**IN THE UNITED STATES DISTRICT COURT**

**FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

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| RAFAEL FIGUEROA, KAHLIL CABBLE, TY' ANTHONY SCOTT and RYAN PETTY, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>POINT PARK UNIVERSITY,<br><br>Defendant. | Civil Action No. 2:20-CV-01484-LPL |

**DEFENDANT'S SUPPLEMENTAL REPLY BRIEF**
**IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

Defendant Point Park University ("PPU"), by and through its undersigned counsel, submits this Supplemental Reply Brief in Support of its Motion to Dismiss Plaintiffs' Complaint.

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## INTRODUCTION

Plaintiffs sought and were granted leave to file a supplemental brief (the "Supplemental Brief") in light of three recent decisions by Pennsylvania federal courts dismissing refund class action claims against The University of Pennsylvania, Temple University and The University of Pittsburgh.

In each of those cases, the breach of contract claims for tuition refunds were dismissed with prejudice because, in each case, the plaintiffs failed to identify a specific promise by the university to provide an in-person experience. The implied contract, quasi-contract, and tort claims also were dismissed in each case because the parties' relationship is governed by an express agreement. The outcomes in *Penn*, *Temple*, and *Pitt* are consistent with long-established Pennsylvania law, dating back at least thirty years. Plaintiffs' Supplemental Brief fails to demonstrate why this Court should deviate from that established precedent and from the building consensus among Pennsylvania federal courts that plaintiffs are precluded as a matter of law from obtaining the relief they seek.

Indeed, Plaintiffs' Supplemental Brief confirms the following points, each of which further demonstrates that PPU's Motion to Dismiss the Complaint should be granted and that Plaintiffs' Complaint should be dismissed with prejudice:

- Plaintiffs still rely on an implied contract theory, effectively conceding that PPU has never made an express, specific and identifiable promise to provide in-person instruction under all circumstances.
- Plaintiffs still cite no Pennsylvania federal or state case in which a court has permitted an implied contract claim against a higher education institution or where the relationship between the parties is governed by an express contract.

- Plaintiffs still do not demonstrate why PPU's online course offerings, the parties' course of conduct, or any other marketing statements should override express contractual terms of PPU's Financial Registration Terms and Conditions ("FRTC") and incorporated policies.
- Plaintiffs still do not show that amending their Complaint to emphasize additional statements on PPU's website or marketing materials would change the outcome.

In short, Plaintiffs are pursuing the same fatally flawed theories that PPU has demonstrated in its initial motion to dismiss brief, and reply brief, should be dismissed. *Penn*, *Temple* and *Pitt* only further underscore that dismissal with prejudice is the appropriate outcome here.

## ARGUMENT

### 1. *Penn*, *Temple,* and *Pitt* are consistent with each other and with longstanding Pennsylvania law in their key holdings.

Plaintiffs wrongly suggest that *Penn*, *Temple,* and *Pitt* involve "incorrectly narrow (and conflicting) views regarding the scope of available breach of contract claims against universities under Pennsylvania law, and, in particular, under theories of implied contract." Supp. Br. at 2-3. Plaintiffs also emphasize variations in the *Penn*, *Temple* and *Pitt* decisions that are peripheral, but none alter the fact that all three of those cases are squarely in line with established Pennsylvania law and each other.

In Pennsylvania, a private university's relationship with its students "is comprised of the written guidelines, policies, and procedures as contained in the written materials distributed to the student over the course of their enrollment in the institution." *Swartley v. Hoffner*, 734 A.2d 915, 919 (Pa. Super. Ct. 1999); s*ee also David v. Neumann Univ.*, 187 F. Supp. 3d 554, 558 (E.D. Pa. 2016) (same). Because these documents govern the parties' relationship, to survive a motion to

