

CAUSE NO. 12747-D

MCMURRY UNIVERSITY,	§	IN THE DISTRICT COURT OF
	§	
Plaintiff/Counter-Defendant,	§	
	§	
v.	§	350th JUDICIAL DISTRICT
	§	
HARDIN-SIMMONS UNIVERSITY,	§	
	§	
Defendant/Counter-Plaintiff.	§	TAYLOR COUNTY, TEXAS

HARDIN-SIMMONS UNIVERSITY’S ORIGINAL ANSWER TO PLAINTIFF’S ORIGINAL PETITION AND APPLICATION FOR DECLARATORY RELIEF, AND ITS ORIGINAL COUNTERCLAIM PETITION AND APPLICATION FOR DECLARATORY RELIEF

Defendant/Counter-Plaintiff Hardin-Simmons University (“HSU”) files this *Original Answer to Plaintiff’s Original Petition and Application for Declaratory Relief, and Its Original Counterclaim Petition and Application for Declaratory Relief*, and would respectfully show the Court the following:

**I.
PRELIMINARY STATEMENT**

HSU has actively participated in the Patty Hanks Shelton School of Nursing (“PHSSN”) for 43 years and has faithfully served as the coordinating institution of PHSSN for the last 19 years. HSU deeply appreciates the long history of cooperatively working with Plaintiff/Counter-Defendant McMurry University (“McMurry”), Hendrick Medical Center, and, previously, Abilene Christian University, as members of the PHSSN Consortium.

Now, more than ever, the Abilene community needs a greater number of quality nursing professionals. After thoughtfully considering how to best accommodate this demand, HSU decided to develop an independent nursing program with the goal of enrolling and graduating more

nursing students. By late 2021, HSU was exploring options to accomplish this goal, including discussions with McMurry regarding the future of PHSSN.

One option HSU considered was to purchase McMurry's interest in PHSSN, and in doing so, to allow McMurry adequate time to establish its own nursing program if it chose to do so. HSU sent a letter to McMurry on March 21, 2022 making this proposal ("HSU's March 21 Letter"). If McMurry did not want to sell its interest in PHSSN, HSU also offered to "entertain a proposal" from McMurry to purchase HSU's interest in PHSSN on the same financial terms HSU had offered to purchase McMurry's interest. Fairly dividing PHSSN's assets and providing ample time for each school to obtain full accreditation and certification for their respective nursing programs seemed to be the best path forward for each university.

Unfortunately, for reasons still not fully understood by HSU, instead of making a proposal for HSU to consider, as it was invited to do, on April 12, 2022, McMurry unilaterally claimed that HSU's invitation to "entertain a proposal" to sell its interest in PHSSN constituted a binding contract, and that HSU must immediately sell its interest to McMurry ("McMurry's April 12 Letter"). The practical effect of this claim would cause HSU's current nursing students to no longer have an HSU-affiliated nursing program to attend, and leave HSU without a nursing program for two or three years—the time HSU needed to set up its independent nursing program.

When it became evident that McMurry was not being reasonable, and to begin the process of establishing an independent nursing program in a timely manner, HSU gave notice of terminating its participation in PHSSN on June 2, 2022. This termination will become effective in early June 2025, at the end of the required three-year notice period as expressly allowed by the PHSSN Consortium Agreement.

HSU is deeply disappointed that, instead of working together cooperatively to resolve differences, McMurry chose to file this court action in an attempt to force HSU to sell its interest in PHSSN without agreement on material terms and at the expense of access for HSU students to nursing education. To protect itself and its students, HSU must now vigorously defend itself as it seeks to expand nursing education and graduate a greater number of nursing professionals to serve the community.

II. **GENERAL DENIAL**

In accordance with Texas Rule of Civil Procedure 92, HSU denies all material allegations in McMurry's Original Petition and Application for Declaratory Relief and demands strict proof thereof by the applicable burdens of proof as required by law.

