IN THE SUPREME COURT OF IOWA

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

and

IOWA HORSEMAN'S BENEVOLENT AND PROTECTIVE ASSOCIATION and IOWA THOROUGHBRED BREEDERS AND OWNERS ASSOCIATION
Intervenors-Appellees

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
No. LACL143202
THE HONORABLE SCOTT D. ROSENBERG

INTERVENOR-APPELLEE'S AMENDED BRIEF

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ROUTING STATEMENT

Under Iowa R. App. P. 6.1101(3)(a), this case presents the application of existing principles, and therefore would appropriately be transferred to the Court of Appeals.

STATEMENT OF THE CASE[1]

This appeal seeks to apply a "solution" to a problem that doesn't exist.

In this appeal of a denial of class certification, it cannot be forgotten that the two organizations (Intervenors herein) that currently represent nearly every proposed class member vehemently oppose such certification, as well as the underlying litigation. (**App. Vol. 4 0038** Order 4/29/2021 p. 7)

STATEMENT OF THE FACTS[2]

That litigation, based on two contracts executed in 2010 and 2015, respectively, were negotiated and entered into by Intervenor-Appellee Iowa Horsemen's Benevolent and Protective

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[1] ITBOA is satisfied with Appellant's recitation of the Relevant Events of Prior Proceedings.

[2] While this Statement of the Facts is thorough, in the interests of readability & economy, certain particular facts will be reserved for the specific arguments they are necessary to address below.

Association (IHBPA) and Defendant Prairie Meadows Racetrack and Casino, Inc. (Prairie Meadows). (**App. Vol. 4 0035** Order 4/29/2021 p. 4). The IHBPA, which represents 1,100 members, contracted with Prairie Meadows for the latter to provide to breeders and owners of Iowa-bred horses awards and purse supplements of 20% of the net purse amount. (**App. Vol. 3 0055** Order 12/31/2020 p. 3; **App. Vol. 2 0366** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Affidavit of Jonathan Moss ¶ 2 (App. 111-112)).

The IHBPA is the "'exclusive horsemen's group' or 'host racing association'" under federal and state law for contracting with Prairie Meadows regarding the "purse structures for all horse racing." *See* 15 U.S.C. §§ 3002, 3004(a); I.C.A. §§ 99D.7, 99F.6) (**App. Vol. 4 0034-0035** Order 4/29/2021 p. 3-4). Membership in the IHBPA is "automatic;" that is, it is triggered when a person has started at least one thoroughbred at a race in Iowa in that year; no one has ever opted out of this membership. (**App. Vol. 4 0173** Hearing Tr. 112:21-24; **App. Vol 2 0052** Benda's Appendix in Support of Class Certification, Moss Deposition 117:10-13 (App. 221) Accordingly, each owner

of an Iowa-bred horse that has ever raced at Prairie Meadows was, at least for that year, an IHBPA member. (Id.)

In 2015, the method of calculating the net purse was changed, which would raise the amount of the 20% supplement to Iowa-bred owners and breeders, and all parties agreed that the change should not become effective until November 1, 2015. (**App. Vol. 3 0054** Order 12/31/2020 p. 2; **App. Vol. 2 0247** ITBOA Appendix in Resistance to Motion for Class Certification, IRGC Declaratory Order p. 7 (App. 8)). At all times, the IHBPA has identified that there has never been a breach of contract by Prairie Meadows. (**App. Vol. 4 0033** Order 4/29/2021 p. 2; **App. Vol. 2 0368-0369** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Affidavit of William Leroy Gessman ¶¶ 5, 7 (App. 113))

Intervenor-Appellee Iowa Thoroughbred Breeders and Owners Association (ITBOA), which represents ~400 members, provided the impetus for the calculation change, but never requested that it be retroactive, "recognizing that this would be problematic," and asking only that it "tak[e] effect on January 1, 2016." (**App. Vol. 4 0036-0037** Order 4/29/2021 p. 5-6;

App. Vol. 2 0248-0249 ITBOA Appendix in Resistance to Motion for Class Certification, Resolution 5/27/2020 p. 1-2 (App. 9-10); **App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶¶ 3, 7 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶¶ 3, 7 (App. 12)).

Those problems included that retroactive application could reduce future purses and awards to its members and would hurt its relationship with Prairie Meadows. (**App. Vol 4 0037** Order 4/29/2021 p. 6)

As Jonathan Moss, IHBPA's executive director since 2011, testified, IHBPA's belief is that retroactive application would in effect, be "seeking to receive monies that do not exist. And the only place those monies would exist is by having those monies repaid back through individuals who already received them." (**App. Vol. 2 0037** Benda's Appendix in Support of Class Certification, Moss Deposition 45:18-21 (App. 206)). As Moss clarified, IHBPA's (and ITBOAs) position against retroactivity

was **not** taken (as alleged by Benda) because anyone threatened anyone:

> Prairie Meadows hasn't threatened to do anything. But they don't have the money…. That money doesn't exist in escrow someplace that they didn't pay out. So … in my mind, logically… it's been distributed to other horsemen.

(**App. Vol. 2 0038** Benda's Appendix in Support of Class Certification, Moss Deposition 46:10-25 (App. 207)). So, logically, per Moss: "Prairie Meadows would end up having to say that's not their responsibility to pay back. And then it would fall back on my membership." (**App. Vol. 2 0038** Benda's Appendix in Support of Class Certification, Moss Deposition 46:2-5 (App. 207)). So, rather than having prior winners pony-up the funds to cover any retroactive application, the Intervenors have taken the position that no one should seek such a disastrous path.

The Iowa Racing and Gaming Commission (IRGC), which must approve the contracts under Iowa law, ordered that the change in purse supplement calculation not become effective until after the 2015 season "to avoid any disruptions in the 2015 meet and in order to protect all parties and interests."

(**App. Vol. 4 0038** Order 4/29/2021 p. 7; **App. Vol. 2 0247** ITBOA Appendix in Resistance to Motion for Class Certification, IRGC Declaratory Order p. 7 (App. 8)).

Despite the unified rejection of retroactivity by the Intervenors, Prairie Meadows and the IRGC, purported class representative Plaintiff-Appellant Robert Benda (Benda), is chomping at the bit for some reason to force these recalcitrant parties into class litigation. To that end, he has proposed the following class: "All horse breeders or owners who were eligible to receive breeder's awards or purse supplement awards from Prairie Meadows for one or more Iowa-foaled horses (as defined and limited by Iowa Code 99D.2) from 2012-2015."[3] (**App. Vol. 1 0040** Amended Petition ¶ 47)

Nearly everyone affected by the calculation change oppose class certification, to wit:

- William Leroy Gessmann, president of IHBPA and a horse owner/breeder: "I do not agree that Prairie Meadows

[3] In the Second Amended Petition, not included in the Appendix, this class definition remains identical except the time frame is 2010-2018. (Second Amended Petition).

breached the Iowa HBPA contract as alleged by Benda.... Benda does not represent my interests." (**App. Vol. 2 0369** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Affidavit of William Leroy Gessman ¶¶ 7,8 (App. 114))

- An owner & breeder of 35-40 Iowa-foaled horses, H. Allen Poindexter: "I am aware of the allegations and claims that Robert Benda has made against Prairie Meadows in this lawsuit.... I do not believe that going backwards and requiring Prairie Meadows to pay additional money for purse supplements and breeder's awards for 2012-2015 is good for the horseracing industry in Iowa.... Benda does not represent my interests as an owner and breeder of Iowa-foaled horses." (**App. Vol. 2 0364-0365** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Affidavit of H. Allen Poindexter ¶¶ 6, 8-9 (App. 109-111).
- IHBPA's executive director Moss testified that his members are aware of Benda's proposed action and are concerned it will impact their purses, which they believe "would come

out of somebody's pocket." (**App. Vol. 2 0045-0046** Benda's Appendix in Support of Class Certification, Moss Deposition 55:22-56:9 (App. 214-215).

