

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CHURCHILL DOWNS)
INCORPORATED, et al)

PLAINTIFFS)

v.)

) *Electronically Filed*

) CIVIL ACTION NO. 3:08CV-225-JGH

THOROUGHBRED HORSEMEN’S)
GROUP, LLC, et al)

DEFENDANTS)

ANSWER OF KENTUCKY HORSEMEN’S BENEVOLENT
& PROTECTIVE ASSOCIATION, INC. (“KYHBPA”),
RICK HILES AND MARTIN A. MALINE
AND
COUNTERCLAIM OF KYHBPA

Come the Defendants, Kentucky Horsemen’s Benevolent and Protective Association, Inc. (“KYHBPA”), Rick Hiles and Martin A. Maline (the “KYHBPA Defendants”), for their Answer to the Amended Complaint of Churchill Downs Incorporated (“Churchill Downs”) and its wholly owned subsidiary, Churchill Downs Technology Initiatives, LLC, d/b/a TwinSpires and TwinSpires.com (“TwinSpires”), state, defend and affirmatively plead as follows:

A N S W E R

FIRST DEFENSE

Plaintiffs’ Amended Complaint fails to state any claim upon which relief may be granted against any of the KYHBPA Defendants, and pursuant to Fed.R.Civ.P 12(b) and/or (c) should therefore be dismissed with prejudice. The KYHBPA Defendants incorporate herein by reference all matters set forth in the Joint Motion to Dismiss the Amended Complaint and

Memorandum in Support thereof as well as the KYHBPA's Motion for Judgment on the Pleadings and Memorandum in Support thereof, both of which have been filed contemporaneously with this Answer and Counterclaim.

SECOND DEFENSE

1. The KYHBPA Defendants deny the allegations in paragraph 1 of the Amended Complaint.

2. The KYHBPA Defendants admit the allegations contained in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of the Amended Complaint.

3. The allegations in paragraphs 12 and 13 of the Amended Complaint do not pertain to nor require responses from the KYHBPA Defendants, but to the extent a response to any of said allegations is deemed required, the allegations are denied.

4. The KYHBPA Defendants admit the allegations in paragraph 14 of the Amended Complaint.

5. The allegations in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 of the Amended Complaint do not pertain to nor require responses from the KYHBPA Defendants, but to the extent a response to any of said allegations is deemed required, the allegations are denied.

6. The KYHBPA Defendants admit the allegations in paragraph 26 and 27 of the Amended Complaint, and affirmatively state that, at all times, relevant to the Plaintiffs' Amended Complaint, the Defendants Rick Hiles and Martin A. Maline have acted within the scope of their responsibilities and authority as President and Executive Director, respectively, of the KYHBPA. The KYHBPA Defendants further affirmatively state that at all times relevant to the Plaintiffs' Amended Complaint, Defendant Rick Hiles has served as President of the KYHBPA as a volunteer without compensation or other remuneration.

7. The allegations in paragraph 28 and 29 of the Amended Complaint do not pertain to nor require a response from the KYHBPA Defendants, but to the extent a response to any of said allegations is deemed required, the allegations are denied.

8. The KYHBPA Defendants admit the allegations contained in paragraphs 30 and 31 of the Amended Complaint.

9. The KYHBPA Defendants admit so much of paragraph 32 of the Amended Complaint as alleges that the KYHBPA Defendants are subject to the personal jurisdiction of this Court. The remaining allegations in paragraph 32 do not pertain to nor require a response from the KYHBPA Defendants, but to the extent a response to any of said allegations is deemed required, the allegations are denied.

10. The KYHBPA Defendants admit the allegations contained in paragraphs 33, 34, 35, 36, 37 and 38 of the Amended Complaint.

11. The KYHBPA Defendants admit the allegation in paragraph 39 of the Amended Complaint that racetrack operators compete for wagering dollars with other racetracks that conduct races at or near the same time. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the remaining allegations in paragraph 39, and therefore deny same.

12. With respect to the allegations in paragraph 40 of the Amended Complaint, the KYHBPA Defendants admit that a substantial percentage of pari-mutuel wagering in the United States is through off-track betting and advanced deposit wagering (“OTB/ADW”) sites as opposed to host racetracks, but are without sufficient knowledge or information upon which to form a belief as to whether the percentage alleged is accurate, or as to the truth of the remaining allegations in paragraph 40, and therefore deny same.

13. The KYHBPA Defendants admit the allegations in paragraphs 41 and 42 of the Amended Complaint.

14. The KYHBPA Defendants admit the allegations in paragraphs 43, 44 and 45 to the extent they accurately summarize the provisions of the Interstate Horseracing Act (the "IHA," 15 U.S.C. 3001, *et seq.*). The IHA, however, speaks for itself. The KYHBPA Defendants further admit that OTB/ADW operators are required to negotiate a contract with the host racetrack and the resulting contract typically provides the OTB operator with the right to accept wagers and to present simulcasts of the races. The KYHBPA Defendants further state that the IHA prohibits a host racetrack from contracting to send its racing signal for off-track wagering purposes to an OTB/ADW site unless the racetrack first obtains, in the regular contractual process with horsemen, the consent of the horsemen's group to the proposed arrangement negotiated with that OTB/ADW company. The KYHBPA Defendants deny all other allegations in paragraphs 43, 44 and 45 not expressly admitted or stated herein.

15. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the allegations in paragraphs 46, 47 and 48 of the Amended Complaint, and therefore deny same.

