

Arabian horse registration services using the Trust's computer software, database and related Documentation (collectively, the "Licensed Technology"). Pursuant to the purpose of the Trust, the Agreement expressly protected the Trust's ability to resume performing registration services if AHA was ever unable to do so. In 2016, a dispute arose between the Trust and AHA concerning their rights and obligations under the Agreement (the "2016 Lawsuit"). After 8 days of trial, the Court entered a series of orders declaring the rights and obligations of the parties under the Agreement. In particular, the Court held that AHA had the responsibility of providing a system capable of registering purebred Arabian horses, "so long as the Trust has the ability to perform registration services in the event that it must do so." **Ex. 2**, p. 16.¹

Following the Court's orders, the Trust and AHA negotiated and entered into Amendment #1 to the Agreement ("Amendment"), which permits the Trust to elect to reassume registration services upon giving AHA notice of an "Insourcing Event." As relevant here, such an Insourcing Event includes either (1) AHA's breach of its obligations under the Amended Agreement, or (2) a force majeure event prohibiting AHA from providing continuous registration services for five consecutive business days. In February and March of 2020, AHA experienced two ransomware attacks that caused the AHA to be unable to register horses for nine days (including six business days) and thirty consecutive days, respectively. Each of these events constituted an Insourcing Event under the Amendment and undermined the Trust's and purebred

¹ References to Exhibits 1-5 in this Motion refer to the same numbered exhibits attached to the Trust's Verified Complaint. The Trust is prepared to offer additional evidence related to the Amendment and AHA's breach at a preliminary injunction hearing, if necessary. Additionally, the Court can take judicial notice of the public filings from the prior litigation between the parties. *See People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004).

Arabian horse community's confidence in AHA's commitment and ability to maintain continuous registration services. In addition, AHA has also failed to perform a number of its other obligations under the Amendment related to operating, maintaining and keeping a registration system continuously available for the Trust and registration customers. Accordingly, the Trust provided AHA notice of the Insourcing Events and its election to resume responsibility for Purebred Registry Services as provided for by the Amended Agreement. Despite the Trust's timely notice, AHA disputes that an Insourcing Event has occurred and has refused to reasonably cooperate with the Trust to facilitate a smooth transition of registration services to the Trust. The Trust now seeks a preliminary injunction prohibiting AHA from withholding its cooperation to transition the Purebred Registry Services to the Trust as required by the Amended Agreement.

FACTUAL BACKGROUND

1. In April 2003, the Trust and AHA entered into the Agreement to permit AHA, as a perpetual licensee, to take over performing purebred Arabian Horse Registration services. **Ex. 1.** After a dispute arose regarding the Agreement in 2016, the Trust filed a declaratory judgment action seeking the Court's declaration of the parties' respective rights and obligations under the Agreement. **Verified Complaint** ¶ 13. In 2018 and 2019, the Court entered a series of three orders setting out and clarifying the parties' rights and responsibilities under the Agreement (collectively, the "Court Rulings"). *Id.* ¶¶ 14–16. Specifically, the Court held that AHA "has the responsibility to provide a software system capable of registering purebred Arabian horses and to maintain the database for purebred Arabian horses [and] has the right to make the choice about how it will comply with the requirements of the [Agreement], so long as the Trust has the ability to perform registration services in the event that it must do so." **Ex. 2**, p. 16. Moreover, AHA "is

required to provide a functioning version of software capable of registering purebred Arabian horses, and [] is required to maintain the database for such registrations.” *Id.* at 21, ¶ A.

2. To comply with the Court Rulings and further clarify the Agreement, the parties negotiated for several months and, on June 26, 2020, mutually agreed to the Amendment (together with the original Agreement, the “Amended Agreement”). *See Ex. 5.*

3. Under the Amended Agreement, the AHA would continue performing Purebred Registry Services up until the occurrence of an “Insourcing Event,” which was defined as the Trust’s “election to take over the operation, hosting, support and maintenance of the Licensed Technology following one of the events identified in [subsections 9(a)(i) – (ix) of the Amendment].” *Id.* § 1.

