IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

SAMUEL SCHOENING, individually and on behalf of all others similarly situated,	)	
	)	**Civil Action 2:20-cv-05566**
Plaintiff,	)	
	)	**Hon. Madeline Cox Arleo**
v.	)	
SETON HALL UNIVERSITY,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF SETON HALL UNIVERSITY'S MOTION TO DISMISS THE COMPLAINT

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I. INTRODUCTION

Plaintiff, Samuel Schoening ("Plaintiff") was in the process of completing his senior year at defendant Seton Hall University ("Seton Hall") during the Spring 2020 semester. According to the Complaint, Plaintiff filed this putative class action lawsuit seeking a refund of a portion of the tuition and fees he paid during the Spring 2020 semester on the theory that the remote instruction he received was not equivalent to the in-person instruction that Seton Hall allegedly promised him. Undoubtedly, and as demonstrated throughout this brief, Plaintiff's Complaint must be dismissed in its entirety with prejudice because all three causes of action constitute claims for educational malpractice, which are prohibited under New Jersey law.

This case arises from the COVID-19 pandemic, which has impacted hundreds of millions of people across the globe. In March 2020, President Donald Trump declared COVID-19 a national emergency, and as of the filing of this motion, the virus has killed over 155,000 people in the United States, including more than 15,000 in New Jersey.[1] While everyone has had to adjust their way of life to prevent the spread of the virus, college and university students, and the institutions they attend, have faced unique challenges.

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[1] New Jersey Coronavirus Map and Case Count, The New York Times (last visited August 3, 2020), *available at* https://www.nytimes.com/interactive/2020/us/new-jersey-coronavirus-cases.html.

Defendant Seton Hall was not immune to the challenges the pandemic presented. When the national state of emergency was declared — closely followed by state-by-state business closure orders, including in New Jersey — Seton Hall was in the middle of its Spring 2020 semester. Around that same time, New Jersey Governor Philip Murphy ordered all institutions of higher education, including Seton Hall, to cease all in-person instruction. Seton Hall was left with no choice but to transition to remote instruction to enable its students to complete the remainder of the Spring 2020 semester and continue the pursuit of their academic degrees.

There is no dispute that the Spring 2020 semester was not lost. Indeed, Seton Hall acted quickly by making significant investments in technology and data security in order to create a secure and functional virtual learning environment. Courses continued to be taught by Seton Hall's faculty, and students continued to earn credits toward their degrees. In fact, Seton Hall's faculty conducted lectures, performed demonstrations, met with students, answered questions and held office hours with students virtually. Academic support and tutoring continued to be provided remotely, and Seton Hall's dedicated staff continued to provide students with an array of support services.[2]

[2] Seton Hall also made funds available to students in need through CARES Act grants and its Student Emergency Fund. *See* CARES Act Frequently Asked Questions (last visited Aug. 3, 2020), *available at* https://www.shu.edu/health-

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Plaintiff, now a Seton Hall alumnus, has filed this lawsuit against Seton Hall, asserting claims for breach of contract, unjust enrichment and conversion, and seeking to recover a pro-rated refund of a portion of the tuition and fees he paid during the Spring 2020 semester. The factual basis underlying each of the Plaintiff's claims is that the remote instruction he received during the Spring 2020 semester was not equivalent to the in-person instruction that Seton Hall allegedly promised. But even accepting Plaintiff's allegations about the quality of the remote instruction as true — which Seton Hall disputes — all of the pleaded causes of action must be dismissed with prejudice because they constitute claims for educational malpractice, which are prohibited under New Jersey law.

Significantly, New Jersey courts, as well as courts in other states, have repeatedly dismissed claims similar to those pled here, which challenge the quality of the education a school provides. Courts simply refuse to second guess the academic judgment of higher education administrators in light of the various acceptable methods of teaching and training, the lack of a standard of care to measure an educator's performance, the inability to establish the proximate cause for an educa-

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intervention-communication/cares-faqs.cfm#cares10; COVID-19 Relief Fund: Persevering Through Uncertain Times (last visited Aug. 3, 2020), *available at* https://advancement.shu.edu/support/covid-19-relief-fund.

tional failure, and the risk that educational malpractice claims would expose college and universities to a flood of litigation.

Recognizing that New Jersey prohibits educational malpractice claims, Plaintiff creatively pleads claims alleging that Seton Hall breached a contract, was unjustly enriched, and converted tuition and fees. All of these claims fail as a matter of law because they are based on the quality of the education Seton Hall provided during the pandemic and unquestionably constitute claims for educational malpractice.

Moreover, even if Plaintiff could overcome New Jersey's blanket ban on educational malpractice claims, the Complaint still is subject to dismissal on a count-by-count basis. First, Plaintiff's breach of contract claim (Count I of the Complaint) fails because Seton Hall did not contract with the Plaintiff to provide solely in-person course instruction. To the contrary, Seton Hall's policies, as detailed in its Academic Catalog, permit the University to do exactly what it did here — modify its academic programs, course content, and course schedules at its discretion in order to fulfill its mission. A breach of contract claim without a contract fails as a matter of law.