16. The KYHBPA Defendants admit the allegations in paragraph 49 and 50 of the Amended Complaint.

17. The KYHBPA Defendants admit so much of the allegations of paragraph 51 of the Amended Complaint as state that in October 2006, Churchill Downs entered into the contract which is Exhibit A to the Amended Complaint (DE # 34.2) with KYHBPA, and that said contract is still in effect and will remain in effect through the end of Churchill's 2009 Spring/Summer Race Meet in 2009. The KYHBPA Defendants are without knowledge or

information sufficient to admit the truth of the remaining allegations of paragraph 51, and therefore deny same.

18. With respect to the allegations in paragraphs 52, 53, 54 and 55 of the Amended Complaint, the KYHBPA Defendants admit only so much of the allegations therein as accurately recite the provisions of the contract between the KYHBPA and Churchill Downs Incorporated which is Exhibit A to the Amended Complaint, and affirmatively state that the contract speaks for itself as to what the parties agreed. The KYHBPA Defendants deny all other allegations contained in said paragraphs including all interpretations stated or implied by Plaintiffs with respect to the terms of the contract except that the KYHBPA Defendants admit that Exhibit A requires the prior written approval (consent) of the KYHBPA before races may be simulcast interstate from Churchill Downs.

19. The KYHBPA Defendants admit the allegations in paragraph 56 to the extent they accurately describe the contracting process between a racetrack and ADW operators, payment of host and source market fees. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of any remaining allegations in paragraph 56, and therefore deny same.

20. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the allegations in paragraph 57 of the Amended Complaint, and therefore deny same.

21. The KYHBPA Defendants deny the allegations in paragraphs 58, 59, 60, 61 and 62.

22. With respect to the allegations in paragraph 63 of the Amended Complaint, the KYHBPA Defendants admit that the Thoroughbred Horsemen's Group ("THG") was formed in 2007. The KYHBPA Defendants deny the remaining allegations in said paragraph.

23. With respect to the allegations in paragraph 64 of the Amended Complaint, the KYHBPA Defendants admit that the KYHBPA is a member of THG. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the allegation that the other horsemen's groups identified in said paragraph are members of THG, and therefore deny same. The KYHBPA Defendants deny the remaining allegations in paragraph 64.

24. The KYHBPA Defendants admit only so much of the allegations in paragraph 65 of the Amended Complaint which suggest that Exhibit C attached thereto (DE # 34-4) represents a contract prepared by THG and affirmatively state that Exhibit C speaks for itself as to the contractual provisions therein. The KYHBPA Defendants deny the remaining allegations in paragraph 65.

25. The KYHBPA Defendants deny the allegations in paragraph 66 of the Amended Complaint. The KYHBPA Defendants affirmatively state that as the exclusive representative of its members, the KYHBPA has the absolute right to authorize any person or entity to negotiate for, or to represent its interests or act as its agent in negotiations, including with third parties, and, in exercising that right, has chosen the THG to assist, advise, consult and represent it in negotiations concerning interstate off-track wagering.

26. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the allegations in paragraph 67 of the Amended Complaint, and therefore deny same.

27. The KYHBPA Defendants deny the allegations in paragraph 68 of the Amended Complaint. The KYHBPA Defendants affirmatively state that the KYHBPA has the contractual and statutory right under the IHA to not consent to any interstate off-track wagering agreement

proposed by Churchill Downs, and as the exclusive representative of its members, further have the absolute right to authorize any person or entity to negotiate for, or to represent its interests or act as its agent in negotiations, including with third parties. In exercising that right, the KYHBPA has chosen THG to assist, advise, consult and represent it in negotiations concerning interstate off-track wagering.

28. The KYHBPA Defendants deny the allegations in paragraph 69 of the Amended Complaint except that the KYHBPA admits that it sent Exhibit H to Amended Complaint (DE # 34-9) to Churchill Downs on April 22, 2008, and that said Exhibit speaks for itself.

29. With respect to the allegations in paragraph 70 of the Amended Complaint, the KYHBPA admits that it has withheld its consent for Churchill Downs to send its simulcast signal for off-track wagering purposes to Calder Race Course, and states that Exhibit H to the Amended Complaint speaks for itself. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the allegations in paragraph 70 regarding the actions or conduct of any of the other horsemen's groups and/or defendants identified in said paragraph, or the authenticity of Exhibits D, I, J, K, L and M to the Amended Complaint, and therefore deny same. The KYHBPA Defendants deny all remaining allegations in paragraph 70.

30. The KYHBPA Defendants admit only so much of the allegations in paragraph 71 of the Amended Complaint as state that Calder Race Course is the only racetrack that as of the date of the filing of the Amended Complaint until December 2008 is hosting live racing within the State of Florida. The KYHBPA Defendants deny all remaining allegations in paragraph 71 of the Amended Complaint. In further response to the allegations in paragraph 71, the KYHBPA Defendants affirmatively state that it is in the economic best interest for the entire sport of

thoroughbred racing for KYHBPA not to consent to any form of interstate off-track wagering, including at Calder Race Course, whenever such wagering will not contribute to both the short-term and long-term survival of the sport. This is a statutory role assigned to horsemen's groups under the IHA as recognized by the Sixth Circuit Court of Appeals in *Ky. Div., Horsemen's Benevolent & Prot. Ass'n, Inc., v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406 (6th Cir. 1994). Under the IHA, Congress prohibited all interstate off-track wagering unless and until all interested parties, including the horsemen's group (such as the KYHBPA)—whose members are putting on the horse race “show”—are completely satisfied that any proposed interstate off-track wagering will not undermine the continued demand for horsemen's services and thus harm the entire sport of live thoroughbred racing. *Id.* at 1414-1415. Therefore, when considering whether to waive Congress' prohibition on interstate off-track wagering, the KYHBPA has far more to take into account than the short-term revenues that off-track wagering may provide. *See id.* at 1415. KYHBPA further states that Plaintiffs, by counsel, admitted in open court during the hearing on June 16, 2008, that it was Plaintiffs' own decision to shut off simulcast wagering at other off-track betting venues in the State of Florida when KYHBPA did not consent to off-track wagering at Calder. (*See* DE # 72, June 16, 2008 Hearing Transcript at pp. 65-68.)

