aDISTRICT COURT, ARAPAHOE COUNTY STATE OF COLORADO 7325 South Potomac Street Centennial, CO 80112 Tel.: (303) 645-6600	DATE FILED: October 25, 2022 5:55 PM FILING ID: 62C7A0D5CEB62 CASE NUMBER: 2021CV31173 ▲ COURT USE ONLY ▲
Plaintiff: THE PUREBRED ARABIAN TRUST v. **Defendant:** ARABIAN HORSE ASSOCIATION	Case Number: 2021CV31173 Division: 21
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REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Arabian Horse Association ("AHA"), by counsel, respectfully submits this Reply in Support of its Motion for Summary Judgment.

I. SUMMARY.

Plaintiff ("PAT") sued AHA for breach of contract based on a June 23, 2020 amendment the original License and Security Agreement ("LSA") between the parties from April 2003 ("Amendment #1"). PAT's counsel drafted Amendment #1. All drafts of Amendment #1 required that the agreement would be "effective" only when "signed by duly authorized officers or representatives" of AHA and PAT. Only one version of Amendment #1 was signed by duly authorized officers of AHA and PAT – the June 26, 2020 version. As a matter of simple contract law, the June 23, 2020 version on which PAT sued is not a contract binding AHA.

PAT's *Response* asks the Court to ignore the only Amendment #1 that was "signed by duly authorized officers or representatives" of both AHA and PAT. PAT's insistence that the June 23, 2020 version of Amendment #1 was the final agreement fails under basic contract law because AHA did not accept the June 23, 2020 version PAT offered, but instead, suggested some problems with the proposal. Three days later, on June 26, 2020, Nancy Harvey (AHA's President) advised PAT that AHA's Executive Committee approved the proposed amendment in concept. PAT sent a different version of Amendment #1, which AHA accepted by signing it. Fauls also signed it, making it "effective" according to Amendment #1's plain language. The only reasonable inference from these undisputed facts is that the June 26, 2020 fully executed Amendment #1 is the only "effective" contract. The June 23, 2020 version, upon which PAT entirely relies, cannot be. It was an offer that was not accepted.

The undisputed facts also demonstrate that AHA did not breach the "effective" Amendment #1 (the June 26, 2020 version). Without a contract or admissible evidence of breach of specific terms, PAT's only claim fails. AHA is entitled to summary judgment in its favor.

II. ARGUMENT.

PAT argues "[s]ummary judgment is improper here due to the numerous genuine issues of material fact." *Response*, p. 11 (citations omitted). PAT claims genuine disputes of material fact exist regarding whether the June 23, 2020 version of Amendment #1 is the agreement

memorializing all the terms in the agreement between PAT and AHA. *Response*, pp. 12-17. PAT also claims genuine disputes of material fact exist regarding whether AHA breached the alleged agreement. *Id.*, pp. 17-25. AHA responds to each of PAT's arguments in turn.[1]

A. The Undisputed Facts Show the June 23, 2020 Amendment #1 is Not a Contract.

PAT's only claim is for breach of contract based on the June 23, 2020 version of Amendment #1, which PAT claims "is a legally binding and enforceable contract between the Trust and AHA." *Complaint*, ¶ 57. It claims AHA breached that version of Amendment #1 in several ways. *Id.*, ¶¶ 57-64. But PAT does not dispute its claim requires PAT to establish the existence of an enforceable contract binding PAT and AHA. *W. Distrib. Co. v. Diodosio*, 841 P.2d 1053, 1058 (Colo. 1992). Summary judgment is appropriate because the undisputed evidence shows the June 23, 2020 version of Amendment #1 is not an enforceable contract.

1. The Only Amendment #1 that is "Effective" is the June 26, 2020 Version.

First, to determine which version of Amendment #1 is effective, the Court must review the language of Amendment #1 itself. *Ad Two, Inc. v. City & Cnty. of Denver*, 9 P.3d 373, 376 (Colo. 2000). From the first draft PAT sent on April 26, 2020 through the fully executed version signed by PAT and AHA on June 26, 2020, all drafts of Amendment #1 expressly provided that the proposed agreement is effective only when "signed by duly authorized officers" of PAT and AHA. *Ex. 14*, p. 10; *Ex. 17*, p. 11; *Ex. 19,* p. 10; *Ex. 23*, p. 10; *Ex. 28*, p. 10. PAT admits that "its counsel at that time" prepared the drafts. *Response*, p. 4, ¶ 39. PAT also admits that the

