

CAUSE NO. 2014-2287-3

BAYLOR UNIVERSITY,	§	
	§	
PLAINTIFF,	§	IN THE DISTRICT COURT,
	§	
V.	§	74TH JUDICIAL DISTRICT,
	§	
THE BAYLOR UNIVERSITY ALUMNI ASSOCIATION,	§	MCLENNAN COUNTY, TEXAS
	§	
DEFENDANT.	§	

**DEFENDANT’S ORIGINAL ANSWER, FIRST AMENDED COUNTERCLAIM,
AND REQUEST FOR DISCLOSURE**

The Baylor University Alumni Association (“BAA”), as its Original Answer to Baylor University’s Original Petition, and as its Original Counterclaim, states the following:

ORIGINAL ANSWER¹

1. **General Denial.** The BAA denies each allegation of Plaintiff’s Original Petition and exercises its right under Rule 92 of the Texas Rules of Civil Procedure to require Plaintiff to prove each allegation as required by law.

2. **Plaintiff’s Lack of Capacity.** The BAA denies that Plaintiff is entitled to recover in the capacity in which it sues insofar as plaintiff claims to be a beneficiary of a trust. The BAA further denies existence of a trust.

3. **Defendant’s Capacity.** The BAA denies that it is liable in the capacity in which it is sued insofar as Plaintiff claims that the BAA is a trustee of a trust. The BAA further denies that it is liable in the capacity in which it is sued in response to Plaintiff’s allegation that the BAA is a charitable trust under Texas law.

4. **Estoppel.** By virtue of its conduct, Baylor is estopped from asserting that the BAA has breached obligations to it under the parties’ agreements or has failed to perform any

¹ The BAA’s First Amended Counterclaim, *infra*, is incorporated herein by reference as if set forth verbatim.

obligations thereunder. Baylor also is estopped to assert that the BAA does not perform the purposes for which it was formed, as set forth in its Constitution and Bylaws and its Articles of Incorporation.

5. License. In opposition to Baylor's claims for trademark infringement and trademark dilution, the BAA alleges that it holds a license to use the BAA Marks, as set forth below, and that it therefore is entitled to use the BAA Marks.

6. Breach of Contract. As set forth below, Baylor has repeatedly been guilty of a prior material breach of the parties' agreements, and it therefore is not entitled to assert that the BAA has breached those agreements.

7. Prevention of Performance. Baylor has prevented the BAA from performing certain of the functions allocated to it under the parties' agreements, thus excusing any alleged non-performance.

8. Unclean Hands. Baylor's requests for injunctive and equitable relief are barred by the doctrine of unclean hands.

9. Fair Use. BAA's use of the BAA Marks, even if there were no license agreement, is a legally permissible fair use of the terms "Baylor Alumni Association" and "Baylor University Alumni Association," insofar as those terms are used descriptively to identify BAA's membership and purpose.

FIRST AMENDED COUNTERCLAIM

As its First Amended Counterclaim against Baylor University, the BAA states the following:

I. FACTUAL BACKGROUND

A. Introduction.

1. The BAA has been Baylor's officially recognized alumni association since it was incorporated in 1978 as the "Baylor University Alumni Association." The BAA is the successor to the Baylor Ex-Students Association, which had been Baylor's alumni organization for many years.

2. The BAA was incorporated as a Texas non-profit corporation with the purpose of providing:

the support of benevolent, charitable, and educational undertakings by extending financial and other aid to Baylor University and to students thereof, by generally encouraging sentiments favorable to education and by promoting union of and good fellowship among former students and friends of Baylor University; to coordinate all alumni activities; to serve as the general alumni organization of Baylor University; and to maintain the administrative agency and executive personnel needed to provide for a continuity of alumni activity, interest and financial support of Baylor University.

Constitution And Bylaws of The Baylor Alumni Association, Art. I § 2.

3. Since its incorporation, the BAA has provided substantial support to Baylor students and the university. Indeed, a report dated January 29, 2007, which was prepared by Baylor's administration, stated that BAA members accounted for 57.03% of all alumni giving to Baylor in 2004; 73.82% of all such giving in 2005; and 53.57% of all such giving in 2006. Baylor has refused to give the BAA data for years after 2006.

4. The BAA's efforts to support Baylor continued despite Baylor's campaign to take over the alumni functions that were the province of the BAA, until Baylor made performance of

some functions impossible. Accordingly, the BAA fulfilled its role as Baylor's general alumni organization as long as Baylor did not wrongly keep it from doing so. The BAA remains ready and willing to continue acting as Baylor's general alumni association, consistent with its rights and obligations under its contracts with Baylor.

5. Over recent years, the relationship between the BAA and the university cherished by its members has soured. Baylor's administration and Board of Regents, determined to silence the BAA's independent voice and to seize control of alumni relations and fundraising, embarked on a course towards the destruction of the independent BAA and the usurpation of its functions by the university.

6. Baylor's filing of this suit was the culmination of the effort to destroy the BAA. Because the individuals today governing Baylor have chosen to bring the parties' dispute to court, the BAA now must assert the legal claims to which Baylor's conduct has given rise. It does so reluctantly but resolutely, confident that its actions are in the long-term best interests of Baylor's alumni and the university itself.

