

CAUSE NO. 448,056

IN RE:

HOFHEINZ CHARITABLE TRUST

IN THE PROBATE COURT

NO. 4

HARRIS COUNTY, TEXAS

HOFHEINZ FAMILY'S PETITION IN INTERVENTION AND COUNTERCLAIMS

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, The Irene Cafcalas Hofheinz Foundation, The Hofheinz Fund, and The Dene Anton Foundation, intervenors and counter-claimants in the above-styled and numbered cause ("Hofheinz family" or "counter-claimants") complaining of petitioner The University of Houston, acting through the Board of Regents of The University of Houston ("University" or "petitioner"). Counter-claimants respectfully show the Court as follows:

**I.
DISCOVERY PLAN**

1. Discovery should be conducted under Discovery Control Plan Level 3 under Texas Rule of Civil Procedure 190.3.
2. Counter-claimants give notice that, in accordance with Texas Rule of Civil Procedure 193.7, all documents produced by petitioner during discovery may be used in pretrial proceedings or trial without the necessity of authenticating the document.

**II.
THE PARTIES**

3. Counter-claimants are the following charitable foundations, who have standing in this suit as direct successors in interest to the Roy M. Hofheinz Charitable Foundation (“Hofheinz Foundation”):

- (1) **The Irene Cafcalas Hofheinz Foundation**, whose president resides in Harris County, Texas;
- (2) **The Hofheinz Fund**, whose trustee resides in Riverside County, California; and
- (3) **The Dene Anton Foundation**, whose trustee resides in Harris County, Texas.

4. Petitioner Board of Regents is an agency of the State of Texas established under Chapter 111 of the Texas Education Code. It has a principal place of business at 4302 University Drive, Suite 128, Houston, Texas 77204-6001.

5. Petitioner University of Houston is a coeducational institution organized under Tex. Educ. Code § 111.01, *et seq.* It may sue and be sued through its Board of Regents. Tex. Educ. Code Ann. § 111.33. Service of process may be effected upon “the president [of the University of Houston] or any of its vice presidents.” *Id.*

6. The Texas Attorney General filed this case as representative of the public interest in charitable trusts, pursuant to Tex. Prop. Code § 123.003.

**III.
JURISDICTION AND VENUE**

7. This Court has subject matter jurisdiction over this claim pursuant to Texas Estates Code § 32.007, which provides a statutory probate court with concurrent jurisdiction over (1) an action by or against a trustee or (2) an action involving a charitable trust. Petitioner waived any

objection to this Court's jurisdiction by filing this suit. Counter-claimants file this cause in opposition to a trustee's petition to terminate a charitable trust and to state their own counterclaims to enforce the terms of the trust and contracts related to it.

IV.
THE REAL REASON PETITIONER FILED THIS CASE

8. Exhibit A to this *In Rem* proceeding by petitioner is a two-page document petitioner calls "the gift instrument." The document states that "in consideration of" petitioner's agreement to name its new sports facility the "Hofheinz Pavilion," the Hofheinz Foundation will pay \$1.5 million (over 1/3 the cost of the structure) to a trust administered by the University's regents for use on campus buildings. Item "(b)" under the petition's "prayer" requests the following: "An Order that Petitioner has no further obligation under the gift instrument."

9. Petitioner filed this case for one reason. It wants to change the name of the facility. It is seeking from this Court a declaratory judgment that it no longer is required to maintain the building's original name. It wants to break the deal it made, and it wants this Court to approve such action. The Hofheinz family has a direct interest in requiring petitioner to keep its word and continue to honor a great Houstonian. That is what this case is really about.

V.
FACTS

A. Roy Hofheinz's legacy to the City of Houston.

10. Roy Hofheinz's grandfather immigrated to the United States with 10 cents in his pocket. His father was a Beaumont shipyard worker who moved his family in 1924 to Houston in search of a better life. Young Roy Hofheinz sold newspapers and worked for a dry cleaner to help support his family. By the time he was 14, Hofheinz was a self-made entertainment promoter. He hired orchestras and put on dances at venues he rented between Houston and Lake Charles. He

promoted these events by converting an old Model T (purchased for \$8) into a mobile billboard, and driving around town drumming up enthusiasm. As a teenager, he produced an amateur radio hour on KTLC and became a writer for the *Houston Chronicle*. He was an exceptional public speaker and debater, and graduated with highest honors from San Jacinto High School. That year, his father died in a tragic work accident, and Hofheinz became, at the age of 16, his family's breadwinner.

11. Hofheinz worked his way through the predecessor to the University of Houston. He passed the bar exam and became a trial lawyer. In 1934, he became the youngest state representative ever elected in Texas – winning even though all three Houston newspapers endorsed his more experienced opponent. In his first term, the 23-year-old “Boy Wonder Legislator” fulfilled every major campaign promise and became a passionate and effective advocate for his constituents. Two years later, he defeated the incumbent Harris County judge to become the youngest person to hold the position in history. (Henceforward, he would always be known, affectionately, as “the Judge.”) He used his position as an opportunity to improve conditions for children, the elderly, and those with mental illness.

12. Hofheinz resigned as County Judge in 1944, determined to enter the business world and achieve financial security for his wife and three young children. He obtained the first radio license issued to Houston after WWII and built a network of radio stations across the nation. He was a founder of KTRK TV, Channel 13, in Houston. He figured out how to use leftover slag from steelmaking and recycle it to build roads. With creativity and hard work, his businesses flourished. Beholden to no one, he returned to the public service he loved.

