IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BROOKE RYAN, individually and on behalf of all others similarly situated,	:	
Plaintiff,	:	No. 20-cv-02164-JMG
v.	:	CLASS ACTION
TEMPLE UNIVERSITY,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT TEMPLE UNIVERSITY'S MOTION TO DISMISS COMPLAINT

Roberta D. Liebenberg, PA ID # 31738
Gerard A. Dever, PA ID # 85291
Jessica D. Khan, PA ID # 208875
FINE, KAPLAN AND BLACK, RPC
One South Broad Street, 23rd Floor
Philadelphia, PA 19107
Tel: 215-567-6565
Fax: 215-568-5872
rliebenberg@finekaplan.com

Attorneys for Defendant Temple University

TABLE OF CONTENTS

Page #

TABLE OF AUTHORITIES

Page #

Cases

I. INTRODUCTION

Confronted with the life-threatening Covid-19 pandemic, Temple University ("Temple"), like other colleges and universities around the country, acted promptly to protect the health and safety of its students, faculty, staff, and the public at large by moving its classes online after 9 weeks of the 16-week Spring semester. Indeed, Temple was legally barred from continuing with in-person classes because of shut-down orders issued by Philadelphia Mayor Jim Kenney and Pennsylvania Governor Tom Wolf. Despite the acknowledgment by plaintiff Brooke Ryan that "transitioning to online classes was the right thing for Defendant to do" (Compl. ¶ 2), she has nevertheless filed a sprawling class action seeking pro-rata refunds of tuition and the University Services Fee based on claims of breach of contract (First and Third Counts) and unjust enrichment (Second and Fourth Counts).

Though the pandemic and the daunting challenges it has created are unprecedented, there is ample legal precedent demonstrating that plaintiff's claims are deficient as a matter of law. Under Pennsylvania law, a breach of contract claim by a student against a university must identify the specific contractual provisions that were violated. Here, the Complaint does not, and indeed cannot, attach or even quote from the contract allegedly promising exclusively in-person, classroom instruction for a simple reason: no such contract exists. Plaintiff cites to and relies upon the website for the Temple Bursar's Office (Compl. ¶ 26 and nn.2, 3), but she ignores the "Financial Responsibility Agreement," "Tuition and Fees Policy," and other provisions on that website which govern the relationship between Temple and its students. They do not promise in-person classes and make clear that refunds are available only under four specified circumstances, none of which apply in this case.

The breach of contract claim fails for two additional reasons equally applicable to the unjust enrichment claim. First, plaintiff's allegation in paragraph 19 that "the level and quality of

instruction" provided online is "lower" than in-person instruction does not state a cognizable cause of action. Numerous courts in Pennsylvania and elsewhere have consistently rejected contract and unjust enrichment claims against universities based on challenges to the quality of the education provided. *See, e.g.*, *Vurimindi v. Fuqua School of Business*, 435 F. App'x. 129, 133 (3d Cir. 2011). Moreover, plaintiff's claims fail because the alleged damages are inherently speculative. Plaintiff seeks damages equal to "the difference between the value of the online learning which is being provided versus the value of the live in-person instruction in a physical classroom." (Compl. ¶ 61.) Such damages are necessarily subjective and unquantifiable, and courts have routinely dismissed complaints on that basis, including many cases brought by students against their universities. *See, e.g.*, *Cavaliere v. Duff's Business Inst.*, 605 A.2d 397, 403 (Pa. Super. 1992).

Plaintiff's unjust enrichment claim is legally deficient for other reasons as well. First, she alleges a contractual relationship with Temple, which precludes an unjust enrichment claim. In addition, the Complaint fails to allege that Temple cancelled the classes for which she paid tuition or that she was prevented from attending them, and thus Temple's retention of the tuition and University Services Fee paid by plaintiff was not "unjust." *See, e.g.*, *Bradshaw v. Pennsylvania State Univ.*, No. 10-cv-4839, 2011 WL 1288681, at *2 (E.D. Pa. Apr. 5, 2011). Nor does the Complaint allege that Temple reaped income which it would not have received but for the transition to online classes. Quite to the contrary, Temple has suffered significant lost revenue due to the pandemic.

In sum, the numerous legal deficiencies in the Complaint are fundamental and cannot be cured by amendment. Thus, Temple respectfully submits that the Complaint should be dismissed with prejudice, and without leave to amend.

