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CAUSE NO. 2014-2287-3

BAYLOR UNIVERSITY,	§	
PLAINTIFF,	§ § 8	IN THE DISTRICT COURT,
V.	§	74TH JUDICIAL DISTRICT,
THE BAYLOR UNIVERSITY ALUMNI ASSOCIATION,	9 8 8	MCLENNAN COUNTY, TEXAS
DEFENDANT.	8 §	

DEFENDANT'S ORIGINAL ANSWER, COUNTERCLAIM, <u>AND REQUEST FOR DISCLOSURE</u>

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

The BAA's Original 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.

ORIGINAL COUNTERCLAIM

As its Original 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.
- 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 it 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:

² Plaintiff's Original Petition, paragraph 18.

- 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 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 supplied).

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. In 2002, the BAA's executive director unexpectedly resigned to take a position as director of a newly formed alumni services department at Baylor. Thereafter, much of the new department's programming (including the Baylor Alumni Network) was taken directly from a long-range plan the BAA worked on for several years, at a significant cost. In other words, Baylor took both the BAA's executive director and its operational plan, including the plans for 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.
- 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 meta data 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
- 1. 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. 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.
- 33. 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.

- 34. The *Transition Agreement* failed to garner sufficient support in the September 2013 vote, and thus failed to become effective.
- 35. 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.

- 36. 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.
- 37. 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*.
- 38. 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).

- 39. 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.
- 40. 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.
- 41. 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.
- 42. 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.
- 43. 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 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.

- 44. Paragraphs "1" through "43" of this pleading are incorporated herein by reference as if set forth verbatim.
- 45. 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 Section5 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*.
- 46. 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.
- 47. 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.

- 48. Paragraphs "1" through "47" of this pleading are incorporated herein by reference as if set forth verbatim.
- 49. 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.
- 50. 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.

- 51. Baylor also failed to comply with this contract by unilaterally terminating it in contravention of this term and termination provisions.
- 52. 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.
- 53. 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.

- 54. Paragraphs "1" through "53" of this pleading are incorporated herein by reference as if set forth verbatim.
- 55. By locking the BAA out of the Robinson Tower, Baylor failed to comply with the *Agreement To Vacate*.
- 56. 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.

- 57. The BAA is entitled to specific performance of Baylor's obligation to provide a building for its exclusive use 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.
- 58. 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 the cost of relocating to and occupying alternative office space in Waco.

D. Declaratory Judgment Claim.

- 59. Paragraphs "1" through "58" of this pleading are incorporated herein by reference as if set forth verbatim.
- 60. 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.

- 61. Paragraphs "1" through "60" of this pleading are incorporated herein by reference as if set forth verbatim.
- 62. Due to Baylor's actions, the BAA has been required to retain the undersigned attorneys to represent it in this action.
- 63. 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.
- 64. 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.

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.

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 certify which witness my hand and seal of this office.

_day of August, 2014, to

Notary Public State of Texas

THERESA HENSEN

Notery Public, State of Texas

My Commission Expires

May 20, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this <u>6th</u> day of August, 2014, 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:

Andy S. McSwain Fulbright Winniford 22nd Floor ALICO Building 425 Austin Avenue Waco, Texas 76701

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