

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 South Potomac Street Centennial, Colorado 80112	DATE FILED: September 19, 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.	<hr/> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> Case Number: 2016CV31911 Division: 202
FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT	

THIS MATTER follows an eight-day trial to the Court which occurred on 6/11/8, 6/12/18, 6/13/18, 6/14/18, 6/15/8, 7/10/18, 7/11/18 and 8/03/18. The Court, having considered the evidence, argument, pleadings and applicable law, enters the following FINDINGS & ORDER:

I. PARTIES, CLAIMS & ISSUES

1. **Plaintiff, The Purebred Arabian Trust (the “Trust”)**, filed a Complaint on August 8, 2016 and an Amended Complaint on August 31, 2017. In their Amended Complaint, Plaintiff brings forth the following claims against Defendant Arabian Horse Association (the “Association”):

- A. Declaratory Judgment on the issues of (i) the Trust’s ownership of “Licensed Technology, ... including the Database, Software and Documentation and all Updates thereto” used to register purebred Arabian horses; (ii) the Trust’s right to a “fully-functioning copy of the current version

of [the] Licensed Technology,” and (iii) the obligation of the Association to pay royalties to the Trust on “Purebred Revenues ... earned [for] Purebred Registry Services” without regard for where the services are performed.” TMO, p.2-3.¹

- B. Breach of Contract for “failure to pay Royalties ... for Purebred Registration Services ... for registering purebred Arabian horses located in Canada.” TMO p.3.

The Trust seeks a declaration of ownership over certain software referred to in this litigation as the Horse Registry System (“HRS”), which the Trust asserts is an update to or replacement for the referenced Licensed Technology and “an injunction requiring [the Association] to deliver a fully-functioning copy of the Licensed Technology and Documentation sufficient to relate solely to purebred Arabian horses and to carry out the Purebred Registry Services, including all Updates,” as well as the payment of royalties for registering purebred Arabian horses in Canada from January 1, 2017. TMO, p.3.

- 2. **Defendant, the Association** filed the following Counterclaims against the

Trust:

- A. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing as to the claim that the Trust owns the Licensed Technology developed by the Association. TMO p.3-4.
- B. Unjust Enrichment based on the argument that the Trust did not pay the substantial costs incurred in developing the Licensed Technology. TMO p.3-4.

- 3. **Third-Party Defendants Susan C. Meyer, Robert Fauls, Howard Pike and Hampton Johnston (collectively referred to as the “Trustees”)**. The

¹ A previous claim for declaratory judgment concerning the Association’s obligation to carry insurance naming the Trust as an additional insured was withdrawn at the time of trial.

Association brought claims against individual Trustees, who were appointed by the Trust to serve on the Association's Board for:

- A. Breach of Fiduciary Duty, for voting to approve the expenditure of substantial costs on the part of the Association to develop the Licensed Technology while at the same time maintaining the position that the Trust would be the owner of the Licensed Technology. TMO p.4.
- B. Civil Conspiracy alleging that the four Trustees acted together in voting to expend the Association's resources to develop software to be owned by the Trust. TMO p.4.

II. FINDINGS OF FACT

4. The parties generally do not dispute the history of the relationship between the parties or the existence of relevant contracts or documents.

Merger of AHRA and IAHA to form the Association

5. Prior to 2003 there were "two Colorado non-profit corporations involved in the Arabian horse industry" the Arabian Horse Registry of America, Inc. (the "AHRA") and the International Arabian Horse Association, Inc. (the "IAHA"). Stip, ¶1.

6. The AHRA was primarily focused on "registering purebred Arabian horses in the United States." Stip. ¶2. The IAHA was more focused on competitive horse show events. Tr.Test Faults²

7. For several years, the two organizations had explored a merger or cooperation agreement. In 2003 those discussions resulted in an agreement to merge the two entities and form the Association. Stip. ¶1

² Statements in quotation marks are not a reference to a trial transcript, but simply reflect the Court's notes and recollections of what a witness said at trial.

8. On December 12, 2003, but effective April 1, 2003, the AHRA and IAHA entered into an Agreement and Plan of Merger creating the Association. Stip.¶4; Ex.8; Ex.12.