Second, Plaintiff's unjust enrichment claim (Count II of the Complaint) must be dismissed because it duplicates the breach of contract claim. Plaintiff alleges that Seton Hall was unjustly enriched because the tuition and fees he paid were in

exchange for a promise of in-person instruction. As with the breach of contract claim, Seton Hall made no promise to deliver in-person instruction. In fact, there could be no such promise because Seton Hall's policies permit the modification of academic programs, course content, and course schedules, and set forth a schedule for fee refunds. These policies preclude Plaintiff from contending that (i) he had any reasonable expectation of a refund, or (ii) that Seton Hall was unjustly enriched by the retention of tuition and fees associated with the Spring 2020 semester.

Finally, Plaintiff's conversion claim (Count III of the Complaint) fails because it too is duplicative of the breach of contract claim, and because Plaintiff does not allege that Seton Hall had a duty (independent of the alleged contract) to provide students with in-person instruction. The conversion claim also fails because nothing was taken from Plaintiff.

There is little doubt that the onset of COVID-19 and the transition to a wholly remote learning environment in the middle of a semester were stressful and disruptive events for students and their families. But, there also is no doubt that throughout the pandemic, Seton Hall continued to serve its students by transitioning to virtual learning, offering remote students services and activities, and providing relief funds for those in need. Seton Hall must not be penalized for taking necessary steps to protect the health and safety of the members of its community,

complying with a government order, and ensuring the Spring 2020 semester was not lost. In fact, Plaintiff was awarded his undergraduate degree at the conclusion of the Spring 2020 semester. It is without question that Seton Hall did what was necessary to provide its students with a high-quality education during the middle of a pandemic. Respectfully, and as established herein, this matter must be dismissed in its entirety with prejudice because all three causes of action asserted constitute claims for educational malpractice, which are prohibited under New Jersey law.

II. STATEMENT OF FACTS

A. The Parties

Plaintiff Samuel Schoening was completing his senior year as an undergraduate student at Seton Hall during the Spring 2020 semester when COVID-19 arrived in the northeast United States. Compl. ¶ 1. As a result of Seton Hall's efforts to quickly transition to a remote learning environment, Plaintiff completed his Spring 2020 semester courses and graduated from Seton Hall University on May 15, 2020, receiving his Bachelor of Science in Diplomacy and International Relations.[3]

[3] Seton Hall's virtual commencement ceremony is available on Seton Hall's website. *See* A Time to Reflect — Congratulations Class of 2020 (last visited July 30, 2020), *available at* https://www.shu.edu/commencement/.

Since Plaintiff relies on the statements on Seton Hall's website to form the basis of its claim, the Court may look to the content of the website on a motion to

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Seton Hall is a private not-for-profit education institution with an enrollment of over 10,000 students. *See* Compl. ¶ 2. In 2019–2020, Seton Hall's undergraduate tuition was $20,730 per semester, *id.*¶ 17, which allowed a full-time undergraduate student to take and earn between 12 and 18 credits during the semester. Declaration of Angelo A. Stio III ("Stio Decl."), Ex. A at 44. In addition to tuition, Seton Hall also charged undergraduate students mandatory fees, which Plaintiff identifies in the Complaint as including a University Fee of $485, a Mobile Computing Fee of $285[4] and a Technology Fee of $400. Compl. ¶ 16.

B. Seton Hall's Transition to Remote Learning

On March 10, 2020, when Seton Hall was approximately half-way through its Spring 2020 Semester, which ran from January 13, 2020, to May 12, 2020, *id*. ¶ 15, the University responded to COVID-19 by announcing that it was suspending

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dismiss. *In re Philips/Magnavox TV Litig.*, Civil Action No. 09-3072 (PGS), 2010 U.S. Dist. LEXIS 91343, at *15 n.4 (D.N.J. Sep. 1, 2010).

[4] The Mobile Computing Fee is associated with the University's Mobile Computing program, which provides laptop computers to all undergraduate students and faculty. This technology is supported by a campus-wide wireless network, an on-campus computer repair facility, 24/7 phone support, and a state-of-the-art data center providing network services that include the PirateNet campus portal, the Blackboard learning management system, an ePortfolio system, and online services such as registration, payment and access to grades. Stio Decl., Ex. A at 13.

in-person course instruction and transitioning to wholly remote instruction in order to protect the health and safety of its "students, faculty, priests, and staff." Compl. ¶¶ 20; Stio Decl., Ex. C. On March 12, 2020, Seton Hall announced that remote instruction would continue through April 13, 2020. Stio Decl., Ex. D; Compl. ¶ 22.[5]

Four days later, on March 16, 2020, Governor Philip Murphy issued Executive Order 104 (the "Stay At Home Order") ordering all institutions of higher education to cease in-person instruction by March 18, 2020. Stio Dec., Ex. E. On March 18, 2020, in response to the Stay At Home Order, Seton Hall announced that remote instruction would continue through the remainder of the Spring 2020 semester. Stio Decl., Ex. G; Compl. ¶¶ 20–22.