- Moss further testified that as of April 7, 2020, he had spoken with between 20-40 purported class members, and not a single one "agrees with the merits of Benda's claims." (**App. Vol. 2 0063-0064** Benda's Appendix in Support of Class Certification, Moss Deposition 169:16-170:4 (App. 232-233)).
- Moss further testified that of these 20-40 IHBPA purported class members he spoke with, none of "them think they're entitled to more money." (**App. Vol. 2 0064** Benda's Appendix in Support of Class Certification, Moss Deposition 170:21-25 (App. 233).
- In an ITBOA Board Resolution: "the Board has been advised by counsel on Benda's claims and the relief requested in the lawsuit… ITBOA's members would be potential members of the class action proposed by Benda.… Benda's requested relief would damage Iowa's racing industry, and would be contrary to the interests of

ITBOA's members…. neither Benda nor his counsel can or should represent the interests of Iowa-bred owners and breeders." (**App. Vol. 2 0249** ITBOA Appendix in Resistance to Motion for Class Certification, Resolution 5/27/2020 p. 2 (App. 10))

It is also important to note that the proffered class representative, Benda, cannot properly represent the class:

- Unlike most members of the purported class, for several years Benda had been "put out to pasture," by losing his racing license due to disciplinary actions for regulatory violations. (**App. Vol. 2 0249** ITBOA Appendix in Resistance to Motion for Class Certification, Resolution 5/27/2020 p. 2 (App. 10); **App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 5 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 5 (App. 12); **App. Vol. 4 0050** Order 4/29/2021 p. 19)
- Benda has an extensive disciplinary history, including once in 2016 and three times in 2017 (**App. Vol. 2 0271-**

0275 IHBPA Appendix in Support of Resistance to Motion for Class Certification, IRGC Rulings 45772, 45877, 45886, 45890 (App. 16-21)

- On January 26, 2018, Benda accused the IRGC's Board of Stewards of "entrapment practices," and "injecting misrepresentations and unauthorized evidence" into disciplinary proceedings against him. (**App. Vol. 4 0051-0052** Order 4/29/2021 p. 20-21; **App. Vol. 2 0312, 0315** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Appeal Letter from Robert Benda to IRGC (App. 57-61)
- On January 26, 2018, Benda accused a proposed class member of being involved "in inappropriate possession of my personally owned" property. (**App. Vol. 4 0051-0052** Order 4/29/2021 p. 20-21; **App. Vol. 2 0313** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Appeal Letter from Robert Benda to IRGC (App. 58-59)
- Benda has been a defendant in numerous collections & related lawsuits, including for failing to pay his horse

trainers and related services (**App. Vol. 2 0317-0330** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Petition & Judgment in Tracy v. Benda, Polk Co. No. SCSC603508-SCSC603510 (App. 62-76); **App. Vol. 2 0331-0334** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Landers v. Benda Polk Co. No. LACL 133881 (App. 76-80); **App. Vol. 2 0335-0340** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Bolinger v. Benda, Polk Co. No. LACL 143502 (App. 80-86); **App. Vol. 2 0341-0344** IHBPA Appendix in Support of Resistance to Motion for Class Certification, UMB Bank NA v. Benda, Polk Co. No. LACL144863 (App. 86-90); **App. Vol. 2 0345-0347, 0351-0363** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Comm. Credit Union v. Benda, Polk Co. No. LACL 145613, LACL 147485 & EQCE085308 (App. 90-93 & 96-109))

- Pursuant to a forcible entry and retainer action against him, that Benda lost, Benda abandoned his horses, and the animals had to be taken to the Animal Rescue League.

(**App. Vol. 4 0053** Order 4/29/2021 p. 22; **App. Vol. 2 0348-0350** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Estate of William Hummel v. Benda, Polk Co. No. SCSC 641495 (App. 93-96)

And as for a group of people amenable to class certification, Iowa's owners and breeders have far too diverse interests, as: (1) the number of horses owned and/or bred; (2) whether some or all of their horses are Iowa- or non-Iowa-bred; and (3) the success of each horse owned – all vary. (**App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 6 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 6 (App. 12))

Likewise: "Retroactive application of the IRCG interpretation of Iowa Code § 99D.22 to the years 2012 2015 would only benefit some owners of Iowa-bred horses that won purses, and would deprive others, who also owned non-Iowa-bred horses that won purses, of their awards." (**App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 7 (App. 11); **App. Vol.**

2 0251 ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 7 (App. 12)) And, the "amount of purses awarded for each successful horse in each race from 2012 through 2015 at Prairie Meadows will be different, depending on where the horse placed in the race." (Id.)

IHBPA's Moss provided an example of the disparate impact this class action could have on its members:

> [T]hey may have had a lot of Iowa-breds in the previous and during these calendar years but their Iowa-breds did not win races and were not very – you know, were not necessarily very competitive, but they had one good open horse that was, and then all of a sudden the one good horse that was paying for the Iowa-breds that weren't doing well, they're going to have to go in the hole even deeper even though they're substantially impacting the state of Iowa and the economic impact in totality.

(**App. Vol. 2 0047** Benda's Appendix in Support of Class Certification, Moss Deposition 58:7-17 (App. 216)) Moss identified that the "totality of the board" expressed this concern. (**App. Vol. 2 0047-0048** Benda's Appendix in Support of Class Certification, Moss Deposition 58:19-59:12 (App. 216-217))

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR CLASS CERTIFICATION.

A. Preservation of Error & Standard of Review

ITBOA does not dispute Benda's statement on error preservation. Iowa Rule App. P. 6.903(3).

ITBOA does not dispute Benda's statement that the standard of review is abuse of discretion, but does dispute his characterization as to how that is determined.

"A district court's decision on class certification is reviewed for abuse of discretion." *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 320 (Iowa 2005). This review is limited "because the district court enjoys broad discretion in the certification of class action lawsuits." *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36, 44 (Iowa 2003) Because Iowa's "rules regarding class actions closely resemble" the federal rule, Iowa courts "may rely on federal authorities construing similar provisions." *Id.*

B. General Provisions Governing Class Action Certification

1. Iowa procedure for certification

Iowa Rule 1.261 identifies a class action may commence when: (1) "The class is so numerous or so constituted that

joinder of all members … is impracticable; and (2) There is a question of law or fact common to the class."

In order to proceed as a class, it must be certified by the district court. Iowa Rule 1.262. This can only occur if the court finds each of the following: (a) both elements of Rule 1.261 have been satisfied; (b) a class action will ensure the "fair and efficient adjudication of the controversy;" and (c) "The representative parties fairly and adequately will protect the interests of the class." Iowa Rule 1.262(2).