II. FACTUAL BACKGROUND

Plaintiff was enrolled as an undergraduate student at Temple for the Spring semester beginning on or about January 13, 2020. (Compl. ¶¶ 13, 31.) On March 11, 2020, "as a result of the COVID-19 pandemic," Temple announced that all classes would be taught online, effective March 16, 2020. (*Id.* ¶ 34 and n.6.) Students were also asked to return to their permanent homes through the end of the semester. (*Id.* ¶ 35 and n.6.) Temple's decision was in line with subsequent city and state government shut-down orders.[1] On March 16, 2020, Mayor Jim Kenney announced that only essential businesses could remain open in the City of Philadelphia and that an end date to the citywide shutdown had not yet been determined.[2] On March 19, 2020, Governor Tom Wolf announced that only life-sustaining businesses could remain open in the Commonwealth of Pennsylvania. Governor Wolf's Order stated that it was "effective immediately (March 19, 2020) and will remain in effect until further notice."[3]

As required by these orders, Temple's campus remained closed for the remainder of the Spring semester. From March 16, 2020 through the end of the semester, Temple faculty taught classes online. (*Id.* ¶¶ 21, 34, 38.) Temple provided pro-rata refunds for parking, on-campus housing, and meal plans. (*Id.* ¶ 41.)

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[1] Matters of which judicial notice may be taken may be considered in connection with a Rule 12(b)(6) motion. Here, this includes the issuance of Governor Wolf's and Mayor Kenney's executive orders and their terms. *See Vanderklok v. United States*, 868 F.3d 189, 205 n.16 (3d Cir. 2017) ("It is appropriate to take judicial notice of … information … made publicly available by government entities.").

[2] *See* https://www.phila.gov/2020-03-16-city-announces-new-restrictions-on-business-activity-in-philadelphia.

[3] *See* https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/; https://www.scribd.com/document/452416027/20200319-TWW-COVID-19-Business-Closure-Order.

Plaintiff, on behalf of a putative class of those who paid tuition for the Spring 2020 semester, seeks damages representing the alleged difference in value between online and in-person instruction. (*Id.* ¶¶ 42, 61.) On behalf of a putative class of all those who paid fees, she also seeks pro-rata refunds of the University Services Fee and other unspecified fees, other than fees for room and board. (*Id.* ¶¶ 24-26, 41.)

III. LEGAL STANDARDS APPLICABLE TO MOTIONS TO DISMISS

The standards governing a motion to dismiss are well-established. "[T]he plaintiff must provide more than labels and conclusions; a formulaic recitation of the elements of a cause of action will not do." *Icynene v. Next Generation Insulation, LLC*, No. 20-cv-0326, 2020 WL 2198977, at *1 (E.D. Pa. May 6, 2020) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Instead, to survive a motion to dismiss, the plaintiff must plead that the "factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). That is, "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 545.

In evaluating the sufficiency of a complaint, the Court "need not accept as true unsupported conclusions and unwarranted inferences." *Doug Grant, Inc. v. Greate Bay Casino Corp.*, 232 F.3d 173, 183-84 (3d Cir. 2000) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

IV. ARGUMENT

A. The Complaint Does Not State a Claim for Breach of Contract

Under Pennsylvania law, which applies here, the essential elements of a breach of

contract claim are: (1) "the existence of a contract, including its essential terms"; (2) "a breach of duty imposed by the contract"; and (3) "resultant damages." *Vurimindi*, 435 F. App'x. at 132-33. A breach of contract claim against a university by a student "must relate to a specific and identifiable promise that the school failed to honor." *Id*. at 133. And, "[a] plaintiff must do more than allege that the school did not provide a good or quality education." *Id*. (citations omitted). Also, it is well established that "no implied-in-fact contract can be found when … the parties have an express agreement dealing with the same subject." *Cohn v. Pennsylvania State Univ.*, No. 19-cv-2857, 2020 WL 738496, at *10 (E.D. Pa. Feb. 12, 2020) (quoting *In re Penn Central Transp. Co.*, 831 F.2d 1221, 1229 (3d Cir. 1987)).

1. The Terms on the Bursar Website Governing Tuition and the University Services Fee Require Dismissal of Plaintiff's Contract Claim

The contract terms that plaintiff agreed to when enrolling for the Spring 2020 semester defeat her contract claim. These terms were set forth in the Financial Responsibility Agreement and the Tuition and Fees Policy. They do not state that classes will be conducted only on a live in-person basis, nor do they state that refunds of tuition or the University Services Fee will be provided if classes are taught online due to exigent circumstances. To the contrary, plaintiff agreed to be responsible for all tuition and fees based on the classes she was enrolled in as of the drop/add deadline of January 27, 2020,[4] which long preceded the switch to online classes in mid-March.

