IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ALHIX OYOQUE, ENRIQUE CHAVEZ, and EMMA SHEIKH, individually and on behalf of all other similarly situated, Plaintiffs, v. DEPAUL UNIVERSITY, Defendant.	Case No. 1:20-cv-3431 Judge: Matthew Kennelly Magistrate: M. David Weisman

DEFENDANT DEPAUL UNIVERSITY'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED CLASS ACTION COMPLAINT

Daniel M. Blouin
Jaime R. Simon
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601
312-558-5600
312-558-5700 (fax)
DBlouin@winston.com
JRSimon@winston.com

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INTRODUCTION AND BACKGROUND

On March 9, 2020, weeks before the start of DePaul University's Spring Quarter, Governor J.B. Pritzker declared a public health emergency in Illinois related to COVID-19—a disease with no proven treatment or cure. (Ex. A).[1] The rapid and aggressive onslaught of the COVID-19 pandemic was an unanticipated circumstance that neither DePaul nor Plaintiffs could have predicted. In-person interaction quickly became a serious threat to the health and safety of DePaul students, faculty, staff, and the communities in which students, faculty, and staff live and work. On March 11, DePaul made the difficult but necessary decision to administer Winter Quarter exams remotely and transition to remote instruction for Spring Quarter. Am. Compl. ¶ 9.[2,3] By March 20, Governor Pritzker issued a shelter-in-place order for Illinois residents. *See* Ill. Exec. Order No. 2020-10 (March 20, 2020) (Ex. B). The Governor's order allowed educational institutions to operate only "for purposes of facilitating distance learning, performing critical research, or performing essential functions." *Id.* at § 12(j). Its hands tied, DePaul, like many other universities, implemented remote learning because it was the only viable solution for the continuation of educational services in a safe manner.

After being informed that Spring Quarter classes would be held remotely, Plaintiffs (and members of the putative class) effectively had three options: (1) take a leave of absence; (2) receive a full tuition refund at the outset of the Spring Quarter; or (3) proceed with remote classes.[4] Plaintiffs chose to continue classwork remotely. Indeed, Plaintiffs Oyoque and Chavez completed

[1]References to "Ex." are exhibits to the Declaration of Jaime R. Simon, filed concurrently with this memorandum.
[2] The very same day the World Health Organization declared the COVID-19 virus a global pandemic. (Ex. C). On March 13, Mayor Lori Lightfoot announced that Chicago Public Schools would close effective March 17. (Ex. D).
[3] In deciding a motion to dismiss, a court may consider exhibits and documents incorporated by reference into the complaint and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights Ltd*., 551 U.S. 308, 322-23 (2007); *Phillips v. Prudential Ins. Co. of Am.,* 714 F.3d 1017, 1020 (7th Cir. 2013).
[4] As discussed, *infra*, applicable University documents including the Academic Catalog and the Academic Calendar confirm that undergraduate and graduate students had until April 13, 2020, to make their decision in this regard. Ex. E, Ex. F.

their degrees and graduated from DePaul at the end of Spring Quarter 2020. Am. Compl. ¶¶ 21-22.

Plaintiffs essentially acknowledge that DePaul made the correct and responsible decision to transition to remote instruction, given the grave circumstances and the mandates of state and local government. Nevertheless, Plaintiffs, on behalf of themselves and the proposed class, claim that DePaul should be liable in contract and tort because the remote learning the University provided was not equivalent to Plaintiffs' expectations or their prior on-campus learning experience. *See* Am. Compl. ¶ 11, 14, 54-56, 60. While Plaintiffs' frustration with changes necessitated by the COVID-19 pandemic is understandable, their legal claims fail for several reasons.

First, although couched in different terms, Plaintiffs' claims are for educational malpractice. The Seventh Circuit, along with numerous other courts in Illinois and throughout the country, repeatedly has rejected such claims. In holding nearly three decades ago that Illinois "would adhere to the great weight of authority and bar any attempt to repackage an educational malpractice claim as a contract claim," the Seventh Circuit explained that the "professional judgment" of a university should not be "second-guess[ed]." *Ross v. Creighton University*, 957 F.2d 410, 416-17 (7th Cir. 1992). Claims relating to the quality of education or the manner of instruction—the type of claims brought by Plaintiffs in the amended complaint—are simply impermissible in Illinois.