4. Under section 9 of the Amendment, the Trust had the right to “elect by providing notice to [AHA] to take on, or permit a third party to undertake, the operation, maintenance and support of the Licensed Technology” upon the occurrence of nine specified events. *Id.* § 9(a). As relevant here, two such circumstances include:

[AHA] is in breach of its obligations as to the operation, maintenance, support or modification of the Licensed Technology under the Agreement or any maintenance agreement entered into in connection with the Licensed Technology [and]

The occurrence of a force majeure event (as such term is generally understood) that reasonably appears probable to prevent [AHA] from being able to perform its maintenance and support obligations with respect to all or any portion of the Licensed Technology for a period more than five (5) business days.

Id. § 9(a)(vii) and (ix).

5. AHA also had numerous obligations under the Amended Agreement related to the Licensed Technology environments, and support, including:

- a. to “continuously maintain, update and operate the Production Environment in accordance with the Specifications” (Ex. 5, § 2(a));
- b. to “prepare, maintain and continually have ready the Transition Environment for the benefit of [the Trust] until [the Trust] takes over the operation of the Transition Environment following an Insourcing Event” (*id.* § 2(b));
- c. to “adhere to good industry practices in the safeguarding and protection of the accuracy and integrity of the Database and the other Licensed Technology in both [AHA’s] Production Environment and the Transition Environment, including . . . performing nightly back-ups of [AHA’s] production server and the Development Server on separate servers” and also “promptly access and use the information contained on a back-up server as necessary for Licensee to comply with the Specifications” (*id.* § 8(a) and (a)(iii));
- d. to “upload a full, complete and accurate copy of the Database updates into the Transition Environment and Production Environment” on “[e]ach Business Day (or on the evening or night thereof) throughout the Term” (*id.* § 8(b));
- e. to “maintain and update the Scripts in the Transition Environment so that, upon an Insourcing Event, the Licensor may use a Database Administrator to update the production database *so the Licensed Technology continuously performs in accordance with the Specifications*” (*id.* (emphasis added));
- f. to “use commercially reasonable efforts to keep the Production Environment of the Licensed Technology continuously available and operational during Business Hours” (*id.* § 8(c)(i));

g. to “continuously maintain and keep current Documentation and standard operating procedures sufficient to allow a professional having ordinary skills and experience to properly access, use, maintain, and keep current the Licensed Technology (collectively, including the Documentation, ‘SOPs’),” which AHA acknowledged are part of the Licensed Technology and would be maintained “consistent with good industry practices” (*id.* § 8(c)(iii));

h. to “provide the first SOP Certification not later than August 31, 2020, and each calendar year thereafter, shall provide an SOP Certification [on or within one week of May 15th of each year] as provided in Section 7.c of this [Amendment]” (*id.*);

i. to “monitor the performance of the Initial Trust Hardware and any Updated Trust Hardware to detect any Component or database failures and will have such failures repaired or corrected within two (2) Business Days” (*id.* § 8(f)); and

j. to “establish and maintain the organization, staff, contractors and processes to comply with the Specifications” (*id.* § 8(g)).

6. Further, AHA expressly agreed to perform these obligations “in a manner to guard against performance failures resulting from force majeure events (as such term is generally understood) and other reasonably anticipated natural disasters,” including “criminal activity . . . and other deleterious activity, and shall not be excused for nonperformance as a result of events outside of its reasonable control, except for such nonperformance proximately caused by the breach or negligence of [the Trust].” *Id.* § 10(c).

7. In addition, AHA represented and warranted that the “logically-separated Database is capable of, and will, transition to the Updated Hardware, including the Trust

Hardware, so that the Licensed Technology shall continuously perform in accordance with the Specifications both before and after an Insourcing Event[.]” *Id.* § 7(a)(ii).

8. Upon the Trust’s notice of an Insourcing Event, AHA is obligated to reasonably cooperate with the Trust to provide “Transition Assistance” to ensure a smooth transition of Purebred Registry Services from AHA back to the Trust (including “coordinating the delivery of relevant mail, DNA test results, open PARS trouble tickets, providing pending transaction and financial reports with regards to registrations, and any future activity requirements”). *Id.* § 9(b).

9. On or about February 20, 2021, AHA experienced a ransomware attack on its Microsoft Windows-based servers that also affected approximately one-third of AHA’s computers, leaving its windows-based software encrypted and inoperable. **Verified Complaint ¶ 35.** This, in turn, impacted the operation and backup of other software and databases, including AHA’s horse registration system (“HRS”), leaving it unable to register horses for nine days, until March 1, 2021. *Id.* ¶ 36.

