DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: 7325 S. Potomac Street Centennial, CO 80112	
Plaintiff: THE PUREBRED ARABIAN TRUST **v.** **Defendant:** ARABIAN HORSE ASSOCIATION	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiff the Purebred Arabian Trust: Name: J. Lee Gray, Reg No. 27306 CONDIT CSAJAGHY LLC Address: 695 S. Colorado Blvd., Suite 270 Denver, CO 80246 Phone No.: 720.287.6607 E-Mail: Lee@cclawcolorado.com	Case No. 2021CV31173 Div: Ctrm: 21

PLAINTIFF'S RESPONSE IN OPPOSITION TO AHA'S MOTION FOR SUMMARY JUDGMENT

The drastic remedy of summary judgment is only warranted upon a clear showing that there is no genuine issue of material fact. This case has numerous material factual disputes that prohibit entry of summary judgment. Although a copy of the contract was mistakenly signed after the fact, the facts demonstrate that this "signed" version is, in fact, a prior version of the document that was not agreed to but was subsequently modified at AHA's request during negotiations. The later, revised version was physically signed by the Plaintiff on June 23, 2020, discussed and approved by AHA's Executive Committee ("EC") on June 26, 2020, and then electronically signed, pursuant to the Colorado Uniform Electronic Transactions Act, by AHA's President via an email on June 26, 2020. After this, the Trust mistakenly attached a prior version of the document to an email for physical signature, which the parties later signed without realizing that it was the old, unapproved version of the Amendment. The continuing dispute over

which version of the Amendment is enforceable is itself a material disputed fact that prohibits summary judgment and AHA's Motion for Summary Judgment ("MSJ") should be denied.

The Parties agreed to the Amended Agreement for the primary purpose of assuring continuous registration services for purebred Arabian horses in the United States and to provide the mechanism by which responsibility for such registrations would automatically transfer to the Trust if AHA either could not or would not provide such continuous registrations. It is a fundamental tenant of contract interpretation that the Court should enforce contracts to assure the agreed-to purpose of the contract and to avoid absurd results. Ignoring the central purpose of the Parties' agreements, AHA claims it did not violate the Amended Agreement based on several hyper-technical arguments to excuse the 38 day interruption in its registration services.

As shown below, AHA has breached several provisions of the Amended Agreement by failing to keep the registration system continuously operational and updated, failing to use adequate measures to protect the registration system, failing to update the Documentation related to PARS, and failing to promptly cure critical impact errors and hardware failures. As such, there are numerous material factual disputes for the court to decide in a bench trial currently set for early December that prohibit entry of summary judgment here. The Court should deny AHA's MSJ in its entirety.

I. RESPONSE TO MATERIAL FACTS[1]

1-2. Admitted.

3. The World Arabian Horse Organization ("WAHO") only recognizes one Arabian

[1] Plaintiff responds to Defendant's alleged material facts by number, for reference.

horse registry per country. By Agreement and by virtue of its relationship to the Arabian Horse Registry of America ("AHRA"), the Trust is recognized as a Founding Member of WAHO and the official registry of the US, and two of its Trustees perpetually serve on WAHO's Executive Committee. The Trust admits that it has designated AHA as the WAHO-recognized registry for the US as long as it performs registration services under the LSA. Similarly, the Trust admits that the Canadian Arabian Horse Registry ("CAHR") has also designated AHA as the WAHO-recognized registry for Arabian horses in Canada. *See* Letter from WAHO dated Oct. 9, 2022, copy attached as **Exhibit A**. The Trust admits the remaining allegations of this paragraph.

4. Admitted.

5. Although the Trust admits that AHRA transferred the Database used to register purebred Arabian horses to the Trust prior to the April 1, 2003 merger, it denies that this was all that was transferred. *See* Ex. 3[2] at pp. 1-2, Recitals C-E.

6-26. Admitted.

27. The Trust admits that it received a thumb drive from AHA purported to contain certain software and related data but was unable to verify what was on the thumb drive because it did not have the Oracle software that AHA used for horse registrations. The Trust denies that the thumb drive contained a fully functioning registration system as required by the LSA and related Court Orders. *See* Ex. 29, 8:6-9:25.

28. The Trust denies any characterization that it contemplated making a new agreement to take the place of the LSA, but admits that Mr. Fauls met with AHA President,

[2] Numbered exhibits refer to the exhibits attached to AHA's MSJ.

Nancy Harvey, and others to negotiate a resolution to the dispute over the Trust-owned registration system, as opposed to the software on a "stick." *See* Ex. 9 (p. 2 "As we discussed, we will work with you to create a fully functioning purebred Arabian Registration System that will be updated and maintained by AHA, and owned by the PAT. … resulting in the ability for the PAT at any time to perform Registration Services if AHA is ever unwilling or unable to perform those services.").

29. The Trust admits that its objective was, and has always been, to ensure that it could take over purebred Arabian horse registration services if AHA was ever unwilling or unable to do so, but denies that this was limited to only AHA's bankruptcy or ceasing to do business. *See id*.; Depo. of Robert Fauls, 19:12-20:6, highlighted excerpts attached as **Exhibit B**.

30-38. Admitted.

39. The Trust admits that its counsel at that time revised the draft Amendment to incorporate numerous changes requested by AHA that the Trust agreed to, but denies that all of AHA's proposed revisions were accepted and incorporated into that draft. *See* Ex. 18.

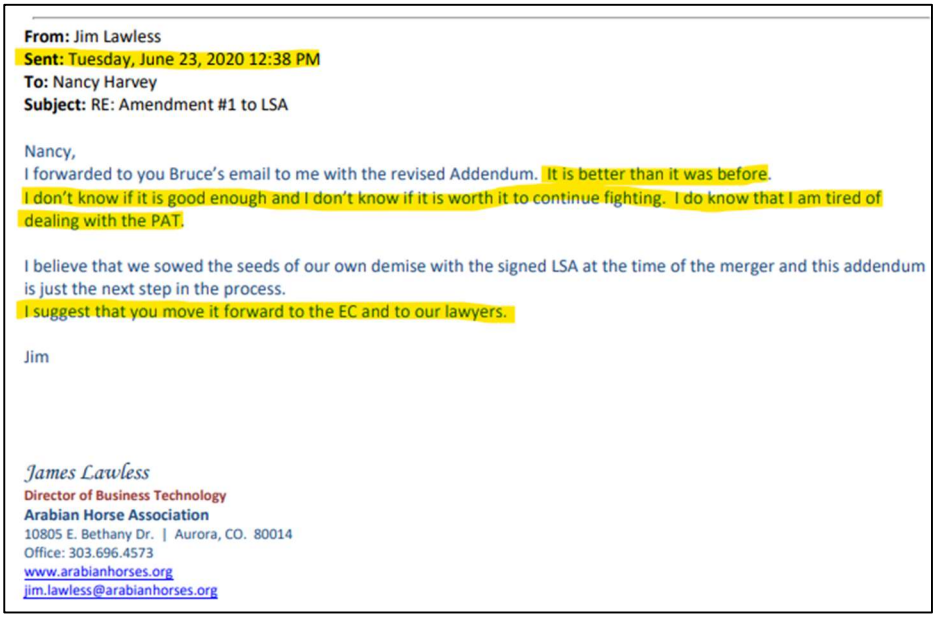
40-41. Admitted.

