

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: 7325 S. Potomac Street Centennial, CO 80112	DATE FILED: October 31, 2022 9:29 AM CASE NUMBER: 2021CV31173
Plaintiff: The Purebred Arabian Trust v. Defendant: Arabian Horse Association	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> Case No. 2021CV31173 Div: Ctrm: 21
PROPOSED TRIAL MANAGEMENT ORDER	

Plaintiff The Purebred Arabian Trust (the “Trust”) and Defendant Arabian Horse Association (“AHA”), through their respective undersigned counsel, submit this Proposed Trial Management Order pursuant to C.R.C.P. 16(f)(3). A 5-day trial to the Court is set to commence on December 5, 2022.

I. STATEMENT OF CLAIMS AND DEFENSES REMAINING FOR TRIAL.

A. Plaintiff: The Trust asserts a single claim for relief against AHA for breach of contract. The contract at issue is the Amended License and Security Agreement (“Amended LSA”), which is made up of two documents: the original LSA, entered into on April 1, 2003, and the Amendment #1 thereto, agreed to in June 2020. The parties dispute which version of Amendment #1 applies. The Trust maintains that the June 23, 2020 version of Amendment #1 was physically signed by Robert Fauls for the Trust on June 23, 2020 and electronically signed by Nancy Harvey for AHA via an email sent on June 26, 2020.

After performing purebred Arabian horse registrations services in North America for nearly a century through its predecessors, the Trust entered into the LSA on April 1, 2003 for

AHA to take over performing registrations using certain technology, including a Database, computer software, and Documentation (the “Licensed Technology”), it licensed from the Trust. The LSA provided an exclusive, perpetual license to AHA to use the Trust’s registration technology and decades of registration Documentation to perform purebred registration services until it could no longer do so, at which time that function would revert back to the Trust. That is, pursuant to the Trust purpose, the LSA expressly protected the Trust’s ability (and obligation) to resume performing registration services if AHA was ever unable or unwilling to do so.

This Court issued a declaratory judgment and related orders in 2018 and 2019 (Case No. 2016CV031911) to resolve certain disputes regarding the parties’ rights and obligations under the LSA, including holding that AHA could use separate software that it had developed to perform registrations but it also had to develop a new registration system for the Trust to own and use to resume performing Registration Services if needed. In early to mid-2020, the Parties negotiated and agreed to Amendment #1 to the LSA that, among other things, set out certain obligations for AHA regarding the registration systems, the circumstances (called “Insourcing Events”) under which the Trust would resume registration services and the procedures for such a transition. As a result of two ransomware cyber-attacks on AHA’s computer systems in the Spring of 2021, that left it unable to perform Registration Services for approximately 38 days, the Trust learned that AHA has breached several provisions of the Amended Agreement by, among other things, failing to keep the registration system continuously operational and updated, failing to use adequate measures to protect the registration system, failing to update and maintain the Documentation, and failing to promptly cure critical impact errors and hardware failures that adversely impacted the registration systems. Upon learning of some of these breaches, the Trust

notified AHA of known breaches on April 20, 2021 and again on May 14, 2021, which required AHA to cooperate in transferring the purebred registration function back to the Trust. AHA has refused, claiming that an earlier draft of Amendment #1 actually applies and disputing that it has breached the Amended LSA.

B. Defendant AHA:

AHA denies that the draft version of Amendment # 1 to the License and Security Agreement (“LSA”) that the Trust attached to its Complaint is a fully integrated contract reflecting a meeting of the minds between AHA and the Trust. As expressed in AHA’s Motion for Summary Judgment, incorporated herein, the June 23, 2020 version of Amendment # 1 was not agreed upon and was not signed by AHA’s President. The only version of Amendment # 1 that AHA’s authorized agent signed, after obtaining approval from AHA’s executive committee, was the June 26, 2020 version. The Trust claims that the June 26, 2020 version, although fully integrated and signed, does not accurately reflect the meeting of the minds between the Trust and AHA. As a result, no written contract exists. The Trust has only asserted a breach of express contract claim, which fails given the absence of a fully integrated contract that accurately reflects a mutual meeting of the minds between AHA and the Trust.

Assuming *arguendo* that the June 23, 2020 version of Amendment # 1 to the LSA was a fully integrated contract that accurately reflects a mutual meeting of the minds between AHA and the Trust, despite the absence of signatures, AHA contends that it did not breach Amendment # 1. AHA used commercially reasonable cyber security protection for its systems. Indeed, AHA used the same cyber security protection that the Trust used. The Trust knew what system AHA was using and did not request anything different (likely because the Trust was

using the same system). AHA experienced ransomware attacks in February and March 2021 from hostile actors that were not foreseeable or preventable by the cyber security protection that both AHA and the Trust were using.

