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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2024-000291

DAVIA BUNCH and CASEY KELLY,
Individually and on behalf of
others similarly situated .....Appellant,

v.

THE UNIVERSITY OF SOUTH CAROLINA.....Respondent.

RECORD ON APPEAL
VOLUME III (895-1341)

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAVIA BUNCH and CASEY KELLY, individually and on behalf of others similarly situated,	)	**CIVIL ACTION NO. 2020-CP-40-02330**
Plaintiffs,	)	**COMPLEX CASE DESIGNATION**
vs.	)	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT**
THE UNIVERSITY OF SOUTH CAROLINA,	)	**JUDGE JOCELYN NEWMAN**
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiffs Davia Bunch and Casey Kelly ("Plaintiffs"), by and through their undersigned counsel, hereby submit this memorandum in opposition to the Defendant University of South Carolina's (the "University") motion for summary judgment ("MSJ").

INTRODUCTION

Plaintiffs agreed to pay tuition and fees to the University of South Carolina for "face-to-face instruction" and access to on-campus services during the Spring 2020 semester. When the University closed its campus and canceled classes for an entire week following spring break, Plaintiffs did not receive instruction of *any kind* or *any* of the on-campus services for which they paid. Thereafter, when the University moved all courses online, Plaintiffs received a *different product* than that which the University agreed to provide, charged them for, and for which they paid (and no on-campus services). Nonetheless, the University refused to make *any refunds*

(partial or otherwise) for the products and services it failed to provide (and for which it therefore did not incur the expected expenses), instead choosing to enrich itself by pocketing funds it received for same. Although the University's decision to close its campus and switch to online instruction due to the COVID-19 pandemic may have been understandable, its decision to keep ***all*** the money it received for the promised "face-to-face instruction" and on-campus services was not.

The University's MSJ brief fails to grapple with these issues head on, and largely ignores these undisputed facts regarding the substance of Plaintiffs' claims (as well as the ample evidence supporting them). Instead, the University relies upon red herrings, misstatements of both fact and law, and facts that are plainly in dispute—all of which confirm that summary judgment is *not* appropriate here. More specifically, to state just a few examples:

- The University starts its brief by *patently mischaracterizing* Plaintiffs' *objective* claims regarding the University's failure to provide the products and services it offered and charged Plaintiffs for as being based on Plaintiffs' "subjective expectations"[1] regarding the quality of instruction. That argument is remarkable not only because it is a blatant mischaracterization, but also because *the University* is the only party that has made *any* "quality" arguments—arguments it relies upon throughout its brief, thus highlighting its inability to meet its summary judgment burden with respect to the actual claims at issue.[2]

- To support its arguments against the breach of contract claims, the University cites inapposite cases for the proposition that the terms of Plaintiffs' course registration are not part of the contract at issue, yet the University ignores the fact that—unlike the cases upon which it relies—the Statement of Financial Responsibility here *expressly incorporates* the

[1] (Def's Br. in Supp. of Sum. J. at 2 [hereinafter, "Def's Br."].)

[2] (Def's Br. at 12, 15-20 & n.7, 43-44.)

Plaintiffs' "course registration" (*e.g.*, the representations that the courses provided "face-to-face instruction" and the fees were for on-campus services).

- The University states that its MSJ is directed *only to the two Plaintiffs*, but then argues that the *Plaintiffs'* breach of contract claim regarding face-to-face instruction somehow fails because *some other hypothetical, unnamed students* might not have seen the University's promise of face-to-face instruction.[3] Moreover, that irrelevant assertion is not an undisputed fact in any event, as both Plaintiffs testified to the contrary.

- To support its arguments on the breach of contract claims, the University asserts that professors were free to change to online instruction at any time,[4] yet ***the University's own documents state that the "Instructional Method" cannot be changed absent permission of a dean***, and that students "registered in classes . . . ***have an expectation that the class will be taught in the method that is specified in Self-Service Carolina***."

The above examples are just a few of many where the University relies upon *disputed* facts that it thinks favor its position, while simply ignoring contrary facts and/or evidence. Indeed, the University's brief is so replete with reliance on *disputed* facts that it reads more like an *opposition to an MSJ Plaintiffs have not yet filed* rather than a proper summary judgment brief showing that Plaintiffs' claims fail as a matter of undisputed fact or law.

Given the above and other issues, the University has failed to meet its burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law, for multiple reasons.

[3] (Def's Br. at 26-28.)

[4] (Def's Br. at 28-29.)

First, the University's sovereign immunity arguments—which the Court rejected when denying the University's motion to dismiss—still fail, as it is black letter law that the State of South Carolina has waived sovereign immunity for contract claims. The University's assertion to the contrary is based on a fundamental misreading of the binding South Carolina Supreme Court decisions (as the University's counsel has acknowledged in prior briefs). If the rule were otherwise, the University could act with impunity by, for example, accepting payment on a contract to sell one of its buildings and then refusing to allow the buyer to take possession, yet leaving the buyer without recourse. Similarly, under the South Carolina Tort Claims Act ("SCTCA"), the University cannot avoid liability for its tortious conduct, as Plaintiffs assert in this action. The University's decision to convert tuition and fees paid for products and services it refused to provide is actionable under the SCTCA, and the University has failed to even acknowledge—let alone meet—its burden of proving any of the SCTCA's exceptions.

Second, the University's educational malpractice argument—which the Court also rejected at the motion-to-dismiss stage—is an obvious red herring, as: (1) the University is the only party asserting "quality of education" arguments, as noted above; and (2) Plaintiffs' Second Amended Complaint expressly disclaims such theory (stating that Plaintiffs' claims are "not based on the (doubtlessly inferior) quality of the education they received through their online classes"). Indeed, Plaintiffs' claims present precisely the type of "objective" claims contemplated by the South Carolina Supreme Court, as they turn upon the University's failure to provide: (1) a promised product (face-to-face instruction), instead substituting what the *University itself* recognizes as an entirely different product (ERT); and (2) the on-campus services it promised and for which Plaintiffs' paid. Thus, as *numerous* other courts have held in COVID-19 tuition-and-fee class actions, the relevant inquiry is whether the promised products and services were provided at all

during the period at issue, not whether they were adequate or of inferior quality.[5]

Third, the University's standing arguments fail because Plaintiffs suffered a legally cognizable injury when they paid for promised products and services the University failed to provide. Thus, the University's repeated arguments regarding Plaintiffs earning credits, improving their GPAs, securing employment, etc., are entirely immaterial to whether they were injured for standing purposes, as is their argument regarding the receipt of financial assistance—an argument that has been repeatedly rejected by courts that have addressed it.

Fourth, the University's arguments opposing Plaintiffs' breach of contract claims fail. Indeed, the University concedes it has a contract with Plaintiffs, but disputes its terms, thus presenting a classic dispute of fact that cannot be resolved by summary judgment. Further, the University's "shotgun" approach of launching multiple meritless contract "defenses" (*i.e.*, reservation of rights, impossibility, and acquiescence) fails for a multitude of reasons, including:

- The University's admission that it *routinely breaches* its agreements with other students to provide face-to-face instruction is not a defense to Plaintiffs' claims.
- As other courts have held under these same circumstances, the University did not reserve any rights by posting a "bulletin" *somewhere* on its website, wholly disconnected from the Self-Service Carolina registration process.
- Likewise, the contractual documents at issue—which were drafted by the University—do not include any disclaimers regarding the University's offerings and charges for face-to-face instruction and on-campus services. Thus, the University's arguments as to whether it was contractually bound to provide such products and services

[5] The Court should reject the University's attempt to *inject* the issue of educational malpractice into this case by claiming (presumably in an attempt to support an unpled affirmative defense) that Plaintiffs' damages are *mitigated* by the fact that ERT has *some* value.

present—at best—a jury question, if not an issue that would require summary judgment in Plaintiffs' favor upon the filing of an appropriate motion.

- The impossibility doctrine does not apply because neither the pandemic nor the Governor's executive orders (which are not legislative acts and thus do not carry the force and effect of law) made it *impossible* for the University to provide the face-to-face instruction and on-campus services it promised to provide. Moreover, even if the impossibility doctrine applied (it does not), its only effect is to *rescind* the contract, meaning that the University would still be required to disgorge the tuition and fees it received from Plaintiffs, *as shown by the cases the University relies upon for its impossibility argument*.

- Plaintiffs did not "acquiesce" to the University's breaches by not immediately dropping out of college (which would have been a failure to mitigate their damages). Further, the doctrine of acquiescence does not apply where the party attempting to invoke its protection cannot show any detrimental reliance—and the University did not (and would not have) changed its plans based on Plaintiffs' enrollment status.

Fifth, the law is clear that Plaintiffs can pursue their breach-of-contract, unjust enrichment, and promissory estoppel claims in the alternative. Moreover, even if there were no contract for face-to-face instruction and on-campus services (there clearly is), multiple triable factual questions exist concerning Plaintiffs' detrimental reliance on the University's promises (for purposes of their promissory estoppel claims) and the gross miscarriage of justice that would result if the University were allowed to profit from its retention of Plaintiffs' tuition and fees (for purposes of their unjust enrichment claims).

In short, Plaintiffs have provided immutable evidence that the University, through its course registration system (Self-Service Carolina), extended a contractually enforceable offer to provide face-to-face instruction and on-campus services for the Spring 2020 semester in exchange for Plaintiffs' execution of a Statement of Financial Responsibility—which *expressly incorporates* their "course registration" into the terms of the contract. As noted above (and shown below), the University's arguments to the contrary repeatedly rely on *disputed facts*, rendering summary judgment wholly inappropriate.

Accordingly, because the University has failed to show that the material facts in this case are undisputed and that it is entitled to judgment as a matter of law, the Court should deny its Motion for Summary Judgment.

FACTS

I. The University *Offered* Plaintiffs In-Person, "Face-to-Face Instruction"

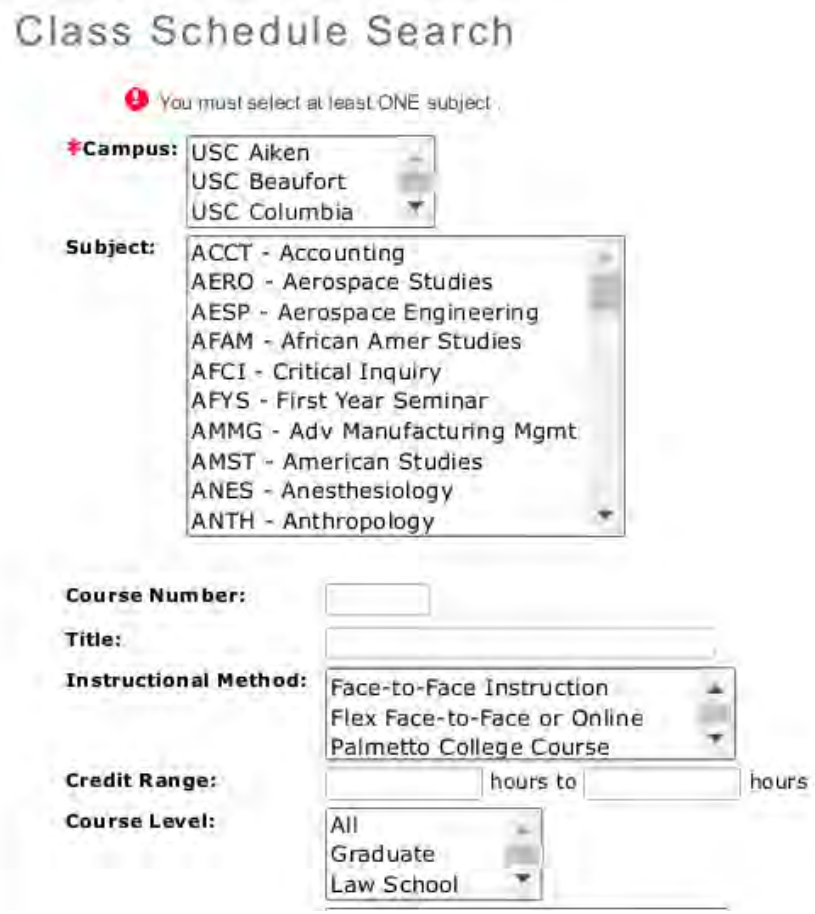
Notably, the University concedes that a contract existed between the University and Plaintiffs. (Def's Br. at 3 ("[T]he parties' relationship is governed by contract.").) While the University disputes the contract's terms, its arguments raise (at most) a fact dispute and fall far short of meeting the University's burden to prove it is entitled to judgment as a matter of law, as Plaintiffs' have provided substantial evidence supporting each element of their breach of contract claims. The relevant facts are as follows.

Approximately 90% of the University's course offerings for the Spring 2020 semester were for "face-to-face" instruction. (Ex. 1, USC_00014490 "Schedule of Courses"; Ex. 2, Expert Report of Ted Tatos ("Tatos Rep.") ¶ 28.) The University publicly defined "traditional instruction" as "face-to-face" instruction in a published policy made available to all potential students, and provided students with a course catalog that specifically identified the relevant classes providing

"face-to-face instruction," as well as the physical on-campus location for each of those in-person classes. (Ex. 1, USC_00014490; Ex. 3, 30(b)(6) Deposition of Aaron Marterer ("30(b)(6) Marterer Dep.") at 23:14–24:13; Tatos Rep. ¶¶ 28, 30 & n.11, 32, 34.)

The *only way* Plaintiffs could register for classes was through "Self Service Carolina," a web-based registration platform. (30(b)(6) Marterer Dep. at 38:5–9 ("[T]here are no other options for a student to physically register. . . . Self Service is the only way that they can register."); Ex. 4, Deposition of Casey Kelly ("C. Kelly Dep.") at 98:13–22; Ex. 5, Deposition of Davia Bunch ("Bunch Dep.") at 27:16–28:12 ("[W]e all go through the same process of registering online for face-to-face instruction . . . [and] we all have the exact same service, Self Service Carolina system.").) Self Service Carolina specifically identified the "Instructional Method" for each course, including offers for "face-to-face instruction." (30(b)(6) Marterer Dep. at 24:16–23; Bunch Dep. at 18:9–19, 144:14-25; Kelly Dep. at 238:23-25, 240:3-8.) In fact, as pictured below, to find courses that met their criteria, one of the first things students did was filter the offered courses by "Instructional Method"—*e.g.*, "face-to-face instruction," "Palmetto College Course,"[6] etc. (30(b)(6) Marterer Dep. at 28:19–31:2; Kelly Dep. at 124:23–125:9 ("[W]e went through all those filters. And then if these three course numbers have the filters that I want and show me face-to-face instruction on Monday, Wednesday, Friday, [and] have seats left, I'm picking that one.").)

[6] Palmetto College provides classes offered primarily through online teaching. Thus, selection of a "Palmetto College Course" as the "Instructional Method" typically reflects a student's choice of a class providing online teaching, as opposed to "face-to-face instruction."



(*Id.* Ex. 73.) Further, once Plaintiffs chose a specific course offering, Self Service Carolina identified the "Instructional Method" for that course, among other details, as shown in the picture below. (*Id.* Ex. 62; Kelly Dep. at 100:14–101:2 (explaining that, when registering for classes, "face-to-face instruction" in the dialogue box description pictured below meant that the course was in a physical classroom).)



II. Plaintiffs *Accepted* the *Offered* "Face-to-Face Instruction" By Registering for Same and Executing Statements of Financial Responsibility

As a prerequisite to access Self Service Carolina and select their courses, Plaintiffs, like all students, were required to execute a written "Statement of Financial Responsibility." (30(b)(6) Marterer Dep. at 22:23–23:7; Ex. 6, First Interrogatory Response ¶ 1; Kelly Dep. Ex. 10 (Plaintiff Kelly's Statement of Financial Responsibility); Bunch Dep. Ex. 102 (Plaintiff Bunch's Statement of Financial Responsibility).) In pertinent part, the Statement of Financial Responsibility provides:

> The University of South Carolina requires all students acknowledge the ***financial arrangement*** between the student and the University. ***By submitting course registration I am entering into a financial arrangement with the University***, and I accept responsibility for all charges billed to my account. I understand that my USC bill will be posted online in Self-Service Carolina (SSC) and that all billing notices will be sent to my USC assigned email address and that it is my responsibility to review and pay my bill by the due date

(C. Kelly Dep. Ex. 10 (emphasis added).) This is, explicitly, a binding "arrangement" between two parties in which students agree to their "responsibility" to pay tuition and fees in exchange for the University's promise to provide them with the classes, instructional methods, and other

services described in the "course registration." (*Id*.; Ex. 7. 30(b)(6) Deposition of Nicole Pressley ("30(b)(6) Pressley Dep.") at 67:17–68:11 (University Bursar agreeing that "the university considers the student to be bound to pay all of the tuition and fees it assesses after they accept th[e] Statement of Financial Responsibility."); C. Kelly Dep. at 16:22-23, 179:15-181:23; Bunch Dep. at 144:14-25.)

Thereafter, Plaintiffs logged into Self Service Carolina, selected the "Instructional Method" of "face-to-face instruction" for at least one course in their "Shopping Cart," and then clicked a button to lock in their selections. (30(b)(6) Marterer Dep. at 34:1–35:17.) The University's reliance on an affidavit from Mr. Marterer to argue otherwise cannot support the MSJ, as: (1) speculation that *some hypothetical other students* might not have seen instructional method when registering is entirely immaterial here, as both Plaintiffs testified that they saw and selected this instructional method, as shown above; and (2) Marterer's affidavit conflicts with his prior, sworn deposition testimony.[7] As shown above, the University—through the Self Service Carolina registration process—represented to Plaintiffs that "face-to-face instruction" classes would be held in specific buildings and classrooms on the University's campuses. (30(b)(6) Marterer Dep. Ex. 62, 73.)

In fact, according to the University's provost, students "registered in classes . . . ***have an expectation that the class will be taught <u>in the method</u> that is specified in Self-Service Carolina***."

[7] *Compare* 30(b)(6) Marterer Dep. at 36:5–16 (explaining that students register after considering course details *including instructional method*), *with* (Marterer Aff., MSJ Ex. W ¶ 30 ("[I]t was possible that a student could register for classes for the Spring 2020 semester without ever seeing the 'Instructional Method.')); *see McMaster v. Dewitt*, 411 S.C. 138, 149 (Ct. App. 2014) ("A trial court may exclude an affidavit when it was submitted 'to contradict that party's own prior sworn statement' . . . ."). Further, the instructional video referenced by the Marterer Affidvit explicitly instructs students to not only check the instructional method when registering using CRN numbers, but to ***double-check it.*** (Marterer Aff., MSJ Ex. W ¶ 14, video at 2:06–31, *available at* https://www.youtube.com/watch?v=cPeKtEwVgFI&t=126s) (last visited Nov. 8, 2023).

(University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester, Updated August 4, 2022 (emphasis added).)[8] Further, ***the University acknowledges that the "Instructional Method" is so important that it cannot be changed absent permission of a dean***. *Id.* Thus, not surprisingly, Plaintiffs registered for face-to-face courses expecting to receive the same. (Bunch Dep. at 16:16–22 ("[T]hat last semester . . .I specifically chose [courses] because of the face-to-face experience."); Kelly Dep. at 238:23-25 (Q: "What type of instructional method did you choose?" A: "Face-to-face instruction.").

III. In *Consideration* For Their "Face-to-Face Instruction" Classes and Associated On-Campus Services, Plaintiffs Paid the University Tuition and Fees

Following Plaintiffs' successful registration, the University assessed tuition and fees based on their course selections during registration for the Spring 2020 semester. (30(b)(6) Pressley Dep. at 67:17–68:11; Kelly Dep. at 87:15-16 ("Signing up for my classes and paying for those classes was my contract with the university."); Bunch Dep. at 117:1–7 ("I entered into an agreement with the University of South Carolina to pay for classes that I registered [for] and I registered for face-to-face classes.").)

Failure to pay tuition and fees could result in disenrollment and/or legal action against the students to collect tuition and fees, among myriad other potential adverse consequences. (30(b)(6) Pressley Dep. Ex. 55 (listing as potential consequences: (1) late fees; (2) registration cancellation; (3) financial hold that prevents registration and access to grades, transcripts, diplomas, and certificates; (4) referral to outside collections agencies; (5) reporting to the National Credit Bureau system; (6) deduction from state income tax refunds; (7) liability for attorneys' fees, interest, and "any other costs and charges necessary for the collection of any amount not paid when due."); *id*.

[8]https://sc.edu/about/offices_and_divisions/provost/academicpriorities/keepteaching/guidance/index.php, accessed 11/6/2023.

at 64:1–65:6 (admitting University refers delinquent student accounts to collections); *see also* Ex. 6, First Interrogatory Responses No. 1 (admitting University has "taken the position that certain students were obligated to make agreed upon payments for tuition and fees.").) 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. (Kelly Dep. at 131:6-132:8, 134 & Exs. 3, 4, 7; Bunch Dep. at 36:20-37:6, 43:13-15, 110:12-16 & Ex. 99.)

IV. The University Breached Its Contract by Failing to Provide Plaintiffs the Promised "Face-to-Face Instruction" and Instead Providing a Different Product

On March 11, 2020, following the COVID-19 pandemic outbreak, University President Bob Caslen announced that classes would be canceled the week after Spring Break (March 16–22, 2020) and that all in-person, face-to-face classes would subsequently be moved to virtual instruction, *i.e.*, ERT. (Ex. 8, 30(b)(6) Deposition of Ed Walton ("30(b)(6) Walton Dep.") at 51:12–25; Tatos Rep. ¶ 53.) On March 19, 2020, the University extended ERT through the end of the semester. (Ex. 9, Kibler Dep. at 98:19–99:4 & Ex. 30; Tatos Rep. ¶¶ 56–57.) Specifically, the University transitioned the in-person, "face-to-face instruction" courses for which Plaintiffs paid tuition and fees to ERT, including. (*Id.*; Ex. 10, First RFA Response ¶ 3; Ex.. 6, First Interrogatory Response ¶ 12.) Moreover, Plaintiffs were not allowed on campus to utilize the services and equipment for which they had paid fees—*e.g.*, art lab fee, language lab fee, and technology fee. (Kelly Dep. at 134, 237:9–238:12; Bunch Dep. at 93:23-94:22, 153:16-19.)

The University's admitted purpose of changing to ERT, rather than shutting down classes entirely, was ***not*** because the University concluded it lacked a contractual obligation to provide the aforementioned offered-and-accepted services. Instead, the admitted purpose was to ***save money; specifically by providing a different educational product in the hope the University could***

avoid refunding any portion of the tuition and fees paid by Plaintiffs. That is, according to the University, ***the "[a]bility to 'protect' tuition through deployment of online strategies, resulting in granting of course credit, [was] key***." (Ex. 11 USC_00007532 (emphasis added); Tatos Rep. ¶ 115.) As the University's Chief Financial Officer further explained in an internal communication:

> We got everyone's attention by telling them the cost of simply closing (yes, that was on the table for about 48 hrs) then we [turned] that to the basic per day costs in terms of lost tuition and auxiliary enterprise refunds. Since then, we have made the decision to extend spring break and two weeks of ad-hoc teaching.

(Ex. 12, USC_00009240; Tatos Rep. ¶ 58.) Additionally, other internal documents produced by the University show that the "goal" of the ERT program "was to allow the student to progress while ***also 'protecting' the tuition/fee revenue stream***." (Ex. 9, Kibler Dep. Ex. 25 at USC_00046366; Tatos Rep. ¶ 115.)

Notably, the University issued refunds for other on-campus products and services such as housing, meals, and a $200 parking fee—*on the grounds that it was required to do so because it declined to provide the offered, accepted, and paid for housing, meals, and parking*. (*See* C. Kelly Dep. Ex. 91; Ex. 8, 30(b)(6) Walton Dep. at 65–66 & Ex. 63.) Indeed, the University's Chief Financial Officer reasoned that, where a service is provided by contract, "Students Pay. We Deliver. ***We don't deliver then students don't pay***." (30(b)(6) Walton Dep. at 65–66 & Ex. 63 (emphasis added).) Yet, the University issued no refunds (partial or otherwise) of tuition for "face-to-face instruction" or certain of the mandatory fees for on-campus services (including technology and lab fees) for which the students paid but the University failed to deliver. (Ex. 10, First RFA Responses ¶¶ 6, 12, 14–17 (tuition and technology fees).[9]

[9] The University attempts to argue that the "fees assessed during the Spring 2020 Semester were not refunded because they related to educational and technology services that students continued

The University's refusal to provide *any* such refunds was particularly unjust given that the University had a ***budget surplus*** following the pandemic—***comprised of over $58 million in net income (i.e., profit) as of June 30, 2020***. (Ex. 13, 30(b)(6) Deposition of Kelly Epting At 104:4–22 & Ex. 60.) Moreover, the University acknowledges that its refusal to issue partial refunds of the tuition and fees it charged for the "face-to-face instruction" and associated on-campus services it failed to provide resulted in a deluge of complaints from both students and their parents.[10] Nonetheless, despite the University's undisputed cost savings resulting from the move to ERT and closure of its campuses and facilities, and the uproar from students and parents asking for a partial refund, the University kept the full value of tuition and fees it had collected from the Plaintiffs and other students. This lawsuit followed.

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to receive before, during, and after the transition to virtual instruction." (Def's Br. at 4.) The University does not even argue—let alone provide evidence showing—that its expenses relating to technology stayed the same or increased during the pandemic. Although the University no doubt spent some portion of its collected technology fees on ERT-related technology expenses, the precise amount it spent remains unknown. Because the University collected those fees under the guise of providing on-campus technology services and then unilaterally blocked access to on-campus technology, a genuine issue of fact remains regarding the extent to which the University unjustly profited from the Plaintiffs' technology fees in its move to ERT. Moreover, the University does not attempt to argue that summary judgment should be granted on Plaintiff Kelly's language and art lab fees, as there is no dispute that she paid those fees for in-person experiences she did not receive.

