CAUSE NO. 2014-2287-3

BAYLOR UNIVERSITY,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff,	§	
vs.	§	
	§	MCLENNAN COUNTY, TEXAS
THE BAYLOR UNIVERSITY ALUMNI ASSOCIATION,	§	
	§	
	§	
Defendant.	§	74TH JUDICIAL DISTRICT

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE TO BAYLOR'S MOTION FOR SUMMARY JUDGMENT

The Baylor University Alumni Association ("BAA") moves for partial summary judgment pursuant to Rule 166a, and responds in opposition to Baylor's Motion for Summary Judgment filed July 22, 2015, as follows:

I. Summary: The Agreements Unambiguously Express the Parties' Intent About the Contracts' Duration and Should be Enforced As Written.

There are two requests for summary judgment before the Court. The BAA seeks declaratory judgment that the License Agreement and the Official Recognition Agreement between Baylor University and the BAA remain in full force and effect and Baylor's unilateral attempt to terminate them was ineffective. Baylor, on the other hand, seeks to declare those same agreements, under which the parties have operated for over 20 years, void, unenforceable, and terminable at will.[1]

The parties' intent regarding the duration and termination of the 1993 Trademark License Agreement is found in the express written terms of the agreements. The License Agreement grants the BAA a "perpetual and fully paid up" license to use the Baylor name and provides that

[1] Baylor also attacks the validity of the Agreement to Vacate—an agreement the parties executed only a couple years ago. The BAA's response in opposition to Baylor's Motion addresses why Baylor has not proved a right to summary judgment with respect to that agreement. *See infra* Part III.

it may be terminated "only" if the BAA fails to "substantially comply" with its obligations. *See* Ex. 1 §§ 5-6. Baylor must give the BAA notice of any alleged performance problems and an opportunity to cure. *Id*. § 6. Similarly, the 1994 Official Recognition Agreement provides the BAA a permanent home on the Baylor campus, grants the BAA recognition as the official alumni association of Baylor and its academic units "as long as" the BAA performs its written obligations, and states that it "may be terminated by Baylor only in the event the [BAA] defaults by ceasing to carry out in good faith" its obligations. *See* Ex. 2 §§ I, II, IV. In the event of an alleged default, the BAA is guaranteed notice and an opportunity to cure. *Id*. § IV.

The BAA's objective is to enforce the written agreements, while Baylor's objective is to avoid its solemn promises. The BAA's position hinges on express, plain contract language that specifies the parties' intent. Baylor's position requires the court to disregard the contract language and determine it does not mean what it says. The BAA freely admits that the agreements would terminate if, without interference from Baylor, the BAA no longer performed its duties as promised. But Baylor's motion does not argue (or even attempt to prove) that the BAA has failed to live up to its end of the bargain.

Given the unambiguous terms of the written agreements, this Court should declare that the License Agreement and Official Recognition Agreement remain in full force and effect and that Baylor's unilateral attempt to terminate them was ineffective. Further, this Court should reject Baylor's attempt to declare the parties' agreements a nullity and deny its request for a determination that it properly terminated them.

II. The BAA's Motion For Summary Judgment: This Court Should Declare That The Agreements Remain In Full Force And Effect

A. Background: The Parties' Agreements And Baylor's Attempt To Terminate Them Contrary To Their Express Terms

1. The 1993 License Agreement

Grant of license and the BAA's duties. The License Agreement grants the BAA "a perpetual and fully paid-up license to use" the names and marks of Baylor University Alumni Association, Baylor Alumni Association, and the Baylor Line. Ex. 1 § 2.1. Section 5 describes the BAA's key obligations in exchange for the license. The BAA must (1) serve as the general alumni organization of Baylor University, including coordination of alumni activities; (2) maintain offices in Waco; (3) carry out all of the purposes, objects, and activities set forth in its constitution and bylaws; (4) publish an alumni magazine; and (5) organize and sponsor activities for the Baylor Homecoming on at least an annual basis. *Id.* § 5.1. The agreement acknowledges the BAA's past "provision of high quality services and products" under the parties' former agreements and says the BAA will "maintain the quality of the services and products provided" in this list of duties at a "reasonable level." *Id.* § 5.

Termination. The license granted in the agreement "may be terminated only as provided in [the section 6 "Termination" provision]." *Id.* § 2.2. That provision says: "In the event Licensee fails to substantially comply with any of its obligations owed to Licensor," Baylor must serve notice of default, identify any specific measures required to remedy the default, and provide a reasonable time for cure. If the default is not cured, Baylor "may then immediately give written notice of its termination of the License Agreement." *Id.* § 6.

2. The 1994 Official Recognition Agreement ("ORA")

Grant of official recognition. Under the ORA, Baylor recognizes the BAA as the "official alumni organization of Baylor University and all of its academic units." Ex. 2 § I. The stated

consideration for this recognition is the BAA's promise to "support the purpose and goals of Baylor University as expressed in its original charter" and to satisfy the five specific duties listed in the License Agreement. *Id*. Like the License Agreement, the ORA's grant of recognition is contingent on the BAA's performance of express duties: "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 association of all the academic units of Baylor University.'" *Id.*

License to use physical facilities. The ORA also provides 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 above [concerning the services provided by the BAA]." *Id.* § II. This includes the exclusive right to occupy the Hughes-Dillard Alumni Center for an "indefinite" time unless Baylor needs the land and no other land is available for the purpose Baylor cites. *Id.* § I, II. In that event, Baylor must provide the BAA with another substantially similar building on campus. *Id.*

Termination. The ORA provides that, in the event that the BAA fails to carry out its enumerated duties in "good faith:"

> Baylor shall give the Baylor Alumni Association written notice of the default, specifying the nature of the default and what is reasonably and specifically required to remedy the default. If the Baylor Alumni Association fails to cure the default within 120 calendar days and service of the notice of default, Baylor may immediate terminate [the recognition and physical facility license] granted.

Id. § III.

3. The May 2013 Agreement To Vacate And Baylor's Attempt To Terminate The Parties' Contractual Relationship

The BAA resided in the Hughes-Dillard Alumni Center for nearly two decades. In 2013, however, Baylor began construction of a new football stadium. In connection with this project, Baylor advised the BAA that it needed the land under the Hughes-Dillard Alumni Center.[2] Ex. 3 at third "Whereas" clause.

Baylor and the BAA entered into an Agreement to Vacate, under which the BAA agreed to leave its long-time home in return for Baylor's promise to house the BAA in Robinson Tower "for an indefinite term free of charge" until a Transition Agreement contemplated by the parties was approved or the BAA could be housed elsewhere, whichever was later. *Id.* § 1. The Transition Agreement was not approved, but Baylor locked the BAA out of Robinson Tower and has not supplied the BAA housing elsewhere. Ex. 46 at 210:3-218:11.

On the same day Baylor induced the BAA to agree to vacate Hughes-Dillard Alumni Center, Baylor's General Counsel delivered a letter to the BAA. This letter purports to provide "formal notice of unilateral termination of the executory contracts" between Baylor and the BAA, including the 1993 License Agreement and the 1994 ORA. Ex. 4. Baylor did not provide the BAA written notice of any purported problems with the BAA's performance and did not provide the BAA an opportunity to cure, as required by those agreements.

[2] Documents reveal that Baylor did not need this property for the construction project and that Baylor used this excuse as a false pretext to move the BAA off campus. The BAA has thus asserted that Baylor fraudulently induced the Agreement to Vacate. *See* Defendants' First Amended Answer and Second Amended Counterclaim.