13. In 1953, Hofheinz was elected mayor of Houston. His first year in office, he made a courageous decision to desegregate the City by ordering the removal of “white” and “colored”

signs on all City property, including swimming pools. He personally participated, with his children, in painting over the hateful signs. As a direct result of Mayor Hofheinz's foresight and moral integrity, Houston was integrated long before governmental mandate, without the social unrest that plagued other American cities.

14. Mayor Hofheinz aggressively promoted Houston's growth. Among other things, he oversaw the completion of essential roads and built a new terminal at the Houston Airport. In 1960, after leaving office, he led efforts to bring Houston its first National League baseball team, insisting that any stadium where the team played would freely admit all races to any available seats or restaurants. He conceived and built the world's first air-conditioned domed stadium, the Astrodome. He envisioned the first modern scoreboard. He created the concept of a sports skybox. He saw the need for artificial grass, and worked with engineers to develop Astroturf. A photo of Hofheinz at the ground-breaking ceremony for the Astrodome is reproduced below:



If he did nothing else, conceiving and developing the Astrodome marked Roy Hofheinz as one of the world's greatest contributors to sports. Characteristically, he made sure that the stadium known as the "Eighth Wonder of the World" would be fully integrated.

15. As a complement to the Astrodome, Hofheinz built Astroworld – the first major amusement theme park in the coastal region of Texas. These two venues spurred development in the empty fields of south Houston and pumped an estimated \$1.5 billion into the Houston economy between 1965 and 1978. The visionary concepts of Roy Hofheinz – both as a public official and private citizen – are icons of one of the City’s most successful eras, and have a lasting impact on the people of Houston. In 2012, the *Houston Chronicle* noted: “Few politicians have shaped our area as much as [Judge Roy] Hofheinz.” J. R. Gonzalez, *Happy Birthday, Roy Hofheinz*, *Houston Chronicle*, April 10, 2012. That was a tremendous understatement. Despite his incalculable contributions, no Houston landmark bore his name until 1970, and only one does today.

16. Hofheinz was particularly generous to the University of Houston. In 1938, he helped raise the funds needed to build the first four buildings on the present campus. However, the University remained a private institution and faced frequent financial difficulties in its early life. By 1960, tuition did not cover rising costs, and enrollment was falling. The survival of the University of Houston was at risk. In 1963, Hofheinz stood up to fierce opposition from state universities and lobbied the Legislature to pass Senate Bill 2, which allowed his alma mater to enter the state university system. Since then, it has grown into the third largest university in Texas, and benefits from approximately \$300 million per year in state taxpayer appropriations. In 1964, Hofheinz made sure his beloved University of Houston Cougars could play their home games in the Astrodome. The Cougars were the only college team in the world to have a domed, air-conditioned, indoor stadium.

B. The Roy M. Hofheinz Charitable Foundation gave the University of Houston \$1.5 million as Consideration for naming rights to the Hofheinz Pavilion.

17. Even after Judge Hofheinz helped to secure the University of Houston’s future as a public institution, he personally provided it with financial support. By 1979, the Roy M. Hofheinz

Charitable Foundation had given the University of Houston at least \$2,150,000. In 1969, at the request of the University, the Hofheinz Foundation made the second single largest donation ever given to the University at the time, \$1,500,000 for “the acquisition, installation, construction, support, or maintenance of improvements, buildings, plant facilities, equipment and property of every nature and kind . . . useful . . . to the University of Houston . . .” Exhibit 1, Agreement. The University of Houston’s Board of Regents (and their successors) were named trustees of this fund.

18. There was only *one* condition to this extremely generous gift (worth approximately \$8 million in today’s dollars). The University of Houston was required to name its new athletic field house “Hofheinz Pavilion,” as a lasting memorial to his lifetime of service to Houston. *See* Exhibit 1, Agreement. The amount pledged was over one-third the cost of construction of the Hofheinz Pavilion. The University happily agreed with this one condition, and gratefully took Roy Hofheinz’s hard-earned money. Below is a photograph of Judge Hofheinz with Phillip Guthrie Hoffman, president of the University of Houston and first chancellor of the University of Houston System. They are announcing plans for the Hofheinz Pavilion.



19. After accepting the Hofheinz Foundation's money, the University of Houston honored its promise. It dedicated the "Hofheinz Pavilion" in 1970. A plaque inside the building reads:

THIS FACILITY HONORS THE NAME OF TWO FORMER STUDENTS OF THE UNIVERSITY OF HOUSTON, JUDGE ROY HOFHEINZ AND HIS LATE WIFE, IRENE CAFCALAS HOFHEINZ, AND THEREBY THE UNIVERSITY ITSELF. DISTINGUISHED HOUSTONIANS AND MAJOR BENEFACTORS OF THE UNIVERSITY, THEY MET ON CAMPUS DURING THE INSTITUTION'S EARLIEST YEARS AND WENT ON TO INCREASING ACCOMPLISHMENTS THAT HAVE DONE MUCH TO SHAPE THE PAST, PRESENT AND FUTURE OF OUR COMMUNITY

20. Despite Hofheinz's immeasurable contributions to our City, this single building on the campus of his alma mater is the only public structure bearing his name. Through the years, the University of Houston has diluted the importance of Hofheinz's memory. It sold the naming rights of the court and locker rooms inside the Hofheinz Pavilion. It failed to provide proper maintenance. It even allowed the Hofheinz plaque to deteriorate into a graffiti-covered embarrassment, pictured below.



