012-2015 were for Iowa-bred horses.

C. Prairie Meadows Failed To Comply With The "Rasmussen Formula."

Appellees, especially IHBPA, assume that Benda's lawsuit fails if the "Rasmussen formula" (or "Rasmussen rule") governs the required payment of purse supplements and breeder's awards. They want to focus on whether the Rasmussen formula or the IRGC-approved statutory calculation is proper.[2] But Appellees ignore that Prairie

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[2] IHBPA also argues, without authority, that Benda's lack of participation in negotiation of the at-issue contracts somehow undermines his positions. IHBPA Br. 9. Third parties are usually not involved in the contract negotiations, yet third-party beneficiary claims are nonetheless valid. *E.g.*, *Vogan v. Hayes Appraisal Assocs., Inc.*, 588 N.W.2d 420, 423-24 (Iowa 1999). It is undisputed Benda and fellow class members were third-party beneficiaries of the at-issue contracts. App. v.2, pp. 15, 52-53.

Meadows *also* underpaid the Proposed Class even if the Rasmussen formula defined Prairie Meadows' contractual obligations.

The 2010-2014 contract between IHBPA and Prairie Meadows required that "20% of the net purse amount allocated for Thoroughbred horses each year shall be supplemented to Iowa bred horses placing in first through fourth positions." App. v.1, p. 557. According to IHBPA, that provision incorporated the Rasmussen formula, which calculated the total purse supplements at 20% of the money set aside for base purses (as opposed to 20% of the net purse money). IHBPA further contends that the 2010 contract provision applied to purse supplements and not breeder's awards. But even if IHBPA is correct about the contract requirements, there was still a significant underpayment of purse supplements:

Underpayment of Purse Supplements to Thoroughbreds				
Year	**Net Purse Money (Base Purses + Purse Supp.)[3]**	**Purse Supp. Due Under Rasmussen Formula[4]**	**Purse Supp. Paid[5]**	**Under-Payment**
2012	$15,207,919	$2,534,653	$1,973,681	$560,972
2013	$15,110,207	$2,518,368	$1,917,609	$600,759
2014	$14,217,038	$2,369,506	$1,832,854	$536,652
			TOTAL	**$1,698,383**

Of course, the underpayment was *even greater* if the IRGC-approved calculation governed Prairie Meadows' obligations.

Moreover, Prairie Meadows underpaid owners and breeders in 2015 even if the Rasmussen formula applied that year. In the contract for 2015-2019, Prairie Meadows was required to pay 20% of the net purse money for thoroughbreds "in the form of breeder's awards or purse supplement awards." App. v.1, p. 566. So, the 2015 contract set a requirement for the aggregate amount paid as purse supplements

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3 *See* App. v.4, pp. 68-71.

4 Under the Rasmussen Rule, the purse supplements comprised 20% of the base purses and 16.67% of the "net purse money" (the combined total of the base purses and purse supplements).

5 *See* App. v.4, pp. 62-67.

and breeder's awards. Benda's expert (Totagamuwa) testified without contradiction that in 2015 Prairie Meadows underpaid the purse supplements and breeder's awards *even using* the Rasmussen formula. App. v.4, pp. 125-26, 160-61. The underpaid amount in that year was $172,982. *Id*.

The record contains no evidence that Prairie Meadows complied with the 20% requirement in any year under any interpretation of its contractual obligations. IHBPA and ITBOA never scrutinized the payment history to verify Prairie Meadows was fulfilling the 20% requirement even under the Rasmussen formula. Appellees try to discredit Benda as an outlier and misfit because he realized, and proved without contradiction at hearing, that there was an underpayment regardless of how Prairie Meadows' contracts are interpreted.

D. The Proposed Class Members Are Not Aware Of The Underpayment.

Appellees emphasize that no one else has made a similar claim against Prairie Meadows. *E.g.*, PMRC Br. 33-35. That argument assumes, however, that other owners and breeders know about the underpayment – an assumption the record disproves.

As IHBPA notes, the 20% requirement concerns aggregate payment amounts to the class over an entire year, not the individual payments to owners or breeders for particular races. IHBPA Br. 7. The aggregate amounts of purses, purse supplements, and breeder's awards – i.e., the data necessary to show an underpayment – were not shared with individual owners and breeders. *See* Benda Br. 62 n.9. Even Maggi Moss, the most successful racehorse owner at Prairie Meadows for many years, was never aware of the aggregate amounts paid for purse supplements and breeder's awards or whether Prairie Meadows was paying the correct amount. App. v.4, pp. 139-42.

There is no evidence that the Proposed Class Members *realized* they were underpaid. Appellees wrongly assume that everyone knew about this problem even though the underlying data was never shared. Given the lack of transparency from Prairie Meadows, the cost of litigation, and the fear of retaliation (articulated by Ms. Moss and proven by her experience), it is unsurprising that Benda is the first person to make this claim.