Second, even if Plaintiffs could evade the clear and overwhelming precedent foreclosing educational malpractice actions—and they cannot—the breach of contract claim cannot stand because Plaintiffs fail to identify any contractual promise made by DePaul to provide an in-person education under all circumstances. Indeed, the materials incorporated by the amended complaint

highlight that no such promise was ever made. To the contrary, the documents establish that DePaul has always maintained discretion over academic affairs, including the ability to alter academic offerings. Moreover, even if Plaintiffs did identify a contractual promise to administer classes in person, which they do not, Plaintiffs' claim should still be dismissed because Plaintiffs have not alleged that DePaul's decision to move to remote learning in response to a pandemic was arbitrary, capricious, or in bad faith.

Plaintiffs' unjust enrichment claim fails as a matter of law because it rests on the same conduct alleged in another claim, which itself is not viable. And the conversion claim fails because Plaintiffs made voluntary payments to DePaul, fail to allege a "specific chattel," and never demanded the return of the funds paid prior to filing this lawsuit.

In summary, claims for "inadequate" education are not cognizable, whether sounding in contract or tort. Plaintiffs' attempts to conceal this fundamental infirmity in their claims through artful pleading should be rejected. Accordingly, the Court should dismiss each of Plaintiffs' asserted claims with prejudice.

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), a complaint must include factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While well-pleaded facts are taken as true for purposes of a motion to dismiss, factual allegations must be more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, "allegations in the form of legal conclusions are insufficient" to state a claim for relief that is plausible on its face. *Tierney v. Advocate Health & Hosp. Corp.*, 797 F.3d 449, 451 (7th Cir. 2015). A complaint that "merely parrot[s] the statutory language of the claims . . . rather than

providing some specific facts to ground those legal claims" must be dismissed. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

I. Illinois Law Prohibits Educational Malpractice Claims

Courts in Illinois, and across the country, have held that claims for "inadequate" education are not cognizable, whether sounding in contract or tort. In *Ross v. Creighton University*, the Seventh Circuit made clear that there are no permissible claims in Illinois for an education that "was not good enough." 957 F.2d 410, 417 (7th Cir. 1992). The Illinois appellate courts agree. *See Waugh v. Morgan Stanley & Co.*, 966 N.E. 2d 540, 555 (Ill. App. 1st Dist. 2012) (claims that "require[] an analysis of the quality of education" are "noncognizable claim[s] for educational malpractice."). Claims that essentially ask courts to "evaluate the course of instruction" and "review the soundness of the method of teaching that has been adopted by an educational institution"—the very type of claims Plaintiffs bring here—clearly are impermissible claims for educational malpractice. *Ross*, 957 F.2d at 416 (quoting *Paladino v. Adelphi Univ.*, 89 A.D.2d 85 (N.Y.S. Ct. 1982)).

As the Seventh Circuit explained, there are many practical reasons courts prohibit claims for educational malpractice, including a "lack of satisfactory standard of care by which to evaluate an educator"; "inherent uncertainties . . . about the cause and nature of damages"; potential "for a flood of litigation against schools"; as well as concerns that such claims "might be particularly troubling in the university setting where [they] necessarily implicate[] considerations of academic freedom and autonomy." *Ross,* 957 F.2d at 414-15. The unwillingness of courts to wade into these issues holds true whether the claim sounds in contract or tort. *See id.* at 417; *Fleming v.*

Chicago School of Prof'l Psychology, 2017 WL 4310536, at *3 (N.D. Ill.) (Ellis, J.). Courts around the country are in accord that "educational malpractice" claims cannot stand.[5]

While a plaintiff may state a claim if an institution "failed to perform [educational] service[s] at all" (*Ross*, 957 F.2d at 417) or "utterly failed to teach" (*Fleming,* 2017 WL 4310536 at *4), that did not occur here. Plaintiffs do not argue that they were deprived of an education or that there was no instruction "at all," as would be required by *Ross* and *Fleming*. Nor could they. Plaintiffs admit that DePaul held classes during the Spring Quarter and that two of the named Plaintiffs graduated upon completion of their Spring Quarter classes. Am. Compl. at ¶¶ 21-23. Instead, Plaintiffs suggest the quality of education DePaul provided via remote learning in Spring Quarter 2020 was inferior, the instructors' methods improper, and the University provided deficient academic services. *See* Am. Compl. ¶¶ 11, 14, 54-56, 60. It is precisely these types of claims that Illinois courts repeatedly have rejected as impermissible educational malpractice claims. *See, e.g.*, *Ross*, 957 F.2d at 417; *Fleming*, 2017 WL 4310536 at *3-4.