The Financial Responsibility Agreement, available on the Bursar website that plaintiff cites in her Complaint, provides that:

[4] https://www.temple.edu/registrar/documents/calendars/19-20.asp.

> I acknowledge that by registering for classes at Temple University, I agree to pay all assessed tuition and fees that result from my initial registration and/or future drop/add activity. I understand that I am responsible to pay for all classes in which I am registered after the final day of the term's drop/add period, which is published on the University's Academic Calendar.[5]

As stated on the Bursar website, "[all] students **are required** to accept Temple University's Financial Responsibility Agreement prior to looking up classes or registering for the first time each semester" (emphasis in original), and students are sent an email reminder of the Agreement when their registration for the semester is processed.[6]

The Tuition and Fees Policy, which is also on the Bursar website, states that **"[s]tudents who do not drop classes by the end of the official drop/add period . . . remain financially obligated for the balance due."**[7] (emphasis in original.) The Policy further states that: "Students who do not withdraw by the published deadline are responsible for payment of all tuition and fees"[8]; "[s]tudents will be charged 100% of their semester bill unless a course drop form is processed by a registration office of the university or the student successfully drops courses through the Self Service Banner by the Drop/Add deadline date"[9]; and "[s]tudents who are still registered for classes after the Drop/Add deadline date are responsible for paying all related tuition and fees."[10] With respect to the University Services Fee, the Policy expressly states as follows: "All students are assessed the **non-refundable** University Services Fee every

[5] https://bursar.temple.edu/sites/bursar/files/documents/FRA_Students_May_2019_Update.pdf.

[6] https://bursar.temple.edu/billing/financial-responsibility-agreement.

[7] https://bulletin.temple.edu/undergraduate/tuition-fees/#policy.

[8] *Id.*

[9] *Id.*

[10] *Id.*

semester."[11] (emphasis added.)

Temple's Tuition and Fees Policy provides only four limited exceptions to the general rule that no refunds are available after the drop/add deadline: (1) failure to process the drop or withdrawal form by the deadline (where a student has an extreme extenuating circumstance that prevented him or her from getting the drop transaction completed in time and did not attend classes); (2) death of a student; (3) serious extenuating circumstances preventing completion of the semester (such as medical necessity, family emergency, or military deployment); and (4) employment change/relocation (mandatory relocation or shift change that prevented the student from attending the class).[12] In each of these four exceptions, the student is unable to complete his or her classes due to extenuating circumstances. Here, of course, Temple continued to offer classes, and plaintiff does not allege that she was prevented from taking them.

Plaintiff cites to the Bursar website for purposes of describing the University Services Fee. (Compl. ¶ 26 and nn.2, 3). Remarkably, however, plaintiff ignores the Financial Responsibility Agreement, Tuition and Fees Policy, and the other governing provisions also posted there. Significantly, her Complaint omits the first sentence of the paragraph in the Tuition and Fees Policy from which the Complaint quotes in paragraph 26(a)-(c), which expressly states that the University Services Fee is "non-refundable." It is a flat, per-semester fee unrelated to the extent to which (if at all) a student avails herself of the services during the semester.

The Third Circuit has explained that "[a]s a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings. However, an exception

[11] *Id.*

[12] *Id.*

to the general rule is that a document *integral to or explicitly relied* upon in the complaint may be considered without converting the motion [to dismiss] into one for summary judgment." *In re Burlington Coat Factory Securities Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis in original). *See also SEB Investment Management AB v. Endo Int'l, PLC*, 351 F. Supp. 3d 874, 892 (E.D. Pa. 2018) (a court may "probe" documents integral to or relied upon in the complaint). "The rationale underlying this exception is that the primary problem raised by looking to documents outside the complaint – lack of notice to the plaintiff – is dissipated where plaintiff has actual notice . . . and has relied upon these documents in framing the complaint." *Burlington Coat Factory*, 114 F.3d at 1426.