42. Denied. As is clear from Ex. 20, Ms. Harvey's concern that Mr. Faul's statement regarding further review of certain documents included the Amendment, but in response to her question, Mr. Fauls clarified that it was new documentation and training for PARS that needed further review—not the amendment to the LSA. *See* Ex. 20.

43. Admitted.

44. Denied. Ms. Harvey informed Mr. Fauls that the EC approved the Amendment that he sent "as a scan," which she could not electronically apply her signature. *See* Ex. 21.

Further, the facts affirmatively show that it was the June 23, 2020 version of the Amendment that AHA's Executive Committee received and approved. Ms. Harvey sent the June 23, 2020 version to Jim Lawless to review and advise if the changes he wanted had been incorporated. *See* June 23, 2020 email exchange, highlighted copy attached as **Exhibit C**. In response, Mr. Lawless replied later that day to indicate that, while he did not know if it was "good enough," he was not interested in continuing to negotiate and recommended that she "move it forward to the EC":



From: Jim Lawless
Sent: Tuesday, June 23, 2020 12:38 PM
To: Nancy Harvey
Subject: RE: Amendment #1 to LSA

Nancy,
I forwarded to you Bruce's email to me with the revised Addendum. It is better than it was before.
I don't know if it is good enough and I don't know if it is worth it to continue fighting. I do know that I am tired of dealing with the PAT.

I believe that we sowed the seeds of our own demise with the signed LSA at the time of the merger and this addendum is just the next step in the process.
I suggest that you move it forward to the EC and to our lawyers.

Jim

James Lawless
Director of Business Technology
Arabian Horse Association
10805 E. Bethany Dr. | Aurora, CO. 80014
Office: 303.696.4573
www.arabianhorses.org
jim.lawless@arabianhorses.org

See June 23, 2020 email exchange, highlighted copy attached as **Exhibit D**. Further, AHA has admitted that Ms. Harvey sent this June 23, 2020 version of the Amendment to AHA's EC. *See* AHA's Responses to First Set of Written Discovery, Request for Admission No. 3, highlighted copy attached as **Exhibit E**. The EC met in a telephone conference call at 10:am on June 26, 2020, where it discussed and unanimously approved the June 23, 2020 version of the Amendment that Ms. Harvey had sent to them at that time. *See* Approved Minutes, highlighted copy attached as **Exhibit F**. There is no evidence that AHA's EC saw, discussed, or approved

any other version of the Amendment prior to its meeting. *See, e.g.*, Depo. of Stan Morey, 12:10-13:4, 13:19-25, 14:22-15:7, 55:4-56:2, 57:10-58:5, 59:7-60:23, 61:9-22, 68:12-70:16, 71:2-72:9, 73:9-74:7, 74:17-75:7, 78:24-79:10, highlighted excerpts attached as **Exhibit G**.

45. Denied. Shortly after the EC adjourned, Ms. Harvey emailed Mr. Fauls at 10:39 MDT (9:39 PDT, where she resides in California) to inform him that AHA's EC had approved the Amendment. *See* Ex. 21. Ms. Harvey included her name and title on the email and indicated her intention to sign it electronically. *Id*. Ms. Harvey asked for a Word version of the document instead of a PDF to facilitate adding her electronic signature to the document. *Id*.

46. The Trust admits that, in response to Ms. Harvey's request—after AHA approved the June 23, 2020 version—Mr. Fauls forwarded the prior, June 9, 2020, version of the Amendment that fellow Trustee, Bruce Johnson, inadvertently sent to him to forward to Ms. Harvey. *See* Depo. of Bruce Johnson, 98:6-99:12, highlighted excerpts attached as **Exhibit H**.

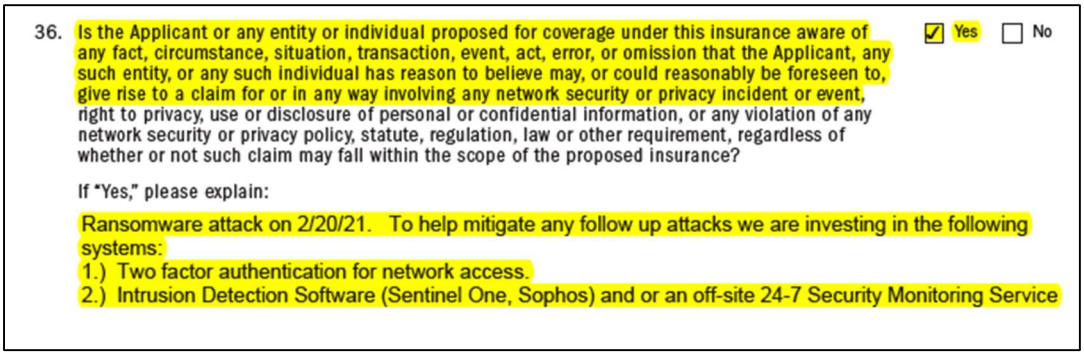
47-51. Although the Trust admits that both sides later signed the earlier June 9, 2020 draft of the Amendment that Mr. Fauls mistakenly sent to Ms. Harvey, it denies that the Parties either realized the mistake or affirmatively agreed to the terms of the June 9, 2020 draft of the Agreement, which Ms. Harvey had previously rejected. *See* Fact 38, Exs. 16 and H, 98:6-99:12.

52. Denied. While both sides mistakenly signed the earlier June 9, 2020 draft of the Amendment, Ms. Harvey electronically signed the June 23, 2020 version of the Amendment by virtue of the Colorado Uniform Electronic Transactions Act, C.R.S. § 24-71.3-102(8), and her June 26, 2020 email (Ex. 21), which Mr. Fauls had physically signed.