[1] AHA does not reply directly to PAT's response AHA's statement of facts because it is unnecessary to do so. PAT admitted without qualification the facts contained in paragraphs 1-2, 4, 6-26, 30-38, 40-41, 43, 53, 56-66, and 75-79 of AHA's *Motion*. *Response*, pp. 2-10. PAT admitted, but attempted to explain, the facts contained in paragraphs 3, 5, 27, 29, 39, 46, 47-51, 54-55, 67, 68-70, 72, 73-74, and 80-81. PAT's explanations in those paragraphs are immaterial to the outcome of its only claim and therefore do not create a fact question. *See Markus v. Brohl,* 2014 COA 146, ¶ 49 ("A material fact is one that will affect the outcome of the case.") (citation omitted). The only disputed issues concern whether Harvey's June 26, 2020 email to Fauls after AHA's EC approved Amendment #1 in concept (*Ex. 20*) could be considered an electronic signature that would satisfy the Uniform Electronic Transactions Act ("UETA"), C.R.S. § 24-71.3-101 et seq. *Response*, pp. 4-6, ¶¶ 44-52. That is a legal question the Court can decide on summary judgment. *Francis v. Aspen Mountain Condo. Ass'n*, 2017 COA 19, ¶ 7.

only version of Amendment #1 containing physical signatures of AHA's and PAT's "duly authorized officers" is the June 26, 2020 version of Amendment #1, which AHA attached to its *Motion* as Ex. 28. Although PAT claims that Harvey "electronically signed the June 23, 2020 draft of the Amendment" based on the UETA, *Response*, p. 6, ¶ 52, that is a legal question which AHA addresses below. *See infra* Section II(4). Any disputes PAT presents on this legal question do not preclude summary judgment. *Francis*, 2017 COA 19, ¶ 7.

When a document expressly requires a signature by the parties' "duly authorized officers," any absence of a signature renders document ineffective because the Court must enforce the plain language. *Ad Two, Inc.*, 9 P.3d at 376. To determine that the June 23, 2020 version of Amendment #1 is not "effective," the Court need look no further than Ex. 28, which provides that "to be effective," Amendment #1 must "be signed by duly authorized officers or representatives." *Ex. 28*, p. 10. Only one version of Amendment #1 (the June 26, 2020 version) is physically signed by duly authorized officers of AHA and PAT. *Id.* It therefore is the ***only*** document the Court needs to review. The Court should reject PAT's breach of contract claim because it is based on documents that, as a matter of law, could not be "effective" contracts.

2. AHA Did Not Accept PAT's June 23, 2020 Offer on Identical Terms.

Second, if the Court were to ignore the language just above the signature block in all versions of the proposed Amendment #1, the undisputed facts still show the June 23, 2020 version of Amendment #1 is not an enforceable contract. AHA did not accept PAT's June 23, 2020 proposal on the identical terms, and through the identical manner, AHA offered.

"To be enforceable, a contract requires mutual assent to an exchange between competent parties for legal consideration." *French v. Centura Health Corp.*, 2022 CO 20, ¶ 26 (citations omitted). A "contract is not valid without mutual assent." *Scarlett v. Air Methods Corp.*, 538 F. Supp. 3d 1205, 1219 (D. Colo. 2021); *Agritrack, Inc. v. DeJohn Housemoving, Inc.,* 25 P.3d 1187, 1192 (Colo. 2001). Mutual asset occurs through a process of offer and acceptance. *Scoular Co. v. Denney*, 151 P.3d 615, 617 (Colo. App. 2006); *Marquardt v. Perry*, 200 P.3d

1126, 1129 (Colo. App. 2008). "[T]o form an enforceable agreement, an offer must be accepted as-is, that is, the terms of the acceptance must be identical to the terms of the offer, without any changes." *Joseph Brazier, Ltd. v. Specialty Bar Prod. Co.*, 2009 WL 690308, at *3 (D. Colo. Mar. 12, 2009). "If the acceptance is not identical, it acts as a counteroffer and the original offer is deemed rejected." *Id.*; *Goodwin v. Eller,* 258 P.2d 493, 496 (Colo. 1953) ("'It is well settled that a proposal to accept, or an acceptance upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.'") (quoted authority omitted).