[10] *See, e.g.*, Ex. 14, Deposition of Sandra Kelly ("S. Kelly Dep."), Ex. 48 at USC_00020006 (parent complains that "I feel that we are being charged tuition for a full class experience where we can communicate with the teachers in a face-to-face environment but are now being forced to learn from home); *id.* at USC_00020005 (University Bursar stating that "[s]ince the pandemic we have gotten countless complaints about the lab fees and technology fee being assessed for online classes."); *id.* Ex. 49 (student complains: "The issue I have is that the fee is for lab supplies which are not being . . . utilized, therefore I do not understand why I am not having a portion returned to me."); 30(b)(6) Pressley Dep. Ex. 50 at USC_00042047 (University Bursar internally remarking, "the university could have decided to refund tuition if we chose to."); *See id.* Ex. 52 at USC_00015185 (concerned parent "pleading with the powers that be" to provide "some fairness with tuition costs" and reconsider a "plan on reduction of tuition").

LEGAL STANDARD

"Summary judgment is only appropriate where it is ***perfectly clear*** that no genuine issue of material fact is involved and an inquire into the facts is not desirable to clarify application of the law." *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 418 (Ct. App. 1990) (emphasis added); *Weston v. Kim's Dollar Store*, 399 S.C. 303, 308 (2012). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact, and the Court must "liberally construe the pleadings, affidavits, and other documents in favor of [Plaintiffs], the nonmoving party, and give [them] the benefit of ***all*** favorable inferences that might reasonably be drawn therefrom." *Id.* (emphasis added).

ARGUMENT

I. The University's Sovereign Immunity Arguments Still Fail.

The University's sovereign immunity argument is virtually identical to the argument in its motion to dismiss, which this Court denied. (*Compare* Def's Br. at 8-11, *with* Def's Br. ISO Mot. to Dismiss at 19-21.) The University cites no additional evidence and adds *nothing* of substance to the arguments previously made. The Court need not re-plow the same ground and should reject this argument for the same reasons previously stated.

Under controlling South Carolina law, the University cannot use sovereign immunity to shield itself from Plaintiffs' claims. As to Plaintiffs' breach of contract claim, when the State of South Carolina enters into a contract, it implicitly consents to be sued and waives sovereign immunity to the extent of its contractual obligations. *See Kinsey Constr. Co. v. S.C. Dep't of Mental Health*, 272 S.C. 168, 171, 249 S.E.2d 900, 902 (1978), *partially overruled on other grounds*, *Unisys Corp. v. S.C. Budget and Control Bd.*, 346 S.C. 158, 166, 551 S.E.2d 263, 268 (2001); *see also Hodges v. Rainey*, 341 S.C. 79, 92, 533 S.E.2d 578, 585 (2000) ("We eliminated

the State's immunity from suit based upon its contractual obligation in 1978 in *Kinsey* . . ."); *Chesterfield Cnty. v. State Highway Dep't of S.C.*, 181 S.C. 323, 187 S.E. 548, 550 (1936) (breach-of-contract suit could proceed against the State despite no specific statutory waiver), *relied on by Kinsey*, 272 S.C. at 73; *Sloan Constr. Co. v. Southco Grassing, Inc*., 377 S.C. 108, 118 n.6, 659 S.E.2d 158, 164 n.6 (2008) ("A sovereign is not immune from a suit based on its breach of a contractual obligation."); *see also Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (unjust enrichment claim sounds in quasi-contract); *N. Am. Rescue Prod., Inc. v. Richardson*, 411 S.C. 371, 379 (2015) ("Promissory estoppel is a quasi-contract remedy."); S.C. Code Ann. § 59-101-10 (showing University of South Carolina is an arm of the state).

The University's contention that *Unisys* overruled *Kinsey* on this point is misplaced. (Def's Br. at 9.) *Kinsey* had two relevant holdings: (1) the state waives sovereign immunity on contract claims by virtue of its entry into the contract; and (2) private parties may bring claims on contracts secured pursuant to the procurement process in circuit court. *Kinsey*, 272 S.C. at 171, 249 S.E.2d at 902. *Unisys* overruled *Kinsey* only as to the second of these holdings. *See Unisys*, 346 S.C. at 166, 551 S.E.2d at 268. The first holding—that the State waives sovereign immunity on contract claims by virtue of its entry into the contract—was untouched, and so was *Kinsey's* reliance on *Chesterfield*, which unquestionably remains good law. But even if *Unisys* altered the relevant portion of *Kinsey*, *Sloan* restored *Kinsey* on this point.[11]

Further, although the University cites *Thomas v. State of S.C*., No. 2015-CP-40-07269 (S.C. Ct. Com. P. Apr. 2, 2019) for the proposition that South Carolina is infinitely immune from

[11] This is the exact position taken by Nelson, Mullins, Riley, & Scarborough in prior litigation before a South Carolina state court. *See* Ex. 15 (arguing that South Carolina is not immune from breach of contract claims).

contractual claims, that decision is (1) not binding and (2) contrary to the South Carolina Supreme Court's decisions on this issue, as outlined above. Likewise, the University's citation to North Carolina law—holding that quantum meruit claims against North Carolina are barred by sovereign immunity—is equally unavailing. In South Carolina, "when a State secures itself the benefits of a contract, it implicitly assumes the corresponding liabilities." *Kinsey*, 272 S.C. at 171, 249 S.E.2d at 902. Accordingly, the State of South Carolina implicitly consented to be sued by entering into contracts with the University's students.

If the University's position were the law, the results would be absurd: no one could rely on any State entity to honor its obligations unless there was a specific statute waiving sovereign immunity, and the State could elect not to honor any of its contractual obligations on a whim. As the Court noted in *Kinsey*, "[t]o hold otherwise would be to endorse an obvious contradiction, for it cannot be true that the State is empowered to contract with individuals and yet retains the power to avoid its obligations." *Id.*[12]

Similarly, as for Plaintiffs' conversion claim, the South Carolina Tort Claims Act waives sovereign immunity and allows recovery for the State's "torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages and exemptions from liability and damages contained herein." S.C. Code Ann. § 15-78-40; *see also Summers v. Harrison Const.*, 298 S.C. 451, 454, 381 S.E.2d 493, 495 (Ct. App. 1989) ("The South Carolina Tort Claims Act does not create causes of action. Rather, it removes the common law bar of sovereign immunity. . . to the extent mandated by the Act."). However, the

[12] The same analysis applies to Plaintiffs' unjust enrichment and promissory estoppel claims to the extent they sound in quasi-contract rather than tort. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (2012) (unjust enrichment); *Thomerson v. DeVito*, 430 S.C. 246, 257, 844 S.E.2d 378, 384 (2020) (promissory estoppel).

immunity provided by the Act is an affirmative defense. *Frazier v. Badger*, 361 S.C. 94, 101, 603 S.E.2d 587, 590 (2004).

Here, the University has failed to meet its burden of proving its immunity defense. Indeed, it has submitted *no evidence*—only executive orders issued by the Governor, which say nothing about whether tuition and fees must be refunded. The University has the burden of showing that Plaintiffs' losses resulted from the "adoption, enforcement, or compliance with a[] law" or the "imposition or establishment of a quarantine by a governmental entity." S.C. Code Ann. § 15-78-60(4), (18). It has not and cannot make this showing. Although the University may have been required to stop in-person instruction to comply with the Governor's executive orders, it was not required to retain the tuition and fees it charged for face-to-face instruction. Plaintiff's conversion claim is premised on the University's ***subsequent decision*** to retain the tuition differential and other fees paid in connection with on-campus activity. (SAC ¶¶ 78-82.) The University does not claim (much less show) that the Governor also required it to retain all tuition and fees students paid for in-person instruction and other on-campus activities. In fact, the opposite is true, as evidenced by the University's refund of dining, parking, and housing charges.

The University waived sovereign immunity by entering into contracts with Plaintiffs and by virtue of the SCTCA. It has not met and cannot meet its burden of showing otherwise.

II. The University's Educational Malpractice Arguments Also Still Fail.

Again, the University's educational malpractice arguments are virtually identical to those previously raised and rejected by the Court. The Court should reach the same conclusion as to the present motion that it reached in denying the University's motion to dismiss.

A. Plaintiffs' Claims Are "Objective" Claims Based on Specific Promises by the University, to Which the Educational Malpractice Doctrine Does Not Apply.

Only "subjective" claims are barred by the educational malpractice doctrine; "objective" claims are not. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 460-61, 578 S.E.2d 711, 716-17 (2003). Subjective claims are those alleging that students received "*deficient* academic services" or that they have "not received the *education* they ha[ve] been promised." *Id.* (first emphasis in original, second emphasis added). In contrast, objective claims are those based on a "specific promise to provide certain services" or that reference "specific services for which the [plaintiffs] allegedly paid and which [the university] allegedly failed to provide." *Id.* (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 411-12, 417 (7th Cir. 1992); *CenCor, Inc. v. Tolman*, 868 P.2d 396, 399-400 (Colo. 1994)).

Plaintiffs' claims are objective. There is a specific, "identifiable contractual promise that [the University] failed to honor in this case." *Hendricks*, 353 S.C. at 461. The University made specific, written promises during the registration process that it would provide face-to-face instruction and on-campus services, and then it failed to provide both during the second half of the Spring 2020 semester. The Court need not delve into "the nuances of educational processes and theories" to resolve this claim. *Ross*, 957 F.2d at 411-12. Contrary to the University's argument, Plaintiffs' claims do not depend on whether ERT is an "inferior" product—it *is* an inferior product of course, as the University's former president has admitted, but that is not Plaintiffs' theory of the case. (Ex. 16, USC_00049360–63 (former University President Bob Caslen admitting students "faced with no option other than prolonged remote learning, will elect to postpone or discontinue their education").)

Rather, Plaintiffs' claims are based on the University's total failure to fulfill its specific, objective promises to provide face-to-face instruction and access to on-campus services.[13] The difference is *in kind*, not in degree. (Tatos Rep. at 19 ("Emergency remote teaching (ERT) is a different product than face-to-face and pre-planned online instruction.") (alterations omitted).) The University's own admissions confirm it understands (as does its former President) that ERT is nothing more than a stopgap measure that is an entirely different product than what students registered for. (*See, e.g.*, *Additional Resources*, Univ. S.C. Cntr. for Teaching Excellence[14] (citing *The Difference Between Emergency Remote Teaching and Online Learning*, Hodges, Charles et. al (Mar. 27, 2020)[15] ("Well-planned online learning experiences are ***meaningfully different*** from courses offered online in response to a crisis or disaster. Colleges and universities working to maintain instruction during the COVID-19 pandemic should understand those differences when evaluating this emergency remote teaching.") (emphasis added).)

[13] *See* Second Amended Complaint ¶ 30 ("Plaintiffs' claims are not based on the (doubtlessly inferior) quality of the education they received through their online classes. Instead, Plaintiffs' claims are more simple and straightforward: Plaintiffs paid tuition for in-person classes, Defendant obligated itself to provide these in-person classes in exchange for that payment, and Defendant failed to provide those in-person classes."); University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester (University Provost admitting students "have an expectation that the class will be taught in the method that is specified in Self-Service Carolina"), https://sc.edu/about/offices_and_divisions/provost/academicpriorities/keepteaching/guidance/index.php, (last visited November 8, 2023).

[14] https://sc.edu/about/offices_and_divisions/cte/teaching_resources/adapting_large_classes/resources/index.php (last visited Nov. 8, 2023).

[15] https://er.educause.edu/articles/2020/3/the-difference-between-emergency-remote-teaching-and-online-learning (last visited Nov. 8, 2023).

B. Plaintiffs' Claims Do Not Require Any Second-Guessing of the University's Decision to Shut Down Its Campus.

The University's suggestion that Plaintiffs' claims must be barred because they received *something* misconstrues the educational malpractice doctrine and ignores the wealth of authority to the contrary. Plaintiffs' claims do not require the Court to second-guess the University's decision-making in shutting down its campus or to assess the subjective *value* of what it chose to provide in place of face-to-face instruction—only whether the University provided what was specifically contracted for. *Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211, 1218 (M.D. Fla. 2020) (a tuition and fees case "is not about the quality of the College's education" or the "*decision* to move to online learning" but "simply about an alleged promise to provide in-person learning that was allegedly breached"); *Saroya v. Univ. of the Pac.*, 503 F. Supp. 3d 986, 996 (N.D. Cal. 2020) (plaintiff's "claim is not that UOP failed to provide students with an adequate education, but that it failed to provide certain services as promised. Notwithstanding Plaintiff's allegations comparing remote learning to in-person learning, '[r]uling on these issues would not require an inquiry into pedagogical methods, the quality of Defendant's instructors and curriculum, or an evaluation of Plaintiff'[s] 'progress or achievement, or the reasons for their success or failure.'") (citation omitted); *Ford v. Rensselaer Polytechnic Inst.*, 507 F. Supp. 3d 406, 417 (N.D.N.Y. 2020) ("Plaintiffs . . . do not challenge the merits of RPI's decision to shift to remote learning, which is what New York's educational malpractice rule seeks to avoid. . . . All they argue is that regardless of fault, the value of the on-campus experience defendant plausibly promised them is greater than the value of the remote experience they received. ***That can be true even if defendant made every choice reasonably, or even perfectly***.") (emphasis added); *Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1342 (S.D. Fla. 2020) ("The Court emphasizes that this is not a case about the quality of the education Lynn provided students during the Spring 2020 semester. . . . Rather, Plaintiff's claim

is based on Lynn's alleged failure to provide in-person, on-campus instruction and access to campus facilities and resources."). Whether the University provided what was contracted for is a jury question. *Roberts v. Sheriff Const. Co.*, 284 S.C. 618, 621, 328 S.E.2d 123, 125 (Ct. App. 1985) (whether parties breached a contract is a jury question); *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009) ("The determination of whether a party has breached a contract is a question of fact.").

Whether the University *mitigated the damages for its breach* by providing ERT goes to an affirmative defense the University failed to plead and thus waived. *Darby v. Waterboggan of Myrtle Beach, Inc.*, 288 S.C. 579, 244 S.E.2d 153 (Ct. App. 1986) (defendant has "the burden of proof on the issue of mitigation of damages"); *Creative Commc'n Servs., Inc. v. Travelers Prop. & Cas. Co. of Am.*, No. 2011-UP-525, 2011 WL 11735816, at *1 (S.C. Ct. App. Dec. 5, 2011) (reversing mitigated damages award because the defendant waived mitigation of damages by failing to plead it). In other words, if the University wished to argue that providing ERT mitigated the damages for breaching its contract to provide face-to-face instruction, it could have done so. It chose otherwise.

But even if it had properly raised this affirmative defense, the fact that *the University itself has attempted to inject this issue into the case* does not convert Plaintiffs' claim into one of educational malpractice. Rather, the issue of whether Plaintiffs' expectation damages should be reduced based on the value of what they *did* receive would, at best, be a factual question for the jury that precludes summary judgment.

III. The University's Lack-of-Damages Standing Arguments Fail.

Plaintiffs suffered a legally cognizable injury for standing purposes when the University breached its contract. As described in detail above, Plaintiffs were damaged by the University's

unilateral switch to ERT, that damage does not constitute a claim of educational malpractice, and Plaintiffs are entitled to prove those damages at trial. *See HIS Glob. Ltd. v. Trade Data Monitor, LLC*, No. 2:18-cv-01025, 2021 WL 2134909, at *12 (D.S.C. May 21, 2021) (granting summary judgment in plaintiffs' favor, finding defendant liable for breach of contract, but leaving for the jury the issue of damages, as it is "for the jury to decide the 'extent of the breach,' i.e., the damages arising from [the defendants'] violations of the relevant contracts"). *Cf. Moore v. University of S. Fla. Bd. of Trustees*, No. 21-CA-2445 (Cir. Ct. of Hillsborough Cnty., Fla. Aug. 14, 2023) ("[t]he fact that Plaintiff's *extent* of [her] injury (i.e., damages) might vary from that of the other class members does not bar" class certification) (quotation marks and citations omitted) (emphasis in original). Thus, the facts that Plaintiffs still earned credits, improved their GPAs, and secured employment are immaterial to whether Plaintiffs were injured for standing purposes, as their injury was not receiving the product they bargained for. (*Compare* Def's Br. at 11–13, *with* Tatos Rep. at 45–47 (explaining in detail why "[r]eceiving credit and fulfilling degree requirements do not mean that students received the educational product for which they paid").) Thus, material issues of fact exist regarding damages and, therefore, summary judgment must be denied. *See HIS,* 2021 WL 2134909, at *12.

The University further argues that Plaintiff Bunch lacks standing because she did not pay tuition and fees; rather, she used money from various grants and scholarships to fulfill her contractual payment obligations with the University. (Def's Br. at 13–15.) This argument is a red herring. Other courts to reach this issue have concluded that the student bound by the contract—not the party who ultimately pays the bill—is the intended beneficiary of the contract and therefore has standing:

> GCU's argument that Plaintiff lacks standing because his parents paid his fees and costs must be rejected. While Plaintiff's parents paid his fees and costs, he is

> ultimately the individual who had a contract with GCU. In other words, if he had failed to pay, he—not his parents—would be on the hook. It does not matter how he procured the money to pay his obligations to GCU, it was ultimately his obligation. As Plaintiff points out, if this were not the case, students could rarely sue a university because students often do not have the means to pay their own tuition, fees, and room and board. This would lead to absurd results. It is irrelevant if Plaintiff got the money from his parents, a student loan, or a scholarship. Thus, the Court rejects GCU's argument that Plaintiff lacks standing on this basis.

Little v. Grand Canyon Univ., No. CV-20-00795-PHX-SMB, 2022 WL 266726, at *3 (D. Ariz. Jan. 28, 2022); *see also Arredondo v. Univ. of La Verne*, 618 F. Supp. 3d 937, 949 (C.D. Cal. 2022) (noting the "true payer for class members' tuition costs" not relevant, as "[t]hird-party grantors or parents paying for class members' education do not have standing to pursue a contract claim regarding educational expenses with a university because they are not intended beneficiaries"); *Ninivaggi v. Univ. of Delaware*, No. 20-cv-1478, 2023 WL 2734343, at *2 (D. Del. Mar. 31, 2023) (finding students who paid for tuition "with money from outside sources" had standing because "[t]hose students, no less than students who paid out of their own pockets, were parties to the contract that U. Delaware allegedly breached").

Indeed, Plaintiff Bunch is the one who contracted with the University, signed the Statement of Financial Responsibility, received the invoice from the University, and would have been subject to the University's various enforcement mechanisms had she failed to pay. (Bunch Dep. Ex. 102 (listing as potential consequences as including referral to outside collections agencies, adverse reporting to the National Credit Bureau, and financial liability for attorneys' fees, interests, and any other costs incurred in collecting payment); (30(b)(6) Pressley Dep at 64:1–65:6 (admitting University refers delinquent student accounts to collections); *see also* Ex. 6, First Interrogatory Responses No. 1 (admitting University has "taken the position that certain students were obligated to make agreed upon payments for tuition and fees.").) The fact she received funding through

separate channels to satisfy her contractual obligations with the University does not deprive her of standing.

IV. The University Has No Defense to Plaintiffs' Breach-of-Contract Claim.

a. The University Made an Enforceable, Specific Promise to Provide Face-to-Face Instruction for the Spring 2020 Semester.

As shown above, the University made a specific, unambiguous promise through Self-Service Carolina—in writing—that the method of instruction Plaintiffs would receive based on their course registration would be face-to-face. This, which the University cannot deny, defeats its meritless argument that Plaintiffs assert only "broad allegations without reference to a specific contractual promise." (Def's Br. at 21.) The specific, written contractual promise is explicit in the Self Service Carolina course registration:



That is, in exchange for Plaintiffs' agreement to pay all tuition and fees associated with their course registration, the University promised to provide them with face-to-face instruction on the University's campus in specific buildings and classrooms. The University failed to proffer any evidence that excused it from performing this promise during the Spring 2020 semester—whether "in the midst of a pandemic" or otherwise. (Def's Br. at 22.)

The University's argument that it should be absolved of liability because its "website does not state that face-to-face instruction will be provided even if it is precluded by public health concerns, as in a pandemic" (MSJ ¶ 6(b)) is an attempt to obfuscate the University's failure to include a *force majeure* clause in its contracts with students. In South Carolina, "[t]he court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 89, 326 S.E.2d 395, 400 (1985) ("[A] party to a contract should not be given relief from the requirements of the contract simply because it proved to be less favorable than an alternative provision would have been."); *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) ("[A] court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

Likewise, the fact that the Statement of Financial Responsibility itself does not state that it contains a specific promise of face-to-face instruction is irrelevant, given that it ***expressly incorporates "course registration" as part of the terms of the contract***. (*See* C. Kelly Dep. Ex. 10, Statement of Financial Responsibility ("***By submitting course registration I am entering into a financial arrangement with the University of South Carolina*** and I accept the responsibility for all charges billed to my account.") (emphasis added).) Regardless, the University failed to include an integration clause or any other language in the Statement of Financial Responsibility suggesting it embodies the entire agreement of the parties. *See RentCo., a Div. of Fruehauf Corp. v. Tamway Corp.*, 283 S.C. 265, 267, 321 S.E.2d 199, 201 (Ct. App. 1984) (absent an integration clause, consistent parol agreements not intended to be merged with final agreement are enforceable). The Statement of Financial Responsibility is not only *consistent* with the University's promise to

provide face-to-face instruction, but it expressly incorporates "course registration" as part of the contract, confirming that Plaintiffs' acceptance of the "financial arrangement" (*i.e.*, the contract) with the University is consideration for the promises the latter made in the course registration system.

The University's suggestion that Plaintiffs must "point to contractual language promising an in-person [sic] instruction *at all times*" (Def's Br. at 21 (emphasis added)) attempts to impose nonexistent requirements and ignores the plain language of the contract. (Def's Br. at 3 ("the parties' relationship is governed by contract.").) The University unqualifiedly promised to provide the face-to-face instruction during the Spring 2020 semester. (30(b)(6) Marterer Dep. at 24:16–23; Bunch Dep. at 18:9–19, 144:14-25; Kelly Dep. at 238:23-25, 240:3-8.) There is no contractual term that limits, modifies, or abridges this responsibility, temporally or otherwise. Whether the University breached this obligation is a jury question. *Roberts*, 284 S.C. at 621, 328 S.E.2d at 125 (breach a jury question); *Laser Supply & Servs., Inc.*, 382 S.C. at 337, 676 S.E.2d at 145 (breach a question of fact).

This case is entirely unlike the cases cited by the University, all of which involved students who had *no* written agreement with the school at issue. *Zwiker v. Lake Superior State Univ.*, 340 Mich. App. 448, 477, 986 N.W.2d 427, 443 (2022) (plaintiffs could not point to any contract language, and financial agreement contained an integration clause); *Chong v. Ne. Univ.*, 494 F. Supp. 3d 24, 28 (D. Mass. 2020) (plaintiffs failed to plead course descriptions comprised part of the parties' contract or part of the enrollment process); *Bergeron v. Rochester Inst. of Tech.*, No. 20-CV-6283 (CJS), 2023 WL 1767157, at *7 (W.D.N.Y. Feb. 3, 2023) (statements in course bulletins and the online registration system that classes would be in specific locations insufficient; stating in dicta that, while some courts had found to the contrary, others had found an enforceable,

specific promise of in-person instruction through registration); *Lindner v. Occidental Coll.*, No. CV 20-8481-JFW(RAOX), 2020 WL 7350212, at *8 (C.D. Cal. Dec. 11, 2020) (course catalogue, course schedule, and syllabi contained no specific promise of in-person instruction); *Miller v. Lewis Univ.*, 533 F. Supp. 3d 678, 685 (N.D. Ill. 2021) (course schedule publication with notations concerning instructional method insufficient to form a binding promise).[16] Unlike the plaintiffs in those cases, the University made a specific promise through Self-Service Carolina to provide face-to-face instruction. Accordingly, it has failed to show that there is no enforceable agreement.

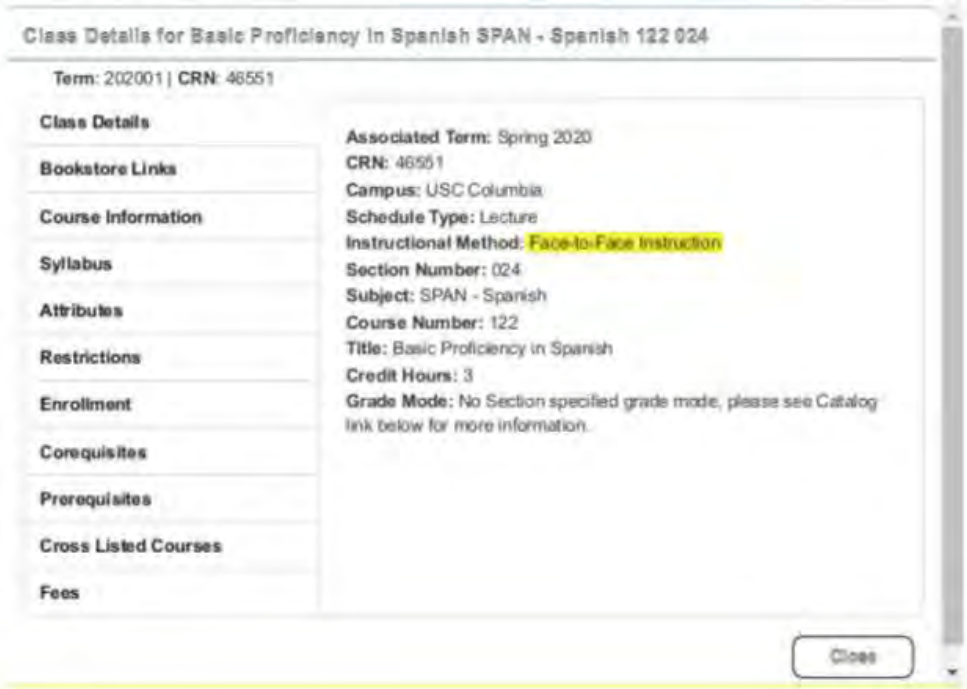
b. Whether Plaintiffs "Could" Have Registered Without Ever Seeing the University's Promise of Face-to-Face Instruction Is Irrelevant.