Of particular significance here, the Third Circuit has held that "[w]here there is a disparity between a written instrument annexed to a pleading and an allegation in the pleading based thereon, *the written instrument will control*." *ALA, Inc. v. CCAir, Inc.*, 29 F.3d 855, 859 n.8 (3d Cir. 1994) (emphasis added). *See e.g., Slavko Props., Inc. v. T.D. Bank, N.A.*, No. 14-cv-05045, 2015 WL 1874233, at *12 (E.D. Pa. Apr. 24, 2015) (dismissing breach of contract claim and stating that "Plaintiffs' alternative reading mischaracterizes the clear intent of the parties. The language of the written agreement, not Plaintiffs' mischaracterization, controls."); *Lopez v. Blink Fitness Linden*, No. 17-cv-6399, 2018 WL 6191944, at *3 (D.N.J. Nov. 28, 2018) ("While a party can make factual allegations, a court is not bound to accept them as true when the allegations are clearly contradicted by an underlying document on which the allegations rely."); *Liao v. United States*, No. C 11-02494, 2012 WL 3945772, at *3 (N.D. Cal. Apr. 16, 2012) (dismissing breach of contract claim because allegations were refuted by "terms of use" set forth on website cited in complaint).

Thus, it is appropriate for the Court to consider the Bursar website in deciding this

motion. As described above, the Financial Responsibility Agreement and Tuition and Fees Policy demonstrate conclusively that there is no entitlement to a refund. *See Andre v. Pace Univ.*, 170 Misc.2d 893, 899, 655 N.Y.S.2d 777 (App. Div. 1996) (enforcing tuition refund policy against students who belatedly sought refund of tuition for course that was allegedly more difficult than described in University catalog).

Plaintiff's Complaint constitutes an impermissible effort to change the Agreement. *See, Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1259, 1261 (Pa. 2015) (a court cannot "alter" or "rewrite" a written contract between the parties); *Sullivan v. Commonwealth of Pennsylvania*, 708 A.2d 481, 484 (Pa. 1998) ("this Court will not rewrite the terms of a contract, nor give them a meaning that conflicts with that of the language used."). In other words,

> The court may not rewrite the contract for the purposes of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice . . . make for [the parties] a better contract than they chose, or saw fit, to make for themselves, or remake a contract, under the guise of construction, because it later appears that a different agreement should have been consummated in the first instance . . . .

Steuart v. McChesney, 444 A.2d 659, 662 (Pa. 1982). *Accord Wetty v. AXA Equitable Life Ins. Co.*, No. 18-cv-4756, 2020 WL 2556970, at *3 (E.D. Pa. May 20, 2020) ("the Court should not rewrite the contract after the fact" and "[p]arties to a contract must live with their bargain. It is not for courts to revise the bargain later based on concerns of equity.").

In sum, plaintiff is bound by the contract terms that she agreed to when she enrolled, and her breach of contract claim should be dismissed with prejudice.

2. Plaintiff Has Not Identified Any Contract Providing for Tuition Refunds if Classes Were Taught Online

Plaintiff's Complaint does not attach, cite to, or quote from the contract that she alleges requires "live in-person instruction in a physical classroom." (Compl. ¶ 56.) There is a simple

reason for that: there is no contract, either express or implied, promising exclusively in-person, classroom instruction under any and all circumstances. Nor is there a contract stating that Temple must provide refunds if it switches to online teaching in response to a global pandemic to protect the safety of its students, faculty, staff, and the public.

Under well-settled Pennsylvania law, a student may bring a cause of action for breach of contract against a university only "in some limited instances" where the student can point to specific contractual provisions that were violated. *Miller v. Thomas Jefferson Univ. Hosp.*, 908 F. Supp. 2d 639, 655 (E.D. Pa. 2012), *aff'd*, 565 F. App'x. 88 (3d Cir. 2014). However, where the plaintiff has not identified a specific contractual promise that has been breached, a breach of contract claim should be dismissed. For example, in *David v. Neumann Univ.*, 177 F. Supp. 3d 920, 925 (E.D. Pa. 2016), the Court dismissed plaintiff's breach of contract claim because she "failed to set forth any specific contractual provisions that the University allegedly breached." *See also Vurimindi*, 435 F. App'x. at 133 (affirming dismissal of plaintiff's claim against business school because he could "not point to any specific and definite terms that were violated . . . ."); *Hart v. Univ. of Scranton*, No. 11-cv-1576, 2012 WL 1057383, at *1 (M.D. Pa. Mar. 28, 2012) (dismissing breach of contract claim because plaintiffs failed to identify "any specific contractual promise that the Defendants failed to honor . . . .");[13] *Swartley v. Hoffner*, 734 A.2d 915, 919 (Pa. Super. 1999) (plaintiff "fails to point to a single provision of the written contract between the university and its students that sets forth the obligations" that were allegedly breached by the university).