53. Admitted

54. The PAT admits that both parties were aware that Mr. Lawless was continuing to revise the Exhibit B components list to the Amendment, which was a material document, but denies that this fact has any bearing on the validity or enforceability of the June 23, 2020 version of the Amendment that was agreed to by the parties.

55. The Trust admits that AHA had some cybersecurity measures in place at the time of the ransomware attack but denies that the cybersecurity measures were adequate or commercially reasonable. In fact, in AHA's application for its computer network security insurance policy that Mr. Lawless filled out on March 17, 2021, AHA admitted that its failure to have two-factor authentication and intrusion detection software, which was a circumstance, error or omission that allowed the first ransomware attack on Feb. 20, 2021:



36. Is the Applicant or any entity or individual proposed for coverage under this insurance aware of any fact, circumstance, situation, transaction, event, act, error, or omission that the Applicant, any such entity, or any such individual has reason to believe may, or could reasonably be foreseen to, give rise to a claim for or in any way involving any network security or privacy incident or event, right to privacy, use or disclosure of personal or confidential information, or any violation of any network security or privacy policy, statute, regulation, law or other requirement, regardless of whether or not such claim may fall within the scope of the proposed insurance? ☑ Yes ☐ No

If "Yes," please explain:

Ransomware attack on 2/20/21. To help mitigate any follow up attacks we are investing in the following systems:
1.) Two factor authentication for network access.
2.) Intrusion Detection Software (Sentinel One, Sophos) and or an off-site 24-7 Security Monitoring Service

See OneBeacon Network Security & Privacy Supplement Application, p, 4, highlighted copy attached as **Exhibit I**; Ex. K, 199:22-200:13, 202:12-25. Further, although AHA stated that it was investing in these items to "mitigate any follow up attacks," it did not do so until after the second ransomware attack on March 31, 2021. Ex. K, 218:25-220:7.

56-66. Admitted.

67. The Trust admits that Ms. Fuentes sent the email marked as Ex. 35, but denies that this email indicates that AHA had all delayed registrations completed as of that time.

Instead, Ms. Fuentes explained that this email reported that her team had completed data entry from the hard copy documents pictured here (Ex. 35, p. 2):

but the registrations from those documents either remained pending or certificates had only just been printed as of May 14, 2020. *See* Depo. of Debbie Fuentes (rough copy), 167:6-168:14, highlighted excerpts attached as **Exhibit J**.[3]

68-70. The Trust admits that the PARS server, database or file system itself was not encrypted or damaged by the ransomware attacks. But the Trust denies that any registrations were recorded or processed using either HRS or PARS because access to and use of HRS was interrupted during the two ransomware attacks. *See* Depo. of James Lawless, 235:11-22, 236:5-7, highlighted portions attached as **Exhibit K**, see also, Ex. J, 179:21-180:3. As such, neither HRS nor PARS was updated or kept current with incoming registrations for the 38 days when these systems were down during the two ransomware attacks.

71. Denied. Although PARS was not encrypted, neither HRS nor PARS was accessed by AHA registration staff and registration data **was not** uploaded or otherwise updated in HRS

[3] Plaintiff will file pages from the final copy of this deposition transcripts when available.

or PARS during the ransomware attacks. *See* Ex. H, 72:7-73:1.

72. The Trust admits that the manual aspect of registration work, including receipt of hard-copy paper forms and telephone calls with customers, continued during the ransomware outage, but denies that the registration work performed by HRS, including automated error letters and emails to customers, receipt of DNA test results, and completing registrations/printing certificates occurred during the 38-day outage. *See* Ex. K, 235:11-22, 236:5-7; 251:17-20, 252:1-15, 253:8-22; *see also*, Ex. J, 179:21-180:3.

73-74. The Trust admits that it is unaware of any specific customer that was not able to eventually obtain registration services from AHA, but denies that customers were able to timely obtain completed registrations during the ransomware outage. Ms. Fuentes testified that registration applications are received at a steady rate throughout the year, but AHA's discovery responses show that zero or negligible registrations were completed during the two ransomware outages of February 21-28, 2020 and March 31-April 29, 2020:

Dates	Purebred Registrations Completed
02.01.2021 - 2.6.2021	44
2.7.2021 - 2.13.2021	71
2.14.2021 - 2.20.2021	25
2.21.2021 - 2.27.2021	1
2.28.2021 - 3.6.2021	39
3.7.2021 - 3.13.2021	31
3.14.2021 - 3.20.2021	38
3.21.2021 - 3.27.2021	16
3.28.2021 - 4.3.2021	23
4.4.2021 - 4.10.2021	0
4.11.2021 - 4.17.2021	0
4.18.2021 - 4.24.2021	0
4.25.2021 - 5.1.2021	50
5.2.2021 - 5.8.2021	18
5.9.2021 - 5.15.2021	36

See AHA Fifth Supplemental Disclosure and Registration Data (Bates labeled AHA002324), collectively attached as **Exhibit L**.; *see also*, factual citations response to Fact 72, above.

75-79. Admitted.

80-81. Again, the Trust admits that HRS and PARS were not themselves corrupted or encrypted by the ransomware attacks, but denies that either system was accessible or being used to record, process, or complete horse registration services during the ransomware outage. *See* factual citations in responses to Facts 68-74 above. Further, Mr. Johnson clarified in deposition that his statement about testing PARS in Exhibit 33 referred to testing he performed in August 2019 and was not related to the then-current status of PARS or HRS in May 2021:

24 Q Okay. And then carrying over to the next page on
25 1611, you say: "I have tested the PARS software and it

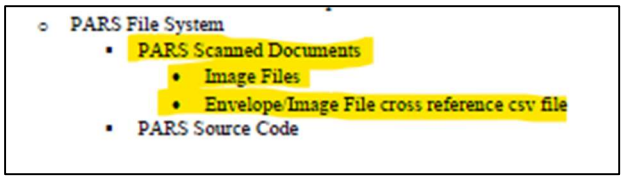
Page 80

1 does what it's supposed to do"; do you see that?
2 A I do.
3 Q And what does that refer to: "I have tested the
4 PARS software"?
5 A It refers to the testing I did in AHA -- or at AHA
6 in August of 2019, using the PARS database.

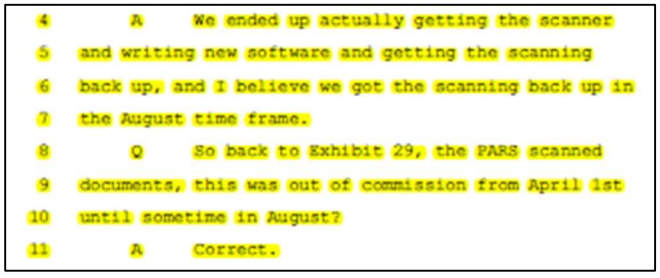
Ex. H, 79:24-80:6.