31. With respect to the allegations in paragraph 72 of the Amended Complaint, the KYHBPA Defendants state that Exhibit N to the Amended Complaint (DE # 35-15) speaks for itself. All allegations in said paragraph referring to or interpreting the content of Exhibit N, and all other allegations in paragraph 72 are denied.

32. The KYHBPA Defendants deny all allegations in paragraphs 73 and 74 of the Amended Complaint.

33. In response to paragraph 75 of the Amended Complaint, the KYHBPA Defendants incorporate by reference as if fully stated herein, their responses, denials, and defenses to the allegations in paragraphs 1 through 74 of the Amended Complaint set forth above.

34. The KYHBPA Defendants deny all other allegations in Count I—paragraphs 76, 77, 78, 79, 80, 81, 82, 83, 84 and 85 of the Amended Complaint.

35. In response to paragraph 86 of the Amended Complaint, the KYHBPA Defendants incorporate by reference as if fully stated herein, their responses, denials, and defenses to the allegations in paragraphs 1 through 85 of the Amended Complaint set forth above.

36. With respect to the allegations in paragraph 87, the KYHBPA Defendants state that Section 3 of the contract (Exhibit A to the Amended Complaint) speaks for itself. The KYHBPA Defendants are without sufficient knowledge or information upon which to form a belief as to the truth of the allegations of said paragraph pertaining to the contract between Kentucky Thoroughbred Association (“KTA”) and Churchill Downs (Exhibit B to the Amended Complaint, DE # 34-3), and therefore denies same. The KYHBPA Defendants further affirmatively state that as the exclusive representative of its members, the KYHBPA has the absolute right to authorize any person or entity to negotiate for, or to represent its interests or act as its agent in negotiations, including with third parties, as to the “terms and conditions” pertaining to, including allocation of wagering revenues for races held at Churchill Downs. The KYHBPA Defendants deny all other allegations in paragraph 87 of the Amended Complaint.

37. As to the allegations in paragraph 88, the KYHBPA Defendants state that Section 29 of the contract (Exhibit A to the Amended Complaint) speaks for itself. The KYHBPA Defendants deny any implication in the allegations in paragraph 88 of the Amended Complaint that

KYHBPA has assigned the contract with Churchill Downs to any third party and deny all other allegations in paragraph 88.

38. The KYHBPA Defendants deny the allegations in paragraphs 89 and 90 of the Amended Complaint.

39. The KYHBPA Defendants additionally deny that Churchill Downs is entitled to any equitable or legal relief under any Count or allegation of the Amended Complaint, including all such relief prayed for in the Amended Complaint from and against the KYHBPA Defendants or any of them.

40. All allegations and claims of a right to relief in the Amended Complaint not expressly admitted by the KYHBPA Defendants herein above are hereby denied.

THIRD DEFENSE

The provisions of the IHA are a complete bar to the Plaintiffs' claims in Counts I and II of the Amended Complaint against the KYHBPA Defendants.

FOURTH DEFENSE

The Plaintiffs' are without antitrust injury or injury in fact and have no standing to assert the claims alleged in Count I of the Amended Complaint under the Sherman Act and/or Clayton Act against the KYHBPA Defendants.

FIFTH DEFENSE

The provisions of the Volunteer Protection Act of 1997 (as amended) 42 U.S.C. 14501 *et seq.*, are a complete bar to Plaintiffs' claims in Counts I and II of the Amended Complaint against the Defendant Rick Hiles.

SIXTH DEFENSE

Plaintiffs' claims against the KYHBPA Defendants in Counts I and II of the Amended Complaint are barred by Plaintiffs' failure to mitigate damages, if any, including but not limited to Plaintiffs' failure to negotiate fairly and in good faith with the KYHBPA and its authorized representatives in accordance with applicable federal and state law, and by any other matter constituting an avoidance or affirmative defense, pursuant to Fed.R.Civ.P. 8(c), and as discovery may reveal.

SEVENTH DEFENSE

The Plaintiffs' claims against the KYHBPA Defendants in Counts I and II of the Amended Complaint are further barred, to the extent Plaintiffs seeks equitable relief of any kind, by the doctrine of unclean hands, equitable estoppel, laches, waiver, and/or other defense in equity.

EIGHTH DEFENSE

The KYHBPA Defendants deny that any of their actions or conduct violated the antitrust laws or breached the contract with Churchill Downs, but notwithstanding said denial, affirmatively plead that the actions and conduct of the KYHBPA Defendants at all times relevant to the subject-matter of this lawsuit was justified and/or excused as an appropriate response to the actions committed by Plaintiffs in violation of the antitrust laws and in breach of Churchill Down's contractual and statutory obligations to the KYHBPA under the contract (Exhibit A to the Amended Complaint).

NINTH DEFENSE

The KYHBPA Defendants plead the right to set-off as against any and all alleged damages the Plaintiffs may claim are due from the KYHBPA Defendants by virtue of Churchill

Downs' own multiple breaches of the contract with the KYHBPA (Exhibit A to the Amended Complaint) as alleged in the KYHBPA's Counterclaim set forth below.

