STATE OF SOUTH CAROLINA COUNTY OF RICHLAND DAVIA BUNCH and CASEY KELLY, individually and on behalf of others similarly situated, Plaintiffs, v. THE UNIVERSITY OF SOUTH CAROLINA, Defendant.	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT Civil Action No. 2020-CP-40-02330 **ORDER GRANTING THE UNIVERSITY OF SOUTH CAROLINA'S MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on a motion filed by Defendant The University of South Carolina ("USC") on June 14, 2023, seeking summary judgment on all of Plaintiffs' claims ("USC's Motion for Summary Judgment"). The Court has carefully reviewed the parties' filings and the arguments of counsel at the hearing on November 20, 2023. Having considered all arguments and submissions, the Court grants USC's Motion for Summary Judgment for the reasons stated below.

FACTUAL BACKGROUND

In response to the COVID-19 pandemic, USC, like other colleges and universities in South Carolina and across the nation, closed its campus for a portion of the Spring 2020 semester to everyone except those with extenuating circumstances and transitioned all on-campus classes and services to virtual operation, which required cooperation of all eight USC campuses in 20 locations across South Carolina. (Exhibit A to USC's Brief in Support of Its Motion for Summary Judgment ("USC's Brief"), Wilner Rpt. at 4-5.) This closure was consistent with the executive order issued by the South Carolina Governor on March 15, 2020, requiring the closure of all state-supported

universities and authorizing university officials to establish a "means to deliver virtual instruction and remote learning." (Exhibit C to USC's Brief, Henry McMaster, Executive Order No. 2020-09 at p. 2, § 2 (Mar. 15, 2020).) The executive order was continued until at least June 26, 2020, making it unlawful for students to be on campus throughout the remainder of the Spring 2020 semester. (Exhibit S to USC's Brief, Henry McMaster, Executive Order No. 2020-42 at p. 12, § 1(I) (June 26, 2020).)

USC provided prorated refunds to students for non-academic fees related to university housing, meal plans, and parking permits for a portion of the semester beginning March 16, the first day the campus was closed following spring break. (Exhibit E to USC's Brief, USC_00004993-4; Exhibit F to USC's Brief, USC_00005126-7.) In total, USC issued more than $20.7 million in prorated refunds. (Exhibit A to USC's Brief, Wilner Rpt. at 6.) USC did not refund tuition and other fees assessed during the Spring 2020 semester.

Importantly, USC charged the same amounts for tuition and fees for online instruction and face-to-face instruction. The cost per credit hour was the same no matter the mode of instruction, and tuition rates remained the same whether a student signed up for all in-person courses, all online courses, or a mix of in-person and online courses.[1]

Plaintiff Bunch was an undergraduate senior studying Political Science at USC's Columbia campus in the Spring 2020 semester. (Exhibit A to USC's Brief, Wilner Rpt. at 7.) After she

[1] For example, it is undisputed that Plaintiff Davia Bunch chose to enroll in two online courses, in addition to three in-person courses, but was charged the same tuition and fees for these online courses as she was for her in-person courses. (Exhibit H to USC's Brief, Bunch Dep. at 18:9-22; Exhibit A to USC's Brief, Wilner Rpt. at 7-8.) It is further undisputed that Plaintiffs Davia Bunch and Casey Kelly both paid a technology fee for the Spring 2020 semester—a fee paid by all students, even those taking all online classes or enrolled in USC's online degree completion program through its Palmetto College. (Exhibit H to USC's Brief, Bunch Dep. at 72:2-24 and 94:23-95:11; Exhibit G to USC's Brief, Defendant's Answer to Int. 8.)

graduated, Plaintiff Bunch filed this class action lawsuit,[2] purporting to represent a proposed class of undergraduate, graduate, and professional students at the eight different universities and colleges within USC's system and seeking partial refunds of tuition and fees as a result of USC's transition to virtual instruction. Plaintiff Casey Kelly, who was an undergraduate senior at USC Columbia's School of Visual Arts and Design in Spring 2020 (Exhibit A to USC's Brief, Wilner Rpt. at 7), was later added as a named plaintiff. Plaintiffs bring claims against USC for breach of contract, unjust enrichment, promissory estoppel, and conversion.[3]

It is undisputed that USC's transition to online instruction protected the health and safety of its community and enabled its more than 49,000 students, including Plaintiffs Bunch and Kelly, to complete their courses and make uninterrupted progress toward their degrees. Plaintiffs not only continued their Spring 2020 coursework at USC after the transition and earned the same credits they would have received had the instruction continued in-person, but they also increased their cumulative GPAs, graduated, and accepted employment upon graduation. (Exhibit O to USC's Brief, Cavanagh Rpt. at 3, 8, and 17; Exhibit A to USC's Brief, Wilner Rpt. at 7.)

LEGAL STANDARD

It is well-settled that summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. Rule 56(c) further "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of

[2] Plaintiffs filed a Motion for Class Certification on April 5, 2023, which is now moot in light of this Order.

[3] Plaintiffs expressly conceded that summary judgment is appropriate on their conversion claims. (Plaintiffs' Response in Opposition at 36 n. 18.)

an element essential to [a claim] . . . on which that party [bears] the burden of proof." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007) (citations and internal quotation marks omitted). A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial*." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C.340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (citations and internal quotation marks omitted). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id*. at 355,559 S.E.2d at 336. Reliance on self-serving allegations in a pleading is insufficient to overcome a motion for summary judgment. *See* Rule 56(e), SCRCP. Moreover, "[a] party cannot escape summary judgment on the mere hope that something may develop at trial." *Champion Int'l Corp. v. Eubanks*, 291 S.C. 395, 398, 353 S.E.2d 880, 882 (Ct. App. 1987) (citation and internal quotation marks omitted).

FINDINGS

Having reviewed and carefully considered the parties' arguments and positions in support of and in opposition to summary judgment, the Court concludes that Plaintiffs have failed to establish a genuine issue of material fact or otherwise defeat USC's Motion for Summary Judgment, and the Court finds that USC is entitled to summary judgment in its favor on all of Plaintiffs' claims as a matter of law for the reasons outlined below.

I. Plaintiffs have failed to demonstrate any cognizable damages that do not implicate the educational malpractice doctrine.

A student who has not suffered damages may not bring a claim against a university because the student lacks standing. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 23 n.14, 577 S.E.2d 190, 201 (2003) ("A plaintiff may not sue a defendant unless the plaintiff has suffered an injury at the hands of the defendant."). Standing is a "fundamental requirement in instituting an action."

Pres. Soc'y of Charleston v. S.C. Dep't. of Health and Env't Control, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020) (citation and quotation marks omitted). "Once it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." *Brock v. Bennett*, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994). A showing of damage is also a necessary element of each of Plaintiffs' causes of action. *See, e.g.*, *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962) (stating that proof of damages is necessary element of breach of contract claim); *Barnes v. Johnson*, 402 S.C. 458, 474, 742 S.E.2d 6, 14 (Ct. App. 2013) (noting that promissory estoppel requires that promisee sustain an injury); *Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 124, 678 S.E.2d 430, 435 (2009) (affirming dismissal of unjust enrichment claim where appellants suffered no injury). Here, summary judgment is appropriate as to all of Plaintiffs' causes of action because Plaintiffs have failed to demonstrate that they suffered any cognizable damages.