82-83. Denied. The fact that the PARS server, database, and software were not encrypted by the ransomware attack is not determinative of whether there was an insourcing event. As described in responses to Facts 68-74 above, HRS was not accessible or utilized for processing registrations and thus neither it nor PARS was updated during the ransomware attack.

Further, both versions of the Amendment include the component list Mr. Lawless later completed as Exhibit B to the Amendment, which requires that the PARS File System include the scanned images of the registration documents:



See, e.g., Ex. 28, p. 11 and Ex. 19, p. 12. As Mr. Lawless explained, horse markings are drawn by the horse owner and scanned into an image file as part of the registration process and these image files are kept as part of the PARS scanned documents in the "PARS File System." Ex. K, 121:18-122:16, 176:18-178:5. And as Mr. Lawless also testified, due to the ransomware attack, AHA was unable to scan the images required to be placed in the PARS file system during the ransomware outages and for an additional four months, until August 2021:



4 A We ended up actually getting the scanner
5 and writing new software and getting the scanning
6 back up, and I believe we got the scanning back up in
7 the August time frame.
8 Q So back to Exhibit 29, the PARS scanned
9 documents, this was out of commission from April 1st
10 until sometime in August?
11 A Correct.

Id. at 267:4-11; *see also*, id. at 266:17-19. Thus, even counting Mr. Fauls' May 14, 2021 letter as first notice of the insourcing event, PARS still was not being fully updated and did not contain the required scanned images for several months thereafter, until August 2021.

84. Denied. *See* responses and factual cites to Facts 68-74 and 82-83 above.

II. Argument

Simply put, summary judgment is improper here due to the numerous genuine issues of material fact. *D.R. Horton, Inc.-Denver v. D & S Landscaping, LLC*, 215 P.3d 1163, 1166 (Colo.App.,2008) ("Summary judgment is a drastic remedy that is never warranted unless there is a clear showing that there is no genuine issue of material fact."); *Bebo Const. Co. v. Mattox &*

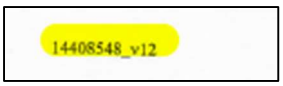
O'Brien, P.C., 990 P.2d 78, 83 (Colo. 1999). In addition, when deciding a motion for summary judgment, "a district court grants the nonmoving party the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts and resolves all doubts against the moving party." *City of Longmont v. Colorado Oil and Gas Association*, 369 P.3d 573, 577–78, 2016 CO 29, ¶ 8 (Colo. 2016). As described above, there are numerous disputed material facts that prohibit summary judgment here, including which version of the Amendment applies and whether AHA has breached the Amended Agreement.

A. The June 23rd version agreed to by the parties and electronically signed by AHA is the operative version of the Amendment.

AHA first disputes that the June 23rd version of the Amendment is the operative version yet nonetheless argues that that there are no factual disputes regarding which version of the Amendment was agreed to by the parties. MTD at 14-15. AHA's characterizations of a few selected facts do not establish which version of the Amendment is valid. At most, AHA's MSJ only provides its side of the disputed issues to be decided by the Court in a bench trial in two months. As shown by the evidence cited in response to Facts 44-46 above, the parties negotiated and agreed to the terms found in the June 23rd version of the Amendment. The above-cited facts demonstrate the following chronology:

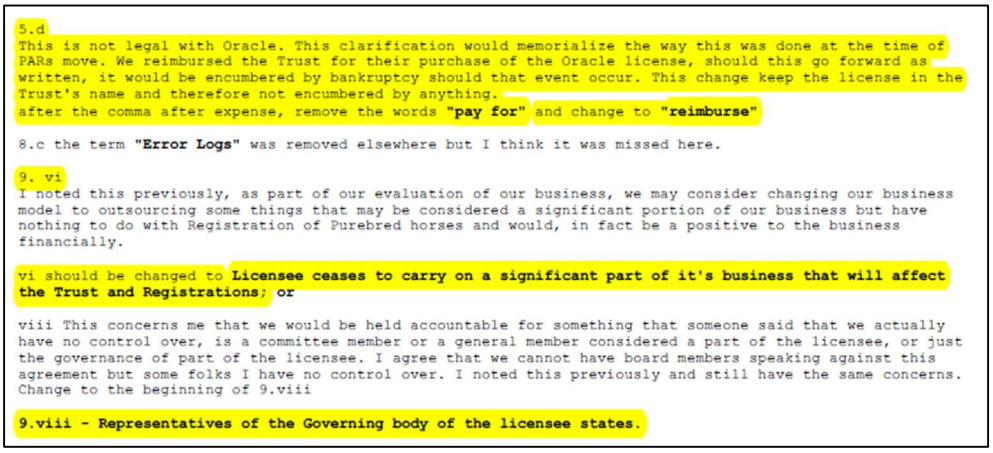
- After several in-person meetings in Tulsa, Oklahoma, Burbank, California, and Denver, Colorado, (*see* Exs. 9, 11, 12, and 13) to discuss the issues, the Trust emailed AHA an initial draft of Amendment #1 to the LSA on April 26, 2020 (*see* Ex. 14);
- AHA responded on May 15, 2020 with comments and proposed revisions to that draft (*see* Ex. 15);
- The Trust responded with a revised version of the draft Amendment on June 9, 2020 (*see* Fauls email to Harvey, highlighted copy attached as **Exhibit M**);

- This June 9, 2020 version of the Amendment included a document control number on the last page (Ex. M, p. 13) indicating that it was version 12:



- This "version 12" draft also included certain provisions that were subsequently changed at AHA's request, including (1) a provision in Section 5(d) that said AHA will pay for the Trust's purchase of an Oracle License, and (2) three provisions in Section 9(a) defining insourcing events to include AHA ceasing to carry on all or any significant portion of its business(subsection vi), AHA stating in public or writing that it did not intend to comply with its obligations under the LSA (subsection viii), and a force majeure event that prohibited the Trust, as Licensor, from performing maintenance and support obligations (subsection ix) (*see* Ex. M, pp. 5 and 8);

- Ms. Harvey responded on June 12, 2020 to provide AHA's comments and proposed changes to version 12 (Ex. 16), including the four items described above:


5.d
This is not legal with Oracle. This clarification would memorialize the way this was done at the time of PARs move. We reimbursed the Trust for their purchase of the Oracle license, should this go forward as written, it would be encumbered by bankruptcy should that event occur. This change keep the license in the Trust's name and therefore not encumbered by anything.
after the comma after expense, remove the words **"pay for"** and change to **"reimburse"**

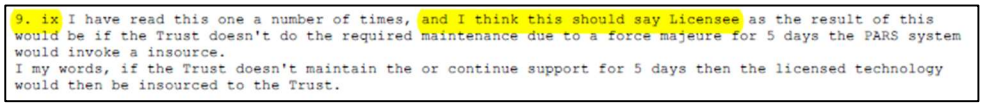
8.c the term **"Error Logs"** was removed elsewhere but I think it was missed here.