E. <u>Benda Did Not Try To Muzzle Opposition.</u>

IHBPA mischaracterizes Benda's May 2020 motion to restrict communications as an effort to "muzzle opposition to this case."

IHBPA Br. 38. Benda asked that any communications to Proposed Class Members be approved by the Court. App. v.2, pp. 128-32. Benda withdraw that motion given that such communications would be disclosed in discovery. App. v.2, pp. 146-47. No one was muzzled, although Benda was legitimately concerned that class members were being and would be misinformed about this case.

III. PROCEDURAL ISSUES AND DISPUTES.

A. Benda's Brief Complies With The Appellate Rules.

Benda raises one issue: whether the District Court abused its discretion in denying Benda's motion for class certification. Consistent with the Iowa Rules of Appellate Procedure, Benda addressed error preservation and the standard of review in separately numbered divisions of his brief and then outlined the reasons why the district court abused its discretion in separately numbered divisions. Like many litigants, including IHBPA in its brief, Benda also summarized his arguments for the Court, which is not forbidden. Insofar as there was any technical mistake, the Court should deem it harmless or, in the alternative, grant Benda leave to file an amended brief with a numbered heading for the argument summary.

B. A Ruling Denying Class Certification Must Be Reviewed Differently In Light Of Iowa's Policy Favoring Class Actions And Liberal Standard for Class Certification.

IHBPA notes the same standard of review (abuse of discretion) applies to rulings granting and denying class certification. IHBPA Br. 25-26. True, but that misses the important point that Iowa law requires that district courts exercise their discretion in a manner that favors class actions. The standard of review here is framed by Iowa's policy favoring class actions and the liberal standard for class certification. Benda Br. 41-43. Thus, a district court's denial of class certification must be reversed when that discretion is exercised in a manner inconsistent with the remedial purpose of the class rules and the liberal certification standard. *Limmer v. City of Council Bluffs*, 2016 WL 3556392, at *3 (Iowa Ct. App. June 29, 2016) (reversing denial of class certification as an abuse of discretion); *Staley v. Barkalow*, 2013 WL 2368825, at *13 (Iowa Ct. App. May 30, 2013) (same). The district court eschewed these standards in denying class certification and thus abused its discretion.

C. Benda's Substantive Allegations Must Be Accepted As True Even Though He Bears The Burden Of Proof On The Prerequisites For Class Certification.

Under Iowa law, Benda had the burden of proving the perquisites for class certification, although that burden is light. Benda Br. 42. However, Benda was not required to prove his substantive claims at this early stage. Rather, when deciding whether to certify a class, "the trial court should accept allegations in the complaint as true." *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 324 (Iowa 2005) (citation omitted). Thus, the district court should have accepted for purposes of class certification that owners and breeders of Iowa-bred horses were underpaid purse supplements and breeder's awards from 2012-2015, and the total underpayment exceeded $1.7 million. *See* App. v.1, pp. 34-36. The district court abused its discretion by not accepting Benda's substantive allegations as true and instead finding the opposite – i.e., that some Proposed Class Members *benefited* from Prairie Meadows' actions. In doing so, the district court accepted a contested affirmative defense as true, turning the mandate of *Comes* on its head.

Without acknowledging binding precedent in *Comes*, ITBOA cites federal case law for the proposition that the district court should resolve fact disputes at the certification stage. ITBOA Br. 37-39. That

is not Iowa law. This Court's approach in *Comes* is clearer for the district court and litigants. *See* Rubenstein, 3 Newberg on Class Actions § 7:23 (5th ed.) (reviewing federal courts inconsistent and confusing history about when merits may be considered). It is also more sensible given the usual early stage of certification proceedings in a class action lawsuit.

D. The Proposed Class Time Period Was 2012-2015.

The class period stated in Benda's motion for class certification was 2012-2015, which matched the operative pleading at the time of that motion. App. v.1, pp. 480-81. On appeal, IHBPA incorrectly asserts the class period was 2010-2018. IHBPA Br. 26. Benda filed a second amended petition shortly before the class certification hearing that expanded the class period. That amendment could have justified a later request to amend the class definition (per Rule 1.265), but the only class period before the district court was 2012-2015.

IV. REPLY TO ALL APPELLEES.

A. Appellees Cannot Defend The District Court's Erroneous Findings About Personal Or Organizational Liability.

Completely absent from Appellees' briefs is any attempt to defend the district court's finding that Benda's lawsuit "would put both

intervenors in a potentially antagonistic bargaining position with Prairie Meadows and could subject the IHBPA to claims of breach of contract on existing contracts between the parties." App. v.4, p. 37 (Order at 6). Similarly missing is any defense of the district court's finding that Benda's lawsuit would "place[] in jeopardy" the contracts negotiated with Prairie Meadows "and could subject those who negotiated and agreed to those contracts liable for a claim of breach of contract brought by Prairie Meadows." App. v.4, p. 48 (Order at 17). These illogical findings are indefensible, as they are totally unsupported in the record. *See* Benda Br. 57-58. A district court abuses its discretion by relying on findings that are devoid of evidentiary support, as here.