"In determining whether the class action should be permitted," the court considers a number of factors including: "(a) Whether a joint or common interest exists among members of the class… (e) Whether common questions of law or fact predominate … (h) Whether members who are not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions." Iowa Rule 1.263(1); *see also Vos*, 667 N.W.2d at 45 ("The rule does not require the district court to assign weight to any of the criteria listed… [but] merely requires the court to weigh and consider the factors.")

2. Qualities of a proper representative party

As for the proffered representative party, they must be someone who will, in pertinent part: "adequately represent the interests of the class," and does "not have a conflict of interest in the maintenance of the class action." Iowa Rule 1.263(2). "Doubts as to the ethics or character of either counsel or representative can also be relevant in determining adequate representation." *Foley v. Student Association Corp.*, 336 F.R.D. 445, 449 (E.D. Wisc. 2020) *citing Kolish v. Metal Techs, Inc.*, No. 16-cv-00145, JMS-MJD, 2017 WL 525965, at *12 (S.D. Ind. Feb. 8, 2017) ("The Court finds that [plaintiff's] inconsistent statements to the Court render her an inadequate class representative.")

"Whether a person is of sufficient moral character to represent a class is indeed relevant to the adequacy requirement." *Medical Society of the State of New York v. UnitedHealth Group Inc.*, 332 F.R.D. 138, 151 (S.D.N.Y. 2019) (noting this is particularly true where the "improper or questionable conduct aris[es] out of or touch[es] upon the very prosecution of the lawsuit.")

"Courts have looked to such factors as honesty, conscientiousness and other affirmative personal qualities to determine whether a named individual is a proper class representative." *Herrera v. LCS Financial Services Corp.*, 274 F.R.D. 666, 679 (N.D. Cal. 2011) And while "unsavory character or credibility problems," alone "will not justify a finding of inadequacy," they will when these are "related to the issues in litigation." *Id.*

Because the class representative has "a fiduciary obligation to the purported class, [they] must have the character and means to carry out that obligation, including the abilities to examine independently the decisions of counsel and to play an active role in the litigation for the protection of the interests of the class." *Robinson v. Gillespie*, 219 F.R.D. 179, 186 (D. Kan. 2003)

3. Burden of proof and the District Court's determination

"The plaintiff has the burden of establishing that a purported class of plaintiffs meets the prerequisites." *Vos*, 667 N.W.2d at 45. "Because the class determination generally

involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the … analysis often requires the court to probe behind the pleadings before coming to rest on the certification question." *Id.* at 46. Accordingly, most courts have characterized a plaintiff's burden as to demonstrate by "a preponderance of the evidence… [the] facts necessary to establish the existence of a class." William B. Rubenstein, *Movant's burden of proof – Plaintiff's burden of proof on a motion to certify a class,* 3 NEWBERG ON CLASS ACTIONS § 7:21 (June 2021 Update)

Thus, the "Court must examine all of the relevant evidence admitted at the class certification stage to ascertain if the party seeking class certification has made a prima facie showing." *Walsh v. Principal Life Ins. Co.*, 266 F.R.D. 232, 240 & n. 7 (S.D. Iowa 2010) ("when a motion for class certification requires resolution of disputes regarding the facts of the case, the moving party is required to establish by a preponderance of the evidence that she can make [the] prima facie showing of each element of the claim.")

C. The District Court Committed No Error in Its Denial of Class Certification

1. The District Court properly determined there was insufficient commonality among the class claims.

Commonality from Rule 1.261 and whether common issues predominate from Rule 1.263 are typically analyzed together. *Legg v. West Bank*, 873 N.W.2d 756, 759 (Iowa 2016) ("Predominance or commonality asks whether the class members have common issues that predominate over individual issues.") "Inherent in our inquiry … is the recognition that the class action device is appropriate only where class members have common complaints that can be presented by designated representatives in the unified proceeding." *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752, 759 (Iowa 2020) ("This inquiry is fairly complex.")

In this matter, the District Court below found:

> In short, there is no common interest to support a class action. Each owner and breeder has unique interests that would not necessarily be satisfied by whatever relief, if any, they may receive from a successful lawsuit. Indeed, it may even cause some of the purported class members to actually lose money payable to other members of the same class through overpayment of awards and purses if such is found to be the case. The board of the ITBOA has

> expressly determined that the proposed class action would "damage Iowa's racing industry," is "contrary to the interests of ITBOA's members" and is "not in the best interest of Iowa-bred owners and breeders…. Given that the largest association in Iowa of thoroughbred breeders and owners has rejected the efficacy of the class action, clearly, then, it cannot be said that there is any common interest to support a class.

(**App. Vol. 4 0049** Order 4/29/2021 p. 18).

a. There can be no commonality where a clear intra-class conflict exists.

Simply put, in this case there is no "joint or common interest [that] exists among members of the class," as some members would benefit and others would be harmed by the litigation. Iowa Rule 1.263(1).

A class cannot be certified where "a 'conflict of interest' exists that prevents the representative party from fairly and adequately protecting the interests of all the class members." *Hoekman v. Education Minnesota*, 335 F.R.D. 219, 243 (D. Minn. 2020) *quoting Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1145 (8th Cir. 1999).

> Intraclass conflicts precluding certification exist where some party members claim to have been harmed by the same conduct that benefitted other members of the class because in such a situation,

> the named representatives cannot vigorously prosecute the interests of the class … because their interests are actually or potentially antagonistic to, or in conflict with, the interest and objectives of other class members.

Id. (internal quotations omitted).

As the District Court identified, as some class members would be jockeying for position with other class members to recoup past overpayments, this creates an untenable intra-class conflict that defeats commonality. *Id.*

b. Because the issues individual recovery & individual damages would overwhelm the common question, there can be no class.

In addition to the intra-class conflict, these claims are also not amenable to class litigation because they cannot be adjudicated in a "unified proceeding." *See Luttenegger v. Conseco Fin. Serv. Corp.*, 671 N.W.2d 425, 437 (Iowa 2003). As the District Court found:

> This proceeding, if allowed to be certified, would necessitate an individual analysis as to whether the IRGC interpretation of the formula for awards and purses would benefit or be a detriment to each and every horse owner and breeder in Iowa [from 2010-2018]… many of the proposed class members of breeders and owners who may be eligible to receive breeder's awards or purse supplement awards for Iowa-foaled horses who also own non-Iowa-foaled

> horses that won purses would be injured by a retroactive application of the IRGC interpretation.... In addition, the ITBOA has determined that such a retroactive application would injure the entire industry and its members.

(**App. Vol. 4 0049-0050** Order 4/29/2021 p. 18-19)

Benda's argument on this point is unavailing. Claiming that the "statutory and contractual formulas that Prairie Meadows … paid" is a class-wide issue is accurate - but this single issue is inadequate to support a class. While it's true that whatever formula applies will apply to each Iowa-bred horse owner/breeder, this is just one tiny portion of the determination of each class member's right to recover (and the amount of recovery). Rather, this determination requires a complicated multi-factor analysis. As IHBPA's Moss *tried* to explain:

> What I said is that you get a different outcome based on the type of races that are ran and the types of horses that are available to come and participate in those races.... We run roughly 600 races a year that vary from anywhere from about $10,000 to $300,000.... The total pool, correct, that's not necessarily a complex structure to understand. When you're looking at the balance of races that are being put together and the types of races that can be offered in a particular day… that's when it becomes complex.