9. vi
I noted this previously, as part of our evaluation of our business, we may consider changing our business model to outsourcing some things that may be considered a significant portion of our business but have nothing to do with Registration of Purebred horses and would, in fact be a positive to the business financially.

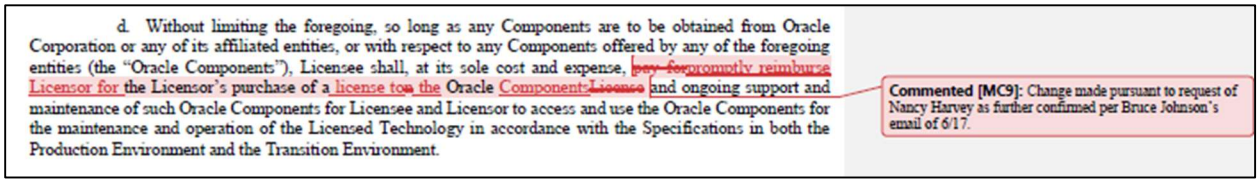
vi should be changed to **Licensee ceases to carry on a significant part of it's business that will affect the Trust and Registrations; or**

viii This concerns me that we would be held accountable for something that someone said that we actually have no control over, is a committee member or a general member considered a part of the licensee, or just the governance of part of the licensee. I agree that we cannot have board members speaking against this agreement but some folks I have no control over. I noted this previously and still have the same concerns. Change to the beginning of 9.viii

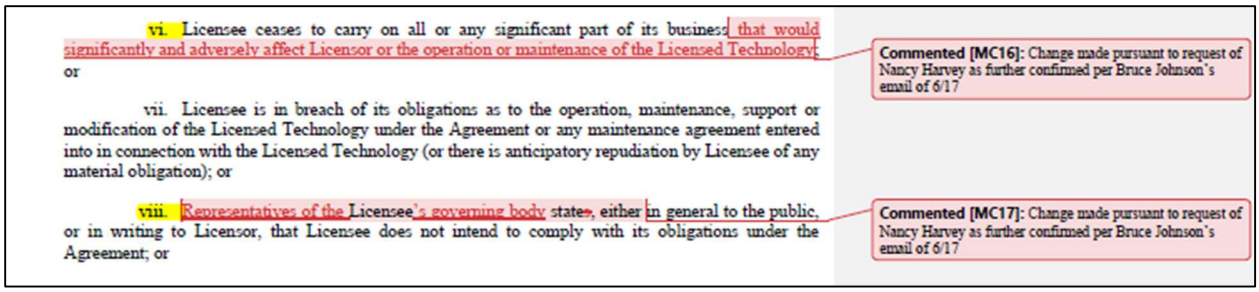
9.viii - Representatives of the Governing body of the licensee states.

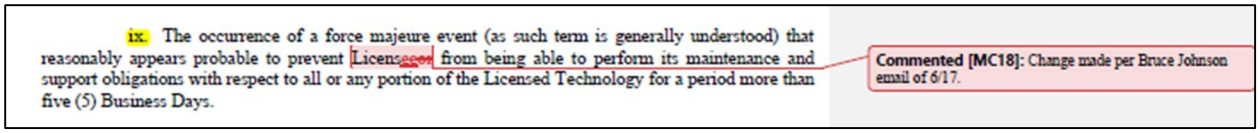

9. ix I have read this one a number of times, and I think this should say Licensee as the result of this would be if the Trust doesn't do the required maintenance due to a force majeure for 5 days the PARS system would invoke a insource.
I my words, if the Trust doesn't maintain the or continue support for 5 days then the licensed technology would then be insourced to the Trust.

- The Trust's legal counsel revised the agreement to incorporate these changes and emailed a clean version (version 16) and redlined version (version 15) to the Trust on June 22, 2020 (Ex. 18):


d. Without limiting the foregoing, so long as any Components are to be obtained from Oracle Corporation or any of its affiliated entities, or with respect to any Components offered by any of the foregoing entities (the "Oracle Components"), Licensee shall, at its sole cost and expense, ~~pay for~~promptly reimburse Licensor for the Licensor's purchase of a license to~~n~~ the Oracle Components~~License~~ and ongoing support and maintenance of such Oracle Components for Licensee and Licensor to access and use the Oracle Components for the maintenance and operation of the Licensed Technology in accordance with the Specifications in both the Production Environment and the Transition Environment.

Commented [MC9]: Change made pursuant to request of Nancy Harvey as further confirmed per Bruce Johnson's email of 6/17.





- Mr. Fauls signed the clean version (version 16) and emailed it to Ms. Harvey on June 23, 2020 (Ex. 19);
- AHA's President, Nancy Harvey, forwarded this version to James Lawless to verify that the changes he wanted were in this version (Ex. C);
- Mr. Lawless stated that it was as good as it was going to get and recommended that she present it to AHA's Executive Committee for approval, which she did (Exs. D and E);
- The EC reviewed and approved this version—which is the only version that it had (Ex. F); and
- Ms. Harvey then emailed Mr. Fauls to notify him that AHA had approved that version, thus accepting the June 23, 2020 offer, and explicitly indicated her intent to electronically sign the Amendment while adding her name to the email (Ex. 21).

These facts affirmatively show that AHA agreed to and Ms. Harvey electronically signed the June 23rd version of the Amendment (Ex. 21) pursuant to the Colorado Uniform Electronic Transactions Act. C.R.S. § 24-71.3-102(8) ("Electronic signature means 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.").