In summary, in suggesting that the remote learning DePaul provided was inferior, Plaintiffs essentially question the "reasonableness of [DePaul's] conduct in providing educational services" (*Waugh,* 966 N.E. 2d at 555) and invite the court to "second-guess[]the professional judgment" of the University by "evaluat[ing] the course of instruction," and "review[ing] the soundness of the method of teaching that [was] adopted" (*Ross*, 957 F.2d at 416). Such inquiries, however, clearly present "noncognizable claim[s] for educational malpractice" and must be dismissed. *Waugh*, 966 N.E. 2d at 555*; see also Ross*, 957 F.2d at 417 (declining to determine whether a university

[5] *See, e.g.*, *Hutchings v. Vanderbilt Univ.*, 55 F. App'x, 308, 310 (6th Cir. 2003) ("Courts are not inclined to review educational malpractice claims or breach of contract claims based on inadequate educational services."); *Krebs v. Charlotte School of Law LLC*, 2017 WL 3880667, at *6 (W.D.N.C. Sept, 5, 2017) ("Any inquiry into the quality or value of services provided in return for [p]laintiffs' tuition and fees constitutes an impermissible foray into educational malpractice."); *Vurimindi v. Fuqua Sch. of Bus.*, 435 F. App'x 129, 133 (3d Cir. 2011) (dismissing a "general complaint about the quality of education…received.").

"perform[ed] adequately a promised educational service" by inquiring into the "nuances of educational processes and theories"). For this reason alone, Plaintiffs' claims must fail.

II. Plaintiffs' Breach of Contract Claim Has Additional Fatal Flaws

Even assuming Plaintiffs could somehow circumvent the prohibition on "educational malpractice claims"—which they cannot—their breach of contract claim fails for the following additional reasons: (1) Plaintiffs do not identify with specificity any contractual promise DePaul allegedly breached; (2) the purported contractual materials incorporated by reference in the amended complaint make clear that DePaul retains discretion to modify the format of classes; (3) DePaul's decision to move to remote learning during the COVID-19 pandemic was not arbitrary, capricious, or in bad faith; and (4) any arguable requirement to provide in-person classes effectively was excused, given the grave public health circumstances surrounding COVID-19 and the local and state emergency orders.

a. Plaintiffs fail to identify any specific contractual provisions that DePaul allegedly breached

Under Illinois law, a claim for breach of contract requires a plaintiff to allege the following: (1) offer and acceptance, (2) consideration, (3) definite and certain terms, (4) performance by the plaintiff of all required conditions, (5) breach, and (6) damages. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 560 (7th Cir. 2012). The defendant must be given fair notice of the contractual duties it allegedly breached. Even under a liberal pleading standard, "claimants must state enough direct or inferential allegations to establish the necessary elements under the selected theory of recovery to survive a 12(b)(6) motion." *Grabianski v. Bally Total Fitness Holding Corp.*, 891 F. Supp. 2d 1036, 1046 (N.D. Ill. 2012) (Bucklo, J.).

The first step in assessing a breach of contract claim is determining the nature and parameters of the "contract" at issue. Importantly, in the education context, Plaintiffs must point

to an "identifiable contractual promise that the defendant failed to honor." *Ross*, 957 F.2d at 417. And they "must do more than simply allege that the education was not good enough." *Id.* at 416-417. Instead, as discussed above, a plaintiff seeking to sue a university on a breach of contract claim must allege the school "failed to perform [the educational service] at all." *Id.* at 417; *see also Kyung Hye Yano v. City Colleges of Chicago*, 2009 WL 855977 at *5 (N.D. Ill.) (Zagel, J.) ("Cases that have recognized a valid contract claim by a student against a university have done so where the institution failed to perform a particular service altogether, as opposed to failed to adequately perform a promised educational service.").

