

DISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO 7325 South Potomac Street Centennial, CO 80112 Tel.: (303) 645-6600	▲ COURT USE ONLY ▲
Plaintiff: THE PUREBRED ARABIAN TRUST v. Defendant: ARABIAN HORSE ASSOCIATION	Case Number: 2021CV31173 Division: 21
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DEFENDANT’S MOTION FOR SUMMARY JUDGMENT	

Defendant Arabian Horse Association (“AHA”), by counsel, respectfully moves the Court to enter summary judgment in its favor on Plaintiff’s claims, pursuant to C.R.C.P. 56.

I. SUMMARY.

The Purebred Arabian Trust (“PAT”) filed this suit on July 7, 2021, asserting a breach of contract claim. *Complaint*, ¶¶ 56-64 (FID 233577A8E5D8E). PAT claims it has an agreement with AHA entitled Amendment # 1 to License and Security Agreement By and Between the Purebred Arabian Trust and Arabian Horse Association (“Amendment # 1”). PAT claims AHA breached Amendment # 1 in seven ways. *Id.*, ¶¶ 58(a)-(g).

PAT’s claim suffers from four fatal defects. First, there was no contract. PAT claims arise under a June 23, 2020 draft version of a contract that AHA never executed. PAT sued based on a version of Amendment # 1 that PAT’s Chairman, Bob Fauls, signed and sent to AHA on June 23, 2020. It is undisputed, however, that Fauls sent AHA a different version of Amendment # 1 on June 26, 2020, which AHA’s President Nancy Harvey signed and sent back.

The following day, Mr. Fauls signed the June 26, 2020 version of Amendment # 1 and sent it to Ms. Harvey with a note telling her “[a]ttached signed Amendment #1. Please let me know that you received it and it is in order.” Ms. Harvey responded that she “received it and it is in order.”

The June 26, 2020 version of Amendment # 1 (attached as **Ex. 28**) is the only version both AHA and PAT fully executed. It is the only version that AHA believed was the final version. It is not what PAT attached to its Complaint nor the document PAT claims was the final agreement. It is hornbook law that to have a contract, there must be a meeting of the minds on all material terms. The undisputed facts show there was no meeting of the minds on the June 23, 2020 version of Amendment # 1 PAT attached to its Complaint.

Second, even if the June 23, 2020 version of Amendment # 1 (herein “6-23-20 *Amendment # 1*”) reflected the final agreement without being signed, the undisputed facts show AHA did not breach it. The Court’s role is to interpret the language of *Amendment # 1* according to its plain language in harmony with the other provisions. The 6-23-20 *Amendment # 1* required only that AHA “develop or implement any commercially reasonable efforts, processes, or plans for guarding against performance failures....” It did not require AHA to use NIST or other standards the PAT now seeks to impose on AHA through its expert. The 6-23-20 *Amendment # 1* also did not require AHA to ensure that **all** of AHA’s information technology systems operate continuously even in the face of a ransomware attack. As PAT’s corporate designee Mr. Johnson testified, the 6-23-20 *Amendment # 1* merely required that any failures to “the initial Trust hardware” or “any updated Trust hardware” be corrected within 2 business days. **Ex. 29**, p. 87:9 – 88:4. PAT admits that AHA never suffered any failures to the initial Trust hardware or any updated Trust Hardware, so there could be no breach. *Id.*, p. 88:5-12.

Third, the undisputed facts demonstrate that the ransomware attacks AHA suffered did not affect PAT’s objective of ensuring that purebred Arabian horse owners could register their horses because the PARS server, file system and database operate independently. Although the

ransomware attacks against AHA affected AHA's windows-based systems, the PARS server, database and file system were unaffected because they ran on Linux (a different operating system). PAT knew this on May 14, 2021, the same day it sent its Notice of Insourcing Event.

Finally, PAT claims AHA breached its agreement because the ransomware attacks disrupted AHA's systems for 39 days and prevented registrants of purebred Arabian horses from registering their horses. *Complaint*, pp. 8-11. The undisputed evidence demonstrates, however, that no purebred Arabian horse registrant was unable to register his horse or enter his horse in a race even with the ransomware attacks AHA suffered. AHA had fully caught up with registrations by May 14, 2021. Thus, PAT cannot establish any breach of the alleged contract, assuming any contract existed. The Court should enter summary judgment in AHA's favor.

II. UNDISPUTED MATERIAL FACTS.¹

A. Background.

1. AHA is the product of a merger between the Arabian Horse Registry of America ("AHRA") and the International Arabian Horse Association ("IAHA"). *Complaint*, ¶¶ 7-8.

2. Before the merger, AHRA "was primarily focused on registering purebred Arabian horses in the United States," while IAHA focused on competitive horse show events. *Ex. 1*, p. 3, ¶ 6.²

3. As the merged entity, AHA supports Arabian horse owners and enthusiasts, facilitates recreational or competitive activities for Arabian horse owners, and provides the official Arabian horse breed association and registry in the U.S. and Canada. *See* <https://www.arabianhorses.org/discover/about-aha>.

4. Bob Fauls ("Fauls") and other Trustees formed PAT September 2002 "for the

¹ AHA identifies each discrete fact in a separately numbered paragraph so the Court can identify which, if any, of these facts are disputed. AHA invites PAT to respond to each fact independently to identify if it disputes the fact, and if so, what evidence supports of its dispute.

² AHA files herewith an Exhibit List to identify the exhibits referenced herein.

purpose of aiding, promoting, and fostering the preservation and use of purebred Arabian horses and the Arabian breed and to engage in undertakings incidental to or designed to further promote these objectives....” **Ex. 2**, p. 5, ¶ (C).

5. AHRA transferred its “registration database” to PAT for the merger. *Id.*, ¶ (D).

6. Through a License and Security Agreement (“LSA”), PAT granted AHA an exclusive, perpetual license. **Ex. 3**, p. 2.

7. The LSA defined the term “Licensed Technology” as “the Database and the Software and all information technology, and other items related thereto.” *Id.*, p. 2.