To succeed on any of their claims, Plaintiffs must show they were injured as a result of the transition to remote learning. However, Plaintiffs cannot rely on a purported difference in value or quality of the instruction they received because such alleged injuries amount to damages for educational malpractice, which is not cognizable in South Carolina. *See Hendricks v. Clemson Univ.*, 353 S.C. 449, 460, 578 S.E.2d 711, 716 (2003). It is undisputed that USC did not stop instruction or cease operations; rather, USC merely shifted instruction and services to an online platform due to the danger posed by the worldwide pandemic. Plaintiffs admittedly received the same courses for the same credits taught by the same faculty at the same cost per credit after the switch to online instruction.[4] (Exhibit O to USC's Brief, Cavanagh Rpt. at 3 and 8; Exhibit A to

[4] Plaintiff Bunch herself chose to enroll in two online courses, in addition to three in-person courses, for the Spring 2020 semester, and she was charged the same tuition and fees for these online courses as she was for her in-person courses. (Exhibit H to USC's Brief, Bunch Dep. at

USC's Brief, Wilner Rpt. at 7.) Plaintiffs have not submitted any evidence – much less enough to create a genuine issue of material fact – showing how they were harmed by the switch to online instruction.[5] Plaintiffs do not and cannot contend that USC's shift to virtual classrooms prevented them from completing their coursework or being awarded the expected credits toward graduation. Instead, Plaintiffs maintain that they were harmed because they received something different (online education) from what they expected (in-person instruction). But "different" is not necessarily harmful, and Plaintiffs must show actual harm to meet the damages element of all of their claims. Plaintiffs cannot have their cake and eat it too by insisting that they are not seeking damages for receiving an inferior education (and hence not barred by the educational malpractice doctrine), while simultaneously alleging they were damaged because they received an education that is materially *different* from what they signed up for. In arguing their alleged injury was not receiving the "product" for which they contracted, Plaintiffs fail to explain how they can establish they were damaged without comparing the value of the two (supposedly) different products and

18:9-22; Exhibit A to USC's Brief, Wilner Rpt. at 7.) As for Plaintiff Kelly, the syllabi for two of her courses stated they would be taught in a hybrid format, rather than exclusively in person, and she chose not to drop them—which she could have done at no cost—after learning about the mode of instruction. (Exhibit Z to USC's Brief, FAMS 308 Syllabus, at USC_00047903; Exhibit AA to USC's Brief, SPAN 122 Syllabus, at USC_00047918-9; Exhibit N to USC's Brief at USC_00002318.)

[5] Plaintiffs do not dispute that they accomplished all of their course objectives during the Spring 2020 semester, received full academic credit, increased their cumulative GPAs, and accepted employment upon graduation. (Exhibit O to USC' s Brief, Cavanagh Rpt. at 3, 8, and 17; Exhibit A to USC's Brief, Wilner Rpt. at 7.) Plaintiff Kelly surpassed her cumulative GPA of 3.42 to earn a 3.8 GPA during Spring 2020. (Exhibit O to USC's Brief, Cavanagh Rpt. at 8.) Similarly, Plaintiff Bunch outperformed her 3.728 cumulative GPA by earning a 3.9 GPA for the Spring 2020 semester. (*Id*.) Prior to graduating, Plaintiff Bunch accepted a job as a finance manager at a political consulting firm in Charleston, South Carolina. (Exhibit A to USC's Brief, Wilner Rpt. at 7.) Plaintiff Kelly similarly accepted an offer before graduating to work in Qualcomm's marketing department in San Diego, California starting in June 2020. (*Id*.; Exhibit P to USC's Brief, CKELLY000007.)

showing that what they received purportedly had less value or worse quality than what they bargained for. Indeed, the only way for Plaintiffs to show actual harm would be to show they received inferior instruction because they received a portion of a semester's teaching remotely instead of in-person. Such an evaluation would necessarily require the Court to make judgments about the quality of the academic curriculum, including faculty members, student engagement and learning, and other qualitative factors, which is precisely where this Court cannot venture under the educational malpractice doctrine.

In sum, Plaintiffs have failed to show a genuine issue of material fact with respect to the basic elements of all of their claims that require Plaintiffs to show they suffered a cognizable injury. Further, because Plaintiffs have not met their burden of demonstrating that they incurred any cognizable damages, Plaintiffs lack standing to bring their causes of action.

In addition, it is undisputed that Plaintiff Bunch did not pay USC any out-of-pocket tuition or fees (Exhibit A to USC's Brief, Wilner Rpt. at 65-67, including Figure 12.) USC could have no obligation to disgorge tuition and fees that she did not pay in the first place. Thus, Plaintiff Bunch has not suffered a concrete injury in fact, and therefore, has no standing. *See Patel v. Univ. of Vermont & State Agric. Coll.*, No. 5:20-CV-61, 2021 WL 4523683, at *1, 6 (D. Vt. Oct. 1, 2021) (denying motion to reconsider dismissal of non-paying plaintiffs in a similar COVID-19 tuition class action because "they lack constitutional standing to seek the return of tuition they had not actually paid").[6]

[6] Similarly, the shift to virtual learning did not have any impact on Plaintiff Kelly's Internship in the Media Arts class (MART 499) because she was able to complete this internship by obtaining enough of the required hours of work, despite the closure of the USC campus during the pandemic. Plaintiff Kelly testified that she continued her internship for two weeks after all the students were sent home so that she could obtain credit and complete the course. (Exhibit L to USC's Brief, C. Kelly Dep. at 113:7-114:19.)

II. Plaintiffs have failed to point to any contractual language promising in-person instruction and educational services.

In addition to failing to show damages, Plaintiffs have not identified a specific contractual term that USC breached, and, therefore, USC is entitled to summary judgment as a matter of law on Plaintiffs' causes of action for breach of contract. To prevail on a claim for breach of contract, a plaintiff must establish "the existence of the contract, its breach, and damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). Here, Plaintiffs have failed to show facts supporting the existence of specific contractual provisions USC allegedly breached. *See Ferguson v. Waffle House, Inc.*, 18 F.Supp.3d 705, 731 (D.S.C. May 8, 2014) ("Under South Carolina law, in order to prevail on a breach of contract claim, the Plaintiff bears the burden of establishing the existence and terms of the contract [and] the Defendant's breach of one or more of the contractual terms . . . .") (citations omitted)). Specifically, Plaintiffs have not identified any contractual promise in the Academic Bulletin, course registration, Statement of Financial Responsibility, or any other publication or document[7] obligating USC to provide a particular mode of delivery for its curriculum or to provide its educational services covered by fees (as opposed to *non-academic* services related to meals, housing, and parking, for which fees USC issued a prorated refund) exclusively on-campus or in any particular fashion. And Plaintiffs have pointed to no contractual provision entitling students to refunds of tuition or fees

[7] While Plaintiffs quote snippets from brochures and refer to generalized statements regarding the college experience from USC's website (Second Am. Compl. ¶¶ 26-27), Plaintiffs have seemingly abandoned this argument as they did not raise it in their Response in Opposition or at the hearing. In any event, these descriptive documents do not constitute contractual promises and, regardless, do not promise exclusively in-classroom instruction or access to on-campus facilities. (*See* USC's Brief at 23-24.)

this far into the semester for any reason. The Court finds that this failure is fatal to their claims as a matter of law.

A. The Statement of Financial Responsibility and subsequent course registration do not contain a contractual promise of in-person instruction or on-campus services.

Plaintiffs attempt to rely on the Statement of Financial Responsibility and subsequent course registration processes to support their contention that USC promised in-person instruction and on-campus services. The record reflects that each semester, as a precondition to registering for classes, students are required to accept the Statement of Financial Responsibility, which is an express contract, and pursuant to which they expressly agree to "accept the responsibility for all charges billed to [their] account" by "submitting course registration." (Exhibit V to USC's Brief, USC_00001466.)