Seton Hall's March 18 announcement explained that "[s]tudents fulfilling the necessary academic requirements will graduate and receive their diplomas, on time, regardless of when or how Commencement occurs," and that "the University

[5] As matters of public record, the Court may consider Seton Hall's public announcements on a motion to dismiss without converting the motion to one for summary judgment. When deciding a motion to dismiss, a court "may consider documents that are 'integral to or explicitly relied upon in the complaint' or any 'undisputedly authentic document that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document,'" as well as "matters of public record." *IJKG Opco LLC v. Gen. Trading Co.*, No. 17-6131 (KM) (JBC), 2020 U.S. Dist. LEXIS 39585, at *8 (D.N.J. Mar. 6, 2020) (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999)).

will broaden its pass/fail rules to give undergraduate students more flexibility this semester." Stio Decl., Ex. G. Seton Hall also announced it was continuing to provide student services remotely, including conducting student wellness activities, holding virtual masses, providing academic advising and tutoring, providing counselling and psychological services, offering career services and providing health services. Stio Decl., Exs. F, H, I.

On April 1, 2020, Seton Hall announced it was refunding students a prorated portion of room, board, and parking fees equal to the time period when the campus was closed by the Stay At Home Order. Stio Decl., Ex. J.

C. The Plaintiff's Complaint

In his Complaint, Plaintiff does not dispute that Seton Hall had no choice but to close its physical facilities and cease in-person instruction after the Stay At Home Order was issued. *See* Compl. ¶¶ 7, 23, 45. Plaintiff also does not dispute that Seton Hall acted quickly to avoid the loss of the Spring 2020 semester and ensure Plaintiff had the opportunity to earn the credits for the courses he enrolled in.

Instead, all of Plaintiff's claims are premised on allegations that the remote instruction Seton Hall provided was "subpar in practically every aspect," and "in no way the equivalent of the in-person education that he and the putative class members contracted and paid for." *Id.* ¶¶ 5, 27. Based on these allegations, Plaintiff asserts claims against Seton Hall for breach of contract (Count I), unjust en-

richment (Count II) and conversion (Count III) and seeks to recover a refund of the "pro-rated portion of tuition and fees (or at minimum a portion thereof), proportionate to the amount of time that remained in the Spring Semester 2020 when classes moved online and campus services ceased being provided." Compl. ¶¶ 8, 29. Plaintiff not only seeks this recovery on behalf of himself, but also on behalf of a putative class ("Class") that he defines as: "all people who paid Seton Hall Spring Semester 2020 tuition and/or fees for in-person educational services that Seton Hall failed to provide, and whose tuition and fees have not been refunded." *Id*. ¶ 30.

In response to the Complaint, Seton Hall now moves to dismiss all the claims in their entirety under Federal Rule of Civil Procedure 12(b)(6).

III. THE RULE 12(B)(6) STANDARD GOVERNING A MOTION TO DISMISS

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must allege "enough facts to state a claim of relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 6789 (2009) (citing *Twombly*, 550 U.S. at 556).

In evaluating a motion to dismiss, "[a] court must accept all factual allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *Robern, Inc. v. Glasscrafters, Inc.*, 206 F. Supp. 3d 1005, 1008 (D.N.J. 2016). Importantly, courts are "not compelled to accept unwarranted inferences, unsupported conclusions or legal conclusions disguised as factual allegations." *Baraka v. McGreevey*, 481 F.3d 187, 211 (3d Cir. 2007).

When deciding a motion to dismiss, a court also "may consider documents that are 'integral to or explicitly relied upon in the complaint' or any 'undisputedly authentic document that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document,'" as well as "matters of public record." *IJKG Opco LLC v. Gen. Trading Co.*, No. 17-6131 (KM) (JBC), 2020

U.S. Dist. LEXIS 39585, at *8 (D.N.J. Mar. 6, 2020) (quoting *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 184 F.3d 280, 287 (3d Cir. 1999)). The Court may consider such documents without converting a motion to dismiss into a motion for summary judgment. *See id*.

IV. LEGAL ARGUMENT

A. Plaintiff Asserts Non-Actionable Claims For Educational Malpractice

Plaintiff's causes of action for breach of contract, unjust enrichment and conversion must be dismissed in their entirety because they all involve a challenge to the quality of the education that Seton Hall provided once courses were taught wholly on a remote platform in the Spring 2020 semester. Because all Plaintiff's asserted causes of action are for "educational malpractice," they are not actionable under New Jersey law, and must be dismissed with prejudice.