8. PAT remained “the exclusive owner of the Licensed Technology and the Documentation and all Updates thereto....” *Id.*, p. 4, ¶ 12.

9. The LSA required AHA to maintain and update the Licensed Technology to carry out PAT’s registry services, *Id.*, p. 4, ¶ 4(A), in return for defined royalties. *Id.*, p. 6.

B. Underlying Case (Arapahoe County District Court Case No. 2016CV31911).

10. In August 2016, PAT sued AHA seeking a declaration that it owned the Licensed Technology and alleging AHA breached the LSA by failing to pay royalties. **Ex. 1**, p. 2.

11. After an eight-day trial, the Underlying Court entered its Findings of Fact, Conclusions of Law and Judgment. *Id.*, pp. 1-22.

12. The parties filed post-judgment motions, which the Underlying Court resolved. **Exs. 4 & 5.**

13. After the Court closed the underlying case, PAT moved for contempt, arguing that AHA has refused to correct deficiencies with the registration system and would not collaborate with PAT’s information technology personnel. **Ex. 6.**

14. The Underlying Court denied PAT’s motion for contempt because PAT “misunderst[ood] the nature of the Court's prior Findings, Conclusions and Order in its Declaratory Judgment Action” and it could not decide, through a contempt proceeding, whether

any party “to the agreement has violated the agreement.” *Id.*

C. AHA’s Horse Registry and the Purebred Arabian Horse System.

15. AHA has a Horse Registration System (“HRS”), which manages six different registries for Arabian horses. **Ex. 30**, ¶ 13.

16. One of the registries that AHA manages is the Arabian Horse Registry (“AHR”), which AHA used to register purebred Arabian horses. *Id.*, ¶ 14.

17. After the underlying case, AHA created a Purebred Arabian Horse System (“PARS”), which is a database and software components that operate the database. . *Id.*, ¶ 15.

18. The PARS system runs on an independent server and is contained in a different location than AHA’s other servers. *Id.*, ¶ 16.

19. The information contained on the PARS server is generated from a complete backup of all data from AHA’s registries from which a database script removes registration data for Arabian horses other than purebreds, resulting in the Purebred Trust registry. *Id.*, ¶¶ 17-18.

20. AHA backups the HRS database every night and then transfers a copy of the backup to the PARS registry. *Id.*

21. AHA’s Horse Registration System (“HRS”) does not interface with the PARS server because the PARS server operates independently of AHA’s HRS. *Id.*

22. AHA’s registry services staff are not users on the PARS system. *Id.*, ¶ 20.

23. Bruce Johnson, a PAT Trustee, is the administrator on the PARS system, allowing him to authorize new users or remove authorization from users if he desired. *Id.*

D. AHA Works with PAT to Create the PARS System.

24. As the post-judgment motions were pending in the Underlying Case, AHA and PAT discussed creation of a PARS system to clarify and address their respective obligations. *Complaint*, ¶ 17; **Ex. 7**.

25. On May 24, 2019, AHA explained the details of the PARS system and how it

would integrate with AHA’s Horse Registration System (“HRS”). **Ex. 7.**

26. On August 28, 2019, AHA certified that the PARS system – which related “solely to the registration of purebred Arabian horses” – would be functional and provided PAT with the source code for all PARS components, compiled executables for all PARS components, a current backup of the Oracle PARS database, a copy of the PARS system test environment, and scanned images of all customer documents from purebred Arabian horse owners or registrants. **Ex. 8.**

27. The PAT actually received the source code, executable components, current database, and components for the PARS system with the 2019 certification. **Ex. 10**, p. 32:18-21.

28. In November 2019, Faults from PAT and Nancy Harvey (AHA’s then-President) discussed creating a potential new agreement that would result in AHA creating “a fully functioning purebred Arabian Registration System that will be updated and maintained by AHA and owned by the PAT.” **Ex. 9.**

29. PAT had this objective because it wanted to ensure that it could take over the ability to register purebred Arabian horses if AHA ever became unwilling or unable to perform registration services due to bankruptcy or AHA closing its doors. **Ex. 9**; *see also* **Ex. 10**, p. 19:12 – 20:6 (confirming PAT’s objective was to ensure that a “backup process was available in the event that AHA was unwilling or unable to perform the [registration] services.”).

30. On March 8, 2020, Bruce Johnson (“Johnson”) and Faults from the PAT met with AHA representatives to discuss the design and creation of the PARS system and the components it would include. **Ex. 11.**

31. After the March 8, 2020 meeting, AHA’s President Nancy Harvey presented to AHA’s Board a resolution to approve the PARS system, which included six essential items: (1) AHA would “provide a fully functional server on which will be installed the PARS Software and the Purebred Arabian Registration Data;” (2) “AHA will pay for and maintain the Oracle Standard License as long as the Purebred Arabian Horse Registration System (PARS) Database

is on the Oracle Database infrastructure;” (3) “AHA will copy the Horse Registration System (HRS) database backup files to the PARS server nightly and will provide the scripts used to update the PARS database from these backup files; (4) “any changes made to [AHA’s] HRS program affecting Purebred Registration codes or process will be made to the PARS software as well;” (5) “PAT will provide a network with internet access on which PARS will reside;” and (6) “the PAT will provide to AHA Virtual Private Network (VPN) access to that network and to the PARS server.” **Ex. 12.**

E. PAT Hires TrinWare to Provide the Relocation of the PARS Server, Remote Access, and Managed Services of PARS.

32. PAT retained TrinWare (a company that provides integrated computing solutions) to provide PAT remote access to the PARS system with cybersecurity protections, and with managed services support. **Ex. 31.**

33. TrinWare owed obligations to PAT to ensure appropriate responses to service interruptions, “to adequately document any service, support requests, maintenance, and communications,” to provide “antivirus management” including protecting against ransomware, to provide “backup management,” and “disaster recovery” from any “catastrophic interruption.” **Ex. 31**, p. PAT 0520-0525 & 0535-0536.