If a contract's "language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and [its] language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). "Where an agreement is clear and capable of legal interpretation," this Court's "only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Id.* (citation and internal quotation marks omitted). Whether a contract's language is ambiguous is a question of law. *See S.C. Dept of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). The "construction of a clear and unambiguous" contract is a "question of law for the court." *Id.*

The Court finds that the plain language of the Statement of Financial Responsibility is clear and unambiguous, and therefore, the construction of its terms is a question of law for the Court. The Court finds that Plaintiffs' interpretation is untenable. Nothing in the Statement of Financial

Responsibility promises students in-person courses or on-campus services, unfettered access to campus buildings and facilities, or the right to take their courses in any particular modality. And the Statement of Financial Responsibility does not promise that USC, under all circumstances, will provide educational services for which students paid fees in a particular fashion, nor that classes will be conducted in exactly the same way as they are described in Self Service Carolina.[8]

Plaintiffs' contract and promissory estoppel claims depend entirely on their contention that the Statement of Financial Responsibility "incorporates course registration." (Plaintiffs' Response in Opposition ("Response") at 27.) The Court finds that it does no such thing. The Statement of Financial Responsibility merely states, "***By submitting course registration*** I am entering into a financial arrangement . . . ." (emphasis added). The Statement of Financial Responsibility's reference to the act of submitting course registration is only in the context of triggering the students' duty to pay tuition and fees if they register for courses. This sentence ***does not incorporate*** into the contract a student's choices made during course registration, such as a student's selection of a class with a particular mode of instruction, at a certain location, and taught by a specific professor. The phrase "by submitting" does not mean "hereby incorporating." The term "to submit" is not a synonym of the term "to incorporate." This is a far cry from contractual language that actually incorporates terms and conditions.[9] To conclude that the Statement of

[8] Self Service Carolina is USC's web-based platform through which most USC students, among other things, register for classes. (*See* Exhibit W to USC's Brief, Marterer Aff., ¶ 4.)

[9] Plaintiffs' argument that they entered into a "clickwrap" agreement by electronically submitting their class registration likewise fails. Choosing classes in the registration process did not embody the formalities necessary for the formation of a contract, and a "clickwrap" agreement, like any other contract, only arises where the requisite formalities exist and a meeting of the minds is reached. *See Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 877 S.E.2d 486 (Ct. App. 2022), *reh'g denied* (Aug. 30, 2022) (citing *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253 (4th Cir. 2021)). The undisputed facts show that the instructional method was not identified anywhere as a term having legal significance at all. The class registration information in Self Service Carolina does not show an "I agree" box, it does not state that the instructional method

Financial Responsibility, by requiring students to agree to pay tuition and fees as a prerequisite to submitting their course registration, contractually obligates USC to provide every class and every service in every detail as described in the registration process is not consistent with the plain language of the Statement of Financial Responsibility, and the Court rejects Plaintiffs' contentions that the mode of instruction information supplied in the registration process constitutes a contractual offer or promise. The plain meaning of the Statement of Financial Responsibility does not support Plaintiffs' arguments.

Moreover, Plaintiffs do not dispute that students sign the Statement of Financial Responsibility *before* course registration—meaning they accept the financial responsibility of paying the costs of their tuition and fees before ever seeing or knowing the method of instruction for their classes. (*See* Response at 10.) In fact, the uncontroverted evidence submitted by USC demonstrates that students might not even see the instructional method at all after signing the Statement of Financial Responsibility because the mode of instruction would be visible only if the student clicked certain links when navigating the course registration process. (*See* Exhibit W to USC's Brief, Marterer Aff., ¶ 12, 16, and 30; USC's Brief at 26-28.) [10]

In addition, to accept Plaintiffs' untenable interpretation of the Statement of Financial Responsibility would open USC to breach of contract claims every time it did not provide the same professor for a class as indicated in the registration process, or when the location of a class changed

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is a contractual offer (much less a promise), and nothing in the course registration process indicates that the information about classes or the student's selection of classes will have any effect on the parties' legal rights and obligations.

[10] Plaintiffs argue that the Court should disregard the affidavit of Aaron Marterer, USC System Registrar, establishing the different ways to register, stating that his affidavit conflicts with his prior testimony. The Court, however, finds that nothing in his affidavit actually contradicts his prior testimony. Thus, the Court concludes that Plaintiffs have failed to offer any evidence to contradict Mr. Marterer's affidavit. (*See* USC's Brief at 12-14; Exhibit W to USC's Brief, Marterer Aff.; Exhibit F to Plaintiffs' Motion for Class Certification, Marterer Dep. at 31:23-32:13.)

after registration or even mid-semester, or when the registration portal incorrectly indicates a course is online when it is actually hybrid, or when a course is reflected as face-to-face, but is actually hybrid or online. Such an interpretation is unsupported and would "be unwise, considering the great potential for embroiling schools in litigation that such [a finding] would create." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003) (rejecting a claim for damages based upon negligent advice provided by an academic adviser).

Moreover, in similar COVID-19 tuition refund cases in other jurisdictions, courts have rejected arguments that are remarkably similar to Plaintiffs' assertions here, finding that the financial responsibility statements and attendant course registration processes do not create an express promise of face-to-face instruction. *See, e.g.*, *Zwiker v. Lake Superior State Univ.*, 986 N.W.2d 427 (Mich. Ct. App. 2022) (oral argument scheduled by Michigan Supreme Court on application for leave to appeal) (finding "no error in the trial courts' conclusions that the financial agreements between the parties [that referenced course registration] were unambiguous and did not promise live, in-person instruction"); *Bergeron v. Rochester Inst. of Tech.*, No. 20-CV-6283 (CJS), 2023 WL 1767157 (W.D.N.Y. Feb. 3, 2023) (appeal filed) (finding that financial responsibility agreements did "not contain any promises of the provision of in-person, on-campus instruction or services," and that "listings of specific physical classroom locations in course descriptions and the university course registration system" did "not constitute a specifically designated, discrete promise that [the institute] will provide an entire semester of on-campus, in-person instruction and experiences, and are not proof of the existence of such a promise"); *Lindner v. Occidental Coll.*, No. CV 20-8481-JFW(RAOX), 2020 WL 7350212 (C.D. Cal. Dec. 11, 2020) (finding that plaintiff could not rely on course schedules and syllabi as evidence of in-person nature of college's course offerings because, although they stated a specific room where each class would

meet, they did "not promise in-person instruction or that the courses will always meet in the specific rooms stated"); *Miller v. Lewis Univ.*, 533 F. Supp. 3d 678 (N.D. Ill. 2021) (dismissing student's breach of contract claim, finding that "notations regarding instructional method" contained in university's "course schedule" during "recurring course registration process" were "hardly sufficient to form a binding contract as they cannot be confused with definite and concrete promises," and that "[w]ithout more, these notations are informative rather than promissory and [student] cannot transform such statements into a binding contract" promising "in-person education" (citation and internal quotation marks omitted)).

In summary, the unambiguous terms of the contract simply do not include a promise of face-to-face instruction or provision of educational services covered by fees in any particular fashion, and after careful consideration of all of Plaintiffs' arguments to the contrary, the Court finds that USC is entitled to summary judgment on Plaintiffs' breach of contract claims.