(**App. Vol. 2 0041-0042** Benda's Appendix in Support of Class Certification, Moss Deposition 51:21-52:15 (App. 210-211))

Where "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class," predominance cannot be found. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (reversing class certification where the purported class could not demonstrate common questions predominated). So, while a "class can have individual damage calculations … the Court has to look at the issues of individual damages calculations at the class certification stage, and if different methodologies for different class members [are required, the court] must decide … whether these individual questions predominate over the questions of law or fact common to the class." *Bhasker v. Kemper Casualty Insurance Company*, 361 F.Supp.3d 1045, 1099 (D. N.M. 2019).

Here, the **only** common question is whether there is any liability (i.e., were the calculations wrong).

On the other hand, as identified above, the individual damages calculations will require:

- Determination of each Iowa-bred winner;
- Of each of the 600 races each year from 2010-2018 (4800 races);
- Where the Iowa-bred winner placed in the race (e.g., win, place, show, etc.);
- The amount of the total purse for each race;
- The amount of each Iowa-bred winner's award or purse awarded; and
- The amount of the award or purse that should have been awarded to the Iowa-bred winner.

(**App. Vol. 2 0041-0042** Benda's Appendix in Support of Class Certification, Moss Deposition 51:21-52:15 (App. 210-211); **App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 7 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 7 (App. 12); **App. Vol. 3 0055** Order 12/31/2020 p. 3; **App. Vol. 2 0366**

IHBPA Appendix in Support of Resistance to Motion for Class Certification, Affidavit of Jonathan Moss ¶ 2 (App. 111-112))

Clearly, between the intra-class conflict and the overwhelming nature of the individual rights and damages questions, class certification was properly denied. *Comcast,* 569 U.S. at 34; Iowa Rule 1.263(1); *Hoekman*, 335 F.R.D. at 243.

c. Claims by Prairie Meadows against prior, overpaid payees would be wholly supported by Iowa law.

Benda is just horsing around with his assertion that "there is no plausible and legal way that any of the Proposed Class Members could be liable for payments received." (Appellant's Proof Brief p. 51) This claim is wholly belied by the law of restitution and unjust enrichment.

"The right of recovery for money paid under a mistake … is based upon the promise to return the money that the law implies, irrespective of any actual promise, and even against the refusal to make a promise, whenever the circumstances are such that one person is unjustly enriched by receipt of the benefit if the retention of the benefit would be unjust." Noah J.

Gordon & Barbara J. Van Arsdale, *Recovery of money paid under mistake of fact, generally*, 66 AM. JUR. 2D RESTITUTION AND IMPLIED CONTRACTS § 116 (Aug. 2021 Update)

> Money paid to another under the influence of a mistake of fact … on the supposition of the existence of a specific fact that would entitle the other to the money, that would not have been paid if it had been known to the payor that the fact was otherwise, may be recovered…. Thus, payment by mistake gives the payor a claim in restitution against the recipient… The ground on which the rule rests is that money paid through misapprehension of facts belongs, in equity and good conscience, to the person how paid it.

Id. See also Payment of Money Not Due, REST. (3RD) OF RESTITUTION AND UNJUST ENRICHMENT § 6 (2011) ("Payment by mistake gives the payor a claim in restitution against the recipient to the extent payment was not due.")

"[W]here one is compelled to pay money which in justice another ought to pay … the former may recover from the latter the sums so paid." *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951)

"The doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or

benefits without paying just compensation." *State, Dept. of Human Services ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001)

> The doctrine of unjust enrichment serves as a basis for restitution.... Recovery based on unjust enrichment can be distilled into three basic elements ... (1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the benefit to retain the benefit under the circumstances.

Id.

"Enrichment is unjust if it is a result of money paid by mistake." *Talley v. Talley*, 566 N.W.2d 846, 853 (S.D. 1997) ("Restitution for unjust enrichment is appropriate for a person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum was necessary for the discharge of a duty.")

This is on all fours with the situation Prairie Meadows would face were it deemed to have mis-calculated (and mis-paid). Because of its mistake of fact, some purported class members would have received an undue benefit and they would be subject to suit for restitution under the theory of

unjust enrichment. *Palmer*, 637 N.W.2d at 154. Accordingly, Benda's argument on this issue is meritless.

2. The District Court properly resolved factual disputes when it denied certification.

When facts are in dispute, the ""Court must examine all of the relevant evidence admitted at the class certification stage to ascertain if the party seeking class certification has made a prima facie showing," and it must resolve "disputes regarding the facts of the case." *Walsh*, 266 F.R.D. at 240.

a. The District Court properly resolved the dispute as to whether all purported class members shared a common interest and if common issues predominated.

On this point, it was Benda's obligation to establish, by a preponderance of the evidence, that the class members shared a common interest. Iowa Rule 1.263(1)(a); *see also Hudock v. LG Electronics U.S.A., Inc.*, --- F.4th ---, No. 20-2317, 2021 WL 4029769, at *1-2 (8th Cir. Aug. 25, 2021) ("The movant must … show that questions of law for fact common to class members predominate over any questions affecting only individual members.") But, saddled with a poor set of facts, Benda was unable to meet this burden.

Rather, as is common and appropriate in these situations, it was right for the "defendant [to] present evidence negating a plaintiff's … showing … [and that] the case would be dominated by individual issues… [and] unsuitable for class treatment." *Id.* at *2.

"Because a defendant's evidence may be probative of class cohesiveness and may be such as to cause the class to degenerate into a series of individual trials … a court performing a predominance inquiry under Rule 23(b)(3) may consider not only the evidence of plaintiff's case in chief but the defendant's … rebuttal evidence." *Gawry v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 942, 952-53 (N.D. Ohio 2009) *quoting Rodney v. Northwest Airlines, Inc.*,146 Fed. App'x 783, 786-87 (6th Cir. 2005) ("[T]he Advisory Committee Notes to Rules 23(b)(3) advise against certification when the defendant has a defense to liability that varies with individual class members.")

Where there is a "likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting individuals in different ways… an

action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Fed. R. Civ. Proc. 23, Advisory Committee Notes, Subdivision (b)(3).

Accordingly, the District Court properly considered the defense's evidence and ruled accordingly. *Id.*

b. The District Court properly found that purported class members could be injured in the future by reduced purse awards and payouts.

The District Court found:

> ITBOA reasoned that since its members negotiated and made contracts with Prairie Meadows on purse awards and payouts any claims for past underpaid funds could affect their bargaining position in the future with Prairie Meadows and could reduce purse and other economic awards to their members detriment. If Prairie Meadows had to pay out the sums now sought by Benda and his purported class, a substantial sum as calculated by Benda, the funds would have to come from moneys that would or could be used to pay out future purses and awards to members….
>
> Future awards and purses could be significantly reduced if Prairie Meadows would be required to pay out over $2,000,000 in addition to the legal fees and costs incurred by this class action. The interests of Benda and the purported class members simply do not align and make little economic sense and benefit.