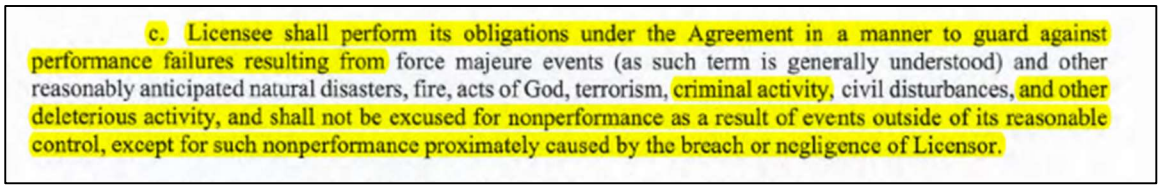
The Trust later mistakenly sending the prior draft (version 12) of the document, which both parties later mistakenly signed, does not change the fact that the parties mutually agreed to and first signed the June 23rd version and should not make the mistakenly-signed earlier draft of

the Amendment enforceable. *See Casey v. Colorado Higher Educ. Ins. Benefits Alliance Trust*, 310 P.3d 196, 206, 2012 COA 134, ¶ 48 (Colo.App. 2012) ("The doctrine of mistake allows the mistaken party to avoid the contract."). As described above, AHA has no evidence that it knowingly changed its mind and later agreed to the terms of the version 12 draft, which did not contain the changes it requested on June 12th that were incorporated into the June 23rd version. *See* response to Fact 44 above.

AHA also argues that Ms. Harvey's June 23, 2020 email (Ex. 20), was not an acceptance of the Trust's offer (*i.e.*, the June 23, 2020 email, Ex. 19). MSJ at 15. The Trust does not contend that Ex. 20 was AHA's acceptance. Indeed, the "concern" raised in Ms. Harvey's email was about a phrase in Mr. Fauls' email, not the Amendment itself. In fact, Mr. Fauls clarified that the items to be further reviewed were the training manual and documentation about operating the registration system—not the agreement. *See* Ex. 20. While Ex. 20 is not relevant to AHA's acceptance of the June 23, 2020 offer, Ms. Harvey's June 26, 2020 email (Ex. 21) is relevant. When Ms. Harvey emailed Mr. Fauls after the EC meeting on June 26th, the only version that the EC had to approve was the June 23, 2020 "offer." *See* response to Fact 44 above. And thus, Exhibit 21 was an acceptance of the offer and served as an electronic signature pursuant to C.R.S. § 24-71.3-102(8).

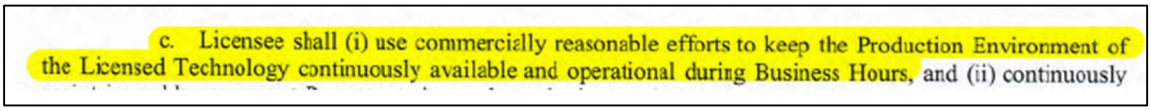
AHA next claims that the Trust admitted that there was not a meeting of the minds on whether "two factor authentication" as a cyber security measure had to be used by AHA or whether national standard NIST 853 applied. MSJ at 15. But as Mr. Johnson pointed out in his deposition, the parties did not "get down into the weeds to direct" how AHA would perform certain contractual obligations. Ex. H, 97:3-11. What the parties did agree to—regardless of

which version of the Amendment is valid—is section 10(c), which provides that AHA "shall perform its obligations under the Agreement [the LSA] in a manner to guard against performance failures resulting from … criminal activity", which includes ransomware attacks:



c. Licensee shall perform its obligations under the Agreement in a manner to guard against performance failures resulting from force majeure events (as such term is generally understood) and other reasonably anticipated natural disasters, fire, acts of God, terrorism, criminal activity, civil disturbances, and other deleterious activity, and shall not be excused for nonperformance as a result of events outside of its reasonable control, except for such nonperformance proximately caused by the breach or negligence of Licensor.

See Ex. 19, p. 10 and Ex. 28, p. 9. In addition, both versions of the Amendment include Section 8(c)(i), which required AHA to use commercially reasonable efforts to keep the Production Environment of the Licensed Technology:



c. Licensee shall (i) use commercially reasonable efforts to keep the Production Environment of the Licensed Technology continuously available and operational during Business Hours, and (ii) continuously

See Ex. 19, p. 7 and Ex. 28, p. 6. The Trust contends that AHA breached these provisions by failing to use adequate cybersecurity measures, such as two-factor authentication, which it acknowledged was needed after the first ransomware attack but did not use until after the *second* ransomware attack. AHA's effort to turn this failure into a specific contractual term is clever, but should not serve as a basis for the Court to find that there is no contract here. Further, the question of whether using two-factor authentication is a reasonable requirement under either Section 8(c)(i) or 10(c) is a factual question to be determined at trial—not in summary judgment.

AHA also argues that the Trust's breach of contract claim is based solely on the Amendment. MSJ at 13. But the Trust's breach of contract claim is based on AHA's breaches of the "Amended Agreement," which includes both the Amendment and original LSA. *See* Compl. at ¶ 17 ("Exhibits 1 and 5 are collectively referred to as the 'Amended Agreement.'"). Although

many of the alleged breaches relate to certain provisions of the Amendment, others relate to AHA's alleged failure to maintain and update the Licensed Technology as required by Section 4.A of the original LSA. *See* Compl. at ¶¶ 21, 48, 54, and 58(e) and (f).

AHA argues that an earlier, draft document, which was not agreed to by the parties and was subsequently revised in negotiations, but that was mistakenly sent and signed after the parties agreed on the June 23rd version, is valid solely because it was physically signed. This argument should fail. As described above, the facts show that the June 23rd version was negotiated, agreed to, and effectively signed by both parties. At a minimum, there remains a genuine issue of material fact regarding which version of the Agreement was agreed to that prohibits entry of summary judgment. Consequently, AHA's MSJ should be denied.

B. AHA has breached the Amended Agreement in numerous ways.

AHA's arguments regarding breach are primarily based on narrow, hyper-technical interpretations of the plain language of the applicable documents that completely ignore the purpose of both the LSA and its Amendment. It is an undisputed fact that the purpose of the Amended Agreement is to ensure that the registration system be continuously functional and available and that the Trust can immediately take over purebred Arabian horse registration services if AHA is ever unwilling or unable to do so for any reason. AHA argues that it did not breach the Amended Agreement because the unused PARS system was not encrypted by the ransomware attack, regardless of how long AHA was unable to perform purebred horse registration functions or access and use HRS or PARS. That is, AHA argues here that it could perpetually fail to perform horse registration systems if it keeps the separated, unused PARS system "operational." AHA's narrow view of its obligations not only harms the horse-registering

public that rely on the continuous availability of registration services, it completely ignores the very purpose of the Amended Agreement and would lead to an absurd result.