[13] In *Hart*, the court stated that "even assuming an unwritten promise might suffice in a contract claim between a student and a university, the Court does not find that an implied in fact contract would relieve Hart of her burden of pointing to specific representations that have been breached." *Hart v. Univ. of Scranton*, 838 F. Supp. 2d 324, 328 n.1 (M.D. Pa. 2011).

Here, too, plaintiff's Complaint should be dismissed, as it fails to identify any specific contractual provision Temple breached by moving its classes online in response to the pandemic. Indeed, the Financial Responsibility Agreement and Tuition and Fees Policy make clear that plaintiff has no contractual entitlement to a refund of tuition or the University Services Fee.

B. Plaintiff's Claims for Breach of Contract and Unjust Enrichment Should Be Dismissed Because They Are Impermissible Educational Malpractice Claims

Unable to identify any specific contract in which Temple promised to provide exclusively in-person classes, plaintiff resorts to the claim that "common sense would dictate" that the "level and quality" of online instruction is "lower than" and "not commensurate with" in-person instruction. (Compl. ¶¶ 19, 22.) However, courts in Pennsylvania and across the country have consistently and repeatedly dismissed breach of contract and unjust enrichment causes of action based on challenges to the quality of education provided by a university.

Under Pennsylvania law, there is no cause of action for failure to provide a "quality" education. Pennsylvania courts, like many others, "refuse[] to recognize a general cause of action for educational malpractice, whether framed in terms of tort or breach of contract, where the allegation is simply that the educational institution failed to provide a quality education." *Cavaliere*, 605 A.2d at 403. As the Superior Court explained, "It would be unwise to inject the judiciary into an area where it would be called upon to make judgments despite often insurmountable difficulties both in the formulation of an adequate standard of care and in finding a causal link between the alleged breach and the alleged damages."[14] *Id.* Similarly, in *Swartley*

[14] The "insurmountable difficulties" of comparing the quality of plaintiff's in-person and online instruction would be compounded exponentially if quality comparisons had to be made for each of the nearly 40,000 Temple students in over 600 different academic programs at the undergraduate and graduate levels. Those students took myriad courses from hundreds of instructors, and each student's learning ability and response to online instruction are necessarily

v. Hoffner, the Superior Court rejected a contract claim based on a theory of educational malpractice and emphasized that "it is not the place of this Court to second-guess academic decisions and judgments made in colleges and universities of this Commonwealth. We are not now and will never be experts in each and every academic field open to scholarly pursuit. . . . As a result, our Court abides by a general policy of nonintervention in purely academic matters." 734 A.2d at 921. *Accord Vurimindi*, 435 F. App'x. at 133 ("A plaintiff must do more than allege that the school did not provide a good or quality education." (citations omitted)); *Miller*, 908 F. Supp. 2d at 655-56 (concluding "the Plaintiff's claims simply 'invite[ ] the court to enter into precisely the kind of generalized review of the entire course of instruction that so many other courts have wisely refrained from doing'" (citation omitted)); *Manning v. Temple Univ.*, No. 03-cv-4012, 2004 WL 3019230, at *12 (E.D. Pa. Dec. 30, 2004), *aff'd,* 157 F. App'x. 509 (3d Cir. 2005) ("Pennsylvania refuses 'to recognize a general cause of action . . . where the allegation is simply that the educational institution failed to provide a quality education.'") (citation omitted).

Courts around the country similarly have recognized that they are not "qualified to pass an opinion" on the quality of education. *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992). Those decisions are left to "the sound judgment of the professional educators who monitor the progress of their students on a regular basis." *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 94 (2d Cir. 2011). It is well established that a university's First Amendment academic freedom includes the right to determine for itself "who may teach, what

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different, as are the teaching skills of each of the different instructors. Other important differences requiring individualized proof include what year the student was in, whether they lived on or off campus, what activities they were involved in, whether they received financial aid, and whether a parent or other family member paid their tuition and fees. Indeed, whether students receive scholarships, financial aid, Pell grants or other state aid could impact whether they or someone who made payments on their behalf are the appropriate class members. Thus, the proposed classes (Compl. ¶ 42) could never properly be certified in this case.

may be taught, *how it shall be taught*, and who may be admitted to study." *Edwards v. California Univ. of PA*, 156 F.3d 488, 492 (3d Cir. 1998) (emphasis added). In *Edwards*, the Third Circuit also emphasized that "academic freedom thrives . . . on autonomous decisionmaking by the academy itself." *Id.* (citation omitted). *Accord McKinney v. Univ. of Pittsburgh*, 915 F.3d 956, 963 (3d Cir. 2019) ("we are particularly ill-equipped to wade into the realm of academic decisionmaking.") (citation and internal quotations marks omitted).