dismiss, a "complaint must point to ***specific failures*** on the part of a university ***within these written materials***." *Hart*, 2012 WL 1057383, at *3 (emphasis added); *see also Neumann Univ.*, 187 F. Supp. 3d at 558 ("[w]hile Pennsylvania law allows a student to sue a private university for breach of contract, the allegations ***must relate to a specific and identifiable promise*** that the school failed to honor.") (emphasis added and quotations omitted) (citing *Vurimindi v. Fuqua Sch. of Bus*., 435 F. App'x 129, 133 (3d Cir. 2011)); *Cavaliere v. Duff's Bus. Inst.*, 605 A.2d 397, 404 (Pa. Super. 1992) (dismissing breach of contract claim where the "complaint does not allege that there was any specific undertaking, in the student handbook and catalog or otherwise, to provide a specific course of instruction which was not provided.").

Consistent with that precedent, the three federal district courts that have ruled on defendants' motions to dismiss all have dismissed students' breach of contract claims seeking tuition refunds for precisely this reason: the plaintiffs' inability to point to any specific failure or specific promise by schools to an in-person experience under all circumstances.

- *Hickey v. Univ. of Pittsburgh*, No. 2:20-cv-690, 2021 WL 1630579, *2 (W.D. Pa. Apr. 27, 2021) (Stickman, J.) ("Plaintiffs' claim fails because it does not identify any specific contractual promise that the University allegedly breached with respect to in-person instruction, tuition, fees, or any other costs.").
- *Smith v. Univ. of Penn.*, No. 20-2086, 2921 WL 1539493, *5 (E.D. Pa. Apr. 20, 2021) (Savage, J.) ("The plaintiffs have not identified a specific, written promise in any of the contract documents.").
- *Ryan v. Temple Univ.*, No. 5:20-cv-02164, 2021 WL 1581563, *7 (E.D. Pa. Apr. 22, 2021) (Gallagher, J.) ("Plaintiffs have not identified any provision within the Agreement stating that Temple University would provide in-person classes under all circumstances or that tuition and fees would be refunded should classes be moved to an online format.").[1]

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[1] That the courts in *Penn*, *Temple*, and *Pitt* vary slightly in how they define the outer contours of the parties' express contract (for example whether the contract is limited to a financial responsibility agreement or includes written policies and procedures) is irrelevant here, as the Plaintiffs have not identified any specific promise in ***any writing***, whether in the FRTC or otherwise, that PPU allegedly breached. Those variations in *Penn*, *Temple*, and *Pit* also reflect alleged factual differences in the terms of the written agreements

Plaintiffs' suit against PPU should be dismissed for the same reason. Even in their Supplemental Brief, Plaintiffs still do not identify – and cannot identify – a "specific failure" or a "specific and identifiable promise" that PPU failed to honor during the Spring 2020 semester. This Court need not go any further in its analysis to dismiss Plaintiffs' claims.

**2. Plaintiffs are asking this Court to "infer" an implied contract that Pennsylvania law prohibits.**

Rather than point to an express promise, Plaintiffs ask this Court to "***infer*** a promise to provide these pre-paid, but undelivered, services." Supp. Br. at 2 (emphasis added). Plaintiffs further argue that such an inference is "plausible" and therefore should survive under *Twombly* and *Iqbal*. *Id.* Respectfully, it is quintessentially ***implausible*** to base a complaint upon a theory of liability that consistently and repeatedly has been rejected by courts. Longstanding Pennsylvania law is clear that a viable breach of contract claim against a university requires an express, written promise. *Swartley*, 734 A.2d at 919 (finding breach of contract claim "cannot stand [against a university] unless linked to the written policies of the university").