TENTH DEFENSE

The KYHBPA Defendants incorporate by reference as additional affirmative defenses as if fully set forth herein any allegations, claims and/or causes of action asserted in the KYHBPA's Counterclaim set forth below should any of same be properly deemed to be affirmative defenses.

WHEREFORE, the KYHBPA, Rick Hiles and Martin A. Maline, respectfully pray that the Amended Complaint be dismissed with prejudice in its entirety as to each of these answering Defendants, and that they be awarded their costs, expenses and reasonable attorneys' fees incurred in the defense of this action.

COUNTERCLAIM OF KYHBPA

The KYHBPA, by counsel, for itself, and on behalf of its member horsemen and those persons working and participating in the thoroughbred racing industry in Kentucky including at Churchill Downs Racetrack who are the beneficiaries and potential beneficiaries of KYHBPA's benevolent operations, brings the following Counterclaims against the Plaintiffs, Churchill Downs Incorporated (hereafter referred to as "CDI") and Churchill Downs Technology Initiatives Company, pursuant to the Interstate Horseracing Act, 15 U.S.C. § 3001 *et seq.*, ("IHA"), and the contract contemplated thereunder between CDI and KYHBPA attached as Exhibit A to the Amended Complaint (DE # 34-2, hereinafter the "Contract").

1. KYHBPA incorporates by reference and alleges as if fully set out herein all of the responses pled by the KYHBPA Defendants in their foregoing Answer to the factual allegations contained in paragraphs 1 through 74 of the Amended Complaint.
2. The KYHBPA is the official horsemen's group and representative of the majority of owners and trainers of thoroughbred horses ("horsemen") racing at Kentucky racetracks, as defined in the IHA at 15 U.S.C. § 3002(12). As such, the KYHBPA represents the interests of horsemen in negotiating agreements with racing associations like CDI for the percentage of revenues generated from wagering that will be paid into horsemen's purses annually.
3. CDI owns and operates Churchill Downs Racetrack in Louisville, Kentucky, and Churchill Downs Technology Initiatives Company, a Delaware corporation registered to do business in Kentucky at 700 Central Avenue, Louisville, Kentucky 40208, and doing business in Kentucky and on the Internet in other states under the assumed but unregistered names of "TwinSpires" and "TwinSpires.com."

4. TwinSpires operates an advanced deposit wagering (“ADW”) business and website which solicits, accepts and places pari-mutuel wagers on thoroughbred races at Kentucky racetracks including Churchill Downs Racetrack. These wagers are made via the Internet, telephone and other mobile devices by customers in Kentucky and other states who have established and funded accounts with TwinSpires in advance of wagering.

5. Wagers made with TwinSpires are accepted by TwinSpires as having been placed in Oregon where TwinSpires has located its operations hub and where it is authorized by Oregon law to accept pari-mutuel wagers made via the Internet, telephone or other device on thoroughbred horse races conducted in various states, including Kentucky.

6. CDI “launched” TwinSpires.com as its new and “official” ADW service on May 2, 2007 in time to accept wagers on races conducted during the Churchill Downs 2007 Spring Race Meet which included the running of the Kentucky Derby and Kentucky Oaks stakes races. With the launch of TwinSpires.com as CDI’s official ADW, CDI ceased simulcasting live races to certain OTB/ADWs including Television Game Network (“TVG”), the nationally recognized interstate ADW not affiliated with CDI.

7. On or about October 2006 and prior to purchasing TwinSpires, CDI entered into the Contract with the KYHBPA (DE # 34-2) pursuant to 15 U.S.C. § 3004(a), which sets forth the terms and conditions upon which CDI is to allocate wagering revenues to the Horsemen’s Account for purses from all forms of wagers on live racing at Churchill Downs Racetrack and on races simulcast to Churchill Downs Racetrack on which CDI accepts wagers.

8. CDI pays purse awards to purse winners at Churchill Downs Racetrack from funds it maintains in the “Horsemen’s Account.” CDI is legally required to maintain the “Horsemen’s Account” as a fiduciary for the benefit of the KYHBPA and its members in accordance with

KRS §230.215 *et seq.*, and 810 K.A.R. 1:026 (28). The regulation and Section 5 of the Contract require CDI to maintain the Horsemen's Account separately from CDI's own accounts and to ensure there are sufficient funds in it to pay purses, stakes awards, rewards, claims and deposits. Purses are to be paid from the Account within forty-eight (48) hours after race results are declared official. CDI is not permitted to deduct any money from purses paid to winning horsemen except for jockey fees, unless the deduction is requested in writing by the horseman to whom the purse award is due or his/her authorized representative. *See* 810 KAR 1:026(28). Only a steward appointed by the Kentucky Horse Racing Authority (now "Commission") may order money withheld from a purse award. *Id.*

9. Section 4A(1) of the Contract addresses the allocation of on-track wagering commissions to horsemen's purses as follows:

On-Track Wagering. During the Term of this Agreement, Churchill shall pay to Horsemen as purses an amount equal to fifty-one percent (51%) (hereinafter referred to as the "On-Track Purse Percentage") of Churchill's annual commissions, including breakage, but excluding any taxes due under KRS 138.510 or similar statute, received from pari-mutuel wagers made at the Racetrack on live races run at the Racetrack (the "Purse Monies"). . . .

Section 4.B(2) of the Contract further provides:

Interstate Pari-Mutuel Wagering.