The policy reasons for prohibiting claims against a university based on the quality of the education provided apply with even greater force where, as here, an emergency requires schools to create novel solutions to ensure that students receive the best education possible while also remaining safe. Highly instructive here is *Paynter v. New York Univ.*, 314 N.Y.S. 2d 676 (N.Y. Civ. Ct. 1970), *rev'd*, 66 Misc. 2d 92, 319 N.Y.S. 2d 893 (N.Y. App. 1971). In *Paynter*, as a result of violent student protests concerning the invasion of Cambodia and the killing of four students at Kent State University, NYU cancelled 19 days of classes. The father of a student sued for a pro-rata refund of the tuition he paid for his son's cancelled classes and prevailed in the trial court. However, on appeal, the Appellate Division reversed, holding that no refund was owed. The court stressed that "private colleges and universities are governed on the principle of self-regulation, free to a large degree, from judicial restraints, and they have inherent authority to maintain order on their campuses." *Paynter*, 319 N.Y.S. 2d at 894 (citation omitted). The court held as follows:

> [T]he services rendered by the university *cannot be measured by the time spent in a classroom.* The circumstances of the relationship permit the implication that the professor or the college may make minor changes in this regard. The insubstantial change made in the schedule of classes does not permit a recovery of tuition.

Id. (emphasis added). The argument for rejecting the tuition refund claim here is even stronger

than in *Paynter*, as Temple did not cancel any of plaintiff's classes, but instead continued to provide instruction online despite the considerable challenges posed by the pandemic.

Also directly relevant here is the decision in *Roe v. Loyola Univ. New Orleans*, No. 07-cv-1828, 2007 WL 4219174 (E.D. La. Nov. 26, 2007). When Hurricane Katrina devastated New Orleans in August 2005, plaintiff was entering his final year as a law student at Loyola. Because the law school was unable to operate in the Fall 2005 semester, Loyola developed a policy whereby students would be able to attend classes at other law schools and receive full credit towards their Loyola degree, provided they paid their tuition to Loyola (they did not have to pay tuition to the other law schools). Plaintiff spent the Fall 2005 semester at SMU Law School. He returned to Loyola for the Spring 2006 semester and graduated without any delay. Nevertheless, he filed a class action against Loyola, on behalf of all students in the university, alleging that because Loyola was unable to offer classes at its campus in New Orleans for the Fall 2005 semester, he and all other students should have their tuition refunded to them. He asserted claims of breach of contract and unjust enrichment. The court rejected both claims. As to the breach of contract claim, it stated that "by attending classes during the Fall 2005 semester at SMU, plaintiff received the benefit of the emergency policy made possible by Loyola." *Id*. at *2. The same is true in this case as well. With respect to the unjust enrichment claim, the court emphasized that "[b]ut for the actions of Loyola in allowing its students to attend other schools and receive credit for Loyola for the courses they took, Loyola students would have fallen behind . . . ." *Id*. at *3. Once again, this reasoning is equally applicable here, as Temple's provision of online instruction enabled plaintiff and other students to continue their education in a timely manner despite the unprecedented circumstances caused by the pandemic.

C. Pennsylvania Law Does Not Permit Breach of Contract or Unjust Enrichment Claims Based on Speculative Damages

Yet another reason why plaintiff's breach of contract and unjust enrichment claims should be dismissed is that her claimed damages are inherently speculative. Plaintiff claims damages for the "difference between the value of the online learning which is being provided versus the value of the live in-person instruction." (Compl. ¶ 61; *see also id.* at ¶¶ 47(ii)-(iv), 60.) It is well-established in Pennsylvania law and analogous cases from across the country that such a claim for speculative damages is not cognizable.