Here, it is undisputed that Fauls sent the June 23, 2020 draft, which he said was the "final revision of the Amendment #1," to Harvey on June 23, 2020. *Ex. 19; Compare Motion,* p. 8, ¶ 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.") *with Response,* p. 4, ¶ 40 (admitting averment). Fauls said the proposed contract would "become effective upon [Harvey's] signature." *Ex. 19*. It is undisputed Harvey did not physically sign the draft Fauls sent, rendering it ineffective.

Instead, Harvey responded to Fauls' email at 3:43 p.m. and explained she "was a little concerned" with Fauls' email and the draft attached. *Ex. 20*. Harvey noted additional information needed to be provided to complete the proposed contract. *Id.* Harvey's response was not an acceptance on the identical terms Fauls offered, so it was a rejection of the June 23, 2020 offer as a matter of law. *Goodwin*, 258 P.2d at 496; *Nucla Sanitation Dist. v. Rippy*, 344 P.2d 976, 979 (Colo. 1959) ("'Upon this point the law is clear. Unless the proposition made by one is accepted by the other, *without any modification whatever*, no contract arises.'") (quoting *Salomon v. Webster*, 4 Colo. 353, 361 (1878)); *Parry v. Walker*, 657 P.2d 1000, 1002 (Colo. App. 1982) (to have a valid contract, any "acceptance [of an offer] must comply exactly with the requirements of the offer, omitting nothing from the promise or performance requested.") (citing 1 Restatement of Contracts §§ 58 and 59). There was no contract on June 23, 2020 because AHA did not accept the identical terms of Fauls' June 23, 2020 offer or physically sign it.

3. Harvey Did Not Sign the June 23, 2020 Draft, Which Was the Process PAT Communicated Was Necessary to Accept PAT's Offer.

Third, the undisputed facts show AHA did not accept PAT's June 23, 2020 offer in the manner that was necessary to accept the offer and make the contract "effective." In his June 23, 2020 email to Harvey, Fauls communicated that PAT's offer would "become effective upon [Harvey's] signature." *Ex. 19.* Fauls categorically required signatures from AHA's agent to accept the offer and create a binding agreement. *City & Cnty. of Denver v. Adolph Coors Co*., 813 F. Supp. 1476, 1480 (D. Colo. 1993); Restatement (Second) of Contracts § 60 (1981) ("If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract."); *Leodori v. CIGNA Corp*., 814 A.2d 1098, 1107 (N.J. 2003) (party may not "require [the other's] signature on an agreement and then successfully [] assert that the omission of that signature is irrelevant to the agreement's validity."). It is undisputed that neither Harvey nor any other authorized agent of AHA signed the June 23, 2020 offer from PAT. *Ex. C*. Because AHA did not accept the June 23, 2020 in the manner directed, on identical terms as offered, the June 23, 2020 offer did not become a contract. *See supra.*

4. Harvey Did Not Electronically Sign the June 23, 2020 Version.

Fourth, PAT's attempt to rescue their claims by relying on the UETA, C.R.S. §§ 24-71.3-101 *et seq.*, fails. PAT admits that neither Harvey nor any other AHA officer affixed a signature to the June 23, 2020 version of Amendment #1. *Response*, p. 6, ¶ 56. Recognizing the fatal impact of this fact, PAT suggests the UETA saves its claim. *Response,* p. 14. PAT recites the definition of an "electronic signature" from C.R.S. § 24-71.3-102(8) to suggest that Harvey "electronically signed the June 23rd version of the Amendment." *Id.* PAT errs in many ways.

To begin, the UETA does not apply unless all parties agree in advance "to conduct transactions by electronic means." C.R.S. § 24-71.3-105(2). PAT presented no evidence showing it and AHA agreed to complete the transaction by electronic means. The undisputed

evidence shows the contrary. All drafts of Amendment #1 expressly provided that the proposed agreement is effective only when "signed by duly authorized officers." *Ex. 14*, p. 10; *Ex. 17*, p. 11; *Ex. 19*, p. 10; *Ex. 23*, p. 10; *Ex. 28*, p. 10. Fauls' emails and PAT's drafts demonstrate as a matter of law that the UETA was inapplicable, as a court explained in a similar context:

> In light of the express indication by the [attorney] that plaintiff should sign and forward the settlement documents, we conclude that the parties did not agree to the use of electronic signatures in lieu of physical signatures…. Because the parties intended for plaintiff's physical signature to appear on the Settlement Agreement and Release, and because no signature is affixed, the writing is not signed. Accordingly, that document does not satisfy the signature requirement of the statute of frauds….