Assignment of Purebred Registry Database to the Trust

9. On March 31, 2003, one day prior to the effective date of the merger, the AHRA entered into an Assignment and Assumption Agreement with the Trust, assigning to the Trust “the electronic database ... pertaining to [the registration of] purebred Arabian horses.” Stip.¶3; Ex.9.

10. Except for the electronic database for registering purebred Arabian horses previously assigned to the Trust, all other property of AHRA and IAHA was transferred to the newly formed Association, including all “real estate [and] intellectual property.” Stip. ¶6.

Exclusive Perpetual License to Use Registry Database

11. At the same time as the merger forming the Association, on April 1, 2003 the Trust and the Association entered into an agreement regarding the database used for registering purebred Arabian horses. This agreement is referred to as the License and Security Agreement (the “LSA”). Stip.¶7 ;Ex.11. All parties agree that the LSA is a “valid and enforceable contract.” Stip. ¶8.

12. Pursuant to the LSA, the Trust granted an “exclusive perpetual license” to the Association to use the database for registering purebred Arabian horses “subject to payment of Royalties.” Stip. ¶10(a); LSA §2.A.

13. The LSA provides, in part, that the Trust “shall remain the exclusive owner of the Licensed Technology and the Documentation and all Updates thereto, regardless

of which party generated the Updates” subject to certain “Third Party Software Agreements.” Stip. ¶10(b); LSA §3.A.

14. The LSA further provides that “[a]t its own expense, [the Association] shall (i) maintain the Licensed Technology and Documentation, and (ii) make all Updates necessary or desirable to make the Licensed Technology and the documentation sufficient to relate solely to purebred Arabian horses and to carry out the Purebred Registry Services.” Stip. ¶10(c); LSA §4.A.

Trust representatives on Association Board

15. As part of the merger agreement and the Association’s by-laws, the Trust appoints “four At-Large Directors and two At-Large Vice Presidents” to sit on the Association’s board. Stip. ¶27; Ex.8; Ex.192.

16. In August 2005, all four of the Trustees named in this litigation were serving on the Association’s board as Trust appointees. Stip. ¶28.

Development of Horse Registry System

17. On or about September 12, 2006 the Association entered into an agreement with International Business Systems (“IBS”) to “develop an application which replaces the current horse registration system developed in PICK/Universe into a web based application using J2EE/Oracle technology. Stip. ¶15

18. Prior to the creation of the Association, the AHRA was using IBM type technology to register purebred Arabian horses, while IAHA was using an Oracle based system to perform its business functions, including registration, membership, and horse show events. Tr. Test. Faults, Johnson

19. It is undisputed that all parties recognized the need to update and/or improve the various technology systems. The parties do not dispute that the technology systems in use at the time of the merger were becoming obsolete and generally, all parties understood that there was a need to both upgrade the technology and combine the functions of the two systems for more efficient operation. Tr. Test. Fauls, Johnson, Meyers, Andreasen, Pike, Jacobsen, Richardson

20. Over time, the Association's board voted to expend funds to develop what ultimately became known as the HRS. It is undisputed that the HRS performs the function of registering purebred Arabian horses, which function previously utilized the IBM based system under the LSA. The HRS also performs functions previously utilizing the Oracle based system.

Is the HRS an Update of the Licensed Technology under the LSA?

21. The heart of the dispute, as presented by the parties, is whether the HRS is a separate and distinct form of technology or an update of the IBM based Licensed Technology referenced in the LSA. The Trust maintains that the HRS should be viewed as either an "Update" or a "replacement" of the original Licensed Technology, as those terms are defined in the LSA.

22. The Association argues that the HRS is a completely different technology from the Licensed Technology and therefore HRS is owned by the Association.

23. Several experts testified comparing the technical aspects of the HRS and the Licensed Technology used to register purebred Arabian horses. These experts testified as to the general use of the term "update" in the technology field. One expert opined that the term "update" generally refers to "fixes" or "incremental improvements"

of an existing system, while another expert opined that there is “no standard use of this term within the industry” and similarly there is no standard definition of the word “replacement.” Tr. Test. Snyder, Ramey

24. A number of witnesses testified as to the differences between HRS and the Licensed Technology, including the fact that HRS uses a different type of system, the significant changes to the software, and that HRS performs many functions not associated with the registration of purebred horses.