1. AHA breached its duty to use commercially reasonable efforts to guard against failures and to keep the HRS and PARS Registration Systems continuously available and operational.

As described above, Section 8(c)(i) of *both versions* of the Agreement required AHA to use commercially reasonable efforts to keep "the Production Environment of the Licensed Technology continuously available and operational during Business Hours." Ex. 19, § 8(c)(i) and Ex. 28, § 8(c)(i). AHA admits that the Licensed Technology includes both HRS and PARS and argues that its use of NexusTek and Unitrends to protect HRS and the Trust's use of TrinWare to protect PARS were both commercially reasonable. MSJ at 17. And while true that the ransomware attacks only encrypted Windows-based programs and not the Linux-based HRS or PARS, the loss of the Windows-based systems rendered the registration systems unavailable for 38 days. *See* responses to Facts 68-72 and 83-83 above. Further, the ransomware attacks also left AHA unable to scan the registration documents and images, which were required to be placed on the PARS file system as part of ongoing operations, until at least August 2020 (some five months after the second ransomware attack). *See* response to Facts 82-83 above. In addition, as explained in response to Facts 80-81, Mr. Johnson's test of PARS was in August 2019—not after the ransomware attacks. These disputed facts regarding the availability and operation of HRS and PARS prohibits entry of summary judgment.

In addition, while AHA maintains that it used commercially reasonable methods to protect its systems, the evidence shows that it did not use either multi-factor authorization or intrusion detection software prior to the ransomware attacks. *See* response to Fact 55 above.

AHA now tries to evade this shortfall by blaming the Trust for not explicitly requiring AHA to use these specific cybersecurity measures. *See* MSJ at 19. This argument must fail. It was not the Trust's obligation to audit AHA's cybersecurity measures. Indeed, detailing specific requirements in a static contract is plainly ineffective because cybersecurity measures are constantly evolving to meet changing threats. Instead, it was AHA's obligation to use current best practices based on its agreement to use "commercially reasonable efforts" to keep its registration systems continuously available and operational under Section 8(c)(i) of both versions of the Amendment. And by its own contemporaneous admission, AHA failed to do so. That is, AHA admitted in its March 17, 2021 insurance application that its failure to use multi-factor authentication and intrusion detection software could reasonably have given rise to the first ransomware attack and resulting insurance claim on its cybersecurity insurance policy. *Id*. These additional factual disputes also prohibit entry of summary judgment.

2. AHA failed to correct "Critical Impact Errors."

AHA argues that it did not fail to cure critical impact errors based on two things: first, it did not receive notice of the errors from the Trust until Mr. Fauls' May 14, 2021 insourcing letter and second, that the language from the earlier draft (mistakenly signed after the fact) only required a "workaround." *See* MSJ 17-18. These arguments are based on factual disputes that prohibit summary judgment. The evidence shows that the Trust provided notice to AHA in a zoom meeting on April 20, 2021 where the Mr. Fauls expressly notified AHA of the critical impact errors and that AHA was in breach of the Amended Agreement. *See* Ex. G, 115:9-119:6. So, although AHA was already well aware that its computer systems were inaccessible, it had notice of the critical impact errors from the Trust on April 20, 2021 but did not resume

completing registrations until at least nine days later on April 29, 2021 (*see* responses to Facts 67-74 above) and did not resume scanning required images into the PARS file system until months later, in August 2021 (*see* response to Facts 82-83 above). Moreover, as discussed at length above, there is also a material factual dispute regarding which version of the Amendment applies here. All of these factual disputes prohibit entry of summary judgment.

3. AHA failed to correct the hardware failures and maintain Components.

The Trust does not dispute that its hardware (i.e., the off-site servers) on which the PARS software and database was installed did not experience any failures during the ransomware outage. But the breach described in ¶ 58(e) of the Complaint relates to AHA "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." As described in the prior section and in response to Facts 82-83 above, AHA failed to timely replace the scanners (hardware) it used to scan images into the PARS file system as required by Exhibit B to the Amendment. The PARS file system is one of the Components listed in Exhibit B to the Amendment that AHA had to continuously maintain. Thus, the PARS file system was not updated or maintained as required for five months due to the ransomware attack. This material factual dispute also prohibits entry of summary judgment in favor of AHA.

4. AHA failed to maintain and keep Documentation Current.

One of the items included in the Documentation is the PARS user's manual. AHA appears to argue that the Trust waived the requirement that Documentation be maintained and kept current because Mr. Fauls acknowledged that it was not complete when the Amendment was agreed upon. *See* MSJ, pp. 20-21. But as is clear from that June 23, 2020 email, while Mr.

Fauls acknowledged that the "PARS Documentation and Training Manual" were not yet complete, he indicated his understanding that they were "nearing completion" and asked to continue meeting over the next couple of months to review and complete these items. *See* Ex. 20. Moreover, Mr. Johnson testified that, although AHA indicated that it would be provided in June 2021, the Trust never received an updated PARS user guide reflecting the new registration procedures incorporated in a February 2021 update to HRS and PARS, including recording microchip data, digital tattoo process and scanning of images with horse markings from registration applications. *See* Ex. H, 90:5-91:24. Although AHA produced a copy of a "PARS user's manual" in this case on May 25, 2022, that version was prior to the February 2021 changes. *See* Ex. J, 68:6-70:15. The updated version of the PARS users guide reflecting the updated registration process that took effect in February 2021, which was described as being updated six months later, on August 16, 2021, was first provided by AHA in a supplemental document disclosure served on October 4, 2022. *See* Ex. J, 70:1-15, Defendant's Eighth Supplemental Disclosure, highlighted copy attached as **Exhibit N**. Thus, the evidence affirmatively shows that AHA did not timely update the Documentation, including PARS User Guide, as required under the Amended Agreement. At minimum, there is a material factual dispute regarding this particular breach, which also prohibits summary judgment.

5. Numerous insourcing events have occurred.

Although the question of which version of the Amendment does not control some alleged breaches, the factual issue does matter with respect to AHA's argument concerning insourcing and *force majeure*. MSJ at 21-23. This is because AHA leans into the typographical error in Section 9(a)(ix), which AHA itself called out to be corrected in Nancy Harvey's June 12, 2020

email (Ex. 16), where the word "Licensor" (*i.e.*, the Trust) was used instead of "Licensee" (*i.e.*, AHA). Specifically, Section 9(a)(ix) provides that the Trust could declare an insourcing event and resume performing registrations if a "force majeure event (as that term is generally understood)" reasonably appeared probable to keep the party from being able to perform its maintenance and support obligations with respect to all or any portion of the Licensed Technology for 5 days.