Further, the central purpose of Amendment # 1 was to have a fully operational database system that was capable of registering purebred Arabian horses and isolating the registration data for the purebred Arabian horses apart from the data for all other registrations. AHA and the Trust agreed that this would be accomplished through the PARS system, which operates on a completely different server from a different location using Linux software. AHA registers horses through its Horse Registry System (“HRS”) and then completely copies the registration data from that system on a nightly basis and – through an automated process – moves the backup copy of that data over to the PARS database located on a different server owned by PAT in a different location. Database scripts are then run on the complete copy of the data so that all non-purebred Arabian horse registration data is removed, leaving a complete database of solely the purebred Arabian horse registrations. The Trust and AHA agreed on this system architecture in order to have a PARS database that was fully updated and over which the Trust could take control and operations should AHA be unable to continue to operate. The PARS database was always fully functioning, even during the ransomware attacks, because it operates on a Linux based operating system that was not subject to the Windows-based ransomware attacks. Although AHA had difficulty with its own Windows-based software that interrupted AHA’s ability to print registration certificates or receive email through its local exchange server, the PARS database was unaffected. Further, although the ransomware attacks resulted in some delay in AHA’s registration staff inputting registration data into the HRS (because HRS had to

be taken offline as a precaution so that AHA's forensic team could evaluate the source and scope of the ransomware attack), any backlog on inputting registration data because of the delays was fully resolved before the Trust provided its May 14, 2021 notice of insourcing event.

AHA further contends that even if the June 23, 2022 version of Amendment # 1 were a fully integrated contract that accurately reflects a mutual meeting of the minds between AHA and the Trust, the Trust has no damages. The Trust has no evidence that any owner or registrant of a purebred Arabian horse was unable to complete his or her registration because of the ransomware attacks or in any other way was adversely affected by the delay in inputting registration data into the HRS. The Trust has a fully operational and complete database of purebred Arabian horses that is as up to date as AHA's horse registry.

The affirmative defenses remaining for trial as asserted in Arabian Horse Association's Answer are: (1) the Trust's claim is barred by the doctrines of *in pari delicto* and unclean hands because the Trust is seeking to benefit from the conduct to which they contributed or was equally positioned to avoid; (2) the Trust has failed to mitigate its damages, particularly by sending a May 14, 2021 notice of insourcing event when, at the time, the Trust knew that all AHA had recovered its systems and the PARS system was unaffected; (3) the Trust's ability to recover is barred because its prior material breach of the contract; (4) the Trust's claim relating to royalties is barred by the doctrines of payment or accord and satisfaction; and (5) the Trust is not entitled to recover any special or consequential damages.

II. STIPULATED FACTS

1. AHA is the product of a merger between the Arabian Horse Registry of America ("AHRA") and the International Arabian Horse Association ("IAHA").

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.

3. Prior to the merger, AHRA transferred its horse registration system, including the Database, related software, and Documentation used to perform registration Services, to the Trust, which is a non-profit entity formed to aid, promote, and foster the preservation and use of purebred Arabian horses and the Arabian breed and to provide for the security and integrity of purebred Arabian horse registrations.

4. As the merged “breed entity,” AHA works to support Arabian horse owners and enthusiasts, facilitates recreational or competitive activities for Arabian horse owners.

5. As part of the merger, the Trust and AHA entered into the LSA on April 1, 2003.

6. After prior litigation between the parties, this Court entered a declaratory judgment and made findings of fact and conclusions of law related to the parties’ rights and obligations under the LSA.

7. AHA has a Horse Registration System (“HRS”), which manages six different registries for Arabian horses.

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

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

10. The PARS system runs on an independent server and is contained in a different location than AHA’s other servers.

11. 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.

12. AHA backups the HRS database every night and then transfers a copy of the backup to the PARS server.

13. AHA's Horse Registration System ("HRS") does not interface with the PARS server because the PARS server operates independently of AHA's HRS.

14. AHA suffered a Lockbit ransomware attack on February 20, 2021.

15. AHA rebuilt its systems and resolved all damage from the Lockbit ransomware attack between February 21, 2021 and March 1, 2021.

16. By March 1, 2021, AHA's systems, including HRS, were fully functional.

17. On March 30, 2021, AHA suffered another ransomware attack.

18. The March attack affected many more of AHA's computer systems than the previous Lockbit attack.

19. AHA retained counsel, who in turn retained the services of Kroll, a cybersecurity forensic investigation firm, to provide an investigative analysis.