B. USC expressly reserved the right to amend its courses, policies, and procedures.

In addition to the foregoing, USC expressly reserved the right to amend its course offerings, policies, and procedures at any time. USC's 2019-2020 Academic Bulletins are the official documents of record concerning USC's academic programs and regulations and are provided to students during course registration in Self Service Carolina. (Exhibit N to USC's Brief at USC_00001467.) All of USC's Academic Bulletins for the 2019-2020 academic year across the USC system contained an express disclaimer that USC "reserves the right to make changes in curricula, degree requirements, course offerings, or academic regulations at any time when, in the judgment of the faculty, the president, or the Board of Trustees, such changes are in the best interest of the students and [USC]." (*Id*.) Thus, class locations, meetings times, professors, and modes of instruction are all subject to change by USC if circumstances require and it is in the best interest

of its students. In fact, the evidence in the record shows that USC's professors had the authority to plan and provide a mode of instruction that differed from the instructional method listed when students registered for classes. Long after the registration process was completed, professors could still change the instructional method via syllabi given to students on the first day of class once the course actually started. (Exhibit O to USC's Brief, Cavanagh Rpt. at 4.) Contrary to Plaintiffs' argument, USC's reservation of the right to make changes to the curriculum and coursework is the opposite of a bait-and-switch. Having expressly informed students that it could make changes when circumstances warranted, USC cannot be guilty of a bait-and-switch after making changes to adapt to the COVID pandemic. And to counterbalance this right, pursuant to USC's rules and regulations, "students have the ability to add and remove courses from their schedule through Self Service Carolina . . . during the official first day of the course and . . . to a minimum of 6% of the Part of Term in which the course is scheduled." (Exhibit N to USC's Brief, USC_00002338.)

Plaintiffs' assertion that USC's reservation of rights is unenforceable because it also states that the "bulletin is for information purposes only and does not constitute any contractual agreement between a student and [USC]" is also unavailing. The Academic Bulletins make explicit that the course registration details are not contractual by stating that USC can make changes to curricula and courses whenever needed. For the Court to find the class registration details are a part of the contract as Plaintiffs insist, the Court would have to find a meeting of the minds, and the express statement of USC that it reserves the right to make changes to those details when they are justified proves that there was no meeting of the minds between USC and its students such that USC was contractually bound to provide face-to-face instruction at all times whenever a student registered for a class that was described in Self Service Carolina as face-to-face. Another court in a similar COVID-19 tuition refund case held, "if [the university] has the ability to change the

underlying policies and procedures that create the implied contractual term, it follows that the implied term itself is subject to change." *Dixon v. Univ. of Miami,* 75 F.4th 1204, 1209 (11th Cir. 2023). The same logic applies here. If USC objectively intended to be contractually bound to honor at all times every detail about the classes and services reflected in Self Service Carolina during registration, it would not have reserved the flexibility to change the curricula and course offerings whenever it was in the best interests of USC and the students to do so.

The Court finds that USC's reservation of its right to make changes allowed USC to shift to online operation in the face of the COVID-19 pandemic. Because of this express reservation, USC cannot be held liable for exercising its right to make the necessary changes to its curriculum and offerings in the midst of a global pandemic. *See Dixon*, 75 F.4th at 1208-1210 (find that "Miami cannot be held liable for switching to remote learning at the time and under the conditions that it did" because "Miami retained 'the express right to alter or amend its procedures or policies'"). For this additional reason, USC is entitled to summary judgment on Plaintiffs' breach of contract claims.

III. Plaintiffs' claims are barred by South Carolina's educational malpractice doctrine.[11]

Educational malpractice claims have been rejected in South Carolina and by virtually all courts in other jurisdictions. *See Hendricks,* 353 S.C. at 457, 578 S.E.2d at 715 (stating the majority

[11] Plaintiffs argue that because this Court rejected educational malpractice and sovereign immunity as grounds for dismissal of their complaint at the motion to dismiss stage, that ruling somehow is dispositive now. This argument is not correct. "[T]he denial of a motion to dismiss does not establish the law of the case and the issue[s] raised by the motion can be raised again at a later stage of the proceedings." *McLendon v. S.C. Dep't of Highways & Pub. Transp*., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) (citing 21 C.J.S. Courts, 149, p. 183 (1990)); *see also DeClemente v. Assistive Tech. Med. Equip. Servs., LLC,* No. 2018-001413, 2020 WL 5412892, at *1 (S.C. Ct. App. Sept. 9, 2020) (citing *McLendon,* 313 S.C. at 526 n.2, 443 S.E.2d at 540 n.2) ("We find no merit to Appellant's argument that Judge Nicholson erred in [granting summary judgment and] overruling Judge Dennis's ruling on the statute of limitations. Judge Dennis's order denying Respondents' motion to dismiss did not establish the law of the case.").

of states refuse to recognize claims brought by students alleging an inadequate education); *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992) (acknowledging "the overwhelming majority of states that have considered this type of claim have rejected it"). While it is true that there is currently a split in decisions among the COVID-19 tuition refund cases in other jurisdictions with regard to whether students' claims implicate the educational malpractice doctrine, most of the decisions declining to apply the educational malpractice doctrine have done so in the early stages of the litigation and have not fully considered the implications of the students' inability to prove damages without straying into the impermissible territory of educational quality and processes.[12]

In any event, in South Carolina, the law on educational malpractice is clear, and this Court need go no further than simply applying the straightforward principles set forth by the South Carolina Supreme Court in *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 716 (2003). In South Carolina, a student's claim that "calls for an adjudication of the *deficiency* of [a university's] services" cannot proceed because it "would invite courts to engage in just the type of subjective analysis that courts prohibiting educational malpractice claims in tort and contract have avoided." *Hendricks*, 353 S.C. at 461, 578 S.E.2d at 717. Our Supreme Court has identified several policy concerns with recognizing these types of claims, including: "(1) the lack of a satisfactory standard of care by which to evaluate educators; (2) the inherent uncertainties of the cause and nature of damages; and (3) the potential for a flood of litigation against already beleaguered schools." *Id.* at 457, 578 S.E.2d at 715 (citations omitted). This Court finds that these same policy concerns apply to Plaintiffs' claims for tuition and fee refunds here. Plaintiffs have not advanced an objective

[12] The cases cited by Plaintiffs themselves in their Response demonstrate this. (*See* USC's Reply Brief at 14-15 n.9.) Moreover, other courts in similar COVID-19 tuition refund cases have dismissed such complaints as impermissible educational malpractice suits. (*See* USC's Brief at 16-17.)

standard of care by which the online instruction would be measured because their argument that online instruction is a "different product" from face-to-face instruction necessitates a qualitative analysis of the two forms of instruction and calls for an adjudication of the alleged deficiencies of online instruction. Further, Plaintiffs' failure to articulate what harm they experienced from having to take their classes online for the remainder of the Spring 2020 semester implicates the policy concern related to the uncertainties of the cause and nature of damages. And to allow claims like those of Plaintiffs to proceed would open the floodgates of litigation, which is precisely what our State's highest court sought to avoid in precluding educational malpractice claims. South Carolina unequivocally does not recognize such claims, regardless of whether they are based in contract, quasi-contract, or tort. *See id*. at 460, 578 S.E.2d at 716. There is simply no basis for the Court to deviate from this well-established precedent.

Plaintiffs' argument that their claims are "objective" because there exists "a specific, identifiable contractual promise that the University failed to honor" (Response at 20) fails. As the Court found above, Plaintiffs are unable to identify any term of the contract that constitutes an objective promise that USC will provide classes and on-campus services in the exact manner as indicated in the online registration information under any circumstance, but particularly when flexibility is required, as when a professor is no longer available to teach a class as expected at the time of registration, or when there are fires, floods, hurricanes, pandemics, or other extenuating circumstances. Plaintiffs are further unable to identify any term of the contract constituting an objective promise that USC will provide educational services covered by fees in a particular fashion. The Court finds that no such promises exist objectively.

Plaintiffs next attempt to get around the clear educational malpractice bar by arguing that their claims are not tied to the subjective quality of the education they received. (Response at 20.)