B. Motion For Summary Judgment: The Agreements Remain In Full Force And Effect

As a matter of law, the BAA is entitled to a declaration that the 1993 License Agreement and the 1994 Official Recognition Agreement are in full force and effect and that Baylor's unilateral attempt to terminate them was ineffective.

1. Courts Must Enforce Agreements As They Are Written

When interpreting a contract, the court's "primary concern: is to ascertain and give effect to the written expression of the parties' intent. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex. 2011). The terms used in the contract are to be given "their plain, ordinary, and generally accepted meaning" unless the agreement shows the parties used a term in a technical or different sense. *Moayedi v. Interstate 35/Chisam Road, L.P.*, 438 S.W.3d 1, 7 (Tex. 2014). Contracts must be "read as a whole, and an interpretation that gives effect to every part of the agreement is favored so that no provision is rendered meaningless or as surplusage." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 235 (Tex. 2003). These rules apply even if a provision seems inequitable to one party. *See Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007) (courts' "confined duty is to construe the contract as is, and holding that equitable considerations trump contrary contract terms would render [written terms] a nullity").

Texas contract construction principles center on enforcing the parties' intent as expressed in the agreements' written terms because public policy favors this approach. According to the Texas Supreme Court, freedom of contract is the "paramount public policy" to be observed when addressing the enforceability of a contract:

> If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall

> be held sacred and shall be enforced by the Court of justice. Therefore, you shall have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

Wood Motor Co. v. Nebel, 150 Tex. 86, 238 S.W.2d 181, 185 (1951); *see also Fairfield Ins. Co. v. Stephens Martin Paving Co.*, 246 S.W.3d 653, 664 (Tex. 2008) (same); TEX. CONST. art. I § 16 (prohibiting "any law impairing the obligation of contracts"). Thus, parties in Texas "are free to enter into contracts without fear of retroactive nullification." *In re Bank of Am., N.A.*, 278 S.W.3d 342, 344 (Tex. 2009). This is because, ultimately, "the role of the courts is not to protect parties from their own agreements, but to enforce contracts that parties enter into freely and voluntarily." *El Paso Field Serv's, Inc. v. MasTec North Amer., Inc.*, 389 S.W.3d 802, 810-11 (Tex. 2012); *see also Fairfield*, 246 S.W.3d at 664 (contract enforcement is the "indispensable partner" to freedom of contract).

2. Application Of Law To Facts: The Agreements Provide Express Terms Of Duration And Express Provisions For Termination—They Should Be Enforced According To Those Terms

The plain language of the License and Official Recognition Agreements—and Baylor's admitted failure to adhere to such language—demonstrates that Baylor's attempt to terminate them fails as a matter of law. Both agreements contain provisions expressing the parties' intent that the agreements last for a particular duration. Baylor granted the BAA a "perpetual and fully paid-up license" to use the Baylor marks. Ex. 1 § 2.1. The ORA grants the physical facility license for an "indefinite term." Ex. 2 §§ III-IV. The meaning of the words "perpetual" and "indefinite" are plain and unmistakable; they mean the licenses will last forever, or at least until Baylor terminates in accordance with the agreements' express terms.

This leads to the next important point. Both the License Agreement and ORA also contain express provisions addressing when the agreements can be terminated. Ex. 1 §§ 2.2, 6;

Ex. 2 § IV. These provisions allow termination only if the BAA fails to substantially comply and perform in good faith its enumerated responsibilities. Ex. 1 § 6; Ex. 2 § IV. Further, Baylor must provide the BAA written notice of any alleged default and an opportunity to cure. *Id.*

In this case, Baylor not only failed to provide the requisite notice and cure period for any alleged default by the BAA, it purported to terminate the agreements without proving the BAA materially breached its express performance obligations. This is directly contrary to the deal for which the parties bargained. Because "an unambiguous contract" like the License Agreement and ORA must be "enforced as written," *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011), the Court should issue a declaration that the 1993 License Agreement and the 1994 Official Recognition Agreement are in full force and effect and that Baylor's unilateral attempt to terminate them was ineffective. *See, e.g., Nano-Proprietary, Inc. v. Cannon, Inc.*, 537 F.3d 394, 400-01 (5th Cir. 2008) (enforcing agreement regarding "irrevocable," "fully paid-up," and "perpetual" license because unambiguous language expressed parties' intent).

3. Even If The Court Finds The Contracts To Be Ambiguous, The Evidence Supports The BAA's Interpretation

Because the contracts are unambiguous, there is no reason for the Court to consider extrinsic evidence to interpret them. Should the Court conclude otherwise, however, the extrinsic evidence supports the BAA's interpretation that the parties intended the agreements to last in perpetuity until the termination events specified in the agreements occur.

Basil Thomson, Baylor's former general counsel and the primary drafter of the agreements, testified that the License Agreement uses "language that was proposed by Lou Pirkey as consistent with trademark law that would allow for a license that would continue

essentially until terminated." [3] *See* Ex. 45 at 31:16-25. An important purpose of the perpetual license grant was to ensure that a future Baylor administration would not "eliminate" the BAA. *See id.* at 27:3-29:17, 31:16-37:10; Ex. 43. In short, then-President Reynolds prepared the license document for the *specific* purpose of protecting the BAA against the types of vendettas that the present Baylor administration has unleashed against it. *Id*.; *see also infra* Part III.C.4. (discussing evidence showing Baylor's attempts to silence the BAA and put it out of business).

Additionally, Mr. Thomson testified that the ORA's purpose is to give the BAA "further assurances" of its status as the official alumni organization and "a way of stating clearly the intent of both parties that the [BAA] be the official alumni organization." Ex. 45 at 51:8-54:20. He also explained that the parties intended the ORA to confirm the BAA's exclusive and permanent use of the Hughes-Dillard Alumni Center, so that the BAA would be required to move from its home only "if there were no other alternative." *Id*. at 56:3-60:4.

Accordingly, whether the agreements are unambiguous or ambiguous, this Court should enter a declaration that the agreements are in full force and effect and that Baylor's unilateral attempt to terminate them was ineffective. *See Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (declaratory judgment is appropriate "if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought").

III. Response In Opposition To Baylor's Motion For Summary Judgment

Citing no evidence, Baylor's motion makes sweeping accusations against the BAA regarding its performance. The truth is the BAA has consistently performed its contractual obligations in good faith in compliance with the agreed-upon standard. It is Baylor who has

[3] Chambers USA guide to America's Leading Lawyers for Business refers to Lou Pirkey as "the guru" who is "widely recognized as one of the leading trademark litigators in the country." *See* http://www.pirkeybarber.com/attorneys/profile/louis-t-pirkey/.

shirked its responsibilities by attempting to silence the BAA's independent voice and hinder the BAA's performance at every turn.

A. Factual Background

1. The Baylor-BAA Relationship

The BAA has supported Baylor University and the Baylor Family for more than 150 years. It was created in 1859 and began publishing its award-winning alumni magazine, "The Baylor Line," in 1946. In its early years, the BAA helped raise money for Baylor, but relinquished that function, at Baylor's request, when Baylor created a professional development office in the early 1960s. As Robert Feather, the Vice President of University Development from 1980 to 1995 told *The Baylor Line*, raising money from alumni "was the development office's responsibility, not the alumni association's responsibility." Ex. 23 at 43.