It is well settled that an institution of higher education has substantial discretion "to determine for itself on academic grounds . . . what may be taught [and] how it shall be taught," as part of the "'four essential freedoms' that constitute academic freedom." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing the "four essential freedoms" and observing that

"[a]cademic freedom thrives . . . on autonomous decision making by the academy itself"). Consistent with the principles of academic freedom, courts in New Jersey (and around the country) will not entertain claims that seek to second guess academic judgments about curriculum, course placement, or the quality of the education a school provides. *See*, *e.g.*, *Swidryk v. Saint Michael's Med. Ctr.,* 201 N.J. Super. 601, 603-05 (Ch. Div. 1985) (recognizing claims alleging (i) a failure to acquire basic skills, (ii) improper placement in a program or (iii) lack of supervision or quality of an education, are claims not permitted). In other words, claims for "educational malpractice" are not recognized in this State. *Myers v. Medford Lakes Bd. of Educ.*, 199 N.J. Super. 511, 514 (App. Div. 1985) (observing that "[e]ducational malpractice has not been approved as a theory of recovery in [New Jersey] or elsewhere"); *see also M.G. v. Crisfield*, Civil Action No. 06-5099, 2009 U.S. Dist. LEXIS 83419, at *28 (D.N.J. Sep. 11, 2009) (to the extent that plaintiffs "assert[ed] a claim akin to educational malpractice, leave to amend must be denied because the cause of action has not been recognized in New Jersey.").

The strong public policy for not interfering with academic judgments of a university was articulated in *Swidryk v. Saint Michael's Medical Center.* There, the court dismissed negligence and breach of contract claims that a medical resident intern brought against the director of a medical education program at a New Jersey teaching hospital. *Swidryk*, 201 N.J. Super. at 602. The intern claimed that

the medical education director was negligent by failing to adequately supervise him and the resident program, and the medical education director breached a contractual duty to provide him with a suitable educational environment and adequate supervision. *Id.* at 603.

The *Swidryk* court found the medical intern's claims were for educational malpractice because they challenged the quality of the education and training the intern received from the medical school. In dismissing the claims, the court held that in New Jersey "there is no cause of action for educational malpractice either in a tort or contract claim." *Id.* (emphasis added). Significantly, the court commented that the intern's labeling a cause of action as one for breach of contract was simply a "mere characterization" that could be disregarded "to achieve substantial justice." *Id.*

The *Swidryk* court emphasized that courts "have unalteringly eschewed" sitting in review of the day-to-day implementation of policies by educators. *Id.* at 603 (citing *Donohue v. Copiague Union Free School District*, 418 N.Y.S. 2d 375, 391 (1975)). It added that the prohibition on second-guessing schools arises because (a) there is no feasible way to formulate a standard of care to judge the delivery of an education given the various acceptable methods employed to teach and train students, and (b) the nature of an educational malpractice claim prevents a finding of legal causation because educational failures can "stem from a variety of

factors including the student's physical, neurological, emotional, cultural and environmental background, as well as the actual [school] system itself." *Id.* at 603.

Other courts have cautioned that if educational malpractice claims were permitted it would open a flood of litigation against schools and the judiciary would find itself embroiled in overseeing a school's day-to-day operations. *See Brantley v. District of Columbia*, 640 A.2d 181, 184 (D.C. 1994) (quoting (*Ross v. Creighton University*, 957 F.2d 410, 414 (7th Cir. 1992)); *Roe v. Saint Louis Univ.*, No. 4:08CV1474 HEA, 2012 U.S. Dist. LEXIS 183265, at *27 (E.D. Mo. Dec. 31, 2012); *see also Cavaliere v. Duff's Business Inst.*, 605 A.2d 397, 403 (Pa. Super. Ct. 1992) ("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.").

An instructive example of the treatment of an educational malpractice claim under New Jersey law is found in the court's decision in *Stein-O'Brien v. Pennington School*, Civil Action No. 06-2101, 2008 U.S. Dist. LEXIS 2856 (E.D. Pa. Jan. 14, 2008). There, a mother and daughter sued the Pennington School alleging, among other things, that the school breached a contract, (a) by failing "to provide educational services to the best of [the daughter]'s potential with accommodations for her learning disabilities," (b) by failing to teach the daughter "writing and study

skills in her CS class to address her dyslexia and ADHD," (c) by "failing to provide [the daughter] with specific accommodations, such as extended test-taking time, quiet testing areas, and clarification of test questions, without constant requests and complaints," and (d) by "offering [the daughter] an AP-level Physics course during her 11th grade year, but then dropping the course down to an honors-level class midway through the academic year." *Id.* at 19–25.

In dismissing the plaintiffs' complaint, the court reiterated that a breach of contract claim based on a school providing an inadequate or ineffective education is tantamount to a tort claim for educational malpractice and barred under New Jersey law. *Id.* at 18–19 (citing *Swidryk*, 201 N.J. Super. at 603, and *Myers*, 199 N.J. Super. at 514). In addressing each of the plaintiffs' allegations about contractual rights being breached by the Pennington School, the court noted that in the absence of the plaintiffs identifying contractual provisions setting forth the specific rights allegedly breached, the claims asserted were for inadequate educational services, and were subject to dismissal based on New Jersey's prohibition on educational malpractice claims. *Id.* at **22–24.