The University's claim that it is entitled to summary judgment because (1) there was more than one way to register, and (2) hypothetical students (not Plaintiffs) could register without ever seeing the instructional method is a red herring. Not only is whether Plaintiffs actually searched for or saw the instructional method during registration (as discussed below) completely irrelevant, but the suggestion that they failed to do so is demonstrably false. Indeed, Plaintiffs did *in fact* specifically search for and select face-to-face instruction through Self-Service Carolina. (*See, e.g.*, Bunch Dep. at 18:9–19, 144:14-25 ("[W]hen I select face-to-face . . . I was expecting the university to give me face-to-face instruction. So that's what I was thinking when I was clicking the button."); Kelly Dep. at 238:23-25 (Q: "What type of instructional method did you choose?" A: "Face-to-face instruction."), 240:3-8 (Q: "The course registration that you submitted to the university to form this contract, is that reflected in the two documents we just looked at a moment ago when

[16] The University mischaracterizes the *Miller* case by suggesting the court rejected a promise of in-person instruction during the registration process, but the court was discussing statements made in a *publication*, not during the registration process itself. This mischaracterization serves only to highlight and acknowledge that promises made during the registration process itself, where students must affirmatively make their selections and acknowledge their financial responsibility, are enforceable.

you selected face-to-face instruction in the classroom?" A. "Yes.").) Whether Plaintiffs *could have* signed up for classes without making such a selection is irrelevant.

Moreover, the University has *admitted* through the testimony of its Rule 30(b)(6) deponent that students must register through Self Service Carolina. "Self Service is the ***only*** way that [students] can register" for classes. (Marterer Dep. at 38:5-9 (emphasis supplied).) "[T]here are two ways to register." (Marterer Dep. at 34:9-10.) One involves searching for classes through the Self Service system's "schedule search" function, which allows filtering by "face-to-face instruction," and then adding classes to a shopping cart before locking them in. (*Id.* at 28:19-29:3; 30:4-10; 34:9-10; Ex. 73.) The other method involves simply copy/pasting a known CRN number into the Self-Service system for each class without using the schedule search function. (See Marterer Dep. at 34:12-14.) The University has admitted that, either way, "the student has . . . gone through and selected classes based on the information that's provided in Ex. . . . 62." (*Id.* at 36:5-16 (emphasis added).) Ex. 62 explicitly sets forth the instructional method:



(*Id.* Ex. 62.)

Regardless, under elementary principles of contract law, whether Plaintiffs saw the instructional method during registration is irrelevant, as the contracting party is deemed to have read its contents. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541 & n.6, 542 S.E.2d 360, 365 & n.6 (2001) ("party signing [an] agreement is presumed to have read it"); *Doub v. Weathersby-Breeland Ins. Agency*, 268 S.C. 319, 326, 233 S.E.2d 111, 114 (1977) (same); *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *4 (D.S.C. Dec. 15, 2011) (same); *Gourdine v. Redstone Mod. Dentistry*, No. CV 0:21-2656-MGL-SVH, 2021 WL 5333012, at *4 (D.S.C. Oct. 21, 2021) (failure to read contract is "irrelevant" to whether it is binding because "an *elementary principle of contract law* is that a party signing a written contract has a duty to inform himself of its contents before executing it") (emphasis added), *report and rec. adopted*, No. CV02102656MGLSVH, 2021 WL 5330619 (D.S.C. Nov. 16, 2021) (internal quotation marks and citation omitted).

Likewise, it is well settled that a contract is formed upon acceptance of an offer even when the terms of the contract are within a "popout," "hyperlink," or "clickwrap" agreement. *Lampo*, 437 S.C. at 244 (holding that arbitration contract was enforceable where offer contained only link to terms); *Church v. Hotels.com L.P.*, No. CV 2:18-0018-RMG, 2018 WL 3130615, at *2 (D.S.C. June 26, 2018) (terms of service in a hyperlink enforceable); *Kraft Real Est. Invs., LLC v. HomeAway.com, Inc.*, No. 4:08-CV-3788, 2012 WL 220271, at *10-11 (D.S.C. Jan. 24, 2012) (same); *Rock v. Solar Rating & Certification Corp.*, No. 8:17-CV-3401-DCC-JDA, 2018 WL 3750617, at *5 (D.S.C. July 23, 2018) (same), *report and rec. adopted*, No. 8:17-CV-3401-DCC, 2018 WL 3745057 (D.S.C. Aug. 7, 2018); *Hireguru, LLC v. McKay*, No. 3:16-CV-01669-MBS, 2016 WL 4536344, at *2 n.1 (D.S.C. Aug. 31, 2016) (same).

c. The University Did Not Reserve any Rights to Modify Its Contracts By Routinely Breaching Them or Posting a Disclaimer on Its Website.

The University contends that face-to-face instruction was somehow not a part of its contract with students because it routinely engages in a bait-and-switch—promising to provide face-to-face instruction and then, in fact, providing something different. (*See* Def's Br. at 28-29.)

The University's suggestion that its practice of routinely violating its obligations under its contracts with students somehow absolves it of liability or entitles it to summary judgment is ironic and nonsensical. The University promised to provide face-to-face instruction and on-campus services to Plaintiffs and all other class members in exchange for their promise to pay tuition and fees. The University's admission that it does not keep this promise does not absolve it from its obligations to do so, much less modify the terms of the contracts it entered into with Plaintiffs. *In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2021 WL 3560783, at *7 (C.D. Cal. Aug. 6, 2021) (rejecting USC's argument that a reservation of rights precluded the existence of a contract); *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603 & n.3, 799 S.E.2d 912, 917-18 & n.3 (2017) ("the subjective, after-the-fact meaning one party assigns to" a contract cannot trump the "objective manifestations of assent") (internal quotation marks and citation omitted); *Sauner*, 354 S.C. at 405 (one party cannot unilaterally alter terms). *Cf. In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2023 WL 6453814 (C.D. Cal. Sept. 29, 2023) (finding unpersuasive USC's argument that a reservation of rights in one of its catalogues rendered class treatment inappropriate).

The University also claims it "reserved the right to amend its policies and procedures at any time" simply by posting an academic bulletin to its website containing a boilerplate disclaimer. Critically, however, the bulletin expressly disclaims it "is for information purposes only and does not constitute any contractual agreement between a student and the University of South Carolina."

(MSJ Ex. N at USC_00001467.) As a result, this bulletin could not possibly have become part of the terms of the contract between the University and Plaintiffs. Moreover, the University provides ***no factual support whatsoever*** for its assertion that this academic bulleting was "provided during course registration." (Def's Br. at 30; *see* Bunch Depo. 252:25-253:1 ("I don't recall ever seeing this specific bulletin."). Contrary to the University's assertion, the bulletin doe ***not*** provide that it is available through Self Service Carolina, and it contains no signature or acknowledgment page. (Def's Br. at 30, Ex. N.) Further, unlike the plaintiffs in the case cited by the University, Plaintiffs do not rely on the document containing the reservation of rights itself for their breach of contract claim (i.e., the bulletin) but rather the University's express, written representations in a totally separate set of documents provided through Self-Service Carolina. *Dixon v. Univ. of Miami*, 75 F.4th 1204, 1209 (11th Cir. 2023) (plaintiffs relied on handbook regulations and procedures, which themselves contained a reservation of rights, to prove contractual promise of in-person education). The University has simply failed to meet its burden of showing that this bulletin or any other "reservation of rights" became a part of the parties' contract.[17]

d. The Doctrine of Impossibility Does Not Apply.

The doctrine of "impossibility" does not apply, and even if it did, it would not prevent Plaintiffs from recovering damages from the University. "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). "A party to a contract cannot be excused from performance on the theory of

[17] The University also argues that Plaintiff Casey Kelley confirmed that the shift to emergency remote teaching did not affect her internship. This goes only to the *extent* of her damages, not the viability of her claims. The University cannot show she received the benefit of the bargain for her other classes.

impossibility of performance unless it is made to appear that the thing to be done cannot by *any means* be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed in law impossible." *Id.* (quotation marks and citation omitted) (emphasis added). Here, the impossibility of the University's performance under the circumstances is a disputed fact that is not suitable for summary judgment. It was not impossible for the University to perform on its promise to provide face-to-face instruction and access to campus services. It could have done so.

Regardless, even assuming *arguendo* that the impossibility defense applied here, that does not mean the University can *keep the money it received from Plaintiffs*. The effect of the impossibility doctrine is to excuse both parties' performance, not just one side. *Meng v. New Sch.*, No. 23-CV-3851(JSR), 2023 WL 5162181, at *5 (S.D.N.Y. Aug. 11, 2023) ("[T]he remedy for impossibility, or its related and more applicable principle, frustration of purpose, is rescission of the contract. For this reason, TNS's impossibility defense would not relieve it of its obligation to return any portion of the tuition or fees plaintiff paid to which the university is not entitled.") (citation and quotation marks omitted); *Omori v. Brandeis Univ.*, 635 F. Supp. 3d 47, 57 (D. Mass. 2022) (same); E. Allan Farnsworth, Contracts § 9.9 at 642 (4th ed. 2004) ("The excused party's failure to perform because of impracticability or frustration affects the other party's duties of performance in the same way as if the excused party had broken the contract."); Restatement (Second) of Contracts § 267 (party's failure to render performance may affect the other party's duties even though the failure to perform was justified).

Indeed, cases cited by the University are consistent with this principle. *See, e.g.*, *In re Pepperdine Univ. Tuition & Fees COVID-19 Refund Litig.*, No. CV 20-4928-DMG (KSX), 2023 WL 2576766, at *6 (C.D. Cal. Mar. 7, 2023) (partially denying a university's summary judgment motion based on impossibility arguments because, "where . . . performance of an otherwise valid

contract has been rendered impossible, a plaintiff may still pursue restitution on a quasi-contract theory"); *In re Bos. Univ. COVID-19 Refund Litig.*, No. CV 20-10827-RGS, 2023 WL 2838379, at *3 (D. Mass. Apr. 7, 2023) ("Plaintiffs correctly note that, even if performance is excused, [the university] must still provide restitution for the difference in value between what they were promised and what they received."). Accordingly, even if this Court were to find the impossibility defense applicable here, summary judgment would be inappropriate, as the University would still be liable to return the portion of tuition and fees it collected for services not rendered.

e. The Doctrine of Acquiescence Does Not Apply.

Under the doctrine of acquiescence, "if a party stands by, and sees another dealing with property in a manner inconsistent with his rights, and makes no objection, he cannot afterwards have relief." *McClintic v. Davis*, 228 S.C. 378, 383, 90 S.E.2d 364, 366 (1955). "His silence permits or encourages others to part with their money or property, and he cannot complain that his interest are affected." *Id.* "His silence is acquiescence and it estops him." *Id.*

The doctrine of acquiescence is an equitable doctrine that presents inherently factual questions that are inappropriate for adjudication at summary judgment. At best, the University can only show there are factual issues on this defense to be resolved by the Court at trial. It is clear, however, that Plaintiffs did not simply stand by and fail to object. To the contrary, this lawsuit was filed immediately after the end of the Spring 2020 semester. Moreover, this is not a situation in which the University relied to its detriment on any decision by *Plaintiffs*. There can be no question the University resolved to shut down face-to-face instruction and access to on-campus services and switch to ERT. There is no dispute it would have done so whether Plaintiffs continued to remain enrolled or not. Without some detrimental reliance by the University, the doctrine of acquiescence does not apply. *See Bauckman v. McLeod*, 429 S.C. 229, 245, 838 S.E.2d

208, 216 (Ct. App. 2019) (no estoppel based on acquiescence without showing of detrimental reliance).

According to the University, Plaintiffs waived their right to bring a breach-of-contract claim when they did not immediately drop out of college upon learning of the University's unilateral change to ERT. Of course, this argument is nonsensical, as the Plaintiffs had a duty to mitigate their damages, and it would be absurd to require students to drop out of college mid-semester to preserve their contractual rights. *See Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct.App.1997) ("A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages"); *see also* 23 Williston on Contracts § 63:9 (4th ed.) ("An intent to acquiesce or waive is essential to establish a waiver of a breach of contract, and the waiver must therefore be a voluntary, intentional relinquishment of a known right").

V. The Court Should Deny Summary Judgment On Plaintiffs' Alternative Claims.[18]

"In South Carolina, a party is generally precluded from pursuing a claim for either unjust enrichment or promissory estoppel where a valid contract governs the subject matter in dispute." *T-Zone Health Inc. v. SouthStar Cap. LLC*, No. 2:20-cv-02519, 2023 WL 5021952, at *7 n.6 (D.S.C. Aug. 7, 2023) (quotation marks omitted). Importantly, however, "[w]hen promissory estoppel and/or unjust enrichment claims are stated in the alternative to a breach of contract claim where the existence of a contract is contested," it is premature to grant summary judgment before resolving whether a contract exists. *Id.*

Here, although Plaintiffs contend that a contract existed for in-person instruction and the University breached that contract, the University disputes this fact. (*See, e.g.*, Def's Br. at 21–22).

[18] Plaintiffs concede that summary judgment is appropriate on their conversion claim.

Because the existence of the contract is contested, it would be premature to grant summary judgment on Plaintiffs' alternative theories. This is especially true here, where the University's success on an impossibility argument would entitle Plaintiffs to restitution, as discussed in detail above. Moreover, as shown below, assuming no contract existed, material issues of fact exist as to those claims, and summary judgment therefore must be denied.

a. Promissory Estoppel

Promissory estoppel "may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice." *Higgins Const. Co. v. S. Bell Tel. & Tel. Co.*, 276 S.C. 663, 665 (1981) (quotation marks omitted). The elements are (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 promise by her reasonable reliance. *N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379–80 (2015).

Here, disputes of fact exist as to every element of Plaintiffs' promissory estoppel claims. *First*, as described in detail above, the University promised to provide certain courses to Plaintiffs in a specific modality when they registered for courses. (*See, e.g.*, 30(b)(6) Marterer Dep. Ex. 62, 73.) *Second*, the Plaintiffs' reliance on the representations in the registration portal were reasonable because the entire system existed to allow students to predictably and reliably customize their schedules to account for their time, location, and modality preferences. (30(b)(6) Marterer Dep. at 28:19–31:2; Kelly Dep. at 124:23–125:9 ("[W]e went through all those filters. And then if these three course numbers have the filters that I want and show me face-to-face instruction on Monday, Wednesday, Friday, [and] have seats left, I'm picking that one.").) *Third*,

reliance by the Plaintiffs was explicitly expected and foreseeable to the University. In fact, according to the University's provost, students "registered in classes . . . ***have an expectation that the class will be taught <u>in the method</u> that is specified in Self-Service Carolina***." (University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester, Updated August 4, 2022 (emphasis added).) *Fourth*, the Plaintiffs were injured by the University's move from in-person to ERT courses because they were provided a product that was different from the one they paid for. (Tatos Rep. at 45–47 (explaining in detail why "[r]eceiving credit and fulfilling degree requirements do not mean that students received the educational product for which they paid").).

b. Unjust Enrichment

"Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123 (2009). The elements are (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit under circumstances that make it inequitable to retain it. *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 9 (2000).

Here, the facts are undisputed and Plaintiffs' easily satisfy each element. *First*, Plaintiffs paid the University money for in-person instruction. *Second*, the University realized that benefit from Plaintiffs (and the entire putative class), recording a budget surplus following the pandemic. (30(b)(6) Deposition of Kelly Epting At 104:4–22 & Ex. 60.) *Third*, it is inequitable for the University to retain a budget surplus of tuition and academic fees for in-person instruction and campus services that it did not provide. (*Id.*) Indeed, even if the University was arguably justified in moving to ERT, it had no excuse for retaining all of the money it received for services it did not

provide. Accordingly, the University was unjustly enriched and summary judgment should be denied.

CONCLUSION

For all of the reasons stated herein, the Court should deny the University's Motion for Summary Judgment.

Dated: November 9, 2023

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
DAVIA BUNCH and CASEY KELLY, individually and on behalf of others similarly situated, Plaintiff, vs. UNIVERSITY OF SOUTH CAROLINA, Defendant	EXPERT REPORT OF TED TATOS **Civil Case No. 2020CP4002330** **January 4, 2023**

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I. Introduction

1. Plaintiffs in this matter have alleged that the actions of the University of South Carolina ("Defendant") in approximately March 2020 deprived them of benefits for which they had already paid in the form of tuition and fees.

2. Specifically, Members of the Putative Plaintiff Class (hereafter "Class Plaintiffs") allege that the University of South Carolina ("USC" or "the University") announced in March 2020 that it would cancel all live, face-to-face instruction and would transition to alternative instruction in the form of emergency remote teaching (ERT)[1] for the remainder of the semester, depriving them of the product for which they paid. I understand that Class Plaintiffs do not dispute that Defendant's actions to cancel face-to-face instruction in response to the Novel Coronavirus (COVID-19) pandemic were responsible from a public health perspective. However, Class Plaintiffs seek pro-rata refunds for the balance of the Spring 2020 term during which USC's actions precluded them from receiving the services and benefits for which they paid.

3. Plaintiffs allege that they entered into agreements with USC to pay tuition and certain fees in exchange for live, face-to-face instruction in a classroom setting. Class Plaintiffs seek remuneration in the amount of the difference between the value of approximately one-half of a semester of emergency remote teaching[2] ("ERT") versus the value of the same period of live, face-to-face instruction.

II. Assignment and Summary of Opinions

A. Assignment

4. Counsel for Class Plaintiffs has asked me to determine whether common methods and evidence can be used: (1) to demonstrate that the members of the putative Plaintiff Class received instruction in the form of ERT which provided an educational experience that was different in kind (i.e., a different product) than the face-to-face instruction which they anticipated and for which they paid, (2) to calculate the difference between the value of the instruction for

[1] See https://onlineteaching.umich.edu/keep-teaching/ ("These strategies should not replace the careful design process that you may go through to develop an online course. Instead, these strategies can be used to bridge the gap and support teaching continuity even in times of disruption.")

[2] This concept has been synonymously referred to as "emergency remote learning", or "ERL" as Schultz and DeMers (2020), cited herein, explain. I use the two concepts interchangeably in this report.

which Plaintiffs paid and the value of the instruction they actually received ("Tuition & Fees Differential"), (3) to determine whether this differential affected all or almost all Class Members ("Common Impact"), and (4) to calculate the damages that Plaintiffs incurred.

5. While my analysis presents a formulaic approach for estimating the "Tuition & Fees differential" and damages in this matter. The key economic question at the class certification stage asks: if each member of the putative Plaintiff Class were to file her/his own lawsuit, would the evidence and methods used to determine liability be the same or similar across all of them? In other words, the relevant inquiry, as I understand it, lies with the fact of damages.

6. Although much of this report references undergraduate studies, my analysis also includes graduate students, with the exception of courses that were already designed for online instruction. As I explain subsequently in this report, the majority of the issues in this litigation are common to both graduate and undergraduate students, and, where differences exist, these can be addressed using common methods that do not require individual inquiry.

7. I have been asked to address economic and statistical issues relevant to the merits of the case, where they fall under the scope of my engagement as detailed above. I do not intend to offer any opinion regarding legal or factual issues, as these are the province of the court and/or fact finder. I expect to render my full opinion of economic damages after the conclusion of the discovery process in this matter. I reserve the right to revise my report should the production of additional facts or data warrant my doing so.

8. I have also been asked to address potential justifications that Defendants may offer for their refusal to refund Class Plaintiffs the difference between the benefits for which they paid versus the benefits they received. Further, I have been asked to analyze whether such justifications would need to be evaluated and resolved using individualized inquiry or if they lend themselves to class-wide assessment.

9. In approaching this assignment and forming my opinions, I have relied on legal filings and other documents in this matter. These include:

- The Second Amended Complaint
- Discovery produced in this matter by the University of South Carolina detailed in Exhibit 1 of this report or cited herein.

- Discovery produced by Plaintiffs Davia Bunch and Casey Kelly.
- Depositions of witnesses in this action.

10. I have also relied on public documents, literature, and my experience and knowledge of literature specific to the issues addressed herein. To the extent that I refer to any such literature, publication, or documents, I cite such material in the footnotes of this report or note them in Exhibit 1.

B. Summary of Opinions

11. This case involves simple economic issues that readily lend themselves to common, class-wide analysis. The University of South Carolina effectuated its cancellation of face-to-face instruction and the transition to emergency remote teaching as a holistic policy that affected all or nearly all students. Plaintiffs proffer the theory of damages that, after the University implemented this policy and transitioned to alternative emergency instruction, students did not receive the educational product for which they paid. Thus, Class Plaintiffs seek refunds in the amount of the difference between the value of the goods and services for which they paid the value of the goods and services they actually received.

12. Specifically, Class Plaintiffs seek a refund in the amount of the difference between the value of approximately one-half of a semester of alternative instruction in the form ERT and the value of the same period of live, face-to-face instruction for which they paid. The University of South Carolina, like other institutions of higher education in the United States, offers both face-to-face and preplanned online courses as part of its curriculum, although the vast majority of students choose the former. However, the students whose courses transitioned from face-to-face to remote delivery in the Spring 2020 semester did not receive either face-to-face instruction or preplanned online course instruction. Rather, such students, which constitute the members of the putative tuition and fees classes, received emergency remote teaching (ERT), an ad hoc instructional method that neither USC nor other universities offer as part of their curriculum. USC, other universities and educational institutions, and the relevant educational literature have explained that ERT sis a different kind of instruction than either face-to-face or preplanned instruction and is a rushed approach that carries the benefits of neither method.

13. The evidence indicates that students who selected attending USC on campus would

not have selected USC ERT if given a choice between the two because 1) these are different products and 2) USC does not even offer ERT as an instructional method. USC itself recognized that students would even withdraw from the institution in the face of continued remote instruction, telling students, faculty and staff on May 6, 2020 that, "We have listened to the increasing number of students who have expressed their desire to be back on campus to experience the fullness of academic and student life. Many of these students, if faced with no option other than prolonged remote learning, will elect to postpone or discontinue their education."[3] The documents that USC produced in this litigation include a student survey conducted by the Kennedy Group on behalf of USC that supports USC President Caslen's conclusion of student dissatisfaction with the transition to emergency remote teaching.[4] I discuss the results of this survey in more detail in this report.

14. Based on the above, my review of the documents listed previously, and the analysis that follows in this report, my economic opinions are that:

i. The educational experience that USC offered before the pandemic to students who chose in-person instruction and the ERT experience it offered to those same students during the latter portion of the Spring 2020 semester represent different educational products.

ii. Members of the putative Plaintiff class suffered a common injury, as all were affected by USC's holistic transition from face-to-face instruction to ERT. This action represents an act by the university administration that did not depend on individual instructor decisions.

iii. No individualized inquiry is necessary as 1) USC holds the necessary data and 2) any differences between individual students such as the number of face-to-face courses in which they enrolled can be resolved using formulaic methodology common to the class. I present such a methodology in this report.

iv. In response to the University shutdown in the latter half of the Spring 2020 semester, USC students received ERT not the preplanned online instruction that USC offers as part of its regular curriculum. Whatever differential may exist between the prices that USC charges for face-to-face and online education,

[3] University of South Carolina, Message from President Caslen about resuming in-person instruction on the Columbia campus, May 6, 2020, *archived at* https://web.archive.org/web/20200630064015/https://sc.edu/safety/coronavirus/.
[4] See, *e.g.,* USC_00014568-USC_00014575.

respectively, does not capture the lower value and benefits that ERT has relative to regular online instruction.

v. Evaluating the differential in value and benefits between ERT and pre-planned online instruction lends itself to formulaic, class-wide methodology that requires no individualized analysis. In this report, I present such an approach that, based upon the materials produced to date, I can use to calculate damages to Class Plaintiffs on a common basis. I then apply this formula to calculate damages based on documents and data that USC has produced thus far.

vi. My damages calculation is conservative. It only captures a portion of damages because it necessitates the implicit and conservative assumption that that face-to-face and pre-planned online instruction offered equal value and benefits to students. Under this assumption, I estimate that, by receiving ERT instead of the educational product they chose and for which they paid, face-to-face instruction, members of the putative Plaintiff Tuition Class suffered economic damages between $107 million and $125 million based on net tuition.

vii. I have also calculated the damages to the Plaintiff Fees Class to equal approximately between $7.3M and $14.2M

viii. No damages occurred for courses that members of the Plaintiff Class originally elected (i.e. registered to take prior to the advent of the COVID-19 pandemic) to take online or through instructional delivery other than face-to-face.

15. Further, I address potential justifications that Defendant is likely to offer. In my opinion, such justifications are unavailing from an economic point of view, and, even if they were, such defenses could be assessed via evidence and methods common to the class.

16. The opinions I express in this report reflect my review of the evidence, data, and other relevant materials produced to date. I understand that partial discovery has occurred thus far, and that further discovery may be forthcoming. I reserve the right to supplement or amend my opinions should additional materials or information become available that warrant my doing so.

III. Qualifications

17. My name is Ted Tatos. I am an economist and a statistician with EconONE Research. I am also an adjunct professor in the economics department at the University of Utah,

where I teach Applied Econometrics for Master's level graduate students in the Spring 2023 semester. I hold a B.A. in Economics from Duke University and an M.S. in Statistics with a focus in Econometrics from the University of Utah. I also hold a PStat® professional statistician certification from the American Statistical Association.