Throughout the years, the BAA's primary focus has been on serving as a "friendraiser"—keeping alumni informed and excited about the great things that have happened at Baylor. *Id.* In addition to publishing *The Baylor Line*, the BAA has run numerous popular programs such as the Heritage Club (celebrating graduates of 50 years or more), Lifelong Learning (continuing education for adults); Travel (trips for alumni, often with an educational component); Fling (reconnecting alumnae); Alumni By Choice (recognizing nongraduates with a special affection for Baylor); football tailgates; homecoming reunion dinners; and graduation celebrations. *See* Ex. 13 (describing the BAA's programs). The BAA also administered the Official Class Ring program and awarded coveted outstanding alumni awards. Ex. 41. Baylor has acknowledged the effectiveness of many of these programs. *Id.* ("I would LOVE to have [Lifelong Learning, Travel, Alumni By Choice, annual awards and the official ring program] connected to the university through the Baylor Alumni Network.").

The BAA has also assisted on other matters. Past presidents have called upon the BAA to help inform and galvanize alumni when troubling things have happened at Baylor. For example, in the early 1990s, then-President Herbert H. Reynolds enlisted the BAA's help when he effectuated a charter change to avoid a fundamentalist takeover of Baylor.

2. Baylor Expresses Its Intent That The BAA Operate As An Independent Alumni Organization

President Reynolds recognized the potential mischief that could result from the self-perpetuating board of regents he had created as part of the charter change. He felt strongly that Baylor must have an official, independent alumni organization as a counterbalance. Thus, under his leadership, Baylor granted the BAA a perpetual trademark license that expressly acknowledged the BAA as "an independent 'voice' of alumni of Baylor University" that might take positions "contrary to the administration of the University or its Board of Regents." Ex. 1 § 9.2. Baylor intentionally used language "that would allow for a license that would continue essentially until terminated" according to the termination provisions of the license. Ex. 45 at 31:16-25. This was to prevent the elimination of the BAA without just cause by a hostile future Baylor administration. *Id.* at 27:3-29:17; 31:16-37:10; s*ee also* Ex. 43.

3. The BAA Continues To Perform Its Duties, But Baylor's New President Dislikes Its Independent Voice

In the early 2000s, with the support of the administration and in reliance on its agreements with Baylor, the BAA hired a consultant to help it develop a comprehensive plan for expanding its alumni services. Over a two year period, the BAA dramatically enlarged its staff and significantly drew down its quasi-endowment to prepare for implementing the plan.

The BAA's executive vice president presented the plan to President Sloan in March 2002. Much to the BAA's surprise, Baylor rejected the plan and almost immediately hired the BAA's

executive vice president to direct a new alumni relations unit within the administration. He took the BAA's plan and implemented it through that newly-created unit. President Sloan then requested that the BAA merge with Baylor or give Baylor the name "Baylor Alumni Association." When, in November 2002, the BAA respectfully declined, President Sloan retaliated by giving the BAA six months to become financially independent. Ex. 42 at 10, 14.

Baylor's alumni services unit began referring to itself as the Baylor Network and eventually as the Baylor Alumni Network, causing confusion among alumni. This confusion was only exacerbated by the Baylor Alumni Network's adoption of a logo that was strikingly similar to the one long used by the BAA. *See id.* at 26.

Meanwhile, Baylor began taking dramatic steps to interfere with the BAA's ability to make contact with or be contacted by alumni. For example, Baylor:

- forced the BAA to give up its long-standing website domain name and staff email addresses;
- removed references to the BAA or its employees from Baylor's toll-free number, website, and directory;
- prohibited the BAA from introducing its awards at popular Homecoming events and graduations;
- denied access to alumni contact information;
- refused to distribute the BAA's online newsletter or news releases;
- refused to allow the BAA to purchase a table at Diadeloso (a popular all-campus event) or host Homecoming events such as Cabaret (which was created by the BAA in 1960);
- refused to allow the BAA to purchase a marketing sponsorship package for Baylor athletic events; and
- barred the BAA from soliciting new memberships at Bear Faire (an event for graduating seniors).

See, e.g., Ex. 10 (demanding the BAA give up domain name and staff email addresses); Ex. 33 (informing the BAA of its exclusion from Bear Faire); Ex. 20 (noting that this "will be the last year" the BAA can present its awards on campus "since next year we will have our own awards").[4]

4. Baylor's Administration Continues to Pressure the BAA

Kenneth Starr became the President of Baylor in June 2010. He announced an official policy of treating the BAA with "courtesy, hospitality, and respect," causing some to hope that the era of administrative hostility toward the BAA was over. Ex. 44. But it turned out that "courtesy, hospitality, and respect" were simply public relations buzz words intended to mask the administration's and the Board of Regents' plan to put the BAA out of business.

In a March 15, 2011 email to President Starr and Vice President of Constituent Engagement Tommye Lou Davis (her "Fellow BAA Warriors"), Karla Leeper wrote that regent Dary Stone "believes that someone is working intentionally at cross purposes with our strategy of driving the BAA out of business." Ex. 31. A few months later, Ms. Davis wrote to Ms.

[4] These are just a few examples. Many other Baylor internal communications reveal that the University implemented a systemic effort to interfere with the BAA's business. *See* Ex. 11 (appealing to President Garland to reconsider decision to remove the BAA from "the telephone and email systems and removing the link from the website"); Ex. 12 ("We will refuse to become involved in the future if there is any reference to the alumni association related to the event. We can give the association a list of **their members only** in the identified counties.") (emphasis added); Ex. 14 (questioning why "BAA representatives would no longer be able to introduce the awards and recipients"); Ex. 18 ("We have adjusted all the downloads to only allow data to be provided on anyone who is a Life Member and anyone who has paid a membership within the last 12 months."); Ex. 24 (allowing BAA to hold event on campus one last time because "the venue was scheduled some time before our change in practice" and the BAA was honoring an alumnus that Baylor "did not want to alienate" or "draw … into the BAA fight"); Ex. 26 ("Since we have been denied the list of contact information of all graduating seniors, it is impossible to get their membership packet to them."); Ex. 25 (exclusion of BAA from Diadeloso); Ex. 27 ("After this week, there will be no more BAA advertising in conjunction with Baylor Athletics."); Ex. 28 (exclusion of BAA from Cabaret); Ex. 29 (Baylor denying advertising sales to the BAA because "the BAA was in direct competition with Baylor University"); Ex. 32 (acknowledging that excluding the BAA from Bear Faire is not consistent with treatment of other third-party vendors); Ex. 34 ("It is very important that the BAA leadership understands that there will be NO solicitation of any kind and no promotion of the BAA at Bear Faire.").

Leeper: "I have 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." Ms. Leeper forwarded the email to President Starr. Ex. 36. With President Starr's blessing, Baylor then banished the BAA to a remote tailgate location—which Baylor deemed the "farthest reaches of Siberia"—so that they could not connect with alumni. Ex. 34; Ex. 35.

Baylor also repeatedly used the License Agreement as a sword to attempt to control the content of the BAA's publications and prevent the publication of anything the administration or Board of Regents considered "critical." Baylor sent the BAA numerous threatening letters demanding that the BAA take or forego certain actions to comply with the License Agreement or face legal action if it failed to do so. Ex. 8; Ex. 9; Ex. 19; Ex. 21; Ex. 22; Ex. 37. Baylor never took legal action (until now) despite these attempts to silence the BAA.

In 2013, Baylor dramatically escalated its efforts to rid itself of the BAA. On May 31, 2013, Baylor wrote the BAA to give "formal notice of unilateral termination" of the License Agreement (and other contracts) because they were "executory." Ex. 4. Baylor contemporaneously moved forward with inducing the BAA into agreeing to vacate its campus home—the Hughes-Dillard Alumni Center—under the guise of needing the land for the construction of McLane Stadium. When even this vindictive move failed to drive the BAA out of business, Baylor filed this lawsuit and argued for the first time that the long-standing agreements between Baylor and the BAAare unenforceable and terminable at will.