Courts in New York and North Carolina recognize the same prohibition on educational malpractice claims. In fact, two cases from these jurisdictions involving facts directly on point to those plead here demonstrate why Plaintiff's claims must be dismissed. In *Paynter v. New York University*, the New York Appellate

Division reversed a trial court judgment awarding the parent of a college student a refund of tuition for instruction time that was lost after the university cancelled all classes following the shootings at Kent State University. 319 N.Y.S.2d 893 (N.Y. App. Div. 1971). In finding that the refund claims failed as a matter of law, the *Paynter* court noted:

> 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. In the light of the events on the defendant's campus and in college communities throughout the country on May 4 to 5, 1970, the court erred in substituting its judgment for that of the University administrators and in concluding that the University was unjustified in suspending classes for the time remaining in the school year prior to the examination period.

Id. at 984 (N.Y. App. Div. 1971) (citation omitted) (emphasis added).

In *Krebs v. Charlotte School of Law, LLC,* the Western District of North Carolina reached a similar conclusion and dismissed a putative class action filed by students who sought to recover millions of dollars in damages from a law school after the school lost its American Bar Association accreditation. No. 3:17-cv-00190, 2017 U.S. Dist. LEXIS 143060, at *13–14 (W.D. N.C. Sept. 5, 2017). There, like here, plaintiffs asserted a breach of contract claim based on allegations about the poor quality of the education the students were provided. *Id*. at *15. Because the complaint failed to identify "any 'specific promises' about the quality of

education, ABA accreditation, or a 'rigorous curriculum'" that the law school promised to provide, the court had little problem dismissing the breach of contract claim. *Id*. The court found the claim was barred as one for educational malpractice and it could not proceed because it "involve[s] inquiry into the nuances of educational processes and theories." *Id*. (quotation marks omitted).

In light of the prohibition on claims for educational malpractice and the holdings from *Swidryk*, *Stein-O'Brien*, *Paynter* and *Krebs,* all of the Plaintiff's claims here fail as a matter of law and must be dismissed. The reason for this is that each claim is premised on the alleged inferior quality of the education that Seton Hall provided. The allegations in the Complaint demonstrate this repeatedly:

- "The remote learning options are in no way the equivalent of the in-person education that Plaintiff and the putative class members contracted and paid for." Compl. ¶ 5.
- "Defendant has not delivered the educational services, facilities, access and/or opportunities that Plaintiff and the putative class contracted and paid for." *Id*. ¶ 23.
- "The online learning options being offered to Seton Hall students are subpar in practically every aspect and a shadow of what they once were, from the lack of facilities, materials, and access to faculty." *Id*. ¶ 27.

Plaintiff's allegations are the epitome of educational malpractice.

The allegations in the Complaint also impermissibly require this Court to delve into the educational processes of an institution of higher education and assess such day-to-day educational matters such as the quality of "Face to face interaction with professors, mentors, and peers," "Access to facilities such as libraries, laboratories, computer labs, and study rooms," "Student governance and student unions," "Extra-curricular activities, groups, intramural sports, etc.," "Student art, cultures, and other activities," "Social development and independence [of students]," "Hands on learning and experimentation," and "Networking and mentorship opportunities." *Id.* ¶ 28.

Moreover, if claims based on these types of allegations were permissible — which they are not — it would subject institutions of higher education to a flood of litigation. Among other things, a student could pursue claims for a refund based on the particular teaching style of a professor, the career advice received from a mentor, the quality of the student activities and intramural sports that were offered, the quality of laboratory or hands on instruction, or simply the failure of a student to become independent, mature or even make new friends. For public policy reasons alone, Plaintiff's claims cannot proceed. Accordingly, because New Jersey law prohibits claims for educational malpractice, each of the Plaintiff's claims here fail as a matter of law and must be dismissed.

B. Each of Plaintiff's Causes Of Action Fail To State Claims Upon Which Relief Can Be Granted

The prohibition on educational malpractice claims relieves this Court from having to determine whether any of Plaintiff's three pleaded causes of action, independently, state a claim for which relief can be granted. However, even if the Court engages in this analysis, Plaintiff's Complaint still must be dismissed with prejudice. Indeed, none of the pleaded counts in the Complaint state the required elements of a cognizable claim under New Jersey law.

1. Count I Must Be Dismissed Because Plaintiff Does Not Identify Any Contract Promising In-Person Instruction

To state a breach of contract claim under New Jersey law, the Plaintiff must establish three elements: "a valid contract, defective performance by the defendant, and resulting damages." *Coyle v. Englander's*, 199 N.J. Super. 212, 223 (App. Div. 1985). A breach of contract claim simply cannot survive if the plaintiff fails to "identify the specific contract or provision that was allegedly breached." *Barker v. Our Lady of Mount Carmel Sch.*, Civil Action No. 12-4308, 2016 U.S. Dist. LEXIS 118067, at *46 (D.N.J. Sep. 1, 2016) (dismissing breach of contract claim because plaintiffs had "not identified what contract or contractual provision Defendants allegedly breached"); *Eprotec Pres., Inc. v. Engineered Materials, Inc.*, No. 10-5097 (DRD), 2011 U.S. Dist. LEXIS 24231, at *23 (D.N.J. Mar. 9, 2011)

("Failure to allege the specific provisions of contracts breached is grounds for dismissal.").