18. I have published on economic and statistical issues in various journals, including the Federal Circuit Bar Journal, the Antitrust Bulletin, the Appraisal Journal, the Harvard Journal of Sports and Entertainment Law, and others.[5] I currently serve on the editorial board of the Antitrust Bulletin journal as its Associate Economics Editor. A significant portion of my research and publication work has involved higher education, particularly the interplay of athletics and academics within post-secondary institutions in the United States, as well as the health and safety of college athletes.[6]

19. I have approximately twenty-four years of experience in economic, statistical, and econometric analysis for both public and private sector clients. Prior to my positions at EconONE Research and Empirical Analytics, I was a consultant with North Harvard Group, an information technology and strategy consulting firm. Before that time, I was employed as a Managing Economist with the global expert services firm of LECG in the Washington, D.C. and Salt Lake City, UT offices. I been involved in many class action litigation matters as both a consulting and a testifying expert. Such matters have included breach of contract, employment, antitrust claims, and California Invasion of Privacy Act (CIPA) litigation. I have also presented on economic and statistical issues to the Utah Bar Association at its annual summer conventions. I have testified on statistical and economic issues in both state and federal court and presented testimony in front of administrative law judges.

20. I have previously submitted class certification reports that cover similar issues in the matters of *Milanov v. University of Michigan* and *Cross v. University of Toledo*. I have also submitted declarations detailing the nature of instruction offered in the Winter/Spring 2020 semester in *Dalke v. Central Michigan University*, *Stenger v. Ferris State University*, *Garland v.*

[5] Publications that I have authored or co-authored are available online at https://utah.academia.edu/TedTatos

[6] My peer-reviewed research into cognitive disorders among incoming college football athletes was published in June 2019 in the Journal of Scientific Practice and Integrity and available at https://jospi.scholasticahq.com/article/8883-cognitive-disorders-among-incoming-college-football-athletes-legal-and-medical-implications-of-undisclosed-inclusion-in-concussion-research. My work on this topic was discussed in detail in an October 2019 documentary by the sports journalism site The Athletic and can be found at https://theathletic.com/video/21-adhd/.

Western Michigan University, and *Simmons v. Northern Michigan University*.

21. Over the last several years, my research work has involved analyzing a repository of nearly two million documents produced as a result of an academic fraud investigation at one major university in the United States. Such documents detailed the administration of courses, financial aid assistance, exit interviews, and various intra- and inter-institutional academic and athletic endeavors, including tuition and aid distribution. Where relevant, I cite to such documents in this report. Relying in part on this research, I have published several articles on these issues and continue to do so.

22. Exhibit 2 to this report contains a copy of my Curriculum Vitae, which details my qualifications, publications, presentations, and testimony (both deposition and trial) that I have offered. The hourly rate that EconONE Research charges for my work on this matter is $550. No part of my compensation depends on the outcome of this litigation.

IV. Background on Relevant Economic Issues

23. To illuminate the nature of the harm and its class-wide impact, in this section I address the nature of Class Plaintiffs' allegations. I begin by discussing the three main types of instruction that USC provided during the Spring 2020 term: face-to-face instruction, pre-planned online instruction and emergency remote teaching (ERT). As I explain, the University, the literature, college administrators, and educators have all indicated that the type of instruction that students received in the winter/spring 2020 semester represents a departure from face-to-face and pre-planned online instruction and should be properly characterized as "emergency remote teaching".

24. The time period covered by Class Plaintiffs' claims begins on the date that the University cancelled face-to-face classes and indicated it would transition to emergency remote teaching. However, because the University's announcement occurred during spring break, the damages period for tuition and course-related fees begins when the university's Spring 2020 schedule indicated courses would begin after break, On Monday, March 16.[7] USC canceled all

[7] University of South Carolina, 2019-2020 Official Academic Calendar, Spring 2020, *available at* https://www.sc.edu/about/offices_and_divisions/registrar/academic_calendars/2019-20_calendar.php.

classes for the following week, resuming instruction through ERT on March 23, 2020.[8]

25. This matter presents issues that economists regularly study, particularly in the field of competition and antitrust, where much of my work focuses. Specifically, leaving aside the existence of any contractual arrangement, determination of which falls under the purview of the fact finder, the issues involved deal with 1) the types of goods offered, 2) how students as consumers view these goods, and 3) how students choices affect institutions' provision of such goods.

A. Student Expectations and the Economic Relationship Between Online and Face-to-Face Instruction

26. I have also been asked to address the existence of an expectation of face-to-face instruction at the University of South Carolina. I offer no opinion as to whether a legal agreement for face-to-face instruction existed, as this determination falls under the purview of the fact finder.

1. Student Expectations of Face-to-Face Instruction at USC in Spring 2020

27. To investigate student expectation of face-to-face instruction during the Spring 2020 semester, I examined documents that USC produced in this matter, its Academic Bulletin, Course Catalog, as well as representations the University made in its communications with its principal accreditor, The Southern Association of Colleges and Schools Commission on Colleges (SACSCOC). Each of these sources of information indicate that USC communicated its intention to offer face-to-face instruction when students registered for the courses. USC explains that "Students enter into a financial agreement with the University of South Carolina through course registration regardless of their financial aid awards or eligibility."[9]

28. First, the documents that USC produced through discovery in this matter include a schedule of courses that the University offered in Spring 2020 at its Columbia, South Carolina campus.[10] The schedule that USC provided includes information such as course name, number,

[8] University of South Carolina, March 13, 2020 Update from President Bob Caslen, "Classes will be canceled for the week after spring break (March 16 – 22)", *archived at* https://web.archive.org/web/20200630064015/https://sc.edu/safety/coronavirus/.

[9] University of South Carolina, Financial Aid and Scholarships, *available at* https://www.sc.edu/about/offices_and_divisions/financial_aid/forms_and_resources/terms_and_conditions/financial_aid_authorization_and_fee_payment/index.php.

[10] USC_00014490

section, instructional format, location, instructor name, number of students enrolled, and others. This file indicates that USC specified a traditional, or "face-to-face" instructional format for approximately 90 percent of courses (89.7 percent) it offered during the Spring 2020 semester.[11]

29. USC also produced a file that listed course enrollments and tuition and board mandated fee (BMF) charges for each student for the Spring 2020 semester.[12] I discuss this file in more detail in Section V of this report, as I base my damages estimates on the data contained in this file. I aggregated the data in each file and combined the results, to arrive at a holistic picture of the USC enrollment and tuition charges for the Spring 2020 semester. The results appear in Table X below.

TABLE 2. USC COURSES OFFERED, ENROLLMENT, AND TUITION CHARGED BY INSTRUCTIONAL METHOD, COLUMBIA CAMPUS, SPRING 2020

Instruction Method Listed	Instruction Method Description	Registrations Listed in Tuition Data	Gross Tuition Per Course	Net Tuition Per Course	Total Courses	Enrollees Listed
TRAD	Face-to-Face Instruction	127,090	$276,760,619	$208,079,578	10,894	153,380
DWEB	Web 100% Asynchronous	13,305	$28,160,740	$21,653,355	477	14,275
BWEB	Over 50% Web Delivery	1,154	$2,332,028	$1,888,925	169	1,924
B3WEB	Blend 25-49% Web Delivery	787	$2,115,960	$1,400,887	41	1,322
DTWS	Two Way AV Betw Syst Campuses	640	$1,378,049	$1,340,938	137	783
BTWOF	Over 50% Two Way AV Off Campus	317	$851,025	$826,119	14	316
DTWOF	Two Way AV Off Campus	245	$521,862	$489,172	15	277
NONE	Instruction Method missing; please notify Registrar	204	$901,466	$782,108		
PLMC	Palmetto College Course	163	$261,250	$250,475	382	1,117
BTWON	Over 50% Two Way AV On Campus	4	$12,877	$6,867	9	22
B3TWN	DO NOT USE	1	$878	$878	1	1
Totals		143,910	$313,296,753	$236,719,301	12,139	173,417
% Face-to-Face Instruction		**88.3%**	**88.3%**	**87.9%**	**89.7%**	**88.4%**

30. These results above support two key conclusions. First, USCs own data indicate that traditional instruction means face-to-face delivery. USC's Academic Affairs (ACAF)

[11] USC defines traditional instruction as "face to face", describing it as "Course that is taught in a traditional face-to-face classroom setting" and offering an example as "Course meets in-person on Tuesday / Thursday in a classroom on campus". University of South Carolina, Scheduling, available at https://sc.edu/about/offices_and_divisions/on_your_time/faculty_toolbox/hybrid/scheduling.php.
[12] USC_00041697

document 2.03 also explains that,

> Academic programs and courses are identified based upon the delivery method(s) used to satisfy the total number of required credit hours…Traditional Instruction: Courses offered in a traditional classroom setting in which the instructor is face-to-face in the same room at the same time as the students. Delivery Location: Academic programs and courses are also identified based upon the delivery location(s) or site used to offer the total number of required credit hours. On-campus: Courses offered on the geographic site of the home campus.[13]

31. Second, this method of instruction reflects nearly 90 percent of courses offered, courses in which students enrolled, and tuition charged. Only approximately 10 percent of the course offerings, enrollments, and tuition charged reflect web-based delivery, either in whole or in part. Thus, students enrolled in courses pursuant to the instructional format that USC designated.

32. Documents indicated that USC represented the accuracy of the programs and statements it makes to students to its accreditation body, SACSCOC. Accreditation document 10.1 requires that "The institution publishes, implements, and disseminates academic policies that adhere to principles of good educational practice and that accurately represent the programs and services of the institution." [14] In response, USC represented that

> The University of South Carolina Columbia and the regional Palmetto College campuses widely publishes academic policies that adhere to principles of good educational practice. These are disseminated to students, faculty, and other interested parties through a variety of publications, both electronically and in print, that accurately represent the programs and services of the University's colleges and schools. All of these publications are available online and each document is periodically reviewed by faculty and the administration as appropriate.[15]

33. Likewise, accreditation requirement 10.3 that SACSCOC publishes states that "An institution is obligated to provide to its students, constituents, and the public information about itself that is complete, accurate, timely, accessible, clear and sufficient. Regardless of the name assigned to the publication, the college catalog is one of the most critical publications at any higher education institution. The catalog describes the institution consistent with its mission statement

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[13] Univ. of South Carolina, Academic Affairs Policy Number ACAF 2.03, available at https://www.sc.edu/policies/ppm/acaf203.pdf.

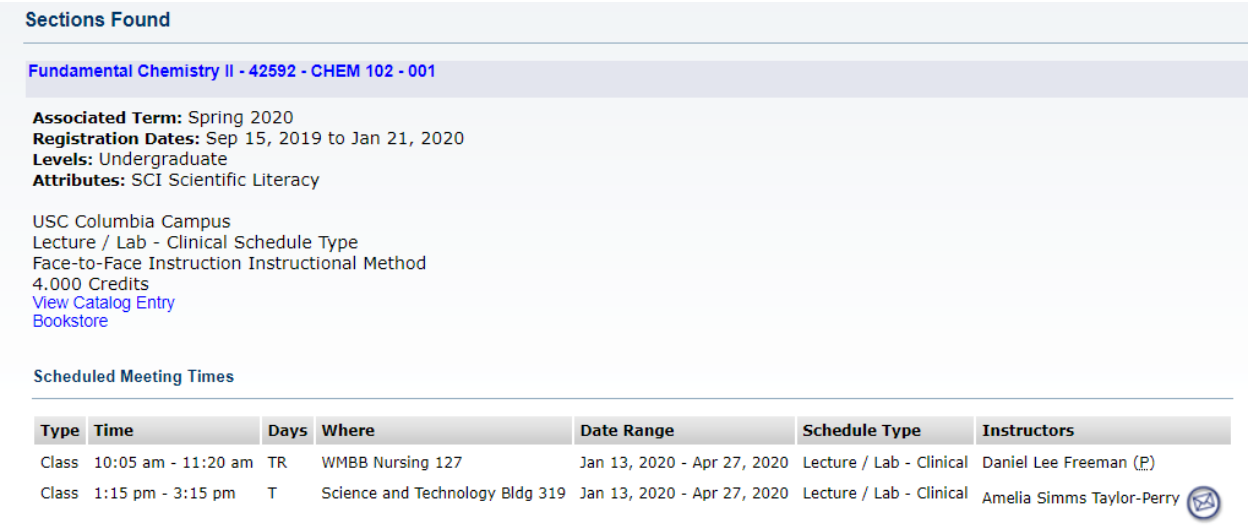
[14] USC, Accreditation Reaffirmation Submission 10.1, *available at* https://www.sc.edu/about/offices_and_divisions/institutional_research_assessment_and_analytics/documents/sacscoc/2021_reaffirmation_submissions/requirement_10.1.pdf.

[15] *Id.*

and sets forth the obligations and responsibilities of both students and the institution."[16] In its Reaffirmation Submission for Accreditation, USC stated that,

> The University of South Carolina provides to its students, constituents, and the public, information about itself that is complete, accurate, timely, accessible, clear and sufficient. Its Academic Bulletins (both current and archived) ensures availability to the public electronically and are sufficient to the needs of both alumni and students. The university's current academic bulletins describe the institution consistent with its mission statement and sets forth the obligations and responsibilities of both students and the institution.[17]

34. Documents that Plaintiffs have produced in this matter indicate that Ms. Davia Bunch relied on the school's representations and enrolled in courses based on the course catalog.[18] I have also examined the course schedule associated with the courses described in the catalog. An example appears below.[19]



Sections Found

Fundamental Chemistry II - 42592 - CHEM 102 - 001

Associated Term: Spring 2020
Registration Dates: Sep 15, 2019 to Jan 21, 2020
Levels: Undergraduate
Attributes: SCI Scientific Literacy

USC Columbia Campus
Lecture / Lab - Clinical Schedule Type
Face-to-Face Instruction Instructional Method
4.000 Credits
View Catalog Entry
Bookstore

Scheduled Meeting Times

Type	Time	Days	Where	Date Range	Schedule Type	Instructors
Class	10:05 am - 11:20 am	TR	WMBB Nursing 127	Jan 13, 2020 - Apr 27, 2020	Lecture / Lab - Clinical	Daniel Lee Freeman (P)
Class	1:15 pm - 3:15 pm	T	Science and Technology Bldg 319	Jan 13, 2020 - Apr 27, 2020	Lecture / Lab - Clinical	Amelia Simms Taylor-Perry

35. The example above mirrors Ms. Bunch course registration. Further, the information reflected in the course schedule presented during registration also reflects the data that USC produced in discovery, as described above.

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[16] SACSCOC, Resource Manual for The Principles of Accreditation: Foundations for Quality Enhancement, 3rd, ed. 2020, at 92, *available* at https://sacscoc.org/app/uploads/2019/08/2018-POA-Resource-Manual.pdf. For a definition of the term course catalog, see Angela Caballero de Cordero, The College Catalog: An Academic and Professional Matter, April 2006, ("The college catalog is more than a document for students in a utilitarian way, however. It is a legal document whereby the college informs students about policies both at the college and state level.") *Available at* https://www.asccc.org/content/college-catalog-academic-and-professional-matter.

[17] USC Reaffirmation Submission 10.3, *available at* https://www.sc.edu/about/offices_and_divisions/institutional_research_assessment_and_analytics/documents/sacscoc/2021_reaffirmation_submissions/requirement_10.3.pdf.

[18] 000005

[19] https://ssb.onecarolina.sc.edu/BANP/bwckschd.p_get_crse_unsec, *accessed* 8/24/2022.

36. The University of South Carolina itself has acknowledged student preference for face-to-face instruction and dissatisfaction with the transition online. The Minutes of the USC Board of Trustees Meeting of June 19, 2020 contain record of the following statement from USC President Bob Caslen regarding the planned reopening of the campus in the Fall of 2020: [20]

> As for the reopening of campus, President Caslen said the biggest issue is how to balance the risk of the virus with the associated costs. While one cost is the $126 million budget deficit, the real cost is the interruption to the students' education by changing the delivery of education in a way the student does not desire. Their reaction to this is to forgo higher education and they question the value proposition of higher education, he said. Across the nation, enrollments and enrollment deposits are down 15% to 20%. The University is down now by about 7.4%, but anticipates a total enrollment decrease of 10%. (emphasis added)

37. On its website, USC acknowledges that students rely on representations that the university makes and choose the method of instruction accordingly. Further, the university's instructions indicate that it does not consider changes to synchronous or asynchronous online instruction to be substitutes for face-to-face instruction. Under the category "Changing classroom and teaching modalities" the USC provost instructs that,[21]

> Since students are registered in classes and have an expectation that the class will be taught in the method that is specified in Self-Service Carolina, permanent changes in teaching method can only occur when there is a documented health issue or disability making online teaching a necessity. The decision of a change in modality should be made at the level of the dean and every effort should be made to not change the modality of a course with registered students in it…. Temporary changes and changes to hybrid instruction with less than 50% online are preferred over permanent changes to 100% online instruction; changes to synchronous online courses are preferred over changes to asynchronous online courses.

38. USC registrar Dr. Aaron Marterer testified at his 30(b)(6) deposition that "there are no other options for a student to physically register. Self-Service is the only way that they can register."[22]

39. Additional documents that USC provided to its accreditation agency, SACSCOC

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[20] University of South Carolina, Minutes of the Board of Trustees, June 19, 2020 at 18, *available at* https://sc.edu/about/offices_and_divisions/board_of_trustees/documents/minutes_archive/2020/minutes_bot_061920wheader.pdf.

[21] University of South Carolina, COVID-19 Faculty Guidance, COVID-19 faculty guidance for Fall 2022 semester, Updated August 4, 2022, available at https://sc.edu/about/offices_and_divisions/provost/academicpriorities/keepteaching/guidance/index.php, accessed 1/4/2023.

[22] Deposition of Aaron Marterer at 38, lines 5-9. I understand that staff members may also occasionally register a student.

also indicate concerns with online instruction and proposals to restrict incoming students from even enrolling in such courses. USC's response to accreditation requirement document 8.2b, which addresses student outcomes in general education, lists faculty recommendations, which include,

- Possibility of restricting who can register for online courses.
- Preferable that freshmen be prohibited from taking online courses.
- Faculty must be vigilant in the review of courses proposed for online delivery.
- Faculty may have to police themselves with respect to offering additional courses online.
- Faculty must be careful that as online offerings are increased across the university, we may face problems in the future with properly educating people. (emphasis added)[23]

40. Guidance from the Department of Education also indicates student expectation of face –to-face instruction. On March 5, 2020, the Department of Education issued its Guidance for interruptions of study related to Coronavirus (COVID-19), which it updated on June 16, 2020 to extent the time frame through the end of the academic year that includes December 31, 2020.[24] The Department addressed five potential student and campus scenarios, including the one at issue in this litigation: "A campus temporarily stops offering ground-based classes in order to prevent the spread of COVID-19." In response to this scenario, the Department explained,

> The Department is providing broad approval to institutions to use online technologies to accommodate students on a temporary basis, without going through the regular approval process of the Department in the event that an institution is otherwise required to seek Departmental approval for the use or expansion of distance learning programs. This flexibility only applies to a program during a payment period that overlaps the date of this electronic announcement or the following payment period. If an institution chooses to continue offering a new program or use distance education in a manner requiring the Department's approval after that point, it must seek approval under the Department's normal process. (emphasis added)[25]

[23] USC Accreditation Reaffirmation Submission statement 8.2.b at 5, *available at* https://www.sc.edu/about/offices_and_divisions/institutional_research_assessment_and_analytics/documents/sacscoc/2021_reaffirmation_submissions/requirement_8.2.b.pdf

[24] Department of Education, Federal Student Aid, Guidance for interruptions of study related to Coronavirus (COVID-19) (Updated June 16, 2020), March 5, 2020. Available online at https://ifap.ed.gov/electronic-announcements/030520Guidance4interruptionsrelated2CoronavirusCOVID19.

[25] The Department of Education's guidance also permitted "accreditors to waive their distance education review requirements for institutions working to accommodate students whose enrollment is otherwise interrupted as a result of COVID-19. We currently are limiting that permission to distance learning opportunities developed for the purpose of serving students who were already in attendance, but whose attendance was interrupted by COVID-19." *Id.*

2. Higher education is a trust market characterized by information asymmetries, rendering students vulnerable to the institution's representations.

41. Information asymmetries characterize the market for higher education.[26] Such asymmetries occur when one party in a transaction, generally the seller, possesses substantially greater information relevant to the transaction than the countervailing party (buyer). Such differences can result in adverse selection, a market failure[27] where one side, in this case the university/seller, exploits its information advantage to obtain benefits that it could otherwise not garner if the students/buyers were equally informed. For this reason, higher education has been called a "trust market," a term that refers to markets for goods where the purchaser relies on the assurances of and is thus vulnerable to the opportunism of the seller.[28] As Winston (1999) points out, "at the extreme, consumers may not be informed about whether they have bought anything at all."[29]

42. In a 2021 Brookings Institution report, education economists explained the information asymmetries that characterize the market for higher education.[30]

> The market for higher education is far from the textbook version of a competitive market where the forces of supply and demand might lead poor-performing institutions to shut down without government intervention. Multiple market failures make this unlikely.

[26] Substantial literature exists on such information asymmetries. I discussed some of these in an earlier article. Ted Tatos. NCAA Amateurism as an Anticompetitive Tying Restraint. The Antitrust Bulletin, September 2019; 64(3). While I discussed relevant markets for antitrust purposes in that article, here I use the term "market" generally, and I do not mean to imply a unitary antitrust market.

[27] Market failure commonly refers to a violation of the assumptions underlying neoclassical economics. Generally, economists assume that given a set of assumptions that including competitive firms, few barriers to entry, and perfect information, a free market will result in an optimal production of goods and services. In the case of higher education, at least one of these assumptions, perfect information, is violated. This is because information asymmetry exists: students and parents, buyers of education, operate at an information deficit relative to the universities (sellers). As the literature observes, this situation exposes students and parents to schools' potential exploitation of this informational advantage.

[28] Gordon C. Winston. Subsidies, Hierarchy and Peers: The Awkward Economics of Higher Education. Journal of Economic Perspectives, Vol. 13, No. 1, (1999), 13–36. Also see Gordon Winston, Hostility, Maximization, & the Public Trust, Change: The Magazine of Higher Learning, July 9, 2010, at 22-23, ("Markets with asymmetric information can usefully be called "trust markets…And, of course, higher education is sold in a trust market. Just like going to a doctor, our students come to colleges and universities in large part because they don't know what they'll get from us…ultimately there remains a whole lot of asymmetric information between buyer and seller inherent in the educational process. We know more than they do, so we operate in a market that has to rely on trust…Kenneth Arrow, a Nobel in economics, recently said in a talk at Williams that "education is the supreme example of a product subject to asymmetric information.")

[29] *Id.* at 14.

[30] Dominique J. Baker, Stephanie Riegg Cellini, Judith Scott-Clayton, and Lesley J. Turner, Why information alone is not enough to improve higher education outcomes, Brookings Institution Brown Center Chalkboard, Dec. 14, 2021, available at https://www.brookings.edu/blog/brown-center-chalkboard/2021/12/14/why-information-alone-is-not-enough-to-improve-higher-education-outcomes/.

> Among the most important, the market for higher education is characterized by imperfect information. Institutions (and, in our view, the federal government) have more information on school quality and student outcomes than the students who are considering whether and where to enroll.
>
> This lack of information is compounded by the fact that college education is an experience good, where the full value of a product (i.e., college) may not be known until after buying it (i.e., enrolling). Students have little way of knowing how well the institution will meet their needs until after they experience it—and after they have taken on debt to attend.

43. Blankenberger and Williams (2020), writing within the context of the COVID-19 pandemic, further explain the nature of the agreement between institution and student in higher education:

> Higher education operates under conditions of market failure…students and parents operate at a severe information deficit compared to higher education institutions. Students transact for a credential and, more importantly, the knowledge they expect to obtain in a degree program. However, degree content, student outcomes, what and how much students need to know, how this is measured, and even assessment of whether the student has learned enough to be awarded credit is all in the hands of the institution and its faculty. Hence, higher education operates in what is known as a trust market, wherein students are extremely vulnerable to fraud and must rely on the honesty of the seller in the exchange.[31]

44. These statements echo Birnbaum (2001), who explains that

> Institutions of higher education (except in the proprietary sector) have no owners and cannot distribute profits, so there is less pressure to operate efficiently. They function in a "trust market", in which people do not know exactly what they are buying and may not discover its value for years.[32]

45. Likewise, Hill (2015) notes the reliance of consumers on institutional claims when purchasing an education, "A college education is a complex good and will only be consumed by each student (hopefully) once in their lifetimes. It is difficult for families and students to evaluate the quality of the services supplied. The family has to place a good deal of trust in the institution offering these services."[33]

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[31] Bob Blankenberger & Adam M. Williams. COVID and the impact on higher education: The essential role of integrity and accountability, Administrative Theory & Praxis, 42:3, 404-423, (2020) at 406. Available at https://www.tandfonline.com/doi/pdf/10.1080/10841806.2020.1771907?needAccess=true.

[32] Robert Birnbaum. Management fads in higher education: Where they come from, what they do, why they fail. San Francisco, CA: Jossey-Bass (2001) at 216. Available online at https://archive.org/stream/managementfadsin0000birn#page/n9/mode/2up

[33] Catharine Hill, Higher Education and the Market, Journal of Educational Issues, 1(2), 2015 at 38, ("As mentioned earlier, access to higher education regardless of ability to pay is seen as an equity issue.") Available online at http://www.macrothink.org/journal/index.php/jei/article/view/8232/6850

46. The presence of information asymmetries informs the nature of the economic transaction and agreement for exchange of services between students and universities that lies at the center of this litigation. As I expressed previously, I offer no opinion on the existence of a legal contract between the parties. From an economic viewpoint, however, it is clear that students and parents rely in large part on information provided to them by the University with regard to the method of instruction, educational experience, and other services they should expect to receive.

47. If students base their decisions on representations made by universities with regard to the type of instruction expected, as detailed in course catalogs and/or other university information, but the type of instruction can be changed at will to the students' disadvantage, such a scenario creates an economic outcome known as a moral hazard.[34] This occurs when the party making the decision, the university in this case, can shift negative consequences onto another party, the students, thus insulating the institution from incurring the full costs of its own actions.

