UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-CV-61431-RAR

LEO FERRETTI, individually and on behalf of himself and all others similarly situated,

Plaintiff,

v.

NOVA SOUTHEASTERN UNIVERSITY, INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED CLASS ACTION COMPLAINT

Defendant Nova Southeastern University, Inc. ("NSU" or "University"), pursuant to Fed. R. Civ. P. 12(b)(6), moves to dismiss Plaintiff's First Amended Class Action Complaint [ECF No. 25] with prejudice, and states as follows:

PRELIMINARY STATEMENT AS TO THE AMENDED COMPLAINT

Plaintiff, a doctor who graduated from NSU in May 2020 (despite COVID and the transition to remote learning), asks the Court to create a *post facto* tuition and fees discount for him and all students when NSU transitioned to remote learning for six weeks during the Winter 2020 semester due to the COVID-19 pandemic.[1] Plaintiff has not identified an agreement between the parties promising exclusively in-person education or a promise that NSU would deliver specific services (on or off campus) during the semester in exchange for a fee. The "contract" underlying this lawsuit does not exist. The Court has no authority to add to or alter the contractual relationship between the parties to create new terms and should dismiss this claim.

[1] NSU refers to the January-May semester as the "Winter" semester although this is more routinely referred to as the Spring semester.

To try to rectify these deficiencies, Plaintiff abandoned his breach of implied contract and conversion claims and proceeds under two theories: breach of contract and unjust enrichment. Since Plaintiff cannot find a contractual term, Plaintiff cobbles together generic sections of NSU's marketing materials, Academic Catalog, and University Policies to try to create an alleged term for "live on-campus instruction and access to campus facilities," even during an emergency situation like a pandemic. Cutting and pasting phrases and ideas from different parts of a catalog or marketing materials to create a bi-lateral contract out of Plaintiff's unilateral *expectancy* for the in-person delivery of education is an affront to the well-established law of contracts.

Next, without a contractual term on which to rely, Plaintiff fixates on the distinctions between NSU's Day Division and Online Division to justify or bolster what he "expected" of his experience in choosing the Day Division and his subjective belief that remote learning is less valuable. His virtually untouched unjust enrichment claim is an apparent afterthought and doomed by his incorporation by reference of the facts allegedly supporting his new contract allegations.

Plaintiff's amendments do not cure the obvious defects because he continues to ignore NSU's *explicit written* Student Enrollment Agreement which states that tuition and fees are charged in exchange for *enrollment*, not based on usage or how education is delivered. NSU never promised a delivery modality. This Court is not empowered to inject this new term into the existing agreement.

Even Plaintiff's "expectancy" theory is without merit as Plaintiff openly admits that NSU advises all students, *in writing*, that Day Program classes may be offered remotely or online. The very predicate of this lawsuit, that students expect to have classes delivered only in-person, is directly contradicted by Plaintiff's express allegations. Having admitted that NSU tells students that classes may be offered remotely and that NSU did so during Winter 2020 (offer classes in

person, but then offer classes remotely post-COVID), Plaintiff is without legal recourse. In light of this clear policy and representation by NSU that classes could be delivered online, which all students accepted upon enrollment, Plaintiff's claim that students were promised exclusively in-person instruction is objectively frivolous and arguably in bad faith.

INTRODUCTION AND SUMMARY OF ARGUMENT

The COVID-19 pandemic in March 2020 required everyone to make immediate, unprecedented, and widespread changes to daily interactions and the delivery of goods and services. Nothing is the same. These seismic shifts imposed on our lives – not seen or felt since the influenza pandemic in 1918 – continue to endure. Educational institutions were not immune to the virus' grasp. Like virtually all institutions of higher education, NSU took swift, decisive, and creative actions to protect the health and safety of its students, faculty, and staff and to comply with executive orders, recommendations, and federal and state guidelines. NSU reimagined all university activities and kept its students, faculty and staff safe. At all times, NSU remained laser-focused on its fundamental obligation: safely providing a quality education to all NSU students for the balance of the Winter 2020 semester. Indeed, Plaintiff himself acknowledges NSU's commitment to "respond and adapt to the challenges and changes inherent in higher education," which includes NSU's responding and adapting to the COVID-19 pandemic. AC ¶ 19.

For six (6) weeks, NSU delivered its academic instruction using a variety of remote platforms. Professors taught classes, administered exams, assigned projects, and ensured that students learned in furtherance of their academic progress. Throughout the unprecedented public health crisis, NSU students remained connected to NSU and obtained the core services they sought and paid for: completion of and credit for their Winter 2020 courses, to advance toward – or complete – their degree. Plaintiff admits in the Amended Complaint that he personally benefitted

from NSU's remote-based services and successfully graduated as a doctor. AC ¶ 11.

Plaintiff does not dispute: (i) that he received and accepted education and credits; (ii) the existence of the pandemic; or (iii) the wisdom *and the legal and practical necessity* of NSU's suspending in-person learning. AC ¶ 74. Instead, Plaintiff expresses his personal disappointment that he could not participate in on-campus classes and activities for about six (6) weeks, which disappointment, disjointedly jammed into two (2) counts, should entitle him and a putative class of NSU students to a refund simply because NSU transitioned to remote learning. He argues that, based solely on *his subjective expectation for exclusively in-person delivery of education, and no contract or legal doctrine,* he deserves compensation simply for adapting to the COVID-19 reality.

In fact, NSU's policies expressly state:

> Policies and requirements, including fees, are subject to change without notice at any time at the discretion of the NSU administration. *NSU reserves the right to change curriculum, course structure,* calendar, graduation requirements, and costs during the life of this publication.

Further, Plaintiff's Student Enrollment Agreement ("SEA"),[2] the express agreement between the parties, similarly states, in pertinent part,

> I agree to pay all NSU charges pursuant to NSU policies. I understand that [NSU] is advancing value to me in the form of educational services and that my right to register is expressly conditioned upon my agreement to pay institutional costs including, but not limited to, tuition, fees, housing, meal plan, and any additional costs when those charges come due. . . . This agreement shall be construed in accordance with Florida law.

