DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: November 27, 2018 CASE NUMBER: 2016CV31911
Plaintiff: **THE PUREBRED ARABIAN TRUST,** v. Defendant/Third Party Plaintiff: **ARABIAN HORSE ASSOCIATION.** v. Third Party Defendants: **SUSAN C. MEYERS et al.**	▲ **COURT USE ONLY** ▲ Case Number: 2016CV31911 Division: 202

ORDER RE: PARTIES RULE 54 MOTIONS

THIS MATTER comes before the Court on motions filed on behalf of The Purebred Arabian Trust (the "Trust") and the Arabian Horse Association (the "Association") pursuant to Rule 54 seeking further rulings and/or clarification from the Court following entry of the Court's September 19, 2018 Findings of Fact, Conclusions of Law and Judgment ("Judgment"). After reviewing the motions, and considering the previous findings of fact and applicable law, the Court rules as follows:

ISSUES RAISED BY MOTIONS

Trust Motion for Clarification

1. The Trust, in *Plaintiff's Motion For Further Relief Pursuant To C.R.C.P. 54* asks the court to "rule on additional claims and issues not resolved in the Court's initial" order. Pltf Mtn, p.1. First, the Trust asks the Court to issue an order requiring the Association to deliver a "fully-functioning copy of the required licensed technology," and

make clear that the Trust owns this "software used to solely register Purebred Arabian horses." Pltf Mtn p.1-2. The Trust asks the Court to impose a deadline of 2/11/19 to produce the functioning software. Second, the Trust asks for a ruling on whether the Association or the Trust is responsible for payment of "annual WAHO," (World Arabian Horse Organization) dues and "TrackMaster" fees. Pltf Mtn p.2.

2. With regard to the software issue, the Trust notes that although the Court entered judgment in favor of the Trust on its declaratory relief claim, finding that "the Association is required to provide a functioning version of software capable of registering purebred Arabian horses, and … to maintain the database," the Court did not set a date certain to produce the functioning software, or specifically state that the Trust would own the software. Pltf Mtn p.2-3, quoting Judgment.

3. With regard to the issue of fees, the Trust seeks a ruling on the Association's breach of contract counterclaims alleging a breach of the 2003 Merger Agreement between the parties, in which the Association alleged that the Trust had failed to pay the annual WAHO dues and TrackMaster fees. Pltf. Mtn p.3. The Trust points out the Association "failed to specifically identify these two bases for its breach of contract in its recitation of claims in the TMO … [but] … the parties introduced evidence at trial related to [these] fees." Pltf Mtn p.3.

4. The Trust asserts that since re-admittance to WAHO in 2008 the Trust has payed travel expenses for Trustees to attend meetings of the organization and the Association, as the designated authority for registrations in the United States, has paid the annual dues. The Trust asks the Court to affirm the continued payment of dues by the Association.

5. As to the TrackMaster fees, the Trust asserts that it paid such fees on a voluntary basis for a period of time at the request of the Association, but the Association subsequently covered such fees in their budget. The Trust seeks a ruling that there was no breach of contract for the Trust's failure to continue paying such fees.

Association Motion for Clarification

6. The Association, in *Defendant's Motion For Clarification* asks the Court to

> (1) clarify whether the Association owes any royalties for registration of purebred Arabian horses outside the United States;
>
> (2) issue a ruling affirmatively denying the Trust's claim for declaratory relief as to the ownership of the Horse Registry System ("HRS");
>
> (3) clarify the Court's ruling that the Association is obligated to maintain a "functioning version of software capable of registering purebred Arabian horses." Def. Mtn p.6, quoting Court's Findings of Fact;
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> (4) clarify that the Trust is not entitled to a copy of HRS;
>
> (5) issue a ruling in favor of the Association on the Trust's withdrawn claim regarding the Association's obligation to maintain insurance;
>
> (6) issue a ruling in favor of the Association on its breach of contract claim asserting that the Trust is obligated to "pay for TrackMaster" based on the Trust's obligation to contribute to the Association's MDP (Marketing Development and Promotion) budget; and
>
> (7) determine that the Trust is obligated to pay WAHO membership fees based on language in the Merger Agreement that the Trust is responsible for all matters related to WAHO. Def.Mtn p.12, citing Ex.8, Merger Agreement, Section 9.3(a-d).