10. Computer hackers again attacked and infiltrated AHA’s computer systems on or about March 30, 2021, once again causing failures and interruptions to AHA’s computer network, again leaving it unable to perform horse registration services. *Id.* ¶ 37.

11. On April 1, 2021, AHA notified the Trust of the second attack and reported that it had engaged a “Cyber Security Legal Team as well as Forensic Analysts” to investigate the two cyber-attacks and to perform a “forensic analysis of these network interruptions.” *Id.* ¶ 38. AHA notified its membership of its network interruptions on April 2, 2021 and indicated that certain resources would be unavailable until further notice. *Id.* ¶ 39.

12. This second cyber-attack caused more damage to AHA’s computer network, software, and some hardware, including scanners used to perform horse registration services. *Id.*

¶ 40. At an April 6, 2021 AHA Board of Directors meeting, Mr. Johnson offered AHA the use of the Trust’s PARS system to resume registering horses. *Id.* ¶ 41. AHA did not respond to this offer. *Id.* AHA later resumed performing some registration service functions using its HRS system on April 29, 2021, thirty days after the second cyber-attack. *Id.* ¶ 44.

13. AHA has failed to continually have the Transition Environment current with the Production Environment or Specifications or maintain and update the Components in the Transition Environment so that, upon an Insourcing Event, the Licensed Technology continuously performs in accordance with the Specifications. *Id.* ¶ 48. AHA has also failed to use commercially reasonable efforts to keep the Production Environment of the Licensed Technology continuously available and operational during Business Hours. *Id.* ¶ 49. Moreover, AHA has failed to continuously maintain and keep current Documentation and SOPs for the Licensed Technology, provide SOP Certification, or to cure the Critical Impact Errors within two Business Days when notified by the Trust so that the Licensed Technology operates in accordance with the Specifications. *Id.* ¶ 50.

14. AHA acknowledged the need for a plan to address “catastrophic hacking” in 2013, but failed to develop or implement any commercially reasonable efforts, processes, or plans for guarding against performance failures resulting from criminal activity, including the two ransomware attacks that occurred in February and March 2021. *Id.* ¶ 52.

15. Based on these facts, AHA has breached several of its obligations in the Amended Agreement and two Insourcing Events have occurred. *Id.* ¶ 53. In an April 20, 2021 letter, the

Trust notified AHA that it had breached the Amended Agreement due to the two interruptions in registration services, with the second interruption being twenty-one days at that point. *Id.* ¶ 54.

16. Due to these two cyber-attacks, AHA was unable to complete any registration services for a combined 39 days, nine days between February 20, 2021 and March 1, 2021, and thirty days, from March 31, 2021 through April 28, 2021, causing a significant backlog of registration service requests made by Arabian horse owners, including multiple rush requests related to horse racing registrations. *Id.* ¶ 44.

17. Although some registration functions had returned, other functions that require email, including customer password reset and emailing member cards to customers remained non-functional until at least May 10, 2021. *Id.* ¶ 45. AHA still cannot perform certain registration functions related to registration payment or customer balance confirmation. *Id.* ¶ 46.

18. On May 14, 2021, the Trust provided AHA with written notice of Insourcing Events and the Trust's intent to undertake operation of the Licensed Technology to perform purebred Arabian horse registrations. The Trust requested that AHA immediately begin providing the agreed-upon Transition Assistance. *Id.* ¶ 54.

19. AHA has refused to cooperate or provided Transition Services as required by the Amended Agreement and subsequently denied that an Insourcing Event had occurred. Thus, the Trust is unable to execute its right to resume Purebred Registry Services. *Id.* ¶ 55.

LEGAL STANDARD

“The decision whether to grant preliminary injunctive relief is within the sound discretion of the trial court[.]” *Gold Messenger, Inc. v. McGuay*, 937 P.2d 907, 909 (Colo. App. 1997) (affirming decision to grant preliminary injunction on breach of contract claim). “A preliminary

injunction is designed to preserve the status quo or to protect a party's rights pending the final determination of a cause." *Keller Corp. v. Kelley*, 187 P.3d 1133, 1137 (Colo. App. 2008). The factors a court must consider when deciding a motion for preliminary injunction are: (1) whether there is a reasonable probability that the plaintiff will succeed on the merits; (2) whether there is a danger of real, immediate, and irreparable injury to the plaintiff which is preventable by the injunction; (3) whether the plaintiff has an adequate legal remedy; (4) whether the balance of the equities favors entry of the injunction; (5) whether the public interest would be served by the injunction; and (6) whether the injunction will preserve the status quo during the time prior to the trial on the merits. *Rathke v. MacFarlane*, 648 P.2d 648, 653–54 (Colo. 1982).