III. **SPECIFIC DEFENSES**

1. HSU's March 21, 2022 Letter and McMurry's April 12, 2022 Letter did not create a binding and enforceable contract.
2. HSU's March 21, 2022 Letter did not create an unconditional or binding offer to sell because it merely provided that if McMurry would prefer to purchase HSU's interest in PHSSN, HSU would "entertain a proposal from McMurry" to do so.
3. McMurry's April 12, 2022 Letter was not an acceptance of any purported offer in HSU's March 21 Letter because:
 - a. HSU's March 21, 2022 Letter was not an offer to enter a contract, but was merely an offer to "entertain a proposal";
 - b. McMurry's attempted acceptance in its April 12 Letter did not mirror the terms of HSU's March 21 Letter. McMurry ignored the final provision in

HSU's March 21 Letter that required McMurry to express its intent in the transaction in a very specific manner—namely, the term required McMurry to request “drafting of a final agreement that, when executed, shall become binding on both parties” (the “Acceptance Term”).

- c. McMurry's April 12 Letter also included an additional term and contractual obligation to the extent the contract “would be contingent upon receipt of [third-party] approvals.” This provision was not in HSU's March 21 Letter.

4. McMurry's claim that HSU's March 21 Letter and McMurry's April 12 Letter alone created a binding contract fails because the conditions precedent stated in HSU's March 21 Letter were never met.

5. HSU's March 21 Letter and McMurry's April 12 Letter do not create a binding and enforceable contract because:

- a. The letters are not sufficiently definite to be enforceable; and
- b. The Acceptance Term in HSU's March 21 Letter further anticipates that only a separate and final agreement would be enforceable.

6. HSU's drafting of a proposed final agreement, as called for in the Acceptance Term of HSU's March 21 Letter, is not an affirmance or ratification of McMurry's incorrect theory that HSU's March 21 Letter and McMurry's April 12 Letter alone created a binding and enforceable contract.

7. HSU's March 21 Letter and McMurry's April 12 Letter do not create a binding and enforceable contract because the letters and the parties' conduct demonstrate a lack of meeting of the minds.

IV.
AFFIRMATIVE DEFENSES

1. McMurry's claims are barred by the doctrine of unclean hands.
2. In the alternative, even in the unlikely event any contract to sell HSU's interest in PHSSN was created by HSU's March 21 Letter and McMurry's April 12 Letter, it was rescinded by the conduct of both parties.

V.
COUNTERCLAIMS

Finding itself before this Court, HSU asserts the following counterclaims against McMurry:

A. Parties

1. HSU is a nonprofit Texas corporation with its principal place of business at 2200 Hickory Street, Abilene, Texas.
2. McMurry is a nonprofit Texas corporation with its principal place of business at 1400 Sayles Boulevard, Abilene, Texas. McMurry has appeared in this matter.

B. Jurisdiction and Venue

3. This Court has jurisdiction over the subject matter of the case because the amount in controversy exceeds this Court's minimum jurisdictional requirements and because the parties seek declaratory relief.
4. This Court has personal jurisdiction over the parties because they reside in Taylor County, Texas.
5. Venue is proper in Taylor County, Texas because all or a substantial part of the events giving rise to the claims occurred in Taylor County, Texas.

C. Discovery and Damages

6. HSU requests that discovery be conducted under a Level 3 discovery control plan.

7. HSU seeks monetary relief over \$1,000,000, declaratory relief, and all other relief to which it may show itself to be entitled.

D. Factual Background

8. By late 2021, HSU had recognized there was significant demand for a greater number of quality nursing professionals, educated for service by nursing programs in Abilene. After much thoughtful consideration, and because McMurry was unwilling to consider any change in the parties' current relationship in the PHSSN Consortium, HSU determined that the best way to accommodate this demand for nursing professionals was to develop its own independently-owned nursing school.

HSU's March 21, 2022 Letter Contains a Proposal to Purchase McMurry's Interest and an Invitation to Negotiate McMurry's Possible Purchase of HSU's Interest

9. On March 21, 2022, HSU delivered a letter containing a proposal (the "Proposal") to McMurry, in which HSU offered to either purchase PHSSN's assets from McMurry or to "entertain a proposal" from McMurry, if McMurry preferred to purchase rather than sell PHSSN's assets.

10. The March 21 Letter discussed how the current consortial approach between HSU and McMurry was not meeting the needs of HSU and its students. It further discussed how each university could best serve its own students, its university community, and the broader community, by operating independent nursing programs.