B. The District Court Abused Its Discretion In Relying On The Alleged Intra-Class Conflict To Deny Certification.

Like the district court, Appellees rely heavily on ITBOA and IHBPA's positions as evidence of intra-class antagonism toward Benda's lawsuit. We highlight several reply points.

1. *Appellees Cannot Escape Or Defend The Speculative Nature Of The Intra-Class Antagonism.*

One of Benda's major criticisms of the district court's ruling was it erred in finding a fundamental conflict based on ITBOA and IHBPA's speculation about how Prairie Meadows might respond to a judgment. ITBOA's president (Rentfle) and executive director (Fett) admitted that the concerns about damage to Iowa's horseracing industry, reductions in future purses, and claims against overpaid owners were all based on "speculation" (their word). Benda Br. 31-35. IHBPA was afraid of the "unknown." *Id.* at 36-37. Under *Kragnes v. City of Des Moines*, 810 N.W.2d 392 (Iowa 2012), class certification shall not be denied based on alleged intra-class antagonism rooted in speculative predictions about the effect of a judgment.

IHBPA and Prairie Meadows completely ignore this problem, much like the district court did. They do not address, for example, the testimony from Rentfle and Fett admitting that their concerns are pure speculation. Nor do they explain why, particularly considering *Kragnes*, the district court was justified in denying certification based on speculative fears.

ITBOA claims that Fett's testimony was properly considered because it was based on "firsthand knowledge of observed facts." ITBOA Br. 45-46. However, neither Fett nor anyone else knows how Prairie Meadows will react to an adverse judgment in this case, which is why she admitted ITBOA's fears on that topic were "just speculation. Totally." App. v.2, p. 207.

Equally meritless is ITBOA's attempt to distinguish *Kragnes*. ITBOA claims that this case is different because "some Iowa-bred horse owners and breeders will have received higher purses on their non-Iowa-bred winners, and these purported class members would not want this litigation to continue." ITBOA Br. 48. But this Court in *Kragnes* rejected the same retrospective concern. There, the city argued that some overcharged residents would have paid more in property taxes historically without the illegal franchise fees, and therefore, the city claimed those residents would oppose the class action. In *Kragnes*, and here, that type of retrospective speculation cannot prevent class certification.

2. Benda Is Not Required To Prove That Anyone Will Join This Lawsuit If A Class Is Certified.

ITBOA faults Benda for only presenting one person (other than himself) who would agree to participate in the class. ITBOA Br. 51. In the same vein, Prairie Meadows argues while ignoring Maggi Moss, the most successful owner for many years, that Benda "cannot name any person who would participate in the class." PMRC Br. 25, 33-34. However, neither the Iowa Rules nor their federal counterparts require a representative plaintiff to produce evidence that other people will join the lawsuit. Appellees are imposing false burden. *See Frank v. Enviro-Tech Servs.*, 577 S.W.3d 163, 168-69 (Mo. Ct. App. 2019) (district court abused its discretion by denying class certification because of the lack of evidence (only five affidavits) that other class members supported the lawsuit, explaining that burden would be impracticable and has no basis in a procedural rule virtually identical to Iowa Rule 1.262).

Appellees incorrectly assume that class members must join this lawsuit and further that it is Benda's responsibility to prove that people will take affirmative steps to join. In some class actions, class members can exclude themselves, but the rules do not require potential plaintiffs

to opt in. *See generally* Iowa R. Civ. P.. The rationale is that "[r]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people – especially small claims held by small people – who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." *Frank*, 577 S.W.3d at 169 (quotation omitted). Appellees get this backwards by demanding that Benda produce evidence that others will join this lawsuit.

3. Iowa Law Forbids The Speculative Concern That Prairie Meadows Could Reduce Future Purses.

Appellees repeat the claim, which the district court accepted at face value, that Prairie Meadows might pay for a judgment by taking money from future horseracing purses. For instance, Prairie Meadows says that "negative impacts" on future payments are "likely" but "[i]t is difficult to tell at this point exactly what those impacts will be." PMRC Br. 37. But no one explains *how* that could legally happen. Horseracing purses are calculated based on a statutory formula that begins with "no less than eleven percent" of the first $200 million in Prairie Meadows' net receipts. Iowa Code § 99F.6(4)(a)(3); *see also* App. v.4, pp. 129-30, 132-33. Prairie Meadows could not legally reduce

future purses to pay for a judgment in this case. That point is indisputable, yet the district court (and Appellees) simply assumed that Prairie Meadows could disregard Iowa law.