The courts in *Penn*, *Temple*, and *Pitt* consistently rejected the very implied contract theory Plaintiffs ask this Court to adopt. *See Univ. of Penn*, 2021 WL 1539493 at *6 ("A cause of action for breach of an implied promise is not cognizable under Pennsylvania law in the higher education context."); *Temple Univ.*, 2021 WL 1581563 at *9 (finding that plaintiffs' implied contract theory is precluded by the existence of an express contract concerning the same subject matter as the alleged implied contract, and rejecting arguments based on school publications and the parties'

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themselves (for example, whether they include an integration clause) rather than any ambiguity or disagreement among the courts in their fundamental rulings based on Pennsylvania law.

course of conduct); *Univ. of Pitt*, 2021 WL 1630579 at *5 (rejecting implied in fact contract theory based on the University's website, promotional materials and other publications).[2]

Plaintiffs do not cite a single case under Pennsylvania law permitting a student to proceed on an implied contract claim against an institution of higher learning.[3] Instead, they argue there is no reason general principles of Pennsylvania contract law, which permit implied contracts, should not apply to claims against colleges and universities. Supp. Br. at 8. This argument ignores the well-reasoned decisions in *Swartley*, *Hart*, *Penn*, *Temple*, *Pitt* and numerous other Pennsylvania cases.

Even focusing, however, on more general principles of Pennsylvania contract law as Plaintiffs suggest, Plaintiffs' implied contract theory still fails, as it is foreclosed by the existence of a relevant written agreement. "It is well-settled that where an express written agreement has been validly entered into by both parties, a party may not allege that an implied contract exists as to terms in the written agreement." *Turkmenler v. Almatis, Inc.*, Civil Action No. 11-1298, 2012

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2 These recent rulings are consistent with longstanding Pennsylvania precedent. For example, in *Hart*, 838 F. Supp. 2d at 327, a student sued a university for breach of contract, arguing that the school violated its plagiarism policy. The student did not cite a specific provision of the policy and, when faced with a motion to dismiss, argued that "discovery [was] necessary to determine what procedures were promised by the University" and that "an implied contract existed between the parties[.]" *Id*. The court dismissed the complaint and found that the student's "claim must fail as a matter of law where she has failed to point to any specific provisions breached by the University." *Id.* at 327-28. Here too, dismissal, not exploratory discovery, is necessary.

3 Plaintiffs cite a portion of a sentence from *Gati v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 91 A.3d 723, 731 (Pa. Super. 2014) in support of their implied contract theory. In the Supplemental Brief, Plaintiffs state that "'the essence of the bargain between student and university" is the student's "reasonable expectation based on statements of policy by the university and the experience of former students…'" Supp. Br. at 4. Had Plaintiffs quoted the ***complete*** sentence from *Gati*, the sentence concludes: "experience of former students … that if he performs the work required in a satisfactory manner and pays his fees he will receive the degree he seeks." *Gati*, 91 A.3d at 723. In other words, this quote from *Gati* (which is dicta) does not contemplate sweeping implied contractual obligations based on prior conduct, but rather (if anything) contemplates a limited scenario in which the ***only*** implied contractual obligation is to confer a degree upon a student's successful completion of the degree requirements. *Univ. of Penn*, 2021 WL 1539493 at *4.

WL 1038866, at *3 (W.D. Pa. Mar. 28, 2012) (internal quotations and citations omitted). This bedrock principle of contract law extends far beyond higher education.

Here, the FRTC holds students financially responsible for the cost of their education. *Id.* It provides that ***"[b]y proceeding with the online registration process, you are agreeing to payment of Point Park University's tuition, fees, room, board, and other charges on your student account by the due date***, regardless of your expected reliance on third-party resources, including but not limited to financial aid, employer reimbursement, outside scholarships, government assistance or other external resources." *See* Ex. 1 to PPU's Motion to Dismiss, ECF Doc. No. 20 (emphasis added). Therefore, by enrolling in the Spring 2020 semester, as Plaintiffs in the above-captioned case did, Plaintiffs expressly agreed to take financial responsibility for their education at PPU regardless of any outside circumstances. *Id.*

Moreover, in the FRTC, students expressly represent that they understand that they must officially drop or withdraw during the tuition refund periods to be eligible for a partial or full refund of tuition and fees by enrolling in the Spring 2020 semester. *Id.* The withdrawal policy specifically provides the following: "You are required to officially drop or withdraw from your classes during the determined tuition refund periods to be eligible for a refund of all or a portion of tuition and fees." *Id.*

Plaintiffs bear, but cannot meet, the burden to show that the purported implied contract is entirely unrelated to the FRTC, which along with its incorporated policies, speaks directly to the limited circumstances under which students might receive tuition refunds, none of which apply here.