7. As the BAA defends itself, a decent respect for the opinions of those who care for Baylor requires that the BAA declare the reasons for its actions. In summary:

- a. Baylor has failed to honor contractual promises it made to the BAA, thereby breaching its contracts;
- b. Baylor has violated the BAA's rights under the parties' trademark license agreement by purporting to unilaterally terminate it in violation of its terms;
- c. Baylor has unlawfully purported to unilaterally terminate the parties' other written contracts in contravention of their terms;
- d. Baylor has caused confusion between the BAA and Baylor's in-house alumni

organization, the “Baylor Alumni Network,” which Baylor created to usurp the BAA’s functions, thereby abrogating and impairing the rights it granted to the BAA in the trademark license agreement and other agreements;

- e. Baylor has refused to honor its contractual promises to house the BAA in a building on its campus, going so far as to destroy the Hughes-Dillard Alumni Center and later to lock the BAA out of its interim offices in a Baylor-owned building, repudiating a contrary contractual promise;
- f. Baylor has frustrated the BAA’s efforts to carry out its functions as Baylor’s officially recognized alumni association, effectively preventing the BAA from fully performing certain obligations under the parties’ contracts;
- g. Baylor, having impeded or destroyed the BAA’s ability to perform some of its historic functions, has seized on the BAA’s alleged non-performance of those functions as an excuse for the filing of this lawsuit; and
- h. Baylor has invoked alleged legal loopholes to call into question the enforceability of contracts with the BAA.

The facts underlying these charges follow.

B. The License Agreement.

8. Several contracts govern the relationship between the BAA and Baylor. The foremost of these is the *License Agreement Between Baylor University and the Baylor University Alumni Association* (the “*License Agreement*”), which was signed by Baylor’s President, Dr. Herbert H. Reynolds, in 1993. This agreement was drafted by Baylor’s attorneys, or otherwise prepared by Baylor, and its execution was duly authorized by Baylor’s Board of Regents.

9. In the *License Agreement*, Baylor granted the BAA “a perpetual and fully paid-up license” to use the names “Baylor Alumni Association,” “Baylor University Alumni Association,” and “The Baylor Line” (together the “BAA Marks”). *License Agreement*, § 2.1. The BAA’s right to use the names “Baylor Alumni Association” and “Baylor University Alumni Association” is “sole and exclusive,” while the right to use “The Baylor Line” on magazines is sole and exclusive so long as the BAA publishes a magazine under that name. *License Agreement*, § 2.2.

10. As Baylor admits,² the BAA’s license allows it to use the BAA Marks so long as the BAA, at a minimum:

- a. Serves as the general alumni organization of Baylor;
- b. Maintains an administrative office in Waco;
- c. Carries out the purposes, objects, and activities set forth in the “Constitution and Bylaws of the Baylor Alumni Association;”
- d. Publishes an alumni magazine; and
- e. Organizes and sponsors activities for the Baylor Homecoming on at least an annual basis.

License Agreement, § 5.1.

11. The *License Agreement* can be terminated only in accordance with its section 6. *License Agreement*, § 2.1. Section 6, in turn, allows termination only if the BAA “fails to substantially comply with any of its obligations owed to” Baylor under the agreement. *License Agreement*, § 6.1. However, before Baylor can invoke any right to terminate the License Agreement, it must give “a written notice of default, specifying the nature of the default and what is reasonably and specifically required to remedy the default.” *Id.* If a proper notice is

² Plaintiff’s Original Petition, paragraph 18.

given, then the BAA has a reasonable time, not longer than 120 days, to cure the default. If, and only if, the BAA fails to cure a properly noticed default, Baylor may give written notice of termination of the *License Agreement*.

12. The BAA's freedom to take positions contrary to those of the individuals who control Baylor's administration or Board of Regents at any passing moment was deemed crucial to its role by both the BAA and Baylor's President Reynolds. That freedom therefore is enshrined in the *License Agreement*, which provides that the BAA "is an independent voice of alumni of Baylor University" and that its positions on issues affecting the university are not subject to Baylor's control and "shall not be grounds for [Baylor's] termination of this agreement." *License Agreement*, § 9.2.

13. Section 9.2 further provides that the BAA "is completely independent from" Baylor and that Baylor has no right to control the BAA's actions, other than its contractually prescribed quality control right as to goods and services bearing the licensed trademarks.

C. The Official Recognition Agreement.

14. The BAA and Baylor also are parties to an *Official Recognition And License Agreement Between Baylor University And The Baylor Alumni Association* (the "*Official Recognition Agreement*").

15. The *Official Recognition Agreement* was entered into in May 1994, and was signed by Dr. Reynolds as President of Baylor and by Ms. Judy Battles, the President of the BAA. The BAA believes that, like the *License Agreement*, this agreement was drafted by Baylor's attorneys, or otherwise prepared by Baylor, and its execution was duly authorized by Baylor.

16. Under the *Official Recognition Agreement*, Baylor "recognizes the Baylor

University Alumni Association ('Baylor Alumni Association') as the official alumni organization of Baylor University and all of its academic units." In consideration for that recognition, the BAA agreed to perform certain functions as the university's alumni association and Baylor gave its word to allow it to do so for as long it performed those functions:

As long as the Baylor Alumni Association maintains the above services on behalf of Baylor University and continually and consistently seeks to enroll graduates as members of the Baylor Alumni Association, Baylor shall consider the Baylor Alumni Association to be 'the general alumni organization of all the academic units of Baylor University.'

Official Recognition Agreement, section I.

17. Under the *Official Recognition Agreement*, Baylor made yet another promise that it has failed to honor. In section II, Baylor granted the BAA "an exclusive license to occupy for its exclusive use a building on the Waco campus of Baylor for the purposes set forth in Section I" of the agreement.