In the university context, the contract between the university and its students is often not one set document, but terms set forth in "catalogues, bulletins, circulars, and regulations of the institution." *Bissessur v. Indiana Univ. Bd. of Trustees*, 581 F. 3d 599, 601-02 (7th Cir. 2009); *see also Ross*, 957 F. 2d at 416; *Raethz v. Aurora Univ.*, 805 N.E. 2d 696 (Ill. App. Ct. 2nd Dist. 2004). Here, Plaintiffs assert that the terms of their contractual agreement with DePaul were set forth in DePaul publications including the Academic Catalog. Am. Compl. ¶¶ 5, 6, 8. Assuming, *arguendo*, that the Academic Catalog constitutes the basis for a contractual agreement, Plaintiffs nevertheless fail properly to identify the operative provisions of the contract that DePaul purportedly breached by holding remote classes when the University was prohibited by state and local orders from holding in-person classes.

In addition, Plaintiffs conveniently fail to address key facts regarding the contractual relationship, including: (1) when Plaintiffs paid the tuition and fees now being challenged; (2) whether such payments were made after Plaintiffs had been informed that Spring Quarter classes would be conducted through remote learning; (3) whether they had an opportunity to receive a full refund after learning that classes would be remote; and (4) whether the University affirmatively

waived or refunded any fees that had been paid, and if so, which fees. Each of these inquiries are directly linked to the asserted breach of contract claims and, therefore, should be addressed in the pleadings. *See Burke v. 401 N. Wabash Venture, LLC*, 2010 WL 2330334, at *2 (N.D. Ill.) (Marovich, J.) (dismissing plaintiff's breach of contract claims, explaining "[t]he Court fails to see how, post-*Iqbal*, a plaintiff could state a claim for breach of contract without alleging which provision of the contract was breached. Without alleging a contract provision that was breached, the claim is merely possible, not plausible.").

Although not acknowledged by Plaintiffs, the documents effectively incorporated by the amended complaint unquestionably establish that even if Plaintiffs had paid their tuition and fees for the Spring Quarter prior to the decision to move to remote learning, Plaintiffs had four weeks to drop their classes and receive a full refund. *See* Ex. E at 1390, 1425, 1463. This policy applied to undergraduate and graduate students who wanted to withdraw from one course or all courses for the term. *Id.* The last day to drop Spring Quarter undergraduate and graduate classes without penalty was April 13, 2020. Ex. F (Academic Calendar). This fact alone effectively vitiates Plaintiffs' claims.

Next, Plaintiffs do not identify a specific contractual provision in which DePaul unequivocally promises to provide in-person instruction and resources (or a promise to ignore state and local directives during a public health emergency). Not surprisingly, no such "promise" exists. Out of the hundreds if not thousands of DePaul course offerings, Plaintiffs merely reference a few course descriptions found in the Academic Catalog and suggest that the descriptions infer those classes might be held in person. Am. Compl. ¶¶ 39-50. There are several problems with Plaintiffs' claim.

First, even taking the Academic Catalog excerpts in the light most favorable to Plaintiffs, nothing in the excerpts explicitly promises the classes will be held in person. Instead, the course descriptions merely provide an overview of the topics to be covered during the course. This alone is fatal to Plaintiffs' claim. Second, contrary to what Plaintiffs would like this Court to believe, it certainly is possible to conduct the identified classes remotely—and Plaintiffs have not alleged otherwise. [6] Third, Plaintiffs do not allege that they took any of the specific courses referenced in the amended complaint. The fact that a member of the putative class may have elected to take such courses during the Spring Quarter is not a sufficient basis for the named Plaintiffs to state a viable claim. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514-15 (7th Cir. 2006) (finding named plaintiff failed to establish her ability to represent the class where her claims involved factual variations that were atypical of the putative class). For each of these reasons, Plaintiffs' reliance on selected references to the Academic Catalog does not save their breach of contract claim.

Similarly, Plaintiffs' reliance on selected portions of DePaul's 2019–2020 student handbook is misplaced. Am. Compl. ¶¶ 36-37. Although a student handbook may contain part of a student's contract with a university, it does so only to the extent it contains concrete promises. "Expressions of intention, hope or desire" do not form part of the student contract and are unenforceable. *See Galligan v. Adtalem Glob. Educ. Inc.*, 2019 WL 423356, at *7 (N.D. Ill.) (Lefkow, J.). Notably, Plaintiffs do not, and cannot, credibly contend that DePaul promised to provide university resources mentioned in the handbook regardless of circumstances or in direct contravention of state and local ordinances and directives.