34. PAT hired TrinWare before drafting or entering into *Amendment # 1* and both PAT and AHA knew that TrinWare would provide the cybersecurity protections and managed services for the PARS service. **Ex. 31**, p. PAT 0576-0577.

F. Drafts of Amendment # 1 to License and Security Agreement.

35. After AHA’s Board’s approval of the resolution on March 18, 2020, Fauls asked PAT’s counsel to draft a proposed agreement to document PAT’s and AHA’s respective obligations moving forward. **Ex. 13.**

36. PAT’s counsel prepared a document called Amendment # 1 to LSA and sent it to

Fauls, who forwarded it to Harvey on April 26, 2020. **Ex. 14.**

37. Harvey from AHA responded that she did not agree with the draft Amendment # 1 and suggested numerous changes. **Ex. 15.**

38. Harvey and other AHA representatives requested further revisions to the draft Amendment # 1 throughout the next month. **Ex. 16; Ex. 17.**

39. By June 22, 2020, PAT's counsel attempted to include AHA's requested revisions into the draft of Amendment # 1 and sent the draft back to PAT's representatives to send to AHA. **Ex. 18.**

40. Fauls sent what he viewed as the "final revision of the Amendment # 1" to Harvey on June 23, 2020, which Fauls had signed. **Ex. 19.**

41. The June 23, 2020 version Bob Fauls sent to Nancy Harvey on June 23, 2020 was the version PAT attached to its Complaint as the final agreement. *Complaint*, at Ex. 5.

42. Harvey responded that she "was a little concerned" with Fauls' email and the draft attached. **Ex. 20.**

43. By June 23, 2020, AHA's Board of Directors had not reviewed the proposed "final revision" of Amendment # 1 nor approved it. *Id.*

44. On June 26, 2020, Harvey advised Fauls that AHA's Executive Committee ("EC") "approved the LSA addendum # 1" but did not indicate which version was approved nor did she attach a version of Amendment # 1 that AHA's EC approved. **Ex. 21.**

G. Final Amendment # 1 to LSA.

45. At 9:39 a.m. on June 26, 2020, Harvey asked Fauls to send her "a pdf of the original word document" so she could sign it electronically and "email it back for [Fauls'] signature." **Ex. 22.**

46. Fauls emailed Harvey three hours later with a different version of the draft Amendment # 1 and asked whether sending the document is helpful. **Ex. 23.**

47. Harvey signed the document Fauls emailed hours earlier and attached the signed document to her email with a note advising Fauls “here is the signed amendment.” **Ex. 24.**

48. Fauls is the Trustee who has authority to sign agreements like Amendment # 1 on behalf of PAT. **Ex. 10**, p. 12:8-15.

49. The next day, Fauls signed the same version of Amendment # 1 that Harvey signed and asked Harvey to confirm that she “received it and it is in order.” **Ex. 25.**

50. Harvey responded minutes later that she “received it and it is in order.” **Ex. 26.**

51. Fauls sent the fully signed *Amendment # 1* to PAT’s Trustees as the final version of the fully executed agreement the following day. **Ex. 27.**

52. The fully executed version Fauls sent back to Harvey on June 27, 2020 and sent to the PAT Trustees on June 28, 2020 is the **only** version of the document that both AHA’s authorized representative and PAT’s authorized representative signed. **Ex. 28.**

53. PAT, however, attached to its *Complaint* the *6-23-20 Amendment # 1* because that is what it considers the final version. **Ex. 29**, p. 4:6-22.

54. Even after June 28, 2020, the parties were still revising the component list, which was intended to be Exhibit B to Amendment # 1 and was material to the agreement. **Ex. 30.**

H. AHA Attacked by Ransomware.

55. Although AHA had cybersecurity and managed information technology security services through independent providers (**Ex. 30**, ¶¶ 23-24), AHA suffered a Lockbit ransomware attack on February 20, 2021. *Id.*, ¶ 25.

56. AHA rebuilt systems and resolved all damage from the Lockbit ransomware attack between February 21, 2021 and March 1, 2021. *Id.*, ¶ 28.

57. By March 1, 2021, AHA’s systems were fully functional. *Id.*, ¶ 30.

58. The Lockbit attack did not affect the PARS server, database, or system. *Id.*, ¶ 31.

59. On March 30, 2021, AHA suffered another ransomware attack. *Id.*, ¶ 32.

60. The March attack affected many more of AHA's systems than the previous Lockbit attack. *Id.*, ¶ 34.

61. AHA retained counsel, who in turn retained the services of Kroll, a cybersecurity forensic investigation firm, to provide an investigative analysis. *Id.*, ¶ 32.

62. To avoid a tainted investigation, Kroll advised AHA not to engage in any recovery efforts until it completed its investigation of AHA's servers, resulting in a 12 day pause in AHA's recovery efforts. *Id.*

63. By April 12, 2021, Kroll permitted AHA to begin its recovery efforts. *Id.*, ¶ 35.

64. AHA worked diligently to restore its systems impacted by the March ransomware attack. *Id.*, ¶¶ 36-43.

65. By April 29, AHA's HRS was operational and AHA staff was processing registrations, prioritizing any backlogged cases. *Id.*, ¶ 38.

66. By May 6, 2021, AHA had restored its systems. *Id.*, ¶¶ 40-43.

67. By May 14, 2021, Debbie Fuentes, AHA's Registrar, emailed Fauls with photos of the backlogged registration paperwork and confirmed that AHA's registry services had all delayed registrations "work processed at the end of last week" and was working on "May's work this week" to be completely caught up. **Ex. 35.**

68. The March ransomware attack did not affect the PARS server, database, or file system. **Ex. 30**, ¶¶ 44 & 47.

69. AHA's IT staff recently provided routine maintenance on the PARS server and confirmed that it operated continuously and without interruption for 441 days. *Id.*, ¶ 46.