Simply put, if the term "Licensor" is correct (as AHA maintains), then the party in this provision is the Trust, but if the term is "Licensee" (as AHA's President contended back in June 12, 2020 and as the Trust does today) then the party is AHA. The Trust maintains that enforcing the term "Licensor" here would yield an absurd result because the Trust has no maintenance or support obligations and that would render the entire provision meaningless. The law on this point is clear. "The court should interpret a contract in its entirety with the end in view of seeking to harmonize and to give effect to all provisions so that none will be rendered meaningless." *Copper Mountain, Inc. v. Industrial Systems, Inc.*, 208 P.3d 692, 697 (Colo. 2009) (internal quotations omitted). In addition, avoiding absurd results is also a primary tenant of the Court's obligation when interpreting the contract. *See Amtel Corp. v. Vitesse Semiconductor Corp.*, 30 P.3d 789, 794 (Colo. App. 2001) (holding that, "a contract should never be interpreted to yield an absurd result."). But this absurd result appears to be what AHA seeks here because it argues that under the Amendment version that it seeks to enforce, "there was no event that prevented PAT from performing maintenance and support obligations on PARS because PAT had no such obligations." MSJ at 21-22.

AHA next argues that the ransomware attack was not a *force majeure* event. MSJ 22-23. In doing so, AHA states that *force majeure* events are generally considered to be unforeseeable actions that cannot be anticipated or controlled. *Id*. at 22. Although the Trust disputes that *force majeure* is limited to an act of God or inclement weather or war, it does agree that the term refers to unforeseeable actions that cannot be anticipated or controlled. Despite arguing that it was not a *force majeure* event in the MSJ, AHA has maintained that the ransomware attacks were unforeseeable and unanticipated. *See* Ex. E, Response to Interrogatory No. 5. As such, despite its arguments in its MSJ, AHA admits that the first ransomware attack was an unforeseeable *force majeure* event as it defines the term in its MSJ. But then AHA continues (MSJ, p. 23) to argue that, Section 10(c) of the Amendment refers to *force majeure* events to include "reasonably anticipated" natural events and "deleterious activity." Thus, it appears questionable whether an unforeseen and unanticipated ransomware attack is a force majeure event under AHA's analysis.

Regardless, other courts have found that ransomware attacks are properly considered to be *force majeure* events. *See, e.g., Princeton Cmty. Hosp. Ass'n., Inc. v. Nuance Commc'ns, Inc.*, 2020 WL 1698363, at *5 (S.D.W.Va. Apr. 7, 2020); *Heritage Valley Health Sys., Inc. v. Nuance Commc'ns, Inc.*, 479 F. Supp. 3d 175, 184 n.4 (W.D. Pa. 2020). It seems that at a minimum, this is a factual issue that should not be determined in a summary judgment motion.

But if, after trial, the Court determines that one or both of the ransomware attacks were foreseeable and could have been anticipated, then the ransomware attacks were covered by Section 10(c) of the Amendment (both versions), which provided that AHA "shall perform its obligations under the Agreement ***in a manner to guard against performance failures resulting from*** force majeure events (as such term is generally understood) and other ***reasonably***

anticipated … ***criminal activity***, civil disturbances, and other deleterious activity, and shall not be excused for nonperformance as a result of events outside of its reasonable control. *See* Ex. 19, § 10(c) and Ex. 28, § 10(c) (emphasis added). Whether anticipated or not, ransomware attacks, like those perpetrated against AHA in this case, are criminal activities under Colorado law. C.R.S. § 18-5.5-102(1)(a), (d), and (e) (defining cybercrimes under Colorado criminal code).

Further, although the first ransomware attack may have been an unforeseeable *force majeure* event, the second ransomware attack was not because it was both foreseeable and anticipated by AHA as shown in the cybersecurity insurance policy application it completed between the first and second ransomware attack. *See* response to Fact 55 above. Further, AHA also acknowledged in this application that two-factor authentication and intrusion detection software are known and appropriate mitigation measures to guard against ransomware attacks, but AHA did not implement these measures prior to the second ransomware attack. *Id*. Thus, the evidence demonstrates that AHA has breached Section 10(c) of the Amendment by failing to guard against performance failures due to foreseeable criminal activity.

6. AHA has also breached the Amended Agreement by refusing to cooperate after an insourcing event.

Relying on its earlier arguments, discussed above, AHA finally claims that an insourcing event has not occurred and thus it had no obligation to cooperate with the transition of registration functions to the Trust. MSJ at 24-25. In doing so, AHA argues, once more, that it did not breach the Amended Agreement because "the PARS server, database, and file system were not impacted by the ransomware attacks." Id. at 24. Again, as discussed at length above, the PARS database and file system were not updated as required during the 38-day outage and, in the case of updating scanned images into the PARS file system, for another 4 months thereafter.

AHA also argues that its failures and the 38-day outage described above do not matter because none of its customers were really harmed. MSJ at 24-25. This "no harm-no foul" argument completely misses the purpose of the Amended Agreement. AHA's customers paid it over $180,000 in registration fees in the first quarter of 2021. *See* Ex. G, 107:15-108:3 ($181,105 in registration revenue in the first quarter of 2021). The customers whose registrations were delayed should receive the same prompt service in exchange for the fees paid as similar customers who had the good fortune of requesting services when AHA was not unable to complete registrations. In fact, prompt and superior customer service is the main reason it has gone to such lengths, including the LSA and the Amendment thereto, to assure that the purebred Arabian registration system is continuously operational for its customers. Frankly, AHA's "no harm-no foul" attitude is a primary reason the Trust has now embarked on two costly lawsuits to try to assure prompt and continuous registration services.

Based on all of the above-described breaches of the Amended Agreement, the Trust had a right to provide notice of an insourcing event under Section 9(a)(vii) of both versions of the Amendment, which provides that the Trust may resume responsibility for registrations if:

> vii. Licensee 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); or

See Ex. 19, § 9(a)(vii) and Ex. 28, § 9(a)(vii).

III. Conclusion

For these reasons, the Court should deny AHA's Motion for Summary Judgment in its entirety.

Dated October 11, 2022.

Respectfully submitted,

s/ J. Lee Gray
J. Lee Gray
Condit Csajaghy LLC

CERTIFICATE OF SERVICE

I certify that on October 11, 2022, I served a copy of the foregoing document to the following by

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Fax
☒ Electronic Service via email

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