25. Based on all of the testimony and evidence produced at trial, the Court finds that the HRS system is a new form of technology and not simply an update of the former IBM based Licensed Technology referenced in the LSA.

Does the Association have an Obligation to Update the Licensed Technology?

26. Although the parties have framed the issue in this case to be a determination of which entity “owns” the HRS, the Court finds that focusing on this question does not resolve the declaratory judgment claim. Regardless of who owns the present version of the HRS (or future updates of the HRS or even some yet unknown form of technology) the real question is what obligation does the Association have to maintain a technology system capable of registering purebred Arabian horses? The answer to this question does not depend on technology experts, but rather contract interpretation.

Interpretation of LSA Contract

27. The LSA contains specific definitions of various terms associated with the Licensed Technology, including:

AGREEMENT

1. DEFINITIONS

A. *Specific Definitions...*

“Database” means the Original Database together with all Updates thereto. ...

“Licensed Technology” means the Database and the Software and all information technology, and other items related thereto. ...

“Software” means all technology and software (in object and source code form) used with, supporting, or otherwise related to, the Database from time to time together with all Updates thereto.

“Updates” means all replacements, additions, deletions, enhancements, and modifications to, or derivative works of, the Database (including the Racing Data), the Documentation, and the Software developed by or for either party.

2. GRANT OF LICENSE

A. *Exclusive License.* ... Licensor [the Trust] grants to Licensee [the Association] an exclusive, perpetual license to reproduce, perform, display, modify, create derivative works of, distribute, ... and ... otherwise exploit the Licensed Technology and Documentation (in whole or in part) in connection with the legitimate business purposes of [the Association]
...

3. OWNERSHIP

A. *Software.* [The Trust] is and shall remain the exclusive owner of the Licensed Technology and the Documentation and all Updates thereto, regardless of which party generated the Updates, ...

4. MAINTENANCE INSURANCE; BACK-UP; POTENTIAL LITIGATION

A. *Maintenance and Updates.* At its own expense, [the Association] shall (i) **maintain the Licensed Technology** and the Documentation, and (ii) make all Updates necessary or desirable to make the Licensed Technology and the Documentation **sufficient to relate solely to purebred Arabian horses and to carry out the Purebred registry Services**; ... [The Trust] shall have no obligation to modify, update, maintain, or support the Licensed Technology or the Documentation. ... [The Trust] shall have the

right ... to review and make copies of the Licensed Technology and Documentation. (emphasis added) ...

7. ...
MISCELLANEOUS ...

E. Further Assurances. The parties shall cooperate fully with each other and execute such further instruments, documents, and agreements, and shall give such further written assurances, as may be reasonably requested by another party to better evidence and reflect the transactions described herein and contemplated hereby, and to carry into effect the intent and purposes of this Agreement.

28. The Articles of Merger between AHRA and the Association also references the licensing of the registration database and states in pertinent part, the “registration database, as such database changes from time to time (the “licensed Rights”), shall be licensed to [the] Association under the License Agreement. The legal ownership of the Licensed Rights shall remain with the Purebred Trust so that registration and other related activities may continue should a bankruptcy or dissolution of Arabian Horse Association occur on in the event of failure to pay the Purebred Revenues as provided below.” (Emphasis added) Merger, Art.IX, Section 9.1.

29. The language in the LSA and the Merger Agreement makes clear that there is an obligation on the part of the Association to maintain a system capable of registering purebred Arabian horses. Whether that is the previously transferred IBM system or an “updated,” “modified” or “derivative” system, it seems that the choice is the Association’s, so long as there is A System, capable of performing the registration functions. The terms of the LSA also provide that this system must relate “solely” to the registration of purebred Arabian horses. It is clear that the HRS does much more than register only purebred Arabian horses. In fact, the Trust has acknowledged that HRS does more than register purebred Arabian horses, and the Trust states that it “is not

claiming that it owns all of the IT program of [the Association] only that part that relates to Registry.” Tr.Test.Faults

30. It is not clear to the Court whether or not the original IBM type system remains capable of performing the registration functions and/or whether the Documentation associated with such registrations has been maintained. If not, this may be a breach of the LSA.