70. PAT knew in April 2021, shortly after AHA suffered the March 30, 2021 ransomware attack, that the attack affected AHA's Windows-based systems and therefore the PARS system was unaffected. **Ex. 29**, p. 69:17 – 70:16.

71. PAT knew that because the PARS system was Linux based, registration data

could be uploaded into the PARS system even if registration certificates could not be printed using the Windows-based applications. *Id.*, p. 71:12 – 73:1.

72. PAT also knew that any person who wanted to register a purebred Arabian horse could still submit their information to AHA and have the horse registered, even if AHA’s scanners and printers were not working (just as a person can purchase an item on a credit card even if the transaction does not show up on the statement for days later). *Id.*, p. 73:1 – 74:23.

73. PAT has not identified any purebred Arabian horse owner who submitted a paper application for registration and was unable to register his horse. *Id.*, p. 74:24 – 77:22.

74. PAT identified one purebred Arabian horse registrant who was unable to get a certificate between March 31 and May 14, 2021, but later acknowledged that the registrant “was ultimately able to race her horses because she got the paperwork from the Registry.” *Id.*

I. PAT’s Letter Alleging “Critical Impact Error.”

75. On May 14, 2021 at 10:30 a.m., Stan Morey (AHA’s Executive Director) sent Fauls an Assurance Letter. **Ex. 31.**

76. The May 14, 2021 Assurance Letter explained that AHA “re-certifies that PARS continues to be fully functioning software capable of registering purebred Arabian horses and the associated PARS database used for such registration has been maintained. PARS relates solely to the registration of purebred Arabian horses and with PARS the Purebred Arabian Trust will be able to continue purebred registration and other related activities should a bankruptcy or dissolution of the Arabian Horse Association occur.” **Ex. 31**, p. 2.

77. An hour after AHA sent PAT the May 14, 2021 Assurance Letter certifying that PARS “continues to be fully functioning,” Fauls sent a letter to AHA dated May 14, 2021 declaring an “Insourcing Event.” **Ex. 32.**

78. In his May 14, 2021 letter, Fauls claimed “the ongoing technical and software problems have rendered the purebred Arabian Registration System inoperable for several

weeks,” and demanded that AHA transition the Licensed Technology to PAT. *Id.*

79. A few hours after sending the May 14, 2021 letter, Fauls asked PAT Trustee Johnson to provide his thoughts on AHA’s May 14, 2021 Assurance Letter. **Ex. 33.**

80. Johnson confirmed that “[b]oth the HRS production and Test servers operate on a Linux operating system as compared to Windows. This is why HRS was not affected by either Ransomware attack suffered by AHA in Feb-\May 2021 since both attacks were focused on Windows-based servers and PCs.” *Id.*, p. PAT 1610.

81. Johnson also confirmed that he “tested the PARS software and it does what it is supposed to do.” *Id.*, p. PAT 1611.

82. PAT’s own documents confirm no Insourcing Event had occurred because the ransomware attacks did not affect the PARS system, server, or database. *Id.*

83. By May 14, 2021, all of AHA’s systems were operational and there were no “Critical Impact Errors” under Amendment # 1. **Ex. 30, ¶ 44.**

84. Because there was no purebred Arabian horse owner who submitted a paper application for registration but was unable to register his horse (**Ex. 29**, p. 74:24 – 77:22), there was no Critical Impact Error that could be a breach of the fully executed *Amendment # 1*. **Ex. 28**, p. 1 (defining a “Critical Impact Error” as “an Error to the Licensed Technology which is reasonably likely to impact the ability to timely obtain or provide current and accurate data from the Database, including any Racing Data.”).

III. PAT’S CLAIM IN THIS CASE.

PAT filed its Complaint in this case on July 7, 2021. *Complaint*, p. 1. PAT asserted only one claim for relief, alleging AHA breached the *6-23-20 Amendment # 1*. *Id.*, ¶¶ 56-64. PAT claims AHA breached the *6-23-20 Amendment # 1* in seven ways. *Complaint*, ¶ 58. The undisputed evidence shows that there was no meeting of the minds between AHA and PAT on the material terms in the *6-23-20 Amendment # 1*. The only fully executed version of

Amendment # 1 was the June 26, 2020 version, which PAT claims was not the document that reflected the meeting of the minds. PAT admitted that there was no meeting of the minds between AHA and PAT regarding material terms such as cybersecurity protection, whether to use NIST standards, and good business practices because *Amendment # 1* “did not get down into the weeds to direct those processes.” **Ex. 29**, p. 96:24 – 97:25.

IV. LEGAL ARGUMENT.

A. Standards.

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” C.R.C.P. 56(c). “The moving party bears the initial burden of showing no genuine issue of material fact exists; the burden then shifts to the nonmoving party to establish a triable issue of fact.” *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 20 (May 11, 2015) (citing *Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991)).

B. The Court Should Enter Summary Judgment on PAT’s Only Claim for Breach of Contract Because No Contract Existed.

PAT asserts only a claim for breach of contract based on the June 23, 2020 version of *Amendment # 1*. To avoid summary judgment, PAT must present admissible evidence demonstrating three elements: (1) AHA entered into a contract with PAT; (2) PAT substantially performed; and (3) AHA failed to perform. *See* CJI-Civ. 30:10 (2020); *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992) (citations omitted).

The Court should enter summary judgment in AHA’s favor because PAT cannot satisfy its burden on the first element. To show the existence of a contract binding PAT and AHA, PAT must demonstrate that AHA and PAT agreed on all material terms. *See DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1248 (Colo. App. 2001); *Mission Denver Co. v. Sound Corp.*

of Colorado, 515 P.2d 1151, 1152 (Colo. App. 1973); *see also Jorgensen v. Colorado Rural Properties, LLC*, 226 P.3d 1255, 1260 (Colo. App. 2010) (explaining that no agreement exists if there is no meeting of the minds between the parties on one or more material terms); *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1192 (Colo.2001) (a valid contract is created when there is a “meeting of the minds” between the parties as to all essential terms of the contract); *Brush Creek Airport, L.L.C. v. Avion Park, L.L.C.*, 57 P.3d 738, 745 (Colo.App.2002) (a contract exists only when there was mutual assent to all essential terms).