4. A Disagreement Over Whether To Pursue A Remedy Is Not Fundamental.

IHBPA theorizes why class members might choose to forgo a meritorious breach-of-contract claim. IHBPA Br. 31-32. Of course, no one said they would forgo a meritorious claim. But even if a substantial portion of the Proposed Class understood the underpayment claim and would forgo it – evidence not presented here – that is not a *fundamental* conflict that precludes class certification. *See* Benda Br. 64-67 (citing multiple Iowa cases).

Mostly ignoring Benda's cases on this point, ITBOA cites a Fourth Circuit case for the proposition that a "conflict is not fundamental when all class members share common objectives and have the same factual and legal positions and have the same interest in establishing the liability of defendants." ITBOA Br. 53 (citation omitted). That proposition is obviously true, but it does not follow that a conflict *is* fundamental simply because a portion of the class

members disagree on the remedy or objective. Such disagreement, under Iowa law, does not prevent class certification.

5. The Intervenors' Boards Are Not The Proposed Class.

Like the district court, Appellees conflate the boards of IHBPA and ITBOA with the Proposed Class. *E.g.*, IHBPA Br. 27 (claiming "uniform opposition … by the proposed class"). ITBOA and IHBPA acted through their boards alone. Members did not vote on this lawsuit, nor were they even surveyed. Also, neither organization knows how many of its current members are in the Proposed Class. They both include many people who are not Proposed Class Members, and some Proposed Class Members are not in either organization today. Despite these problems, Appellees act like they speak for everyone whose rights are affected by this lawsuit.[6]

The evidence of opposition to this lawsuit is limited to affidavits from three class members (Fett, Gessmann, and Poindexter), hearsay

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[6] ITBOA and IHBPA do not "represent" the Proposed Class Members for purposes of this lawsuit. There is no evidence that any members authorized the boards of those organizations to surrender their individual contractual claims against Prairie Meadows.

from Jon Moss about six additional class members on IHBPA's board,[7] and a resolution orally adopted by ITBOA's board, only four of whom are Proposed Class Members.[8] Generously, that adds up to *thirteen* people, or about 1.5% of the Proposed Class. No authority holds that class certification can be denied based on opposition from 1.5% of a putative class.

C. The District Court Abused Its Discretion In Its Analysis Of Class Commonality And Predominance Of Common Questions.

Commonality does not depend on whether Benda proved the Proposed Class Members desire this lawsuit, as Appellees incorrectly suggest. Rather, the issue is whether a question of law or fact is common among the Proposed Class. There is little dispute that common questions exist here, *see* Benda Br. 45-47, although the district court erroneously concluded there are *none*. App. v.4, p. 55 (Order at 24).

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7 Eight of IHBPA's directors are Proposed Class Members, but that includes Fett and Poindexter.

8 *See* Benda Br. 60 n.7.

Focusing on the predominance issue, which implicitly assumes that common questions exist, Appellees contend that individual questions will predominate over common ones because some people who owned non-Iowa-bred horses benefited from Prairie Meadows' miscalculation. The theory is that base purses were larger because the Iowa-bred bonus payments were underpaid. But this theory fails for three reasons.

First, the overpayment theory assumes that Prairie Meadows paid a hypothetical maximum amount for horseracing such that all payments are zero-sum. But Prairie Meadows paid only the *minimum* amount—there is no maximum. Even IHBPA admits that Prairie Meadows could have paid more (IHBPA Br. 42), in which case there would be no zero-sum trade-off. Prairie Meadows could have paid the correct amount of Iowa-bred bonus payments and still paid the same base purses.

Second, the overpayment theory assumes that Prairie Meadows' offset defense in this lawsuit is meritorious, which is opposite the approach that Iowa law requires. *See* Section III.C., *supra*; *see also* Benda Br. 51-52. Thus, the district court violated a basic procedural

principle for class certification motions in how it analyzed the predominance question.

Third, even if the overpayment theory is correct, it means only that some Proposed Class Members will receive no damages. However, that does not mean individual questions would predominate. The same damages methodology can apply to every Proposed Class Member regardless of the amount due to each person.[9] Benda Br. 46-48. Individualized damages calculations do not prevent class certification, even if Prairie Meadows would allege affirmative defenses or counterclaims against some class members. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453–54 (2016) (holding certification proper when common questions will predominate "even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" (citation omitted)); *Allapattah Servs., Inc. v. Exxon Corp.*,

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9 In *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (cited in ITBOA Br. 32), the plaintiff did not present a common damages methodology that was tied to the alleged wrong. Here, Totagamuwa's damages model is tied to Prairie Meadows' underpayment, and that model is applicable to every Proposed Class Member formulaically based on their individual winnings.