See SEA, attached to Declaration of G. Elaine Poff, filed herewith. ***The SEA, like NSU's general policies, are bereft of any guarantee of in-person educational services***, despite Plaintiff's

[2] Plaintiff refers to the SEA in the Amended Complaint, thus making the document a central part of Plaintiff's claims and ripe for consideration on the instant motion. AC ¶ 35 n.21. *Starship Enters. of Atlanta, Inc. v. Coweta Cnty.*, 708 F.3d 1243, 1252 n.13 (11th Cir. 2013) ("a court may consider documents attached to the motion to dismiss if they are referred to in the complaint and are central to the plaintiff's claim.").

assertions that such an agreement exists. In addition, contrary to the most basic premise of this lawsuit, Plaintiff now openly acknowledges that NSU advises all students, in writing, that part of their Day Program classes may be offered remotely or online (*i.e.*, in offering classes remotely post-COVID, NSU did exactly what it told students that it would do). As such, it is troubling that, in the face of the express language in his SEA and NSU's policies, Plaintiff nevertheless filed this action, which not only alleges terms directly contrary to the admitted policies and governing documents, but also to seeks a refund of tuition and fees after NSU simply acted in a manner consistent with its policies and its agreement with students.

Plaintiff also alleges NSU breached an unidentified agreement when it failed to refund an unspecified portion of semester-based fees that Plaintiff paid for the Winter 2020 semester. To that end, Plaintiff makes the dubious assertion that NSU's *internal tax-related revenue recognition* protocols should somehow inform the contractual terms NSU had *with students*. AC ¶ 22. This is wrong as a matter of law and defies common sense. In fact, Plaintiff does not identify any specific service that NSU promised to students, to be offered for a specific number of days in a semester and in a specific delivery format, in exchange for a specific fee (such that refusal to offer that service might amount to a breach related that to fee). As plainly evidenced by NSU's policies, NSU students pay flat fees by a certain date each semester, are charged these fees wholly unconnected to the usage of any specific service, and are explicitly *not* entitled to any pro-rata refund. Thus, like tuition, Plaintiff has no claim to a refund of fees.

Even if a contract for exclusive in-person education existed, Plaintiff cannot establish ascertainable damages flowing from the alleged breach without essentially claiming "educational malpractice" – the education was not good enough – a claim that Florida courts have repeatedly disallowed. Despite successfully obtaining his degree in May 2020, Plaintiff claims that remote

learning purportedly failed to provide the same "value." But Plaintiff failed to allege any identifiable loss from the transition to remote learning. At best, the Amended Complaint contains only Plaintiff's *subjective* view of what remote education is worth, which is beyond the purview of any judicial remedy and is so speculative and conjectural as to be legally unrecoverable.

Relatedly, even if Plaintiff had identified a contract for exclusively in-person education and could show a breach and recoverable damages, he has no claim because (i) COVID-19, and the related closure orders, made in-person delivery of education impossible; and (ii) Plaintiff admits he knowingly accepted remote learning despite believing that NSU breached its agreement by offering his education remotely. In short, Plaintiff admits he ratified any purported breach.

Plaintiff's alternative theory of unjust enrichment and recovery in restitution fares no better. The law is settled: a party cannot claim unjust enrichment predicated on a contractual relationship or the *same facts* as a contract claim. Equally fatal, Plaintiff pleads no facts that, if true, demonstrate that NSU was enriched at all (much less, unjustly) by transitioning to remote education in response to the pandemic. Plaintiff asserts no facts to suggest that NSU did not apply the tuition and fees to the purposes intended or that it received a windfall from the circumstances. Allowing Plaintiff to accept the education and course credit – as well as the conferral of a degree – from NSU and then to be excused *after the fact* from paying the agreed-upon price would be unjust in Plaintiff's favor. Plaintiff's unjust enrichment claim should be dismissed *with prejudice*.

In sum, Plaintiff's Amended Complaint articulates a *shared* tale of disappointment. While NSU empathizes with Plaintiff's disappointment, it does not establish a cognizable claim.

RELEVANT FACTUAL ALLEGATIONS

Plaintiff is a recent graduate of NSU's Doctor of Osteopathic Medicine Program, who was enrolled in the Winter 2020 academic term (January 2020 to May 2020). AC ¶ 11. Plaintiff alleges

generally that he incurred tuition and other fees and incurred loan debt to pay for such expenses. *Id.* ¶¶ 58-59. Plaintiff admits that even pre-COVID "some, and in some instances *most*, on-campus majors and courses may include an online [ ] component." *Id.* ¶ 25, 29. This is expressly stated by NSU in its catalog, where students applying for face-to-face courses are advised that such courses "*may* include some online instruction." *Id.* ¶ 29 (citing course catalog). Plaintiff does not identify any promise by NSU as to how any specific course might be delivered (remote, partially remote or in person), or identify any promise as to what percentage of any class or course (even if identified as a "face-to-face" course) will in fact be delivered face-to-face *in-person*.

On March 11, 2020—approximately two months into the Winter 2020 term—the WHO declared COVID-19 a pandemic, prompting NSU to make changes to protect the lives of its campus community during this unprecedented global crisis.[3] On March 13, 2020, NSU announced it would transition to remote instruction beginning on March 23, 2020, for the remainder of the term. *Id.* ¶ 62. NSU continued (and continues) to provide academic and student services to its students virtually. *Id.* ¶¶ 64-65. Plaintiff continued his classes remotely and admits that he obtained his degree in May 2020. *Id.* ¶ 11. Despite successfully graduating, he believes that he (and the putative class) somehow is entitled to compensation from NSU. *See id.* ¶¶ 11, 75.

ARGUMENT AND SUPPORTING MEMORANDUM OF LAW[4]

I. Plaintiff Has Failed to State a Claim for Breach of Contract (Count I)

Plaintiff's breach of contract claim fails because he: (1) does not—and cannot—allege the existence of the essential terms establishing an enforceable contract for exclusively in-person

[3] *See* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020, of which the Court may take judicial notice.

[4] The Court is surely aware of the standard of review on a Rule 12(b)(6) Motion to Dismiss. This section is accordingly omitted.

instruction or a refund of semester-based fees; (2) cannot establish the existence of any breach, much less a ***material*** breach, of any alleged contract; and (3) cannot show any legally recoverable non-speculative damages resulting from approximately six weeks of remote education.

A. Plaintiff Has Failed to Identify Any Contractual Term That Required NSU to Provide Exclusively In-Person Instruction, Services, or a Pro Rata Refund

A "claim for breach of contract must identify 'the actual terms of the contract allegedly breached.'" *Toca v. Tutco, LLC*, 430 F. Supp. 3d 1313, 1324 (S.D. Fla. 2020) (citation omitted) (dismissing contract claim with prejudice). Plaintiff must identify the *specific promise* by NSU and how that promise was breached. *Kelley v. Metro. Life Ins. Co.*, No. 13-61864, 2013 U.S. Dist. LEXIS 154239, at *5 (S.D. Fla. Oct. 28, 2013). "[I]f there has been no agreement as to essential terms, an enforceable contract does not exist." *Jacksonville Port Auth., City of Jacksonville v. W.R. Johnson Enters., Inc.*, 624 So. 2d 313, 315 (Fla. 1st DCA 1993).