When “further negotiations are required to work out important and essential terms,” no contract exists. *DiFrancesco*, 39 P.3d at 1248 (citing *Am. Mining Co. v. Himrod–Kimball Mines Co.*, 235 P.2d 804 (Colo. 1951) and *Applebaugh v. Hohl*, 535 P.2d 222 (Colo. App. 1975)). “Agreements to agree in the future are generally unenforceable because the court cannot force parties to come to an agreement.” *Id.* (citations omitted). Further, “[w]hen the parties to an alleged contract assign different meanings to an essential term, a contract may or may not exist, depending on the nature of the term. Unless there is only one reasonable meaning for the term, courts generally conclude there is no meeting of the minds and, thus, no contract.” *Id.* (citations omitted). “Similarly, if the parties omit entirely an essential term, resulting in an alleged contract that is so uncertain the court cannot determine whether or not it has been breached, there is no contract.” *Id.* (citing *Stice v. Peterson*, 144 Colo. 219, 224, 355 P.2d 948, 952 (1960); *DiFrancesco*, 39 P.3d at 1248, and Restatement (Second) of Contracts § 33 cmts. a, f).

PAT claims the *6-23-20 Amendment # 1* was the final agreement between PAT and AHA. *Complaint*, ¶ 17. The undisputed facts described above show that there was no meeting of the minds on the *6-23-20 Amendment # 1*. Fauls’ email sent on June 23, 2020 with the *6-23-20 Amendment # 1* attached was an offer. *Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128, 133 (Colo. App. 2009) (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his asset to that bargain is invited and

will conclude it.”) (quoting Restatement (Second) of Contracts § 24 (2008)) (other citations omitted). Harvey did not accept Fauls’ offer by sending an email noting her concerns in response to Fauls’ June 23, 2020 email. **Ex. 20**; *see also Haselden-Langley Constr., Inc. v. D.E. Farr & Assocs., Inc.*, 676 P.2d 709, 711 (Colo. App. 1983) (“[A]ny attempt to accept the bid on terms materially different from the original bid is a counter-offer and not an acceptance.”).

On June 26, 2020, Harvey advised Fauls that AHA’s EC “approved the LSA addendum # 1” but did not indicate which version was approved nor did she attach a version of Amendment # 1 that AHA’s EC approved. **Ex. 21**. Harvey asked Fauls to send her “a pdf of the original word document” so she could sign it electronically and “email it back for [Fauls’] signature.” **Ex. 22**. Fauls emailed Harvey three hours later and attached a different version of the draft Amendment # 1; not the *6-23-20 Amendment # 1*. **Ex. 23**. Six hours later, Harvey signed the document Fauls emailed earlier in the day and sent it back to Fauls with a note advising him “here is the signed amendment.” **Ex. 24**. Fauls signed the same version of Amendment # 1 on June 27, 2020 and sent it back to Harvey, asking her to confirm that “it is in order.” **Ex. 25**. Harvey responded six minutes later that she “received it and it is in order.” **Ex. 26**. Accordingly, the only possible version of Amendment # 1 on which there could be a meeting of the minds between PAT and AHA was the June 26, 2020 version, which is attached hereto as **Ex. 28**.

PAT alleges that the cybersecurity requirements contained in Amendment # 1 were material to the agreement between the parties. *Complaint*, ¶ 29(c). PAT also alleges that the obligation to “monitor the performance of the Initial Trust Hardware and any Updated Trust Hardware to detect any Component or database failures” and repair them within two business days was a material term. *Id.*, ¶ 29(i). PAT’s Rule 30(b)(6) representative admitted, however, that there was no meeting of the minds on these terms. **Ex. 29**, p. 96:24 – 97:25.

When, as here, no meeting of the minds exists, there can be no contract. *French v. Centura Health Corp.*, 2022 CO 20, ¶ 27; *DiFrancesco*, 39 P.3d at 1248; *Mission Denver Co.*,

515 P.2d at 1152; *Jorgensen*, 226 P.3d at 1260. Additionally, the components list to Amendment # 1 (Exhibit B to Amendment # 1) still remained to be determined at the time Harvey and Fauls signed the June 26, 2020 version of Amendment # 1. **Ex. 30.** Those further negotiations on the components list of Amendment # 1 were material to the terms of the document and show that it was not a final, complete agreement but only an agreement to agree in the future. *See DiFrancesco*, 39 P.3d at 1248. Thus, there was no agreement that AHA could have breached.

The Court should enter summary judgment on the PAT's only claim because the undisputed facts show that there was no meeting of the minds between PAT and AHA on material and essential terms of the *6-23-20 Amendment # 1*. PAT did not assert any other claims (such as unjust enrichment or promissory estoppel) and cannot recover on its breach of express contract claim because there was no express contract between the parties besides the June 26, 2020 version of *Amendment # 1*, which PAT readily concedes is not a document that reflects a meeting of the minds between AHA and PAT. **Ex. 10**, p. 4:6-22.

C. The Court Should Enter Summary Judgment Because PAT Cannot Establish AHA Breached the June 26, 2020 Version of Amendment # 1.

The *6-23-20 Amendment # 1* was not a contract binding AHA, as explained above. PAT claims that the fully executed June 26, 2020 Amendment # 1 did not reflect the actual agreement of the parties. **Ex. 29**, p. 4:6-22 (Q. "What is the final version of the Amendment Number 1 to the License and Security Agreement? A. The Final Version. Q. Yes. A. The version the PAT recognizes is the one that Bob [Fauls] described as the June 23rd version."). Thus, there is no contract to review or enforce, entitling AHA to summary judgment.

Given that AHA and PAT both fully executed the June 26, 2020 version of Amendment # 1, AHA agrees that this document (**Ex. 28**) is a contract. The undisputed facts demonstrate that AHA did not breach the fully executed Amendment # 1. The Court therefore should enter summary judgment in AHA's favor because PAT cannot establish the breach element on any of

its seven alleged theories of breach. This Motion addresses each in turn.