(**App. App. Vol. 4 0037, 0054** Order 4/29/2021 p. 6, 23)

Benda's assertion that this is not authorized by Iowa law is belied by the authority he cites. Iowa Code § 99F.6(4)(a)(3) establishes minimum percentages for payouts of "no less than eleven percent of the first two hundred million of net receipts, and six percent of the net receipts above two hundred million dollars."

The current contracts payout at the rate of 20%. (**App. Vol. 3 0055** Order 12/31/2020 p. 3; **App. Vol. 2 0366** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Affidavit of Jonathan Moss ¶ 2 (App. 111-112)). Were Prairie Meadows liable to make the alleged underpayments for past races, there is nothing to stop it from re-negotiating the contract to reduce the future payouts to 11% - and to use the 9% difference to fund the back payments. Therefore, the District Court, in resolving the dispute, once again considered whether the defendant's rebuttal evidence demonstrated there was no cohesive class and that "significant questions … of liability and defenses … would … affect[] individuals in different ways," making a class un-certifiable. Fed. R. Civ. Proc. 23, Advisory Committee

Notes, Subdivision (b)(3); *Hudock,* 2021 WL 4029769, at *2; *Gawry*, 640 F.2d at 952-53.

3. The District Court properly found a conflict of interest between Benda and purported class members and within the class.

Many of Benda's argument in this subsection is duplicative of the previous subsections, and those rebuttals are incorporated herein.

a. The District Court had sufficient admissible evidence to resolve the dispute against certifying the class.

That said, once again, Benda has ignored the District Court's duty to resolve factual disputes, and instead, has set up a straw man of error. *See* Fed. R. Civ. Proc. 23, Advisory Committee Notes, Subdivision (b)(3); *Hudock,* 2021 WL 4029769, at *2; *Gawry*, 640 F.2d at 952-53.

Defendants and intervenors presented a plethora of evidence to rebut any contention that there is a common interest and that certain class members would clearly be hurt by the class litigation, including:

- "Retroactive application of the IRCG interpretation of Iowa Code § 99D.22 to the years 2012 2015 would only benefit

some owners of Iowa-bred horses that won purses, and would deprive others, who also owned non-Iowa-bred horses that won purses, of their awards." (**App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 7 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 7 (App. 12))

- The "amount of purses awarded for each successful horse in each race from 2012 through 2015 at Prairie Meadows will be different, depending on where the horse placed in the race." (Id.)
- "[T]hey may have had a lot of Iowa-breds in the previous and during these calendar years but their Iowa-breds did not win races and were not very – you know, were not necessarily very competitive, but they had one good open horse that was, and then all of a sudden the one good horse that was paying for the Iowa-breds that weren't doing well, they're going to have to go in the hole even deeper even though they're substantially impacting the

state of Iowa and the economic impact in totality."(**App. Vol. 2 0047** Benda's Appendix in Support of Class Certification, Moss Deposition 58:7-17 (App. 216))

- The "totality of the board" of the IHBPA expressed this concern. (**App. Vol. 2 0047-0048** Benda's Appendix in Support of Class Certification, Moss Deposition 58:19-59:12 (App. 216-217))

This evidence clearly supports the District Court's resolution of the factual dispute against certifying a class, a function it was obligated to perform. *See* Fed. R. Civ. Proc. 23, Advisory Committee Notes, Subdivision (b)(3); *Hudock,* 2021 WL 4029769, at *2; *Gawry*, 640 F.2d at 952-53.

As for the District Court's resolution that future purse awards would be adversely impacted, it properly considered this rebuttal evidence against certifying the class:

- The executive director of the ITBOA, Brandi Jo Fett (Fett) opined that "if Prairie Meadows had gone back into past years and corrected the miscalculation," this "would have come out of the Purse Fund and our purses would have been lower for the upcoming years… because … if we

would have fought and tried to get the back money, it would have had to come out of purse --- because supplement can only be paid out of purse funds. And then the next year would have been penalized." She also testified the entire ITBOA board shared this opinion. And she identified that they drew this conclusion because this requirement was in the statute – "the code said purses." [4] (Benda's Supplemental Appendix in Support of Class Certification 10/8/2021, Fett Deposition 62:1-14; 64:6-10; 70:3-10 (App. 016, 017, 021); **App. 936** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Bradi Jo Fett ¶¶ 1,2 (App. 12))

- It was "the ITBOA's understanding … that if there was an effort to correct the historical miscalculation, that … money would come out of the purses paid for future years." (Benda's Supplemental Appendix in Support of Class

[4] It is important to note that this opinion, shared by the entire ITBOA board & Fett, came about in March 2015 when the ITBOA was considering seeking the Declaratory Order regarding the calculation change. (**App. Vol. 2 0200** Benda's Supplemental Appendix in Support of Class Certification 10/8/2021, Fett Deposition 49:7-10 (App. 014)

Certification 10/8/2021, Fett Deposition 64:20-25 (App. 017))

Fett's testimony was given on her personal knowledge as the executive director of the Iowa Thoroughbred Breeders and Owners Association. (**App. 936** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Bradi Jo Fett ¶¶ 1,2 (App. 12)) In this role, she has personal knowledge of the laws and procedures that govern supplement payouts, and she and the ITBOA board (which also shares this knowledge) analyzed the repercussions of retroactive payment when they initially sought the supplement increase in 2015. As Fett testified, after the ITBOA's analysis: "that's why the IRGC when they made the order said it didn't go into effect till November. Because we didn't want to mess with what has already been put out." (Benda's Supplemental Appendix in Support of Class Certification 10/8/2021, Fett Deposition 64:1-4 (App. 017))

And while it is true that Benda's counsel elicited from Fett that her opinion was "speculation," this is not the type of legal speculation that is precluded from evidence. Rather, this is the type of firsthand knowledge of observed facts that is

expressly allowed in evidence. *See Whitley v. C.R. Pharmacy Service, Inc.*, 816 N.W.2d 378, 390-91 (Iowa 2012) (approving a trial court's allowance of a pharmacist, who had personal knowledge of delivery log procedures and who had conducted an investigation into the logs, was proper).

"To properly admit a lay witness's testimony, a sufficient factual foundation must be established showing the witness's opinion is based on firsthand knowledge and personal knowledge of facts to which the observed facts are being compared." *Id*. This was done, and the District Court properly considered the evidence in coming to its conclusion that the class should not be certified. *See* Fed. R. Civ. Proc. 23, Advisory Committee Notes, Subdivision (b)(3); *Hudock,* 2021 WL 4029769, at *2; *Gawry*, 640 F.2d at 952-53.

b. The intra-class conflict in this case is substantial and precludes class certification.

Benda's repeated claim of "speculation" for the injury to purported class members is belied by the evidence set out above. *See Whitley* 816 N.W.2d at 390-91. *See also* Fed. R.

Civ. Proc. 23, Advisory Committee Notes, Subdivision (b)(3); *Hudock,* 2021 WL 4029769, at *2; *Gawry*, 640 F.2d at 952-53.

Moreover, his authority is unavailing. *Kragnes v. City of Des Moines*, 810 N.W.2d 492 (Iowa 2012) on the surface has the appearance of applicability, but it is distinguishable in key areas.