[6] To the contrary, labs, studios, and other courses can be, and successfully have been, held remotely at DePaul both before and during the COVID-19 pandemic. *See, e.g.*, Provost message to students with Spring course information, https://resources.depaul.edu/coronavirus-covid-19-updates/updates/Pages/3-23-20-provostmessage.aspx (referenced at Am. Compl. ¶ 19, fn. 39) (Ex. G).

Going even further afield, the amended complaint contains some highly-selective quotations from DePaul's marketing materials (e.g., "an educational experience" that "weaves together mind, place, people, and heart" (Am. Comp. ¶ 31) and "here you'll learn by doing" (Am. Comp. ¶ 32)). Illinois courts, however, repeatedly have rejected assertions that such marketing materials constitute binding contractual obligations. For example, in *Galligan*, 2019 WL 423356, at *6-7, the court expressly held that university promotional materials are "not concrete promises that could comprise part of a contract between student and university." Similarly, in *Abrams v. Illinois College Podiatric Medicine*, the court held that students cannot "transform" "unenforceable expectation[s]" "into [] binding contractual obligation[s]." 395 N.E.2d 1061, 1065 (Ill. App. 1979). Instead, unspecific and generalized statements like the ones identified by Plaintiffs are classic examples of unenforceable puffery. *Galligan*, 2019 WL 423356, at *6-7.

In summary, at best, the amended complaint contains a few snippets from DePaul's Academic Catalog, student handbook, and marketing documents. None of the referenced statements, however, constitute a binding and enforceable obligation that DePaul must provide in-person classes. Absent an enforceable obligation, Plaintiffs' breach of contract claim cannot stand. *See Fleming,* 2017 WL 4310536 at *3-4 (dismissing breach of contract claims where there was no promise in handbook, catalog, or syllabi to provide appropriate internship sites to students).

b. The materials incorporated into the amended complaint establish that DePaul retains discretion to modify the format of classes

Plaintiffs have not identified a specific contractual provision requiring DePaul to provide an in-person education. In fact, DePaul's 2019-2020 Academic Catalog and student handbooks contain express language that effectively torpedoes Plaintiffs' assertion that DePaul did not have the latitude to change course descriptions, content, or the method by which they would be provided. Specifically, the Academic Catalog and student handbooks expressly provide as follows:

> The University reserves the right to change programs, courses and requirements; and to modify, amend or revoke any rules, regulations, policies, procedures or financial schedules at any time during a student's enrollment period.

(Ex. E, Academic Catalog at 23, 1347, 1398; Ex. H, Undergraduate Student Handbook at 1; Ex. I, Graduate Student Handbook at 1). This provision makes clear that DePaul was well within its contractual rights to modify the manner in which courses were provided. *See Doe v. Columbia Coll. Chicago*, 299 F. Supp. 3d 939, 961 (N.D. Ill. 2017) (St. Eve, J.), aff'd, 933 F.3d 849 (7th Cir. 2019) (finding the policy manual, which included a provision allowing defendant to "modify or amend" the policy at any time, provided further support that the manual did not contain specific, unalterable promises). Thus, DePaul did not breach any contractual obligation owed to its students.

c. DePaul's decision to move to remote learning during the COVID-19 pandemic was not arbitrary, capricious, or in bad faith

Plaintiffs also fail to demonstrate that DePaul's decision to suspend on-campus instruction was "made arbitrarily, capriciously, or in bad faith." *See Raethz v. Aurora Univ.*, 805 N.E. 2d at 699; *see also Fleming*, 2017 WL 4310526 at *3. As the court explained in *Fleming*, "the burden . . . is a heavy one" and "a court may not overrule the academic decision of a private school unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id*. (quoting *Raethz v. Aurora Univ.*, 805 N.E.2d at 699); *see also DiPerna v. Chi. Sch. of Prof'l Psych.,* 893 F.3d 1001, 1007 (7th Cir. 2018) (student must show that school's decision was made arbitrarily, capriciously, or in bad faith, which requires a showing the "school's action was without any discernible rational basis") (internal quotations and citations omitted).