**3. PPU's online course offerings cannot alter express contractual terms.**

Ignoring the obligation to allege an implied contract entirely unrelated to the FRTC, Plaintiffs argue that because PPU also offers online courses, Plaintiffs have plausibly alleged an implied contractual obligation on the part of PPU to provide in-person instruction or be liable for contract damages if it fails to do so. Supp. Br. at 3-5. The fact that PPU offers online courses does not change the fact that the students who enrolled for Spring 2020 semester signed the FRTC and acknowledged the limited circumstances for which refunds would be available.[4] Nor can the fact that PPU offers online courses be relied upon by Plaintiffs to unilaterally attempt to alter or augment the terms of the FRTC and incorporated policies. Plaintiffs are attempting to convert information certain students may have considered, and beliefs certain students may have held, about their educational experience into binding contractual promises by PPU to meet those expectations under all circumstances. This is the essence of forcing PPU into a contract it did not agree to make, and that is inconsistent with the contract PPU ***actually did make*** with its students. This the law does not permit.

**4. Further amendments to the Complaint to include additional advertising and marketing allegations would be futile.**

Plaintiffs also seek leave to amend their complaint, if PPU's Motion is granted, to add additional allegations about PPU's website and marketing materials. Supp. Br. at 9. Such amendment would be futile and should not be permitted. As the *Pitt* decision (which Plaintiffs contend is "most consistent with Pennsylvania law") states: "Although the University's website,

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[4] Plaintiffs also argue, incorrectly, that their complaint is more specific as to the terms of the purported implied contract than the complaint in *Pitt* because Plaintiffs assert the *Pitt* case did not involve allegations of online course offerings pre-pandemic. This is wrong. The plaintiffs in *Pitt*, just like Plaintiffs here, alleged that they made a choice to take courses in person and could have instead chosen fully online programs. *Univ. Of Pitt.*, 2021 WL 1630579 at *1, 4. This undercuts any assertion that the Plaintiffs' complaint here is better pled and should survive dismissal.

promotional materials and other documents and publications reflect the myriad of opportunities students can take advantage of in ordinary times through their on-campus experience, these materials do not constitute identifiable and specific promises and are inadequate in the eyes of the Court to support a breach of contract, even one implied in fact." *Univ. Of Pitt.*, 2021 WL 1630579 at *5 (citing *Brucker v. State Farm Mut. Auto. Ins. Co*., No. 17cv00084, 2017 WL 7732876, at *3 (W.D. Pa. May 26, 2017); *DiBonaventura v. Consol. Rail Corp*., 539 A.2d 865 (Pa. Super. Ct. 1988). *See also Temple Univ.*, 2021 WL 1581563 at *9 (holding that vague or aspirational statements from school publications are "generally not a valid source of contractual obligations under these circumstances."); *Univ. of Penn*, 2021 WL 153949 at *6 ("Informational materials, such as a university's website and brochures distributed to prospective applicants, are not part of a student's contract. Nor are they statements of school policies or procedures.").

## CONCLUSION

The COVID-19 pandemic caused universal turmoil, disruption, and disappointment on college campuses. Academic life has not been normal, and neither students, faculty, nor administrators were entirely happy with the changes occasioned by the pandemic. Plaintiffs assert in their Supplemental Brief that PPU must bear the cost of the impact the COVID-19 pandemic had on students' Spring 2020 semester. The dispositive issue as to all claims asserted in the Complaint, however, is whether Point Park breached a specific contractual promise to students by switching instruction during the latter part of that semester from in person to remote delivery. The answer is no. Like *Penn*, *Temple,* and *Pitt*, this case should be dismissed with prejudice.

Dated: May 27, 2021

Respectfully submitted,

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