B. Public Policy Strongly Favors Enforcing The Parties' Agreements: Texas Has A "Paramount" Interest In Preserving The Freedom Of Contract

Baylor contends that it properly terminated the parties' agreements without notice or reason because they are unenforceable as a matter of public policy. According to Baylor, the agreements "improperly attempt to bind—in perpetuity—future administrators and regents in the

critical management function of alumni relations." Baylor MSJ at 8. Baylor's position not only ignores that the agreements expressly state the parties' intent for them to last until the termination events agreed on occur, *see infra* Part II.A-B, it lacks merit under Texas law.

The exceptions to freedom of contract are few and narrow. The Legislature itself may declare certain agreements to be illegal and against public policy, *see Fairfield Ins. Co. v. Stephens Martin Paving Co.*, 246 S.W.3d 653, 665 (Tex. 2008) (collecting examples), and in some cases the Texas Supreme Court has held that public policy disfavors certain types of agreements. *Id.*[5] When neither the Legislature nor the supreme court has spoken on a particular public policy, a court must balance the public policy interest sought to be protected against the state's acknowledged interest in freedom of contract. *Id*. at 663-664.

The public policy alleged by Baylor does not exist and has never been recognized in Texas law. There is no "fiduciary discretion" that obligates a private university to manage alumni relations, and neither the legislature nor a Texas court has ever used a public policy exception to the freedom-of-contract rule as a justification to invalidate a contract on that basis. "Courts are to derive public policy from existing law, not create it." *Fairfield*, 246 S.W.3d at 673 (Hecht, J. dissenting).

Further, none of the cases cited by Baylor support its broad assertions that the contract is invalid because the parties did not "take into account the evolving nature of higher education" and do not "serve its alumni in what is currently the most effective way possible." Baylor MSJ at 9. Those cases involve rejections of a board's power to enter into permanent *employment* agreements (*Beeman* and *Phinney*), recite the traditional rule of corporate governance that a

[5] The *Fairfield* opinion includes a long recitation of the types of agreements that *are* disfavored by Texas public policy. *See Fairfield*, 246 S.W.3d at 665 & n.20. The supreme court's list of disfavored contracts does not include perpetual or indefinite agreements, or alleged encumbrances on a private University's administrators and board of directors. *Id.*

board cannot divest itself of its overall responsibility to manage the corporation (*Hughes* and *Boston Athletic Association*), or turn on the rule that a governmental body cannot bind its successors (*Slaughter*). None of the cases shows that Texas "public policy clearly disfavors" agreements binding future University administrators, as Baylor incorrectly alleges. *Fairfield*, 246 S.W.3d at 665.

There is a reason why Baylor is unable to identify relevant authority to support its unfounded public policy position. Texas public policy actually favors *enforcement*. Numerous Texas Supreme Court cases establish that Texas has a "paramount" public policy to preserve the freedom of contract. *See supra* Part II.B.1. (citing cases). Further, the Texas Business Organizations Code gives corporations the same broad powers enjoyed by individuals to make contracts and carry out their business and affairs as they see fit. *See generally* TEX. BUS. ORG. CODE §2.101 (giving corporations "the same powers as an individual to take action as necessary or convenient to carry out its business and affairs"). These authorities show the policy Baylor espouses is not "clearly resolved" as the Texas Supreme Court requires. *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001).

Perhaps there is room for legitimate debate about the administrative issues Baylor raises as a matter of management policy. But this is not *public* policy, and overriding the parties' freedom of contract on such flimsy grounds is impermissible. Baylor's public policy argument should be rejected.

C. This Court's Duty Is To Enforce The Intent Of The Parties As Expressed In The Terms Of The Agreements And Not Override Those Terms By Implying A 'Termination At Will' Clause

Next Baylor asks the Court to imply a "termination at will" provision into the parties' agreements because they purportedly have an "indefinite duration, . . . do not specify a time

period," and have no "determinable events allow for termination." Baylor MSJ at 10. Baylor's position disregards that the express words used in these contracts reflect the parties' mutual intent that the agreements continue until terminated according to their specific terms.

1. The Express Intent Of The Parties Trumps The Presumption Against Indefinite Duration

The "rule" Baylor presses regarding the presumption against perpetual contracts is a rule of *construction*, not a rule of law. Thus, contracts expressing the parties' intent to form an ongoing obligation are enforceable according to their own terms. This is reflected in Texas cases holding that courts should honor the express language of the agreement *as written* and enforce that language over the general presumption against perpetual contracts. *See University Computing Co. v. Leader Co.*, 371 F.Supp. 86, 87-88 (N.D. Tex. 1974) (holding that the grant of a license "for an indefinite period of time" was not terminable at will); *Hull v. Quanah Pipeline*, 574 S.W.2d 610, 611 (Tex. App.—San Antonio 1978, writ ref'd n.r.e.) (allowing perpetual right where agreement "clearly and specifically" showed intent to create a right of perpetual renewal).

In other words, when an agreement contains "unequivocal language" demonstrating the parties' intent for the agreement to last perpetually, courts will enforce this intent. *SHA, LLC v. Nw. Tex. Healthcare Sys. Inc.*, No. 07-13-00320-CV, 2014 WL 31420 *3 (Tex. App.—Amarillo, January 3, 2014, no pet.) ("[T]he law disfavors perpetual contracts, and an agreement will not be construed as creating such an arrangement *unless its unequivocal language so mandates*") (emphasis added); *Besco Inc. v. Alpha Portland Cement Co.*, 619 F.2d 447, 449 (5th Cir. 1980) (contract with indefinite term enforced because language in agreement expressed that intent); *Freeport Sulfur Co. v. Aetna Life Ins. Co.*, 206 F.2d 5, 8 (5th Cir. 1953) ("A construction of a contract conferring a right in perpetuity will be avoided unless compelled by the unequivocal language of the contract."); *see also Baldwin Piano, Inc. v. Deutsch Wurlitzer GMBH*, 392 F.3d

881, 885 (7th Cir. 2004) (Easterbrook, J.) ("The presumption of terminability allows separation in the business world, unless the parties clearly provide otherwise. It is the business equivalent of no-fault divorce, with the possibility of covenant marriage if the parties make the necessary declarations").[6]

The rule stated above makes sense when the "cardinal rule" of contract construction—honoring the intent of the parties as expressed in the contract itself —is considered. Courts are not at liberty to disregard a contract's express terms. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 333 (Tex.2011). Thus, while perpetual contracts may be disfavored under some circumstances, it would be "illogical to apply the at-will presumption mechanically, if to do so would contravene the intent of the parties." *Yale Security, Inc. v. Freedman Sales, Ltd.*, 165 F.3d 34, 1998 WL 690994 *3 (7th Cir. 1998) (unpublished