Here, Plaintiff does not identify any contractual provision that Seton Hall supposedly breached. No contract is identified, never mind specific terms requiring in-person instruction in exchange for tuition and fees, because no such contract exists. Plaintiff merely asserts, in conclusory fashion, that he "entered into a binding contract with" Seton Hall, whereby Seton Hall "promised to provide certain services" and Seton Hall "has not delivered the educational services, facilities, access and/or opportunities that Plaintiff and the putative class contracted and paid for." Compl. ¶¶ 5, 23, 41. This is insufficient to state a claim.

The little detail that Plaintiff does plead fails to establish the existence of a contract. Plaintiff merely points to excerpts from Seton Hall's website. In this regard, Plaintiff alleges that the first excerpt, from a page entitled Student Life, "markets the Seton Hall on-campus experience as a benefit of enrollment." *Id.* ¶ 25. But all the excerpt says is that the "campus community is also close-knit and inclusive" and that students' "experiences at Seton Hall extend way beyond the classroom." *Id.* Plaintiff alleges that the second excerpt, from a webpage for the School of Diplomacy entitled "Curriculum," "markets the benefits [of Seton Hall's] facilities and collaborative environment for many programs, including the

International Relations program."[6] *Id.* ¶ 26. The excerpt, at most, says that "classroom discussions will be enriched" by a "diverse student body, by interactions with visiting international leaders and by real-world, practical perspectives from our distinguished faculty." *Id*. Neither statement represents a contractual promise to do anything, much less establish a promise for Seton Hall to provide in-person instruction and other educational services to students when a government order expressly prohibited Seton Hall from doing so.

Further, a vague and aspirational statement in a website or contained in a student manual does not create binding express or implied contractual obligation on behalf of a college or university. New Jersey courts refuse to recognize the existence of an express or implied contractual relationship based on an isolated provision in a student manual or handbook. *Romeo v. Seton Hall Univ.*, 378 N.J. Super. 384, 395 (App. Div. 2005) (dismissing a breach of contract claim because a "contractual relationship cannot be based on isolated provisions in a student manual"); *Barker v. Our Lady of Mount Carmel Sch.*, 2016 U.S. Dist. LEXIS 118067, at *49 (D.N.J. Sep. 1, 2016) ("it is doubtful whether New Jersey law permits contractual obligations based on provisions of student handbooks"); *Mittra v. Univ. of*

[6] The Complaint does not even try to explain how a webpage for the School of Diplomacy and International Relations is relevant to the thousands of other putative class members he seeks to represent who are not studying Diplomacy and International Relations.

Med. & Dentistry of N.J., 316 N.J. Super. 83, 90 (App. Div. 1998) (refusing to extend cases finding implied contractual obligations between employers and employees to university-student disputes).

Plaintiff's failure to identify a specific provision in which Seton Hall promised in-person instruction, a particular type or quality of instruction, or a refund of tuition and fees for providing classes in a remote environment is not surprising because Seton Hall's policies say the opposite. Seton Hall's 2019–2020 schedule for tuition and fees directly ties tuition to the number of credits a student takes in a semester. Stio Decl., Ex. A at 44. Under this schedule, base undergraduate tuition entitles a student to take between 12 and 18 credits per semester, and an additional per-credit fee is charged for anything over 18 credits. *Id.* There is no dispute that Seton Hall continued to offer Plaintiff courses during the Spring 2020 semester and provided him with credits toward his academic degree, which enabled Plaintiff to graduate. This is all that Seton Hall said it would provide in exchange for the tuition and fees that were paid. *Id.*

Seton Hall also has a published tuition and fee refund policy, and Plaintiff does not qualify for a refund under it. Stio Dec., Ex. A at 44. Under that policy, if a student chooses to withdraw and forego credits, the student may do so and obtain a 100% refund of all fees and tuition (less deposits) provided the withdrawal occurs before the end of the add/drop period. *Id.*; *see also* Stio Decl., Ex. K. Thereaf-

ter, a pro-rated schedule of refunds is available for tuition (but not fees) through the fourth week of the semester. Stio Dec., Ex. A at 44. After the fourth week, if a student withdraws and receives no credits for courses, no refunds are available because a substantial portion of the instruction was completed. *Id.* Plaintiff does not allege that he sought to withdraw — to the contrary, Plaintiff graduated and received a degree after completing the Spring 2020 semester. Any request for a refund after the semester is completed is contrary to Seton Hall's policy, particularly given that the transition to wholly remote instruction enabled Plaintiff to obtain his diploma without any delay. Notably, just as Plaintiff never pleads that he failed to receive academic credit or his diploma, he also does not allege that Seton Hall failed to comply with its refund policy.