The Pennsylvania Supreme Court has long made it clear that claims for speculative damages are not cognizable as a matter of law. *Stevenson v. Economy Bank of Ambridge*, 197 A.2d 721, 727 (Pa. 1964) ("We are unable to accept this speculative circumstance as a basis for awarding real or compensatory damages in this proceeding. . . . This Court has repeatedly held that a claim for damages must be supported by a reasonable basis for calculation; mere guess or speculation is not enough."); *Magill v. Westinghouse Elec. Corp.*, 464 F.2d 294, 300 (3d Cir. 1972). *See also Pashak v. Barish*, 450 A.2d 67, 69 (Pa. Super. 1982) (affirming dismissal of complaint where plaintiff's loss was "too conjectural and remote"); *Eagle v. Morgan*, No. 11-cv-4303, 2013 WL 943350, at *13 (E.D. Pa. Mar. 12, 2013) (*quoting Stevenson* and holding that plaintiff's claimed damages were based on "mere guess or speculation" and were "legally insufficient"; "Plaintiff has not established *the fact* of damage with reasonable certainty.") (emphasis in original).[15]

[15] The entirely speculative nature of plaintiff's alleged damages is fatal to her breach of contract and unjust enrichment claims. *Kaymark v. Bank of America, N.A.*, 783 F.3d 168, 180-83 (3d Cir. 2015) (affirming dismissal of contract claims because plaintiff failed to plead non-speculative damages); *Brown & Brown Inc. v. Cola*, No. 10-cv-3898, 2011 WL 2745808, at *7-8 (E.D. Pa. July 13, 2011) (breach of contract counterclaim dismissed because alleged damages were

Particularly instructive here are the numerous cases dismissing claims against educational institutions due to the inherently speculative nature of the damages alleged, as discussed above. As the Superior Court explained in *Cavaliere*, there would be "insurmountable" and "obvious" difficulties in "finding a causal link between the alleged breach and the alleged damages" when a student's claims challenge the quality of the education provided by the university. 605 A.2d at 403, 404. Courts from around the country are in accord. *See, e.g., Hunter v. Bd. of Education of Mont. Cty.*, 439 A.2d 582, 584-85 (Md. 1982) (noting that among the reasons courts have rejected claims challenging the quality of a student's education is "the inherent uncertainty in determining the cause and nature of any damages" and the "inherent immeasurability of damages"); *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 472 (Minn. App. 1999) (emphasizing "the inherent uncertainties" about "the nature of damages" when the quality of education is at issue).

Simply put, plaintiff does not present any factual allegations demonstrating how she was harmed economically by Temple's prudent and mandatory adjustment to an online format for the last seven weeks of the semester in response to the pandemic, nor how a fact-finder could reasonably determine the difference in value between her in-person and online instruction without engaging in impermissible speculation. Consistent with the many cases cited above, the Complaint should be dismissed.

D. Plaintiff's Unjust Enrichment Claim Is Legally Deficient for Two Additional Reasons

Plaintiff's unjust enrichment claim also fails for the additional reasons that: (a) plaintiff

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"entirely too speculative"); *Renkiewicz v. Commercial Union Life Ins. Co. of Am.*, No. 98-cv-1564, 1999 WL 820452, at *3 (E.D. Pa. Sept. 29, 1999) (dismissing breach of contract and unjust enrichment claims because damages sought were "speculative").

has alleged that her relationship with Temple is governed by a contract; and (b) the Complaint does not contain allegations showing that Temple has been enriched unjustly.

"It is well-settled in Pennsylvania that the existence of a contract prevents a party from bringing a claim for unjust enrichment." *Vantage Learning (USA), LLC v. Edgenuity, Inc.*, 246 F. Supp. 3d 1097, 1100 (E.D. Pa. 2017). *See also Miller*, 908 F. Supp. 2d at 656 (holding that because relationship between a student and university is contractual in nature, a "Plaintiff cannot recover under the theory of unjust enrichment.").

As explained above, the terms listed on the Bursar website and, in particular, the Student Financial Responsibility Agreement and Tuition and Fees Policy that plaintiff agreed to when enrolling at Temple, govern the parties' relationship. This contractual relationship precludes an unjust enrichment claim. It is also significant that plaintiff's two unjust enrichment claims expressly incorporate by reference all of the preceding allegations in the Complaint, including those set forth in the breach of contract claims. (Compl. ¶¶ 62, 79.) In *Vantage Learning*, in dismissing an unjust enrichment claim, the Court emphasized that "Plaintiff's claim for unjust enrichment incorporates by reference all facts pled in the breach of contract count." 246 F. Supp. 3d at 1100 n.12. *Accord Khawaja v. RE/MAX Central*, 151 A.3d 626, 634 (Pa. Super. 2016) (same).