Simulcast Sending. In the event Churchill shall enter into a contract with another racing association, off-track wagering system or other off-track facility, located outside of the Commonwealth of Kentucky, for the purpose of authorizing such association to receive a simulcast signal from the Racetrack and to accept pari-mutuel wagers on a race held at the Racetrack, then in such event, Churchill shall pay to horsemen as purses that amount equal to fifty-one percent (51%) of Churchill's revenue received under the terms of said contract, excluding excise or similar taxes, if any, payable with respect to such revenue.

Simulcast Receiving. In the event Churchill shall enter into a contract with another racing association located outside of the Commonwealth of Kentucky for the purpose of accepting pari-mutuel wagers on a race held at such racing association's facility, then in such event, Churchill shall pay to horsemen as

purses that amount provided for in the statute then in effect authorizing the receipt of interstate simulcasts.

10. Section 4.E of the Contract clarifies that wagers made on races through an ADW owned by CDI, *i.e.* TwinSpires, are to be treated as if made physically at Churchill Downs Racetrack for purposes of determining the percentage of monies to be paid into the Horsemen's Account for horsemen's purses. Section 4.E specifically states:

Telephone Account or Other Electronic Media Wagering. For purposes of determining the amount of purses to be paid under this Paragraph 4, a telephone account wager or other wager made through an electronic media wagering system, the majority of which is owned by Churchill **shall be deemed to have been made at the Racetrack** or Trackside, as the case may be, and Churchill revenues received therefrom shall be allocated and paid to Horsemen as purses in the manner described in the appropriate subparagraph of this Paragraph 4. Fifty percent (50%) of any source market or other similar fees received by Churchill from telephone account wagering systems as a result of wagers made in Kentucky on races simulcast from within or outside of Kentucky shall be allocated and paid to the Horsemen as purses. For purposes of this Agreement, the term "source market" or other fees" shall mean: any and all fees paid to Churchill and/or its horsemen by Television Games Network or any other account wagering entities not owned by Churchill for the right to accept wagers from account holders located in the state of Kentucky. (Emphasis added.)

11. Commissions or "take-out" from wagers made at Churchill Downs Racetrack on live races are to be allocated to horsemen's purses in accordance with Section 4.A(1). Pursuant to 4.E., wagers on live races occurring at Churchill Downs Racetrack, but placed through TwinSpires, are "deemed to have been made at the Racetrack" and must be allocated to horsemen's purses according to Section 4.A(1) such that TwinSpires' take-out on those races is to be included in the calculation of CDI's commissions, and 51% of the net amount after taxes paid into the Horsemen's Account at CDI for horsemen's purses.

12. CDI also receives simulcast signals for live races at other racetracks and accepts wagers at Churchill Downs Racetrack on those races. Pursuant to Section 4.E of the Contract, wagers made through TwinSpires on those same races are also "deemed to have been made at the

Racetrack” and must therefore be allocated to horsemen’s purses in accordance with Section 4.B(2)B of the Contract.

CDI’s Improper Withholding of Wagering Revenues From the Horsemen’s Account.

13. During the Churchill Downs 2007 and 2008 Race Meets, upon information and belief, wagers placed through TwinSpires on live races occurring at Churchill Downs Racetrack were not included in the calculation of commissions to be paid into Horsemen’s purses pursuant to Section 4.A. They were instead considered in the calculation of the nominal (believed to be approximately 6%) host fees paid by TwinSpires to its parent corporation, CDI, contrary to Section 4.E of the Contract. The host fees received by CDI were then further divided such that only approximately 3% of the millions of dollars wagered through TwinSpires on live races were paid into the Horsemen’s purses at CDI.

14. In 2007 and 2008, Churchill Downs Racetrack also received simulcasts of races from racetracks outside Kentucky. Customers were able to watch and wager on those races while at Churchill Downs Racetrack, or do so remotely through their TwinSpires account. Pursuant to 4.E of the Contract, wagers placed by customers through TwinSpires on races simulcast to Churchill Downs Racetrack must be deemed to have been made at the Churchill Downs Racetrack. Accordingly, CDI was obligated to pay into the Horsemen’s Account for horsemen’s purses the amount provided for in KRS §230.3771 as stated in Section 4.B(2)(B) of the Contract. Instead, upon information and belief, no portion of the wagers made through TwinSpires on simulcast races received at Churchill Downs Racetrack was paid into the Horsemen’s Account for purses at CDI.

15. CDI additionally failed to include amounts due under Sections 4.E, 4.A(1) and 4.B(2)B of the Contract in the calculation of purses for the Fall 2007 and Spring 2008 race meets, thereby

reducing the amounts of the purses both advertised and paid to horsemen and amounts to be paid to the KYHBPA for its benevolent operations pursuant to Section 9 of the Contract.

16. CDI breached its obligations to the KYHBPA under the Contract by failing to pay into the Horsemen's Account monies due under Sections 4.E, 4.A(1) and 4.B(2)B in 2007 and now 2008. CDI's breach has deprived the KYHBPA and its members who won purses during the 2007 and the Spring 2008 race meet of monies to which they are entitled. The amount wrongfully withheld from the Horsemen's Account in breach of Section 4.E, 4.A(1) and 4.B(2)(B) is estimated in the aggregate, to exceed three million dollars (\$3,000,000.00).

CDI's Retaliatory Underpayment of Purse Awards.

17. Section 6.A of the parties' Contract requires CDI to use its best judgment in estimating attendance, pari-mutuel handle and breakage, and "after consultation with a designated member of the HBPA," to establish a Purse Schedule, and to "exercise due care to avoid underpayments or overpayment of purses at all race meetings."