Powell v. City of Newton, 703 S.E.2d 723, 728 (N.C. 2010) (emphasis added); *see also B.B. Inv. Partners, Ltd. v. Fair,* 182 Cal. Rptr. 3d 154, 165 (2014) (concluding UETA not applicable to settlement agreement emailed between parties because the email "does not show that [the party] printed his name at the end of his e-mail with any intent to formalize an electronic transaction.").

Fauls' June 23, 2020 email does not suggest that Harvey could accept PAT's offer merely by responding with "an electronic sound, symbol, or process attached to or logically associated with" the offer. C.R.S. § 24-71.3-102(8). Instead, Fauls asked Harvey to provide her "signature" and the attached draft of Amendment #1 containing the following:

The parties hereto have caused this Amendment #1 to be signed by duly authorized officers o representatives to be effective as of the Amendment Effective Date.

The Purebred Arabian Trust	Arabian Horse Association
R. J Fauls Jr. Signature	Signature
Robert J Fauls Jr. Name	Name
Chairman Title	Title
6-23-20 Date	Date

Ex. 19, p. 11. PAT requested a physical signature, not an electronic signature under the UETA.

Even if the Court were to accept PAT's argument, the UETA simply addresses how a document may be signed. It does not alter the well-established principle that acceptance [of an offer] must comply exactly with the requirements of the offer, omitting nothing from the promise

or performance requested. *Goodwin*, 258 P.2d at 496; *Nucla*, 344 P.2d at 979. In *Buckles Mgmt., LLC v. InvestorDigs, LLC*, 728 F. Supp. 2d 1145, 1150–51 (D. Colo. 2010), the court rejected a nearly identical argument to the one PAT advances. There, as here, a party merely sent an email with proposed terms to the other party. The email was not signed by the plaintiff, who was the party against whom enforcement was sought. *Id.* The court granted the defendants summary judgment on that claim. The Court should reach the same result here.[2]

5. The June 23, 2020 Version Is Not Enforceable Under the Statute of Frauds.

Fifth, Colorado's statute of frauds presents an insurmountable barrier to PAT's claim. Any contract "that by the terms is not to be performed within one year after the making thereof" is void unless in writing and signed by the party against whom enforcement is sought. C.R.S. § 38-10-112(1)(a). The obligations contained in all versions of Amendment #1, particularly the support obligations in Section 8, could not be completed within a year (*Ex. 19,* pp. 6-7 & *Ex. 28,* pp. 6-7), rendering the statute applicable. Because AHA did not sign the June 23, 2020 version of Amendment #1, it is unenforceable. C.R.S. § 38-10-112(1)(a); *Buckles Mgmt., LLC*, 728 F. Supp. 2d at 1151; *Peace v. Parascript Mgmt., Inc*., 59 F. Supp. 3d 1020, 1027 (D. Colo. 2014).

6. PAT's Unilateral Mistake Does Not Justify the Relief PAT Requests.

Sixth, PAT urges the Court to enforce the June 23, 2020 version of Amendment #1 because Fauls mistakenly sent the wrong version to Harvey when she requested it on June 26, 2020. *Response*, pp. 14-15. PAT argues Fauls' mistake "does not change the fact that the parties mutually agreed to and first signed the June 23rd version," rendering it enforceable. *Id.*

PAT's "mistake" argument is flawed. The facts as PAT presents them do not qualify as a mistake that would allow avoidance of the June 26, 2020 fully executed Amendment #1 or

[2] Harvey's 6/23/20 email could not reasonably be construed as an acceptance of PAT's offer. Harvey expressed "concern" about Fauls' offer and explained there was additional information needed. *Ex. 20*. Harvey's email could not be construed as "an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." C.R.S. § 24-71.3-102(8) (emphasis added). Fauls' inclusion of his own physical signature refutes such a claim.