However, Plaintiffs allege throughout their Response that the so-called "promised" educational product of face-to-face instruction was substituted by "an inferior product." (*Id*.) Plaintiffs simply cannot have it both ways. Plaintiffs specifically seek a "disgorgement of the difference between the value of the online learning which is being provided versus the value of the live in-person instruction in a physical classroom on [USC's] campus that was contracted for." (Second Am. Compl. ¶ 67.) Plaintiffs' allegations also repeatedly criticize the online instruction USC provided after the transition.[13] Further, the report of Plaintiffs' own expert, Ted Tatos, is replete with references claiming there is a quality difference between "Emergency Remote Teaching"[14] (hereinafter, "ERT") and both face-to-face instruction and courses designed in advance to be online. (Exhibit D to Plaintiffs' Motion for Class Certification, Tatos Rpt. at 30-34.) In fact, much of Mr. Tatos' 86-page report is dedicated to his discussions on the alleged "quality differential" of ERT. Mr. Tatos' entire methodology for computing Plaintiffs' alleged damages is based on his assumption that the benefits of ERT are less than the benefits of normal face-to-face instruction.[15] Importantly, the uncontroverted evidence in the record reflects that USC did not charge less for

[13] *See* Second Am. Compl. ¶ 28 (referring to emergency remote instruction as "doubtlessly inferior"); *see also id*. ¶¶ 46, 64, 66, 67 (making allegations about the character, differences, and value of online learning compared to face-to-face instruction).

[14] Mr. Tatos refers to the online instruction provided by USC during the roughly 49 days of the Spring 2020 semester after the pandemic and governmental orders forced USC to close its campuses as "Emergency Remote Teaching." (Exhibit D to Plaintiffs' Motion for Class Certification, Tatos Rpt. at 10-11.)

[15] Mr. Tatos purports to quantify the amount of tuition and fees that should be disgorged based upon "the amount that students overpaid for the education benefits they received versus those for which they paid." (*Id*. at 51.) He counts 49 days during which instruction was provided solely online for face-to-face classes after the pandemic ("the 49 days"). (*Id*., Table 6.) He claims that ERT provided during the 49 days was a "difference in kind of educational instruction and experience," and that damages can be calculated as a measure of "the difference in the benefits attendant to the instruction and college experience agreed upon versus the benefits, or lack thereof, that accompanied [ERT]." (*Id*. at 48.)

online instruction than for face-to-face instruction. Instead, USC assessed students tuition and fees based on campus, residency, and status as either a part-time or full-time student, regardless of whether they signed up for a class with an instructional method of "face-to-face" or some online modality. (Exhibit A to USC's Brief, Wilner Rpt. at 9-10.)[16] As a result, an assessment of Plaintiffs' alleged damages would be impossible without an arbitrary calculation of the value of the educational experience delivered by USC after the implementation of the COVID-19 emergency action plan compared to its in-person counterpart. The Court finds that Plaintiffs' claims fit squarely into the category of claims barred by the educational malpractice doctrine which prohibits a qualitative valuation of the educational instruction and services provided by USC in the later part of the Spring 2020 semester.

Plaintiffs' citation to *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) for the argument that the Court need not delve into the "nuances of educational processes and theories" to determine whether USC failed to deliver its alleged specific promise of face-to-face instruction misses the mark. In *Ross*, which was cited with approval by the South Carolina Supreme Court in *Hendricks*, the Seventh Circuit explained, "[I]f the defendant took tuition money and then provided no education, or alternately, promised a set number of hours of instruction and then failed to deliver, a breach of contract action may be available." *Id.* at 417. The Court finds that this scenario is the antithesis of this case. Plaintiffs here do not contend that USC provided *no* educational instruction and services, or fewer credit hours than they expected; they challenge the *type* and *quality* of the instructional and service methods USC used after the transition. USC did not cancel

[16] For example, Plaintiff Bunch chose to enroll in two online courses, in addition to three in-person courses, for the Spring 2020 semester but was charged the same tuition and fees for these online courses as she was for her in-person courses. (Exhibit H to USC's Brief, Bunch Dep. at 18:9-22; Exhibit A to USC's Brief, Wilner Rpt. at 7.)

classes for the remainder of the semester, nor did it cease operations and academic services for which various fees are paid. Rather, USC shifted instruction and services to an online platform and continued to teach course materials and to award academic credit to students. Plaintiffs do not and cannot contend that USC's shift to virtual classrooms prevented students from completing their coursework or receiving expected credits toward graduation. To the contrary, Plaintiffs achieved grade point averages for the Spring 2020 semester that were higher than their cumulative averages, received full course credit, and earned their degrees. (Exhibit O to USC's Brief, Cavanagh Rpt. at 3 and 8.) Thus, USC did provide Plaintiffs with instruction in the courses for which Plaintiffs registered. That is, USC did provide educational instruction and services notwithstanding the required closure of the campus and its inability to have face-to-face instruction. *See Ross*, 957 F.2d at 417 (cited with approval in *Hendricks*, 353 S.C. at 460, 578 S.E.2d at 716) (explaining that to state a claim for breach of contract against a university, "the plaintiff's complaint would not be that the institution failed to perform adequately a promised educational service, but rather that it *failed to perform that service at all*." (emphasis added)). The question here is not whether USC performed, but whether the performance was materially inferior, and, therefore, Plaintiffs' "claim[s] call[ ] for an adjudication of the *deficiency* of [USC's] services," which is expressly disallowed under South Carolina law. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 461, 578 S.E.2d 711, 717 (2003).

The Court is also unpersuaded by Plaintiffs' argument that because USC purportedly did not provide any education and services at all for one week following spring break, Plaintiffs may pursue damages for that one week of tuition and fees without running afoul of the educational malpractice bar. The evidence in the record reflects that this week was part of the transition process during which USC undertook various efforts to shift all instruction online. (Exhibit O to USC's

Brief, Cavanagh Rpt. at 8-11; Exhibit A to USC's Brief, Wilner Rpt. at 4-5; Exhibit B to USC's Brief, USC_00008841-2; Exhibit J to USC's Brief, S. Kelly Dep. 42:17-20.) Thus, USC did provide educational services during this additional week of spring break. Further, using this one-week period to transition to online instruction would not constitute a material breach in this case. The one-week closure is no different than a university's temporary shut-down occasionally necessitated by more common outside occurrences such as snowstorms, wildfire, flooding, or hurricanes. (Exhibit O to USC's Brief, Cavanagh Rpt. at 11-12.) More importantly, Plaintiffs are not complaining that they did not receive the *quantity* of instruction, and Plaintiffs have not pointed to any contractual obligation by USC to provide any fixed number of hours in class or fixed amount of educational services covered by fees. In any event, Plaintiffs completed all their courses and got their full credits.

As for Plaintiffs' argument that they are entitled to the return of academic fees for services not provided by USC after the transition to remote instruction in Spring 2020, Plaintiffs have failed to demonstrate a genuine issue of material fact to survive summary judgment in this regard. In South Carolina, the educational malpractice bar applies equally to tuition and fees that are collected in relation to the provision of education. *See Hendricks*, 353 S.C. at 460-61, 578 S.E.2d at 717-18. In this case, both parties have treated tuition and fees related to education (as opposed to *non-academic* fees for meals, housing, and parking, for which USC did issue a prorated refund) without making a meaningful distinction. For example, Plaintiffs assert, "In exchange for the courses and instructional methods they selected during registration, Plaintiffs paid the University the tuition and fees it assessed pursuant to the Financial Responsibility Statement, including mandatory 'technology' and 'lab' fees." (Response at 13.) It is undisputed that Plaintiffs received the educational services for which they paid fees during the first part of the Spring 2020 semester. The

record further reflects, and Plaintiffs have not been able to controvert, that Plaintiffs continued to receive certain benefits of educational services covered by fees both during and after the transition to virtual education. (*See* Exhibit A to USC's Brief, Wilner Rpt. at 40-44; Exhibit O to USC's Brief, Cavanagh Rpt. at 4-5; see also USC's Brief at 4-5.) Plaintiffs have not met their burden of showing a genuine issue of material fact with respect to how they were damaged by any alleged failure to deliver the academic services covered by fees for only a portion of Spring 2020 that would not call for an impermissible determination of the deficiency of such services. Thus, the Court finds no basis on which to make a different ruling with respect to fees related to educational services, and the Court holds that the educational malpractice doctrine equally bars Plaintiffs' claims related to fees and tuition.