11. The Proposal, which was titled "Hardin-Simmons University Proposal to Purchase PHSSN Assets *Term Sheet*" was a proposal by HSU to purchase McMurry's interest in PHSSN.

Contrary to McMurry's characterization, it was not entitled a "Buy-Sell," and it contained no contractual offer to sell. This is obvious from the plain language of the Proposal.

12. First, the title of the Proposal, "Hardin-Simmons University Proposal to Purchase PHSSN Assets *Term Sheet*" makes clear that this was not a "buy-sell proposal" nor a proposal to sell. This was a proposal of financial terms for HSU to purchase McMurry's interest in PHSSN.

13. Second, in discussing what would happen to PHSSN property, equipment, and intangible assets, the Proposal states "HSU proposes to purchase McMurry's interest in the furniture and other equipment" and that "HSU would be willing to buy McMurry's interest in PHSSN as a going concern."

14. Third, the Proposal further provides a summary of the financial terms by which it offers to purchase McMurry's interest—"In summary, HSU proposes to buy McMurry's interest in PHSSN for the following distribution of assets," which it then sets out in specific terms.

15. Fourth, the Proposal described what McMurry could do if McMurry preferred to propose to purchase HSU's interest in PHSSN rather than sell its own. If McMurry preferred to purchase HSU's interest in PHSSN, then McMurry was free to make a proposal to purchase that interest, and HSU would "entertain" that proposal, meaning HSU would "receive and take [it] into consideration." ("Entertain," *Merriam-Webster.com Dictionary*, available at <https://www.merriam-webster.com/dictionary/entertain>. Last accessed July 27, 2022).

16. Finally, the Proposal included a signature block for McMurry to accept the HSU proposal to purchase McMurry's interest in PHSSN or indicate its desire to negotiate a sale. Had McMurry signed the Proposal, it would have been representing that it "acknowledges agreement with all terms recited herein, and *requests drafting of a final agreement that, when executed, shall become binding on both parties.*" (emphasis added). The Proposal thus provided additional steps

that were required before a final agreement was reached—which would only then be binding on the parties.

McMurry’s April 12, 2022 Letter Could Not Accept an Offer that was Never Made

17. McMurry responded to the Proposal by sending HSU the letter on April 12, 2022 purporting to accept HSU’s “offer to sell” HSU’s interest in PHSSN to McMurry. Because HSU had not made an offer to sell its interest in PHSSN to McMurry absent further negotiations and a final agreement acceptable to both parties, HSU was surprised by McMurry’s claim. McMurry’s claim that some binding and enforceable contract had been formed fails for a variety of reasons. There is no binding and enforceable contract.

18. First, as discussed above, HSU made no offer to sell that McMurry could have accepted. The Proposal simply suggested that HSU would entertain a proposal from McMurry for McMurry to purchase HSU’s interest in PHSSN.

19. Second, the Proposal invited McMurry to sign and represent that it “acknowledges agreement with all terms recited herein, and *requests drafting of a final agreement that, when executed, shall become binding on both parties.*” (emphasis added). McMurry did not sign the Proposal. McMurry did not request drafting of a final agreement. A final agreement with all the necessary terms was never executed. Thus, a final agreement never became binding on the parties.

20. Third, McMurry’s April 12 Letter included terms that had not yet been negotiated between the parties. It also lacked terms that were material to any agreement pertaining to the transfer of interest either party held in PHSSN. For example, McMurry’s April 12 Letter added a term that the transfer of interest in PHSSN would be contingent on receipt of approval from accrediting bodies and other regulatory boards. HSU’s March 21 Letter did not include such a reference, and such a term was material to the accredited operations of any nursing school.

Likewise, the closing date was material as well, because whichever university sold its interest in PHSSN would need time to set up its new program and obtain needed accreditations and certifications for its new nursing school.