reforming the contract to reflect the June 23, 2020 draft. *See Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128, 136 (Colo. App. 2009). To make such a showing, PAT would have to show that enforcement of the June 26, 2020 agreement would be unconscionable, that AHA engaged in fraud or misconduct, or that PAT and AHA made a mutual mistake of fact by both PAT and AHA. *Id.* (citing Restatement Second of Contracts § 153); *Maryland Cas. Co. v. Buckeye Gas Prod. Co.,* 797 P.2d 11, 13 (Colo. 1990) (mutual mistake requires proof both parties had same erroneous conception of contract's terms); *Poly Trucking, Inc. v. Concentra Health Servs., Inc.,* 93 P.3d 561, 563 (Colo. App. 2004) (reformation is generally permitted when the parties made a mutual mistake or one party made a unilateral mistake and the other engaged in fraud or misconduct). PAT has neither made nor even attempted to make such a showing.

If Fauls made a mistake and sent the wrong document to Harvey, PAT's remedy lies in a tort claim against Fauls. *Casey v. Colorado Higher Educ. Ins.*, 2012 COA 134, ¶ 52. Fauls' mistake does not empower PAT to proceed with its breach of contract claim. Instead, PAT loses its contract claim and gets to proceed against the parties (not AHA) who made the mistake. *Id.*

The undisputed facts refute PAT's claim of mistake. On June 26, 2020, after Harvey signed Amendment #1, she sent it to Fauls for his signature. *Ex. 24.* Fauls signed it the next day. *Ex. 25.* This is confirmed by Fauls' signature on the fully executed Amendment #1:

The parties hereto have caused this Amendment #1 to be signed by duly authorized officers or representatives on the Amendment Execution Date to be effective as of the Amendment Effective Date.

The Purebred Arabian Trust	Arabian Horse Association
R J Fauls Jr.	Nancy Harvey
Signature	Signature
Robert J Fauls Jr.	Nancy Harvey
Name	Name
The Purebred Arabian Trust	President, Arabian Horse Association
Title	Title
6/27/2020	6/26/2020
Date	Date

Ex. 28, p. 10. Fauls sent the version he signed ***after*** Harvey signed it back to Harvey, asking her to confirm "it is in order." *Ex. 25.* Harvey replied she "received it and it is in order." *Ex. 26.* Fauls then sent the fully signed Amendment #1 to PAT's Trustees as the final version. *Ex. 27.*

Almost a year later, on May 10, 2021, when Fauls asked for the final version, he received the June 26, 2022 version. *Ex. 36* (attached). This evidence precludes finding a mistake that would allow the PAT to proceed on the June 23, 2020 version. *Poly Trucking, Inc.*, 93 P.3d at 565.

7. No Meeting of the Minds on Terms Over Which PAT Sued.

Finally, PAT acknowledges that although no version of Amendment #1 requires "two factor authentication" or other specific security measures, there is still agreement without the specific details. *Response*, p. 15. PAT suggests the specific terms are not in any version of Amendment #1 because the parties simply "did not 'get down into the weeds.'" *Id.* (quoting PAT's 30(b)(6) deponent). The PAT's response does not cure the fatal problem with its claim.

To have an agreement that AHA could breach, there must be a meeting of the minds on the material terms. *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1248 (Colo. App. 2001). Cyber security obviously is a term material to PAT given that PAT sued over it.

"Regarding mutual assent, in general, 'when parties to a contract ascribe different meanings to a material term of a contract, the parties have not manifested mutual assent, no meeting of the minds has occurred, and there is no valid contract.'" *French*, 2022 CO 20, ¶ 27 (quoting *Sunshine v. M.R. Mansfield Realty, Inc.*, 195 Colo. 95, 575 P.2d 847, 849 (1978)). Although "contracting parties may incorporate contract terms by reference to another document," they must do so in a way that makes it "'clear that the parties to the agreement had knowledge of and assented to the incorporated terms.'" *Id., ¶ 29* (quoting *Taubman Cherry Creek Shopping Ctr., LLC v. Neiman-Marcus Grp., Inc.*, 251 P.3d 1091, 1094-95 (Colo. App. 2010)). "General or oblique references to a document to be incorporated, in contrast, are usually insufficient to support a finding that the document was incorporated by reference." *Id.*, ¶ 31 (citations omitted).