IV. <u>The doctrine of impossibility excused USC's performance as a matter of law</u>.

It is undisputed that the closure of all state-supported universities, including USC, was required by law by virtue of the Governor's executive orders in response to the COVID-19 pandemic. Governor McMaster's March 15, 2020 executive order specifically directed the closure of all state-supported universities and authorized university officials to establish a "means to deliver virtual instruction and remote learning." (Exhibit C to USC's Brief, Henry McMaster, Executive Order No. 2020-09 at p. 2, § 2 (Mar. 15, 2020).) The Court holds that even if Plaintiffs were able to identify a contractual term obligating USC to provide in-person instruction and on-campus services at all times, the global pandemic and the Governor's resulting executive orders, in turn, would have substantially frustrated the purpose of any such alleged contract, making performance impossible. *See, e.g., Burt v. Bd. of Trs. of the Univ. of R.I.*, 84 F.4th 42 (1st Cir. 2023) (affirming trial court's discharge of university's duty to perform in related COVID-19 case, and holding that pandemic and governor's resulting orders "substantially frustrated the principal

purpose of the contracts – the provision of in-person, on-campus instruction – and made performance of the contract impracticable"); *see also Restatement (Second) of Contracts* § 261 (1981), including comment b., illustration 1 and comment d., illustration 7.

Under South Carolina law, "[t]he doctrine of impossibility excuses performance when the thing to be done cannot by any means be accomplished . . . ." *Morin v. Innegrity, LLC*, 424 S.C. 559, 567, 819 S.E.2d 131, 136 (Ct. App. 2018) (citation and internal quotation marks omitted). "A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997) ("Impossibility must be real and not a mere inconvenience."). Here, there is no genuine issue of material fact that USC's performance was rendered impossible both by "an act of God" (the unprecedented global pandemic) and by "the law" (the Governor's executive orders). (*See* Exhibit C to USC's Brief, Henry McMaster, Executive Order No. 2020-09 at p. 2, § 2 (Mar. 15, 2020).) The threat to the health of students, professors, and personnel posed far too great of a risk to continue to provide face-to-face instruction. And in any event, the Court finds that doing so was simply not possible because it would be illegal, not just unsafe, and would require USC to violate state law.

Plaintiffs' argument that it was somehow "not impossible for the University to perform on its promise to provide face-to-face instruction and access to campus services" is unconvincing. (Response at 34.) The fact that it *may* still be possible for USC to perform if, for example, it was willing to break the law and risk the consequences, does not bar USC from claiming discharge. *See Restatement (Second) of Contracts* § 264, comment a. (1981). USC was required to stop in-person instruction and on-campus services to comply with the Governor's executive orders—laws with which USC and all students were required to comply—beginning March 16, 2020, and until

at least June 26, 2020, which was 8 weeks after the last day of classes at USC in Spring 2020. (*See* USC's Brief at 32-34.) Because of that requirement, the law mandates the conclusion that any contractual obligation USC may have had to provide in-person, on-campus instruction and services prior to the Governor's orders going into effect was discharged once USC's performance was made impossible. *See Restatement (Second) of Contracts* § 264, comment a. (1981) ("if supervening governmental action prohibits a performance or imposes requirements that make it impracticable, the duty to render the performance is discharged. . . ."); *see also White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371-72, 601 S.E.2d 342, 345 (2004) (citing to § 264 of the Restatement while noting that "[w]hen a contract is originally legal, but performance becomes illegal due to a change in the law, any subsequent performance is against public policy and the party who has agreed to perform is excused from doing so"). Plaintiffs inevitably concede that the Governor's executive orders required USC to stop in-person instruction. (Response at 19.)

Plaintiffs' attempt to claim that, even if performance were impossible, USC "would still be liable to return the portion of tuition and fees it collected for services not rendered" (Response at 35), is likewise unavailing. Nothing in the law, including the Restatement, states that Plaintiffs should be entitled to restitution. Further, the Court finds that Plaintiffs have not shown that they would be entitled to any restitution. Rather than ceasing its educational activities and services altogether, USC continued to act in good faith by supplying the only possible substantially equivalent substitute performance by continuing to provide educational instruction and services to its students while keeping them and the rest of the USC community safe and complying with the Governor's orders. Moreover, as discussed above, Plaintiffs have failed to proffer a theory of restitutional damages that does not impermissibly stray into the province of educational

malpractice. Thus, the Court finds that the doctrine of impossibility excused USC's performance as a matter of law, and Plaintiffs have not demonstrated that any restitution is recoverable.

V. The doctrine of sovereign immunity bars Plaintiffs' claims against USC.[17]

In South Carolina, the General Assembly determines when and under what circumstances the State may be sued. *See* S.C. Const., Art. X, § 10 ("The General Assembly may direct, by law, in what manner claims against the State may be established and adjusted."); *see also id.* at Art. XVII, § 2. The State and its subdivisions are thus immune from suit subject only to limited waivers provided by statute. *See, e.g.*, S.C. Code Ann. § 15-78-20(b) (statute affording the State "immunity from liability and suit for any tort except as waived by this chapter"). USC is an arm of the state of South Carolina. *See* S.C. Code Ann § 59-107-10 (including USC in the definition of "state institution"). Plaintiffs do not contest that USC is a governmental entity entitled to sovereign immunity. (*See* Response at 16-19.) Plaintiffs' only dispute is whether this immunity was waived.

In 1978, the South Carolina Supreme Court eliminated the State's immunity from suit based upon its contractual obligations. In *Kinsey Constr. Co. v. S.C. Dep't of Mental Health*, the court held: "[W]hen a State secures itself the benefits of a contract, it implicitly assumes the corresponding liabilities." 272 S.C. 168, 171, 249 S.E.2d 900, 902 (1978). USC argues that the Supreme Court subsequently overruled *Kinsey*'s general waiver of sovereign immunity for breach of contract claims in *Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 170, 551 S.E.2d 263, 270 (2001), holding that the State waives its immunity related to a breach of contract claim only when a statute governs the specific contract at issue. Plaintiffs disagree with USC's interpretation of the *Unisys* holding, arguing that *Unisys* overruled only the venue portion of the

[17] *See* Footnote 11, above.

Kinsey decision and did not overrule the portion of *Kinsey* that waived the State's sovereign immunity for breach of contract claims.