ARGUMENT

I. The Court Should Enter A Preliminary Injunction Against AHA.

A. The Trust has a clear entitlement to relief on the merits of its contract claim.

A plaintiff seeking to recover "for breach of contract must prove the following elements: (1) the existence of a contract, (2) performance by the plaintiff or some justification for nonperformance, (3) failure to perform the contract by the defendant, and (4) resulting damages to the plaintiff." *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Here, the Trust has shown a clear entitlement to relief on the merits of its breach of contract claim. *See Home Shopping Club, Inc. v. Roberts Broad. Co. of Denver*, 961 P.2d 558, 561 (Colo. App. 1998) (affirming preliminary injunction on breach of contract claim).

The Amended Agreement is an enforceable contract. This Court has made rulings interpreting the valid Agreement between the parties. *See Exs. 2-4*. Like the Agreement, the Amendment is a valid, binding contract. The Trust has performed its obligations under the

Amended Agreement. In contrast, AHA has breached the Amended Agreement in numerous ways as described above by, *inter alia*, failing to:

- maintain and update the Components and continually have the Transition Environment current with the Production Environment or Specifications, so that, upon an Insourcing Event, the Licensed Technology continuously performs in accordance with the Specifications;
- continuously maintain and keep current Documentation and SOPs for the Licensed Technology and provide SOP Certification to the Trust;
- cure the Critical Impact Errors when notified by the Trust within two Business Days;
- develop or implement any commercially reasonable efforts, processes, or plans for guarding against performance failures resulting from criminal activity, such as ransomware attacks; and
- return control of the Licensed Software and provide Transition Services to the Trust upon the occurrence of an Insourcing Event.

It is no defense that the ransomware event was caused by actors beyond AHA's control—the Amended Agreement explicitly contemplates such a situation and provides that an Insourcing Event occurs if registration is interrupted for a period longer than five days. Registration services have been interrupted for a period longer than five days twice now. AHA's continued refusal to cooperate in the required Transition Assistance or otherwise comply with the Amended Agreement damages the Trust's bargained-for right to ensure continuous registration of purebred Arabian horses. Thus, based on the allegations in the Verified Complaint and its exhibits, the Trust has a clear entitlement to relief under the plain terms of the Amended Agreement.

B. The Trust has suffered irreparable harm with no adequate remedy at law.

The Trust faces irreparable harm due to AHA's refusal to cooperate in Transition Assistance, and the Trust has no legal remedy for AHA's breach. While certain monetary

damages are measurable here, such as registration revenue owed after the Insourcing Event, damages due to AHA's refusal to cooperate with Transition Assistance, are impossible to ascertain. *Home Shopping Club*, 961 P.2d at 562 (holding damages for breaches of contracts that are speculative or impossible to ascertain cannot be recovered).

The Trust faces the real and immediate threat of irreparable harm, including loss of goodwill and trust of the Arabian horse community, from AHA's refusal to cooperate. *Fireworks Spectacular, Inc. v. Premier Pyrotechnics, Inc.*, 86 F. Supp. 2d 1102, 1107 (D. Kan. 2000) (holding loss of customer goodwill constitutes irreparable harm and granting preliminary injunction). Further, this threatened harm is irreparable because of the "possibility that [registration services], once interfered with, could not be restored to [their] prior condition; because limiting or ceasing [registration services] today cannot really be made up tomorrow . . . it could at best be made up at" a later time. *See Heavy Petroleum v. Atkins*, 2010 U.S. Dist. LEXIS 158324, at *6 (D. Kan. May 25, 2010). Any interruption in continuous registration services create gaps and delays in purebred Arabian horse registrations, which damages the integrity of this carefully maintained registration system, irreparably harming the Trust.

In fact, the Amended Agreement was designed to avoid such harm by ensuring the continuous operation of the registration system. The plain terms of the Amendment require that if AHA fails to carry forth the century-long tradition of continuous registration of purebred Arabian horses, even due to a force majeure event, the Trust may reclaim that weighty responsibility. Indeed, it is the very purpose of the Trust to do so. AHA has failed, and so the Trust has exercised its right to insource Purebred Registry Services. If the Trust must wait until

the conclusion of the litigation to take responsibility for the registration of purebred Arabian horses, it will suffer irreparable harm to these bargained-for contractual rights.