18. CDI publishes its Purse Schedule for each race meet in a several volume Condition Book. CDI makes the first volumes of the Condition Book for an upcoming race meet available to the KYHBPA prior to the beginning of the meet and publishes them on the Churchill Downs website for horsemen to review. Kentucky horsemen rely in good faith on the purse awards advertised by CDI in the Condition Books when determining whether to race at Churchill Downs, and choosing the races in which to enter their horses. The first two volumes of the Condition Book for the 2008 Spring race meet at Churchill Downs were published in April and contained the purse schedules for racing dates beginning April 26, 2008 through May 27, 2008 including the Kentucky Derby and Kentucky Oaks stakes day races.

19. The Contract allows for underpayment of purse awards during a race meet in the event CDI over-estimates them in the Purse Schedule. Pursuant to Section 6.C of the Contract, the maximum underpayment considered reasonable by the parties is 3% of the purses generated at Churchill Downs for the preceding calendar year. (*See* DE # 34-2, Exhibit A to Amended Complaint, § 6.C.)

20. The Contract in Section 6.A as well as standard industry practice requires CDI to consult with the KYHBPA before deciding to underpay purses. Underpayments of more than 3% are to be “distributed as additional purse distribution[s] to those horsemen who have won purses during that part of the year when purses at Churchill Downs were at their lowest dollar amount.” *Id.* For that purpose, the KYHBPA is to “designate the period of lowest purse [*sic*], not to exceed twenty five percent of the race days during the year in which the underpayment was incurred.” In the event CDI underpays purses more than 3%, it must pay over the amount that **exceeds** the 3% limit to the purse winners who were underpaid by the end of the Fall race meet. *Id.* (DE # 34-2, Exhibit A at § 6.C.)

21. In Section 11.B(3) of the Contract, CDI warrants and represents that its officers, directors and employees will not “threaten, intimidate or otherwise coerce any Horseman, HBPA Member, employee or representative thereof.” This includes by economic coercion through underpayment of purses.

22. On May 9, 2008, CDI announced on its website -- www.churchilldowns.com -- that beginning on May 14, 2008 all purses paid to horsemen would be reduced by 20% below the amounts set forth on the Condition Book Purse Schedule. (*See* DE # 39-6). Churchill President Steve Sexton stated:

We have been left with no option but to reduce overnight purses to offset the amount of lost handle because Kentucky horsemen have prevented horse racing fans from wagering

through ADW platforms,” said Churchill Downs President Steve Sexton. We are disappointed because the failure to send the signal will negatively impact the product both on and off the racetrack. While we are still hopeful this impasse can be resolved, we have no choice but to act now.

23. Mr. Sexton’s announcement followed similar announcements on the Calder Race Course website regarding Florida horsemen’s purses. It also followed an email from the president of the Beulah Park Racing Association in Columbus, Ohio to members of the Thoroughbred Racing Associations of North America, Inc. urging them to cut horsemen’s purses to force horsemen’s groups to abandon attempts to negotiate through defendant THG for a more equitable portion of a racing associations’ simulcasting revenues, and to force them to consent to simulcasting agreements. (DE # 39-10.)

24. On May 14, 2008, CDI made good on its threat and began underpaying the purses it had advertised in volumes 1 and 2 of the Condition Book by 20%. It continued to do so through May 26, 2008 (the “underpayment period”).

25. During the underpayment period, CDI released volumes 3 and 4 of the Condition Book for racing days between May 29, 2008 and July 6 when the Spring 2008 race meet ended. The purses advertised in volumes 3 and 4 were grossly underestimated by as much as 20% below the amounts CDI would have normally advertised and paid to purse winners.

26. At no time did CDI consult with the KYHBPA before underpaying advertised purses to winning horsemen at Churchill Downs Racetrack as required by the terms of Section 6.A of the Contract and industry practice. Nor did CDI consult with KYHBPA before grossly underestimating purse awards published in volumes 3 and 4 of the Condition Book.

27. By the public admission of CDI’s president, the action taken by CDI to cut horsemen’s purses at Churchill Downs was retaliatory. CDI’s stated intent and purpose in cutting purses was to force the KYHBPA through the economic coercion of their members to consent to CDI

sending its signal to TwinSpires, Calder Race Course and other OTB/ADW sites in which CDI has an interest, under terms that are inequitable to horsemen.

28. All of the horsemen awarded purses at Churchill Downs during the underpayment period relied in good faith on the purse amounts advertised by CDI in the Condition Book when choosing to race during that time period. CDI did not likewise act in good faith and instead underpaid purse awards to the purse winners' economic detriment and injury. Under the terms of the Contract, only those horsemen winning purses on 25% of the race days in 2008 in which the lowest purses were paid may be able to recoup the underpayment. This is an insufficient and inequitable remedy upon which CDI is not entitled to rely given CDI's own multiple breaches of the Contract, as well as its bad faith conduct. Accordingly, every horseman whose purse award was cut by CDI during the underpayment period is entitled to payment in full of the purse amounts advertised by Churchill Downs.

29. CDI's action to withhold 20% from purse award payouts during the underpayment period was a wrongful and intentional exercise of dominion and control over the Horsemen's Account for CDI's own benefit and not for the benefit of Kentucky horsemen in breach of Sections 5 and 6.C of the Contract, and in direct violation of the fiduciary duty imposed on CDI by 810 K.A.R. 1:026 (28) to maintain the Horsemen's Account for the benefit of horsemen.