In *Kragnes*, Des Moines imposed a franchise fee on utility gas & electric services that each resident in the city was forced to pay, regardless of property ownership. *Id.* at 498. A class was certified over the heated objections of the city, and the city was ultimately ordered to refund the franchise fee. *Id.* at 497. Des Moines had claimed the class should never have been certified because of an intra-class conflict between property owners and non-property owners – because "the most likely result of the [franchise] refund is an increase of proper taxes." *Id.* at 498. The court concluded: (1) there was no intra-class conflict; and (2) any "fundamental conflict is substantially based on speculation." *Id.* at 500-501.

To distinguish from the present matter. First, in *Kragnes*, the Court identified: "Each of the class members paid fees that

the City should not have collected and in this fundamental respect their claims are identical, consistent, and compatible." *Id.* at 500. Contrarily, here, not all Iowa-bred horse owners and breeders in this purported class received a lower payout than that negotiated in the 2015 contract; and 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. Accordingly, purported class members are "unidentical, inconsistent, and incompatible." *Id.*

Second, as opposed to speculation, in this matter, any retroactive payments will have to be made from some source, and the evidence demonstrates that that will either be: (1) Prairie Meadows eats the loss; (2) Prairie Meadows seeks restitution from overpaid winners; or (3) Prairie Meadows funds the repayment by lowering future purses. As opposed to speculation, these options are wholly supported by the evidence in the record. *Id.*

Third, the representative party in *Kragnes* was one of the property owners who was alleged to be potentially subject to

increased property taxes. *Id.* at 501. In this matter, Benda is not alleged to own a non-Iowa-bred horse that won a purse during the class period. (Second Amended Petition ¶2). Accordingly, *Kragnes* is inapposite, and the intra-class conflict in this matter destroys the propriety of certifying a class.

4. The District Court properly recognized the intervenors as representative of the purported class.

The District Court properly found "the ITBOA and the IHBPA… represent almost every proposed class member." (**App. Vol. 4 0038** Order 4/29/201 p. 7). This is because the ITBOA, as the name suggests, represents Iowa thoroughbred breeders and owners. (**App. Vol. 4 0036-0037** Order 4/29/2021 p. 5-6; **App. Vol. 2 0248-0249** ITBOA Appendix in Resistance to Motion for Class Certification, Resolution 5/27/2020 p. 1-2 (App. 9-10); **App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶¶ 3, 7 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶¶ 3, 7 (App. 12)). While it is unclear how many of the ITBOA's ~400 members

are breeders and owners of Iowa-bred horses, it is clear it is a significant amount because it was the ITBOA who requested the 2015 Declaratory Order that increased the Iowa-bred supplement calculation in the first place. (Id.)

But even more pertinently, the IHBPA is the "exclusive horsemen's group" in Iowa - that is, it represents the entire Iowa thoroughbred industry in contracting with Prairie Meadows over purses. (**App. Vol. 4 0034-0035** Order 4/29/2021 p. 3-4). In fact, the Horsemen's Benevolent Association (HBPA) is a national organization, and HBPAs are "at every track … helping horsemen." (**App. Vol. 4 0143** Hearing Tr. 45:13-19). Because membership is "automatic," and no one ever opts out, IHBPA was the representative of each purported class member-owner at the time each purse was paid during the class period. (**App. Vol. 4 0173** Hearing Tr. 112:21-24; **App. Vol. 2 0052** Benda's Appendix in Support of Class Certification, Moss Deposition 117:10-13 (App. 221)) The current IHBPA board, which has nine (out of 11) owners/ breeders who would be purported class members, is

unanimously opposed to the lawsuit. (**App. Vol. 4 0202, 0206** Hearing Tr. 171:1-5; 175: 1-4)

Throughout his brief, Benda attempts to make hay about his contention (refuted by ITBOA) that the Intervenors and Defendant presented only "about a dozen" Proposed Class Members who objected to the class. (*See e.g.* Appellant's Proof Brief p. 60). Even were that correct, it is still ~11 more people than Benda presented; that is, out of what Benda defines as "nearly 850 Proposed Class Members" (other than Benda), he only presented **one (1)** who would agree to participate in the class. (**App. Vol. 4 0143** Hearing Tr. 45:10-12)

That member, Ms. Moss, "was a member of Iowa Breeders, the Iowa HBPA" until she stopped racing horses in the summer of 2020, and therefore was a member of the IHBPA each time one of her horses won a race. (**App. Vol. 4 0138** Hearing Tr. 40:2-10) Moreover, although a lawyer, she refused to testify that she supported the lawsuit. (**App. Vol. 4 0153** Hearing Tr. 61:11-19)

Thus, Benda's argument on this point is meritless, and, ultimately, the IHBPA and ITBOA represent nearly every

member of the purported class, and the District Court properly found this.

5. The District Court properly determined the conflict was fundamental.

"[T]he Court must consider whether Plaintiffs will fairly and adequately protect the interests of the class." *J.S.X. Through Next Friend D.S.X. v. Foxhoven*, 330 F.R.D. 197, 211 (S.D. Iowa 2019). "This inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id.*

"Where, as here, adequacy of class representation is at issue, close scrutiny in the district court is even more important given the need to protect the due process rights of absent class members." *Custom Hair Designs by Sandy v. Central Payment Co., LLC*, 984 F.3d 595, 604 (8th Cir. 2020) (petition for certiorari docketed).

Benda's reliance on *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741 (Iowa 1985) is misplaced. In *Vignaroli*, the Court identified that a disqualifying conflict of interest occurs between a proffered class representative and the class where

the conflict goes "to the specific issues and controversies." *Id.* at 746. The Fourth Circuit has provided even more guidance, noting a "conflict is not fundamental when all class members share common objectives and the same factual and legal positions and have the same interest in establishing the liability of defendants." *Sharp Farms v. Speaks*, 917 F.3d 276, 295 (4th Cir. 2019)

The evidence available to the trial court was that Benda (and perhaps Ms. Moss) shared a common objective and the same interest in pursuing the litigation. Opposed to this objective and pursuing the litigation were the following class members: (1) IHBPA's president, Gessman; (2) Poindexter (who owns 35-40 Iowa-foaled horses); (3) the 20-40 purported class members identified by Mr. Moss; (4) those on ITBOA's unanimous board; and (5) 9 of the 11 class members on IHBPA unanimous board.

Moreover, Benda has demonstrated his antagonism toward at least one class member, who he accused of being involved "in inappropriate possession of my personally owned" property. (**App. App. Vol. 4 0051-0052** Order 4/29/2021 p.

20-21; **App. Vol. 2 0313** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Appeal Letter from Robert Benda to IRGC (App. 58-59)

But even more conflicting is the fact that Benda, who has only Iowa-bred horses, cannot share "the same factual and legal positions and have the same interest in establishing the liability of defendants" as those purported class members who have non-Iowa-bred horses that won purses. *Sharp,* 917 F.3d at 295. Critical and going to the specific issues and controversies, these purported members have an interest in reining in the retroactive application of the calculation increase, which is a position 180-degrees away from Benda's; accordingly, Benda has a fundamental, and disqualifying, conflict of interest from the class. *Vignaroli*, 360 N.W.2d at 746.