Florida courts recognize that the relationship between a student and a private university is "generally set forth in university catalogs, student manuals, student handbooks, and other university policies and procedures." *Villard v. Capella Univ.*, No. 6:17-cv-1429-Orl-41GJK, 2017 U.S. Dist. LEXIS 220541, at *4 (M.D. Fla. Dec. 21, 2017), *adopted* 2018 U.S. Dist. LEXIS 72786 (M.D. Fla. Apr. 30, 2018). To avoid dismissal of a breach of contract claim, a student must *specify the particular rule or procedure* that the university allegedly violated. *Id.* at *5. Federal courts have dismissed breach of contract claims against universities when the plaintiff fails to do so. *Id.*; *Faiaz v. Colgate Univ.*, 64 F. Supp. 3d 336, 358 (N.D.N.Y. 2014) (dismissed claim that failed to identify specific promise).[5]

[5] Other federal courts have similarly dismissed contract claims where a student fails to identify a *specific* promise by a university. *See, e.g., Lee v. Univ. of N.M.*, No. CIV 17-1230 JB/LF, 2020 U.S. Dist. LEXIS 54920, at *165-66 (D.N.M. Mar. 30, 2020) (student asserting breach of contract "must identify specific terms of the implied contract that were allegedly violated by the college"

Plaintiff has not alleged any essential contractual terms that the payment of tuition was in exchange for *exclusively* in-person instruction or entitlement to a refund of semester-based fees.

1. The Amended Complaint Contains No Contractual Terms Requiring NSU to Provide Exclusively In-Person Instruction

Despite two opportunities to plead a viable contract claim, Plaintiff has not identified a contractual promise to students that under all circumstances, NSU would provide a specific educational delivery modality, a specific service in exchange for a specific fee, or was contractually precluded from providing education remotely in compliance with government orders. If there is no provision in NSU's "university catalogs, student manuals, student handbooks, and other university policies and procedures" establishing that: (1) under all circumstances, including a national health crisis, NSU promised exclusively, in-person, on-campus instruction in exchange for tuition; and/or (2) NSU promised a specific service, for a specific number of days in the semester and specifically in-person, in exchange for a specific fee *and* that students were entitled, due to non-use, to a *pro rata* refund of what are clearly identified as flat semester-wide fees unrelated to use, there is no claim. *Villard*, 2017 U.S. Dist. LEXIS 220541, at *4; *see also Stenger v. Ferris State Univ.*, No. 20-000084-MK (Mich. Comm. Cl. Oct. 1, 2020) (dismissing COVID-19-related contract case against a university because "[t]hat the brochures and catalogs were written with the expectation that instruction would be in-person does not create a contractual promise that no matter the circumstance, all instruction would be in-person"); *Dalke v. Cent. Mich.*

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and "failure to do so is fatal to the claim"); *David v. Neumann Univ.*, 177 F. Supp. 3d 920 (E.D. Pa. 2016) (breach of contract suit against private university must identify the *specific promise* the school failed to honor); *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d, 369-70 (S.D.N.Y. 2016) (dismissing student's contract claim; student failed to identify specifically designated and discrete promises allegedly breached, holding general policy statements and broad procedures and guidelines will not suffice); *Gibson v. Walden Univ., LLC*, 66 F. Supp. 3d 1322, 1324 (D. Or. 2014) (for breach of contract in private university context, "plaintiff 'must point to an identifiable contractual promise that the defendant failed to honor.'").

Univ., No. 20-000068-MK (Mich. Comm. Cl. Sept. 25, 2020) (same); *Allen v. Mich. State Univ.*, No. 20-000057-MK (Mich. Comm. Cl. Oct. 1, 2020) (same). *See* Exhibits A-C, attached hereto.

Plaintiff's breach of contract claim relies on a supposed legally enforceable "promise" by NSU that it will provide only its instruction in-person and on campus. Plaintiff has not identified any contract showing that NSU agreed to guarantee in-person instruction. Plaintiff and other NSU students may have expected, under "normal," non-pandemic circumstances, to attend classes live on campus. But Plaintiff fails to identify or quote any statement, *anywhere*, that supports any contractual promise by NSU to provide to any student *exclusively* in-person, on-campus education, in exchange for tuition. In fact, the Amended Complaint simply refers to statements on NSU's website regarding the "beautiful surroundings" on NSU's campus and the potential student experience at NSU.[6] AC ¶¶ 46-47. But how is such a statement a promise of an exclusively in-person delivery modality? And without a promise, there can be no breach. *See Timber Pines Plaza, LLC v. Kinsale Ins. Co.*, No. 8:15-cv-1821-T-17TBM, 2016 U.S. Dist. LEXIS 189904, at *6 (M.D. Fla. Feb. 4, 2016) (noting that a failure to identify the specific contract provision allegedly breached is "akin to making 'the-defendant-unlawfully-harmed-me-accusation'" [the] Supreme Court warned against in *Iqbal*"). Such a promise does not exist.

[6] Plaintiff's claim that these statements form a contract is contrary to hornbook contract law. At best, NSU's statements constitute mere advertisements of a potential on-campus student experience at NSU. There is no offer or guarantee of a solely on-campus experience. *See, e.g.*, *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 122 (S.D.N.Y. 1999) ("The general rule is that an advertisement does not constitute an offer . . . [A]dvertisements . . . are 'mere notices and solicitations for offers which create no power of acceptance in the recipient.'" (internal citations and quotations omitted)). An exception to the general rule on advertisements is where an advertisement is sufficiently definite as to leave no room for negotiation. *Id.* NSU did, however, provide definite terms with respect to its provision of educational services: in exchange for the payment of tuition and fees, as well as meeting NSU's academic standards, students would attain a degree from NSU. Plaintiff, like others who paid their tuition and fees and have graduated from NSU, received precisely the benefit that NSU agreed to provide: the attainment of a degree.