Amendment #1 provides "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). It does not define the term "commercially reasonably efforts." PAT and AHA ascribe different meanings to the term. The term is itself general and

oblique; it does not specifically refer to any documents outside of Amendment #1 itself. Although PAT evidently did not want to get down "into the weeds," its failure to define such a term in a way that that was clear and specific resulted in a lack of a meeting of the minds in the same way that the hospital's failure to reference the chargemaster's terms in *French* resulted in a term left open and an inability to enforce such a term. *French*, 2022 CO 20, ¶¶ 33-35.

When, as here, critical terms are undefined and there is not an objective way to determine the meaning of the material terms from the contract itself, there is no mutual assent and therefore no contract. *Id.*, ¶ 27; *DiFrancesco*, 39 P.3d at 1248. Thus, summary judgment against PAT is appropriate. *BA Mortg. Co. v. Unisal Dev., Inc.*, 469 F. Supp. 1258, 1268 (D. Colo. 1979).

B. The Undisputed Facts Show AHA Did Not Breach Amendment #1.

Assuming *arguendo* that the June 23, 2020 version was effective, the undisputed facts demonstrate that AHA did not breach any specific provisions of Amendment #1.[3] In its *Response*, PAT argues that Amendment #1 should be interpreted "broadly" beyond the words that the document uses. *Response*, pp. 17-18. PAT argues that if the Court interprets the Amendment #1 so broadly, PAT could establish a breach. Close examination of each of PAT's specific theories of breach demonstrates the errors in PAT's approach.

1. "Commercially Reasonable Efforts."

PAT first focuses on Paragraph 8(c), which provides: "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,* p. 7, ¶ 8(c)(1). Amendment #1 does not define the term "commercially reasonable efforts." Yet PAT claims that AHA breached this requirement by not having "multi-factor authorization or intrusion detection software prior to the ransomware attacks." *Response*, p. 18.

[3] As AHA explained in its *Motion,* AHA agrees that the June 26, 2020 signed Amendment #1 is a final agreement binding the parties. PAT does not sue on that contract. Even under the June 26, 2020 final agreement, there is no breach, as explained in the *Motion* and below.

PAT is attempting to impose requirements – "multi-factor authorization or intrusion detection software" – that Amendment #1 did not include. The parties' intent "is to be determined primarily from the language of the instrument itself." *Ad Two, Inc.*, 9 P.3d at 376. Courts may not rewrite or add terms to the contract. *Bledsoe Land Co. LLLP v. Forest Oil Corp.*, 277 P.3d 838, 842 (Colo. App. 2011). PAT's desire for multi-factor authorization or intrusion detection software is an after-the-contract desire not contained in any version. PAT's omission of these terms results "in an alleged contract that is so uncertain the court cannot determine whether or not it has been breached," so "there is no contract." *Jorgensen*, 226 P.3d at 1260. Although a court "may supply some missing essential terms, it may not create a contract where there is none." *Id.* There is no legal or factual basis to supply the missing terms.

Paragraph 8(c)(1) uses the term "commercially reasonable efforts" in direct reference to the obligation "to keep the Production Environment of the Licensed Technology continuously available and operational." *Ex. 28*, p. 7, ¶ 8(c)(1). Amendment #1 defines the term "Production Environment" as "the Licensed Technology together with all Components which are necessary for Licensor to access and use the Licensed Technology." *Id.*, at 1. The original LSA defines "Licensed Technology" to mean "the Database and the Software and all information technology, and other items related thereto." *Ex. 3*, p. 2, ¶ 1(A). Thus, contrary to PAT's argument that Amendment #1 required AHA to have **all of its computer systems accessible**, *Response*, p. 19, Amendment #1 simply required AHA to have the database available and operational. *Ex. 28*, p. 7, ¶ 8(c)(1). PAT cannot establish breach by interpreting Amendment #1 to mean something other than what its plain language says or by adding requirements that do not exist in the plain language. *See Janicek v. Obsideo, LLC,* 271 P.3d 1133, 1138 (Colo. App. 2011). AHA did not breach Amendment #1 by not having multi-factor authorization or intrusion detection software when PAT did not request and AHA did not agree to such a requirement in Amendment #1.[4]

[4] PAT argues further that AHA "admitted in its March 17, 2021 insurance application that its failure to use multi-factor authentication or intrusion detection software could reasonably have given rise to the first ransomware attach and resulting insurance claim on its cybersecurity

2. Failing to Cure Critical Impact Errors.

PAT argues that there are fact disputes on its second theory, which claims 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 claims there are fact disputes about which Amendment #1 was final, precluding summary judgment. *Response,* p. 19. PAT's argument does not survive scrutiny because the effective version of Amendment #1 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.