[6] This is the majority rule applied nationwide. Courts often reason that contracts expressly providing for a perpetual term are not "indefinite" in the sense that they are undefined and thus require the intervention of a court to supply a necessary missing term. Where the parties have expressed an intent as to the duration of the agreement in the language of the contract, therefore, courts hold that they are bound to respect the intent of the parties pursuant to normal rules of contract construction. *See, e.g., P.C. Films Corp. v. Turner Entm't Co.*, 954 F. Supp. 711, 716 (S.D.N.Y. 1997) (holding that express terms of copyright license agreement conveyed "perpetual rights … *i.e.*, rights that last forever."); *FurryRecords, Inc. v. Real Networks, Inc.*, No. 01-CV-10998, 2002 WL 2005812, *2 (S.D.N.Y. 2002) (contract granting copyright license "in perpetuity" would be enforced according to its terms); *Zee Med. Distrib. Ass'n. v. Zee Med., Inc.*, 94 Cal. Rptr. 2d 829, 833 (Ct. App. 2000) ("a contract may, by its express terms, provide for a term of duration of indefinite length and without specific limitation, tied not to the calendar but to the conduct of the contracting parties."); *Paul Gabrilis, Inc. v. Dahl*, 961 P.2d 865, 868 (Ore. App. 1998) ("where provided for, perpetual agreements will be enforced according to their terms"); *Bell v. Leven*, 90 P.2d 1286, 1288 (Nev. 2004) ("when the language of a contract clearly provides that the contract is to have a perpetual duration, the courts must enforce the contract according to its terms"); *Bob's Red Mill Natural Foods, Inc. v. Excel Trade, LLC*, No. 3:12-CV-2194, 2013 WL 5874574, at *5-10 (D. Or. Oct. 30, 2013) (slip copy) (examining Oregon law recognizing perpetual obligations and enforcing indefinite-term future sales commission obligation); *cf. Southern Wine & Spirits of Nev., Inc. v. Mountain Valley Spring Co., LLC*, 646 F.3d 526, 532 (8th Cir. 2011) (enforcing agreement for perpetual term where agreement provided for termination only by mutual consent or specific acts of default); *Compania Embotelladora del Pacifico, S.A. v. Pepsi-Cola Co.*, 607 F.Supp.2d 600, 603 (S.D. N.Y. 2009) ("If the parties to a contract intend for it to be perpetual, they must expressly say so.") (collecting cases); *Baldwin Piano*, 392 F.3d at 885-86 (holding that license to "continue in force without limit of period but may be cancelled by the Licensor for material breach" was not terminable at will by Licensor).

decision) (termination provisions of indefinite term contract should override the at-will presumption).

2. Contracts With An "Ascertainable" Termination Provision Are Not Terminable At Will

Texas law also holds that the contract's term is not indefinite and not terminable at will if the contract is tied to an ascertainable fact or event or the happening of one of several contingencies. *See, e.g., City of Big Spring v. Bd. of Control*, 404 S.W.2d 810, 812 (Tex. 1966). In *Big Spring*, the city contracted to provide water to a state-run hospital at a pre-arranged rate "as long as the State of Texas shall in good faith maintain and operate said hospital." *Id*. at 815. The City alleged that the obligation was indefinite and could be terminated at will, but the court disagreed, holding that the language "fixed an ascertainable fact or event, by which the terms of [the] contract's duration [could] be determined." *Id*.[7]

Numerous Texas courts have applied the "ascertainable event" principle in *Big Spring*. *See, e.g., Kirby Lake Dev. Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 842 (Tex. 2010) (relying on rule from *Big Spring* to hold contract not terminable at will); *Rolling Lands Invs., L.C., v. Northwest Airport Mgmt., L.P.*, 111 S.W.3d 187, 196-97 (Tex. App.—Texarkana 2003, pet. denied) (contract's duration was not indefinite where it was terminable upon nonpayment of fees, violation of specific restrictions, or closing of the airport); *Garcia v. Doctors Hospital of Laredo*, 04-95-00493, 1996 WL 682211, *2-3 (Tex. App.—San Antonio Nov. 27, 1996, no writ) (contract was not for indefinite duration where it could be terminated for cause upon the occurrence of certain specified events); *cf. Besco, Inc. v. Alpha Portland Cement Co.*, 619 F.2d

[7] An obvious example of the principle applied in *Big String* is a standard oil and gas lease, which may continue indefinitely until the occurrence of a termination event, like the failure to produce in "paying quantities." *See, e.g., Anadarko Petroleum v. Thompson*, 94 S.W.3d 550, 554 (Tex. 2002) ("the lessee's mineral estate may continue indefinitely, as long as the lessee uses the land for its intended purpose," but "will automatically terminate if the event on which it is limited occurs.").

447, 448-49 (5th Cir. 1980) (indefinite-term contract was not terminable at will where parties otherwise agreed to limit termination rights).[8]

3. The Plain Language Of The Agreements Must Be Enforced: Baylor And The BAA Expressly Intended For These Agreements To Continue Indefinitely Until Terminated By Their Specific Terms

As demonstrated in the BAA's motion for partial summary judgment, *see supra* Part II, the express language of the License Agreement and the ORA demonstrate that the parties intended to create obligations that cannot simply be terminated "at will." In particular, the parties' expressed their desire for the agreements to be "perpetual" and "indefinite" until the BAA fails to substantially comply with its obligations and perform its enumerated responsibilities in good faith. "[A] court should not, under the guise of contract construction, imply terms in opposition to the express language that the parties themselves have written into the contracts." *Rogers v. Ricane Enter., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989). This is precisely what Baylor asks this Court to do when it argues that the agreements should be construed to include a terminable "at will" provision despite their express language providing to the contrary.

Baylor's "at will" request also ignores that Texas courts presume that "the parties to a contract intend every part of an agreement to mean something." *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 235 (Tex. 2003). If the agreements could be terminated "at will," the provisions (1) requiring Baylor to provide the BAA written notice of any alleged default and an opportunity to cure and (2) allowing termination only if the BAA fails to performs its enumerated responsibilities would be rendered superfluous and meaningless. *See supra* Part II.B.2.

[8] The case Baylor touts, *Trient Partners I Ltd. v. Blockbuster Entertainment Corp.*, 83 F.3d 704 (5th Cir. 1996), does not make this law irrelevant. That case involved a licensee's attempt to terminate a perpetual license that did not express the parties' intent for the licensee to stay in business forever. *Id.* at 707-09. *Blockbuster* turns on its unique facts and, as at least one court has acknowledged, does not embody settled Texas law. *See Zee Med. Distrib. Ass'n, Inc. v. Zee Med., Inc.*, 94 Cal. Rptr. 2d 829, 837 (Cal. Ct. App. 2000).

(discussing same). "Interpreting contracts so that major clauses fall out usually is not a sensible way to understand the parties' transaction." *Baldwin Piano*, 392 F.3d at 883.

Similarly, the Agreement to Vacate Hughes-Dillard is not terminable "at will" because (1) doing so would frustrate the parties' intent, (2) this intent is reflected in the express terms of the agreement, and (3) it contains a duration term tied to ascertainable events.

- *The purpose is clear: the BAA will vacate Hughes-Dillard in exchange for Baylor's promise to house it in Robinson Tower*. The agreement explicitly spells out its business justification: "The purpose of this Agreement is to have the Association vacate the Hughes Dillard Alumni Center and its premises in exchange for certain commitments by Baylor contained herein," including assisting the BAA with its move to Robinson Tower. Ex. 3 at 1. The BAA relied on these "commitments" and vacated Hughes Dillard, but Baylor now wishes to escape its commitments without penalty or compensation to the BAA. Permitting Baylor to terminate the agreement at will would utterly ignore the underlying purpose of the bargain struck between Baylor and the BAA.[9]

- *The agreement expressly lasts "for an indefinite term free of charge" with an ascertainable minimal term*. The agreement says the BAA is permitted to stay in Robinson Tower "for an indefinite term free of charge" until the latter of "(i) full implementation of the Transition Agreement or (ii) the Association is housed elsewhere, unless agreed otherwise." Ex. 3 at 1. This language makes clear that the parties truly intended the agreement concerning the BAA's residence to last "for an indefinite term," just like the ORA states with respect to the

[9] The evidence is strong that Baylor's plan all along was to entice the BAA to vacate Hughes-Dillard by offering alternate space in Robinson Tower indefinitely, then terminate the agreement "at will" without performing its side of the bargain. On the *same day* that Baylor signed the Agreement to Vacate, it unilaterally terminated the other two BAA agreements on the theory that indefinite or perpetual agreements are terminable "at will." If Baylor's legal theory is right, it has either defrauded the BAA or, at best, has given an illusory promise to the BAA in exchange for the BAA's agreement to vacate.