Despite this neglect and dilution, the University has, so far, complied with the one condition of the gift by preserving the name of the building. For 46 years, every University of Houston graduate

and countless Houston area high school graduates have walked across a stage and accepted their diplomas at Hofheinz Pavilion.

21. As always, Roy Hofheinz's keen perception in sponsoring the construction of the Hofheinz Pavilion paid off immeasurably for our City. When professional basketball came to Houston in 1971, the Rockets' home court for four seasons was the Hofheinz Pavilion. It has also been a favorite forum for campaign rallies for U.S. Presidential candidates. Over the years, the legendary Hofheinz Pavilion has hosted concerts of the world's leading musicians and bands, including Elvis Presley, Elton John, George Harrison, Jethro Tull, The Clash, Emerson Lake, & Palmer, Frank Zappa, Michael Jackson, The Grateful Dead, The Who, The Rolling Stones, Prince, Frank Zappa, Alice Cooper, Bob Dylan, The Band, Madonna, Genesis, Yes, Jerry Jeff Walker, and Led Zeppelin. Recently, the Hofheinz Pavilion has been the venue for concerts by Katy Perry, Chris Brown, Eric Church, Muse, the Zac Brown Band, and Taylor Swift.

22. In recent years, the University's administration has diverted money from its academic departments to fuel an unprecedented athletic spending spree, including multimillion dollar coaching contracts. On February 10, 2016, *The Texas Tribune* reported that from 2008 to 2014, the school diverted \$106 million to athletics – more than twice any other Texas university. By comparison, Texas A&M University transferred \$14.77 million during this time, and the University of Texas at Austin transferred \$50.9 million from athletics to academics. Despite this orgy of spending, 2014's home attendance for football and basketball games was less than half of Texas Tech, a school with similar enrollment and athletics. See Exhibit 2 (“University of Houston Pours Millions into Athletics”, *The Texas Tribune*, September 3, 2015).

23. The University of Houston's transfers of millions of dollars from academics to athletics resulted in at least one internal audit probing whether the administration misappropriated

funds. See Exhibit 3 (“UH to Investigate Slice of Stadium Funding,” *Houston Chronicle* November 14, 2014). According to the *Houston Chronicle*, the University spent \$5 Million in “Higher Education Assistance Funding” – state money that is supposed to be used for academic purposes – on rooms in the stadium. The *Chronicle* reports that the football stadium “was originally expected to cost \$105 million.” However, soon “that estimate jumped to \$120 million,” and as “costs continue to rise – now to as much as \$128 million.” [Note – It is unlikely a coincidence that the football stadium’s cost overage of \$20 million is the same price the University recently put on new naming rights to the Hofheinz Pavilion.]

The article continues:

The stadium’s growing price tag has cut into funding for renovations to the Hofheinz Pavilion, where basketball games and other events are held. UH still plans to either upgrade the facility or build a new one completely, but is now having to fundraise to cover the costs.

Id. (emphasis added). The quote in the article by UH Chancellor and President Renu Khator seems written for this case: “*A system of accountability needs to be developed to ensure that expectations are being met and that promises are being kept.*” These words are true. The University of Houston has not met expectations, and has decided not to keep promises. The “system of accountability” now required is this Honorable Court.

24. In 2010, the University announced an intention to renovate the Hofheinz Pavilion. In 2012, the students agreed to help the school finance the renovations and voted to assess themselves an additional \$45 per semester for 25 years to, in part, accomplish the Hofheinz

renovation.¹ Administrators took the students' money and apparently spent all of it to pay for their staggering cost overruns on the \$128 million football stadium.² The University's student government called for three administrators to resign over this misappropriation. The students were so incensed by the University's breach of trust that they took their cause to the *Houston Press*, which published an article on February 12, 2015 stating:

"They don't care what we have to say," student president Charles Haston said in a speech before Wednesday night's no-confidence vote demanding that Carlucci and two of his subordinates resign or be fired, according to the Chron. ***"They live in a bubble over in E. Cullen and they have forgotten who they serve."***

The no-confidence vote that passed Wednesday night reads: **"The Division of Administration and Finance failed to construct the football stadium on budget and chose to use money allocated to the renovation of Hofheinz Arena to fund the additional cost of construction of the football stadium in direct conflict with the Memorandum of Understanding" between students and the university.**³

25. The University's student newspaper, *The Cougar* reported on November 3, 2014 that the administration violated other terms of its written agreement to use student funds for the Hofheinz renovation. The University refused to provide an accounting of its actions, or send a representative to attend meetings of the Student Fees Advisory Committee, as required by the Memorandum of Understanding. Instead, administrators privately contacted committee members in an apparent effort to influence them. See Exhibit 4, *The Cougar*, November 3, 2014. This sort

¹ The student assessment was to "complete financial support for two capital projects, specifically the construction of a new football stadium and renovation of Hofheinz Pavilion." See Exhibit 4, *The Cougar*, November 3, 2014 (emphasis added).

² Student assessment funds are still being paid to the University to renovate the Hofheinz Pavilion, and it is still unclear what is happening to them. Even if the University's present enrollment of 42,704 remains flat for 25 years, the students will collectively have given the University at least \$96 million, dedicated in part to pay for the renovation of the Hofheinz Pavilion.