Ex. 28, ¶ 8(f). PAT does not allege AHA breached this provision. It does not dispute that by May 14, 2021, AHA's systems were fully operational. *Ex. 30*, ¶¶ 40-43.

Instead, PAT argues that it provided notice of an insourcing event "in a zoom meeting on April 20, 2021 where Mr. Fauls expressly notified AHA of the critical impact errors." *Response*, p. 19. But Amendment #1 requires notice of any errors to be written and sent by email or given over the telephone. *Ex. 28,* p. 8, ¶ 8(f). Further, the notice provided must be of an "insourcing event," *Ex. 28*, p. 9, ¶ 9(a), not notice that "registration services had been interrupted twice," as PAT alleges. *Complaint*, p. 8, ¶ 42. Indeed, the effective Amendment #1 provided that "[i]f an insourcing event occurs, Licensee shall promptly update the Transition Environment but only after receiving Licensor's prior written consent…." *Ex. 28*, p. 8, ¶ 8(i). This term requires ***written*** consent after notice is provided. It would be unreasonable to interpret Amendment #1 as a whole and conclude that PAT can simply sneak in "notice" at a Zoom meeting.

It is undisputed that the first written notice of an "insourcing event" was May 14, 2021.

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policy." *Response*, p. 19. PAT's argument is a strawman. This case does not involve a claim by AHA's insurer against AHA. This case does not involve the question of what AHA's insurer required or what it inquired about during the underwriting process. It is about whether AHA breached a contractual obligation to PAT. Amendment #1 and the LSA define those contractual obligations. Neither document requires multi-factor authentication or intrusion detection software. AHA could not have breached an obligation that the contracts did not impose.

Ex. 32. The purpose of the May 14, 2021 notice that PAT drafted and sent was "to provide AHA with notice of this Insourcing Event, under Sections 9(a), (a)(vii) and/or (a)(ix) of the Amendment." *Id.*, p. 2. PAT understood that written notice was required because its actions demonstrated it. *Avemco Ins. Co. v. N. Colo. Air Charter, Inc.*, 38 P.3d 555, 559 (Colo. 2002).

3. Correcting Hardware Failures.

Regarding its third theory, PAT admits the PARS hardware "did not experience any failures during the ransomware outage." *Response,* p. 20. PAT claims, however, that Amendment #1 required AHA to replace all hardware failures affecting all of AHA's systems, including AHA's scanners and printers. *Id.* PAT's theory expands the obligations of Amendment #1 beyond its terms. Amendment #1 required AHA to "procure a server capable of operating the Licensed Technology consistent with the Specifications for a minimum of five (5) years from the Amendment Effective Date ('Initial Server'), together with any other hardware necessary for operation of the Licensed Technology consistent with the Specifications." *Ex. 28,* p. 3, ¶ 4(a). The components list to Amendment #1, which was attached as Exhibit B, provided that the Initial Server would be the Dell PE 740 Linux Server. *Ex. 28*, p. 11, Ex. B. Scanners and printers are not included. *Id.* Amendment #1 does not use the word "scanner" at all.

Amendment #1 uses the word "printer" only once – referring to PAT's obligation to "procure and pay for the special printer(s)…." *Id.*, p. 3, ¶ 4(c). PAT's theory that AHA breached Amendment #1 by not replacing AHA's own scanners or printers fails because Amendment #1 did not impose any such requirement on AHA.

4. Documentation.

PAT further alleges that AHA breached Amendment #1 by not providing PARS documentation and training manual for the PARS system. *Response*, p. 21. Again, however, PAT's theory of breach strays from the language of Amendment #1. Any failure to provide PARS documentation and training manual for the PARS system is not one of the insourcing events. *Ex. 28,* p 8, ¶ 9(a)(i)-(ix). Amendment #1 required AHA 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')." *Ex. 28,* p. 6, ¶ 8(c). The reason for this provision was that, in the event that an insourcing event occurred and PAT needed 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," *Id.*, ¶ 9(a), PAT would have a manual to enable it to do so.