**HSU Drafted a Proposed Final Agreement Required by HSU's March 21 Letter,
but McMurry Refused to Negotiate**

21. Over the next two months, HSU attempted to continue negotiations by providing drafts of a proposed final agreement required by HSU's March 21 Letter, while also acting to promote the success of PHSSN and its students. On the other hand, McMurry refused to engage in negotiations on a possible agreement. Specifically, McMurry did not request any draft final agreement with all material terms and did not comment on ideas for draft agreements that HSU requested.

22. Instead, McMurry filed a lawsuit claiming that a contract, without a closing date and other details necessary for the sale of an educational program, had been created and breached.

23. Even worse, McMurry attempted to use HSU's post-April 12 efforts to negotiate the final agreement called for in HSU's March 21 Letter as evidence to support its mistaken claims that HSU's March 21 Letter and McMurry's April 12 Letter created a binding and enforceable contract.

24. McMurry knew that an immediate sale would leave HSU without a nursing school and would adversely impact HSU nursing students. Nonetheless, it filed this lawsuit—which would accomplish that very result.

E. Causes of Action

Count One: Declaratory Judgment

25. HSU incorporates by reference all prior paragraphs.

26. The Texas Uniform Declaratory Judgments Act allows this Court to determine the existence or validity of written instruments.

27. There is a justiciable controversy concerning whether HSU's March 21 Letter and McMurry's April 12 Letter, by themselves, or with implications, created a legally enforceable contract.

28. All parties with an interest in the determination of this contract-formation issue are parties to this action.

29. HSU requests a judicial declaration that:

- a. HSU's March 21 Letter, in which it represented that it would "entertain a proposal" to sell its interest, was not a clear and definite offer to sell its interest in PHSSN;
- b. Even if HSU's March 21 Letter was an offer to sell, McMurry did not accept that offer because its "acceptance" did not mirror HSU's terms.
- c. Even if HSU's March 21 Letter was an offer to sell, and even if McMurry accepted those precise terms, the contract could not be binding and enforceable since certain material terms were missing.
- d. There was never a binding contract between the parties because of the failure of a condition precedent to formation—the execution of a final agreement.
- e. The post-April 12 conduct and communications between the parties never created a binding and enforceable agreement, since there was no meeting of the minds and no execution of a "final agreement."

30. A declaration is necessary and appropriate at this time so that each party may ascertain their rights and duties.

31. Pursuant to Texas Civil Practice and Remedies Code section 37.009, HSU seeks those attorneys' fees and costs incurred in pursuing the declaratory judgment claims and defending against McMurry's requested declaratory judgment.

Count Two in the Alternative: Breach of Contract

32. HSU incorporates by reference all prior paragraphs.

33. HSU maintains that no enforceable agreement exists between the parties. But in the unlikely event that this Court holds to the contrary, McMurry materially breached that contract.

34. Even if construed as an offer, HSU's March 21 Letter omitted certain key terms and details. HSU's March 21 Letter required that McMurry request and work towards a "final agreement":

"McMurry University acknowledges agreement with all terms recited herein, and requests drafting of a final agreement that, when executed, shall become binding on both parties."

35. McMurry has refused to proceed toward a final agreement as required by HSU's March 21 Letter. Instead, McMurry has stonewalled HSU's efforts to strike a deal.

36. If a contract existed, this refusal to negotiate towards a final agreement constitutes a material breach that resulted in damages to HSU.

37. Pursuant to Texas Civil Practice and Remedies Code section 38.001, HSU seeks those attorneys' fees and costs HSU has incurred in connection with the breach of contract claims.

Count Three in the Alternative: Rescission

37. The conduct of both parties, together with HSU's March 21 Letter and McMurry's April 12 Letter, demonstrates that there was no meeting of the minds, and any contract should be rescinded.

**VI.
PRAYER**

WHEREFORE, PREMISES CONSIDERED, HSU prays that (i) McMurry take nothing by its suit, (ii) HSU be granted the declaratory judgment it has requested, (iii) in the alternative, HSU be awarded the damages it has requested, (iv) in the alternative, HSU be granted the rescission it has requested, (v) HSU be awarded its reasonable and necessary attorneys' fees, (vi) HSU be awarded judgment on its costs, and (vii) HSU be granted all other and further relief to which it is justly entitled, at law and in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2022, a true and correct copy of the foregoing was served via electronic service on all counsel below.

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