1. Failing to Keep Registration System Continuously Operational.

PAT's first alleged theory is that AHA breached Amendment # 1 by "failing to keep the registration system continuously available and operational during Business Hours." *Complaint*, ¶ 58(a). PAT bases its first alleged theory of breach on Paragraph 8(c) of Amendment # 1, which provided "Licensee shall (i) use commercially reasonable efforts to keep the Production Environment of the Licensed Technology continuously available and operational during Business Hours." **Ex. 28**, ¶ 8(c). This term does not reference AHA's registration system at all. It also does not require that the registration system be continuously available and operational. Instead, it requires AHA to "use commercially reasonable efforts to keep the Production Environment continuously available and operational during Business Hours." **Ex. 28**, p. 1 (defining Production Environment as "the Licensed Technology together with all Components which are necessary for Licensor to access and use the Licensed Technology") & *Id.*, ¶ 8(c).

AHA used commercially reasonable efforts to protect the Licensed Technology through NexusTek and Unitrends. **Ex. 30**, ¶ 28. PAT used similar efforts to protect the Licensed Technology using TrinWare. **Ex. 31**, p. PAT 0520-0525 & 0535-0536. AHA maintained the components that were part of the PARS system throughout March 31, 2021 through May 6, 2021. **Ex. 30**, ¶¶ 35-44. They were on an independent server that was operational and accessible during the time. *Id.* PAT acknowledged that the March 30, 2021 ransomware attack that the attack affected AHA's Windows-based systems and therefore the PARS system was unaffected. **Ex. 29**, p. 69:17 – 70:16. Indeed, Johnson "tested the PARS software and it does what it is supposed to do." *Id.*, p. PAT 1611. Accordingly, PAT does not have admissible evidence showing that AHA breached Paragraph 8(c) of Amendment # 1.

2. Failing to Cure Critical Impact Errors.

PAT's second theory alleges AHA breached Amendment # 1 by "failing to cure the

Critical Impact Errors within two Business Days when notified by the Trust.” *Complaint*, ¶ 58(b). PAT’s second theory of breach fails because it depends on the *6-23-20 Amendment # 1* to which AHA never agreed. The *6-23-20 Amendment # 1* contains the sentence “Critical Impact Errors will be corrected within two (2) Business Days unless a longer repair time is agreed to in writing by both parties.” **Ex. 21**, p. PAT 1102, ¶ 8(f). The fully executed Amendment # 1 does not have the same language. **Ex. 28**, p. 7, ¶ 8(f). Instead, it provides:

For each Critical Impact Error reported by Licensor: (i) Licensee will respond with confirmation of its receipt of Licensor's notice within three (3) Business Hours of such notice; and (ii) Licensee will resolve the Critical Impact Error or provide an acceptable Workaround within one (1) Business Day of such notice. Until a Workaround has been provided for a Critical Impact Error, or such Critical Impact Error has been resolved, Licensee shall provide Licensor with reasonably detailed reports regarding its progress in diagnosing and fixing such Critical Impact Error at least every four (4) Business Hours. For any Error which is not a Critical Impact Error, Licensee shall provide reasonably detailed reports to Licensor within three (3) Business Days of Licensor's request.

Ex. 28, ¶ 8(f). PAT does not allege that AHA violated this provision.

PAT’s second theory of breach also fails factually because Paragraph 8(f) required PAT to report any error it believed to be a Critical Impact Error to AHA and then allow AHA to “provide an acceptable Workaround within one (1) Business Day of such notice.” *Id.* It is undisputed that PAT first provided its notice on May 14, 2021. **Ex. 32**. By May 14, 2021, all AHA’s systems were fully operational and functional. **Ex. 30**, ¶¶ 40-43. Thus, AHA already had provided the workaround and corrected the errors, in compliance with Paragraph 8(f).

3. Correcting Hardware Failures.

PAT’s third theory alleges AHA breached the provisions contained in Paragraph 8(f) of Amendment # 1 by not correcting failures. *Complaint*, ¶¶ 29(i), 58(b) & 58(e). PAT testified that Paragraph 8(f) of Amendment # 1 required AHA only to maintain the “initial Trust hardware” or “any updated Trust hardware,” and that any failures to those specific components must be corrected within two business days. **Ex. 29**, p. 87:9 – 88:4. PAT also admits that AHA

never suffered any failures to the initial Trust hardware or any updated Trust Hardware, so there could be no breach. *Id.*, p. 88:5-12. AHA therefore could not have breached this provision.

4. Commercially Reasonable Efforts to Guard Against Failures.

Fourth, PAT alleges AHA breached Amendment # 1 by “failing 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.” *Complaint*, ¶ 58(c). Amendment # 1 required AHA to “use commercially reasonable efforts to keep the Production Environment of the Licensed Technology continuously available and operational during Business Hours,” **Ex. 28**, ¶ 8(c). Amendment # 1 also required AHA to “use commercially reasonable efforts to prevent Components relating to the Licensed Technology from becoming Obsolete.” *Id.*, ¶ 8(e). Amendment # 1 did not define “commercially reasonable efforts.” **Ex. 28**, at *passim*.

By June 26, 2020, however, PAT knew that the database administrator AHA was using was named Regortek. **Ex. 29**, p. 29:1-33:4. PAT knew that AHA was using NexusTek for cybersecurity protection. *Id.* PAT knew that TrinWare also would be providing PAT and AHA with cybersecurity protection. *Id.* PAT believed that what TrinWare was providing for cybersecurity protections “was commercially reasonable.” *Id.*, p. 31:8-10. PAT never asked AHA to do anything else for cybersecurity. *Id.*, p. 53:3-6. PAT never requested AHA take any different cybersecurity measures, nor did not ask for NIST standards or other processes now recommended by the expert PAT hired. *Id.*, p. 53:7 – 55:3. PAT never had any discussion with AHA about what commercially reasonable efforts or good industry standards meant. *Id.*

The undisputed facts demonstrate that AHA utilized the same “commercially reasonable efforts” after June 26, 2020 that it did before *Amendment # 1*, which PAT understood and had approved. Under these circumstances, PAT cannot establish that AHA breached Paragraph 58(c) of Amendment # 1, even assuming that it is a binding contract.