48. In this case, the university would have the incentive to exploit its informational advantage to shift any consequences on its actions onto the students, an adverse selection problem, thus imposing relieving it, at least in part, of any economic burden associated with these actions. Such an outcome would erode the trust-based foundation of the market for higher education, resulting in negative outcomes for both students and universities. If students can no longer rely on university representations of the benefits associated with matriculation at that institution, students may choose to forego the option of attending altogether, thus placing the institution's own financial position at greater risk.

B. Emergency Remote Teaching (ERT) is a Different Product Than Face-to-Face and Pre-Planned Online Instruction.

49. The method of instruction offered at the University of South Carolina and other universities in the U.S. during the latter half of Spring Term 2020 was emergency remote teaching

[34] For an early discussions of the concept of moral hazard in economics focusing on the insurance sector, see Kenneth Arrow, Uncertainty and the Welfare Economics of Medical Care, The American Economic Review, Dec. Vol. 53, No. 5, 1963, 941-73, discussing the effects of insurance on incentives to utilize medical care, and
Mark Pauly. The Economics of Moral Hazard: Comment. The American Economic Review, Vol. 58, No. 3, 1968, 531–537. Pauly responds to Arrow's article and argues that the concept of moral hazard in insurance can be analyzed using standard economic tools rather than delving into issues of ethical behavior. For a more detailed discussion of the moral hazard problem in health insurance, see, Michel Grignon, Jeremiah Hurley, David Feeny, Emmanuel Guindon and Christina Hackett, Moral Hazard in Health Insurance, in Contributions to the History of Health Economics (Philip Clarke and Guido Erreygers, eds.), OECONOMIA, Vol. 8, No. 3, 2018, Available at https://journals.openedition.org/oeconomia/3470.

(ERT), not face-to-face instruction or pre-planned online instruction.

50. The primary difference between ERT and face-to-face instruction is that the latter occurs in person and in the classroom, with all the attendant experiential benefits that ERT lacks. Second, every student who registered for face-to-face instruction made a specific choice to pay for that educational product, whereas no student chose ERT (or even could choose it), because neither USC nor any other institution offers ERT under normal market conditions.

51. In perhaps the most oft-cited paper on the subject, Hodges et al. (2020) delineate the distinction between ERT and pre-planned online courses as follows, cautioning against misinterpreting the former as representative of the latter:

> In contrast to experiences that are planned from the beginning and designed to be online, emergency remote teaching (ERT) is a temporary shift of instructional delivery to an alternate delivery mode due to crisis circumstances. It involves the use of fully remote teaching solutions for instruction or education that would otherwise be delivered face-to-face or as blended or hybrid courses and that will return to that format once the crisis or emergency has abated. The primary objective in these circumstances is not to re-create a robust educational ecosystem but rather to provide temporary access to instruction and instructional supports in a manner that is quick to set up and is reliably available during an emergency or crisis. When we understand ERT in this manner, we can start to divorce it from "online learning."[35]

52. Institutions of higher education have drawn the same distinction between ERT and pre-planned online instruction. For example, the University of Michigan defines ERT as "The rapid transfer of some portion of a course to the online environment to ensure continuity of instruction during unpredictable emergent situations that threaten the ability to teach on-campus."[36] "On the other end of the spectrum", the University of Michigan defines online teaching and learning as "The transformation of teaching practices to include thoughtful and well-planned instructional strategies that effectively engage the unique affordances of online technologies and pedagogies to support learning."[37] The University further explains that "ERT is sudden and

[35] Charles Hodges, Stephanie Moore, Barb Lockee, Torrey Trust and Aaron Bond. The Difference Between Emergency Remote Teaching and Online Learning, Educause Review, 2020 [hereafter Hodges et al. (2020)]. Available online at https://er.educause.edu/articles/2020/3/the-difference-between-emergency-remote-teaching-and-online-learning.

[36] University of Michigan Center for Academic Innovation, Online teaching & emergency remote teaching, July 8, 2020, available at https://onlineteaching.umich.edu/online-teaching-emergency-remote-teaching/. Accessed 8/29/2020. ("We are defining remote teaching as: Transferring course content and/or activities to the online environment temporarily to ensure continuity of instruction due to an anticipated and time-limited outage.")

[37] *Id.*

unexpected" but "Online teaching is careful and deliberate."

53. On March 11, 2020, University of South Carolina President Bob Caslen announced the institution's response to the COVID-19 pandemic, telling students that:

- Classes will be canceled for the week after spring break (March 16 – 22).
- All campus events next week will be cancelled.
- From Monday, March 23 through Friday, April 3, we will suspend all face-to-face instruction in lectures, discussion sections, seminars and other similar classroom settings and move to virtual instruction. [38]

54. On the same date, March 11, 2020, University of South Carolina Executive Vice-President for Academic Affairs and Interim Provost Tayloe Harding informed Faculty and Staff Instructors that,

> There are many ways to convert a face-to-face class to an on-line class. I know that in this and future emergency situations, you will strive to implement best practices for on-line classes but that it may be challenging to provide quality instruction through Blackboard. May I suggest that the goal is to deliver instruction so that students are not negatively impacted with respect to earning credits or delaying graduation.(emphasis added)[39]

55. The University of South Carolina's statement mirrors that of the University of Michigan's Center for Academic Innovation, which also distinguished between typical online courses and ERT, where faculty were given little time to prepare, observing that,

> The important thing here is that remote teaching is constrained by time. It's not a permanent situation nor are the strategies likely the best practices for online teaching. But given the situation, we understand that everyone is doing the best they can.[40]

56. Subsequently, on March 19, 2022, the University informed students, families, faculty, and staff that "we have made the decision to extend remote learning for students through

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[38] March 11: UofSC COVID-19 Updates to Students, archived at https://web.archive.org/web/20200630064015/https://sc.edu/safety/coronavirus/.

[39] March 11: "Keep Teaching" Online Resources for Faculty and Staff Instructors" *Id.,*

[40] University of Michigan Center for Academic Innovation, Online teaching & emergency remote teaching, July 8, 2020, available at https://onlineteaching.umich.edu/online-teaching-emergency-remote-teaching/. Accessed 8/29/2020. The University of Michigan Center also explained that "In March of 2020, the University of Michigan went online due to the COVID-19 pandemic. While the delivery of classes took place online, it was not the same as the type of learning experiences that come from a typical online course… In fact, the COVID-19 crisis has fundamentally changed the field of online learning by adding the concept of "Emergency Remote Teaching" (or ERT, also sometimes called "panicgogy") to describe what happened when faculty were given an incredibly short amount of time to learn and teach as much as possible about teaching online." (emphasis added)

the remainder of the Spring semester. Online instruction will begin on Monday, March 23 and continue through the completion of final exams in May."[41]

57. At her deposition, USC Controller Mandy Kibler confirmed that the University transitioned to emergency remote teaching.[42]

> Counsel: And my recollection is that on -- in early March of 2020 the university made the decision to transition from face-to-face instruction for those classes for which it was being offered to emergency remote instruction. Is that consistent with your recollection??
>
> Ms. Kibler: That is correct, yes.

58. University of South Carolina documents also reflect the unplanned nature of the instruction. In a March 13, 2020, Executive Vice President for Administration and Chief Financial Officer Ed Walton explained that "We got everyone's attention by telling them the cost of simply closing (yes, that was on the table for about 48hrs) then we tuned that to the basic per day costs in terms of lost tuition and auxiliary enterprise refunds. Since then, we have made the decision to extend spring break and two weeks of ad-hoc teaching."[43] (emphasis added) In an email to the parent of a USC student, University President Bob Caslen acknowledged that "First, with respect to on line instruction. We recognize that the transition to virtual instruction this spring was rushed, not perfect and a challenge for all."[44]

59. Likewise, the University of South Carolina's Center for Teaching Excellence draws the distinction between emergency remote teaching and pre-planned online instruction, explaining that, "A final point to emphasize is that teaching online, as compared to remote teaching, are two different things. Transitioning to remote delivery under an emergency global health crisis is not the same as the intentional design best practices needed to create high-quality, engaging online courses."[45] USC's Center also cites to Hodges et al. (2020), who observe, "Effective online learning results from careful instructional design and planning, using a systematic model for design and development. The design process and the careful consideration of different design decisions

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[41] March 19: COVID-19 Updates from President Caslen and Interim Provost Harding, *Id.*
[42] 30(b)(6) Deposition of Mandy Kibler at 9, 4-10.
[43] USC_00009240
[44] USC_00011188
[45] University of South Carolina Center for Teaching Excellence, What Delivery Format Options (Models) Are Available?, available at https://sc.edu/about/offices_and_divisions/cte/teaching_resources/adapting_large_classes/delivery_options/index.php (accessed 8/6/2022).

have an impact on the quality of the instruction. And it is this careful design process that (is) absent in (such) emergency shifts."[46] I discuss the Hodges et al. paper as well as the literature distinguishing ERT from pre-planned online instructions subsequently in this report.

60. Further, the provisions of the CARES Act provided $14 billion to institutions of higher education to cover needs directly related to the COVID-19 pandemic through the Higher Education Emergency Relief Fund. Guidance from the Department of Education acknowledged that changes in the delivery of instruction could justify tuition refunds:

> Institutions may use the funds for Recipient's Institutional Costs to provide refunds to students for room and board, tuition, and other fees as a result of significant changes to the delivery of instruction, including interruptions in instruction, due to the coronavirus. Institutions also may reimburse themselves for refunds previously made to students on or after March 13, 2020, the date of the President's Proclamation of National Emergency, if those refunds were necessitated by significant changes to the delivery of instruction, including interruptions in instruction, due to the coronavirus.[47]

61. Similarly, in an October 5, 2020 email to USC Director of Government Relations Craig Parks and USC Director of Federal Relations Steven Beckham, Jr., Angela Leidinger, Vice President for External Affairs at Clemson University, wrote that,

> On an October 2, 2020 Department of Treasury (Dan Kowalski, Chris Bickley) held a conference call with the Department of Administration, the Executive Budget Office, the Governor's Office, representatives from Guidehouse, Congressman Timmons' Office, Congressman Duncan's Office, the Commission on Higher Education and representatives from Clemson and USC. The purpose of the call was to confirm Treasury's position that refunds of tuition, housing, dining and activity fees that occurred during the transition from in person instruction to online instruction during the Spring 2020 semester are allowable expenses under the Cares Act.[48]

62. Both of the documents cited above indicate that the Department of Education considered the transition to a different method of instruction, ERT, to justify issuing tuition refunds to students. By definition, ERT occurs in an emergency setting. The following analogy underscores the distinction between ERT and face-to-face instruction. Suppose commuters take a ferry across

[46] Hodges et al. (2020).
[47] USC_00013125, Letter from Representatives Tom Rice & Joe Wilson and Sen. Lindsey Graham to Department of Treasury Secretary Steven Mnuchin, Sept. 18, 2020.
[48] USC_00013123. See also USC_00013124 ("On the October 2 call, Guidehouse asked the question about revenue replacement. Treasury explained that refunds were a discretionary action by the universities and not a decline in revenue. The refunds were a COVID-related expense and would not have happened if not for COVID and the transition to online learning. Therefore, Treasury does not consider these expenses to be categorized as revenue replacement.")

the river to arrive at work. Now, also suppose that a fire occurs on the ferry half-way through its journey, such that passengers must abandon ship in life jackets and arrive across the river either being individually pulled to shore or in a rescue boat. Of course, passengers would have received the benefit of reaching their destination: the other side of the river (and not drowning, of course). However, the emergency means by which they attained that benefit neither reflects nor is it available as a market choice. It does not normally exist as a market good because it occurs only in emergency settings, just as ERT existed as "triage mode."

63. Returning to the ferry analogy, the corresponding question would be, knowing that the ferry would suffer a fire requiring emergency abandonment of the ship and continuing the trip either in a life jacket in the water or on a rescue boat, how much less would a passenger pay for the trip? But, given a choice, consumers would likely forego the trip entirely rather than endure an emergency situation. This would indicate that the market value of such a trip would have no value, or perhaps even negative value, potentially as a result of the opportunity cost of time, risk of injury, damage to clothing, and so on. In other words, one would expect passengers offered the choice mid-trip to place a different value on continuing the journey in an emergency situation than passengers offered the choice before embarking.

64. Those who have already started the ferry journey would likely approach the choice between emergency rescue and successful completion of the journey differently than those who have yet to start the journey. The former would be "locked-in" to their decision to a certain extent, making switching costs prohibitively high. For example, Ferris State University's Faculty Guide makes this very point:

> We have many students who are in the middle of their degree/certificate where COVID changes may make success challenging to say the least. It's not the same situation as if all students signed up for online courses and some were simply unrealistic about their ability to succeed—just as for many faculty, teaching in this new fluid environment is not what they expected or wanted. It's what they have and are committed to finishing the certificate or degree; they can't afford to lose their existing investment of time, effort and money to wait it out. There are a different set of expectations from students who specifically sign up through the statewide/online programs.[49]

65. Likewise, to the degree that USC students in the Spring 2020 term felt the same

[49] Ferris Faculty Guide & Fall 2020 Online Survival Skills. Available at https://www.ferris.edu/HTMLS/news/coronavirus/FacultyGuide.pdf.

degree of inertia, eliciting their preferences at that point will likely overstate the value of emergency remote teaching and thus bias overcharge damages downward. This type of "lock-in" and the information asymmetries that I discuss subsequently in Section (B)(1) of this report, indicate that stated values that students may place on ERT compared to face-to-face instruction would result in a conservative estimate of damages.[50]

66. USC and other universities that adopted a similar pedagogical response to the COVID-19 pandemic transitioned to alternative instruction via online delivery.[51] However, both USC and the literature distinguish between the type of instruction, emergency remote teaching (ERT) adopted in the spring of 2020 as the novel coronavirus pandemic swept across the globe and what is commonly known as "online instruction".[52]

1. Other universities and university officials have underscored the suboptimal nature of the emergency remote teaching that occurred in Winter/Spring 2020.

67. Rebecca Quintana, learning experience design lead at the Center for Academic Innovation at the University of Michigan, and James DeVaney, associate vice provost for academic innovation and the founding executive director of the Center for Academic Innovation at the University of Michigan, in a guest post on Inside Higher Ed succinctly observed, "March was the month of whack-a-mole. You may know it as emergency remote teaching."[53] The authors also

[50] An economic complication remains. In the example above, emergency services would have served as the social safety net to rescue the passengers and ensure their safe arrival in the event of the fire. In contrast, colleges and universities would have likely been left with two alternatives: either cancel the semester entirely or continue in the form of ERT. The former would have required the repetition of the courses at a later time, either in-person or online through a course prepared for such instruction, as opposed to ERT.

[51] Eric Levenson Chris Boyette, and Janine Mack, Colleges and universities across the US are canceling in-person classes due to coronavirus, CNN, March 12, 2020, available online at https://www.cnn.com/2020/03/09/us/coronavirus-university-college-classes/index.html Accessed 8/29/2020.

[52] Emergency remote teaching is also referred to as "emergency remote learning" or simply "remote learning" or "emergency remote instruction". For example, see, Drexel University's Department Head of Graduate Studies, Anne Willkomm, Online vs. Remote Learning: What's the Difference, Drexel University Goodwin College of Professional Studies, April 22, 2020, pointing out that "Millions of college students have found themselves, with little notice, at home, in their pajamas, sitting behind a computer, trying to finish their courses. This experience is not 'online learning' — this is remote learning. And yes, there is a difference." Available at https://drexel.edu/goodwin/professional-studies-blog/overview/2020/April/online-vs-remote-learning/.

[53] James DeVaney and Rebecca Quintana, Preparing for Future Disruption: Hybrid, Resilient Teaching for a New Instructional Age, Inside Higher Ed, April 15, 2020. Available online at https://www.insidehighered.com/blogs/learning-innovation/preparing-future-disruption-hybrid-resilient-teaching-new-instructional. Accessed 9/5/2020. See also, UofM Education, Rebecca Quintana and James DeVaney announce Resilient Teaching through Times of Crisis and Change MOOC, June 4, 2020. Available online at https://soe.umich.edu/news/rebecca-quintana-and-james-devaney-announce-resilient-teaching-through-times-crisis-and-change. Accessed 9/5/2020.

noted that "Universities were underprepared for an overnight shift to high-quality online teaching and learning," again pointing to the common effect of the transition to ERT not only across students at USC but students across the country.

68. Using the University of Michigan as an example again, while U-M noted professors and educators' efforts in the face of the COVID-19 pandemic, it also recognized that lower standards should be applied to the Winter 2020 Term courses taught after the emergency transition to an online format in mid-March relative to planned online courses. In an article on U-M's CAI site, the school's Compliance and Policy Lead, Ricky LaFosse, specifically noted the University's "emergency remote teaching" phase and observed that,

> Despite everyone's best efforts to ensure quality learning experiences through the transition to remote instruction (both at U-M and throughout higher education), there has been wide recognition that these emergency "remote instruction" courses should not be held up to the same regulatory standards as planned-from-the-start "distance education" courses.[54]

69. Additionally, Smith College, in its recent decision to adopt an online-only teaching environment for the fall 2020 semester, drew a distinction between online courses taught in the spring and those that will be taught in the fall.[55] Likewise, the University of Southern Utah observed that a good starting point for making the shift from teaching in a land-based classroom to teaching elsewhere is to understand the difference between emergency remote teaching and online learning.[56] Yale University president Peter Salovey, in a letter to Yale Alumni Magazine, commented that he "intentionally used this term [emergency remote teaching] to distinguish our response to the COVID-19 pandemic from the progress Yale and universities around the world have made in online education under normal circumstances."[57] The State University of New York

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[54] Ricky LaFosse, Keep Complying: From Emergency Remote Teaching to Exemplary Online Education, University of Michigan Center for Academic Innovation. Available online at https://ai.umich.edu/blog/keep-complying-from-emergency-remote-teaching-to-exemplary-online-education/. Accessed 8/29/2020. U-M Center for Research on Learning and Teaching (CRLT) also referred to ERT in a scheduled workshop aimed at "Building on what instructors have experienced during Emergency Remote Teaching (ERT)..." See Getting Started/Moving Toward: Designing your Online Class, available at https://crlt.umich.edu/event/114717. Accessed 8/29/2020.

[55] https://www.smith.edu/covid19, "Smith's move to a full-remote spring semester occurred in a short period of time, without advance preparation, and using the resources at hand. In contrast, faculty have now been working all summer with the Sherrerd Center for Teaching and Learning and the COVID-19 Digital Support team to develop and support robust, engaging teaching models tailored to remote delivery."

[56] https://www.usu.edu/empowerteaching/remoteteaching.

[57] Peter Salovey, Emergency remote teaching, President's Letter, Yale Alumni Magazine, Jul/Aug 2020. Available online at https://yalealumnimagazine.com/articles/5150-emergency-remote-teaching. Accessed 8/30/2020. Dr. Salovey also noted that "Thinking back to the years when I taught undergraduate and graduate courses, I know I would

(SUNY)'s Online Teaching guide differentiates remote teaching and online learning, explaining that,[58]

> Remote Teaching & Learning [o]ccurs due to a sudden emergency with no time to plan or prepare to transition to an online/technology-enhanced teaching and learning environment. Neither faculty, nor students have planned, nor elected to teach or learn remotely online… Because of the COVID19 emergency there is a lack of time and there are insufficient resources to fully prepare the numbers of faculty and courses necessary, which results in a continuation of the emergency circumstances characterized in remote teaching.
>
> Online/Distance Learning (Are fully-planned, resourced, and supported online faculty development and course design initiatives, often taking six to nine months before the online instructor is prepared, and the online course is delivered. Both faculty and students have deliberately chosen to teach and learn online.)

70. Lee Gardner, writing in The Chronicle of Higher Education, cites Hampshire College (MA) President Ed Wingenbach, who, in a meeting with the university's faculty and administrators discussing the move to remote instruction, "stressed to everyone that they should not presume that they were creating online courses. Designing online instruction is a discipline backed by decades of learning science, and 'a process that takes months, if not sometimes years, to do properly…I wanted to make it clear to everybody that that's not what we're doing.'"[59]

71. According to Natalie Milman, an online professor at George Washington University who again echoes the familiar refrain prevalent in the literature, "It takes a lot of time and effort to design and develop effective, engaging online education...These are not normal teaching and learning conditions. What we are experiencing now is emergency remote teaching and learning—or as some have called it, 'pandemic pedagogy.'" [60] Matthew Rascoff, Associate Vice Provost for Digital Education and Innovation at Duke University referred to ERT as "a kind of 'first aid' for higher education in a pandemic,"[61] explaining that "We call what we've been

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have preferred at least a few months to redesign my syllabus if I'd had to move any of them online. However, we did not have that kind of time in the spring of 2020."

[58] The State University of New York, Remote Teaching vs. Online Learning, available at https://onlineteaching.open.suny.edu/page/remote-teaching.

[59] Lee Gardner, Covid-19 Has Forced Higher Ed to Pivot to Online Learning. Here Are 7 Takeaways So Far, The Chronicle of Higher Education, March 20, 2020. Available at https://www.chronicle.com/article/covid-19-has-forced-higher-ed-to-pivot-to-online-learning-here-are-7-takeaways-so-far/.

[60] Natalie B. Milman, This Is Emergency Remote Teaching, Not Just Online Teaching – There's a difference, Education Week, March 30, 2020. Available online at https://www.edweek.org/ew/articles/2020/03/30/this-is-emergency-remote-teaching-not-just.html. Accessed August 24, 2020.

[61] Matthew Rascoff, Education and Coronavirus: Lessons From Emergency Remote Teaching, Coursera Blog, June 23, 2020. Available online at https://blog.coursera.org/education-and-coronavirus-lessons-from-emergency-remote-teaching/. Accessed August 30, 2020.

doing the past few months 'emergency remote teaching' because it doesn't represent the full potential of online learning. We accelerated processes that would usually be more deliberate and collaborative." Expressing a similar sentiment, Davidson College's Director of Innovation Initiatives, Kristen Eshleman explained that "The current response is triage. We are adapting to maintain as much of the familiar learning and community engagement as we can in the short term."[62]

72. Cynthia Golden, Associate Vice Provost and Executive Director for the University Center for Teaching and Learning at the University of Pittsburgh explained that course designers, working with faculty, take a full 15-week semester to design a 3-credit online course.[63] She contrasted the instruction that took place in the Winter 2020 Term with the normal online courses:

> I hope that one of the things we learn is that what we did was not launch "online learning" at my institution—or any other institution in the country. Rather, we lived through a period of temporary, remote teaching. There is a huge difference… Our faculty have had about ten days to get ready for our Monday start. And this is happening for every course being offered this term, not just for our typical online programs. So while the headlines are talking about the move to "online learning," the experience for the students and faculty will not reflect what their experience would be when teaching or learning in one of our typical online courses.

73. Ms. Golden's comments above, which note that ERT was happening for "every course being offered this term", point to a common experience among students. Her comments reflect both the literature on the subject and universities' own experiences, as discussed previously. Further, surveys and other evidence point to a dissatisfaction with the divergence between the education they expected versus the one they received once schools implemented ERT.

74. In Inside Higher Ed, Vickie S. Cook, executive director for online, professional and engaged learning at the University of Illinois at Springfield, underscored the distinction between ERT and online learning, explaining that "teaching remotely is really different from teaching online…Online learning is a type of teaching that requires very specific pedagogical skills. The

[62] Doug Lederman, The Shift to Remote Learning: The Human Element, Inside Higher Ed, March 25, 2020. Available online at https://www.insidehighered.com/digital-learning/article/2020/03/25/how-shift-remote-learning-might-affect-students-instructors-and. Accessed 8/30/2020.
[63] Cynthia Golden, Remote Teaching: The Glass Half-Full, Educause Review, March 23, 2020. Available online at https://er.educause.edu/blogs/2020/3/remote-teaching-the-glass-half-full. Accessed 8/31/2020.

pedagogy is more important than the technology."[64] In the same article, Flower Darby, director of teaching for student success at Northern Arizona University noted that professors understood that the instruction offered during ERT lacked the same benefits as regular instruction, "They themselves are frustrated with the experience, They know that this is not very good instruction for their students, and they want that for their students."[65] McDaniel et al. (2020) echo this same sentiment, "Faculty and students alike felt that student learning had been compromised in the spring, with potential longer-term implications."[66] Likewise, Ferris State University instructors, Kollalpitiya et al. (2020) explained that during the Winter/Spring 2020 semester, "For all three instructors, many of the benefits of their interactive teaching and learning strategies were lost in the switch to online content delivery…In the free-response questions, students complained of the loss of face-to-face lecture benefits (14 students) and isolation from their peers (12 students)." [67]

75. Further, conflating ERT with regular online instruction holds the potential of diluting the perception of the latter. A recent Pew Research poll of 10,332 U.S. adults found that 68 percent of respondents said a course taken online does not provide the same educational value as a course taken face-to-face in the classroom.[68] Overall, 75 percent of college graduates with a bachelor's degree or higher said that online classes do not provide the same value as face-to-face instruction. To the extent that public opinion of online instruction was negatively affected by the lack of distinction between the emergency remote teaching that occurred in the Winter/Fall 2020 term and regular online instruction, this confusion has the potential to skew public opinion against online education as an instructional method. Schutz and DeMers (2020) underscore this this observation and caution that, "Hastily moved content to the online format by so many institutions could inadvertently create the misconception that online coursework equates with a weak option

[64] Doug Lederman, Preparing for a Fall Without In-Person Classes, Inside Higher Ed, April 1, 2020. Available online at https://www.insidehighered.com/digital-learning/article/2020/04/01/preparing-quietly-fall-semester-without-person-instruction.

[65] *Id.*

[66] Christy McDaniel, Catherine Suffern, Jenna Joo, Rayane Alamuddin. Student and Faculty Experiences with Emergency Remote Learning in Spring 2020, IHAKA SR Research Report, October 22, 2020. (hereafter Ithaka Report). Available at https://sr.ithaka.org/publications/student-and-faculty-experiences-with-emergency-remote-learning-in-spring-2020/.

[67] Kollalpitiya et al. cited *supra*, at 3387-8.