18. The BAA's right to occupy a building on the Waco campus must be honored as long as the BAA in good faith performs its obligations under the *Official Recognition Agreement*:

The term of the license granted by Baylor to the Baylor Alumni Association under Section II of this agreement is indefinite and may be terminated by Baylor only in the event the Baylor Alumni Association defaults by ceasing to carry out in good faith all of the purposes set forth under Section I above.

Official Recognition Agreement, section IV.

19. The BAA's license to occupy for its exclusive use a building on the Baylor campus is not limited to any particular building. When the *Official Recognition Agreement* was executed, however, the BAA was housed in the Hughes-Dillard Alumni Center. The agreement thus recognized that the BAA's license under section II of the agreement "includes the exclusive right to occupy and use the Hughes-Dillard Alumni Center building . . ." *Id.*, section III.

20. By contract, Baylor could terminate the Baylor Alumni Association's right to use the Hughes-Dillard Alumni Center "only in the event that Baylor University needs the land on which the center is located for its purposes and no other land is reasonably available to Baylor for the purpose for which the land is needed." *Id.* In such a case, the BAA's right to occupy an on-campus building would continue:

Should the Baylor Alumni Association's right to use the Hughes-Dillard Alumni Center be so terminated by Baylor, **Baylor shall provide the Baylor Alumni Association with another building on the Baylor campus**, the size, condition, quality of construction, and location of which is approximately the same as the size, condition, quality of construction, and location of the Hughes-Dillard Alumni Center.

Official Recognition Agreement, Section III (emphasis added).

D. The Events of Recent Years.

21. In 2013, representatives of Baylor's Board of Regents and the BAA entered into negotiations aimed at forging a new relationship between the two. This effort followed several years of escalating tensions, years that saw Baylor take a number of actions aimed at weakening the BAA.

22. Perhaps the most glaring of these was the establishment of the "Baylor Alumni Network," an organization formed to take the place of the BAA despite its contractual rights to serve as the officially recognized alumni association of Baylor.

23. The Baylor Alumni Network originally was conceived by the BAA as part of its effort to expand its alumni relations efforts. The BAA devoted funds and energy into developing a plan for this network, which was an important part of its effort to meet its obligations as Baylor's official alumni organization.

24. But Baylor prevented the BAA from implementing that plan. In 2002, Baylor hired away the BAA's executive director, who then used the BAA's detailed, strategic and

tactical plans to create a newly formed alumni services department at Baylor that would come to be known as the Baylor Alumni Network.

25. Acknowledging the usurpation of the plan, the former executive director wrote in a September 2002 report to BAA directors that:

the efforts made by members of our association (BAA) to devise a long-range plan were not in vain. Although the university has decided to offer critical services to alumni in a manner different from that we envisioned, the services will be available to our alumni – and soon.

In this missive, he effectively admitted that Baylor intended to implement the BAA's plan itself:

If in five years the goals and purposes of the association for our alumni, as you enumerated them in the long-range plan, have been realized, I hope you will take special satisfaction in recognizing the part you have played in the process.

26. Baylor then adopted "The Baylor Alumni Network" as the brand for its effort to usurp the BAA's functions. The use of this name by Baylor violated the BAA's right to sole and exclusive use of the marks "Baylor Alumni Association" and "Baylor University Alumni Association" and caused confusion as to whether the BAA was affiliated with the Baylor Network. Baylor then exacerbated the situation by using the Baylor Alumni Network to take over a number of functions that the BAA historically had performed, including the class ring program, the alumni group travel program, the Heritage Club program, and others.

27. Baylor also took steps to drive internet traffic to the "Baylor Alumni" page of Baylor's web site. To do that, it used phrases like "Baylor Alumni," "Baylor Alumni and Friends," "Baylor University Alumni," and "Alumni of Baylor University" as key words in the metadata underlying its web page. As a result, searches for "Baylor University Alumni Association" include Baylor's alumni page near the top of the search results. These actions violated the exclusive rights conferred on the BAA by the *License Agreement*.

28. The BAA and Baylor had long worked closely together and Baylor had provided

the BAA with a number of services that facilitated its operations. These included allowing the BAA's staff to participate in Baylor employee benefit programs, providing bulk mailing services to the BAA, and hosting the BAA's internet presence and electronic mail systems.

29. Beginning in 2007, Baylor began to insist on the separation of the BAA's functions from Baylor. It required the BAA to remove its employees from Baylor's benefits programs, ended the web hosting, and otherwise began to cut off the BAA's access to university services. These actions were meant to impair the BAA's ability to function and were part of a plan to render the BAA unable to act as Baylor's officially recognized alumni organization so that Baylor would have a pretext for terminating its role as such.

30. To further impede the BAA's ability to perform its historic functions, Baylor took other steps, including:

- a. Ending the BAA's inclusion in the directory of entities that could be reached by calling "1-800-BaylorU;"
- b. Ending the BAA's long-standing use of "@baylor.edu" electronic mail addresses for its staff members;
- c. Objecting to the BAA's use of "bayloralumni.com" for its web site and electronic mail addresses on the ground that the BAA could only use "bayloralumniassociation.com" under the *License Agreement*, despite the fact that Baylor had long known of and permitted the BAA's use of "bayloralumni.com;"
- d. Taking over certain alumni education and travel programs that the BAA had developed or managed at Baylor's request, and demanding that the BAA cease using the name "Baylor" in connection with its programs;
- e. Ending Baylor's distribution of the BAA's "Between The Lines" electronic mail

- newsletter;
- f. Ending the BAA's historic role in relation to Baylor's official Homecoming activities (despite the express contractual agreement that the BAA would conduct Homecoming activities);
 - g. Ending the BAA's access to mailing addresses and other contact information for the members of graduating classes, despite the contractual requirement that the BAA seek to enroll new members;
 - h. Excluding the BAA from graduation activities and ending its hosting of a reception tent outside the graduation hall;
 - i. Ending the BAA's stewardship of the Baylor class ring program;
 - j. Ending the BAA's paid use of Baylor's call center for solicitation of new members;
 - k. Removing a link to the BAA from the "Alumni and Friends" page of Baylor's web site; and
 - l. Ending the BAA's presentation of awards at Baylor events.