6. The District Court properly ignored the fiction that Prairie Meadows engaged in any improper conduct.

Benda's claim that the ITBOA's and IHBPA's objections were somehow due to an extortionate influence from Prairie Meadows is, well, horse feathers.

The ITBOA and its members have been opposed to retroactive application of the 2015 Declaratory Order since before it was entered: "recognizing that this would be problematic," and asking only that it "tak[e] effect on January 1, 2016." (**App. Vol. 4 0036-0037** Order 4/29/2021 p. 5-6; **App. Vol. 2 0248-0249** ITBOA Appendix in Resistance to Motion for Class Certification, Resolution 5/27/2020 p. 1-2 (App. 9-10); **App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶¶ 3, 7 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶¶ 3, 7 (App. 12)).

As set out in detail, above, these problems include: (1) reduced future purses and awards; (2) undermining the relationship between ITBOA members & Prairie Meadows; (3) many ITBOA members would incur no benefit; and (4) some ITBOA members may be subject to suit to recover the funds necessary to pay for the retroactive supplements. (**App. Vol. 2 0037-0038, 0047-0048** Benda's Appendix in Support of Class Certification, Moss Deposition 45:18-21; 46:2-25; 58:7-59:12

(App. 206, 207, 216, 217); **App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 7 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 7 (App. 12))

Because of these problems – and not any purported threat from Prairie Meadows - the unanimous ITBOA Board issued its resolution condemning the action. (**App. Vol. 2 0248-0249** ITBOA Appendix in Resistance to Motion for Class Certification, Resolution 5/27/2020 p. 1-2 (App. 9-10)). Accordingly, the District Court properly rejected this specious and unsupported argument.[5]

7. The District Court properly rejected the contention that sufficient safeguards could be put in place to protect objecting purported class members.

Despite the unavoidable, serious and fatal conflict of interest between Benda and purported class members and

[5] As for the other Intervenor, IHBPA, ITBOA notes that the record is equally devoid of any undue influence made by Prairie Meadows over that organization, as well, but leaves the specific arguments regarding their relationship to those parties.

within the purported class, Benda doubles down with the ridiculous claim that "safeguards" could protect proposed class members.

For his first safeguard, Benda claims that the Intervenors and Prairie Meadows can "adequately advance" the rights of proposed class members whose purses will retroactively be reduced. (Appellant's Proof Brief p. 72). How? Benda doesn't say. Rather, he relies on general authority for the proposition that such protection is possible, without describing what safeguard would protect these purported class members in this case.

For example, in *Horton v. Goose Creek Independent Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982), that class was "all students in a district," for the sole issue of the constitutionality of dog-sniffing school-wide locker searches. *Id.* at 487. The court held that the students who were not against the practice must remain part of the class, despite their opposition. *Id.* Note that these students would suffer no constitutional, financial or legal detriment were the relief requested by that class – no more school-wide, locker-sniffing

dogs – granted. *Id.* Rather, they would end up in the position of having their constitutional rights protected. *Id.* This is unlike the present situation where purported class members, who do not want this litigation, will suffer financial loss were the relief requested granted. *Id.*

Likewise, in *Groover v. Michelin North America, Inc.*, 192 F.R.D. 305 (M.D. Alabama 2000), a small portion of thousands of retirees objected to their participation in a class challenging contractual violations of retirement benefit agreements. *Id.* at 306. Those challengers wanted to maintain the status quo of welfare benefits they were currently receiving. *Id.* There is nothing in *Groover* to indicate that were the class litigation successful, the objectors would suffer financial detriment – to the contrary, their lives would have improved. *Id.* This is the opposite of what will happen to purported class members who own non-Iowa-bred winners here.

Ultimately, Benda has identified no method that would adequately safeguard their interests.

For his second claim, Benda asserts the objectors can simply opt out. But, as the District Court noted:

> Although it is true that once a class is certified any class member may opt out, what happens when a large number of purported class members actively seek at the very beginning of the certification process not to be members of the class? The issue of "predominance" then becomes one of primary focus.

(**App. Vol. 4 0042** Order 4/29/2021 p. 11)

Where a "class could be certified … but it would likely be futile because each class member has the right to "opt out," this, once again, triggers the predominance analysis. Judge Virginia A. Phillips & Judge Karen L. Stevenson, *Class Actions*, RUTTER GROUP PRAC. GUIDE FED. CIV. PRO. Ch. 10(C) § 10:604 (April 2021 Update) (discussing defendant classes). Like defendant classes, as the District Court noted, nearly no one wants this litigation other than Benda (even Ms. Moss wouldn't commit to it), and as shown above, he therefore cannot demonstrate predominance.

In addition, the ability to "opt out" does not supersede the adequacy of representation analysis. "Moreover, to collapse absentees' right of adequate representation into their right to … opt out… would be no substitute for Rule 23's certification criteria." *Epstein v. MCA, Inc.*, 126 F.3d 1235, 1247 (9th Cir.

1997) (opinion withdrawn and superseded on other grounds) *citing Prezant v. De Angelis*, 636 A.2d 915, 924 (Del. 1994) (rejecting the proposition that notice and opt out will satisfy due process for certifying class settlements absent adequate representation). As demonstrated above and below, nobody likes Benda as the class representative because he is dangerously unqualified.

8. The District Court properly found that Benda is wholly inadequate to represent the class.

Lacking all horse sense, and the self-awareness to see that he possesses none of the qualities of an adequate class representative, Benda claims that the District Court's refusal to so find is error. Balderdash.

The District Court found:

> Benda is not an adequate representative party to protect the interests of the purported class members. His position is basically one of antagonist to the class he wishes to represent. Benda's credibility and standing based upon the history of his actions within the horse racing industry and his own personal litigation and disciplinary history would make his representation less effective.... Benda has experienced a multitude of legal and financial problems dating as far back as 2016.

(**App. Vol. 4 0050** Order 4/29/2021 p. 19)

Benda argues that it was inappropriate for the District Court to consider any of this information, but that misstates governing law.

A qualified representative party must be able to "adequately represent the interests of the class" and "not have a conflict of interest in the maintenance of the class action." Iowa Rule 1.263(2) As demonstrated above, Benda has a disqualifying conflict of interest. As for the ability to adequately represent the purported class: "Doubts as to the ethics or character of either counsel or representative can also be relevant in determining adequate representation." *Foley*, 336 F.R.D. at 449.