31. The Trust has stated that it does not want to terminate the LSA, but rather seeks a ruling from the Court as to what are the obligations under the agreement, and enforcement of those obligations.

32. Without further information regarding the capabilities of the original Licensed Technology, or indeed whether that system even exists, the Court cannot determine whether or not the Association has failed to meet its obligations. The Court does find that the Association has such obligation. Further, the Court notes that a decision regarding the ownership of HRS would not address the Trust’s real concern (which is to assure its ability to register purebred Arabian horses in the event that the Association cannot perform such function), since several witnesses referenced the Association’s plans to pursue “Future State” which the Court understands is further technology upgrades and that with Future State it may not be possible to “separate out the registry from the rest of the system.” Tr. Test. Faults.

Canadian Registration Services Royalties

33. The LSA contains provisions stating that the Association “is obligated to pay to [the Trust] the Royalties (as defined below), which Royalties are, in part, payment

for the grant of the license provided for in this Agreement.” LSA, Recitals (B). The LSA further provides:

AGREEMENT

1. DEFINITIONS.

“Purebred Registry Services” means services performed by [the Association] with respect to the registration of purebred Arabian horses and activities relating thereto that result in the generation of Purebred Revenues.

“Purebred Revenues” means the gross revenues derived by [the Association] from activities of the Arabian Horse Registry (as defined in the Licensee Bylaws) including registration fees, transfer fees, service fees and administration fees relating to purebred Arabian horses, as the same are more particularly described in Exhibit A.

“Royalties” means one-third of the Purebred Revenues excluding (i) credits for amounts refunded to third parties by Licensee, and (ii) one-third of the applicable taxes ...

...

6. ROYALTIES; GRANT OF SECURITY INTEREST.

a. Payment of Royalties; Records. [The Association] shall pay ... the Royalties within 30 days following the end of the calendar quarter in which the Royalties are received ...

...

EXHIBIT A.

GROSS PUREBRED REVENUES FROM WHICH ROYALTIES ARE DERIVED

- (1) Registration Fees.
- (2) Ownership Transfer Fees.
- (3) Service Fees including (a) DNA test and blood type test fees, (b) semen transportation fees, and (c) racing certificates fees.
- (4) Administration Fees including (a) transaction processing fees, (b) certificate fees, (c) name change fees, and (d) other miscellaneous fees.

34. The Association's bylaws (referenced above) which were attached to the Merger Agreement also reference the payment of royalties. The bylaws define royalties in a similar manner as the LSA stating:

One third (1/3) of the gross revenues derived from the Arabian Horse Registry, including registration fees, transfer fees, service fees and administration fees (the "Purebred Revenues"), shall be paid to the ... Trust.... Ex.192, Association Bylaws, Art.IX, Section 3, paragraph d

35. There is nothing in the LSA, Merger, or Bylaws that specifically references the registration of Canadian purebred Arabian horses, or in fact references any specific geographic region.

36. Various witnesses testified that, in the past, the Canadian Arabian horse association did not have a software system capable of registering purebred, part-bred or Anglo/Arabian horses. Instead Canadian staff had "access" to the Associations registry system and would perform the registration of their horses. The Canadian group paid a nominal fee of .50 per registration. After HRS was activated the Canadian employees could no longer access the registry. At that point, the Canadian Registry contracted with the Association to perform registration services, with the Association's staff actually doing the data entry work. Tr. Test. Kam; Ex.144, 146 and 149. The Canadian Arabian Horse Registry ("CAHR") entered into a fee agreement with the Association providing for a fee schedule for registration services of Canadian horses. Ex. 173. This agreement was effective January 2017. Tr. Test. Kam.