30. CDI's conduct further constitutes a breach in bad faith of Section 6.A of the Contract in that CDI, with intent to retaliate and wrongfully coerce the KYHBPA and its members, did not (i) use its best judgment in estimating purse awards; (ii) did not consult the KYHBPA before cutting purse awards or before grossly under-estimating purse awards in Condition Book volumes 3 and 4, and (iii) did not exercise due care or caution to avoid underpaying purses.

31. CDI's retaliatory and coercive conduct further constitutes a direct and intentional breach in bad faith of Section 11.A.3 of the Contract wherein CDI warranted its officers, directors and employees would not "threaten, intimidate or otherwise coerce any Horseman, HBPA Member, employee or representative thereof.

32. CDI's bad faith breaches of Contract and fiduciary duty have wrongfully deprived all KYHBPA members who won purses between May 14, and May27, 2008 at Churchill Downs Racetrack of the full advertised purse amount due to them to their economic damage and injury in amounts estimated in the aggregate to exceed two million dollars (\$2,000.000.00).

33. CDI's bad faith breaches of Contract and fiduciary duty have further wrongfully deprived all horsemen who raced at Churchill Downs from May 29, 2008 through July 6, 2008, of the right to compete for fairly estimated purse awards to their economic injury in amounts to be determined.

34. CDI's bad faith breaches of Contract and fiduciary duty have further wrongfully deprived the KYHBPA and its beneficiaries of the 1.5% share of those amounts wrongfully excluded from the estimation of purse awards and from actual purse award payments during the Spring 2008 race meet, which 1.5% is due to the KYHBPA under Section 9 of the Contract.

COUNT I
BREACH OF SECTIONS 4.E, 4.A(1) AND 4.B(2)(B) OF THE CONTRACT

35. The KYHBPA incorporates by reference as if fully stated herein all allegations contained in paragraphs 1 through 34 of this Counterclaim.

36. During the 2007 and 2008 Race Meets at Churchill Downs Racetrack, CDI in bad faith failed to pay into the Horsemen's Account for horsemen's purses 51% of the take-out it received from wagers placed through TwinSpires on live races occurring at Churchill Downs as required

by and in breach of Sections 4.E and 4.A(1) of the Contract to the economic damage of the KYHBPA and its members.

37. Furthermore, during 2007 and 2008 (to date), CDI in bad faith failed to pay into the Horsemen's Account for horsemen's purses the statutory share due under KRS § 230.3771 and Sections 4.E and 4.B(2)(B) of the Contract from wagers placed through TwinSpires on races simulcast to Churchill Downs Racetrack by out of state racing associations, all in further breach of the Contract to the damage of the KYHBPA and its members.

38. As a direct result of the aforesaid contractual breaches committed in bad faith, CDI owes to the Horsemen's Account for the benefit of Kentucky horsemen, the KYHBPA and its beneficiaries such sums as have yet to be fully determined but which upon information and belief, in the aggregate, exceed three million dollars (\$3,000,000.00). The KYHBPA for the common benefit of all of the aforementioned persons and entities, is entitled to recover as damages or equitable relief all amounts which CDI has failed to pay into the Horsemen's Account in breach of Sections 4.E, 4.A(1), and 4.B(2)(B) of the Contract.

COUNT II
BREACH OF SECTIONS 6.A, 6.C AND 11.B(3) OF THE CONTRACT

39. The KYHBPA incorporates by reference as if fully stated herein below all allegations contained in paragraphs 1 through 38 of this Counterclaim.

40. CDI's intentional gross underpayment of purse awards by 20% during the underpayment period and intentional gross underestimation of purse awards for the remainder of the Spring 2008 race meet at Churchill Downs constitutes a direct and unwarranted breach in bad faith of its contractual duties under Section 5 of the Contract to maintain the Horsemen's Account for the benefit of horsemen; to not withhold any portion of a purse award, and to pay over purse awards to purse winners within 48 hours following the official results of a race.

41. CDI's intentional gross underpayment of purse awards by 20% during the underpayment period and intentional gross underestimation of purse awards for the remainder of the Spring 2008 race meet at Churchill Downs further constitutes a direct and unwarranted breach in bad faith of its contractual duties under Sections 6.A and 6.C of the Contract to exercise its best judgment in estimating purse awards; to consult with the KYHBPA regarding purse amounts and before underpaying purses; to exercise due care to avoid underpayments of purses, and to not underpay purses by more than 3%.

42. CDI's intentional gross underpayment of purse awards by 20% during the underpayment period and intentional gross underestimation of purse awards for the remainder of the Spring 2008 race meet at Churchill Downs Racetrack was in retaliation against the KYHBPA for exercising its veto power under 15 U.S.C. § 3004. CDI further committed these acts to coerce KYHBPA's members to exert pressure on the KYHBPA to consent to the simulcasting of live races from Churchill Downs to TwinSpires, Calder Race Course and other CDI affiliates. This retaliatory and coercive conduct constitutes the additional bad faith violation and breach of CDI's warranty and representation under Section 11.B(3) of the Contract.

43. As a direct and intentional result of the aforesaid breaches, CDI owes to KYHBPA members whose purse awards have been grossly underpaid and grossly underestimated, and to the KYHBPA under Section 9 of the Contract, such sums as have yet to be fully determined but which are estimated to exceed, in the aggregate, the sum of two million dollars (\$2,000,000.00). The KYHBPA for the common benefit of all of the aforementioned persons and entities, is entitled to recover as damages or equitable relief all such amounts for CDI's bad faith breach of Sections 6.A, 6.C and 11.B(3) of the Contract.