[68] Kim Parker, Amanda Barroso, and Richard Fry. Americans are divided on whether colleges that brought students back to campus made the right decision, Pew Research Center, October 26, 2020. Available at https://www.pewresearch.org/fact-tank/2020/10/26/americans-are-divided-on-whether-colleges-that-brought-students-back-to-campus-made-the-right-decision/.

in comparison with classroom instruction."[69]

76. Survey evidence indicates the students have agreed with the assessments above. The suboptimal nature of instruction via ERT has demonstrated itself through student dissatisfaction with the alternative instruction provided and calls for reimbursement for the difference between the teaching they anticipated and for which they paid and what they received. Students recognize the difference between the two is a difference in kind (i.e., a different product), not merely degree. In a OneClass survey of 1,287 students from 45 universities across the U.S conducted in spring 2020 and published on April 1, 2020, approximately 75% of respondents answered "No" to the question "Do you feel like you are receiving a quality e-learning experience from your university/college since classrooms were closed to students?"[70]

2. The relevant literature regards emergency remote teaching (ERT) as lacking the attendant benefits that regular online instruction offers.

77. Universities' view of ERT mirrors the literature on emergency remote instruction. The relevant literature chronicles the difficulties of transitioning face-to-face courses to an online format. Atchison et al. (2008)[71] discusses such issues in a 2008 Public Health Reports journal article published in the "From the Schools of Public Health" section, which consists of articles that "highlight practice- and academic-based activities at the schools."[72] The authors detail the findings of the University of Iowa Pandemic (UI) Influenza Task Force (Task Force)[73], which was established in January 2006 as an initiative of the Office of the Provost and "quickly expanded to include more than 70 individuals from across campus, the local community, and state agencies."[74] The resulting preliminary UI Pandemic Response Plan outline "became the starting point for developing a pandemic planning toolkit for all academic institution, through a collaborative of more than a dozen Association of Schools of Public Health Members, with assistance from subject

[69] Richard B. Schultz & Michael N. DeMers (2020) at 143.
[70] OneClass Blog, 75% of College Students Unhappy With Quality of eLearning During Covid-19. Available at https://oneclass.com/blog/featured/177356-7525-of-college-students-unhappy-with-quality-of-elearning-during-covid-19.en.html. Accessed 8/30/2020.
[71] Christopher Atchison, Elizabeth Hosmanek, and Laurie Walkner. On Linkages: Preparing and Sustaining a Comprehensive Pandemic Plan for An Academic Community. Public Health Reports. 2008;123(6):807-811, (hereafter Atchison et al.) Available at https://journals.sagepub.com/doi/pdf/10.1177/003335490812300619.
[72] Public Health Reports, From the Schools of Public Health, SAGE Journals, available at https://journals.sagepub.com/doi/abs/10.1177/003335490812300619.
[73] https://provost.dev.drupal.uiowa.edu/pandemic-influenza-preparedness-task-force.
[74] Atchison et al. (2008) at 807.

matter experts within local, state, and federal government."[75]

78. Atchison et al. describe the Task Force's findings with regard to remote continuity of learning as follows:

> The final decision regarding remote continuity of learning during a pandemic was that it would be logistically impossible to move all classes online once a pandemic became imminent. Additional factors that led the Task Force to prefer suspension of classes during a global emergency rather than remote continuity of learning included (1) the length of time necessary to develop a class for online learning, (2) imposing compounding stressors on faculty and students when caretaking responsibilities and personal illness are likely, (3) unknown reliability of Internet connectivity, and (4) unequal access to technology off campus. Requirements of accrediting bodies also played a role; in some instances, accreditation is partly based on curriculum delivered in person.[76]

79. Universities, including the USC, have echoed the UI Task Force's findings as discussed in the previous section. As an additional example, Columbia State University's Pandemic Influenza Response Plan observed that "It is unlikely that the University will have sufficient bandwidth to teach all classes on-line. It is also unrealistic to assume that all classes lend themselves to on-line instruction. For that reason it is important to examine any and all possibilities."[77] I discuss these issues, particularly the length of time needed to develop online courses in normal circumstances and the requirements of accreditation bodies and the Department of Education regarding face-to-face instruction in this report.

80. The literature, including recent articles, offer support for the UI Task Force's recommendations noted above. Armstrong-Mensah note the difficulties with adapting courses designed for face-to-face delivery to an online format:

> Making distance learning work for all students is challenging. The best tools can be in place, but without equitable access by all students to the tools, adequate preparation time and training for faculty, and the adaption of existing curricula, or the development of brand-new course syllabi, it will be difficult to replicate the in-person learning experience, online. (emphasis added)[78]

81. As referenced earlier in this report, Hodges et al. (2020) propose the term

[75] *Id.* at 807-8.
[76] *Id.* at 810.
[77] Columbia State University, Pandemic Influenza Response Plan, 2016, at 18. Available at https://healthservices.columbusstate.edu/docs/CSUPandemicFluPlan2016_20160830131410.pdf.
[78] Elizabeth Armstrong-Mensah, Kim Ramsey-White K, Barbara Yankey, and Shannon Self-Brown. COVID-19 and Distance Learning: Effects on Georgia State University School of Public Health Students. Front Public Health. 2020 Sep 25;8:576227 at 2. Available at https://www.frontiersin.org/articles/10.3389/fpubh.2020.576227/full.

"emergency remote teaching" for courses offered during an emergency transition.[79] They caution against comparing such ERT courses to customary online teaching and comment that "Well-planned online learning experiences are meaningfully different from courses offered online in response to a crisis or disaster… nobody making the transition to online teaching under these circumstances will truly be designing to take full advantage of the affordances and possibilities of the online format." The authors also note that:

> Typical planning, preparation, and development time for a fully online university course is six to nine months before the course is delivered… Let's face it: many of the online learning experiences that instructors will be able to offer their students will not be fully featured or necessarily well planned, and there's a high probability for suboptimal implementation…The rapid approach necessary for ERT may diminish the quality of the courses delivered. The need to "just get it online" is in direct contradiction to the time and effort normally dedicated to developing a quality course. (emphasis added)

82. Hodges et al. also mention an additional constraint in addition to time, subject to which faculty had to optimize their instructional delivery after the cancellation of face-to-face classes: technical support resources. The authors note that "these individuals and teams will not be able to offer the same level of support to all faculty in such a narrow preparation window." Citing to Hodges, Rapanta et al. (2020) further delineate the distinction between online education and ERT:

> For example, online education pre-supposes an existing organizational infrastructure, serving the purposes of online teaching and learning. In contrast, the emergency remote teaching required by Covid-19 has often been improvised rapidly, without guaranteed or appropriate infrastructural support.[80]

83. Petillion and McNeil's (2020) phenomenological study discusses the Winter/Spring 2020 transition of face-to-face teaching at the University of British Columbia's Okanagan campus as a result of the COVID-19 pandemic and observe that "this rapid transition to emergency remote teaching had negative impacts on student learning, engagement, and mental well-being."[81] The authors recruited a total of two hundred and ninety (290) unique participants who were students in

[79] Hodges et al. (2020).
[80] Chrysi Rapanta, Luca Botturi, Peter Goodyear, Lourdes Guardia, and Marguerite Koole. Online university teaching during and after the Covid-19 crisis: refocusing teacher presence and learning activity. Postdigit Sci Educ 2: 923–945, 2020, hereafter "Rapanta et al.". Available at https://link.springer.com/article/10.1007%2Fs42438-020-00155-y.
[81] Riley J. Petillion and W. Stephan McNeil. Student Experiences of Emergency Remote Teaching: Impacts of Instructor Practice on Student Learning, Engagement, and Well-Being, Journal of Chemical Education. (2020). https://dx.doi.org/10.1021/acs.jchemed.0c00733.

three chemistry courses taught during the second semester of the 2019-2020 academic year, sixty-four (N=64) of whom completed the Likert-scale survey.[82] The authors found that,

> The survey results reveal that the principal concerns expressed by our students about their emergency remote learning experience relate to their diminished ability to maintain a productive level of interest and engagement with course instruction, to develop and adhere to a productive learning schedule, and to manage a distraction-free learning space in their homes; the interview data reinforced these concerns. A vast majority of our students felt that their learning was negatively impacted and that they suffered some degree of stress and anxiety because of the transition to remote learning, which was exacerbated by a lack of any period of downtime to prepare for that transition. Overall, the remote learning experience was viewed unfavorably as compared to in-person instruction, especially with regard to a reduced ability to maintain an organized schedule and to connect and interact with instructors, TAs, and other students.

84. Likewise, Schultz and DeMers (2020) observe that,

> The rapid shift from the structures and face-to-face contact did not permit time for proper design of a virtual learning environment…The result of this emergency was generally chaotic learning environments…In general, the focus of this emergency remote learning (ERL) scenario was a concentration on learner to content interaction as opposed to the critical aspects of student-student and student-faculty interactions. (emphasis added) [83]

85. The authors explain that, not only do educators require training for online instruction, for those who have taught in their classroom their careers and have not employed the tools and pedagogies of online learning, "Shifting to that model over a few days as the pandemic has dictated is essentially an impossibility in that span of time."[84]

86. In a commentary published in the American Journal of Pharmaceutical Education, Schlesselman (2020) echoes the distinction between ERT and online teaching. The author discusses the frantic and suboptimal transition between face-to-face instruction and ERT that occurred in the Winter/Spring 2020 semester, noting,

> While technology provided the ability to transition to teaching during the spring semester, what was provided for the remainder of the semester was emergency remote teaching, not online learning… What was acceptable as emergency remote teaching will not be

[82] The Likert scale included seven response categories that ranged from Very Strongly Disagree (VSD) to Very Strongly Agree (VSA). The supporting documentation for this survey is available at https://pubs.acs.org/doi/10.1021/acs.jchemed.0c00733?goto=supporting-info.
[83] Richard B. Schultz & Michael N. DeMers (2020) Transitioning from Emergency Remote Learning to Deep Online Learning Experiences in Geography Education, Journal of Geography, 119:5, at 143.
[84] Schultz and DeMers (2020) at 144.

> appropriate for an online fall semester…Even with courses that they have taught face-to-face for years, faculty who work with our instructional designers typically require 6 months of diligent course design to create an online course that meets all of the standards established by Quality Matters.[85]

87. Notably, Schlesselman cites the months-long time frame needed for the successful development of an online course, which again contrasts with the two weeks accorded faculty during USC's to transition to ERT. I discuss this point in more detail in the following section.

3. Development of pre-planned online courses requires a significant time and resource investment that ERT courses did not have.

88. As detailed above, university administrators and educators concur that the development of an online course requires substantial investment in time, which the transition to ERT did not permit. The University of South Carolina's Center for Teaching Excellence observes that "It typically takes 20 weeks to design and develop a 14-week online course."[86]The Center provides two timelines, one that calls for a proposed 20-week time frame, which it labels as "Highly Recommended"[87], and another that provides an "Accelerated 12-week Option."[88] In providing additional resources, the USC Center for Teaching Excellence links to the University of Wisconsin's Center for Teaching, Learning & Mentoring's Design + Teach + Engage resources.[89] The University of Wisconsin also provides a resource to "review five suggestions for now [not] to design an online course." This guide, created by Online Learning Insights creator Debbie Morrison lists various pitfalls to avoid in designing on online course, and explains that:

> Moving a face-to-face credit course to an online environment is far more challenging than one might expect.. What not to do: Underestimate the amount of time needed for course transition. This is one of the most common mistakes of all, underestimating how much time

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[85] Lauren S. Schlesselman, Perspective from a Teaching and Learning Center during Emergency Remote Teaching, American Journal of Pharmaceutical Education May 2020, ajpe8142; DOI: 10.5688/ajpe8142.

[86] The University of South Carolina Center for Teaching Excellence, Online Course Development, available at https://sc.edu/about/offices_and_divisions/cte/teaching_resources/online_teaching_faculty_toolbox/online_course_development/index.php. Accessed 8/6/2022.

[87] Direct download *available at* https://sc.edu/about/offices_and_divisions/cte/teaching_resources/online_teaching_faculty_toolbox/docs/online_course_development_timeline.docx.

[88] Direct download *available at* https://sc.edu/about/offices_and_divisions/cte/teaching_resources/online_teaching_faculty_toolbox/docs/online_course_development_timeline_12week_option.docx.

[89] USC Center for Teaching Excellence, Quality Standards for Online Courses, *available at* https://sc.edu/about/offices_and_divisions/cte/teaching_resources/online_teaching_faculty_toolbox/qsoc/index.php. See also, University of Wisconsin, Center for Teaching, Learning & Mentoring, available at https://designteachengage.wisc.edu/transitioning-to-the-online-environment/.

is needed to bring a course to the online format. Transitioning an existing course from a face-to-face format to the online learning environment requires an investment of time that is akin to developing a course from the ground-up.[90]

89. The academic literature has also long recognized the time investment required to develop preplanned online courses. Anderson et al. observe that "As in many forms of distance education, the process of designing and planning the online course is usually more extensive and time-consuming than is the analogous process in classroom based teaching."[91] DeGagne and Walters also explain that "Online educators felt that online teaching was challenging because they spent more time on planning, designing, delivering, and evaluating online instruction. Online teaching requires more time and effort than face-to-face education. Administrators must assess and evaluate faculty workload, holding shared responsibility in creating the finest and most effective e-learning environment."[92] Also, Stern concludes that "…for the course to be effective, the time that must be allotted for online teaching will remain an issue that instructors may struggle with as the workload is significantly higher."[93]

90. The University of Michigan's Center for Academic Innovation (CAI) explained that online courses are generally planned eight weeks or more in advance. Other institutions advise a substantial commitment of time to the development of an new online course.[94] State University of New York (SUNY) Broome recommends a five-month window for online course creation.[95] Likewise, Northeastern University's Center for Advancing Teaching and Learning Through Research (CALTR) "suggests that faculty anticipate spending 4-6 months of regular work time to

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[90] Debbie Morrison, How [not] to Design an Online Course, Online Learning Insights, August 6, 2012, *available at* https://onlinelearninginsights.wordpress.com/2012/08/06/how-not-to-design-an-online-course/. ("What not to do: Use the same face-to-face course syllabus.. An instructional strategy for online learning involves unique pedagogical principles applicable to the delivery method, revised teaching methods, learning activities and assessments…What not to do: Utilize the same course materials as used in F2F class.")

[91] Terry Anderson, Liam Rourke, D. Randy Garrison and Walter Archer, Assessing teaching presence in a computer conferencing context, Online Learning, *5*(2) 2001, available at *http://dx.doi.org/10.24059/olj.v5i2.1875*.

[92] Jennie C. De Gagne and Kelley Walters, Online Teaching Experience: A Qualitative Metasynthesis (QMS), JOURNAL OF ONLINE LEARNING AND TEACHING, Vol. 5, No. 4, December 2009, *available at* https://jolt.merlot.org/vol5no4/degagne_1209.pdf.

[93] Barbara Slater Stern, A Comparison of Online and Face-To-Face Instruction in an Undergraduate Foundations of American Education Course, CONTEMPORARY ISSUES IN TECHNOLOGY AND TEACHER EDUCATION, 4(2), 2004, 196-213, *available at* https://citejournal.org/wp-content/uploads/2016/04/v4i2general1.pdf.

[94] This is true of online training as well. For example, Training magazine notes that "Time constraints pose a challenge for both trainers and trainees. For trainers, time is necessary to create a great online presentation." See Matt Pierce, The 4 Most Important Factors for Quality in Online Training, TRAINING, Dec. 29, 2015, available at https://trainingmag.com/5-most-important-factors-quality-online-training/.

[95] http://www3.sunybroome.edu/online/wp-content/uploads/sites/11/2015/10/SUNY-Broome-Development-Timeline-for-New-Online-Courses1.pdf

design and develop an online course."[96] Temple University warns that "You should not plan to teach an online course a week after you first thought about it. You should give yourself *at least a semester* to make plans and prepare materials."[97] (emphasis added) Likewise, the University of Villanova explains that "Transitioning to an online learning environment is a time-consuming and exacting process made all the more challenging when set against the backdrop of dealing with a global pandemic."[98]

91. Steven Shisley, instructional designer in the Office of e-Campus at Eastern Kentucky University, offers a detailed comparison of emergency remote learning and online learning, explaining that "…emergency remote learning may take place online and share similar components as online learning, but it differs from online learning because of design." Shisley adds that that online learning course design "requires a substantial amount of time, forethought, and preparation before the course begins," while emergency remote learning represents "[a] quick consolidation of a large amount of course material prepared for face-to-face learning into an online format."[99] Western Michigan University (WMU) professors Vollbrecht et al. (2020), writing regarding the experience of delivering course instruction via emergency remote learning (ERL), explain that "This commentary is not a best practices list for how to create a fully developed online course, which can take months or years" and that "none of the faculty involved would argue that the ERL experience was equal to an in-person experience…"[100]

92. U-M Dearborn professor Lee Freeman (2015) surveyed one hundred sixty-five professors from three universities, asking each to respond to questions regarding their experiences and perceptions of developing and teaching online courses.[101] Based on sixty-eight total

[96] Northeastern Center for Advancing Teaching and Learning Through Research, What Does It Take To Design An Online Course?, available at https://learning.northeastern.edu/getting-started-with-online-course-design/.
[97] Temple University, First time online teaching, Available at https://sites.temple.edu/firsttimeonlineteaching/.
[98] University of Villanova, Office of the Provost, Online Teaching Guidelines Fall 2020, available at https://www1.villanova.edu/villanova/provost/vital/OnlineTeachingGuidelinesFall2020.html.
[99] Steven Shisley, Emergency Remote Learning Compared to Online Learning, Learning Solutions, May 20, 2020. Available at https://learningsolutionsmag.com/articles/emergency-remote-learning-compared-to-online-learning.
[100] Peter J. Vollbrecht, Kirsten A. Porter-Stransky, and Wendy L. Lackey-Cornelison, Lessons learned while creating an effective emergency remote learning environment for students during the COVID-19 pandemic, Advances in Physiology Education 2020 44:4, 722-725. Available at https://journals.physiology.org/doi/full/10.1152/advan.00140.2020.
[101] Lee Freeman, Instructor Time Requirements to Develop and Teach Online Courses, Online Journal of Distance Learning Administration, Volume XVIII, Number I, Spring 2015. Available at https://www.westga.edu/~distance/ojdla/spring181/freeman181.html. The Ohio State University's Distance Education Team discussed these findings here: https://u.osu.edu/distanceeducation/2015/05/06/time-needed-to-develop-online-courses/.

respondents (41% response rate), Freeman found that:

- In general, more faculty begin online course development earlier and fewer faculty wait as long to start online course development.
- Forty-six percent of the respondents complete their online course development in eight weeks or less, and a full 87% of the respondents complete their online course development in sixteen weeks or less. Twelve percent of the respondents take longer than 20 weeks. In terms of actual hours, 29% of the respondents need over 100 hours (median of 70 hours) to develop their online course.

93. Based on these data, we can obtain an estimate of the number of weeks by which time fifty percent (50%) of professors surveyed completed their online course. This calculation appears below. If 46% of professors complete their online course in 8 weeks or less and 87% do so within 16 weeks, then, between 8 and 16 weeks, we can expect approximately 50% of professors to complete their course between 8 and 9 weeks.

TABLE 1. PREPARATION TIME FOR ONLINE COURSE

		Weeks	**% Completed**
	A	8	46%
	B	16	87%
Difference	C=B-A	8	0.41
% Completed/week			5%

94. However, the calculation above will likely underestimate the amount of time needed for faculty who have not taught online previously to create such a course. In describing the faculty who responded to the survey, Freeman explains that "On average, these instructors developed their first online course in 2001 (but as early as 1990) and taught their first online course in 2002 (also as early as 1990)." Thus, survey respondents stand in contrast to what transpired in the Winter/Spring 2020 semester when "In the Covid-19 emergency situation, teachers have, almost overnight, been asked to become both designers and tutors, using tools which few have

fluently mastered."[102]

95. Further, Freeman's survey relates to the instructor's time developing the course. Course review requires additional time and resources. Chao et al. (2006) observe that "The biggest challenge in controlling course presentation quality is the fairly short turnover time for editorial scrutiny and the multiple stakeholders involved in creating the final course product."[103]

96. As discussed earlier, courses that transitioned from face-to-face to ERT did not benefit from such preparation. USC announced the transition to ERT on March 11, 2020 and instruction in that format began on March 23, 2020, approximately two weeks later. The differential between actual preparation time for transition to ERT versus the preparation time needed for regular online instruction can inform the basis for distinguishing the benefits of a course taught in ERT versus a regular online course.

97. In addition to the distinction between ERT and online courses that I discussed earlier in this report, the literature also supports the quality differential approach to distinguishing the educational benefits offered by these two forms of instruction. Yang and Cornelius (2004) review the literature and recommend that "To ensure the quality of online instruction, the online learning environment must be designed first before the instructor embarks on the online course delivery."[104] The authors review the literature, which includes that university administrators and instructors consider a variety of factors when proceeding with online education. These recommendations for implementing a successful online course have one common characteristic: the time required to implement them.

98. In a 2021 case study, Roy and Covelli investigated faculty and student reaction to the COVID-19 emergency transition to online instruction. The authors asked faculty open-ended questions about what changes they would make if they had to each classes online again extended

[102] Rapanta et al., cited *supra*. While this citation uses the term "teachers", the authors note that "The present article focuses on the pedagogical preparedness of *university teachers* with no or little experience in online teaching." (emphasis added)
[103] Tracy Chao, Tami Saj and Felicity Tessier, Establishing a Quality Review for Online Courses, Educause Review, January 1, 2006. Available at https://er.educause.edu/articles/2006/1/establishing-a-quality-review-for-online-courses.
[104] Yi Yang, and Linda Cornelious. Ensuring quality in online education instruction: What instructors should know? Association for Educational Communications and Technology, Washington, DC.; Association for Educational Communications and Technology, Chicago, IL, Oct 19-23, 2004 at 852. Available online at https://files.eric.ed.gov/fulltext/ED484990.pdf.

time period. They found that,

> One said, "starting online is easy, switching mid-semester is a challenge." Another said: "putting four classes online in four days was not enough prep time." A significant number of faculty responses to this question pointed to the inadequate transition time. Other responses indicated a desire to incorporate more tools for interaction, synchronous video conferencing, and setting up courses in an online format from the beginning.[105] (emphasis added)

99. A potential rejoinder to the discussion above might posit that some of the preparation for online instruction would have already been completed because the ERT did not involve creating online courses "from scratch" but rather transitioning from face-to-face instruction. Such an argument would imply that, as a result, transitioning from face-to-face to online instruction would require less time than creating an online course from the beginning. However, this argument suffers from several flaws.

100. First, as discussed in the previous sections of this report, a consensus among university administrators, educators, and the literature has recognized the deficiency of emergency remote teaching relative to regular online or face-to-face instruction, labeling ERT as "triage mode". Second, a consensus also exists that online instruction means more than simply moving a face-to-face class onto a distance learning platform. Temple University's guide to teaching online, in answering the question of how instructors should decide if a course currently taught face-to-face can also be taught effectively online, remarks that instructors should ask themselves, "How much time do I have to translate the course to the online environment? (Learning to teach online takes preparation time, and planning at least 6 months ahead is probably necessary)."[106]

101. Robin Smith's *Conquering the content: A step-by-step guide to online course design* also highlights the importance of preparation time in observing that "All design and development activities should be completed before the semester begins."[107] Kevin Gannon, recently remarked in The Chronicle of Higher Education that, "Teaching online involves far more than simply dropping a face-to-face course into the campus learning-management system.

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[105] Sudipta Roy and Bonnie Covelli, COVID-19 Induced Transition from Classroom to Online Mid Semester: Case Study on Faculty and Students' Preferences and Opinions, HIGHER LEARNING RESEARCH COMMUNICATIONS, Vol. 11, Issue 0 (Special Issue: Implications of COVID-19 on Higher Education), 2021, 10-32 at 23, *available at* https://scholarworks.waldenu.edu/cgi/viewcontent.cgi?article=1197&context=hlrc.

[106] *Id.* Temple Univ. guide, https://sites.temple.edu/firsttimeonlineteaching/.

[107] R.M. Smith, (2008). CONQUERING THE CONTENT: A step-by-step guide to online course design. San Francisco, CA: Jossey-Bass (2008) at 55.

Designing effective online courses is hard work and differs significantly from in-person teaching."[108] Further, Texas A&M's Online Course Development manual observes that,

> The development process of a course planned for online delivery is more rigorous than traditional face-to-face instruction. Since there are fewer opportunities to adjust instruction and course activities based on mutual agreement between faculty and students, an online course must be well organized from the beginning. Student evaluation feedback has shown that a distance education course that is not aligned or consistent causes much confusion. On the other hand, students report a high degree of satisfaction when courses are well planned from the first day of class. All TAMU online courses must meet quality standards before being offered for the first time. The quality standards that have been adopted by our institution is Quality Matters (QM) and the metric used is the QM Rubric.[109] (emphasis added)

102. A 2015 Public Policy Institute of California report examined successful online course offerings at California's community colleges.[110] The authors also identified difficulties in online courses predicated on the same issues that instructors and students faced in the Winter 2020 term:

> Too frequently, however, the instructor simply tries to create an online version of a traditional course, taking little account of the differences in learning environments (at 3)…Instructors frequently use traditional face-to-face course materials without proper implementation of online pedagogical principles or an understanding of the technology. (at 9).

103. This same situation manifested itself during the Winter/Spring 2020 semester, when instructors, through no fault of their own, were forced to transition courses designed for face-to-face delivery to emergency remote instruction with minimal preparation time. As a March 2020 FacultyFocus publication observed, "Transitioning your face-to-face class to online takes time, but time isn't always on our side in case of emergencies."[111] Fletcher and Bjerkaas (2012) provide a

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[108] Kevin Gannon, Our HyFlex Experiment: What's Worked and What Hasn't, The Chronicle of Higher Education, October 26, 2020. Available at https://www.chronicle.com/article/our-hyflex-experiment-whats-worked-and-what-hasnt.