³ Exhibit 5, *Houston Press*, Feb. 12, 2015 (emphasis added).

of secret activity is a pattern and practice of the University, as explained further below.

26. After spending the students' money on the football stadium, the University's leaders scrambled to find cash to fund the promised renovations to the Hofheinz Pavilion. The University decided to publically offer the building's naming rights for \$20 million, a blatant violation of the one condition of the Hofheinz Foundation's original donation. It has now found someone willing to pay its betrayal fee. In keeping with the secretive recent practice of the University, the donor's name is anonymous until the donation is accepted and the Hofheinz Pavilion bears the donor's name. On November 19, 2015, the campus newspaper reported the University's Vice-President of Athletics as follows:

*"We do have an anonymous gift of \$20 million to begin the renovation of that project," Yurachek said. "We're not sure how that name is going to unfold, but it will no longer be called Hofheinz Pavilion, so were referring to this project as our Basketball Arena Renovation Project."*⁴

27. The University callously promised new naming rights to the Hofheinz Pavilion without even giving the Hofheinz family the courtesy of a telephone call. The family became aware of the University's treachery by reading a newspaper article. They immediately requested the University to keep its word and honor the conditions of its agreement, to no avail. The University's pretense for breaching its agreement is that the Hofheinz Pavilion needs renovating. That is, of course, not counter-claimants' fault. The University should find a way to renovate without breaking its word.

28. The planned changes for the Hofheinz Pavilion include raising the court and "reconfiguring" the seats. See Exhibit 7, University of Houston Basketball Arena Enhancement

⁴ Exhibit 6, *The Cougar*, Nov. 19, 2015.

Project, November 19, 2015. Allegedly the ceiling will be raised, and a new veneer will be placed outside. This is not the first time the University has renovated, removed or reconfigured seats, or modernized the basketball court. Never has it proposed a name change. In 1998, the University removed 1,500 seats and added a ring of luxury suites. In 2004, it installed a new flooring system for the court. See Exhibit 8, “Hofheinz Pavilion”, https://en.wikipedia.org/wiki/Hofheinz_Pavilion. In 2010, the University considered – but rejected – a plan to tear down the Hofheinz Pavilion and build a new building. Instead, it chose to save \$30 million by keeping the structure of this well-built stadium. See Exhibit 9, “UH moving forward with Hofheinz renovation plan,” *Arena Digest*, June 12, 2010 (emphasis added). The studs, rafters, slab, framework, and original footprint will remain untouched. The Hofheinz Pavilion may have a new look, but it will still be the same building.

29. One of our most important values, sometimes lost these days, is that a person’s word is that person’s bond. If the University valued integrity, it would not even consider changing the Hofheinz name. The University plans to sell its integrity for \$20 million. Other colleges routinely renovate their basketball arenas far more extensively than the University of Houston plans to do. Counter-claimants surveyed 35 universities whose basketball centers were built between the 1920s and 1970s and updated in later decades. Two – the University of Maryland and the University of Mississippi – built new basketball stadiums but have retained the old structures (and their names) for other purposes. The remaining 33 universities may have changed the names of their arenas from that of a non-donor to a donor, but none removed the name of a donor.

30. Texas A&M University’s Kyle Field was built in 1904 by horticulture Professor Edwin Kyle with his own money: \$650 for bleachers. It seated 500 and was named in his honor. In 1927, Texas A&M built a new stadium on the spot for \$345,000. In 1929, it added grandstands

on the north and west ends, increasing the capacity to 33,000. In 1953, it added a second deck for \$346,000 to increase capacity to 41,500. In 1967, it further expanded at a cost of \$1,840,000 to raise capacity to 48,000. In 1980, it built a third deck to bring capacity to 70,000. Rather than rename the stadium, 16-foot letters spelling out “KYLE FIELD” were installed. In 1999, Texas A&M spent \$32.9 million to increase capacity to 82,600. A \$450 million renovation is being completed to raise the official seating capacity to 102,512, making Kyle Field the largest football stadium in Texas and the fourth largest in the country. During each of these expansions, and despite having no legal obligation to do so, Texas A&M kept the name of its original donor. That is what honor looks like. In stark contrast, the University of Houston, despite having a legal obligation not to do so, plans to remove the name of its original donor – the man who did so much to make the University possible.

31. When a university accepts a gift as a condition for naming a building, a successor in interest to the donor has the right to enforce the condition. *Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt University*, 174 S.W.3d 98, 117 (Tenn. Ct. App. 2005). (Agreed building signage may not be diminished “as long as the building stands.”) In the *Vanderbilt* case, a university accepted a donation in 1933 on the condition that a building bear the name “Confederate Memorial.” More than 70 years later, students and faculty viewed the inscription as an offensive relic that was a “major impediment to the progress of the university.” The university, with the support of the chancellor, student government association, and board of trustees, attempted to rename the building. The donor’s successor in interest filed suit, and the court held that a deal is a deal and “[t]he courts do not concern themselves with the wisdom or folly of a contract . . . and are not at liberty to relieve parties from contractual obligations simply because these obligations later prove to be burdensome or unwise.” *Id.* at 118. If Vanderbilt University

was required to maintain an 80-year-old Confederate monument generations after the Civil War, then the University of Houston must be enjoined from removing the Hofheinz name – a name that stands for integration of all Houston citizens – simply to snag a rich donor’s money after misusing its students’ renovation funds.