5. Failing to Maintain Components.

As its fifth theory of breach, PAT alleges that AHA breached Amendment # 1 by “failing to 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.” *Complaint*, ¶ 58(e). As Mr. Lawless’ Declaration demonstrates, however, AHA maintained the components that were part of the PARS system throughout March 31, 2021 through May 6, 2021. **Ex. 30**, ¶¶ 35-44.

PAT does not have any admissible documents or testimony refuting this fact. Indeed, PAT knew shortly after AHA suffered the March 30, 2021 ransomware attack that the attack affected AHA’s Windows-based systems and therefore the PARS system was unaffected. **Ex. 29**, p. 69:17 – 70:16. PAT knew that because the PARS system was Linux based, registration data could be uploaded into the PARS system even if registration certificates could not be printed using the Windows-based applications. *Id.*, p. 71:12 – 73:1. Accordingly, the undisputed facts demonstrate that AHA did not breach Amendment # 1 by failing to maintain and update the Components in the Transition Environment.

6. Failing to Maintain and Keep Current Documentation.

PAT further alleges AHA breached Amendment # 1 by “failing to continuously maintain and keep current Documentation and SOPs for the Licensed Technology.” *Complaint*, ¶ 58(f). The undisputed evidence refutes PAT’s allegation of breach.

In November 2019, PAT received the source code for all PARS components, compiled executables for all PARS components, a current backup of the Oracle PARS database, a copy of the PARS system test environment, and scanned images of all customer documents from purebred Arabian horse owners or registrants. **Ex. 8**; **Ex. 10**, p. 32:18-21. PAT also provided log-in credentials and documentation for PARS on October 8, 2019. **Ex. 34**.

When PAT and AHA both signed the June 26, 2020 version of *Amendment # 1*, PAT

understood that additional user manuals and instructions may be provided by AHA later. Nancy Harvey specifically advised Fauls that she was “a little concerned” about Fauls statements. **Ex. 20.** Fauls responded that he was referencing “documentation and training for PARS,” which would be provided later. *Id.* There was no agreement that such “documentation and training for PARS” would be provided by a time certain. **Ex. 28, ¶ 8(c).** The only requirement was that AHA provide PAT with “error logs upon request” and “the first SOP Certification not later than August 31, 2020.” *Id.* AHA could not have breached an obligation that it did not have under Amendment # 1. Moreover, PAT has not alleged any claimed injury from not receiving “documentation and SOPs” for the PARS system. PAT did not even access the PARS system because Johnson’s “network on DSL was too slow.” **Ex. 29, p. 66:9-21.** The Court should enter summary judgment for AHA on PAT’s sixth theory of breach.

7. Force Majeure and Insourcing.

Paragraph 9(a) of Amendment # 1 provided that PAT, as the Licensor, “may elect by providing notice to Licensee [AHA] thereof to take on, or permit a third party to undertake, the operation, maintenance and support of the Licensed Technology and any Components relating thereto within the Transition Environment, upon” one of nine events. **Ex. 28, p. 8, ¶ 9(a).** One of the events is identified in Paragraph 9(a)(ix).

The occurrence of a force majeure event (as such term is generally understood) that reasonably appears probable to prevent *Licensor* 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. (emphasis supplied). The term “Licensor” means PAT. *Id.*, p. 1. Thus, this paragraph would apply if a force majeure event occurred that prevented PAT “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.*, p. 8, ¶ 9(a)(ix). The undisputed facts show there was no event that prevented PAT from performing maintenance and support

obligations on PARS because PAT had no such obligations. **Ex. 29**, p. 87:9 – 88:4.

The *6-23-20 Amendment # 1* contains different language in Paragraph 9(a)(ix):

The occurrence of a force majeure event (as such term is generally understood) that reasonably appears probable to prevent *Licensee* 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..

Ex. 19, p. PAT 1103, ¶ 9(a)(ix) (emphasis supplied). This paragraph would apply if a force majeure event occurred that prevented 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.* As indicated above, however, the undisputed facts show there was no meeting of the minds on this term. **Ex. 29**, p. 96:24 – 97:25.

Additionally, under any reasonable interpretation of Amendment # 1, the ransomware attacks AHA suffered were not a force majeure event. Amendment # 1 did not define the term “force majeure.” **Ex. 28**, p. 8. The term typically is defined as act of God, nature or person that can be neither anticipated nor controlled and that is the sole cause of the nonperformance. *Hayes v. Taylor Petition Mngm’t LLC*, 2021 WL 3072169, at *8-9 (Colo. Dist. Ct. Jan. 16, 2021) (citing Black’s Law Dictionary (11th ed. 2019)); *Barlow v. North Sterling Irr. Dist.*, 277 P. 469, 470 (Colo. 1929); *see also Ryan Gulch Reservoir Co. v. Swartz*, 263 P. 728, 729 (Colo. 1928) (event must be akin to an act of God, could not have been foreseen, and was the proximate cause of the injury for which plaintiff complains); *Church Commc’n Network, Inc. v. Echostar Satellite L.L.C.*, 2006 WL 8454330, at *15 (D. Colo. Mar. 17, 2006) (“[T]he generally accepted meaning of force majeure is ‘[a]n event that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).’” (quoting *Blacks Law Dictionary* 657–58 (7th ed. 1999)). “Courts generally interpret the words in a force majeure provision to relate to specific events like acts of god, terrorist attacks, inclement weather, union strikes, riots, and wars.” *Church Commc’n Network, Inc.*, 2006 WL

8454330, at *15 (citing *Hoyle v. Babbitt*, 927 F. Supp. 1411, 1415 (D. Colo. 1996) and *One World Trade Center L.L.C. v. Cantor Fitzgerald Sec.*, 789 N.Y.S. 2d 652, 654 (N.Y. App. Div. 2004)).