"Whether a person is of sufficient moral character to represent a class is indeed relevant to the adequacy requirement." *Medical Society*, 332 F.R.D. at 151. Courts also consider "such factors as honesty, conscientiousness and other affirmative personal qualities to determine whether a named individual is a proper class representative." *Herrera*, 274 F.R.D. at 679. And while "unsavory character or credibility problems," alone "will not justify a finding of

inadequacy," they will when these are "related to the issues in litigation." *Id.*

Benda lacks the character, conscientiousness, respect for authority and respect for horses and horse racing to be a representative party, to wit:

- On September 14, 2016, the IRGC found that Benda "is an overbearing owner that strongly suggests to his trainer how he expects his horses to be trained… [and] was very close to crossing over the line between owner and trainer," which would have violated 491 IAC 6.5(3). (**App. Vol. 2 0271** IHBPA Appendix in Support of Resistance to Motion for Class Certification, IRGC Rulings 45772 (App. 16-17))
- On September 13, 2017, Benda was found guilty of violating 491 IAC 10.6(1) for removing a horse from his trainer's possession the day before a race and causing the horse to be scratched from an official program; Benda was fined $250. (**App. Vol 2 0272-0273** IHBPA Appendix in Support of Resistance to Motion for Class Certification, IRGC Rulings 45877 (App. 17-19))

- On September 27, 2017, the IRGC suspended Benda's owner's license for financial irresponsibility for failing to pay a $4,095 judgment in violation of 491 IAC 6.5 & 491 IAC 10.4. (**App. Vol. 2 0274** IHBPA Appendix in Support of Resistance to Motion for Class Certification, IRGC Rulings 45886 (App. 19)
- On September 29, 2017, the IRGC **again** suspended Benda's owner license for failing to pay the $250 fine imposed on September 13, 2017. (**App. Vol. 2 0275** IHBPA Appendix in Support of Resistance to Motion for Class Certification, IRGC Rulings 45890 (App. 20-21))
- On January 26, 2018, Benda displayed his disrespect for the IRGC and its authority when he sent an incendiary letter accusing it of "entrapment" and "misrepresentations and unauthorized evidence" in those disciplinary proceedings. (**App. Vol. 2 0312, 0315** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Appeal Letter from Robert Benda to IRGC (App. 57-60).

- Also, on that date and in that letter, Benda, without proof, accused another proposed class member of improperly retaining Benda's property. (**App. Vol. 2 0313** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Appeal Letter from Robert Benda to IRGC (App. 58-59)
- On November 25, 2019, Benda abandoned seven (7) horses on property that he had been removed from by court action. (**App. Vol. 2 0348** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Estate of William Hummel v. Benda, Polk Co. No. SCSC 641495 (App. 93-94))
- Benda failed to retrieve any of those horses, which were kept by the Animal Rescue League of Iowa, for four weeks. (**App. Vol. 2 0348-0349** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Estate of William Hummel v. Benda, Polk Co. No. SCSC 641495 (App. 93-94)
- While he eventually retrieved two of those horses, he abandoned the remaining five, triggering the sheriff to

seek an order allowing the Animal Rescue League to adopt them out. (**App. Vol. 2 0349-0350** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Estate of William Hummel v. Benda, Polk Co. No. SCSC 641495 (App. 94-96)).

In addition, a class representative has fiduciary obligations to the proposed class, so they "must have the character and means to carry out that obligation, including the abilities to examine independently" the litigation. *Robinson,* 219 F.R.D. at 186. In this role, the representative must "represent the interests of the class" in, among other things, ensuring any recovery "is distributed in a manner that is most beneficial to the class." *In re BankAmerica Corp. Securities Litigation*, 775 F.3d 1060, 1062 n. 1 (8th Cir. 2015).

Benda has demonstrated he is that, as he is incapable of running a financially stable horse owning operation, he cannot be trusted to manage the litigation of a class action for horse owners and breeders - or to competently oversee the distribution of any proceeds, to wit:

- On December 21, 2017, a judgment in the amount of $2,978.25 plus interest was awarded against Benda and in favor of his former trainer, Tanner Tracy, for failing to pay training bills for Patti's Edge, Drift on By and Five Star Lolo. (**App. Vol. 2 0317-0321** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Tanner Tracy Racing, L.L.C. v. Robert Terry Benda, Polk Co. No. SCSC 603508 (App. 62-67)).
- On December 21, 2017, a separate judgment of $2,660.00 plus interest was awarded against Benda and in favor of Tanner Tracy for failing to pay training bills for Sweet Scarlet. (**App. Vol. 2 0322-0325** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Tanner Tracy Racing, L.L.C. v. Robert Terry Benda, Polk Co. No. SCSC 603509 (App. 67-71)).
- On December 21, 2017, a separate judgment of $2,017.50 plus interest was awarded against Benda and in favor of Tanner Tracy for failing to pay training bills for Bid's Edge. (**App. Vol. 2 0326-0330** IHBPA Appendix in Support of Resistance to Motion for Class Certification,

Tanner Tracy Racing, L.L.C. v. Robert Terry Benda, Polk Co. No. SCSC 603510 (App. 71-76).

- On September 11, 2017, a judgment of $4,095.00 was entered in favor of the plaintiff against Benda for failing to pay for the training and boarding of five horses. (**App. Vol. 2 0331-0334** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Billy Landers v. Robert T. Benda, Polk Co. No. LACL 133881 (App. 76-80).
- On September 19, 2019, a judgment of $12,500.00 was entered against Benda in favor of the plaintiff for failing to pay for the care and maintenance of various horses. (**App. Vol. 2 0335-0340** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Michael Bolinger v. Robert Benda, Polk Co. No. LACL 143502 (App. 80-86)).
- On September 10, 2019, a default judgment in the amount of $19,969.19 plus interest and court costs was entered against Benda in favor of UMB Bank. (**App. Vol. 2 0341-0344** IHBPA Appendix in Support of Resistance

to Motion for Class Certification, UMB Bank, N.A. v. Robert T. Benda, Polk Co. No. LACL 144863 (App. 86-90).

- On November 15, 2019, a default judgment in the amount of $6,525.73 plus interest and court costs was entered against Benda in favor of Community Choice Credit Union. (**App. Vol. 2 0345-0347** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Community Choice Credit Union v. Robert T. Benda, Polk Co. No. LACL 145613 (App. 90-93).
- On November 25, 2020, a foreclosure was entered against Benda's real property for judgments in the amounts of $116,421.57 and $40,254.70. (**App. Vol. 2 0360-0363** IHBPA Appendix in Support of Resistance to Motion for Class Certification, Community Choice Credit Union v. Robert T. Benda et al., Polk Co. No. EQCE 085308 (App. 105-109).

Unlike Benda, the horse owners and breeders that would comprise this purported class are "sophisticated businesspeople who are extremely knowledgeable of the financial peculiarities of horse racing and the purses

awarded." (**App. Vol. 2 0250** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Steve Rentfle ¶ 4 (App. 11); **App. Vol. 2 0251** ITBOA Appendix in Resistance to Motion for Class Certification, Affidavit of Brandi Jo Fett ¶ 4(App. 12)).

Given his history of financial irresponsibility, how could Benda possibly serve in a fiduciary role for these financially savvy (and successful) owners and breeders? The only answer is, he cannot. And the District Court properly so found. Iowa Rule 1.263(2); *BankAmerica*, 775 F.2d at 1062 n. 1; *Robinson,* 219 F.R.D. at 186.

CONCLUSION

As demonstrated above, the district court's denial is unsupported by substantial evidence, thus warranting reversal.

Respectfully submitted,

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REQUEST FOR ORAL SUBMISSION

Counsel for Appellant respectfully requests this appeal be heard in oral argument.

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of the Iowa Rules of Appellate Procedure because it has been prepared in proportionally spaced typeface using Bookman Old Style in 14 point font and contains 11,298 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or (2)

/s/ Jeffrey M. Lipman

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of this brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon all parties to this appeal by EDMS on the 16th day of February, 2022.

/s/ Jeffrey M. Lipman