The Court, however, need not resolve this issue here because even if Plaintiffs were correct that South Carolina law allows the State to implicitly consent to being sued by entering into contracts not covered by statutory authority, Plaintiffs have failed to identify a waiver of USC's sovereign immunity for claims arising from the switch to online instruction and operation in the Spring 2020 semester in response to the COVID-19 pandemic. As the Court found above, USC's contract with Plaintiffs did not include an express contractual promise to provide educational instruction and services in person or in any specific modality. *See, e.g., Goldstein v. Univ. of Central Fla. Bd. of Trs.*, No. 6D23-1203, 2023 WL 5492043, at *2 (Fla. Dist. Ct. App. Aug. 25, 2023) (affirming trial court's order of dismissal on sovereign immunity grounds and in favor of university where plaintiff failed to show any documents "containing express terms requiring UCF to provide on-campus or in-person services in exchange for fees"). When no "express, written" contractual term exists, "even if the conduct between the parties suggests an agreement, it is merely an implied contract and sovereign immunity protections remain in force." *Id.* at *1 (citations and internal quotation marks omitted). Because there is no specific contractual term obligating USC to provide in-person instruction and services and, thereby, waiving USC's sovereign immunity as to its alleged breach of said term, the doctrine of sovereign immunity bars Plaintiffs' claims against USC for breach of contract.

The doctrine of sovereign immunity also bars Plaintiffs' unjust enrichment and promissory estoppel claims. Unjust enrichment and promissory estoppel are equitable doctrines. *See Dema v. Tenet Physician Servs.–Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("Unjust enrichment is an equitable doctrine . . . ."); *Rushing v. McKinney*, 370 S.C. 280, 289, 633 S.E.2d

917, 922 (Ct. App. 2006) ("The doctrine of promissory estoppel is equitable in nature." (citation and internal quotation marks omitted)). The General Assembly has not waived sovereign immunity for equitable claims seeking monetary relief against governmental entities. The South Carolina Tort Claims Act does not include a waiver of sovereign immunity for non-tort claims for unjust enrichment or promissory estoppel, nor has the General Assembly enacted any other legislation that expressly or implicitly waives sovereign immunity for such equitable claims. Here, USC has not waived sovereign immunity to equitable actions by contract or otherwise. Thus, the doctrine of sovereign immunity bars Plaintiffs' claims for unjust enrichment and promissory estoppel.

VI. Plaintiffs waived their right to bring this lawsuit by acquiescing to virtual instruction.

The Court finds that Plaintiffs have failed to demonstrate a genuine issue of material fact to combat summary judgment based on Plaintiffs' waiver of their right to bring the claims asserted in this action by acquiescing to USC's provision of remote instruction necessitated by the COVID-19 pandemic and accepting all of the resulting benefits. A plaintiff who does not object to actions inconsistent with his "rights" acquiesces to those actions and cannot later seek relief. *See Seabrook Island Prop. Owners Ass'n v. Pelzer,* 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) ("If a party stands by and sees another dealing with his property in a manner inconsistent with his rights and makes no objection while the other changes his position, his silence is acquiescence, and it estops him from later seeking relief.").

Here, USC argues and Plaintiffs do not contest that Plaintiffs: (1) failed to lodge any objection to USC's shift to virtual instruction or ask for reimbursement at the time of the transition to remote instruction in Spring 2020; (2) decided not to explore or seek any alternative options, such as sitting out the remainder of the semester, or pursuing a refund under the applicable policies and pursuing an appeal of any denials; (3) voluntarily remained enrolled in their courses after the

pivot to online learning; (4) continued their Spring 2020 semester coursework online; (5) accepted the prorated refunds that USC issued to students for non-academic fees related to university housing, meals, and parking; and (6) accepted and enjoyed all the benefits that USC provided for the remainder of the Spring 2020 semester, which included, among other things, the provision of full course credits and degrees. While this lawsuit was filed shortly after the end of the Spring 2020 semester, it only further highlights the fact that Plaintiffs waited to object *until after* they received all their credits and degrees from USC. Because of Plaintiffs' acquiescence and silence, as well as their acceptance and enjoyment of the benefits provided by USC that represent USC's change in position, the Court finds that Plaintiffs are estopped from now attempting to seek relief. *See e.g., Facelli v. Se. Mktg. Co.,* 284 S.C. 449, 451-52, 327 S.E.2d 338, 339 (1985) (holding that employee who was notified orally and in writing that his commission rate was being changed impliedly consented to the changed rate by continuing to work for employer and thus was estopped from seeking damages in breach of contract suit for employer's refusal to compensate him under former rate).

Plaintiffs' argument that USC did not rely to its detriment on Plaintiffs' acquiescence to the switch to online learning because USC would have pivoted to virtual instruction regardless of whether Plaintiffs objected misses the mark. Instead, the requisite change in position and reliance to its detriment are in the fact that USC undisputedly expended numerous efforts to continue providing the classes and services to Plaintiffs in the midst of the global pandemic, allowed Plaintiffs to make uninterrupted progress toward their degrees, and did in fact provide the course credits and awarded the degrees to Plaintiffs *before* Plaintiffs lodged any objection or expressed their dissatisfaction. *See Seabrook Island Prop. Owners Ass'n v. Pelzer,* 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) (holding that property owner was "estopped to claim a refund"

of assessments paid to property owners association in excess of what was due under bylaws, finding as follows: "[The owner] had constructive knowledge that the maintenance charges were not being assessed in accordance with the restrictive covenants and bylaws. Nevertheless, he acquiesced in the method of assessment and paid the charges. The Association expended the moneys for purposes authorized by the bylaws. [The owner] received the benefit of those expenditures . . . [and] cannot now return the benefits or restore the Association to its former position."). *See also Acosta v. Dist. Bd. of Trustees of Miami-Dade Cmty. Coll.*, 905 So. 2d 226, 228–29 (Fla. Dist. Ct. App. 2005) ("[E]ven if we assume that there was a valid and enforceable contract in this case, the students, through their conduct, by commencing the program, satisfying all their course requirements, and eventually graduating, may be held to have acquiesced to the higher tuition."). As a result, Plaintiffs have not shown a genuine issue of material fact to combat Plaintiffs' waiver of their right to bring these claims through acquiescence.

VII. Plaintiffs' equitable claims fail as a matter of law because the parties' relationship is governed by contract, and because Plaintiffs have failed to show genuine issues of material fact as to the necessary elements of these claims.

The Court found above that the equitable claims are barred by sovereign immunity and by the educational malpractice doctrine. As additional grounds for summary judgment on these equitable claims, the Court holds that Plaintiffs have failed to meet the necessary elements with material facts, and Plaintiffs cannot maintain both breach of contract claims and equitable causes of action based upon the same facts.

The Court finds that Plaintiffs' equitable claims are subject to summary judgment because Plaintiffs failed to show genuine issues of material fact with respect to the requisite elements of these causes of action. First, as to both their promissory estoppel and unjust enrichment claims, as addressed in more detail above, the Court finds that Plaintiffs have not satisfied the "injury"

element of these claims because they have not shown that they suffered any damages that would not touch on the value and quality of the educational instruction and services they received in Spring 2020, which is expressly prohibited by the educational malpractice doctrine.