C. The equities warrant a preliminary injunction in favor of the Trust.

The balance of equities favor enforcing the Trust's rights and AHA's obligations under the Amendment. *See Home Shopping Club*, 961 P.2d at 563. The Trust should be allowed an opportunity to enforce its rights under the Amendment in a manner that does not become a nullity as AHA continues to breach its clear terms and refuse to cooperate as it promised. Meanwhile, the Trust has acted in good faith to ensure reliable, continuous registration services. It would be inequitable to deny the Trust such relief during the pendency of this case.

D. The public interest favors the preliminary injunction.

Requiring the Trust to await the conclusion of this lawsuit to begin providing registration services would harm not only the Trust, but the entire purebred Arabian horse community, which depends on Purebred Registry Services to ensure the purebred bloodlines of Arabian horses that trace their ancestry back centuries to the Middle East. This significant undertaking has required over a century of work by a dedicated and resilient community. A failure in the registration system harms this community by undermining confidence in the reliability of the registration services. More broadly, the public must be able "to rely on its contractual arrangements and agreements," *Home Shopping Club*, 961 P.2d at 562, and parties like AHA must not be free to ignore their contractual obligations.

E. A preliminary injunction is necessary even if it alters the status quo.

Granting a preliminary injunction here would preserve the status quo, because it would merely enforce the existing rights and responsibilities of the parties—namely, AHA’s obligations in the event of breach and of the occurrence of an Insourcing Event.

Even if the requested injunction were viewed as a mandatory injunction that would alter the status quo, such an injunction would still be warranted here. Where a “plaintiff seeks a mandatory injunction via specific performance of a contract,” the plaintiff “must show that the facts and law clearly favor its likelihood of success on the merits.” *Zurn Constructors, Inc. v. B.F. Goodrich Co.*, 685 F. Supp. 1172, 1183 (D. Kan. 1988); *see also Allen v. Denver*, 351 P.2d 390, 391 (Colo. 1960). “Ordering specific performance of a contract or prohibiting a defendant’s continuing breach of a contract” may make “an injunction a mandatory one.” *Id.* at 1187 n.7. The Court may grant a preliminary injunction notwithstanding that it alters the status quo where the plaintiff “show[s] that the facts and law clearly favor its likelihood of success on the merits.” *Id.* at 1183. This is because “[i]t sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant[.]” *Graham v. Bd. of Supervisors*, 49 Misc. 2d 459, 462 (N.Y. Sup. Ct. 1966). Under such circumstances “there should be no hesitancy about granting a request for a mandatory preliminary injunction whenever a need for one is shown.” *Id.* Where a plaintiff makes the requisite showing, Colorado courts have ordered mandatory preliminary injunctions, even where the relief sought temporarily is the same relief the plaintiff seeks permanently upon conclusion of the case. *Sanger v. Dennis*, 148 P.3d 404, 411 (Colo. App. 2006) (affirming mandatory preliminary injunction even where relief temporarily provided plaintiffs the same

relief they sought permanently in the case); *Guy Martin Buick, Inc. v. Colo. Springs Nat'l Bank*, 511 P.2d 912, 913 (Colo. App. 1973) (trial court issued mandatory preliminary injunction ordering bank to surrender vehicles' certificates of title to car dealership).

Even if the injunction is construed as mandatory, such relief is particularly appropriate here. An injunction would not create an affirmative obligation for AHA out of whole cloth; instead, it would simply require AHA to do that which it has already agreed to do: transition registration services to the Trust after a breach or an Insourcing Event. By contrast, preserving the status quo—interrupted and unreliable registration services—is an unsuitable condition of rest that inflicts injury upon the Trust and the horse-registering public. *See Graham*, 49 Misc. 2d at 462. Furthermore, although the status quo in recent years has been for AHA to perform registration services, the Trust (through its predecessor) has a long history of providing those services for nearly a century. Therefore, the requested preliminary injunction is warranted here.

CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction prohibiting AHA from continuing its refusal to reasonably cooperate with the Trust to facilitate a smooth transition of the operation, maintenance and support of the Licensed Technology to the Trust, consistent with the Specifications and as required under the Amended Agreement.

Dated August 5, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 5, 2021, I served a copy of the foregoing document to the following
by

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