Moreover, the Complaint does not establish that Temple has been enriched unjustly. In *WFIC, LLC v. LaBarre*, 148 A.3d 812, 819 (Pa. Super. 2016), the Superior Court explained that the elements of unjust enrichment are "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of the value." The Court emphasized that "the most significant element of the doctrine is whether

the enrichment of the defendant is unjust. The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff." *Id.* at 819.

The Complaint does not demonstrate that Temple's retention of tuition and the University Services Fee was "unjust." As a threshold matter, the parties' contract did not provide for refunds under the circumstances at issue here, so Temple's failure to give a refund cannot be "unjust." Temple continued to provide classes in the only format that it could: online instruction. This allowed plaintiff's education to proceed despite the pandemic, and she concedes that this was the "right thing" for Temple to do. (Compl. ¶ 2.)

Courts in this District have repeatedly rejected unjust enrichment claims brought against universities where, as here, the student attended the classes for which she paid. *See, e.g.*, *Bradshaw*, 2011 WL 1288681, at *2 (plaintiff did "not allege that the defendant failed to hold the classes for which she paid her tuition or that she was prevented from attending such classes."); *David v. Neumann Univ.*, 177 F. Supp. 3d at 927 ("Plaintiff fails to allege how it would be unconscionable for the University to retain the tuition paid for classes that she attended."); *Park v. Temple Univ.*, No. 16-cv-5025, 2019 WL 1865060, at *18 (E.D. Pa. Apr. 25, 2019) (same). The same conclusion should be reached here.

With respect to fees, it is undisputed that Temple has provided refunds for parking, on-campus housing, and meal costs. (Compl. ¶ 41.) The only other fee that plaintiff mentions in her Complaint is the University Services Fee. As explained above, under the parties' agreement, that flat fee was clearly non-refundable, nor was it based on pro-rata use of services.

Moreover, the Complaint does not and cannot allege that Temple reaped unjust revenues as a result of its necessary transition to online classes. To the contrary, Temple, like the other universities around the country defending similar lawsuits, has experienced significant lost

revenue due to the pandemic.

V. CONCLUSION

Temple University was confronted this past Spring with a global pandemic that forced it to cease in-person instruction and switch to online classes in order to safeguard the health and safety of the entire Temple community. Plaintiff has acknowledged that this was the right thing to do, and indeed the shut-down orders by the Mayor and Governor prevented the continuation of in-person teaching. Plaintiff's class action lawsuit for a pro-rata refund of tuition and the University Services Fee is defeated by the plain terms of Temple's Financial Responsibility Agreement and the Tuition and Fees Policy set forth on the Bursar website. Also, plaintiff's subjective belief that her online classes were not of the same "quality" as those given in-person prior to the pandemic is not actionable under well-settled Pennsylvania law. Courts have long recognized that decisions as to how classes are taught rest within the sole purview of a university's academic freedom and should not be second-guessed by the judiciary. Based on the foregoing, Temple respectfully submits that the Complaint should be dismissed with prejudice.

Dated: July 15, 2020

Respectfully submitted,

/s/ Roberta D. Liebenberg

Roberta D. Liebenberg, PA ID # 31738
Gerard A. Dever, PA ID # 85291
Jessica D. Khan, PA ID # 208875
FINE, KAPLAN AND BLACK, RPC
One South Broad Street, 23rd Floor
Philadelphia, PA 19107
Tel: 215-567-6565
Fax: 215-568-5872
rliebenberg@finekaplan.com

Attorneys for Defendant Temple University

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to the Court's Policies and Procedures, on July 7, 2020, the parties met and conferred by telephone in a conversation between Roy Willey and Justin Hemlepp, counsel for Plaintiff Brooke Ryan, and Roberta Liebenberg and Gerard Dever, counsel for Defendant Temple University, regarding the substance of Temple's contemplated Motion to Dismiss and Temple's various arguments as to why the Complaint is legally deficient. The parties were unable to come to a resolution of their differing views concerning the sufficiency of the Complaint, thus necessitating the filing of the foregoing Motion to Dismiss.

Dated: July 15, 2020

/s/ Roberta D. Liebenberg

Roberta D. Liebenberg
FINE, KAPLAN AND BLACK, RPC
One South Broad Street, 23rd Floor
Philadelphia, PA 19107
Tel: 215-567-6565
Fax: 215-568-5872
rliebenberg@finekaplan.com