[109] Texas A&M University Online Course Development Manual at 2 ("TAMU Online Course Manual"). Available at https://www.tamiu.edu/distance/onlinecoursedevmanual/files/assets/common/downloads/Online%20Course%20Development%20Manual.pdf. The manual also notes that, with respect to the peer review process to obtain a Quality Matters Course Review Certificate, "The entire review period may be as long as 20 weeks from the time the course review was started." *Id* at 14.

[110] Hans Johnson, Marisol Cuellar Mejia, and Kevin Cook, Successful Online Courses in California's Community Colleges, Public Policy Institute of California, June 2015. Available at https://www.ppic.org/content/pubs/report/R_615HJR.pdf.

[111] FacultyFocus, A Resource Guide for Transitioning Your Class Online, Magna Publications, March 3, 2020 at 3. Available at https://www.facultyfocus.com/free-reports/a-resource-guide-for-transitioning-your-class-online/.

framework for effectuating such a transition using the Johns Hopkins University Engineering for Professionals Technical Management Program course design matrix. The authors explain that,

> There is a two-fold challenge in converting face-to-face (classroom) courses for online delivery. The first is the overall task of systematically translating a class to an online environment. But there is rarely a one-to-one correspondence in the translation, often because the face-to-face faculty received little-to-no formal training on course design nor had any instructional design support, and therefore resorted to using general pedagogical techniques. And so the second challenge is the coincidental problem of teaching faculty to redesign existing classes to accommodate the online environment.[112]

104. The authors note that while the intention would be to reuse as much of the material designed for face-to-face instruction in the online version, "Only after the learning objectives and assessments have been drafted should the learning materials/learning objects be derived from the face-to-face course or designed for the online course." The frameworks the authors propose involves multiple modules that may require multiple iterations to arrive at an online course design. They conclude that "Converting face-to-face classes to an online environment is not a straightforward or insignificant task. At all stages of the development process, it is important to examine what worked in the classroom and evaluate whether or not it will work online."[113]

105. Explaining the results of a survey of faculty who transitioned their courses from face-to-face to online instruction, Kampov-Polevoi (2010) accentuates the difficulties in doing so, and explains why transitioning between the two methods is not a simple matter.

> The instructors want and need institutional support in the form of consultations with technical specialists, access to variety of course development and teaching tools, and training. The extensive time and effort needed for course conversion was noted by all of the faculty interviewed. Typical comments were along the lines of "development almost killed me" or "it was ten times more work than regular class.[114]

106. Emphasizing the distinction between the emergency remote teaching that occurred in spring of 2020 and what students expected in the fall, Elizabeth Johnson, provost at Post

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[112] M.L. Fletcher and A.W. Bjerkaas, Structured Design Approach for Converting Classroom Courses for Online Delivery. Journal of Online Engineering Education, Vol. 4, No. 1, (2012). Available at http://www.onlineengineeringeducation.com/joee_v4n1a1.pdf.

[113] *Id.*

[114] Julia Kampov-Polevoi. "Considerations for Supporting Faculty in Transitioning a Course to Online Format." Online Journal of Distance Learning Administration 13 (2), 2010. Available at https://www.westga.edu/~distance/ojdla/summer132/kampov_polevoi132.pdf. The author concludes that "Finally, the study suggests that successful transition of instruction to online environment is not simply a matter of faculty interest and motivation but a complex process, heavily dependent on the level of institutional support. Administrators need to be willing to commit technical and human resources necessary for such transition."

University, writes in Inside Higher Ed that

> …we learned this spring that the basic transition of face-to-face courses into remote delivery did not provide the comprehensive learning experience students require… A successful online fall semester will require institutions to focus resources on five key areas that differentiate true online education from remote instruction: culture, course design, support services, technology and student preparation… In-person course design does not generally lend itself to effective online learning. Although online courses meet the same student learning outcomes, the delivery and assessment of student learning in online courses is specifically designed to overcome the challenges of learning remotely.[115]

107. Duke University's online teaching guide highlights the need for preparation time even if the course has been previously taught online, again echoing earlier observations that You should plan to start preparing your online course well in advance of the beginning of class — ideally at least 2 to 3 months before the course will be taught. Even if this course has already been taught online you will need time to prepare and change things for your best outcome."[116]

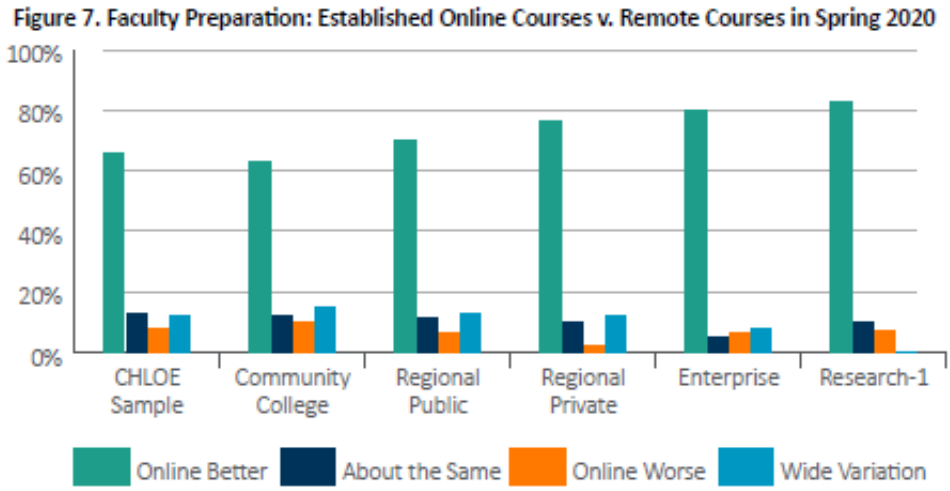
108. Likewise, Columbia University's Center for Teaching and Learning (CTL) offers a guide to help faculty adapt their courses from face-to-face instruction to an online format. The guide cautions that,

> Online course design is more than transferring content online or replicating face-to-face classroom sessions. Instead, it involves redesigning content for an online environment; rethinking course goals, assessments, and learning experiences; integrating technology intentionally; and putting structure and support in place to promote self-directed learning.[117]

109. The most recent iteration of Quality Matters' Changing Landscape of Higher Education (CHLOE) report, issued in July 2020 and titled CHLOE-5, provides additional insights into the differential between the courses offered through emergency remote teaching in the Winter/Spring 2020 term and the instruction universities planned to offer in the Fall 2020. The report observes that, "…if remote learning were to be extended into fall 2020, there was no lack of ideas as to how remote courses could be improved with more time and resources available" and echoes the opinion I offer in this report in explaining that "The targeted reforms implicitly identify

[115] Elizabeth Johnson, Turning Remote Education Into Online Education This Fall, May 20, 2020. Available at https://www.insidehighered.com/advice/2020/05/20/how-turn-springs-remote-courses-high-quality-online-courses-fall-opinion.
[116] Duke University Online Teaching Guide, available at
[117] Columbia University Center for Teaching and Learning, Adapting Your Face-to-Face Course to a Fully Online Course: A Guide, Available at https://ctl.columbia.edu/resources-and-technology/teaching-with-technology/teaching-online/adapting-your-course/.

shortcomings in the spring 2020 remote courses."[118] Approximately 65 percent of Chief Online Officers (COOs) surveyed indicated that faculty preparation for online courses was better than that for the remote instruction that occurred in the spring 2020. Below, I provide a screenshot of the Figure 7 in the CHLOE-5 report. On every category, respondents indicated that preparation for online instruction substantially exceeded that of remote courses in Spring 2020.[119]



110. I do not offer the above discussion to criticize in any way the work that university faculty performed in transitioning their courses to ERT as a pandemic swept across the country. The fact that faculty have had to perform their usual instructional duties under enormous pressure and have had additional workload thrust upon them is well-recognized.[120] On the contrary, I present this information to underscore the distinction between the preparation needed for regular online courses versus what was available to faculty during the rush to ERT as universities terminated face-to-face instruction during the Winter/Spring 2020 semester.

[118] Ron Legon and Richard Garrett. The Changing Landscape of Online Education (CHLOE) 5: The Pivot to Remote Teaching in Spring 2020 and Its Impact, Quality Matters, July 2020 (hereafter CHLOE-5) at 16. Available online at https://www.qualitymatters.org/sites/default/files/research-docs-pdfs/QM-Eduventures-CHLOE-5-Report.pdf

[119] CHLOE-5 at 17-18.

[120] Ithaka Report at 19, ("Both the rapid transition to full online instruction and the emergency situation created by the pandemic thrust additional taxing demands on faculty, including acclimating to technology and online instruction, and supporting their students and peers. Almost without exception, faculty in our focus groups reported that their job responsibilities increased in volume and scope during the spring 2020 term.")

4. Universities' engagement of online program management (OPM) firms accentuates the distinction between preplanned online instruction and emergency remote teaching.

111. Online program management companies are third-party, generally for-profit private enterprises, which assist universities to develop and deliver online degree (generally graduate degrees) and/or certificate programs.[121] OPMs differ in the types of services they provide. Some, such as Pearson, Wiley Education services, and 2U, provide a comprehensive suite of services (e.g., developing the course, transferring existing courses to an online format, and instruction), while others such as Orbis, which assists universities with their pre-licensure healthcare programs, provide a more focused set of program management tools. In exchange for their services, OPMs commonly receive compensation in two ways: 1) the institution either pays the OPM on a fee-for-service (i.e., flat-rate), or 2) the OPM receives a percentage of the university's tuition revenue for the program(s) that the OPM assisted to develop and deliver.[122] The OPM share generally falls between 40 to 65 percent of tuition revenue, with some contracts reaching as high as 80 percent.[123] Revenue-sharing agreements generally involve a multi-year commitment. For example, the University of Illinois' agreement with Pearson extends for seven years past the effective date.[124] The 2019 TCF Report found that over fifty percent of the universities for which they obtained contracts had a revenue-sharing agreement with the OPM they engaged.

112. Although, to my knowledge, USC does not have a contract with an OPM at this time[125], the fact that universities enter into such contracts, which can encumber the institution for multiple years and command the majority of tuition revenue further underscores the deficiency of emergency remote teaching. If the same quality of instruction could have been developed internally within a matter of days and achieved with a fraction of the cost, there would be little, if any reason, for universities to enter into long-term binding contracts and pay millions of dollars to

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[121] Educause, 7 Things You Should Know About Online Program Management, February 6, 2020. Available at https://library.educause.edu/resources/2020/2/7-things-you-should-know-about-online-program-management.

[122] Mark Lieberman, Competing Models and Among OPM Providers, Inside Higher Ed, October 25, 2017, Available at https://www.insidehighered.com/digital-learning/article/2017/10/25/opms-fee-service-growing-revenue-share-models-dominate/.

[123] Stephanie Hall and Taela Dudley, Dear Colleges: Take Control of Your Online Courses, The Century Foundation, September 12, 2019, hereafter "TCF Report. Available at https://tcf.org/content/report/dear-colleges-take-control-online-courses/.

[124] A copy of the University of Illinois' agreement with Pearson can be found here: http://production.tcf.org.s3.amazonaws.com/assets/OPM_contracts/UniversityofIllinois_Pearson.pdf.

[125] Specifically, I reviewed The Century Foundation's (TCF) list of university contracts with OPMs. However, I understand that this list may not be comprehensive.

third-party providers to achieve the same result.

113. Fee-for-service OPM compensation plans can also result in substantial costs to the University. For example, the University of Michigan's Ross School of Business contracted with the OPM Noodle Partners in 2019 to develop its Online Masters of Business Administration (MBA) program.[126] Though I do not have access to the specific terms of these agreements, Noodle Partners, which works with at least eighteen universities including Univ. of Toledo, Harvard, Boston College, New York University, and others[127], asks for a five-year contract.[128] The company charges colleges an $88 per-credit-hour fee for each student enrolled, which drops to $4 as online enrollment grows, plus $22,000 per month in management fees for the initial program and $12,000 per month for each additional program. [129]

114. Based on the findings above, I draw two conclusions. If creating an online program that offers the same instructional benefits as students receive in face-to-face courses could be done in a matter of days, there would have been little need for such an agreement with OPM firms. Further, even focusing on the time needed to move a single course online can understate the time and effort needed to do so successfully. This is because courses are part of a department and a degree program, and thus often build on each other. Moving an entire program online involves not only issues idiosyncratic to a particular course, but also the relationship between that course and others that may either precede or follow it in the program's curriculum.

C. Receiving credit and fulfilling degree requirements do not mean that students received the educational product for which they paid.

115. From an economic point of view, the University of South Carolina's position implies the assumption that any instruction that meets the criteria of completing classes, receiving credit and grades, and progress towards degree requirements can be considered a substitute product for traditional, face-to-face instruction. In the documents produced in this matter, USC explains its strategy for retaining tuition revenue rather than providing refunds to students as follows,

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[126] University of Michigan Ross School of Business, Michigan Ross Selects Noodle Partners to Help Launch Online MBA Program, February 12, 2019. Available at https://michiganross.umich.edu/ross-news-blog/2019/02/12/michigan-ross-selects-noodle-partners-help-launch-online-mba-program.
[127] Joshua Kim, Getting My Head Around Noodle Partners, Inside Higher Ed, November 10, 2019. Available at https://www.insidehighered.com/blogs/technology-and-learning/getting-my-head-around-noodle-partners/
[128] Details on Noodle Partners' contract length can be found here: https://partners.noodle.com/better-than-opms.
[129] Details on Noodle Partners' fees can be found at: https://partners.noodle.com/better-economic-model.

> USC Columbia Campus: The goal of the "online strategy" is to continue to allow the student to progress. Success in this area will also "protect" the tuition/fee revenue stream.[130]
>
> Just as in Columbia, the goal of the "on line strategy" is to continue to allow the student to progress while also "protecting" the tuition/fee revenue stream. System institutions need to be considered is preparation for moving on line (sic).[131]
>
> Ability to "protect" tuition through deployment of online strategies, resulting in granting of course credit, will be key.[132]
>
> …the University will be most affected by reductions to tuition and fees. The University's ability to continue through the semester and earn the balance of spring and summer revenue will be vital to the continued financial health of the University… Maximum negative impact has been assessed in excess of $437M.[133]
>
> Ability to "protect" tuition through deployment of on line strategies, resulting in granting of course credit, will be key[134]

116. However, neither universities, nor students, nor administrator regard emergency remote teaching as a substitute for either face-to-face instruction or regular online instruction. Further, to underscore the distinction between "progress" toward a degree or receiving credit versus receiving the education for which the student paid, I offer the academic fraud scandal at the University of North Carolina at Chapel Hill as an example.

117. A 2014 investigation conducted by Kenneth Wainstein and the law firm Cadwalader Wickersham & Taft into academic fraud at the University of North Carolina at Chapel Hill found a system of "paper classes" that never actually met and required only the submission of a paper at the end of the semester for the student to receive credit.[135] Following the investigation, the University submitted a response letter to its accreditation organization, the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) admitting to "long-standing academic fraud" as uncovered by the Wainstein Report.[136] SCSCOC subsequently placed

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[130] USC_00007575
[131] USC_00007576
[132] USC_00007532
[133] USC_00007597
[134] USC_00011452, USC_00011769
[135] Kenneth L. Wainstein, Joseph Jay III, & Colleen Depman Kukowsi, Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill (Nov. 22, 2014), http://carolinacommitment.unc.edu/reports-resources/ (hereinafter, "Wainstein Report"). Kenneth Wainstein was the former General Counsel of the Federal Bureau of Investigation and the Assistant Attorney General responsible for National Security at the Department of Justice.
[136] Office of the Chancellor of the University of North Carolina at Chapel Hill, Response to the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC) Letter of November 13, 2014. Available online at https://oira.unc.edu/files/2017/07/UNC-Chapel-Hill-Report-to-SACSCOC-Redacted-for-Public-Release.pdf.

UNC-CH's accreditation on probation, which I understand is the penultimate step before loss of accreditation.

118. The same progress toward a degree that occurred after the transition to emergency remote teaching also applied to the fraudulent courses at UNC. Thus, as a logical matter, mere progress toward a credential that USC's documents indicate allowed the school to "protect tuition" cannot be the characteristics that distinguish fraudulent from legitimate education, let alone ERT from in-person education. As another accreditation body, the Higher Learning Commission explains,

> …education is a public good its provision serves a public purpose and entails societal obligations. Furthermore, the provision of higher education requires a more complex standard of care than, for instance, the provision of dry cleaning services. What the students buy, with money, time and effort, is not merely a good, like a credential, **but experiences that have the potential to transform lives, or to harm them**. What institutions do constitutes a solemn responsibility for which they should hold themselves accountable. (emphasis added)[137]

119. Further, the apparent "progress" toward degree justification for charging full tuition despite the transition to ERT would appear to include correspondence courses in this category. However, to address such courses, Congress has incorporated certain provisions, known as the "50% rules" into the Higher Education Act. These provisions affect both institutional eligibility and student eligibility for Title IV aid. Generally, the rules state that "an institution is ineligible for Title IV aid if more than 50% of its courses are offered by correspondence, or if 50% or more of its students are enrolled in correspondence courses."[138] This would imply that the criteria that Defendants propose incorporate methods of instruction that are not considered substitutes for face-to-face, or even distance education.

120. Finally, the fact that students received credit and grades and continued working toward degree completion after the transition does not mean that they received the educational product or the benefits for which they paid.

[137] https://www.hlcommission.org/Publications/guiding-values.html.

[138] Alexandra Hegji, Institutional Eligibility for Participation in Title IV Student Financial Aid Programs, Congressional Research Service (CRS) report R43149, updated February 14, 2019. Available at https://fas.org/sgp/crs/misc/R43159.pdf, at 22.

V. Common Impact and Formulaic Quantification of Class-Wide Damages

121. In the previous section, I explained that USC's March 11, 2020 announcement of a transition from live, face-to-face instruction to emergency remote teaching grew out of necessity to mitigate the risk to public health posed by the novel coronavirus and the disease it causes, COVID-19. From an educational point of view, the University, the literature, students, and other administrators viewed this move as providing a different method of instruction (a difference in kind) to both pre-planned online instruction and the face-to-face teaching expected under the agreement between students and the University.

122. The alternative instruction provided to students in the latter portion of the Spring 2020 semester, ERT, differed to the point that the University would not choose to offer courses in this manner outside of an emergency. Thus, the damages or harm to the students from this difference in kind of educational instruction and experience can be measured as the difference in the benefits attendant to the instruction and college experience agreed upon versus the benefits, or lack thereof, that accompanied emergency remote instruction.

123. While universities may have done their best to continue some other kind of education subject to the constraints imposed by the pandemic, the ERT reflected a different product than the in-person educational product for which students paid, and this difference resulted in a reduction of benefits to students. This section addresses the scope and the quantification of the impact of this different product, in the form of economic damages. Specifically, in this section, I address the following two questions: 1) did the impact of the University's decision to cancel approximately two weeks of classes and then transition to ERT for the remainder of the Spring 2020 Term affect all or nearly all members of the putative classes (scope), and 2) given that the effect was negative, as the previous section explained, can the economic value of the impact be assessed on a class-wide, formulaic basis (quantification). The answer to each of these questions is yes.

A. Common impact to the Tuition Class

124. In the spring of 2020, the impact of COVID-19 was felt nearly ubiquitously throughout educational institutions. The pandemic also affected all students at the University of South Carolina, and by deduction, putative class members. Given the University's uniformly-

imposed decision upon the method of instruction, USC's actions affected all members of the putative Tuition Class, including both graduate and undergraduate students. As USC Executive Vice President for Administration and Chief Financial Officer Edward Walton testified at his 30(b)(6) deposition with regard to the instruction in the latter half of the Spring 2020 semester, " We can do it for everyone. We can do it online."[139] To the extent that nominal differences exist, these can be handled on a classwide basis. For example, courses that were already online and whose format did not change after the University's transition to ERT can be easily removed from the analysis based on enrollment records that USC keeps. No individualized inquiry is necessary. I perform this calculation in my analysis.

125. In addition to receiving ERT instead of live, face-to-face instruction, some class members enrolled in courses that charged fees specific to those classes. Such, fees include laboratory charges to students, even though ERT precluded the availability of laboratories to students or instruction through that medium. The inability to access facilities deemed necessary for education and for which students paid, such as laboratories, represents a reduction in benefits. As Harvard's Physics chair, Subir Sachdev, noted regarding courses taught exclusively through labs, "There's no completely online substitute for a complete lab course like Physics 191 [Advanced Laboratory]."[140]

126. The University's course catalog provides a schedule of fees associated with the courses that charged them. As mentioned previously, I have reviewed this schedule for the Spring 2020 Term. Ascertaining whether any member of the tuition class paid such a fee can be easily done by examining the class member's statement of account to investigate whether it reflects the imposition of such a fee. However, at the time of this report, I have not received a student-specific listing of such fees.

127. Thus, one can also examine the course registration records of individual class members to determine whether they were enrolled in any courses that levied such fees. Where such fees were charged, a pro-rated discount can be calculated on a common basis in the same fashion as the University refunded other charges, such as housing and meal plans.

[139] Deposition of Edward Walton at 47, lines 13-14.
[140] James Bikales and Kevin Chen, Harvard Faculty Prepare for the Possibility of Online Classes in the Fall, April 30, 2020, available online at https://www.thecrimson.com/article/2020/4/30/harvard-faculty-online-semester/.

B. A class-wide, formulaic damages framework for the Tuition Class

128. To calculate damages to the tuition class, the relevant question hinges on the benefits and value associated with emergency remote teaching versus that of live, face-to-face instruction or pre-planned online instruction. As I explained previously in this report, these are not choices students would normally face. Further, USC journalism professor Dr. August Grant, testified at his 30(b)(6) deposition that to his knowledge, USC had no plan for implementing ERT prior to March 2020.[141]

129. My damages model relies on institutional and general consensus of the differential between ERT and face-to-face or pre-planned online courses, namely the time required to prepare the curriculum for regular delivery. As I referenced earlier my approach also relies on the UI Task Force's findings referenced in Atchison et al. (2008) *supra*. The UI Task Force, which informed university pandemic responses across the country, observed that "Additional factors that led the Task Force to prefer suspension of classes during a global emergency rather than remote continuity of learning included (1) the length of time necessary to develop a class for online learning…"[142]

130. The University of South Carolina's documents, as well as the literature I have referenced earlier in this report supports the conclusion that both face-to-face and online education require substantial preparation time.[143] As I explained above, USC's online course development documents indicate that such a course requires an average of 20 weeks of preparation time, with

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[141] Deposition of August Grant at 30, lines 1-3.

[142] Atchison et al. (2008) at 810.

[143] Scholarship and documents from various universities documenting the need for preparation time that ERT did not have are legion. For example, *see*, University of Minnesota, Online Course Development Process - Credit Courses, available at https://cei.umn.edu/services/online-course-and-program-development/online-course-development-process, ("Advance planning is required (up to a full year) to ensure that the course will be available for registration in the appropriate term."). Also see Gwen D. Erlam1, Nick Garrett, Norina Gasteiger, Kelvin Lau, Kath Hoare, Shivani Agarwal and Ailsa Haxell. What Really Matters: Experiences of Emergency Remote Teaching in University Teaching and Learning During the COVID-19 Pandemic, Frontiers in Education, doi: 10.3389/feduc.2021.639842, Oct. 12, 2021, available at https://www.frontiersin.org/articles/10.3389/feduc.2021.639842/full, ("Emergency remote teaching (ERT) is a temporary shift of instructional delivery to an alternate mode due to crisis circumstances (Hodges et al., 2020). It involves the use of fully remote teaching solutions for instruction and education that would otherwise be delivered face-to-face or as blended courses…. In contrast, online learning is both a social and a cognitive process (Conole, 2021), not merely a matter of information transmission via remote information technologies. Careful planning for online learning therefore includes not only identifying the content to cover but also consideration of how different types of interactions will be supported and prioritized. Consequently, development of online courses may take up to 9 months." Emphasis added.) A series of forty-four articles on the topic Covid-19 and Beyond: From (Forced) Remote Teaching and Learning to 'The New Normal' in Higher Education, appear at https://www.frontiersin.org/research-topics/14310/covid-19-and-beyond-from-forced-remote-teaching-and-learning-to-the-new-normal-in-higher-education#articles.

an accelerated time frame of 12 weeks. Dr. Grant also testified in his 30(b)(6) deposition that the typical time it takes to develop a remote class "[c]ould be anywhere from six weeks to six months."[144] The average of this period equals approximately 16 weeks, the same average of the 12 and 20 week time period listed in USC's online courts development documents. If a normal online course requires 20 weeks (80 and 140 workdays and calendar days, respectively) of preparation time and ERT only permitted two weeks, the ERT preparation time can be calculated as a percentage of this total. Assuming a linear relationship between preparation time, and the benefits attendant to pedagogical instruction, we can use this differential to create a common formula for overcharge damages, i.e., the amount that students overpaid for the education benefits they received versus those for which they paid.[145]

131. The approach I propose is grounded in commonly-accepted and widely-employed time-based units in higher education. The Carnegie Unit has represented the temporal basis for the provision of instruction and student progress.[146] The Carnegie Foundation explains that.