BAA's occupation of the Hughes-Dillard building. *See* Ex. 2 § III. This language also provides two independent ascertainable events that provide for a minimum term of duration. Ex. 3 at 1

4. Construing The Agreements To Be Terminable At Will Would Also Thwart The Parties' Intent For The BAA To Have An "Independent Voice"

Baylor's construction of the License Agreement as being terminable at will also runs afoul of section 9.2 of that agreement, which states:

> [I]t is understood that LICENSEE is an independent 'voice' of alumni of Baylor University, and the positions taken by LICENSEE (editorial and otherwise) which may be contrary to the administration of the University or its Board of Regents shall not be alleged by LICENSOR to constitute insufficient quality and shall not be grounds for LICENSOR'S termination of this License Agreement.

Ex. 1 § 9.2 (emphasis added). This provision protects the BAA against retaliation by the University for the BAA's editorial statements and other controversial positions. Yet, if the License Agreement is construed to be terminable at will as Baylor contends, the language precluding Baylor from claiming insufficient performance based on the BAA's "voice" would be meaningless.

The overwhelming amount of evidence showing Baylor's intent to silence the BAA's "independent voice"—and replace it with its own (presumably more compliant) alumni organization—demonstrates why Baylor urges the Court to construe the agreement as terminable at will. There is no doubt that Baylor has a strong desire to silence any criticism from the BAA and make the organization go away. *See, e.g.*, Ex. 15 ("The Baylor Line and Baylor Magazine will be consolidated into one publication with Baylor maintaining editorial control."); Ex. 17 (PR firm's draft letter to the editor: "What does the current Baylor Alumni Association do? They talk bad about the university they serve. Enough! One Baylor, one voice. Make BAA part of the University."); Ex. 30 ("We have made progress in reigning them in over the past two years by consistently applying quality standards."); Ex. 38 ("Independent voice must shift from that of

'lurking critic/'last bulwark'/'canary in a mine' prototype to one of being part of a system of shared University governance.").[10]

Accordingly, a key purpose of the License Agreement was to insulate the BAA from an unwarranted and vindictive termination of its contract rights based on the sort of conflict over opinions that Baylor's communications show. The agreement's recognition of this purpose—in addition to the express language identifying when termination is permitted—underscores the parties' intent that Baylor not be able to terminate the agreement at its whim.

D. Each Agreement Is Supported By More Than Adequate Consideration.

Baylor makes two arguments challenging the sufficiency of the consideration supporting the License Agreement and ORA.[11] One is that the BAA was under no obligation to perform and thus the contracts are void for lack of "mutuality." The other is that the BAA's promises were "illusory" because one of the required ongoing obligations of the BAA is to carry out the purposes of its constitution and bylaws, and the BAA can amend those at any time. Baylor's theories should be rejected because each agreement is based on more than adequate consideration.

1. "No Obligation To Perform" Is Simply A Challenge To Adequacy Of Consideration

With respect to the "mutuality" argument, Baylor frames the issue incorrectly. The law does not require "mutuality of obligation" to make an enforceable contract. "It has been said, thousands of times, that both parties to a contract must be bound or neither is bound. This

[10] These communications about Baylor's efforts to muzzle the BAA are just the tip of the iceberg. *See also* Ex. 6 (filed under seal); Ex. 7 ("I trust you will tell them [the BAA] how publishing the very articles you admonished them about is just pouring gasoline on an already burning fire. . . . If they publish a hatchet job in the Line along this line I just hate to see what the reaction will be."); Ex. 40 ("Haven't we consistently denied such interviews with the baa? Part of denying content.").

[11] It appears that Baylor challenges the consideration supporting these two agreements only and not the Agreement to Vacate.

statement is inaccurate. The law of contracts is not limited to agreements that create reciprocal legal duties." 2 CORBIN ON CONTRACTS § 5.29 (1995); *see also* § 6.1 ("It was once common for courts to state that mutuality of obligation is necessary for a valid contract; that both parties to a contract must be bound or neither is bound…[b]ut symmetry is not justice and the so-called requirement of mutuality of obligation is now widely discredited.").

The most obvious example of a contract without "mutuality of obligation" is a unilateral contract. Under this type of agreement, Party A is bound when Party B performs, even where Party B is under no reciprocal obligation. Texas law expressly recognizes that such contracts are enforceable. *See, e.g., Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 302-03 (Tex. 2009) (quoting CORBIN ON CONTRACTS).

Options contracts are another prominent example; in those cases, one party is contractually obligated to perform at the other party's election. *See generally 1464-Eight, Ltd. v. Joppich*, 154 S.W.3d 101, 105-06 (Tex. 2002) (option agreement is enforceable, even if nominal consideration is not actually paid). As Corbin points out, "the real requirement is that for a promise to be binding there must be consideration or some other basis for enforcement." 2 CORBIN ON CONTRACTS § 5.30; *see also Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997) (using the terms "mutuality of obligation" and "valid consideration" interchangeably).

2. A Present Exchange Bargained For A Return Promise Is Valid Consideration

Under Baylor's "mutuality" and "illusory" arguments, then, the question is whether the agreements are supported by valid consideration. Consideration consists of either a benefit to the promisor or a detriment to the promisee; it is a present exchange bargained for in return for a promise. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 496 (Tex. 1991). It is not contingent on a particular promise in an agreement, read without consideration for all the other

provisions. It may consist of some right, interest, or profit, or benefit that accrues to one party, or, alternatively, of some forbearance, loss or responsibility that is undertaken or incurred by the other party. *Angelou v. African Overseas Union*, 33 S.W.3d 269, 280 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

For example, a contract which grants a right "as long as" the other party performs is supported by valid consideration. *See Meredith v. Duval County Ranch Co.*, 538 S.W.2d 262, 265 (Tex. App.—San Antonio 1976, no writ) (board member's promise to provide advice and counsel "so long as" his health permitted was sufficient consideration for company's promise to pay wife $5000 per month for her lifetime). Similarly, when a promisor must keep an option open "as long as" the promisee performs his obligations under an agreement, that continuing performance constitutes consideration for the option. *Siegler v. Robinson*, 600 S.W.2d 382, 385 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

3. The License Agreement And The ORA Are Each Supported By Consideration.

The 1993 License Agreement. The License Agreement is quite plainly a bargained-for exchange of non-illusory promises. First, the agreement itself recites that it is supported by the "mutual promises contained in this Agreement" and confirms that the license it grants is "fully paid up." Ex. 1 at 1 ("In consideration of the mutual promises contained in this Agreement, Licensor and Licensee agree as follows").

Second, the License Agreement expressly supersedes and replaces a previous one-page license agreement dated April 10, 1989. In doing so, Baylor extracted from the BAA a series of enforceable promises and representations, any one of which is sufficient to constitute "consideration" for the contract:

- Quality control and royalty payments. The BAA promises that it will pay royalties to Baylor, and agrees to use the marks consistent with the "Quality Control" provisions of Section 5 (as it must do consistent with trademark law).[12] The previous license agreement did not provide for royalties or quality control. *See* Ex. 1 § 5.