These actions hindered the BAA's ability to perform its obligations and made it easier for Baylor to supplant it with the Baylor Alumni Network.

31. Baylor's administration also attempted to exercise control over the BAA's activities by making false accusations that the BAA had violated the *License Agreement*. For example, when the BAA conducted a survey of its members, Baylor made baseless claims that it was entitled to engage in "quality control" before the BAA conducted any further surveys. Baylor also sought to exercise purported "quality control" over public statements by BAA representatives that were not to its liking. In truth, Baylor had no quality control rights over public statements or surveys, and its actions were an attempt to exercise prior restraint over the

BAA's communications with its members and others.

32. In addition, Baylor's administration tried to weaken *The Baylor Line* by depriving the BAA of access to Baylor's coaches, athletes, and faculty. For example, in October 2012, Brice Cherry, the Sports Editor of *The Waco Tribune-Herald* asked for an interview with a player on the Baylor women's basketball team for an article he was writing for *The Baylor Line*. When Nick Joos, the Executive Associate Athletic Director, presented the request to the administration, Karla Leeper (President Starr's Chief of Staff) responded "Haven't we consistently denied such interviews with the baa? Part of denying content." Exhibit 1 [BU_036141].

33. After receiving the denial, Mr. Cherry reached out to Mr. Joos and asked for an explanation. Mr. Joos then asked Dr. Leeper "How honest do you want me to be?" Dr. Leeper responded "There's truth and then there's truth." Mr. Joos assured her "I will do my best to dance!" Exhibit 2 [BU_036143]

34. As tensions escalated, an effort was made to negotiate a new framework for the relationship between the BAA and Baylor. The BAA's representatives met with representatives of Baylor's Board of Regents during 2013 and negotiated what became known as the "*Transition Agreement*." This agreement, signed on May 31, 2013, called for the BAA's membership to vote on changes to the relationship between the BAA and Baylor in September 2013.

35. The *Transition Agreement*, under which the BAA's assets would have been transferred to Baylor and to a new "Baylor Line Corporation," required the approval of two-thirds of the BAA's membership. A membership meeting for that purpose was called for September 2013.

36. The *Transition Agreement* failed to garner sufficient support in the September

2013 vote, and thus failed to become effective.

37. After the *Transition Agreement* was not approved, tensions between the BAA and Baylor continued to escalate. Baylor unilaterally announced that the parties' agreements were terminated, in keeping with a letter it earlier had issued. Ultimately, having failed to force the BAA into acquiescence to its demand, Baylor chose to sue the BAA.

E. The Hughes-Dillard Alumni Center.

38. The BAA resided in the Hughes-Dillard Alumni Center pursuant to the *Official Recognition Agreement* for nearly two decades. During that time, the BAA and its members made significant investments in the building, including donations of approximately \$3,000,000 for its renovation in the late 1990s.

39. However, in 2013, Baylor began construction of a new football stadium. In connection with that project, Baylor asserted that it needed the land on which the Hughes Dillard Alumni Center was situated. Negotiations over this assertion were conducted contemporaneously with those over the *Transition Agreement*.

40. On May 31, 2013, the parties entered into an *Agreement Between Baylor University And Baylor Alumni Association To Vacate Hughes Dillard Alumni Center* (the "*Agreement To Vacate*"). In return for the BAA's performance under the *Agreement To Vacate*, which required it to leave the Hughes-Dillard Alumni Center, Baylor promised "to provide the Association interim space in Robinson Tower for an indefinite term" that would last until "the latter of (i) full implementation of the Transition Agreement or (ii) the Association is housed elsewhere, unless agreed otherwise." *Agreement To Vacate*, section 2(b).

41. The BAA left its long-time home for offices in Baylor's Robinson Tower in July 2013 pursuant to this agreement. As soon as it did so, Baylor tore down the Hughes Dillard Alumni Center. Baylor thus got what it wanted pursuant to the *Agreement To Vacate*. Baylor

nonetheless has not kept its side of the bargain.

F. Baylor's Plot To Remove The BAA From Campus.

42. It is now clear that Baylor's claim that it needed the land under the Hughes-Dillard Alumni Center as part of the new football stadium project was false. Destroying the BAA's prominent home was one of the more cynical and dishonest components of Baylor's long-standing plan to remove the BAA from campus permanently.

43. It is beyond dispute that Baylor's leaders wanted to cripple the BAA's ability to engage with and connect alumni on football Saturdays. On June 14, 2011, the BAA reached out to Baylor's Athletics Department to request that it retain its 2010 tailgating location in Touchdown Alley, the main tailgating area of Floyd Casey Stadium. The BAA was immediately informed that it would be assigned a new, as-yet-undisclosed location because of Baylor's "efforts to enhance the Game Day Experience at football and meet the increasing demand for premium tailgating spots." Exhibit 3 [BAA00039317]. When the BAA asked for a meeting with university officials to discuss the tailgating location, Dr. Leeper, President Starr's Chief of Staff, responded that Baylor's "planning folks" were "not ready to make any assignments" and that the BAA should wait a few more weeks while the plan was developed. *Id.*

44. One week later, on June 24, 2011, Dr. Leeper received an email from Neal "Buddy" Jones, the newly-elected Chair of the Board of Regents. The email was entitled "Encroachment," and was cc'd to Ian McCaw (Director of Athletics), President Starr, Tommye Lou Davis (Vice President for Constituent Engagement), and others. Mr. Jones demanded that the BAA be assigned a remote and undesirable tailgating location:

The second thing on my mind is football season and the BAA presence at Baylor stadium. **I want to make sure they are as far away as possible from the main tailgate area.** Across Clay or on the other side of Waco Creek in the least visible spot possible would, in my opinion, create the least competition with the

Network, students, corporate sponsors, donors, etc. Our Board [of Regents] does not want to see that big tent with Baylor Alumni Association written across it.