While Plaintiff scoured NSU's written materials to find terms to support his theory, the best he can do is point to supposed differences between the "Face-to-Face" and "Online" options for choosing courses. AC ¶¶ 27-38. But as should be obvious, how does the *fact* of offering two different products say anything about what the *contractual terms* are as to each product? Just because NSU offers an "online" option does not *per se* mean NSU promised that its other programs would be exclusively in person—to the contrary, as discussed below, Plaintiff admits that NSU *explicitly stated* that the Face-to-Face option *specifically disclaims* in-person exclusivity! AC ¶¶ 25, 29. Similarly, Plaintiff alleges a "right" to learn "within and outside" the classroom equates to some purported "promise" by NSU to provide in-person classes, as does a statement from NSU's president that encouraged students to get "engaged" in activities. *Id.* ¶ 47. But nothing in either statement says anything about an in-person delivery modality, and, certainly, neither statement *promises* as much.

In short, Plaintiff claims that a *student's choice* of course option "make[s] clear that they are seeking to contract with Nova for either live, in-person classes or for online classes." *Id.* ¶ 28. Stating this conclusion as fact, however, does not make it true. Facts still matter. Just because *students* "are *seeking* to contract with NSU" on specified terms does not mean there was a *meeting of the minds* as to such terms. **Nowhere in the documents Plaintiff claims constitute a contract is a promise by NSU to provide *exclusively* in-person, on-campus education and services in exchange for tuition and fees at any time – especially amid a worldwide pandemic. Plaintiff is asking this Court to make unsupported inferences, leaps and assumptions and *create* terms that *do not exist and never existed during Plaintiff's matriculation*.** Like most NSU students enrolled in Winter 2020, Plaintiff may have *hoped*, and perhaps *expected*, to be taught exclusively on-campus as part of the Face-to-Face option, but the key ingredient in this *breach of contract*

claim is missing: the contractual promise requiring NSU to offer classes *only* in-person to students who chose the Face-to-Face option, such that a transition to remote learning becomes a breach. Put simply: if nothing in the contract prohibited NSU from transitioning to remote learning and services, then, in doing so, it could not have breached.

2. Plaintiff Has Failed to Plead Terms Requiring the Refund of Fees

Plaintiff has failed to plead the essential terms of an alleged contract that would require NSU to refund any portion of the semester-based fees that he paid. As with his claims regarding tuition, Plaintiff cannot point to any specific promise that any specific service would be delivered, for a specific number of days, in person exclusively, in exchange for a specific fee such that the failure to do so amounted to a breach. And, he identifies no contractual term that mandates a refund if he did not use a service each day of the semester (regardless of the reason). Indeed, it is undisputed that the fees paid by Plaintiff and other NSU students are *per semester* fees that apply at the outset of the semester *regardless of how much or little a student uses a particular benefit.*

To illustrate, if, pre-pandemic, Plaintiff never participated in activities or used the school's technology, he indisputably is not entitled to a refund of the fees, as the fees are unrelated to the actual use, benefits received, or days on campus. When Plaintiff commenced the Winter 2020 semester, he agreed to pay the semester-based fees in their entirety, without regard for whether he would use any services. Plaintiff's Amended Complaint seeks to insert a mandate for in-person delivery of NSU's services, transform the fees into "daily" fees tied to usage, and require NSU to refund a portion for the days of remote learning—despite NSU's policy forbidding refunds in the middle of the semester and expressly connecting fees to enrollment, not use. Neither Plaintiff nor the Court is entitled to so rewrite the terms.

Moreover, Plaintiff assertion that NSU's internal method for recognizing, for tax purposes,

the revenue generated from tuition and fees shows that the moneys are not earned unless the services are provided throughout the semester is specious. AC ¶ 22. Besides the fact that this ignores basic accounting principles,[7] this "proof" fails for two more basic reasons: NSU's *internal* method of allotting fees says nothing about what NSU *promised to students.* Second, Plaintiff does not allege he was even aware of this accounting feature nor allege that he or anyone other student at NSU ever considered NSU's internal accounting rules in determining what promises NSU made with respect to fees. Thus, this entire assertion is a legally-irrelevant red herring.

Overall, Plaintiff's fee claim fails because (1) he never identifies a contractual term for in-person services at NSU that would prohibit NSU from transitioning to remote education and services or (2) mandating or even authorizing a per-diem prorated refund. In fact, Plaintiff agreed to pay flat fees *regardless of use*, allowed modality changes, and expressly stated no refunds would be provided. The Court should decline Plaintiff's effort to rewrite the parties' agreement.

3. The Express Terms of the SEA and Other University Policies Flatly Contradict Plaintiff's Claim

While predicating his entire claim upon a contract he creates of thin air, Plaintiff completely ignores the very document he signed that governs his obligation to pay tuition and fees:

[7] Plaintiff's assertion represents a fundamental misunderstanding of generally accepted accounting principles ("GAAP") regarding revenue recognition, in particular for transactions such as those at issue here. When NSU bills students for their tuition and fees at the beginning of the semester, the amounts billed represent "receivables," that is, NSU's right to receive payment from students who matriculate for any semester at the university. To receive any educational services from NSU, students are required to pay in full the balance on their accounts before the first day of classes. In accordance with GAAP, NSU receives the moneys (which are due at the start of the semester) and counts them as "deferred revenue" as the semester proceeds ***for purposes of its financial statements***. As even Plaintiff admits, NSU provided services for the remainder of the Winter 2020 semester; it simply provided them remotely and thus ultimately earned the tuition and fees paid at the beginning of the semester. *See* AC ¶¶ 22, 62, 64. Thus, NSU's revenue recognition protocol has **zero** effect on the obligation of students like Plaintiff to pay the fees at the start of the semester to receive any of NSU's services, no matter how such services are provided.

the SEA he agreed to. *See* Poff Decl. at Ex. 1. The express terms of the SEA undermine Plaintiff's claim. The SEA expressly states that Plaintiff's "*right to register* is expressly conditioned upon [Plaintiff's] agreement to pay institutional costs including, but not limited to, tuition, fees, housing, meal plan, and any additional costs . . ." The SEA does not limit how NSU can deliver educational services, particularly during emergencies like a pandemic, does not mandate exclusively in-person education and services, does not promise the delivery of any specific service for a specific number of days (on or off campus), or authorize the pro rata refund of tuition or semester-wide fees and it clearly conditions payment of tuition and fees upon the right to enroll, *not* the receipt of educational services in any particular format.