Plaintiffs have not alleged that DePaul's actions were "without any discernable rational basis" or "such a substantial departure from accepted academic norms" such that the decision to

hold remote classes demonstrated a failure to "actually exercise professional judgment." *Raethz,* 805 N.E.2d at 700. And how could they? DePaul's actions were mandated by state and local emergency orders, taken to safeguard DePaul students, faculty, and staff, and were entirely consistent with actions taken by educational institutions across the country. Because Plaintiffs fail to allege that DePaul's conduct was arbitrary, capricious, and in bad faith, the breach of contract claim cannot stand. *See Raethz v. Aurora Univ.*, 805 N.E. 2d at 699; *see also Fleming*, 2017 WL 4310526 at *3.

d. Any requirement to provide an in-person education was excused

Finally, assuming, *arguendo*, that Plaintiffs otherwise stated a valid breach of contract claim, any such breach should be excused given the serious public health risks students and employees would have faced had the University not changed to remote learning. Impossibility excuses performance in "factual situations where the purposes for which the contract was made have, on one side, become impossible to perform." *YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC*, 933 N.E. 2d 860, 864-65 (Ill. App. 1st Dist. 2010). "One particular example of impossibility excusing performance is an intervening governmental regulation or order." *Rosenberger v. United Cmty. Bancshares, Inc.*, 73 N.E.3d 642, 649 (Ill. App. 1st Dist. 2017); *YPI*, 933 N.E. 2d at 865 (explaining the doctrine of impossibility excuses performance when "performance is rendered objectively impossible due to . . . operation of law"); *see also* Restatement (Second) of Contracts § 264.

The COVID-19 pandemic was an unanticipated circumstance that transformed in-person interaction into a serious threat to the health and safety of DePaul students, faculty, staff, and the communities in which students, faculty, and staff live and work. DePaul, like many other universities, implemented remote learning because it was the only viable solution for the continuation of educational services in a safe manner. This is especially true given Governor

Pritzker's public health emergency declaration on March 9, 2020, and the mandatory shelter-in-place order signed by the Governor on March 20, 2020. Given these facts, the continuation of in-person educational services became impossible as a matter of law.[7] Accordingly, to the extent Plaintiffs otherwise could establish a contractual obligation to provide in-person learning, DePaul was legally excused from any such contractual obligation.

III. Plaintiffs' Unjust Enrichment Claim Cannot Stand

Unjust enrichment "is not a separate cause of action under Illinois law." *Horist v. Sudler & Co.*, 941 F.3d 274, 281 (7th Cir. 2019). If an unjust enrichment claim rests on the same conduct alleged in another claim, which is the case here, the "unjust enrichment will stand or fall with the related claim." *Cleary v. Philip Morris Inc.,* 656 F.3d 511, 517 (7th Cir. 2011). As discussed above, Plaintiffs' breach of contract claim fails for numerous reasons, and so too must their unjust enrichment claim. *See, id*.

The amended complaint expressly incorporates into the unjust enrichment claim the allegations that purportedly form the basis for the breach of contract claim. *See* Am. Compl. ¶ 86 ("Plaintiffs hereby incorporate by reference the allegations contained in all preceding paragraphs of this complaint."). Doing so effectively vitiates any unjust enrichment claim. *See Stewart v. A2B Cargo, Inc.*, 2020 WL 5076716 (N.D. Ill.) (Leinenweber, J.) (dismissing unjust enrichment claim that incorporated breach of contract allegations by reference). [8]

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[7] Governor Pritzker's order allowed educational institutions to remain open only "for purposes of facilitating distance learning, performing critical research, or performing essential functions." Ex. B at §12(j).

[8] Plaintiffs allege their relationship with the university is governed by a contract (Am. Compl. ¶¶ 5, 73-85), but Illinois courts repeatedly have held that an unjust enrichment claim cannot stand where "the claim rests on the breach of an express contract." *Shaw v. Hyatt Int'l Corp.*, 461 F.3d 899, 902 (7th Cir. 2006); *see also Murray v. Abt. Assoc., Inc*., 18 F.3d 1376, 1378 (7th Cir. 1994). While the Federal Rules of Civil Procedure and Illinois law permit a plaintiff to plead unjust enrichment in the alternative, to do so, the complaint has to be clear that "the claim does not refer to, or incorporate the allegations of, an express contract governing the parties' relationship. *See, e.g.*, *Hammer v. Twin Rivers*, 2017 WL 2880899, *11 (N.D. Ill. 2017). Here, Plaintiffs have not pleaded the unjust enrichment claim in the alternative, and they also incorporate their breach of contract allegations by reference. For this reason, Plaintiffs' unjust enrichment claim also fails. *See Hammer*, 2017 WL 2880899 at *11.