Exhibit 4 [BU_005620] (emphasis added). Just in case Dr. Leeper had not understood his directive, Mr. Jones went on to insist:

We need to put the BAA tent at the farthest reaches of Siberia. I want the fewest people to see them. They cannot be visible to most of us. The biggest mistake we can make is to give them any extra life by allowing these things to just slip through. I don't care what Dutch Schroeder or [sic] Clyde Hart or Jim Haller or Carroll Dawson say – they are espousing yesterday's policy. Not today's. They are yesterday's guys. We need to look toward the future.

Id. (emphasis added).

45. Dr. Leeper sought assistance from Ms. Davis (Vice President for Constituent Engagement) in responding to Mr. Jones's rant. Ms. Davis suggested that Dr. Leeper inform Mr. McCaw (Director of Athletics), because Ms. Davis thought that Mr. McCaw "needs to understand the scope of what we are dealing with regarding this issue." Ms. Davis also reported that she has "been saying to Buddy when he calls re tailgating that **we are making progress** ("**putting the BAA out of business**") with the strategy of courtesy, respect, and hospitality. We do not need to give them reason to play the victim card. That hurts us and helps them." Exhibit 5 [BU_036510] (emphasis added).

46. In the end, the administration did as Mr. Jones had commanded and exiled the BAA to a distant locale. The BAA was assigned a tailgating spot at the Hart-Patterson track complex—a spot that is both "across Clay" and on the other side of Waco Creek, a significant distance from the football stadium. Exhibit 6 [BAA0039324].

47. Although the BAA had been told by the President's office that there was no other space available for their tailgate, that was not true. Exhibit 7 [BU_036478] (Leeper to McCaw: "The story we are telling is that we are overflowing and need the space. If that is not true, we are in a bind."). There was still "lots of space to fill" in the newly created "corporate tailgate"

area—but the Baylor administration did not want to offer that space to the BAA because it was “too visible.” *Id.*

48. Having exiled the BAA to “the farthest reaches of Siberia” specifically to prevent the BAA from connecting with alumni, Baylor’s current leaders then decided to lie to the Baylor Family about it. Many alumni reacted negatively to Baylor’s decision to relocate the BAA’s tailgating area. For example, one alumna reached out directly to Ms. Davis to express her frustration: “There are no words to convey adequately the frustration, disgust, and rage that many alumni feel over the continued vengeance and vindictiveness leveled against the BAA. . . . This latest decision to ban the BAA to the outskirts of the stadium parking lot is totally outrageous and very immature by anyone’s standards. What grade are we in anyway??” Exhibit 8 [BU_004767].

49. Baylor’s spin machine quickly prepared a set of “talking points” purporting to explain the decision. John Barry, the Vice President of Marketing and Communications, sent President Starr, Ms. Davis, Dr. Leeper and others “a set of talking points (below) that will serve us as we respond to questions about changes to tailgating areas at Floyd Casey, particularly as it involves the BAA.” Exhibit 9 [BU_004515]

50. Top administration officials then repeated these false “talking points” when confronted about the issue. For example, Ms. Davis responded to an alumna who was also a long time friend: “I am sorry that you feel strongly that the placement of the BAA tent is a vindictive move on the part of the university. I wish I could convince you otherwise” before parroting the lines she had been fed by Mr. Barry. Exhibit 8 [BU_004767]

51. But Ms. Davis’s protestations were disingenuous. In fact, there was a vindictive plot against the BAA, and Ms. Davis was a prominent participant. Ms. Davis and Mr. Jones

communicated regularly about their hatred for the BAA and their hopes of destroying it, including their plans to seize or demolish the BAA's home at Hughes-Dillard. On February 28, 2011—just a few months prior to the tailgating issue—Mr. Jones wrote “I am very encouraged that they [the BAA] admit they are suffering financially. They need to come in house and fold into the Network.” Ms. Davis responded “We agree on all fronts. **I am measuring for curtains every time I go into the building! ;-)**” Exhibit 10 [BU_030760] (emphasis added). On August 9, 2011, Ms. Davis forwarded Mr. Jones a copy of the BAA's newsletter announcing its procurement of an alternative tailgating spot and said “Their newsletter below makes me sick.” Mr. Jones responded “They are dead men walking!!!” Exhibit 11 [BU_027937]. Ms. Davis replied “Hope and pray that is true! They are such a destructive force for the university. Makes you aware that Satan is alive and well.” Exhibit 12 [BU_027954]. On March 6, 2012, Mr. Jones encouraged Ms. Davis “1 more year. Then you fly solo. Let's get the BAA handled quickly. There aren't many with the killer instinct. Get er done!!!!” Exhibit 13 [BU_021711].