37. The CAHR entered into a "management agreement" with the Association. Ex.149. This agreement provides, in part:

1. [That] CAHR shall continue as the registry for Canadian Purebred Arabian and Part-bred Arabian Horses ...
2. [The Association] will provide to CAHR membership and registration services and associated accounting services ...
3. CAHR shall licence (sic) to [the Association] the existing CAHR membership, Canadian Purebred Registry, and Canadian Part-Bred database (Database) for the duration of this Agreement. [The Association] will maintain this Database by adding, deleting and modifying data as necessary to fulfill this Agreement.... Ex.149.p.1

38. The Court finds that, based on the testimony at trial, and the relevant exhibits, that the Association's activities related to the registration of Canadian horses on behalf of the CAHR do not fall under the definitions of Purebred Revenues or Purebred Registry Services as referenced in the LSA and therefore no royalty payments are due to the Trust for these services. Part of this finding is based on the language of the LSA that references the payment of royalties as the fee for the Association's use of the Trust's database and Licensed Technology. The Court finds that the Association is not using either the database or the Licensed Technology to perform services associated with registrations on behalf of the Canadian group.

Trustees Fiduciary Duties

39. It is undisputed that all of the Trustees voted to approve the expenditure of funds for the creation of the HRS, with one abstention by Trustee Johnson in May 2010. Stip. ¶29.

40. It is also undisputed that the Association regularly provided financial statements setting out the costs associated with developing the HRS. Stip. ¶¶34. The Trustees approved these various financial statements. Stip. ¶¶39.

41. The Trustees all acknowledge that they owed a fiduciary duty to the Association. Stip. ¶¶36. The Trustees testified that they did not believe that, at the time of their votes approving the expenditures for HRS that there was a conflict of interest between their position as representatives of the Trust and board members of the Association. Instead they believed that it was “in the best interest of the Association to develop business software.” Tr. Test. Pike.

42. There was no evidence, or even allegation, that any of the Trustees received any personal benefit because of their votes to expend money for the development of HRS.

43. Additionally, it is undisputed that the Association always understood that the Trustees were serving on the Association’s Board as appointed representatives of the Trust.

APPLICATION OF THE LAW

I. Declaratory Judgment Claim

“The purpose of the declaratory judgment law is to afford parties judicial relief from uncertainty and insecurity with respect to their legal relations. Because it is a remedial statute, it must be ‘liberally construed and administered’ to accomplish its purpose. [citation omitted] Thus, ‘the required showing of demonstrable injury is somewhat relaxed in declaratory judgment actions. A declaratory judgment action is appropriate

when the rights asserted by plaintiff are present and cognizable ones.” *Wainscott v. Centura Health Corporation*, 351 P3d 513, 518-19 (Colo. App. 2014).

The Court finds that the Trust is entitled to entry of a Declaratory Judgment on the issue of its right to a “fully-functioning copy of the current version of [the] Licensed Technology.” TMO p.2-3. The Licensed Technology is that software licensed to the Association pursuant to the LSA. The Court finds that while the HRS provides the functions of the prior Licensed Technology it is not an update to that Licensed Technology. However, the LSA obligates the Association to maintain the Licensed Technology such that the Licensed Technology is “sufficient to relate solely to purebred Arabian Horses and to carry out the Purebred registry Services.” LSA 4.A.

While it may be possible to update or maintain the original IBM system, it does not appear that the Association has provided any such updates to that system. To the extent that the original software is (or can be made to be) functional, then the Association must continue to maintain and update that software. Further, it appears that at some point (if not already) it will be necessary to upgrade or replace the IBM system with another type of system. It is the responsibility of the Association to provide this upgrade or replacement. It will also be the responsibility of the Association to continue to maintain or replace a system such that the Trust always has the capability of providing registration of purebred Arabian horses, in the event that the Association can no longer perform those functions.

To be clear, 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. This does not mean that every type of technology used by

the Association, even if it performs registration functions becomes the property of the Trust. The Association may find that it is more cost effective to have one system, or it may conclude that maintaining a separate system for registration of purebred Arabian horses is a better financial decision, even if the Association does not use that system for performing registration functions. 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. That is what the parties bargained for when they entered into the LSA. Judgment on the Trust's claim for Declaratory Judgment is entered in its favor, as described above.