IV. Plaintiffs Cannot State a Viable Claim for Conversion

Plaintiffs' conversion claim fares no better than the other asserted causes of action. To plead a claim for conversion in Illinois, a plaintiff must show: (1) she has a right to the property, (2) she has an absolute and unconditional right to the immediate possession of the property, (3) she made a demand for possession, and (4) defendant wrongfully and without authorization assumed control, dominion, or ownership over its property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 114 (1998). Importantly, however, conversion claims do not lie "for money represented by a general debt or obligation." *Tahir v. Import Acquisition Motors, L.L.C.*, 2010 WL 2836714 at *6 (N.D. Ill. July 15, 2010) (Lefkow, J.). "It must be shown that the money claimed, or its equivalent, at all times belonged to the plaintiff and that the defendant converted it to his own use." *Id.* In cases where plaintiffs make payments, only to be frustrated by an alleged failure to perform, there is no claim for conversion. *Id.*

Here, Plaintiffs allege that they paid tuition and fees in exchange for educational services. Plaintiffs do not allege that their payments to DePaul were involuntary or unauthorized.[9] Am. Compl. ¶ ¶ 5, 95. It is well established that a conversion claim cannot stand where one party voluntarily transfers money to another party. *See Tahir*, 2010 WL 2836714 at *6 (holding "no conversion as a matter of law" when "the funds were voluntarily transferred") (citing *Cordes & Co v. Mitchell Cos.*, 605 F. Supp. 2d 1015, 1024 (N.D. Ill. 2009) (Castillo, J.)). When Plaintiffs chose to engage in remote learning for Spring Quarter, they were obligated to pay tuition, and DePaul's receipt of that money thus "cannot be described as unauthorized or wrongful in the sense that a claim for conversion requires." *Horbach v. Kaczmarek*, 288 F.3d 969 (7th Cir. 2002). For this reason alone, the conversion claim must be dismissed.

[9] Nor could they. Tuition for undergraduate and graduate students was not due until ***after*** DePaul announced on March 11, 2020 that it would be holding Spring Quarter classes remotely. Ex. F (Academic Calendar).

The conversion claim is deficient for the additional reasons that Plaintiffs also fail to allege a "specific chattel" allegedly converted and failed to demand "a return of the allegedly wrongfully taken goods." *See In re Thebus*, 483 N.E.2d 1258, 1260 (1985) ("Money may be the subject of conversion, but it must be capable of being described as a specific chattel."); *Meadowworks, LLC v. Linear Mold & Engineering, LLC*, 2020 WL 5365977 (N.D. Ill.) (Aspen, J.) (dismissing a conversion claim as a matter of law where plaintiff failed to allege he demanded a return of goods). Like the situations presented in *Thebus* and *Meadowworks*, Plaintiffs here do not identify a specific chattel or fund, nor do they allege that they made a demand of DePaul to return monies paid for tuition and fees prior to the filing of this lawsuit. For these additional reasons, the conversion claim must be dismissed.

CONCLUSION

For the reasons stated herein, DePaul University respectfully requests that the Court enter an order dismissing Plaintiffs' amended complaint in its entirety, with prejudice.

Dated: October 20, 2020

Respectfully submitted,

/s/ Daniel M. Blouin

Daniel M. Blouin
Jaime R. Simon
WINSTON & STRAWN LLP
35 W. Wacker Drive
Chicago, IL 60601
312-558-5600
312-558-5700 (fax)
DBlouin@winston.com
JRSimon@winston.com

Certificate of Service

The undersigned, an attorney, hereby certifies that on the 20th day of October, 2020, the foregoing Defendant DePaul University's Memorandum of Law in Support of its Motion to Dismiss Plaintiffs' First Amended Class Action Complaint was filed electronically with the Clerk of the Court for the United States District Court for the Northern District of Illinois, and was served by operation of that Court's electronic filing system on all parties of record.

Dated: October 20, 2020

/s/ Jaime R. Simon
Jaime R. Simon