ANALYSIS & FURTHER ORDERS

I. Declaratory Judgment as to Licensed Technology Software

The Judgment addressed the Trust's action for a declaratory judgment concerning Licensed Technology software as that term is used in the License and Security Agreement ("LSA") between the Trust and the Association. The Court entered judgment in favor of the Trust declaring that the Trust is entitled to a "fully-functioning … version of the Licensed Technology." Judgment, p.15. Further, the Court declared that the Association has an on-going obligation to assure that there is always a fully-functioning version of such software.

Throughout the litigation the Trust argued that the Trust has ownership of any software or technology that the Association might use to register purebred Arabian horses, specifically focusing on the HRS system. The Association, on the other hand focused on the nature and technical aspects of the HRS software it developed to establish that HRS is a separate and distinct program from the Licensed Technology provided to the Association through the LSA.

The Court, while agreeing that HRS is a new and distinct type of technology from the Licensed Technology (referred to as an IBM system during litigation), the Court focused on the language of the LSA, as opposed to the technical specifications of the HRS system. While the Court declined to award ownership of HRS to the Trust, the Court found that the Trust is entitled to a working version of the Licensed Technology. As stated in the Judgment "It is not clear to the Court whether or not the original IBM type system remains capable of performing the registration functions." Judgment ¶30. Further, "Without further information regarding the capabilities of the original Licensed Technology … the Court cannot determine whether or not the Association has failed to meet its obligation" to maintain or replace the technology. Judgment ¶32.

The Court ruled that the Association has an obligation under the LSA to "**maintain or replace** [the] system such that the Trust always has the capability of providing registration of purebred Arabian horses." (Emphasis added) Judgment p. 15. This is an on-going obligation. The LSA does not provide any time frame for the Association to certify that the subject technology is available. However, a reasonable inference is that such certification should occur at least annually. The Court will impose a deadline of March 1, 2019 for the Association to certify that the Trust has been provided a fully-functioning copy of software (or technology) capable of registering purebred Arabian horses.

To further clarify, the Trust is the owner of whatever technology is certified by the Association. As previously stated in the Judgment "the Association has the responsibility to provide a software system capable of registering purebred Arabian horses and to maintain the database for purebred Arabian horses … The Association has the right to make the choice about how it will comply with the requirements of the LSA, so long as the Trust has the ability to perform registration services in the event that it must do so." Judgment, p. 16.

The obligation of the Association to maintain or replace the Licensed Technology does not necessarily implicate ownership of HRS. The Court did not declare that the Trust owns HRS. Instead it determined that the Trust is entitled to functioning technology. At this point in time it may be possible to simply "update" or "maintain" the original IBM system. At some point in time, it appears certain that the IBM system will no longer be capable of working and then a "replacement" system will be needed. The

Association will be responsible for providing that replacement system. At such time the Trust will "own" the replacement system.

II. Clarifying Orders Related Licensed Technology

The following Orders, clarifying the Court's previous rulings in its Judgment are hereby entered:

1. Declaratory Judgment is entered in favor of the Trust on the right to ownership of fully-functioning software (or technology) along with a database maintained by the Association capable of registering purebred Arabian horses.

2. The Association is obligated to maintain or replace the Licensed Technology, as that term is used in the LSA.

3. The Association must certify on an annual basis that the Trust has been provided a copy of fully-functioning software capable of registering purebred Arabian horses and that the database used for such registration has been maintained.

4. The Court imposes the date of March 1, 2019 for the first annual certification date.

5. The Trust is the owner of any software or technology certified by the Association. Such ownership applies regardless of whether the software is simply updated or a complete replacement of an antiquated system.

6. The HRS is a separate and distinct technology system from the IBM type Licensed Technology. The Association is the owner of HRS – unless or until – the Association designated HRS as a replacement for the Licensed Technology.

III. Royalties

In its Judgment, the Court entered judgment in favor of the Association on the Trust's breach of contract claim concerning royalties for registration of Canadian horses. Judgment, Concl, ¶B. The Court determined that under the LSA the Association was required to pay royalties to the Trust when "using the Trust's Licensed Technology

and/or Database." Judgment p.17. Prior to 2017 the Association utilized the Trust's software to register horses on behalf of the Canadian horse association and the Association paid royalties to the Trust. However, "starting in 2017 the Association … no longer use[d] the Trust's software." Judgment p.17. The Court concluded that the Association was not obligated to pay royalties for registrations that did not use the Trust's software.