- Indemnity rights. In exchange for the use of Baylor's marks, the BAA agrees to indemnify Baylor for all claims arising out of its use of the marks. License Agreement at § 8. The previous license did not contain an indemnity provision. *See* Ex. 5.

- Registration rights and disclaimer of BAA's rights to the marks. For decades before the 1993 License Agreement, the BAA had used the names "Baylor Alumni Association" and "Baylor University Alumni Association" without a formal agreement from the University, and the BAA has openly used the "Baylor" name in some form since the mid-19th century. A 1989 letter from Baylor's general counsel suggests that the BAA had been operating under an "implied license" for some time, and it was Baylor's wish that the licensor-licensee relationship be clarified and formalized in a manner acceptable to the University. Ex. 5. As a result, the License Agreement includes express agreements that all rights to the marks "remains vested solely in" Baylor, and disclaimed any ownership right in those marks. Ex. 1 § 2.4. On the face of the agreement, the BAA appears to have bargained away any common law claim to rights in its own names in exchange for a perpetual license to use those names and utilize them in its activities.[13]

- Representations and formalities. The 1993 License Agreement adds a number of standard representations and contractual provisions that were absent from the previous license, including: (1) a severability clause, (2) a choice of law provision, (3) an express merger

[12] A trademark owner's failure to exercise appropriate quality control and supervision over its licensees may result in an abandonment of trademark protection for the licensed mark. *See Exxon Corp. v. Oxxford Clothes, Inc.*, 109 F.3d 1070, 1075 (5th Cir. 1997). A license granted without these protections is called a "naked license" and may be the basis for an inference of abandonment. *Id*. The previous Baylor-BAA license was a "naked license."

[13] Notably, the 1989 license agreement did not require the BAA to disclaim its interest in the "Baylor Alumni Association" name, nor did it expressly revoke or supersede the "implied license" that all parties acknowledge was in existence at that time. *See* Ex. 5.

clause, (4) a "no oral modification or waiver" clause, and (5) a "no-agency or control" clause, confirming the parties' independent status. *See* Ex. 1 §§ 9, 10.

Third, from Baylor's perspective, the agreement provides a number of immediate and long-term benefits to the University that independently constitute consideration. Most obviously, the License Agreement provides a formal and defensible license agreement that conforms to trademark law and includes measures designed to strengthen and confirm Baylor's interest in its trademarks. More broadly, the "perpetual" nature of the license was designed in part to *benefit Baylor itself* by strengthening the legal status of the BAA, providing stability for the Baylor-BAA relationship, and avoiding future fights over the BAA's role in the University. Thus, it is clear from the agreements' express language that the intent of the perpetual license was to *help* Baylor overall, not harm it.

The 1994 Official Recognition Agreement. The consideration for the 1994 Official Recognition Agreement is likewise plain on the face of the agreement. It is an exchange of promises: on the one hand Baylor agrees to recognize the BAA as its official alumni organization and provides a license to use and occupy space on campus for this purpose; in exchange, the BAA agrees to "support the purpose and goals of Baylor University as expressed in its original charter" and to undertake five specific duties. *See* Ex. 2§ I. These promises are not conditional, they are not optional, and they are not discretionary. If Baylor wishes to claim that the BAA has not fulfilled these promises it may do so pursuant to the terms of the termination provision, but it cannot simply dismiss the ORA because it finds its obligations to be inconvenient.

None of the BAA's promises in the ORA are "illusory" as Baylor contends. The promises are contingent on Baylor's promises in the ORA regarding recognition of the BAA and its

residence, and this bargained-for exchange of several promises is obvious on the face of the document. Baylor calls the whole contract "illusory" because *one* of those multiple promises *might* change in the future. Leaving aside the speculative nature of Baylor's argument, the ORA is clearly supported by other promises that do not depend on the BAA's constitution and bylaws. "The slightest consideration . . . is sufficient to make the most important agreement binding." *Nolan v. Young*, 220 S.W. 154, 156 (Tex. Civ. App.—Amarillo 1920, no writ). Here, the consideration is not just "slight" it is more than adequate to bind the parties.

4. Baylor's And The BAA's Performance Under The Agreements Makes The Lack-Of-Consideration Argument Irrelevant

Even if the court assumes for argument's sake that the agreements lacked consideration when they were formed, a determination of whether an agreement is unenforceable (and thus terminable at will as Baylor claims) requires a look at the circumstances when enforcement of the agreement is sought. *Cherokee Commc'ns, Inc. v. Skinny's, Inc.*, 893 S.W.2d 313, 316 (Tex. App.—Eastland 1995, writ denied). Thus, when the parties to an agreement allegedly lacking consideration actually perform, such performance becomes the consideration to support the agreement. *Id.* (citing *Hutchings v. Slemons*, 141 Tex. 448, 174 S.W.2d 487, 489 (1943)).

Here, the agreements are supported by adequate consideration as outlined above. But it is also indisputable that the BAA has continually performed under the agreements, as has Baylor. *See supra* Part III.A.1 (discussing the BAA's various programs). Under such circumstances, Baylor is precluded from contending the agreements are unenforceable for lack of consideration. *See Tex. All Risk Gen. Agency, Inc. v. Apex Lloyds Ins. Co.*, No. 10-10-00017-CV, 2010 WL 4572738, at *5 (Tex. App.—Waco Nov. 10, 2010, no pet) ("regardless of whether the clause was illusory at the time the agreement was signed as alleged by [defendant], the subsequent performance by both [defendant] and [plaintiff] pursuant to the agreement constituted an

adequate consideration"); *see also Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 225 (Tex. App.—Fort Worth 2009, pet denied); *Cherokee Commc'n*, 893 S.W.2d at 315; *Brown v. Alcatel USA, Inc.*, No. 05-02-01678-CV, 2004 WL 1434521, at *2 (Tex. App.—Dallas June 28, 2004, pet. denied).

E. The Agreements Are Not "Too Vague" To Be Enforced

Selectively quoting language from provisions in two of the parties' three agreements, Baylor argues that the parties' agreements are unenforceable because "key terms and conditions are fatally uncertain." Baylor MSJ at 17-18. Neither the law nor the facts support Baylor's position.

In Texas, an agreement is legally binding "if its terms are sufficiently definite to enable a court to understand the parties' obligations." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). Based on this principle, when an alleged oral agreement does not address essential matters or a proposed agreement leaves key terms open for future negotiation—such as the "time of performance, the price to be paid, the work to be done, the service to be rendered or the property to be transferred"—it is not binding on the parties. This is what occurred in the cases on which Baylor relies. *See T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex.1992) (alleged agreement for line of credit missing key terms); *Gannon v. Baker*, 830 S.W.2d 706, 709 (Tex. App.—Houston [1st Dist] 1992, writ denied) (alleged oral agreement to sell stock missing key terms); *Knowles v. Wright*, 288 S.W.3d 136, 142-43 (Tex. 1992) (alleged oral agreement about drilling venture missing key terms).

The rules regarding indefiniteness of a contract's material terms are "'based on the concept that a party cannot accept an offer so as to form a contract unless the terms of that contract are reasonably certain.'" *Id.* (quoting *Texas Oil Co. v. Tenneco Inc.*, 917 S.W.2d 826,

830 (Tex. App.—Houston [14th Dist.] 1994), *rev'd on other grounds*, 958 S.W.2d 178 (Tex. 1997)). Accordingly, the parties' conduct may demonstrate their intention to enter a binding agreement even when certain material terms are uncertain. *Texas Oil Co.*, 917 S.W.2d at 830 (citing RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981)). Because Texas favors enforcing contracts, courts typically defer to the parties' intent and enforce contracts, using contract construction principles to fill in terms when needed. *Id.*; *Gen. Metal Fabricating Corp. v. Stergiou*, 438 S.W.3d 737, 749 (Tex. App.—Houston [1st Dist. 2014, no pet.) (contract enforceable where parties did not indicate intent not to be bound).