333 F.3d 1248, 1259-60 (11th Cir. 2003) (holding a defendant could raise affirmative defenses and set-off claims during the damages phase of a class action); Rubenstein, 2 Newberg on Class Actions §§ 4:54, 4:55, & 4:56 (5th ed.).

D. Appellees' Attacks on Benda Do Not Save The District Court's Ruling.

None of Appellees even proffers a theory as to how Benda's civil matters and administrative disputes after 2015 have any relevance for the claims or defenses in this case. Yet those disputes are, according to Appellees, enough to deny certification and effectively allow Prairie Meadows' class-wide underpayment to stand.

Since Benda's recent disputes have no relevance to the class period (2012-2015), Appellees cloak their arguments in language of Benda's "credibility" and "character." However, courts permit adequacy challenges "only to the degree that the personal characteristics are somehow relevant to the litigation; even when permitted, such challenges are rarely upheld." Rubenstein, 1 Newberg on Class Actions § 3:68 (5th ed.).

> In the few instances where issues of credibility have led to a finding of inadequate representation, there were either confirmed examples of past dishonesty such as fraud or a criminal conviction, or the proposed representative had

> given inconsistent testimony on material issues in the litigation in a way that might jeopardize his credibility with the fact finder at trial.

Id.; *see also Mendell v. Am. Med. Response, Inc.*, 2021 WL 1102423, at *4 (S.D. Cal. Mar. 23, 2021) ("Challenges to credibility or integrity of the proposed class representative are rarely upheld."); *Levie v. Sears, Roebuck & Co.*, 496 F. Supp. 2d 944, 950 (N.D. Ill. 2007) (finding that "[c]redibility is not a requirement of a class representative, and whether or not a plaintiff is credible is irrelevant to that person's ability to be a class representative" despite the fact that the plaintiff had "been sanctioned . . . for engaging is deceptive stock transactions, and failed to disclose this fact in discovery"); Davis, et al., 6A Fed. Proc., L. Ed. § 12:129 ("A plaintiff is not an inadequate class representative merely by reason of the fact that his or her credibility is allegedly vulnerable to attack at trial…").

Each of the matters raised by Appellees were basic civil disputes—none were criminal or involved dishonesty. Such matters are a far cry from those in *Mularkey v. Holsum Bakery, Inc.*, 120 F.R.D. 118 (D. Ariz. 1988), which involved admissible crimes of dishonesty that *still* did not disqualify the class representative. *See*

also Chupa v. Armstrong Flooring, Inc., 2020 WL 1032420, at *4 (C.D. Cal. Mar. 2, 2020) (because bank robbery was "not per se a crime of dishonesty," the plaintiff could represent the class).

No authority holds that civil judgments or administrative disputes necessarily render someone inadequate to represent a class. Benda's disputes starting in 2017 are irrelevant to the claims in this case and to Benda's eligibility for bonus payments that were earned and underpaid in earlier years. By clear authority, including ITBOA's cases, those extraneous disputes should not have been used to deny class certification. *E.g., Med. Soc'y of the State of New York v. UnitedHealth Grp. Inc.*, 332 F.R.D. 138, 151 (S.D.N.Y. 2019) (holding determination of class representative's character "is specifically directed at improper or questionable conduct arising out of or touching upon the very prosecution of the lawsuit," and denying an adequacy challenge "[b]ecause none of the complained-of conduct occurred during the course of this litigation").

Moreover, Appellees' attack on Benda runs into another problem, which is the district court made no findings about Benda's character, nor questioned the credibility of Benda's testimony or his

claims. Rather, the court said that Benda's representation would be "less effective," believing his litigation and disciplinary history would affect his "credibility" and "standing" among the class. App. v.4, p. 50 (Order at 19). However, there was no evidence as to how many people are aware of Benda's other disputes, let alone object to him on this basis. Again, the district court relied on speculation and conflated a small number of people with the entire class. Further, certification does not require that a putative class representative be popular or have good standing *among the class*.

Furthermore, Appellees' description of Benda's recent troubles is inaccurate and unfair. The matters Appellees raise all followed a flare up of a military service-related injury, for which Benda has since received treatment.[10] Appellees attempt to "swift-boat" Benda by mischaracterizing the various actions. In the *Tracy* matter, for example, Benda was also a prevailing party, and the Prairie Meadows steward who wrongfully instructed Tracy to withhold Benda's

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[10] Benda is a retired captain of the United States Air Force, receiving an honorable discharge upon retirement after twenty-three years of service. App. v.3, p. 244.

ownership papers ultimately cost Benda a $17,000 sale of the horse. *Id.* In the *Estate of Hummel*, the issue was whether Benda's rental agreement constituted a farm tenancy; Benda was precluded from reclaiming his horses during the pendency of that action, and only had the sole rights to two of the five horses, both of which he retrieved from the Animal Rescue League (the others were owned through a partnership of which Benda was only a part owner). App. v.3, 245. Contrary to IHBPA's scurrilous suggestion, Benda is not faced with bankruptcy. *Id.*[11] In short, the personal attacks on Benda are based on mischaracterization amplified by speculation.