**COUNT III
VIOLATION OF KENTUCKY LAW**

44. The KYHBPA incorporates by reference as if fully stated herein below all allegations contained in paragraphs 1 through 43 of this Counterclaim.

45. CDI is bound by KRS Chapter 230.215 *et seq* and Title 810 Chapter 1:026 to comply with Kentucky statutes and regulations governing racing associations. Title 810 of the Kentucky Administrative Regulations at Chapter 1:026 requires CDI as a fiduciary with respect to the Horsemen's Account, to pay purse awards to horsemen who have won purses within forty-eight (48) hours after race results are declared official. The regulation and the Contract further prohibit CDI from making any deductions from purses other than jockey fees or those authorized by the horseman to which the purse award is due.

46. CDI's intentional underpayment and withholding of 20% of the advertised purse awards from purse winners during the underpayment period is a direct violation of its legal and fiduciary obligations under KRS Chapter 230.215 and 810 KAR 1:026(28) and common law with respect to the Horsemen's Account at CDI.

47. CDI's violation of said statute and regulation has been to the financial detriment of the legal beneficiaries of the Horsemen's Account including without limitation the KYHBPA, its beneficiaries, and its members whose purse awards have been underpaid, all in sums which are not yet determined but upon information and belief exceed two million dollars (\$2,000,000.00). For itself and for the common fund and benefit of all of the aforementioned persons and entities, KYHBPA is entitled to recover as damages all such amounts pursuant to KRS § 446.070.

**COUNT IV
BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING**

48. The KYHBPA incorporates by reference as if fully stated herein below all allegations contained in paragraphs 1 through 47 of this Counterclaim.

49. Pursuant to Kentucky law and the IHA, CDI has an obligation to deal with the KYHBPA fairly and in good faith in all negotiations, contracting, and to abide by the terms of any agreement entered.

50. CDI has intentionally and wrongfully breached its covenant of good faith and fair dealing as to the KYHBPA by its contractual breaches committed in bad faith, as alleged in Counts I through III herein above.

51. The KYHBPA, its beneficiaries and its members whose purse awards have been grossly underestimated and underpaid, have been harmed and continue to be harmed by CDI's wrongful bad faith actions as alleged herein in such amounts as are yet to be determined, but which upon information and belief, exceed five million dollars (\$5,000,000.00). KYHBPA is entitled to recover as damages or equitable relief all such amounts for itself and for the common fund and benefit of all of the aforementioned persons and entities.

**COUNT V
PERMANENT INJUNCTIVE RELIEF**

52. The KYHBPA incorporates by reference as if fully stated herein below all allegations contained in paragraphs 1 through 51 of this Counterclaim.

53. CDI's wrongful conduct and intentional breach of Sections 4.E, 4.A(1), 4.B(2)(B), 6.A, 6.C and 11.B(3) of the Contract, violations of Kentucky law, and of its common law duties and covenants of good faith and fair dealing have caused and are continuing to cause economic damage and harm to the KYHBPA, its members, its beneficiaries and the thoroughbred racing

industry in the Commonwealth of Kentucky. This continuing damage is irreparable, incapable of sufficient calculation and cannot be adequately remedied at law and accordingly warrants an award against CDI of permanent injunctive relief pursuant to Fed.R.Civ.P. 65 to enjoin and forever prohibit it from continuing any and all of the above-described course of conduct.

COUNT VI
ATTORNEYS FEES FROM CREATION OF COMMON BENEFIT FUND

54. The KYHBPA incorporates by reference as if fully stated herein below all allegations contained in paragraphs 1 through 53 of this Counterclaim.

55. The KYHBPA brings this Counterclaim for damages owed to the Horsemen's Account which is a common fund; to its member horsemen; and to the KYHBPA and those persons who may benefit from the KYHBPA's benevolent operations. Accordingly, KYHBPA is entitled to recover from all such damages awarded herein its reasonable attorneys' fees, costs, and expenses incurred in the prosecution of this Counterclaim.

WHEREFORE, the KYHBPA demands judgment against Churchill Downs Incorporated and Churchill Downs Technology Initiatives Company as follows:

A. Permanent injunctive relief pursuant to Fed.R.Civ.P 65 requiring Churchill Downs Incorporated to cease its practice of retaliatory and coercive underpayment and underestimation of horsemen's purse awards at Churchill Downs to force the KYHBPA to grant its simulcast consent under the Interstate Horseracing Act;

B. Permanent injunctive relief requiring Churchill Downs Incorporated and its wholly owned subsidiary, Churchill Downs Technology Initiatives Company ("TwinSpires") to immediately begin paying into the Horsemen's Account and to horsemen's purses the monies which the KYHBPA Contract entitles them to receive from OTB/ADW wagering;

C. An award of all compensatory damages to the KYHBPA for the common fund and benefit of itself, its members and beneficiaries, all of which damages arise from the breaches of Contract, violation of statute, and breach of its duties of good faith and fair dealing by Churchill Downs Incorporated directly and through Churchill Downs Technology Initiatives, as alleged herein above;

D. KYHBPA's reasonable attorneys' fees, expenses and costs incurred for recovery of and to be paid from the damages awarded to the Horsemen's Account at Churchill Downs, to KYHBPA member horsemen, and to the KYHBPA and those persons who may benefit from its benevolent operations;

E. All other relief to which the Court finds the KYHBPA is entitled.

F. Trial by jury.

Respectfully submitted,

s/Douglas L. McSwain

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2008, I electronically filed the foregoing with the clerk of the court using the CM/ECF system, which will send a notice of electronic filing to the following:

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