Baylor fails to prove the three agreements are indefinite and not binding under this governing standard. Baylor does not contend that any key terms are missing. Instead, it broadly claims the BAA's obligations under the Agreements cannot be understood or enforced. *See* Baylor MSJ at 18. But the provisions from the two contracts that Baylor claims are vague actually specifically outline the services the BAA is to provide. The agreements do not simply say the BAA will use its "best efforts." They expressly identify the BAA's expected tasks and make the continuation of the agreements contingent on the BAA's substantial compliance and good faith performance of those services. *See* Ex. 1 § 5.1 (1)-(5); Ex. 2 § I (1)-(5); *see also supra* Part II.A.B. (discussing express terms of agreements).

Baylor knows perfectly well what these terms mean, and both parties understood the level of service expected of the BAA. For example, the License Agreement states: "It is agreed that the previous quality of series and products of [the BAA] were acceptable and reasonable. LICENSEE agrees that it shall at all times maintain the quality of the services and products provided by LICENSEE at a reasonable level." Ex. 1 § 5.1. According to Baylor's counsel who drafted the ORA and License Agreement, this provision "set the bar at which the alumni had

done historically up to this point as being sufficient to maintain the license." Ex. 45 at 39:16-40:11, 41-46. The parties obviously intended this to create a binding agreement as to the BAA's future performance of the specified tasks, as exemplified by their operation under the agreements for decades. *See supra* Part III.A.1 (discussing the BAA's various programs).

This is not an instance in which essential contract terms are missing or there is no standard by which to assess the performance of services required under the agreement. The terms of the agreements are reasonably certain and sufficiently definite to make them valid and enforceable.

F. Baylor Has Ratified The Agreements And Is Estopped From Claiming They Are Invalid

Baylor's motion seeking to validate its termination of the agreements at will because they purportedly are not enforceable fails for another reason: Baylor has failed to prove as a matter of law that the doctrines of promissory estoppel, waiver, and ratification do not apply.

In Texas, promissory estoppel may be asserted as a defensive theory or cause of action when a party relies to its detriment on an otherwise unenforceable promise. *Frost Crushed Stone Co. v. Odell Geer Const. Co.*, 110 S.W.3d 41, 44 (Tex. App.—Waco 2002, no pet.). This doctrine prevents a party from insisting upon the application of strict legal rights when it would be unjust to allow enforcement of those rights. *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936 (Tex. 1972). Promissory estoppel exists when there is: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial and reasonable reliance by the promisee to his detriment. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 686 n.25 (Tex. 2002); *see also Roberts v. Geosource Drilling Servs., Inc.*, 757 S.W.2d 48, 51 (Tex. App.—Houston [1st Dist.] 1988, no writ) (reliance on indefinite agreement reasonable).

The doctrines of waiver and ratification are also defensive theories that, if established, preclude a party from claiming that an agreement is unenforceable.

- Ratification occurs "when a party recognizes the validity of a contract by acting under the contract, performing under the contract, or affirmatively acknowledging the contract." *Stable Energy, L.P. v. Newberry*, 999 S.W.2d 538, 547 (Tex. App.–Austin 1999, pet. denied). An intent to ratify may be inferred from acceptance of benefits under the agreement. *See Oram v. Gen. Am. Oil Co. of Tex.,* 513 S.W.2d 533, 534 (Tex. 1974) (acceptance of payments under a lease waived right of rescission or attack on lease's validity). A party cannot avoid an agreement by claiming there was no intent to ratify after that party has accepted the benefits of the agreement. *Chopra & Associates, PA v. U.S. Imaging, Inc.*, No. 14-13-01099-CV, 2014 WL 7204868, at *3 (Tex. App.—Houston [14th Dist.] Dec. 18, 2014, no pet.).
- A waiver occurs when one intentionally relinquishes a known right or engages in intentional conduct inconsistent with claiming that right. *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d 353, 357 (Tex. 1971). Waiver is unilateral in nature in that "it results as a legal consequence from some act or conduct of the party against whom it operates; no act of the party in whose favor it is made is necessary to complete it." *Id.* at 358.

Over the past twenty years, the BAA has expended time, effort, and money performing its duties under the agreements in reliance on Baylor's promises that the BAA would be the official alumni organization for the University and would have residence on the campus. The BAA has published an alumni magazine, annually organized and sponsored activities for Homecoming, and sponsored numerous programs that promote good fellowship among students

and friends of Baylor (such as pregame tailgating parties, Heritage Club, travel programs, Fling, and other events). *See supra* Part III.A.1 (discussing the BAA's various programs).

Baylor accepted the benefits of the BAA's performance and never acted as if the agreements were unenforceable. In fact, throughout the years leading up to this litigation, Baylor repeatedly acknowledged the License Agreement and the ORA and attempted to enforce their terms against the BAA:

- In October 2007, Baylor's general counsel demanded a copy of a survey conducted by the BAA, relying on Sections 5.2, 5.3, and 5.5 of the License Agreement. Ex. 8. Baylor sought to prevent the BAA from reporting the survey results by claiming (erroneously) that the BAA's release of the survey data would constitute a breach of the License Agreement. Ex. 9. Although the BAA disagreed with Baylor's legal analysis, it honored Baylor's demand that the survey results remain a secret.
- In May 2009, Baylor's general counsel demanded that the BAA "cease and desist" certain uses of the Baylor mark that he claimed were "not within the scope of the License Agreement" and claimed that the BAA was violating Section 9.1 of the License Agreement. Ex. 10.
- On December 22, 2009, Baylor's lawyers notified the BAA that **"Notwithstanding any past events or communications, Baylor hereby demands strict compliance with all provisions of the License Agreement from this point forward"** and also demanded, pursuant to Section 5.2 of the License Agreement, that the BAA submit a sample of anything bearing any Licensed Mark—such as editions of *The Baylor Line*, articles, editorials, events invitations—to Baylor for pre-publication review. Ex. 19 (emphasis in original); Ex. 21.
- In August 2011, President Starr's Chief of Staff sent the BAA a notice of default under Section 6 of the License Agreement and demanded that the BAA provide written assurances that it would comply with the License Agreement. Ex. 37.
- On May 31, 2013, the parties signed the Agreement To Vacate, which expressly recognizes and confirms the validity of the ORA agreement in the Whereas clause.

Ex. 3 ("Whereas, Baylor and the Association entered into the 1994 Official Recognition and (Building) License . . .").

These indisputable facts demonstrate that, at a minimum, a genuine issue of material fact exists concerning whether Baylor ratified the License Agreement and the ORA and whether Baylor waived the right to claim or is estopped from asserting that they are unenforceable and terminable at will. For this reason alone, Baylor's motion should be denied.

IV. Conclusion and Prayer

For the reasons detailed above, the BAA respectfully requests the following relief:

a) that the Court grant the BAA's partial summary judgment as set forth above and enter a declaration that:

(1) the 1993 License Agreement and the 1994 Official Recognition Agreement are in full force and effect; and

(2) Baylor's unilateral attempt to terminate the 1993 License Agreement and the 1994 Official Recognition Agreement are ineffective.

b) deny Baylor's Motion for Summary Judgment in its entirety, and

c) grant any such further relief as it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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