Other courts have dismissed breach of contract claims against universities arising from a mandatory move to the remote delivery of education based on the express terms of the parties' agreements. In *Chong v. Northeastern Univ.*, No. 20-10844-RGS, 2020 U.S. Dist. LEXIS 181622, at *8 (D. Mass. Oct. 1, 2020) (attached as Exhibit D), the district court reached the same conclusion in plaintiff's tuition claim by relying on the plain language of the financial responsibility agreement, which "tie[d] the payment of tuition to registration for courses, not to the receipt of any particular method of course instruction." The court held that the plaintiff's reliance on course descriptions, implicit understandings, the university's website, and semester schedules failed to establish the existence of a contract given the clear language of the FRA. *Id.* at *8-9. *See also Zwiker v. Lake Sup. State Univ.*, No. 20-000070-MK, at 8 (Mich. Comm. Cl. Aug. 31, 2020) (attached as Exhibit E) (dismissing breach of contract and unjust enrichment claims where the "language purportedly breached [did] not appear in the parties' agreement.").

Moreover, NSU expressly reserved the right to make any necessary changes to its delivery of education services by stating in its catalog, "NSU reserves the right to *change curriculum,*

course structure, calendar, graduation requirements, and costs during the life of this publication."[8] Thus, even if a contract existed for exclusive in-person instruction—which it does not—the express terms leave the instruction mode *open to change*, allowing NSU to shift to remote learning without breaching the supposed agreement. Further, NSU's refund policy makes it clear that *no refunds to tuition and fees would be provided, under any circumstances*, after February 9, 2020.[9]

Finally, and perhaps most critically, Plaintiff now openly acknowledges that NSU advises all students, in writing, that part of their Day Program classes may be offered remotely or online. Specifically, as alleged in Paragraph 25, Plaintiff admits that even pre-COVID "some, and in some instances *most*, on-campus majors and courses may include an online [ ] component." *Id.* ¶ 25 and 29. This is expressly stated by NSU in its catalog, where students applying for face-to-face courses are advised that such courses may be delivered partially remotely. *Id.* (citing course catalog). Plaintiff does not identify any promise by NSU as to how any *specific* course might be delivered (remote, partially remote or in person), nor identify any promise, anywhere, as to *what percentage* of any class or course (even if otherwise identified as a "face-to-face" course). In fact, Plaintiff admits this determination is made by each professor. *Id.* In light of this, NSU was undisputedly and undeniably acting within its rights when it transitioned to remote learning. Plaintiff admits that NSU offered classes for half the semester in-person, and offered the second half of the semester remotely, literally precisely what Plaintiff admits it says in the catalog excerpt cited verbatim in Paragraph 29 of the Amended Complaint. How Plaintiff is able to bring this lawsuit, when his allegations of "breach" demonstrate that NSU did exactly what Plaintiff *admits* NSU said it could

[8] *See* 2019-20 University Catalog at p.2, *available at* https://www.nova.edu/undergraduatestudies/forms/2019-20_undergraduate_catalog.pdf (emphasis supplied).
[9] *See* 2019-2020 University Catalog at pp. 22, 81-82.

and would do, is simply inexplicable.

The Court is bound to enforce the expressly agreed-upon terms, regardless of Plaintiff's or the Court's post-COVID opinions of "fairness." Recently, Florida's Third District Court of Appeal unanimously reversed a trial court's effort to do just that (revise an agreement due to a COVID-related hardship) and concluded that a trial court was without power to do so. *Pinero v. Zapata*, No. 3D20-759, 2020 Fla. App. LEXIS 11755 (Aug. 19, 2020). According to *Pinero*, the trial court was required to "enforce the mediated settlement agreement as voluntarily agreed upon by the parties." *Id.* at *6. This principle is derived from longstanding Florida Supreme Court precedent. *See Beach Resort Hotel Corp. v. Wieder*, 79 So. 2d 659, 663 (Fla. 1955) ("It is well settled that courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain." (internal citation omitted)). Here, the result is the same. NSU has a clear SEA saying nothing about delivery modality and linking tuition and fees to enrollment, not use. NSU policy allows it to modify course structure as necessary, and its catalog expressly tells students that "face-to-face" classes may (and in fact are) offered remotely. NSU also has a refund policy which expressly provides that *no refunds to tuition and fees would be provided, under any circumstances*, after February 9, 2020. 2019-20 University Catalog at pp.22, 81-82 ("Pro-rated tuition refunds are limited to the first three weeks of each semester . . . [and] after the 21st day of the term: **no refund**.").[10] While NSU maintains a detailed refund policy discussing the circumstances in which it provides refunds, nothing in those policies says that if NSU changes the course format, a student may obtain a refund; refunds are only provided if a course is cancelled *in*

[10] Notably, even if Plaintiff were entitled to a refund, "for tuition refund requests to be considered, students **must** provide written notification to their academic advisor." NSU 2019-20 Catalog, at p.82. Plaintiff does not allege that *he* made such a request and he *cannot* do so for the class.

toto or if a student withdraws and requests a refund within 21 days of the semester start date. *Id.* at pp.81-82. Having continued through the entirety of the Winter 2020 semester ***past*** the ***posted*** deadline for receiving any refund, Plaintiff cannot use this action as an end run around what he agreed to. Plaintiff also cannot craft new terms that never previously existed and then seek to hold NSU liable for a breach of the newly crafted terms.[11]

B. Plaintiff Fails to Allege a Material Breach

Even if the Court ignored Plaintiff's failure to identify a contractual term for in-person instruction and services exclusively, Plaintiff has not alleged that NSU committed a *material* breach. To constitute a material breach, a party's failure to perform must "go to the essence of the contract." *MDS (Can.), Inc. v. RAD Source Techs., Inc.*, 720 F.3d 833, 849 (11th Cir. 2013). A party's "failure to perform some minor part of his contractual duty cannot be classified as a material or vital breach." *Id.* (internal quotations omitted). Plaintiff entered into an agreement with NSU for education and credits in exchange for tuition and fees. This is clear from the SEA. *How* that education was delivered was incidental and not an essential term.[12] Here, the actual

[11] In light of the clear contractual terms Plaintiff agreed to, the Court should also reject Plaintiff's invitation to manufacture an implied contract. AC ¶ 118. Breach of an implied contract and unjust enrichment are the same and should be dismissed as duplicative for the reasons below. The SEA and related policies contain the relevant terms, just not the terms Plaintiff *likes*. This argument was recently rejected in a similar COVID-19 higher education matter, in which the court held: "An implied contract cannot be enforced where the parties have made an express contract covering the same subject matter. In addition, a party's expectations cannot supersede the language of an unambiguous contract, and courts are prohibited from rewriting agreements to align with a party's alleged expectation." *Horrigan v. E. Mich. Univ.*, No. 20-000075-MK, at 8 (Sept. 24, 2020) (attached as Exhibit F). This outcome is consistent with Florida law. *White Constr. Co. v. Martin Marietta Materials, Inc.*, 633 F. Supp. 2d 1302, 1334 (M.D. Fla. 2009) (implied-in-law contract "cannot survive" where an express contract covers the same "subject matter").