32. Counter-claimants have not been able to identify a single case where a major university or college was permitted to sell naming rights in violation of an earlier donor’s conditions. For example, in the case of *In re Paul Smith’s College of Arts and Sciences*, Index No. 2015-597, Sup. Ct. N.Y., Franklin County (Oct. 6, 2015), a wealthy benefactor offered to contribute \$20 million (ironically, the same amount the University of Houston appears willing to take to break its word) to the financially struggling Paul Smith’s College, but only if the name of the institution would be changed to “Joan Weill-Paul Smith’s College.” The college was in dire financial condition and petitioned a court to allow the addition of the new donor’s name. The court refused permission, because the new name would be inconsistent with the terms of founder’s original gift in 1928. Even the risk of the college closing without the donation did not make it “impossible or impracticable” to comply with the founder’s requirement that the college bear only his name. The college had no choice but to decline the money. A deal is a deal, and breaking a deal is illegal.

VI. THE STATE HAS WAIVED ANY SOVEREIGN IMMUNITY DEFENSE

33. The University brought this suit seeking “[a]n order that Petitioner has no further obligations under the gift instrument.” Petition, p. 4. That instrument requires, as consideration for a \$1.5 million donation, that the athletic field house be named the Hofheinz Pavilion. The University’s petition goes beyond terminating a trust – it seeks a declaratory judgment that it can

break its promise to the Roy E. Hofheinz Charitable Foundation by renaming the Hofheinz Pavilion.

34. By affirmatively bringing these issues before this Court, the University has waived any sovereign immunity defense to the Hofheinz family's counter-claims. For over 80 years, Texas Supreme Court law has been as follows:

[W]here a state voluntarily files a suit and submits its rights for judicial determination, it will be bound thereby, and the defense will be entitled to plead and prove all matters properly defensive. This includes the right to make any defense by answer or cross-complaint germane to the matter in controversy.

Anderson, Clayton & Co. v. State ex rel. Allred, 122 Tex. 530, 537, 62 S.W.2d 107, 110 (Comm'n App. 1933)(emphasis added). Texas adopted this principle from the United States Supreme Court, which has upheld this rule over 130 years. *Clark v. Barnard*, 108 U.S. 436, 447, 2 S. Ct. 878, 883, 27 L. Ed. 780 (1883). *See also, Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006)(A city's decision to file suit "encompassed a decision to leave its sphere of immunity from suit for claims against it which are germane to, connected with and properly defensive to claims the City asserts."); *Kinnear v. Texas Com'n on Human Rights ex rel. Hale*, 14 S.W.3d 299, 300 (Tex. 2000). Sovereign immunity is also waived for the additional reasons discussed under individual counts below.

VII. COUNT ONE: BREACH OF CONTRACT

35. Counter-claimants incorporate the preceding paragraphs by reference.

36. The University of Houston and the Roy M. Hofheinz Charitable Foundation entered into a contract on September 15, 1969. The contract provided that the Foundation would pay the University \$1,500,000 **"in consideration of the new athletic field house of the University of Houston being designated and named 'Hofheinz Pavilion' . . ."**

37. The Hofheinz Foundation paid the money. The University accepted and acknowledged the contract through the course of dealing and in various writings. As discussed, these writings include: (1) the September 15, 1969 Agreement, (2) at least seven “official receipts” acknowledging acceptance of each installment under the “Pledge Agreement dated 9-15-69” (Emphasis added), and (3) placing the name “Hofheinz Pavilion” on a sign and a plaque at the athletic field house. The University has been in substantial compliance with the contract until now. By publically announcing plans to rename the Hofheinz Pavilion, the University and its Board has expressed an express intention to breach its contract. Counter-claimants are entitled to specific performance, or, in the alternative, money damages.

38. As successors in interest to the Roy M. Hofheinz Charitable Foundation, counter-claimants have standing to enforce the terms of the contract.

39. As discussed above, the University’s choice to place the interpretation of the contract before this Court waives any claims of sovereign immunity. Further, when the State contracts with a private party, it waives immunity from liability. *Texas S. Univ. v. State St. Bank & Trust Co.*, 212 S.W.3d 893, 901 (Tex. App. – Houston [1st Dist.] 2007). When the State’s breach of contract is accompanied by other conduct, a plaintiff is not required to seek legislative consent to bring suit. *Fed. Sign v. Texas S. Univ.*, 951 S.W.2d 401, 413 (Tex. 1997). Such conduct includes failing to honor a settlement agreement, or accepting the benefits of a contract but refusing to honor its terms despite full performance; *Texas A & M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518 (Tex. 2002), *Texas S. Univ.*, 212 S.W.3d at 908. The University accepted ten installments totaling \$1.5 million. It cannot deny full performance by the Hofheinz Foundation.

40. When a contract is breached, a party may request specific performance. Specific performance is an equitable remedy used as a substitute for monetary damages when such damages

would not be adequate. *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App. 2007). When the terms of a donation are breached, a party may also request the equitable remedy of return of the donation, adjusted to its present value. *See Tennessee Div. of United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 119 (Tenn. Ct. App. 2005).

VIII.

COUNT TWO: VIOLATION OF TEXAS EDUCATION CODE § 111.36

41. Counter-claimants incorporate the preceding paragraphs by reference.

42. The University of Houston’s Board of Regents is empowered by the Texas Legislature to “accept donations, gifts, and endowments for the university to be held in trust and administered by the board for the purposes and under the directions, limitations, and provisions declared in writing in the donation, gift, or endowment. . . .” Tex. Educ. Code § 111.36.