Finally, Seton Hall's 2019–2020 Graduate and Undergraduate Academic Catalogs, which outline Seton Hall's policies on undergraduate and graduate education, detail the University's right to change academic programs, courses, scheduling and professors assigned to teach, as it deems necessary to deliver academic programming. For example, the first pages from Seton Hall's Graduate and Undergraduate Academic Catalog each declare that, "[w]hile this catalogue was prepared on the basis of updated and current information available at the time, the University reserves the right to make changes, as certain circumstances require." Stio Decl., Ex. A at 1; Ex. B at 1. The Academic Catalogs then go on to recognize

Seton Hall's right to change course scheduling, as it deems necessary: "The University reserves the right to cancel any course for which registration is insufficient, change the time and place of any course offered, and change the professor assigned to teach the course." Stio Decl., Ex. A at 57 (emphasis added). Both Catalogs also make clear that: "The University reserves the right to close, cancel or modify any academic program and to suspend admission to any program." Stio Decl., Ex. A at 46 (emphasis added); *see also* Ex. B at 41.

These provisions recognize that Seton Hall has the right to change the scheduling and content of courses, which includes moving courses to a remote environment. Two New Jersey courts have found similar academic catalog reservation-of-rights provisions that allowed colleges to alter or eliminate academic programs altogether sufficient to bar claims based on implied or quasi-contract rights. *See Beukas v. Bd. of Trustees of Farleigh Dickinson Univ.*, 255 N.J. Super. 552, 556 (Law Div. 1991), *aff'd*, 255 N.J. Super. 420 (App. Div. 1992) (affirming dismissal of complaint based on closure of dental school due to withdrawal of state funding: "Even if we assume, for analytical purposes, that the various University bulletins constituted an enforceable contract, that contract would include the reservation of rights . . ."); *Gourdine v. Felician Coll.*, Docket No. A-5248-04T32006 N.J. Super. Unpub. LEXIS 1792, at *4 (App. Div. Aug. 15, 2006) (affirming summary judgment in favor of college and finding "[t]o the extent that plaintiffs seek

to enforce a contractual right against defendants, that contract includes the college catalog's reservation of rights to alter or to eliminate the program in which they were enrolled"). The same is true here.

Plaintiff has not identified any contract obligating Seton Hall to provide in-person instruction, and Plaintiff cannot contend an implied contractual relationship exists because New Jersey law does not recognize an implied contract based on provisions on a website, catalog or handbook. Moreover, even if Plaintiff tries to allege a quasi-contractual relationship exists, the New Jersey precedent outlined above recognizes that such a relationship includes Seton Hall's express reservation of the right to modify procedures, scheduling and content of courses. For these reasons the breach of contract claim, Count I of the Complaint, should be dismissed with prejudice.

2. Count II Fails Because The Unjust Enrichment Claim Is Duplicative of the Breach of Contract Claim And Plaintiff Does Not Adequately Allege The Essential Elements of Unjust Enrichment And A Reasonable Expectation To A Refund

Plaintiff's unjust enrichment claim fails for at least two fundamental reasons. First, the claim is duplicative of the breach of contract claim. Plaintiff bases his unjust enrichment claim on the contention that "Plaintiff and members of the Class and Subclass conferred a benefit on Defendant in the form of monies paid for Spring Semester 2020 tuition and other fees in exchange for certain services and

promises [i.e., in-person learning]." Compl. ¶ 48. That is the exact same theory upon which the breach of contract claim is based. *See id.* ¶ 41 ("As part of the contract, and in exchange for the aforementioned consideration, Defendant promised to provide services, all as set forth above [i.e., in-person learning]."). Although New Jersey law recognizes a Plaintiff may plead unjust enrichment in the alternative, when the unjust enrichment claim duplicates the breach of contract claim, as it does here, the claim must be dismissed. *See Ribble Co. v. Burkert Fluid Control Sys.*, Civil Action No. 15-6173, 2016 U.S. Dist. LEXIS 161746, at *13 (D.N.J. Nov. 22, 2016) (dismissing unjust enrichment claim "because it simply duplicates [a] breach of contract claim"); *Slimm v. Bank of Am. Corp.*, No. 12-5846, 2013 U.S. Dist. LEXIS 62849, at *87 (D.N.J. May 2, 2013) (recognizing that a court can dismiss a claim that is duplicative of other claims in the complaint).

Second, Plaintiff's unjust enrichment claim fails because Plaintiff does not adequately allege that Seton Hall unjustly retained the benefit of Plaintiff's tuition and fees. "To establish unjust enrichment, a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust." *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554 (1994). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." *Id*.