20. 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.

21. By April 12, 2021, Kroll permitted AHA to begin its recovery efforts.

22. AHA staff began using the HRS system to input registration data received between March 1, 2021 and April 29, 2021 starting April 29, 2021.

III. PRE-TRIAL MOTIONS

The following Motion is currently pending:

A. AHA's Motion for Summary Judgment filed on Sept. 6, 2022. The Trust filed its Response in Opposition on Oct. 11, 2022. AHA has not yet filed its reply brief.

IV. TRIAL BRIEFS

Trial briefs, if any, will be filed two-weeks before trial, by November 21, 2022.

V. ITEMIZATION OF DAMAGES OR OTHER RELIEF SOUGHT

A. **Plaintiff**: Plaintiff will seek the following damages at trial:

Description	Amount
Consequential damages for breach of contract, including:	
1. The increased cost the Trust will incur to transition the registration services without assistance of AHA <u>and</u> the additional costs necessary to properly maintain and update the Licensed Technology.	\$998,000
2. Pursuant to Section 9(b) of the Amended LSA, the full amount of all Registration Revenue since the date it first provided notice of the Insourcing Event to AHA,	\$780,715 (estimated)

At the conclusion of the litigation, the Trust will seek an award of prejudgment interest and Post-judgment Interest on any awarded damages as provided by Colorado law.

At the conclusion of the litigation, if it is the prevailing party, the Trust will seek an award of attorneys' fees and costs as provided by Section 7.D of the LSA.

B. Defendant: AHA denies that the Trust has incurred any damages. Further, AHA denies that the Trust is entitled to recover damages for any increased cost the Trust will incur to transition the registration services or additional costs necessary to properly maintain and update the Licensed Technology. Amendment # 1, if it is a contract, limits any damages to actual out-of-pocket expenses incurred to transition the PARS system. The damages the Trust claims relate to rebuilding a new system and upgrading a system, which were not part of the drafts of

Amendment # 1 that were exchanged and is a term to which AHA never agreed. AHA further submits that there will be little to no out-of-pocket costs to transition the PARS system because the server already has been purchased, already is racked and hosted, the PARS database is already updated, and the Trust already has access to the PARS system that enables the Trust to take over the PARS system instantaneously without further cost. AHA also claims that the Trust is not entitled to damages reflecting the full amount of all Registration Revenue since May 14, 2021 because the Trust's notice of insourcing event was improper, and no conditions existed that permitted the Trust to exercise an option to insource as of May 14, 2021.

AHA does not have a counterclaim and therefore does not claim any damages. AHA intends to seek its attorney fees and costs, pursuant to the LSA's attorney fee provision, and intends to seek its costs pursuant to C.R.C.P. 54, C.R.C.P. 121, and applicable Colorado statutes allowing a prevailing party to recover its costs.

VI. IDENTIFICATION OF WITNESSES AND EXHIBITS

- A. Witnesses:** Plaintiff's and Defendant's witness lists are filed contemporaneously.
- B. Exhibits:** Plaintiff's and Defendant's preliminary exhibit lists are filed contemporaneously.
- C. Juror Notebooks:** N/A.
- D. Deposition and Other Preserved Testimony:** Plaintiff does not anticipate the need to present testimony by deposition. Defendant also does not anticipate the need to present testimony by deposition.

VII. TRIAL EFFICIENCIES AND OTHER MATTERS

- A. Juror Examination:** N/A.

B. Other Matters: Counsel for the Parties have conferred and intend to use a unified joint exhibit list for numbered trial exhibits. The parties anticipate using electronic presentation of exhibits for use at trial. The parties will also work together to file a joint glossary for the Court.

C. Effect of Trial Management Order: The Trial Management Order shall control the subsequent course of the trial. Modification to or divergence from the Trial Management Order, whether prior to or during trial, shall be permitted upon a demonstration that the modification or divergence could not with reasonable diligence have been anticipated. In the event of any ambiguity in the Trial Management Order, the Court shall interpret the Order in the manner which best advances the interests of justice.

JOINTLY SUBMITTED ON OCTOBER 21, 2022 AND APPROVED BY:

CONDIT CSAJAGHY LLC

SPENCER FANE LLP

s/ J. Lee Gray

J. Lee Gray, Esq.

Attorney for Plaintiff The Purebred Arabian Trust

s/ Troy R. Rackham

Andrew W. Lester, Esq.

Troy R. Rackham, Esq.

Attorneys for Defendant Arabian Horse Association

SO ORDERED THIS 31 DAY OF October, 2022.

BY THE COURT:



District Court Judge