Paragraph 10(c) of Amendment # 1 shows the parties intended to apply this definition of a force majeure event. **Ex. 28**, ¶ 10(c). That paragraph refers to “force majeure events” as “reasonably anticipated natural disasters, fire, acts of God, terrorism, criminal activity, civil disturbances, and other deleterious activity.” *Id.* The use of the term “reasonably anticipated” is consistent with the cases finding that events that could be anticipated or foreseen are not force majeure events. *Hayes*, 2021 WL 3072169, at *8-9; *Ryan Gulch Reservoir Co.* 263 P. at 729; *Hoyle*, 927 F. Supp. at 1415, *aff’d*, 129 F.3d 1377 (10th Cir. 1997).

The undisputed facts show that the ransomware attacks were not force majeure events. They were not caused by floods, weather, or wars. They were not unforeseeable. Indeed, Amendment # 1 defined the term “Virus” in a way that includes ransomware. **Ex. 28**, p. 2 (defining “Virus” as “a set of computer instructions which are self-replicating or self-propagating and whose purpose or effect is to contaminate software ..., including Trojan horses, worms or like destructive code.”); *Ransomware Fact Sheet*, U.S. CISA (“Ransomware is a type of malicious software, or malware, that encrypts data on a computer making it unusable.”); Wyo. Stat. Ann. § 6-3-506 (2021) (defining “malware” as, among other things, “viruses, worms, trojan horses, ... [and] ransomware”).

If a fire (*Hoyle*, 927 F. Supp. at 1415) and COVID-19 (*Hayes*, 2021 WL 3072169) are not force majeure events, certainly the ransomware attacks do not. Further, PAT included ransomware protection as part of the cybersecurity protection it contracted with TrinWare to obtain. **Ex. 31**, p. PAT 0520-0525 & 0535-0536. The ransomware attacks, while unfortunate, were something that were foreseeable and foreseen by PAT. Accordingly, the ransomware attacks did not constitute an “Insourcing Event” allowing PAT “to take on, or permit a third party to undertake, the operation, maintenance and support of the Licensed Technology and any

Components relating thereto....” **Ex. 28**, p. 8, ¶ 9(a). The undisputed facts demonstrate AHA did not breach Paragraphs 9(a) or 10(c) of Amendment # 1.

8. Refusal to Cooperate After an Insourcing Event.

Finally, PAT alleges that AHA breached Amendment # 1 by “[r]efusing to cooperate with Transition Assistance upon notice of the Insourcing Event.” *Complaint*, ¶ 58(f). *Amendment # 1* defined an Insourcing Event as “Licensor's election to take over the operation, hosting, support and maintenance of the Licensed Technology following one of the events identified in Section 9.a.i. through Section 9.a.ix. of this Amendment # 1.” **Ex. 28**, p. 1. Paragraph 9 of the Amended Agreement provided PAT the “Option to Insource” if one of nine events occurred. *Id.*, p. 8. PAT alleges it had an option to insource under Paragraph 9(a)(vii) and 9(a)(ix). *Complaint*, p. 9, ¶ 54. The undisputed facts show both claims fail.

Paragraph 9(a)(vii) allowed PAT the option to insource if PAT gave notice to AHA of an insourcing event and 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 (or there is anticipatory repudiation by Licensee of any material obligation).” **Ex. 28**, p. 8, ¶ 9(a)(vii). The undisputed facts show AHA did not breach of its obligations as to the operation, maintenance, support or modification of the Licensed Technology because, as explained above, the PARS server, database, and file system were not impacted by the ransomware attacks. **Ex. 30**, ¶¶ 31-44. PAT knew this and confirmed this on May 14, 2021. **Ex. 32; Ex. 33**, pp. PAT 1610-1611.

Additionally, the undisputed facts demonstrate no purebred Arabian horse owner who submitted a paper application for registration was unable to register his horse. **Ex. 29**, p. 74:24 – 77:22. Debbie Fuentes, AHA’s Registrar, confirmed all registration requests had been filled and AHA was caught-up by May 14, 2021. **Ex. 34**. Thus, there was no Critical Impact Error that could be a breach of the fully executed *Amendment # 1*. **Ex. 28**, p. 1. Without a Critical Impact

Error, there was no obligation to transition the Licensed Technology and therefore no obligation to cooperate in the transition. The undisputed facts show AHA did not to cooperate and provide Transition Assistance after the May 14, 2021 Notice of Insourcing Event.

Paragraph 9(a)(ix) allowed PAT the option to insource if PAT gave notice to AHA of an insourcing event and the insourcing event was “a force majeure event (as such term is generally understood) that reasonably appears probable to prevent Licensor 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.” **Ex. 28**, p. 8, ¶ 9(a)(ix). The undisputed facts demonstrate that there was no meeting of the minds on this provision. **Ex. 29**, p. 96:24 – 97:25. Even if there was, the undisputed facts demonstrate that there was no breach because AHA was “able to perform its maintenance and support obligations with respect to all or any portion of the Licensed Technology....” **Ex. 30**, ¶¶ 31-44. The Court should enter summary judgment in AHA’s favor on this last theory of breach.

V. CONCLUSION.

For the foregoing reasons, the Court should enter summary judgment in AHA’s favor. No meeting of the minds existed on the terms of the June 23, 2020 version of *Amendment # 1*. PAT’s only claim is based on the terms of the June 23, 2020 version of *Amendment # 1* and it fails because the June 23, 2020 version of *Amendment # 1* was not a contract. Even if the Court considers the June 26, 2020 version of *Amendment # 1*, the undisputed facts show AHA did not breach its obligations under the fully executed *Amendment # 1*.

Respectfully submitted this 6th day of September, 2022.

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CERTIFICATE OF SERVICE

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