PAT admits that by May 14, 2021, when it provided its notice of insourcing event, AHA already had provided a PARS manual. *Response*, p. 21. Although PAT complains about the content of the manual (e.g., it did not reflect "new registration procedures," or address "recording microchip data, digital tattoo process and scanning of images"), Amendment #1 did not impose any obligations on AHA about the content of the PARS manual. *Ex. 28,* p. 6, ¶ 8(c). If PAT wanted specific content in the PARS manual, it should have requested it and negotiated the specific content requirements as part of Amendment #1. It did not. Further, PAT drafted Amendment #1, so the Court must construe it against PAT. *See Christmas v. Cooley*, 406 P.2d 333, 336 (Colo. 1965). The Court cannot find AHA breached Amendment #1 based on PAT's expectations not expressed in Amendment #1. *French*, 2020 CO 20, ¶ 27; *Integrity Med. Mgmt., LLC v. Surgical Ctr. at Premier, LLC*, 234 F. Supp. 3d 1085, 1094 (D. Colo. 2017)

5. Force Majeure and Insourcing.

Finally, PAT urges the Court to deny summary judgment because it claims numerous insourcing events have occurred and AHA refused to agree that such events occurred. *Response,* pp. 21-25. PAT bases its argument on the fact that it "mistakenly" provided the wrong document for signature, which was subsequently signed by all parties and ratified again on June 27 and 28, 2020, as well as on May 10, 2021. *Exs. 25, 26, 27 & 36.* PAT's argument is circular. PAT assumes the June 23, 2020 draft version of Amendment #1 was the actual agreement, contrary to the evidence, and then uses that flawed assumption to argue breach. Indeed, PAT goes so far as

to claim that reliance on the fully executed June 26, 2020 Amendment #1 is "absurd."

Regardless of which version of Amendment #1 was final, the ransomware attacks AHA suffered could not have been a force majeure event. In its *Response*, PAT argues that several cases have held that "ransomware attacks are properly considered *force majeure* events." *Response*, p. 23. The cases PAT cites do not support its claim. In *Princeton Cmty. Hosp. Ass'n, Inc. v. Nuance Commc'ns, Inc*., 2020 WL 1698363, at *5 (S.D.W. Va. Apr. 7, 2020), the court denied a Rule 12(b)(6) motion to dismiss because it concluded that "[a]t this stage of the litigation, it is not clear to the court that the force majeure clause applies," given that the court had to assume the truth of the allegations asserted. *Id.* (citing case that was reversed). This matter is different because the Court is considering a summary judgment motion and PAT presented no evidence that the ransomware attacks were acts of God or acts of war, which was necessary in the *Princeton Cmty. Hosp.* case.[5] Here, based on Colorado authority, the Court should determine that the ransomware attacks were not force majeure events because they were not events that were acts of God that could be controlled. *Hayes v. Taylor Petition Mngm't LLC*, 2021 WL 3072169, at *8-9 (Colo.Dist.Ct. Jan. 16, 2021); *Church Commc'n Network, Inc. v. Echostar Satellite L.L.C.*, 2006 WL 8454330, at *15 (D. Colo. Mar. 17, 2006).

V. CONCLUSION.

For the foregoing reasons, the Court should enter summary judgment in AHA's favor.

[5] PAT also cites *Heritage Valley Health Sys., Inc. v. Nuance Commc'ns, Inc.*, 2020 WL 4700842 (W.D. Pa. Aug. 13, 2020), *appeal dismissed sub nom. Heritage Valley Health Sys. v. Nuance Commc'ns Inc*., 2021 WL 923284 (3d Cir. Feb. 5, 2021). There, the court dismissed a negligence claim the plaintiff asserted against the defendant. The plaintiff alleged that the defendant was negligent because the plaintiff hospital system implemented a business strategy focused predominantly on international growth, which exposed the hospital system to international ransomware attacks. The court dismissed the claim under Pennsylvania's equivalent of the economic loss rule because the contract between the plaintiff hospital system and the defendant controlled. The court did not opine one way or the other whether the ransomware attack could be a force majeure event under the contract because there was no contract claim pending. *Heritage Valley* is inapposite.

Respectfully submitted this 25th day of October, 2022.

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CERTIFICATE OF SERVICE

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