No Appellee explains how their challenges to Benda's credibility, character, or reputation would affect this case, especially where he is represented by experienced counsel with the financial resources and commitment to advance all costs in pursuit of this action. App. v.2, 111-14. As shown by the lengthy docket, Benda and his counsel have

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[11] Many of Benda's debt-related disputes have been resolved or are being resolved, as he predicted. App. v.4, pp. 187-90. After the district court's certification ruling, the judgments in Polk County Case Nos. LACL133881 (Landers) and EQCE085308 (CCCU) were satisfied in full, and UMB Bank did not execute on its levy in Polk County Case No. 144863.

worked extensively to investigate and articulate the class injury, calculate the resultant damages, and to identify the records containing the affected class members. Tellingly, *none* of the Intervenors have undertaken *any* of this analysis[12] despite their claims to "represent" the Proposed Class Members' interests. If anything, the Intervenors' coordinated attack shows they are controlled by a small group of insiders who have never apprised let alone surveyed their memberships about Prairie Meadows' underpayment. The record demonstrates that Benda and his counsel have the capacity to, have in fact, and will continue to adequately represent the interests of Proposed Class.

E. The Size Of Benda's Claim Proves Why Class Certification Is Necessary.

Prairie Meadows and IHBPA argue that Benda's damages were too "small" for class certification. PMRC Br. 27, 37-38; IHBPA Br. 38-39. However, the size of Benda's claim is not a problem for class certification; it shows why class actions are necessary.

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[12] Save, perhaps, Jon Moss's calculation in that *confirmed* the economic injury of ~$1.8M to owners and breeders of Iowa-bred horses. *See* Benda Br. 29.

It is "well settled" that neither the number of representative plaintiffs nor the size of a plaintiff's claim is material for class certification. *Epstein v. Weiss*, 50 F.R.D. 387, 391 (E.D. La. 1970); *see also* Rubenstein, 1 Newberg on Class Actions § 3:60 (5th ed.) ("The size of a plaintiff's individual claim as compared to those of other class members is immaterial to the adequacy inquiry under Rule 23. Thus, a plaintiff is not required to have a large financial interest in the litigation in order to serve as an adequate representative.").

Class actions are designed precisely for such claims that may not be economically feasible to pursue individually. Iowa R. Civ. P. 1.263(1)(m) (stating relevant factor for class certification includes "[w]hether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class"). The goal of the class action rule is, in part, "the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits." *Comes*, 696 N.W.2d at 320.

For instance, in *Kragnes*, the Court noted the extensive resources that had been devoted but also commented that the representative plaintiff's claim "would likely fall within the jurisdictional limit of the small claims court." 810 N.W.2d at 503. That case "demonstrate[d] the very necessity and importance of class action litigation," as "[t]he likelihood of a plaintiff bringing such a complex suit requiring substantial resources to litigate in small claims is highly unlikely." *Id.*

The same is true here. Prosecution of this action has already required more compensable time and out-of-pocket expense than any individual claim could justify. *See* Benda Br. 75 n.14. Class actions exist for this type of case.

V. REPLY TO ITBOA.[13]

A. ITBOA's Novel Theories About Prairie Meadows' Hypothetical Claims Are Legally Baseless.

The district court accepted at face value ITBOA and IHBPA's speculative fear that Prairie Meadows could seek reimbursement from

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13 The district court ruling did not rely on Appellees' myriad arguments addressed here and below. Appellees' inclusion of these arguments in their briefs suggests a recognition that the district court's ruling cannot stand on its own.

people who allegedly benefited from Prairie Meadows' error. Prairie Meadows has never made such a claim or demand. Nor has anyone, except ITBOA, tried to explain a legal theory available to Prairie Meadows.

ITBOA contends that Prairie Meadows could assert claims for restitution and unjust enrichment. ITBOA Br. 34-37. ITBOA's authorities, however, all involve mistakes *of fact*. Prairie Meadows was not mistaken about which horses were Iowa-bred and which were not or about how each horse performed. Plain and simple, Prairie Meadows failed to pay the aggregate amount of bonus payments that it promised and that it was responsible for calculating. Even if some horse owners benefited, there is no legal principle that allows Prairie Meadows to recover the funds already paid to horse owners.