52. On April 4, 2012, in response to a BAA newsletter congratulating the Baylor Lady Bears for being the 2012 NCAA National Women's Basketball Champions, Mr. Jones told Ms. Davis “I hate them.” Ms. Davis agreed: “That makes two of us. Irrelevant twurps [sic]!” Mr. Jones threatened “They are in my sight.” In her response, Ms. Davis acknowledged the way she and Mr. Jones intended to attack the BAA—by destroying the Hughes Dillard Alumni Center. Ms. Davis exclaimed “**Can't wait to tear that building DOWN!!!! If it is tied to the stadium, few will complain! :-)** **How sweet it will be!**” Exhibit 14 [BU_030751] (emphasis added).

53. The Tommye Lou Davis-Buddy Jones dialogue about their mutual hatred for the BAA dates back to at least 1997. In October of that year, Ms. Davis emailed Mr. Jones

lamenting that “Baylor will be crippled until power is completely removed from those folks who are supporting the BAA.” Exhibit 15 [BU_028329]. Ms. Davis wrote of the BAA, “They infuriate me! Thank you soooooo much for hanging in there and fighting their arrogant asses!” *Id.*

54. Ms. Davis’s desire to destroy the BAA did not wane over the years. In a March 2011 email to Ramiro Pena and Dary Stone, Ms. Davis referred to the BAA as “the evil ones” and expressed her view that the BAA is “a scourge on Baylor and we will not be healthy again until they are gone. The BAA is a pox on our beloved Baylor. It truly makes me sick!” Exhibit 16 [BU_028347]

55. Although Ms. Davis was one of his closest confidantes in his vendetta against the BAA, she was not the only person to whom Mr. Jones ranted and raved. In February 2012, Mr. Jones proclaimed to Karla Leeper “Cannot wait to lose the chair role do [sic] I can put on camp [sic] and load my weapons and go hunting for BAA game.” Exhibit 17 [BU_005223]. In August 2012, when he was no longer Chairman of the Board of Regents, Mr. Jones postured to Dr. Leeper and Charles Beckenhauer, Baylor’s most senior lawyer, about the effect of his reinvolved in Baylor’s dealings with the BAA: “You guys do NOT want me re engaged. It will blow up any détente that may be employed. That would only make one person excited – ME! I like hand to hand combat. But our wonderful President doesn’t. . . . You two know how I can create real conflict. Even when I am on your side of the conflict.” Exhibit 18 [BU_034831].

56. In internal discussions, President Starr, Dr. Leeper, and John Barry were highly critical of Mr. Jones’s incessant and irrational obsession with the BAA—but apparently none had either the courage to challenge him to his face or the will to either stop him or simply refuse to

go along. See Exhibit 19 [BU_033999] (Starr criticizing Jones’s “sharp focus on relationships with the Alumni Association”); Exhibit 20 [BU_036293] (Starr criticizing Jones: “N.B.³ Our chairman has ample time to fret about meeting with the BAA, but no time to rein in mendaciously destructive renegades. Bad prioritization. I’m unimpressed. (To put it mildly.)”); Exhibit 21 [BU_0036648] (Barry describing Jones’s communications with the Administration as “insulting and absolutely devoid of any sense of professional respect and decorum” and also the “nutty behavior of our regents”).

G. Baylor’s Breach of the Agreement To Vacate

57. After the *Transition Agreement* failed to pass, Baylor revealed that it did not intend to allow the BAA to stay in the Robinson Tower or to provide a new building for its exclusive use. Given this prompt action by Baylor to disavow its obligations, it appears that the university never intended to perform this promise. However, the BAA did not anticipate the depths to which Baylor’s conduct would sink.

58. One morning, the staff of the BAA arrived at its Robinson Tower office to find that the locks had been changed by Baylor. From that day, the BAA was denied access to its offices, other than for purposes of removing its property.

59. Baylor did not have the right to cast the BAA out of the Robinson Tower under the *Agreement To Vacate* because neither of the contractual contingencies limiting the BAA’s tenancy there had occurred. Baylor’s unilateral termination of the BAA’s tenancy in the Robinson Tower thus was wrongful.

60. Under the *Official Recognition Agreement* and the *Agreement To Vacate*, Baylor is obligated to replace the Hughes-Dillard Alumni Center with a new building. Those

³ N.B. is an acronym for the Latin phrase “Nota bene,” which means “note well.” It is generally used to draw a reader’s attention to a particular point.

agreements require Baylor to “provide the Baylor Alumni Association with another building on the Baylor campus, the size, condition, quality of construction, and location of which is approximately the same as [that] of the Hughes-Dillard Alumni Center.” Despite having locked the BAA out of the Robinson Tower, Baylor has refused to honor this obligation, thereby repudiating its binding contract to provide the BAA an on-campus building for its exclusive use.

III. CAUSES OF ACTION

A. Breach Of The License Agreement.

61. Paragraphs “1” through “60” of this pleading are incorporated herein by reference as if set forth verbatim.

62. By virtue of the foregoing facts, Baylor has failed to comply with the *License Agreement*. Its failures to comply include:

- a. Unilaterally and unlawfully purporting to terminate the *License Agreement* in violation of its term and termination provisions;
- b. Forming and operating the Baylor Alumni Network, thereby abrogating the BAA’s right to sole and exclusive use of the BAA Marks for alumni products and services;
- c. Asserting that the BAA is infringing the BAA Marks by continuing to exist and operate as the Baylor Alumni Association after Baylor’s unlawful and ineffective unilateral termination of the *License Agreement*;
- d. Wrongfully preventing the BAA from acting as the general alumni organization of Baylor University under Section 5 of the *License Agreement*;
- e. Wrongfully preventing the BAA from performing other obligations under Section 5 of the *License Agreement*;

- f. Seeking to terminate the *License Agreement* due to the BAA's editorial positions, in violation of section 9.2;
- g. Asserting rights to exercise control over the activities of the BAA in violation of sections 5 and 9.2 of the agreement;
- h. Taking the actions set out in paragraphs 21 through 31 of this pleading; and
- i. Failing to comply with the termination and "notice and cure" provisions of sections 5 and 6 of the *License Agreement*.