43. The September 15, 1969 Agreement is a written contract in which the Roy M. Hofheinz Charitable Foundation agrees to donate \$1.5 million to the University in exchange for the University’s athletic field house bearing the name Hofheinz Pavilion. Under Tex. Educ. Code § 111.36, the University is statutorily obligated to honor the “directions, limitations, and provisions” of the September 15, 1969 Agreement. The University accepted 10 payments of \$150,000 each between January 15, 1970 and January 15, 1979. At least seven times between 1973 and 1979, the University issued an “official receipt” acknowledging in writing that it was bound by the “Pledge Agreement Dated 9-15-69.” *See* University’s Petition, Exhibit B, sub-exhibit 2, pages 1-8 (emphasis added).

44. By its own repeated written admission, the University is obligated – by agreement – to maintain the name “Hofheinz Pavilion” on the University’s athletic field house. By publically announcing plans to rename the Hofheinz Pavilion, the University, through its Board of Regents,

has expressed an express intention to violate the terms of the Pledge Agreement, and to violate Tex. Educ. Code § 111.36.

45. The Texas Supreme Court has held that “suits to require state officials to comply with statutory or constitution provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money.” *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). The members of the Board of Regents have no lawful discretion to violate the terms of the Hofheinz Pledge Agreement, and their decision to do so places them outside the scope of their authority under Tex. Educ. Code § 111.36. Counter-claimants seek to enforce the Texas Legislature’s policy of requiring that universities honor their promises to donors.

46. In 1984, the Roy M. Hofheinz Charitable Foundation was reorganized with approval of the Internal Revenue Service into the three counter-petitioner foundations. Counter-claimants retained the rights and obligations of the Roy M. Hofheinz Charitable Foundation. Since 1984, they have, themselves, generously donated hundreds of thousands of dollars to Texas universities – including the University of Houston. As successors in interest to the Roy M. Hofheinz Charitable Foundation, counter-claimants have standing under Tex. Educ. Code § 111.36 to enforce the terms of their donation through the remedies requested in this case.

IX.

COUNT THREE: VIOLATION OF TEXAS PROPERTY CODE § 112.001, ET SEQ.

47. Counter-claimants incorporate the preceding paragraphs by reference.

48. The September 15, 1969 Agreement created a trust. A trust is created if the settlor manifests an intention to create a trust. Tex. Prop. Code § 112.002.

49. The trust named the “persons who compose the Board of Regents of the University of Houston” as trustees. A person named as trustee who exercises power or performs duties under

the trust is presumed to have accepted the trust. Tex. Prop. Code § 112.009. The Board of Regents accepted \$1,500,000, paid by agreement over the course of 10 years. By accepting this money and using it, the trustees exercised power and performed duties under the trust. Therefore, their acceptance of the sole condition of the trust's creation – naming of the building – is presumed as a matter of law.

50. The statute of frauds does not apply to a trust consisting of personal property if the property is transferred to a trustee with the intention of creating a trust. Tex. Prop. Code § 112.004. Further, the course of conduct for 46 years plainly confirms the existence of the agreement.

51. “In administering charitable trusts the settlor’s expressed intention should be followed as nearly as possible.” *Moody v. Haas*, 493 S.W.2d 555, 560 (Tex.Civ.App. – Houston [14th Dist.] 1973, writ ref’d). The settlor, the Hofheinz Foundation, clearly stated its intention that the Board of Regents, as trustees, maintain the Hofheinz Pavilion name on the University’s athletic field house. The settlor named the Board of Regents as trustees because the Board had the ability to assure this name was maintained. By publically announcing its plans to rename the Hofheinz Pavilion, the Board has expressed an intention to violate the settlor’s intention.

52. Counter-claimants made these concerns known to the University. In response, the University filed the instant case in a scheme to terminate the trust, under the belief that it could then disregard the settlor’s intentions and rename the Hofheinz Pavilion. This Court cannot modify the terms of a trust, except through the doctrine of *Cy Pres* under the procedure specified in Tex. Prop. Code § 112.054. Even then, a trust can only be modified “in a manner that conforms as nearly as possible to the probable intention of the donor.” *See Moody v. Haas*, 493 S.W.2d 555, 561; Tex. Prop. Code § 112.054(b).

53. As successors in interest to the Roy M. Hofheinz Charitable Foundation, counter-claimants have standing to enforce the terms of the trust’s creation through the remedies requested in this case. A party has standing to institute or maintain suit to enforce the terms of a trust if it is a settlor or beneficiary of the trust or has such a special or active interest in the trust to justify standing. *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488 (Tex. Civ. App. 1976), writ refused NRE (Mar. 30, 1977).

X.

**COUNT FOUR: TAKING OF PROPERTY WITHOUT COMPENSATION UNDER
ARTICLE I § 17 OF THE TEXAS STATE CONSTITUTION**

54. Counter-claimants incorporate the preceding paragraphs by reference.

55. Article I, § 17 of the Texas Constitution forbids the State or its political subdivisions from taking or damaging property for public use without paying adequate compensation. Sovereign immunity does not shield the State from an action for compensation under the takings clause. *Gen. Servs. v. Little–Tex Insulation*, 39 S.W.3d 591, 598 (Tex.2001). To establish a takings claim, one must prove (1) the State intentionally performed certain acts, (2) that resulted in a “taking” of property, (3) for public use. *Little–Tex*, 39 S.W.3d at 598.