Here, Plaintiff cannot plausibly allege that Seton Hall unjustly retained the benefit of Plaintiff's tuition and fees or that he expected to receive a refund from Seton Hall. Plaintiff concedes that he continued to receive remote instruction from Seton Hall and received academic credit for courses he took in the Spring 2020 semester. Compl. ¶¶ 3–4. Indeed, Plaintiff graduated following the Spring 2020 semester. District courts in the Third Circuit recognize there is no unjust enrichment where a student attends classes for which tuition was paid. *See David v. Neumann Univ.*, 177 F. Supp. 3d 920, 927 (E.D. Pa. 2016) (dismissing quantum meruit claim because "Plaintiff fails to allege how it would be unconscionable for the University to retain the tuition paid for classes that she attended."); *Bradshaw v. Pennsylvania State Univ.*, Civil Action No. 10-4839, 2011 U.S. Dist. LEXIS 36988, *5 (E.D. Pa. 2011) (dismissing unjust enrichment claim because there were no allegations that "defendant failed to hold the classes for which she paid her tuition or that she was prevented from attending such classes."). Because Plaintiff attended courses and received credits, there can be no unjust enrichment. Moreover, the unjust enrichment claim fails because Plaintiff cannot plausibly allege that he expected to receive a refund from Seton Hall. This is particularly true given that Seton Hall's treatment of the tuition and fees was consistent with its published policies governing tuition, fees and refunds. *See supra*, at 20–25.

Finally, the unjust enrichment claim fails for the additional reason that there is no allegation — nor could there be — that Seton Hall (a not-for-profit corporation) failed to utilize the fees and tuition it received to further its charitable mission by continuing to provide an education and student services remotely in the middle of a pandemic. Because the tuition and fees were used to fulfill Seton Hall's charitable mission, there is no basis for an unjust enrichment claim. *See, e.g.*, *Moss v. Wayne State Univ. & Wayne State Univ. Bd. of Governors*, No. 286034, 2009 Mich. App. LEXIS 2491, at *6 (Mich. Ct. App. Dec. 1, 2009) (holding that when "plaintiff and other students gained a general benefit from the university's expenditures, which included spending in areas that would directly benefit students," an unjust enrichment claim fails).[7]

[7] Any suggestion that Seton Hall somehow profited from the pandemic is ridiculous. Even under the best circumstances, tuition and fees alone do not cover the full cost of delivering a university's academic and co-curricular programming, including investments that must be made in financial aid and other student support. *See* Nate Johnson, *College Costs and Prices: Some Key Facts for Policymakers*, Lumina Foundation (last visited July 29, 2020), *available at* https://www.luminafoundation.org/wp-content/uploads/2017/08/college-costs-and-prices.pdf; *see also* Journal of Education Finance, Vol. 15, No. 1, *Special Edition: Current Issues in the Economics and Financing of Higher Education*, at 93 (Univ. of Ill. Press, Summer 1989) (with respect to private colleges and universities "a third or more of operating costs is paid for by endowment proceeds, gifts and other non-tuition sources or revenue").

3. Count III Must Be Dismissed Because Plaintiff's Conversion Claim Is Duplicative Of The Breach of Contract Claim And Nothing Was Taken From Plaintiff

Like the unjust enrichment claim, the conversion claim fails because it is duplicative of the breach of contract claim. "New Jersey courts have expressly restricted application of the doctrine of conversion when it seeks to turn a claim based on breach of contract into a tort claim." *Gordon v. Nice Sys.*, Civil Action No. 18-2168, 2020 U.S. Dist. LEXIS 81927, at *12 (D.N.J. May 11, 2020). "While a claim for conversion and breach of contract may coexist in the same complaint, a plaintiff asserting a claim for conversion must establish the defendant violated an independent legal duty and committed a tort, apart from the duty imposed by the contract." *Qingdao Zenghui Craftwork, Co. v. Bijou Drive*, Case No. 3:16-cv-06296(BRM)(DEA), 2019 U.S. Dist. LEXIS 96442, at *10 (D.N.J. June 7, 2019).

Here, the conversion claim asserted by Plaintiff is based on there being a contract or promise that created "an ownership right to the in-person educational services they were supposed to be provided in exchange for their Spring Semester 2020 tuition and fee payments." *See* Compl. ¶ 54. This allegation is not the creation of a new legal duty, but simply a restatement of the alleged breach of contract and unjust enrichment claims.

Plaintiff's conversion claim also fails for the separate reason that he does not plausibly allege the essential element that Seton Hall wrongfully exercised domin-

ion and control over the tuition and fees he paid. *See Latef v. Cicenia*, Docket No. A-5747-13T2, 2016 N.J. Super. Unpub. LEXIS 554, at *5 (App. Div. March 14, 2016) (citing *Lembaga Enters., Inc. v. Cace Trucking & Warehouse, Inc.*, 320 N.J. Super. 501, 504 (App. Div. 1999) ("conversion is the exercise of any act of dominion in denial of another's title to the chattels or inconsistent with such title"). As set forth above, there was nothing improper about Seton Hall's treatment of tuition and fees as such treatment was consistent with, and authorized under, its policies.

V. CONCLUSION

For the foregoing reasons, Seton Hall University respectfully requests that the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Date: August 3, 2020

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