63. The BAA seeks judgment compelling Baylor to specifically perform its obligations under the License Agreement and enjoining Baylor from continuing to operate the Baylor Alumni Network in violation of the parties' agreements. Absent such relief, the BAA will be irreparably injured in that it will be denied the unique benefits to which it is entitled under the *License Agreement* and the parties' other agreements, damages for its injuries will be difficult or impossible to ascertain, and no remedy at law will be as plain and complete, or as practical and efficient, as a remedy in equity. The BAA thus lacks an adequate remedy at law and is entitled to equitable relief.

64. In the alternative, Baylor's failures to comply with the *License Agreement* and the parties' other agreements have caused actual damages to the BAA, and the BAA should be awarded all such damages.

B. Breach Of The Official Recognition Agreement.

65. Paragraphs "1" through "64" of this pleading are incorporated herein by reference as if set forth verbatim.

66. The *Official Recognition Agreement* establishes the BAA as the "official alumni organization of Baylor University and all of its academic units." Baylor has failed to comply

with that provision by establishing and operating the Baylor Alumni Network as an alumni organization and by using it to usurp many of the functions historically performed by the BAA in its capacity as Baylor's official alumni organization.

67. Baylor also has failed to comply with the *Official Recognition Agreement* by preventing the BAA from performing some or all of the services and other obligations set forth in the agreement. This wrongful prevention of performance constitutes a breach of contract by Baylor.

68. Baylor also failed to comply with this contract by unilaterally terminating it in contravention of this term and termination provisions.

69. The *Official Recognition Agreement* also grants the BAA the "exclusive right to occupy and use the Hughes-Dillard Alumni Center building, including its driveways and parking lot, and the land on which they are located" unless "Baylor needs the land on which the center is located for its purposes and no other land is reasonably available to Baylor for the purpose for which the land is needed." *Official Recognition Agreement*, Section III. Baylor has breached this provision by demolishing the Hughes-Dillard Alumni Center based on the false representation that the land was needed for the construction of the new Baylor football stadium. This misrepresentation was simply a pretext for Baylor's real goal—to drive the BAA off campus entirely and prevent it from being visible to the Baylor family.

70. The BAA seeks judgment compelling Baylor to specifically perform its obligations under the *Official Recognition Agreement* and enjoining Baylor from continuing to operate the Baylor Alumni Network in violation of the parties' agreements. Absent such relief, the BAA will be irreparably injured in that it will be denied the unique benefits to which it is entitled under the *Official Recognition Agreement*, damages for its injuries will be difficult or

impossible to ascertain, and no remedy at law will be as plain and complete, or as practical and efficient, as a remedy in equity. The BAA thus lacks an adequate remedy at law and is entitled to equitable relief.

71. Alternatively, Baylor's failures to comply with the *Official Recognition Agreement* have caused actual damages to the BAA, and the BAA should be awarded all such damages.

C. Breach Of The BAA's Right To A Building.

72. Paragraphs "1" through "71" of this pleading are incorporated herein by reference as if set forth verbatim.

73. By locking the BAA out of the Robinson Tower, Baylor failed to comply with the *Agreement To Vacate*.

74. Baylor also has failed to comply with the provisions of the *Official Recognition Agreement* and the *Agreement To Vacate* that entitle the BAA to occupy for its exclusive use a building on Baylor's Waco campus. Baylor is obligated to provide such a building to the BAA but has not done so to date and has further expressly repudiated this obligation.

75. The BAA is entitled to specific performance of Baylor's obligation to provide a building for its exclusive use on Baylor's Waco campus. That building must be of approximately the same size, condition, quality of construction, and location as the Hughes-Dillard Alumni Center. Absent such relief, the BAA will be irreparably injured in that it will be denied the unique benefits to which it is entitled under the *Official Recognition Agreement* and the *Agreement To Vacate*, damages for its injuries will be difficult or impossible to ascertain, and no remedy at law will be as plain and complete, or as practical and efficient, as a remedy in equity. The BAA thus lacks an adequate remedy at law and is entitled to equitable relief.

76. In the alternative, the BAA is entitled to all damages caused by Baylor's failure to provide such a building to it and to all damages caused by the unlawful termination of its tenancy in the Robinson Tower, including but not limited to (1) the value of the lost opportunity to reside in a building on the Baylor campus, the size, condition, quality of construction, and location of which is approximately the same as the size, condition, quality of construction, and location of the Hughes-Dillard Alumni Center and (2) the cost of relocating to and occupying alternative office space in Waco.

D. Fraudulent Inducement To Enter Into The Agreement To Vacate.

77. Paragraphs "1" through "76" of this pleading are incorporated herein by reference as if set forth verbatim.

78. Baylor repeatedly represented to the BAA it needed the land on which the Hughes-Dillard Alumni Center resided for the construction of the new Baylor football stadium project and that no other available land was suitable for its purposes.

79. This representation was false, and Baylor knew that it was false at the time that it was made to the BAA. Just as Baylor intended, the BAA relied on Baylor's false representation when the BAA entered into the Agreement To Vacate the Hughes-Dillard Alumni Center.