56. The Texas Supreme Court holds that when a party donates property to the State subject to conditions, the party has a property interest in those conditions being honored. *El Dorado Land Co., L.P. v. City of McKinney*, 395 S.W.3d 798, 803-804 (Tex. 2013) (When a party sells land to a city on the condition of it being used as a park, but the city builds a library 10 years later, the party has an actionable case under Tex. Const. art I § 17.)

57. Counter-claimants, as successors of the Hofheinz Foundation, provided the University with \$1.5 million under the condition that the University’s athletic field house bear the name Hofheinz Pavilion. For 46 years, the University has recognized this real and valuable right.

It now intends to intentionally take this property right for the purpose of raising money. Counter-claimants are entitled to compensation in an amount equal to the current value of the naming rights.

XI.
COUNT FIVE: DEMAND FOR ACCOUNTING

58. Counter-claimants incorporate the preceding paragraphs by reference.

59. Tex. Educ. Code Ann. § 51.004 imposes upon all public institutions of higher education the duty to maintain the following accounting practice:

(b) All trust funds, including gifts, grants, and bequests received, establishing or adding to endowment funds, loan and scholarship funds, and funds for other current restricted purposes, **shall be credited to separate accounts and shall not be commingled with other local or institutional funds.**

60. The University's Petition to Terminate Hofheinz Charitable Trust makes general, conclusory allegations that the trust funds were properly spent. However, the University's exhibits suggest that the private trust funds were comingled with public funds, and eventually lost in the chaos of the University's accounting system. Such conduct violates both Tex. Educ. Code Ann. § 51.004 and the terms of the trust. The Affidavit of Raymond S. Bartlett, attached as Exhibit B to the University's petition speculates that the Hofheinz \$1.5 million donation "would have been spent in its entirety." University Exhibit B, Bartlett Affidavit at § 10. Spent on what? When? Tracking down a million and a half dollars in payments is not a matter upon which the University should so casually guess.

61. The University's exhibits raise more questions than answers. For example, the University can only supply seven of the 10 receipts related to the Hofheinz Foundation installments. Each of the seven receipts indicates that the Foundation money was spent on the "Athletic Department." The receipts indicate the funds were deposited into account number W-7034 until 1975. From 1976 until 1978, the funds were deposited into account number HWWW

W 7134 150. In 1979, the funds were deposited into account NWWW W 7134 159. University's Petition, Exhibit B, sub-exhibit 2, pages 1-8. What happened to these accounts?

62. The State Auditor's reports attached to the University's petition indicate the University cannot account for the trust funds. It acknowledges an ongoing pattern of "*lack of coordination between the Offices of the Financial Analyst and the Controller*" resulting in financial irregularities starting in 1976. University's Petition, Exhibit B, sub-exhibit 4, page 6. These irregularities grew more serious, and by 1979, the State Auditor noted the "absence of supporting documentation" regarding the University's investments and "interfund borrowing." *Id* at page 8. By 1979, the State Auditor reported: "The University is involved in litigation" concerning "the lack of proper recording of and accounting for temporary investment transactions." *Id* at page 10. This strongly suggests that the University did not properly segregate Hofheinz Foundation funds and cannot account for how they were spent.

63. As successors in interest to the Roy M. Hofheinz Charitable Foundation, counter-claimants have standing to review the historical documents associated with the accounts containing, or that once contained, the money held in trust under the Agreement. As interested parties, counter-claimants have standing to review the accounting documents of all funds which could be used for capital improvements to the Hofheinz Pavilion, including donations and student fees. Counter-claimants demand a full accounting of all these funds to determine whether the Board of Regents acted outside the scope of its authority in co-mingling these funds or failing to keep them in separate accounts. Counter-claimants request that the Court table any consideration of terminating the trust until the University proves what actually happened to all of the trust funds.

XII.
REQUEST FOR INJUNCTIVE RELIEF

64. Counter-claimants incorporate the preceding paragraphs by reference.

65. Tex. Civ. Prac. & Rem. Code § 65.011 allows a court to grant a writ of injunction if irreparable injury to real or personal property is threatened, irrespective of any remedy at law.

66. The Board of Regents has announced an intention to grant the naming rights of the Hofheinz Pavilion to another party. Counter-claimants have demonstrated that they have an interest in these naming rights. Counter-claimants have further demonstrated a probable right of recovery and likelihood of success on the merits. If an injunction is not granted, there is a substantial risk that the University's actions will cloud title to real property by creating competing interests among donors to the naming of the Hofheinz Pavilion.

67. The Hofheinz Pavilion's naming rights hold considerable value to counter-claimants. Their trustees are descendants and heirs bearing the Hofheinz name. Other than a modest tombstone in Glenwood Cemetery, this memorial is the only structure honoring their parents, and removing their parents' names would cause imminent, irreparable harm for which there is no adequate remedy at law. Further, the City of Houston has an interest in making sure the legacy of Judge Roy Hofheinz is not disgraced in the manner planned by the University of Houston.