[12] How can this term have been *material* when (1) it does not exist in writing; (2) Plaintiff was forced to cobble together unrelated statements to manufacture the term based mostly on his unilateral expectations; and (3) Plaintiff admits NSU explicitly stated it could change the course structure and admits students were notified that even "face-to-face" classes could be delivered remotely. AC. ¶¶ 25, 29.

educational service was undisputedly delivered and received, AC ¶ 11, especially when NSU expressly told students that even "face-to-face" classes may be offered remotely. AC ¶¶ 25, 29. Thus, there was no breach. As the *Stenger* court found on this exact issue, "FSU still provided instruction, and plaintiff completed all of her courses for the semester and received full credit. . . . Thus, assuming [ ] such a contract did exist, plaintiff cannot establish that there was any breach or damages." *Stenger*, No. 20-0000084-MK at 7 n.4. The same result should be reached here.

Plaintiff also fails to allege a material breach regarding fees. Plaintiff concludes that he and the class did not receive "access to campus activities, facilities, resources, and services." *Id.* ¶ 75. The Amended Complaint is bereft of allegations showing Plaintiff was precluded from receiving any access to specific "campus activities, facilities, resources, and services" NSU supposedly promised *or* that NSU *refused* to provide. For example, Plaintiff does not allege, anywhere, that NSU did not provide him with access to a microscope or lab in exchange for the microscope fee, health professions divisions general access in exchange for that fee, access to clinical rotations in exchange for that fee, or allege that NSU refused to provide any specific services he sought (to the extent he can point to any specific service NSU promised in the first instance) in exchange for the student services fee. *See* AC ¶ 58. To the contrary, Plaintiff admits these services were provided to him, and he successfully graduated as a medical doctor. *Id*. ¶ 11.

Similarly, Plaintiff does not identify any terms in any promised a specific service, in a specific delivery modality, in exchange for a specific fee, and which that allows any refund if he did not receive the benefits of the flat per-semester fees *in the manner that he preferred each day of the semester*. NSU's written policy explicitly states operational changes could be made for acts of God and that there are no refunds if such changes are made. Plaintiff's breach of contract claim regarding tuition and fees should be dismissed because he has not alleged a breach.

C. Plaintiff Has Failed to Allege Any Actionable Damages

There is no dispute Plaintiff received his education and degree following the Winter 2020 term. *Stenger*, No. 20-000084-MK at 7 n.4; AC ¶ 11. Plaintiff, however, concludes that the education provided by NSU lacked the "full" value of what he paid, because it was delivered remotely for approximately several weeks in the Winter 2020 semester.

The nature of the harm alleged by Plaintiff as a result of receiving remote education for several weeks and not having access to all services on-campus (albeit that Plaintiff does not deny he had access to services generally) is inherently speculative and not calculable. Indeed, Plaintiff has failed to allege precisely the manner in which the value of the degree that he obtained was lowered in any way, nor allege that any particular, objectively provable component of his tuition or fees was paid specifically in exchange for in-person delivery. And, Plaintiff acknowledges that a number of NSU courses and programs – including those taught in-person – ***already expressly contained an online component pre-pandemic.*** AC ¶ 29. Thus, it strains credulity to assert that online courses are somehow inherently less valuable. It also would require the Court or a jury to completely guess as to how much an "experiential" harm (from loss of the "on-campus experience") is *subjectively* worth to Plaintiff given that no part of the tuition and fees is correlated to an in-person component. Such rank speculation cannot form the basis for a damages claim. *Stensby v. Effjohn Oy Ab*, 806 So. 2d 542, 544 (Fla. 3d DCA 2001) (reversing verdict for plaintiff because the "claim of damages . . . fell far short of reaching even the realm of the speculative and thus cannot support a recovery"). Because actionable damages is an essential element of his breach of contract claim, and no objective metric exists to quantify the supposed harm suffered by Plaintiff or how it flows from the alleged breach, Plaintiff lacks an actionable claim.

D. Plaintiff's Claim is, at its Core, One for Educational Malpractice

Florida law does not recognize a claim for educational malpractice. *See, e.g., H.A.B. v. Miami-Dade Cty. Sch. Bd.*, No. 17-20750, 2018 U.S. Dist. LEXIS 61520 (S.D. Fla. Apr. 10, 2018) (". . . Florida does not recognize a cause of action for educational malpractice . . . ."); *McCurdy v. Va. College, LLC*, No. 3:17-cv-562-J-32JBT, 2018 U.S. Dist. LEXIS 66015 (M.D. Fla. Mar. 7, 2018) (breach of contract claim "was actually a non-viable educational malpractice claim improperly couched as a breach of contract claim").

Plaintiff's breach of contract claim is one for educational malpractice (*i.e.*, NSU failed to provide a *quality* education in Winter 2020 by transitioning to remote learning) and should be dismissed. Plaintiff is really alleging that the remote learning he received in the Winter 2020 term was *not as good or valuable* as the education had it been on campus. This is a non-viable educational malpractice claim in sheep's clothing. Even if the *fee* claim is not malpractice, the *tuition*-related claim clearly *is.* Therefore, at least as to tuition, this claim is barred.

II. Plaintiff Ratified Any Alleged Breach, Precluding His Breach of Contract Claim

A complaint may be dismissed when the existence of an affirmative defense clearly appears on the face of the complaint. *Twin City Fire Ins. Co. v. Hartman, Simons & Wood, LLP*, 609 Fed. Appx. 972, 976 (11th Cir. 2015). "Where a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation." *Frankenmuth Mut. Ins. Co. v. Magaha*, 769 So. 2d 1012, 1021-22 (Fla. 2000). Ratification occurs where (i) a defendant performs an act which breached contract; (ii) plaintiff knew of the act and that he could reject the contract because of the act, and (iii) plaintiff accepted the act. *See In re Standard Jury Instructions – Contract & Bus. Cases*, 116 So. 3d 284, 328-29 (Fla. 2013).