II. Breach of Contract Claims

The well-established principles of contract law establish that the primary goal of contract interpretation is to “determine and give effect to the intent of the parties. We ascertain the parties’ intent ‘primarily from the language of the instrument itself.’” *Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP*, 420 P3d 223, 235 (Colo. 2018), quoting *Ad Two, Inc. v. City & City of Denver*, 9 P3d 373, 376 (Colo. 2000). “To determine the intent of the parties, the court should give effect to the plain and generally accepted meaning of the contractual language.” *Copper Mountain, Inc. v. Indus. Sys., Inc.*, 208 P3d 692,697 (Colo. 2009). “A contract should be interpreted to harmonize and, if possible, to give effect to all its provisions.” *First Christian Assembly of God, Montbello v. City & City. Of Denver*, 122 P3d 1089, 1092 (Colo. App. 2005)

(A) Plaintiff Trusts Breach Claim

The Trust asserts that the Association has breached the LSA by failing to pay royalties on payment it receives from the Canadian horse association for registering horses on

behalf of that entity. The Court has interpreted the LSA to require the payment of royalties for registration services performed by the Association when registering purebred Arabian horses using the Trust's Licensed Technology and/or Database. In the case of Canadian registrations there was a period of time in which the Association was using the Trust's Licensed Technology (i.e. the software) to process registrations of Canadian horses. However, starting in 2017 the Association is no longer using the Trust's software. Neither is it using the Trust's database for purebred Arabian horses, instead it is using the Canadian database. Thus there is no breach, and no requirement to pay royalties arising from the registration services provided to the Canadian Arabian horse association. Judgment on the Trust's breach of contract claim is entered in favor of the Association on this claim.

(B) Defendant Association's Breach Claim

The Association has asserted claims of Breach of Contract and Unjust Enrichment against the Trust asserting that the Trust's claim of ownership over HRS is either a breach of the duty of good faith and fair dealing assumed in every contract or constitutes unjust enrichment on the part of the Trust, since the Trust did not contribute financially to the development of HRS. Since the Court has found that HRS is not "owned" by the Trust there is no breach, nor is the Trust unjustly enriched. The Association's alternative theory of Unjust Enrichment must also fail for the same reason.

Further, the Association's Unjust Enrichment claim is precluded in light of their contract claim. Such a claim cannot proceed where there is a valid contract, even as an "alternative theory" for recovery. Colorado Courts however have "rejected this argument, holding that alternative pleading does not limit the principle that an express

contract precludes an implied contract on the same subject matter. Thus, the fact that [Association's] breach of contract claim may fail does not allow [the Association] to plead unjust enrichment in the alternative." *Echostar Satellite, L.L.C. v. Splash Media Partners, L.P.* 2010 WL 3873282, p. 9 (D.Colo. 2010). See also: *Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, LLC*, 176 P3d 737, 741 (Colo. 2007); *Bellairs v. Coors Brewing Co.*, 907 F.Supp 1448, 1445 (D.Colo. 1995) citing *Vigoda v. Denver Urban Renewal Authority*, 646 P2d 900 (Colo. 1982). Judgment on the Association's claims for Breach of Contract and Unjust Enrichment enter in favor of the Trust.

III. Breach of Fiduciary Duty/Civil Conspiracy Claims

"A claim for breach of fiduciary duty is a tort aimed at remedying economic harm suffered by one party due to a breach of duties owed in a fiduciary relationship. A fiduciary relationship exists between two persons when one is under a duty to act or give advice for the benefit of the other on matters within the scope of the relationship." *Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP*, 420 P3d 223, 235 (Colo. 2018). "To prove a claim for breach of fiduciary duty, it is the plaintiff's burden to demonstrate, inter alia, that he or she has incurred damages and that the defendant's breach of fiduciary duty was a cause of the damages sustained. The element of causation is satisfied when the plaintiff proves that the defendant's conduct was a substantial contributing cause of the injury." *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P3d 23, 26 (Colo. App. 2005).

The officers and members of an association's board owe a fiduciary duty to the association and its members. *Semler v. Hellerstein*, 2016 WL 6087893, p.5 (Colo. App.