The Association has interpreted the Court's ruling as a finding that the Association need no pay royalties for registration of any horses outside the United States. However, the Court's finding is more nuanced. The payment of royalties is determined not on the geography of the horses but rather the technology used to process the registrations. If the Association uses the Trust's technology, including the database, then a royalty payment is due. If the Association does not use the Trust's technology or database then a royalty is not due. This ruling, however, does not apply to registration of purebred Arabian horses within the United States, since such registrations would necessarily utilize the Arabian horse database, even if that database is processed through HRS or some other software system.

IV. WAHO and TrackMaster Fees

The Court did not specifically address the issue of which organization is responsible for payment of WAHO annual dues, or whether the Trust is obligated to support TrackMaster fees in its Judgment. Although there was some testimony about the history of payment for such dues and fees, the Trial Management Order did not identify these payments as issues for trial.

> C.R.C.P 16(f)(3)(V) requires the parties to a civil lawsuit to file a trial management order in which each claiming party

> shall set forth a detailed description of the categories of damages or other relief sought and a computation of any economic damages claimed. … [This rule] facilitates preparation and trial of the case.
>
> C.R.C.P. 16(f)(5) provides that the Trial Management Order shall control the subsequent course of the trial. *Miller v. Brannon, 207 P3d 923, 927-28 (Colo. App. 2009)*

In *Brannon* the trial court properly denied plaintiff the opportunity to present evidence of past medical expenses where she failed to make reference to such damages in the TMO. *Brannon, Id. at 928.* Additionally, "[i]n a breach of contract action, damages must be established with reasonable certainty by a preponderance of evidence." *Tait ex rel. Tait v. Hartford Underwriters Ins. Co., 49 P3d 337, 341 (Colo. App. 2001)* The claiming party must "provide the factfinder with a reasonable basis for calculating actual damages in accordance with the relevant measure." *City of Westminster v. Centric-Jones Constructors, 100 P3d 472, 477 (Colo. App. 2003).*

In this case, the TMO did not contain a references to the WAHO or TrackMaster fees as basis for the Association's breach of contract claim, nor did the TMO contain any calculation of damages associated with such a breach. While there was some reference to WAHO and TrackMaster during the trial the Court does not recall any testimony establishing damages associated with any alleged breach. For all of these reasons the Court did not issue findings of fact or a judgment related to these fees and will not do so now.

V. Insurance

At the outset of litigation the Trust sought a declaratory ruling that the Association was obligated to maintain insurance related to the Licensed Technology. Prior to trial the parties filed cross-motions for summary judgment, which motions included the issue

of insurance. In ruling on the cross-motions the Court stated in reference to the insurance issue:

> There really is no dispute between the parties concerning the issue of maintaining insurance. Both The Trust and AHA agree that AHA has an obligation to maintain insurance related to the disputed Registry software and that The Trust must be named as an additional insured. AHA attests to the purchase of such insurance, providing The Trust with certifications naming The Trust as an additional insured and additionally asserting that it has provided a copy of the conforming policy. The Trust does not dispute that it has received the certifications and at least portions of the policy referencing the software. The request to issue a "declaration" that AHA is obligated to maintain insurance is moot, given the statements and conduct of AHA. *MSJ Order, 2/26/18*

The Trust's claim regarding insurance was withdrawn prior to trial. Judgment, FN1. The Association seeks an order denying the Trust's withdrawn claim for declaratory relief on this issue. "When possible, a court should resolve disputes on their merits. However, when an issue is moot, a court will ordinarily refrain from addressing it." *Miller v. Rowtech, 3 P3d 492, 599 (Colo. App. 2000).* The Court finds that there is no need to issue any ruling regarding insurance.

CONCLUSION

The Court has issued further clarifying orders concerning the obligation of the Association to provide the Trust with a fully functioning copy of software and a database capable of registering purebred Arabian horses. The Court finds that the Trust is entitled to such working technology. The Court has issued additional orders directing the Association to certify on an annual basis, starting March 1, 2019, that it has provided the Trust with a copy of functioning technology, and that the Trust owns whatever software is certified by the Association. The Court has reiterated that the HRS

software is not necessarily a replacement for the Licensed Technology nor does the Trust own HRS. However, the Association must continue to update and maintain the Licensed Technology and if necessary replace the technology, even if that requires creation of new and distinct software.

The Court has declined to issue any further orders regarding royalties, finding that the Court's initial Judgment adequately explained its rulings with regard to royalties.

Additionally, the Court has declined to issue any further orders regarding payment of WAHO or TrackMaster fees or to make any ruling regarding insurance for the reasons set out more fully above.

SO ORDERED THIS November 27, 2018.

BY THE COURT:

Elizabeth Beebe Volz
District Court Judge