Lastly, the fact that ITBOA, rather than Prairie Meadows, is posturing these hypothetical third-party claims and counterclaims shows how much conjecture underlies ITBOA's opposition to this lawsuit. ITBOA is exploring theories that Prairie Meadows has never embraced and the district court never considered. As in *Kragnes*,

ITBOA's concern about claims against overpaid owners is "rife with speculation." 810 N.W.2d at 502.

B. The Safeguards For Antagonistic Class Members Must Be Considered.

The district court ignored the often-recognized safeguards that would protect Proposed Class Members who oppose this lawsuit. Benda Br. 70-72. Only ITBOA addressed them.

The first safeguard is the presence of Prairie Meadows, IHBPA, and ITBOA in this lawsuit. Each has shown they will litigate against Benda's claims, which will protect the interests of class members who oppose this lawsuit. For example, IHBPA will present evidence (as it has done) if it disagrees with Benda's interpretation of the 20% requirement in the relevant contracts. The people who have vocalized their opposition will have input, and that is a sufficient safeguard to grant class certification. *See* Benda Br. 71.[14]

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[14] ITBOA unsuccessfully attempts to distinguish two cases cited in Benda's brief (*Horton* and *Groover*), arguing those cases are different because the objecting class members would not "suffer financial detriment" if the class action were successful. ITBOA Br. 57-58. However, that argument is inapposite to the point that the involvement of parties with views and interests against the lawsuit is a valuable safeguard. If anything, the perceived risk of financial detriment (which

The second safeguard is the opt-out procedure. Many cases have recognized the opt-out procedure as a safeguard for putative class members who are hostile to the pending lawsuit, yet the district court did not explain why that procedure is inadequate here. ITBOA first cites an irrelevant treatise section regarding defendant classes. ITBOA Br. 59. Then ITBOA cites (and misquotes) a withdrawn Ninth Circuit opinion concerning the right to opt out of a class settlement and which held only that absent class members can challenge adequacy of the class representative even if they are afforded notice and opt-out rights. *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997). *Epstein* does not explain why the opt-out procedure is generally an insufficient safeguard for antagonistic class members, and neither the district court nor ITBOA can explain why the opt-out procedure is insufficient in this case.

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is speculation) should make ITBOA and IHBPA even *more* interested and active in this case. In short, the safeguard could be *stronger*.

VI. REPLY TO IHBPA

A. Class Certification Will Not Produce Mini-Trials.

IHBPA argues that resolution of the class claims would require "mini-trials" because some Proposed Class Members relied on the Rasmussen formula rather than the IRGC-approved formula. IHBPA Br. 43-45. This argument fails for several reasons.

First, as noted above, Prairie Meadows underpaid the Proposed Class even if the Rasmussen formula is used. ***Second***, IHBPA cannot say how many people believed that the "Rasmussen formula" governed the contractual 20% obligation. So far, they have identified one person (Gessmann). IHBPA's suggestion about "mini-trials" is just a guess. ***Third***, class actions are frequently certified when there are variable degrees of knowledge and reliance among the class members. *See e.g.*, *Lauber v. Belford High Sch.*, 2012 WL 5822243, at *3 (E.D. Mich. Jan. 23, 2012); *Mersay v. First Republic Corp. of Am.*, 43 F.R.D. 465, 471 (S.D.N.Y. 1968). This case is different from *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752 (Iowa 2020), because in *Roland* there was no central issue that could be resolved absent individual adjudication of each class member's unique workers compensation

claim. Here, there are central issues that are common to the class, and they predominate.

B. IHBPA's Suggested Alternative Contractual Remedy Is Misplaced.

IHBPA points to a contractual remedy for "Underpaid Purses" in the written agreements with Prairie Meadows. IHBPA Br. 34. That provision contemplates an underpayment escrow account that can be used in future years. However, IHBPA's executive director admitted that this underpayment account has *no connection* to the bonus payments for Iowa-bred horses. App. v.3, pp. 126-28. Thus, the supposed contractual remedy would not address the injury here.

Furthermore, IHBPA inaccurately asserts that Benda has refused to seek contractual remedies for his breach of contract claims. Count III of Benda's Amended Petition specifically alleged that Prairie Meadows failed to follow the terms of the written contracts resulting in damages to the class that must be repaid. App. v.1, pp. 34-38. Benda's prayer for broad class relief "to fully compensate the Plaintiff and other Class Members" would not foreclose any contractual remedy if that is available.

C. Class Certification On A Contract Claim Would Not Infringe On IHBPA's Statutory Authority.

IHBPA grossly overstates its authority by claiming that it exclusively represents the interests of all Proposed Class Members in this particular action. IHBPA Br. 39-40. IHBPA is, at most, authorized to "consent" to the terms of "interstate off-track wagering" at an operating racetrack. 15 U.S.C. § 3004. It is not expressly, let alone exclusively, authorized to represent Benda's or other class members' interests in this action. Indeed, under 15 U.S.C. § 3002 IHBPA need only represent a "majority" of "owners and trainers" racing there in granting its "consent." This definition excludes breeders, like Benda, whom IHBPA does *not* represent. The same analysis is true under Iowa Code § 99F.6(4)(a)(3). Simply put, IHBPA has no authority to speak for the Proposed Class Members on the individual contract claims raised here.