2016). “A director must act with an extreme measure of candor, unselfishness and good faith. ... [However], [m]ultiple loyalties do not, *per se*, constitute a breach of fiduciary duty. ... Directors may have interests which appear to conflict with the fiduciary duties owed to the corporation, and this apparent conflict does not, *a fortiori*, constitute a breach of fiduciary duty. ... Accordingly, under the law, ... a breach of duty arising out of the representation of conflicting interest can be avoided by full disclosure and consent.” *Astarte, Inc. v. Pacific Indus. Systems, Inc.*, 865 F.Supp. 693, 705 (D.Colo 1994).

A claim for civil conspiracy “requires (1) two or more persons ...; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof.” *Semler v. Hellerstein*, 2016WL6087893, p.4 (Colo. App. 2016). “Civil conspiracy is a derivative cause of action that is not independently actionable. [citation omitted] If the acts alleged to constitute the underlying wrong provide no cause of action, then no cause of action arises for the conspiracy alone.” *Colorado Community Bank v. Hoffman*, 338 P3d 390, 397 (Colo. App. 2013).

In this case the parties stipulate that the Trustees owe a fiduciary duty to the Association. It is also stipulated that the Trustees are appointed to the Association’s board by the Trust, and thus, it is clear that their position as representatives of the Trust on the Association Board was known and understood by all parties.

The Association asserts that the Trustees breached their fiduciary duty to the Association when they voted, along with other board members, to permit the expenditure of Association funds to create HRS, while at the same time knowing that the Trust would assert an ownership interest in the HRS.

First, even if it was a breach of fiduciary duty to vote in favor of expending funds to develop HRS, the Association has not established that these votes resulted in damage to the Association. The evidence shows that even if all four Trustees had voted “No” or had recused themselves from votes concerning HRS, the remaining board members’ votes would have been sufficient to approve the expenditure. Further, there was overwhelming evidence that the technology systems of the Association required upgrading and that funds had to be spent. The testimony supports a finding that the Association needed to expend funds for technology with or without the participation of the Trustees.

Second, to the extent that there was a conflict of interest between the duty owed to the Trust and the duty owed to the Association, such potential conflict was known in so far as the Trustees were clearly serving as representatives of the Trust. Further, the Court finds that the dispute over the ownership of HRS was not fully contemplated or understood when the issue of improving the Association’s technology was first raised before the Board. Therefore, it is not clear that a conflict of interest even existed.

Finally, based on the Court’s finding that HRS is not the same as the Licensed Technology defined in the LSA, the Trustee’s vote to expend funds for the development of HRS cannot be seen as a vote to benefit the Trust at the expense of the Association. For all of these reasons, judgment must enter in favor of the Trustees on the Association’s claim of Breach of Fiduciary Duty.

Because the Court has found that there was no Breach of Fiduciary Duty on the part of the Trustees, there can be no Civil Conspiracy since the purported underlying over act was not actionable. Further, the Court did not find any evidence that the

Trustees conferred or agreed to vote on the expenditure of funds to develop HRS, outside their discussions as members of the Association Board. Judgment on the Association's claim for Civil Conspiracy is entered in favor of the Trust.

CONCLUSION

THE COURT, hereby enters judgment pursuant to C.R.C.P. 58(a) as follows:

A. Plaintiff's Declaratory Judgment Claim. On Plaintiff the Trust's Claim for Declaratory Judgment, Judgment is entered in favor of the Trust finding that the Association is required to provide a functioning version of software capable of registering purebred Arabian horses, and the Association is required to maintain the database for such registrations. The Court finds that the HRS is not a version of the Licensed Technology as that term is defined in the LSA.

B. Plaintiffs Breach of Contract Claim. On Plaintiff's Breach of Contract claim concerning payment of royalties for registration of Canadian purebred Arabian horses judgment is entered in favor of Defendant, the Association.

C. Defendant's Breach of Contract/Unjust Enrichment Claims. On Defendant's Breach of Contract/Unjust Enrichment claim based on ownership of the HRS judgment is entered in favor of Plaintiff, the Trust.

D. Defendant's Breach of Fiduciary Duty/Civil Conspiracy Claims. On the Association's claims for Breach of Fiduciary Duty and Civil Conspiracy judgment is entered in favor of Third-Party Defendants, the Trustees.

SO ORDERED THIS September 19, 2018.

BY THE COURT:



Elizabeth Beebe Volz
District Court Judge