Further, with respect to Plaintiffs' promissory estoppel claims, as the Court found above, Plaintiffs have not shown that USC made an unambiguous promise to continue providing at all times in-person instruction and on-campus academic services for which fees are paid, even during the pandemic and in violation of state law. To establish a claim of promissory estoppel, a plaintiff must show: "(1) an unambiguous promise by the promisor; (2) reasonable reliance on the promise by the promisee; (3) reliance by the promisee was expected by and foreseeable to the promisor; and (4) injury caused to the promisee by his reasonable reliance." *N. American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 379-80, 769 S.E.2d 237, 242 (2015). The requisite unambiguous promise is one with "clearly articulated, definite terms." *Barnes v. Johnson*, 402 S.C. 458, 470, 742 S.E.2d 6, 11-12 (Ct. App. 2013). An "implied" or "vague promise" is "insufficient to support a promissory estoppel claim" because "promissory estoppel does not rest on an implied contract." *A&P Enterprises, LLC v. SP Grocery of Lynchburg, LLC*, 422 S.C. 579, 589, 812 S.E.2d 759, 764 (Ct. App. 2018). Here, the Court finds that at most, Plaintiffs have attempted to show an "implied" or "vague promise" that is simply "insufficient to support a promissory estoppel claim." *Id.*[18]

[18] In addition, Plaintiff Kelly cannot show an unambiguous promise – nor reliance to her detriment – that her FAMS 308 and SPAN 122 classes would be exclusively face-to-face during the Spring 2020 semester because the syllabi for these courses plainly and clearly stated that the courses would be taught in a hybrid format. (Exhibit Z to USC's Brief, FAMS 308 Syllabus, at USC_00047903; Exhibit AA to USC's Brief, SPAN 122 Syllabus, at USC_00047918-9.) Similarly, Plaintiff Kelly cannot show any liability on the part of USC with respect to her Internship in Media Arts (MART 499) class because she completed the internship and explicitly agrees that the move to online instruction in Spring 2020 did not affect this course at all. (Exhibit L to USC's Brief, C. Kelly Dep. at 114:2-19.)

The Court finds that Plaintiffs' unjust enrichment claims likewise fail because Plaintiffs have not and cannot establish that there was a conferral of a benefit on USC that would be inequitable for USC to retain. To recover on a theory of unjust enrichment, a "'plaintiff must show: (1) that he conferred a non-gratuitous benefit on the defendant; (2) that the defendant realized some value from the benefit; and (3) that it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value.'" *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012) (quoting *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988)). Here, the Court finds that Plaintiffs have not demonstrated a genuine issue of material fact showing that it is inequitable for USC to retain payment of full tuition and academic fees for the Spring 2020 semester. Plaintiffs fail, for example, to combat the undisputed fact that despite the unprecedented circumstances of a worldwide pandemic, USC provided Plaintiffs exactly what they paid for – the right and ability to complete their courses at USC and earn the necessary college credits toward graduation without any delays – and Plaintiffs received all the same credits they would have received in an in-person environment. Importantly, tuition and fees at USC are based on credit hours, not the mode of instruction, and, in fact, tuition and fees remained the same whether a student signed up for all in-person courses, all online courses, or a mix of in-person and online courses. (Exhibit A to USC's Brief, Wilner Rpt. at 7-8; Footnote 1, above.) Furthermore, USC informed students that it reserved the right to make changes in the curriculum if circumstances so warranted. The Court finds that as a matter of law, it would not be unjust under these circumstances for USC to retain amounts paid

to support the educational programs and services it provided before, during, and after the transition to virtual instruction.[19]

In addition, the Court holds that Plaintiffs' equitable claims fail as a matter of law because the parties' relationship is governed by contract. An unjust enrichment claim is not cognizable where a plaintiff has an available claim for breach of contract. *See, e.g., Atherton v. Tenet Healthcare Corp.*, No. 2005-UP-362, 2005 WL 7084013, at *5 (S.C. Ct. App. May 25, 2005) (acknowledging unjust enrichment is an equitable remedy and is unavailable where there is an express contract covering the relevant issue); *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 328, 734 S.E.2d 177, 181 (Ct. App. 2012) (holding unjust enrichment is not an available remedy when a relationship is governed by a contract). Likewise, promissory estoppel is not an available remedy when a relationship is governed by contract. *See Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001).

The Court finds that Plaintiffs' Second Amended Complaint does not plead their equitable claims *in the alternative* to their breach of contract claims. Instead, Plaintiffs incorporate within their counts for unjust enrichment and promissory estoppel allegations regarding their contractual relationship with USC,[20] thus impermissibly attempting to *reframe* their breach of contract claims

[19] Other courts in COVID-19 tuition refund cases have rejected plaintiffs' unjust enrichment claims against universities for similar reasons. (*See* USC's Brief at 42-44 (citing *Dixon v. Univ. of Miami*, 75 F.4th 1204, 1211 (11th Cir. 2023); *Beck v. Manhattan College*, No. 20 CIV. 3229 (LLS), 2023 WL 4266015, at *3 (S.D.N.Y. June 29, 2023) (appeal filed); *Bergeron v. Rochester Inst. of Tech.*, No. 20-CV-6283 (CJS), 2023 WL 1767157, at *11 (W.D.N.Y Feb. 3, 2023) (appeal filed); *Hewitt v. Pratt Inst.*, No. 20-cv-2007, 2021 WL 2779286, at *4 (E.D.N.Y. Jul. 2, 2021); *De Leon v. New York Univ.*, No. 21 CIV 05005 (CM), 2022 WL 179812, at *13 (S.D.N.Y. Jan. 20, 2022); *Polley v. Nw. Univ.*, 560 F. Supp. 3d 1197, 1209 (N.D. Ill. 2021)).)

[20] *See, e.g.*, Second Am. Comp. ¶¶ 71, 101 (referencing the "benefit of the bargain" in their causes of action for unjust enrichment) and ¶¶ 86, 115 (referencing the Statement of Financial Responsibility, which Plaintiffs admit in their Response "is a binding arrangement" between USC and Plaintiffs, in their causes of action for promissory estoppel).

as equitable claims. *See Atherton*, 2005 WL 7084013, at *5-6. Simply put, Plaintiffs' equitable claims are based exactly on the same, albeit faulty, facts and premise as their breach of contract claims, which is that USC allegedly promised in-person instruction and provision of academic services in a particular fashion.

As the Court discussed above, the contractual relationship between Plaintiffs and USC is firmly established and undisputed here. Plaintiffs' argument that "the existence of the contract is contested" (Response at 37) because its *terms* are disputed misses the mark. Plaintiffs cannot rely on equitable theories to fill purported gaps in a contract, contradict a contract's terms, correct their failure to identify a specific term of the contract that was supposedly breached, or fabricate a term of the contract that does not actually exist. Even though the contract does not contain a promise of in-person instruction, it does cover the subject matter of Plaintiffs' claims. Thus, Plaintiffs' sole potential remedy is under their breach of contract claims, even if that contract does not actually entitle them to the relief they seek. *See, e.g., Goldberg v. Pace Univ.*, No. 21-1377, 2023 WL 8494254, at *8 (2d Cir. Dec. 8, 2023) (affirming district court's finding that student's unjust enrichment and promissory estoppel claims warranted dismissal in similar COVID-19 tuition refund case because "they were impermissibly duplicative of his breach of contract claim," finding there was no dispute over existence of contract where university acknowledged contract's existence and only contended that promise of in-person instruction was not one of its terms); *Zwiker v. Lake Superior State Univ.*, 986 N.W.2d 427 (Mich. Ct. App. 2022) (oral argument scheduled by Michigan Supreme Court on application for leave to appeal) (first holding that the financial responsibility agreement, which was similar to the one at issue in this case, "did not promise live, in-person instruction," and then finding that because it "specifically addressed student payment obligations when registering for courses" and "governed the same subject matter

as [the students'] equitable claims," grant of summary judgment on the students' equitable claims was proper because "[c]ourts may not imply a contract under an unjust-enrichment theory."). Accordingly, the Court finds that the parties' relationship and the subject matter of Plaintiffs' claims are governed by contract that forecloses Plaintiffs' equitable claims.

CONCLUSION

For the foregoing reasons, it is hereby ordered that USC's Motion for Summary Judgment is granted in all respects, final judgment is entered in favor of USC, and Plaintiffs' Motion for Class Certification, which is pending before the Court, is denied as moot.

IT IS SO ORDERED.

Richland Common Pleas

Case Caption: Davia Bunch vs University Of South Carolina

Case Number: 2020CP4002330

Type: Order/Summary Judgment

So Ordered

Jocelyn Newman