68. After notice and hearing, petitioner should be permanently enjoined from:

1. Entering into any legal agreement to change the name of the Hofheinz Pavilion;
2. Changing, concealing, diminishing, or removing any plaque, sign, memorial, or other insignia of the Hofheinz Pavilion, other than for restoration, short-term maintenance, or temporarily during the pendency of renovations;

3. Changing, concealing, diminishing, or removing the name of the Hofheinz Pavilion from any campus map, directory, website, stationary, brochure, literature, email, or other communication;
4. Soliciting donations in exchange for the naming rights to the Hofheinz Pavilion;
5. Elevating the importance or signage of any sub-portion of the Hofheinz Pavilion, such as the center, floor, entrances, locker, or press room, to diminish the importance of the Hofheinz Pavilion name; and
6. Taking any steps to delete, destroy, conceal, or remove any evidence related to the Hofheinz donation, capital planning or funding of athletic facilities in the last 10 years, and the acquisition or use of student fees in the last five years.

69. In the alternative, counter-claimants request equitable rescission of the \$1,500,000 Hofheinz donation, calculated to present dollar value. This claim does not conflict with the state's sovereign immunity statutes for the reasons discussed and because the donation never belonged to any government entity. It was required to be held in trust, separate from state funds, as provided by the Agreement:

Neither this donation, nor any fund or property arising therefrom, in whatever form it may take, shall ever be any part of the permanent funds of The University of Houston, nor shall the Texas Legislature have power or be in any way authorized to change the purposes hereof, or to divert such donation, fund or property from the purposes herein set out.

70. The requirement to keep donations separate from public funds is also codified by Tex. Educ. Code § 51.004. Any remaining funds, and any property purchased with those funds do not belong to the State or any of its subdivisions. As described above, counter-claimants demand a full accounting of and return of these funds, the fruits of these funds, and property purchased with these funds.

XIII.
REQUEST FOR DISCLOSURE

71. Counter-claimants request that petitioner disclose the information or material described in Texas Rule of Civil Procedure 194.

XIV.
CONCLUSION

72. Roy Hofheinz's life was integral to our city's history. He brought professional sports to Houston. He conceived and developed the Astrodome, focusing the world's awe on what we, as Houstonians, can accomplish when we work together. In that spirit, he provided courageous moral leadership during a crucial time, fighting to end racial segregation and promote equal civil rights for all Houston's citizens.

73. He particularly loved his alma mater, the University of Houston. He helped raise money to build its first buildings, and donated money very generously over the years. When the University was unable to finish its new athletic field house, he provided funds to finish over one-third of it. There was only one condition on the donation: for once, something in Houston that he helped build would bear his name. The University agreed, took his money, spent it, and now wants to break their agreement. That is illegal and, as any fair minded Texan can see, simply wrong.

XV.
PRAYER

Counter-claimants respectfully pray for the following:

- (a) That the Petition to Terminate Hofheinz Charitable Trust be, in all things, denied.
- (b) That petitioner be deemed to have breached the contract with the Roy M. Hofheinz Charitable Foundation and/or its successors-in-interest, and for suitable equitable and/or legal remedies;

- (c) That petitioner comply with the terms of the Hofheinz Foundation donation, as required by Tex. Educ. Code § 111.36, by continuing to name the athletic field house on campus at issue in this case the “Hofheinz Pavilion;”
- (d) That petitioner comply with the intention of the trust donor, as required by Tex. Prop. Code § 112.001 *et seq.*, by continuing to name the athletic field house on campus at issue in this case the “Hofheinz Pavilion;”
- (e) That petitioner be held liable and pay damages for taking property belonging to counter-claimants, as successors to the Roy M. Hofheinz Charitable Foundation, under Article I § 17 of the Texas Constitution;
- (f) That petitioner fully account for all funds provided by counter-claimants and their predecessor entities, as required by Tex. Educ. Code Ann. § 51.004;
- (g) For injunctive relief prohibiting petitioner from:
 - 1. Entering into any legal agreement to change the name of the Hofheinz Pavilion;
 - 2. Changing, concealing, diminishing, or removing any plaque, sign, memorial, or other insignia of the Hofheinz Pavilion, other than for restoration, short-term maintenance, or temporarily during the pendency of renovations;
 - 3. Changing, concealing, diminishing, or removing the name of the Hofheinz Pavilion from any campus map, directory, website, stationary, brochure, literature, email, or other communication;
 - 4. Soliciting donations in exchange for the naming rights to the Hofheinz Pavilion;
 - 5. Elevating the importance or signage of any sub-portion of the Hofheinz Pavilion, such as the center, floor, entrances, locker, or press room, to diminish the importance of the Hofheinz Pavilion name; and
 - 6. Taking any steps to delete, destroy, conceal, or remove any evidence related to the Hofheinz donation, capital planning or funding of athletic facilities in the last 10 years, and the acquisition or use of student fees in the last five years.
- (h) In the alternative, for equitable rescission of the \$1,500,000 Hofheinz donation, calculated to present dollar value.

- (i) For reasonable attorney's fees and costs;
- (j) For transfer to Harris County District Court, if the Court finds that it lacks subject matter jurisdiction over this matter; and
- (k) For such further relief, both at law and in equity, to which counter-claimants may show themselves justly entitled.

Date: May 4, 2016

Respectfully submitted,

RALEY & BOWICK, L.L.P.

/s/ John Wesley Raley

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ATTORNEYS FOR COUNTER-CLAIMANTS

CERTIFICATE OF SERVICE

I certify that copy of the foregoing instrument was served on all counsel of record, via E-Filing and/or Facsimile or Email, on May 4, 2016.

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