This is a textbook case of ratification. If NSU's transition to remote learning due to COVID-19 was a material breach of an agreement between Plaintiff and NSU for exclusive in-person education and services, Plaintiff could have withdrawn or asserted the breach in March (when the transition occurred) and demanded that all tuition and fees be refunded. Or he could have said he refused to take classes remotely and waited until classes resumed in person (as they did in Fall 2020). Plaintiff did *not* do so. As pleaded in the Amended Complaint, Plaintiff knew NSU breached a supposed in-person contract in March 2020 but *chose* to continue attending classes remotely without protest, completed the Winter 2020 semester, accepted the credits, ***and*** accepted the NSU degree. AC ¶¶ 11, 62-75. By Plaintiff's logic, **each day that Plaintiff continued attending courses remotely – and ratified the supposed "breach" – NSU earned – and was entitled to retain – every bit of the tuition and fees that Plaintiff paid through the entirety of the semester and ultimate conferral of his degree**. *Id.* ¶ 22. This lawsuit is nothing but a request to the Court to create a judicially-established COVID-19 discount after accepting all the benefits of the bargain *despite* what Plaintiff perceived to be a breach.

Plaintiff's Amended Complaint does not address the ratification defense or explain why it does not apply. Plaintiff cannot knowingly retain the benefits of the bargain (*i.e.*, ratify the alledged breaching conduct) and get a refund for accepting performance Plaintiff says he knew was a breach when he accepted it. In *Rood Co. v. Bd. of Public Instruction*, 102 So. 3d 139, 142 (Fla. 1958), the Supreme Court held that "It has been repeatedly held that a person by the acceptance of benefits may be estopped from questioning the validity and effect of a contract; and, where one has an election to ratify or disaffirm a conveyance, he can either claim under or against it, but he cannot do both, and having adopted one course with knowledge of the facts, he cannot afterwards pursue the other." *See also Fineberg v. Kline*, 542 So. 2d 1002, 1004 (Fla. 3d DCA 1988) ("once a party

accepts the proceeds and benefits of a contract, that party is estopped from renouncing the burdens that contract places upon him"); *Head v. Lane*, 495 So. 2d 821, 824 (Fla. 4th DCA 1986) (a party who "accepts the benefits" of a transaction is "estopped" from "repudiating the accompanying or resulting obligation"). But "do both" is exactly what Plaintiff is asking for: he wants his educational progress through remote learning by getting a court-manufactured discount off the price he agreed to pay. Plaintiff's conduct falls squarely within the Standard Jury instruction on ratification, warranting dismissal with prejudice of Plaintiff's breach of contract claim.

III. Impossibility and/or Frustration of Purpose Bar Plaintiff's Breach of Contract Claim

"[I]mpossibility of performance . . . and frustration of purpose are well-recognized defenses to nonperformance of a contract" under Florida law. *See, e.g., Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394, 396 (Fla. 4th DCA 2009)). Impossibility arises where "one of the parties finds that the purpose for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party." *Bruno v. Mona Lisa at Celebration, LLC*, 472 B.R. 582, 604 n.64 (Bankr. M.D. Fla. 2012). Frustration of purpose occurs when "one of the parties finds that the purpose for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party." *Id.*

Impossibility and frustration of purpose are evident on the face of the Amended Complaint. The Court can take judicial notice of the basis for the frustration of purpose and impossibility affirmative defenses. Every university in this nation (and likely the world) acted in the face of this unprecedented global pandemic causing the deaths of over 210,000 people just in the United States and over 1,000,000 worldwide. COVID-19 nearly collapsed the U.S. economy, triggered mass layoffs and furloughs, shuttered almost every business and changed the American lifestyle. The

University did not *choose* to teach remotely. The Governor of Florida, Broward County and the CDC guidelines mandated closures.[13] The Supreme Court has *twice* reiterated such orders are not subject to judicial second-guessing, even in the face of *constitutional concerns*. *See South Bay United Pentecostal Church v. Newsom*, No. 19A1044, 2020 U.S. LEXIS 3041, at *3 (May 29, 2020) (allowing California to impose COVID-19 related restrictions on religious gatherings otherwise protected by the First Amendment); *Calvary Chapel Dayton Valley v. Sisolak*, No. 19A1070, 2020 U.S. LEXIS 3584, at *1 (July 24, 2020) (same).

When the government ordered NSU to close, in-person instruction was impossible. If COVID-19 did not frustrate plaintiff's alleged "in-person, on-campus education and services" guarantee, or render provision of such services impossible, nothing could. *See Roe v. Loyola Univ.*, 2007 U.S. Dist. LEXIS 86944, *7 (E.D. La. Nov. 26, 2007) (summary judgment for university moving classes because of Hurricane Katrina). Even if in-person, on-campus instruction was a material term, it was excused as a matter of law by impossibility and frustration of purpose.[14]

IV. Plaintiff Has Failed to State a Claim for Unjust Enrichment (Count II)

A. Plaintiff Has an Adequate Remedy at Law

Unjust enrichment can only survive where there is no adequate remedy at law. *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507, 1518-1519 (11th Cir. 1994); *Herazo v.*

[13] *See, e.g.*, Office of the Governor, Executive Order 20-52 (declaring state of emergency in Florida) (https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-52.pdf); Executive Order 20-83 (directing State Surgeon General and State Health Officer to issue a public health advisory against all social or recreational gatherings of 10 or more people) (available at: https://www.flgov.com/wp-content/uploads/orders/2020/EO_20-83.pdf).

[14] Plaintiff incorporates frustration of purpose into his breach of contract claim, seeking a *post facto* rescission of his tuition responsibilities. *See* ECF No. 25 ¶ 121. Frustration of purpose is not the basis for an affirmative claim but a "*defense* to a claim excusing contractual performance." *See, e.g., Landmar, LLC v. Wells Fargo Bank, N.A.*, 978 F. Supp. 2d 552 (W.D.N.C. 2013) (summary judgment where plaintiff failed to state a cognizable claim). Plaintiff cannot adopt the *defense* as a basis to create a right to a refund *in the first instance*.