D. Benda Can Adequately Represent Owners And Breeders Of Quarter Horses.

The Proposed Class involves owners and breeders of thoroughbred horses and quarter horses. ITBOA and IHBPA have nothing to do with quarter horses. For the class-wide claims, owners and breeders of Iowa-foaled quarter horses are similarly situated to

owners and breeders of Iowa-bred thoroughbreds. They were supposed to receive the benefit of the same 20% allocation for Iowa-bred bonus payments, and they were similarly injured by Prairie Meadows' underpayment. As such, the thoroughbred and quarter horse claims should be resolved together in one class.

IHBPA notes that Benda did not race quarter horses, but that is irrelevant. This situation is analogous to *Larry James Oldsmobile-Pontiac-GMC Truck Co. v. Gen. Motors Corp.*, 164 F.R.D. 428, 436-37 (N.D. Miss. 1996), which was a class action by a dealer of some General Motors brands suing on behalf of GM dealers that sold many brands. The dealer in *Larry James* was an adequate representative regardless of variation in brands among the proposed class because the dealers suffered the same type of injury. Similarly, the fact that Benda did not own every breed of horses has no preclusive conflict. He can adequately represent the interests of owners and breeders of thoroughbreds and quarter horses.

Finally, if evidence develops of any conflict or split between quarter horses and thoroughbreds, the appropriate remedy at that time would be to create subclasses. *See* Iowa R. Civ. P. 1.262(3).

VII. REPLY TO PRAIRIE MEADOWS.

A. Prairie Meadows' Numerosity Objection Fails.

Neither ITBOA, IHBPA, nor the district court has questioned whether the Proposed Class satisfies the numerosity requirement under Iowa Rule 1.261(1). Only Prairie Meadows has objected, but that position is meritless.

Prairie Meadows questions how Benda calculated the Proposed Class at 847 members. Benda's calculation is based on Prairie Meadows' own reports for breeder's awards and purse supplements paid from 2012-2015. App. v.1, pp, 180-428. Anyone, including Prairie Meadows, can count the names in those reports and see that it is well above the presumptive threshold for certification (40 members). *See Legg v. West Bank*, 873 N.W.2d 756, 759 (Iowa 2016).

B. Allegations About Benda's Motives Are Wrong And Irrelevant.

Even though the district court did not accept this attack, Prairie Meadows alleges that Benda's motivations are "not altruistic" but are instead "personal and vindictive." PMRC Br. 37. This argument fails, ***first***, because altruism is not required; representative plaintiffs can be guided by a normal desire to receive what one is owed, as here. *See*

App. v.1, pp. 678-79; App. v.2, 57, 118-19 (horse owners and breeders desire more money and will complain when underpaid). ***Second***, there is no evidence that Benda filed this lawsuit because of animus toward Prairie Meadows. This lawsuit has no connection to Benda's employment with Prairie Meadows, which ended in 2015, or his other interactions with trainers or racetrack regulators. ***Third***, as a legal matter, speculation as to Benda's motives in bringing this lawsuit is irrelevant to certification. "We are concerned with the adequacy of [the class representative's] representation, not with her motives for bringing the lawsuit." *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1324 (N.D. Ill. 1983); *see also Denny v. Carey*, 73 F.R.D. 654, 657 (E.D. Pa. 1977) ("Neither the personality nor motives of the plaintiffs is determinative of whether they will provide vigorous advocacy for the members of the class.").

VIII. CONCLUSION

Benda prays that the Court reverse April 29, 2021 order denying class certification, and allow the Proposed Class Members to decide for themselves if they want to recover the bonus payments that Prairie Meadows underpaid.

Respectfully submitted,

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CERTIFICATE OF COSTS

We certify that the cost of printing the Appellants' Amended Final Reply Brief was the sum of $0.00.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because this brief has been prepared in a proportionally spaced typeface using Georgia typeface in 14 point font and contains 6,985 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1); or

/s/ Todd M. Lantz_____ 2/11/2022_____
Signature Date

CERTIFICATE OF SERVICE

On the 11th day of February, 2022, the undersigned served Appellant's Amended Final Reply Brief on all parties to this appeal by e-filing it on the State of Iowa's Electronic Data Management System.

I further certify that the 9th day of February 2022, I filed Appellant's Amended Final Reply Brief with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319, by e-filing it in the State of Iowa's Electronic Data Management System.

/s/ Michele Baldus_____ 2/11/2022_____
Signature Date