80. The BAA has been damaged by the loss of its right to continue to reside in the Hughes-Dillard Alumni Center.

81. As a result of Baylor's fraudulent conduct, the BAA is entitled to rescind the Agreement to Vacate and to be placed back in the position it would have been in if the Agreement to Vacate had not been entered into. This requires Baylor to rebuild the Hughes-Dillard Alumni Center in its original location. Absent such relief, the BAA will be irreparably injured in that it will be denied the unique benefits of residing in the Hughes-Dillard Alumni

Center (a benefit to which it is entitled under the *Official Recognition Agreement*), damages for its injuries will be difficult or impossible to ascertain, and no remedy at law will be as plain and complete, or as practical and efficient, as a remedy in equity. The BAA thus lacks an adequate remedy at law and is entitled to equitable relief. The BAA received no consideration for entering into the Agreement to Vacate, but if it is determined as a matter of law to have received any such consideration, the BAA offers to return it to Baylor if the remedy of rescission is awarded.

82. In the alternative, the BAA is entitled to all damages caused by Baylor's fraudulent conduct, including but not limited to the value of the lost opportunity to reside in the Hughes-Dillard Alumni Center.

E. Declaratory Judgment Claim.

83. Paragraphs "1" through "82" of this pleading are incorporated herein by reference as if set forth verbatim.

84. By virtue of the foregoing facts, a real, substantial, and justiciable controversy exists between the BAA and Baylor, which are parties interested the *License Agreement* and the *Official Recognition Agreement*. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, the BAA requests that the Court enter judgment declaring that:

- a. Baylor's unilateral termination of the *License Agreement* and the *Official Recognition Agreement* was ineffective to terminate those agreements;
- b. The *License Agreement* and *Official Recognition Agreement* are not of indefinite duration and are not terminable at will or otherwise unenforceable;
- c. Those agreements remain in full force and effect in accordance with their terms, and the BAA is entitled to all benefits thereunder;
- d. Baylor has prevented the BAA from performing the actions that its Original

Petition alleges the BAA has failed to perform, thereby excusing any such failures;

- e. The license to the BAA for exclusive use of a building on the Baylor Campus granted in the *Official Recognition Agreement* is not limited to the Hughes-Dillard Alumni Center and was not terminated by the *Agreement To Vacate*; and
- f. Baylor is obligated to provide the BAA exclusive use of a building on Baylor's Waco campus that meets the requirements of the *Official Recognition Agreement*.

E. Attorneys' Fees; Conditions.

85. Paragraphs "1" through "84" of this pleading are incorporated herein by reference as if set forth verbatim.

86. Due to Baylor's actions, the BAA has been required to retain the undersigned attorneys to represent it in this action.

87. Pursuant to Chapters 37 and 38 of the Texas Civil Practice & Remedies Code, the BAA should be awarded judgment for a reasonable fee for the reasonably necessary services of its attorneys for all proceedings in or relating to the trial of this cause in district court and in connection with any appeal and petition-for-review proceedings in the Court of Appeals and Supreme Court of Texas.

88. All conditions precedent to the bringing of the BAA's counterclaim and the granting of the relief sought by virtue thereof have occurred or have been waived by Baylor.

F. Interest.

89. Paragraphs "1" through "88" of this pleading are incorporated herein by reference as if set forth verbatim.

90. Due to Baylor's fraudulent conduct, the BAA is entitled to prejudgment interest.

REQUEST FOR DISCLOSURE

Pursuant to Texas Rule of Civil Procedure 194, the BAA requests that Baylor disclose, within 30 days of service of this request, the information or material required to be disclosed under Texas Rule of Civil Procedure 194.2.

PRAYER FOR RELIEF

For the reasons stated, the BAA respectfully requests that it be awarded the following relief:

- i. Judgment that Baylor take nothing of or from the BAA by virtue of its claims in this action;
- ii. Judgment decreeing specific performance of the License Agreement;
- iii. An injunction against Baylor's continued operation of the Baylor Alumni Network;
- iv. Actual damages for Baylor's breach of the License Agreement;
- v. Judgment decreeing specific performance of the Official Recognition Agreement, including but not limited to providing the Baylor Alumni Association with another building on the former site of the Hughes-Dillard Alumni Center that is the size, condition, and quality of construction of which is approximately the same as the size, condition, and quality of construction of the Hughes-Dillard Alumni Center;
- vi. Actual damages for Baylor's breach of the Official Recognition Agreement;
- vii. Actual damages for Baylor's breach of the Agreement to Vacate;
- viii. Actual damages for Baylor's fraud;
- ix. A declaratory judgment as described in section III(E) of this pleading;
- x. Prejudgment and postjudgment interest on all sums awarded to the BAA at the

highest rates allowed by law;

- xi. A reasonable fee for the reasonable and necessary services of the BAA's attorneys in this matter; and
- xii. Any other and further relief, at law or in equity, to which the BAA justly is entitled.

Respectfully Submitted,



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VERIFICATION

STATE OF TEXAS §
 §
COUNTY OF MCLENNAN §

BEFORE ME, the undersigned authority, on this day personally appeared Chad Wooten, who on his oath deposed and said that he is the Chief Operating Officer of the Baylor University Alumni Association, that he has read foregoing pleading, and that the matters stated in paragraphs “2” and “3” of Defendant’s Original Answer are true and correct and within his personal knowledge.

Chad Wooten


SWORN TO AND SUBSCRIBED before me on this _____ day of June, 2015, to certify which witness my hand and seal of this office.

Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2015, a true and correct copy of the foregoing document was served in compliance with the Texas Rules of Civil Procedure upon the following counsel of record:

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