Whole Foods Market, Inc., No. 14-61909, 2015 U.S. Dist. LEXIS 96811, at *6 (S.D. Fla. July 24, 2015) (dismissing unjust enrichment claim "in the alternative" based on "black letter law"). An unjust enrichment claim fails where an express contract with a legal remedy exists. *Alhassid v. Nationstar Mortg., LLC*, 771 Fed. App'x 965, 969 (11th Cir. 2019) (plaintiff cannot pursue unjust enrichment "if an express contract exists concerning the same subject matter"); *Roman v. Spirit Airlines*, No. 19-CIV-61461-RAR, 2019 U.S. Dist. LEXIS 182638, at *9 (S.D. Fla. Oct. 20, 2019) (Ruiz, J.) (dismissing unjust enrichment claim *with prejudice* where it was "premised on the same operative facts as the breach of contract claims and there is no dispute that an express contract exists to govern the relevant relationship between the parties").

Here, unjust enrichment cannot be pleaded in the alternative because Plaintiff has an adequate remedy at law. It is undisputed that the relationship between students and an institute of higher education is contractual in nature *as a matter of law*. *See Villard*, 2017 U.S. Dist. LEXIS 220541, at *4. Not only are Plaintiff's unjust enrichment and breach of contract claims based on the same predicate common facts, rendering them duplicative, an express contract exists which is on point and governs the parties' relationship: the SEA.

The *Zwiker* and *Chong* courts rejected unjust enrichment claims in similar COVID-19 lawsuits. *See Zwiker*, No. 20-000070-MK at 12 ("The existence of the Tuition Contract and Housing Contract—which existence plaintiff does not dispute—foreclose her ability to proceed on an unjust enrichment theory"); *Chong*, 2020 U.S. Dist. LEXIS at *13 (dismissing plaintiff's unjust enrichment claim and noting "[i]t is the availability of a remedy at law, not the viability of that remedy, that prohibits a claim for unjust enrichment.").

Similarly, this Court and others routinely reject unjust enrichment claims where an express contract exists and/or based on the same factual predicates as a breach of contract claim. *See, e.g.*,

Toca, 430 F. Supp. 3d at 1327-28; *Ronan*, 2019 U.S. Dist. LEXIS 182638, at *9; *Koski v. Carrier Corp.*, 347 F. Supp. 3d 1185, 1196 (S.D. Fla. 2017) (unjust enrichment claim predicated on the same allegations as a breach of contract claim warrants dismissal). The same outcome is warranted here. Plaintiff asserts that the documents upon which he relies for his breach of contract claim constitute the contract between him and NSU but he does not point to any term in the alleged contract that *requires* in-person, on-campus learning and "experiences" or a *pro rata* refund of tuition or semester-based fees.

NSU's policies, upon which Plaintiff relies, expressly *allow* changes to the course structure for emergency situations and state that *no refunds* of tuition and fees will be issued in such circumstances. The policies also expressly state that even face-to-face courses can be delivered partially or even largely remotely, exactly what happened here. AC ¶¶ 25, 29. Plaintiff's dissatisfaction with the terms of the bargain does not allow him to escape the existence of a contractual relationship by pleading unjust enrichment. *See, e.g., Whitesell Corp. v. Electrolux Home Prods.*, No. CV 103-050, 2014 U.S. Dist. LEXIS 131899, at *7 n. 3 (S.D. Ga. Sept. 18, 2014) (unjust enrichment cannot be used to recover damages beyond allowed by a contract because one party does not like the enforceable limits of the contract). Plaintiff cannot rewrite the parties' contract by alleging unjust enrichment.

Not only do the clear terms of the SEA and other policies control, Plaintiff's unjust enrichment claim actually *incorporates by reference* all factual allegations in Paragraphs 1 to 99, including the numerous allegations that an ***express contract*** exists. AC ¶¶ 1, 28, 38, 56, 68, 125. Courts in this district have dismissed unjust enrichment claims in this circumstance. *Silver Crown Invs., LLC v. Team Real Estate Mgmt., LLC*, 349 F. Supp. 3d 1316 (S.D. Fla. 2018). Plaintiff also failed to plead a lack of an adequate legal remedy, which is fatal to his claim. *See, e.g., Coleman*

v. CubeSmart, 328 F. Supp. 3d 1349, 1367 (S.D. Fla. 2018).

B. Plaintiff Cannot Establish an Inequity for NSU to Retain Tuition and Fees

To establish unjust enrichment, Plaintiff must show he conferred a benefit on NSU, which had knowledge thereof and which accepted and retained the benefit conferred and the circumstances are such that it would be *inequitable* for NSU to retain the benefit without paying the value of it to Plaintiff. *AIM Recycling Fla., LLC v. Metals USA, Inc.*, No. 18-60292-CIV-ZLOCH, 2019 U.S. Dist. LEXIS 78027, at *3 (S.D. Fla. Mar. 4, 2019). Plaintiff has not alleged circumstances that would be inequitable or unjust for NSU to retain the cost of tuition or other fees paid by Plaintiff for the Winter 2020 semester. Other than his alleged disappointment at purportedly "lost" educational and social experiences, Plaintiff does not allege a single fact demonstrating that NSU retained any tuition or fees that were not used by NSU for the purpose intended or that the University enjoyed any windfall as a result of the transition to remote learning. Further, any inference he invites the Court to make that he would have enrolled in a different program had he wanted to receive a remote education is entirely irrelevant to the determination of whether NSU was unjustly enriched (which must focus on NSU, not Plaintiff).

Plaintiff continued to attend class, professors and staff were paid, the University was maintained, and students received credits toward a degree. **And, Plaintiff actually received a degree from NSU**. AC ¶ 11. Does Plaintiff believe the costs associated with continuing to deliver education simply evaporated because of COVID-19? Regardless of Plaintiff's opinion about the *quality* of the education in Spring 2020, he obtained the *educational* service for which he paid tuition at a price *he agreed* was fair. NSU was, therefore, not unjustly enriched. *See Roe, supra*. In fact, allowing Plaintiff a refund would unjustly enrich *Plaintiff*. This outcome would encourage students to sue for unjust enrichment whenever a school does not deliver the experience *that the*

student subjectively expected.

Finally, NSU's policy explicitly permitted the operational and modality changes and explicitly states no refunds of tuition or fees would be available under these circumstances or after completing the semester. It isn't "unjust" to apply to Plaintiff the refund and other policies he agreed to before the semester began. NSU was entitled to rely on its existing policies that were disclosed to every student from the outset.

CONCLUSION

For these reasons, the Court should dismiss Plaintiff's Amended Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 16, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notice of Electronic Filing generated by CM/ECF and Electronic Mail.

s/ Mendy Halberstam
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Ferretti, et al. v. NSU Southeastern University, Inc.
CASE NO.: 20-CV-61431-RAR

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