> The Carnegie Unit, also known as the credit hour, became the basic unit of measurement both for determining students' readiness for college and their progress through an acceptable program of study. Over time, the Carnegie Unit became the building block of modern American education, serving as the foundation for everything from daily school schedules to graduation requirements, faculty workloads, and eligibility for federal financial aid.
>
> The Carnegie Foundation established the Carnegie Unit over a century ago as a rough gauge of student readiness for college-level academics. It sought to standardize students' exposure to subject material by ensuring they received consistent amounts of instructional

[144] Deposition of August Grant at 36, lines 2-3.
[145] A.H. Studenmund, Using Econometrics: A Practical Guide, 4th ed, Addison Wesley, (2001) at 202-3, "When there is little theory on which to base an expected functional form, the linear form should be used unless strong evidence that it is inappropriate is found. Unless theory, common sense, or experience justifies some other functional form, you should use the linear model."
[146] The Carnegie Foundation, What is the Carnegie Unit? ("The unit was developed in 1906 as a measure of the amount of time a student has studied a subject. For example, a total of 120 hours in one subject—meeting 4 or 5 times a week for 40 to 60 minutes, for 36 to 40 weeks each year—earns the student one 'unit' of high school credit. Fourteen units were deemed to constitute the minimum amount of preparation that could be interpreted as 'four years of academic or high school preparation.'") *Available at* https://www.carnegiefoundation.org/faqs/carnegie-unit/. See also, The Association of Community College Trustees, Carnegie unit and student hour, ("Time-based measurement of educational attainment currently used by American colleges and universities. The original definition of the Carnegie Unit is 120 hours of class or contact time with an instructor spread over the school year. Used today, the student hour is aligned with 50 minutes of lecture time or 12 hours of class/contact time per week over a semester, usually 14-16 weeks.") *Available at* https://www.acct.org/glossary/carnegie-unit-and-student-hour#:~:text=The%20original%20definition%20of%20the,%2C%20usually%2014%2D16%20weeks.

time.[147]

132. While the Carnegie Unit applies to secondary education, institutions of higher education used a metric derived from the Carnegie Unit, the "credit hour".[148] USC also relies on the same credit hour metric.[149] Thus, I apply the same standard, a unit of time, that the Carnegie Foundation has used for over a century to evaluate student preparation for college, to the preparation time for online instruction. In doing so, I rely on the explicit statements of not just the University of South Carolina, but other institutions of higher education and the relevant literature that pre-planned online instruction requires preparation time that ERT lacked. In addition to the preparation time, USC also explains that "If course actions involve the inclusion or addition of pedagogy such that 50% of more of the course may be delivered by distributed learning methods, then the proposal shall be submitted to the Faculty Senate Committee on Instructional Development for review and approval."[150] Further, USC's accreditation body, SACSCOC, observes the unit of time as an appropriate measure of the instruction offered to students in higher education.[151]

133. Of course, the Carnegie Unit does not measure how much a student has learned. As

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[147] Elena Silva, Taylor White, and Thomas Toch, The Carnegie Unit – A Century-Old Standard in a Changing Education Landscape, The Carnegie Foundation, 2015, at 3-5, available at https://www.luminafoundation.org/files/resources/carnegie-unit-report.pdf. Also see *Id.* at 8, ("The Carnegie trustees concluded that college entrance requirements should be "designated in terms of units, a unit being a course of five periods
weekly throughout an academic year of the preparatory school." Fourteen such units constituted "the minimum amount of preparation" for students heading for college.")

[148] Id. at 8. ("In higher education, students receive 'credit hours,' a metric derived from the Carnegie Unit and based on the number of "contact hours" students spend in class per week in a given semester. A typical three-credit course, for example, meets for three hours per week over a fifteen-week semester. A student, then, might earn fifteen credit hours per semester (fifteen is standard full-time registration for a semester, thirty for an academic year) en route to a four-year bachelor's degree requiring a total of 120 credits.")

[149] USC Academic Affairs, ACAF Policy 2.03, "The university adheres to the IPEDS definition of a credit hour as "a unit of measure representing the equivalent of an hour (50 minutes) of instruction per week over the entire term." Therefore, each single course credit requires a minimum of 700 minutes of continuous and ongoing instructional time. A minimum of one calendar week of instruction with a cumulative total of at least 700 minutes is required for each credit offered.") Also, Id., ("For Distributed Learning Courses, the syllabus is expected to articulate a schedule for course topics and activities that demonstrates students will be expected to expend total time and effort consistent with course credit hours as defined above.")Available at https://www.sc.edu/policies/ppm/acaf203.pdf.

[150] *Id.* at 8. Also see Id. at 6, ("Topical outline of content to be covered, including a time allocation framework (e.g., week 1, week 2, etc. to include 14 weeks for a standard academic year course session). The time allocation framework will be adjusted for other term lengths accordingly, consistent with course credit hours as defined in section III D.")

[151] USC documentation for SACSCOC Guidelines, standard 9.7, *available at* https://www.sc.edu/about/offices_and_divisions/institutional_research_assessment_and_analytics/documents/resource/9_7/9_7_guidelines.pdf. See also, SACSCOC Guidelines, standard 10.7, *available at* https://www.sc.edu/about/offices_and_divisions/institutional_research_assessment_and_analytics/documents/resource/10_7/10_7_guidelines.pdf.

the Carnegie Foundation notes, it aims to standardize exposure to the subject material. Likewise, the prescriptions that USC and other universities place on the development of online courses and the preparation time required develop a common framework for ensuring that students receive the instructional benefits for which they pay. To wit, USC and other institutions of higher education levy tuition charges on a per-hour basis.[152]

134. Thus, my proposed methodology uses a common benchmark, time, to link the output in the form of instruction to the input in the form of course preparation time. My approach also mirrors the method used in higher education to disburse Title IV education funds to students.[153] As USC explains, "Students 'earn' a percentage of the funds that are disbursed with each day of class attendance and must complete more than 60% of the enrollment period to earn all funding received."[154] My damages calculation applies the same time-based allocation to the preparation of online courses for delivery to distinguish such courses from ERT.

135. The approach I propose is consistent with Bowen's Revenue Theory of Cost explains the relationship between university revenue and cost. USC's documents confirm that its alignment to Bowen's Revenue Theory of Cost. The USC Financial Assessment comparing estimated margins before and after the impact of the COVID-19 pandemic observes that "Typically the University expenses most of what it brings in, ending near zero for the end of the year."[155] My previous published research also observes similar strategies among university athletic departments.[156]

136. The common formula (1) I propose to calculate the tuition refund due to each student is as follows.

$$\text{Refund}_i = (1-P_E/P_O)*T_i*(D_E/D_T)*(1-C_{oi}/C_{Ti}) \qquad (1)$$

Where:

The subscript *i* defines the *i*th student

[152] See, e.g., Univ. of South Carolina, College of Information and Communications, Tuition and Fees, *available at* https://sc.edu/study/colleges_schools/cic/library_and_information_science/about/tuition_and_fees.php.

[153] Title IV funds include Federal Stafford Loans, Perkins Loans, Plus Loans, Pell Grants, FSEOG Grants, TEACH Grants and Federal Iraq/Afghanistan Service Grants. See https://sc.edu/about/offices_and_divisions/bursar/refunds/index.php.

[154] *Id.*

[155] USC_00007535

[156] Ted Tatos. An Empirical Evaluation of EADA and NCAA College Sports Financial Data: Applications for Research and Litigation. Marquette Sports Law Review, Vol. 29, No. 2 (May 2019), *available at*, https://scholarship.law.marquette.edu/sportslaw/vol29/iss2/5/.

P_E = preparation days available for transition to ERT at the institution
P_O = preparation days needed for regular online course preparation
T_i = the tuition/fees paid by, or on behalf of, the student
D_E = days of ERT instruction during the Winter/Spring 2020 semester
D_T = total calendar days in the Winter/Spring 2020 calendar
C_{oi} = the number of online courses taken by the ith student during the semester
C_{Ti} = the total number of courses taken by the ith student during the semester

137. To summarize the formula above, the refund due to each student depends on:

- **P_E/P_O** : the time available for ERT relative to that needed for regular online course preparation, multiplied by:
- **T_i** : the student's tuition for that semester, multiplied by:
- **D_E/D_T** : the proportion of time in that semester where instruction was administered through ERT, multiplied by:
- **C_{oi}/C_{Ti}** :the fraction of courses in which the student as enrolled in that semester that were designed for face-to-face instruction. The logic behind this term in the calculation is that no overcharge damages would be calculated for courses that were already designed for online instruction and taught as such before the transition.

138. I note that the capitalized subscripts are institution-specific and will generally not vary by student. The tuition T_i can vary by program or in/out of state status, for example, but will represent the tuition sticker price. Should the finder of fact decide that financial aid should be applied as an offset, this refund formula is flexible to such a modification and can easily accommodate the receipt of financial aid. For example, should the finder of fact decide that institutionally-administered aid should reduce the tuition amount T_i, the formula can be adapted to substitute the term $(T_i - F_i)$, where F_i equals the student's financial aid that the fact finder decides should offset the tuition.

139. This formula mirrors the simplicity used by universities to issue other refunds to students, which are also based on calendar days. For example, the University of South Carolina issues refunds on a formulaic basis.[157] My approach also relies on the literature and institutional acknowledgement of the differences between ERT and the benefits associated with type of education normally provided. I discuss my analysis in detail in the following section.

[157] University of South Carolina, Bursar's Office, Calculating Your Refund, *available at* https://sc.edu/about/offices_and_divisions/bursar/refunds/index.php.

C. Applying a class-wide formula to calculate damages to the Tuition Class

140. To implement the formulaic methodology I proposed above, I relied on documents and data that USC produced, in particular file USC_00041697. I understand that this file contains enrollment records for each USC student during the Spring 2020 semester. The file contains sixty-two data fields, including student registration information, course information (including type of instruction that the school indicated it would deliver), gross and net tuition, instructor information, and others. I understand that each record (row) covers one course for one student, for a total of 142,910 rows. However, USC has not only redacted the name of the student, but also the student identification number, so I cannot perform any aggregation by student. Nonetheless, these data inform my damages calculation.

141. For descriptive purposes, Table 3 below provides the summary totals of gross and net tuition that USC reported in this file for the Spring 2020 semester, across all students and classes at the Columbia, SC campus.[158]

TABLE 3. TOTAL TUITION, SPRING 2020 SEMESTER, USC COLUMBIA CAMPUS

Total (Gross Tuition Per Course)	$313,296,753
Total (Net Tuition Per Course)	$236,719,301
Total (Exemption Per Course)	$76,577,451
Total (BMF Per Course)	$28,212,732
Total (ENG)	$208,506,569
Total (Net Tuition)	$1,080,414
Total (Amount Per Course)	$332,445
Total (17Net)	$747,969
Total (EnG+17)	$209,254,538
Total (Course Liable Billing Credits)	$421,268
Total (Course Billing Credits)	$421,268

142. Gross Tuition equals the sum of Educational and General (E&G), Board Mandated Fees (BMF) and Exemption components. Excluding the Exemption component results in the Net Tuition. I note that these figures do not include additional course-specific fees, such as lab fees. I address such charges separately in the subsequent section. USC's documents indicate that

[158] Table data source: USC_00041697

University personnel used Gross Tuition and Fees when calculating potential refunds.[159]

143. Next, using Formula 1 detailed above, I calculated the expected refund for each student enrolled in the Spring 2020 semester at USC. My formula calculates no damages for courses already administered through distance learning (online) prior to the transition to ERT or for any courses other than those courses and sections for which USC specified that it would deliver face-to-face instruction. I excluded such courses from my calculation by aggregating tuition and number of courses by instructional method, as shown in the table below.[160]

TABLE 4. USC COLUMBIA - SPRING 2020 TUITION AND COURSES BY INSTRUCTIONAL METHOD

Instructional Method Description	Gross Tuition	Net Tuition	Number of Courses
Face-to-Face Instruction	$276,760,619	$208,079,578	127,090
Web 100% Asynchronous	$28,160,740	$21,653,355	13,305
Over 50% Web Delivery	$2,332,028	$1,888,925	1,154
Blend 25-49% Web Delivery	$2,115,960	$1,400,887	787
Two Way AV Betw Syst Campuses	$1,378,049	$1,340,938	640
Instruction Method missing; please notify Registrar	$901,466	$782,108	204
Over 50% Two Way AV Off Campus	$851,025	$826,119	317
Two Way AV Off Campus	$521,862	$489,172	245
Palmetto College Course	$261,250	$250,475	163
Over 50% Two Way AV On Campus	$12,877	$6,867	4
DO NOT USE	$878	$878	1
Grand Total	**$313,296,753**	**$236,719,301**	**143,910**

144. I calculate two scenarios. In the first scenario, I apply no adjustment for ERT. In other words, the refund equals the tuition in proportion to the amount of time that face-to-face instruction was unavailable to the students who signed up for courses with that delivery method. This scenario reflects the fact students at USC during the latter portion of the Spring 2020 semester (the latter 49 percent of the semester) did not receive either face-to-face instruction or preplanned online instruction. Rather, they received ERT, an instructional method that neither USC nor any other institution in the US of which I am aware offers.

[159] USC_00007569, email from Kelly Epting, USC Associate VIP for Finance and Budget, March 12, 2020, ("Yesterday the attached pdfs were given to Mark Seiger as bullet points for President Caslen. The exercise estimates potential losses/refunds for Columbia as result of COVID 19…For conservatism, we assumed Gross Tuition and fees. So no need to worry about BMF - already in there.")
[160] Data source: USC_00041697.

145. Table 5 below provides the total and percentage of courses and tuition from face-to-face instruction. Such courses represent the source of refund damages to USC students, as USC transitioned all face-to-face courses to ERT in Spring 2020, demonstrating classwide impact. The data below inform two inputs to the formula specified earlier: $\mathbf{T_i}$ and $\mathbf{C_{oi}/C_{Ti}}$, the tuition on face-to-face instruction and the percentage of courses that the University designated for that instructional format at registration.

TABLE 5. TOTAL TUITION AND TUITION FOR FACE-TO-FACE INSTRUCTION – USC COLUMBIA CAMPUS

	Face-to-Face Instruction	Total	% From Face-to-Face
Gross Tuition	$276,760,619	$313,296,753	88.3%
Net Tuition	$208,079,578	$236,719,301	87.9%
Number of Course Enrollments	127,090	143,910	88.3%

146. Next, the calculation depends on the percentage of the Spring 2020 semester in which instruction occurred through ERT. USC lists the start and end dates of the Spring 2020 semester as January 13, 2020 and May 6, 2020, respectively, resulting in a semester of 114 days.[161] It transitioned courses to ERT on March 11, 2020, meaning that ERT instruction occurred for 56 out of the total 114 days, or approximately 49 percent of the semester. In addition, USC also canceled a full week of courses entirely, as shown in the table below.

TABLE 6. SPRING 2020 USC SEMESTER DATES RELEVANT TO REFUND CALCULATION

Semester Start	1/13/2020
Semester End	5/6/2020
Transition to ERT	3/11/2020
Total Semester Days (January 13 - April 27)	114
Total Refund-Eligible Days (March 11-April 27)	56
% Refund-Eligible Transition Days	49%
Days Classes Cancelled	7
ERT Days	49

147. As a first step, I calculate the tuition refund for the week during which USC cancelled courses entirely. I then calculate the total tuition that USC charged for the semester, and

[161] The semester length of 114 days that I use in my calculations also comports to USC's own refund calculation scenarios, which use a total of sixteen weeks. 114 days divided by 7 equals approximately 16. USC also used 50 percent as the estimate of the percentage of the semester affected by various refunds. See USC_00046512, USC_00013809.

divide that total by the total number of days in the Spring 2020 semester (114, as Table 6 shows). Then, I multiply the quotient times seven, the number of days when courses were cancelled. The resulting calculation, in both gross and net tuition terms, appears in Table 7 below. The totals in Table 7 reflect tuition refund damages for the first week of post-transition ERT classes, when USC cancelled all course delivery. Because the cancellation included all classes, damages in Table 7 apply to all courses, regardless of instructional method offered.

TABLE 7. TUITION REFUND FOR DAYS USC CANCELLED COURSES ENTIRELY – COLUMBIA CAMPUS

Total Days in Semester	114
Total Gross Tuition Charged	$313,296,753
Total Net Tuition Charged	$236,719,301
Gross Tuition Per Day	$2,748,217
Net Tuition Per Day	$2,076,485
Days Classes Cancelled	7
Gross Tuition Refund for Cancelled Classes	**$19,237,520**
Net Tuition Refund for Cancelled Classes	**$14,535,396**

148. As USC itself observed, the transition to ERT aimed to "protect revenues". As USC acknowledged, ERT did not meet the requirements commensurate with preplanned instruction or face-to-face instruction. Scenario One refunds students their tuition payments in full for 45 percent of the Spring 2020 semester, for all traditional face-to-face courses, including laboratory sections. No refund damages accrue for any other instructional method. The summary calculation appears in Table 8 below. I note that this calculation applies the same formulaic methodology that USC used in evaluating its expected financial impact from refunding tuition.[162]

TABLE 8. SCENARIO ONE: FULL PRO-RATED TUITION REFUND CALCULATION – USC COLUMBIA CAMPUS

	Total Semester	**Full Refund for ERT Period After Classes Resumed**
Gross Tuition	$276,760,619	$118,958,512
Net Tuition	$208,079,578	$89,437,713

149. Scenario Two assumes that preplanned online instruction offers the same benefits

[162] USC_00013809

as face-to-face instruction and that students would be indifferent between the two. As I explain, this approach reflects a conservative assumption. Nonetheless, this assumption conforms to USC's claims that its preplanned online and face-to-face courses share the same academic characteristics. Even so, as explained earlier in this report, students who transitioned to ERT at USC received neither the benefits of preplanned online nor those of face-to-face instructional methods. Further, even if preplanned online and face-to-face instruction ostensibly offered the same educational characteristics or outcomes, this does not inform student preferences. Chocolate and strawberry ice cream may both cost the same, have the same ingredients, but consumers prefer the former to the latter by more than two to one.[163]

150. Scenario Two requires an additional input: the preparation time for ERT relative to the preparation time that USC reserves for preplanned instruction, so that it can provide the educational benefits commensurate with the tuition that it charges students. As discussed earlier in this report, USC provides two course development guidelines, noting that preplanned online course development typically takes 12 and 20 weeks, respectively. During the transition to ERT, USC only allotted two weeks for the transition from face-to-face instruction to ERT. Using the lower figure of 12 weeks results in a conservative estimate of refunds.

151. Tables 9 and 10 below provide the gross and net tuition refund damages based on the reduction in benefits associated with ERT vs. preplanned online instruction.[164] Before completing such calculations, I separated out laboratory sections, which I interpret as having the letter "L" as the final character in the "Course Identification" number and instructional method listed as "TRAD", meaning face-to-face. For example, CHEM118 indicates the lecture component of the course, and CHEM118L identifies the laboratory component. Such lab courses represent

[163] Tom Fish, The 15 Most Popular Ice Cream Flavors in America, Newsweek, May 25, 2021, available at https://www.newsweek.com/most-popular-ice-cream-flavors-america-1594000.

[164] Kelly A. Bird, Benjamin L. Castleman, and Gabrielle Lohner, Negative Impacts From the Shift to Online Learning During the COVID-19 Crisis: Evidence From a Statewide Community College System, AERA Open, Vol. 8, No. 1, Jan.-Dec. 2022, 1-16, at 3 ("Interestingly, our results suggest that instructor experience teaching the same class online does not mitigate the negative effects of midsemester shifts to online learning, suggesting that aspects of the student experience—more so than pedagogical challenges that instructors face when teaching online—make the transition difficult…Meanwhile, instructors who had to shift to online teaching did not have sufficient advance notice to put into place strategies to increase students' sense of connectedness and interaction with them and peers.") Also see Id. at 14, "Moreover, our results indicate that instructors' familiarity with online teaching was not able to mitigate the negative impact for in-person students. Instead, the impacts appear to have been driven by student struggles with the shift to online learning."), *available at* https://journals.sagepub.com/doi/full/10.1177/23328584221081220.

approximately 5 percent of the course sections.[165] In its refund plans, USC anticipated issuing refunds for such courses, because they could not be conducted in an online setting.[166] I calculate refunds for such courses based on the percentage of the Spring 2020 semester remaining after the transition to ERT, which equals approximately 49 percent. In doing so, I apply the same method that USC used to determine its expected refunds for such courses. The only difference between the calculation of refund damages for laboratory classes versus other face-to-face courses is that the former do not include the $(1-P_E/P_O)$ component (the preparation time required for ERT). Table 9 below provides the refund damages for laboratory courses for the Spring 2020 semester.

TABLE 9. REFUND DAMAGES FOR LABORATORY COURSES, USC SPRING 2020

	Total Semester	**Full Refund Post-Transition (After Cancelled Week)**
Gross Tuition	$5,174,223	$2,224,008
Net Tuition	$3,775,481	$1,622,795

TABLE 10. SCENARIO TWO REFUND DAMAGES FOR FACE-TO-FACE COURSES, USC COLUMBIA CAMPUS

Total Days in Semester	114
Total Gross Tuition Charged, Face-to-Face Classes (Excl. labs)	$271,586,395
Total Net Tuition Charged, Face-to-Face Classes (Excl. labs)	$204,304,096
Gross Tuition Per Day	$2,382,337
Net Tuition Per Day	$1,792,141
ERT Days	49
Prep. Time for ERT	2
Prep. Time for Pre-planned Online	12
% Pre-Planned Prep. Time Alotted	16.7%
Gross Tuition Refund (ERT)	**$97,278,753**
Net Tuition Refund (ERT)	**$73,179,099**

152. I summarize the tuition damages for members of the putative Tuition class at the USC Columbia, SC campus in Table 11 below. I understand that net tuition excludes tuition exemptions, i.e., reduced or waived tuition charges for certain groups. If the fact finder determines that damages should reflect such exclusions, then net tuition damages would apply. Further, if the

[165] Internal USC documents indicate that some courses could not go online because accreditation restrictions. USC_00008897.
[166] USC_00006723, USC_00013809.

fact finder determines that certain types of aid, such as institutional grants, should also count against any damages, my methodology can readily incorporate such an adjustment.[167]

TABLE 11. SUMMARY OF SCENARIO 1 AND SCENARIO 2
TUITION CLASS DAMAGES, USC COLUMBIA CAMPUS

	Gross Tuition Refund	**Net Tuition Refund**
Cancelled Classes (1 week)	$19,237,520	$14,535,396
Full Refund, ERT Days	$118,958,512	$89,437,713
Total Scenario 1	**$138,196,031**	**$103,973,109**
Cancelled Classes (1 week)	$19,237,520	$14,535,396
Lab Courses (56 days)	$2,224,008	$1,622,795
Time-Adjusted ERT Refund (49 days)	$97,278,753	$73,179,099
Total Scenario 2	**$118,740,281**	**$89,337,289**

153. Subsequently, I perform the same calculations described above for the remaining USC campuses: Aiken, Beaufort, Lancaster, Salkehatchie, Sumter, Union, Upstate, and Palmetto.

TABLE 12. TUITION REFUND FOR DAYS USC CANCELLED
COURSES ENTIRELY – ALL OTHER USC CAMPUSES

Total Days in Semester	114
Total Gross Tuition Charged	$64,665,046
Total Net Tuition Charged	$57,205,195
Gross Tuition Per Day	$567,237
Net Tuition Per Day	$501,800
Days Classes Cancelled	7
Gross Tuition Refund for Cancelled Classes	**$3,970,661**
Net Tuition Refund for Cancelled Classes	**$3,512,600**

[167] I understand that exemptions may include credits for athletic scholarships. From an economic perspective, such scholarships do not represent grants, but rather in-kind payment for the services that athletes provide to the institution. In other words, while college athletes may receive partial aid (generally in "equivalency" sports) or full grant-in-aid (or cost-of-attendance) in head-count sports, these tuition reductions only reflect the payments that the college athlete workers make to the institution in the form of labor. I discuss these issues in my various research papers on such topics. These papers have been published in various journals, including the Harvard Journal of Entertainment & Sports Law, the Antitrust Bulletin, the Journal of Antitrust Enforcement, the Georgia State Law Review, and others. My research work is available at https://utah.academia.edu/TedTatos.

TABLE 13. SCENARIO ONE: FULL PRO-RATED TUITION REFUND CALCULATION – OTHER USC CAMPUSES

	Total Semester	Full Refund for ERT Days
Gross Tuition	$47,413,621	$20,379,539
Net Tuition	$41,785,551	$17,960,456

154. Table 14 below provides the calculation of the pro-rated tuition refund damages for laboratory courses intended for face-to-face instruction at USC campuses other than the Columbia, SC campus.

TABLE 14 – FULL REFUND CALCULATION FOR ERT PERIOD – LABORATORY COURSES AT OTHER USC CAMPUSES

	Total Semester	Full Refund for ERT Days
Gross Tuition	$500,214	$215,004
Net Tuition	$434,946	$186,950

155. Table 15 below shows damages from the transition to ERT, excluding the period of cancelled courses, at other USC campuses. This period of time covers approximately 38 percent of the Spring 2020 semester. While Table 15 provides an aggregate of damages across campuses, my approach permits separating such damages on a campus-by-campus basis. Further, with student ID data, which USC has redacted, I can allocate damages for each student using only data from USC and without relying on any individualized analysis.

TABLE 15. SCENARIO TWO REFUND DAMAGES FOR FACE-TO-FACE COURSES, OTHER USC CAMPUSES

Total Days in Semester	114
Total Gross Tuition Charged, Face-to-Face Classes (Excl. labs)	$46,913,407
Total Net Tuition Charged, Face-to-Face Classes (Excl. labs)	$41,350,605
Gross Tuition Per Day	$411,521
Net Tuition Per Day	$362,725
ERT Days	49
Prep. Time for ERT	2
Prep. Time for Pre-planned Online	12
% Pre-Planned Prep. Time Alotted	16.7%
Gross Tuition Refund (ERT)	**$16,803,779**
Net Tuition Refund (ERT)	**$14,811,255**

156. Finally, Table 16 summarizes the total damages under Scenarios 1 and 2 across all USC campuses other than the Columbia campus. Table 17 aggregates the damages for all USC campuses to provide an overall total. As I noted previously, my approach permits the allocation of damages to each student based on their actual course enrollment.

TABLE 16. SUMMARY OF SCENARIO 1 AND SCENARIO 2
TUITION CLASS DAMAGES, OTHER USC CAMPUSES

	Gross Tuition Refund	**Net Tuition Refund**
Cancelled Classes (1 week)	$3,970,661	$3,512,600
Full Refund, ERT Days	$20,379,539	$17,960,456
Total Scenario 1	**$24,350,200**	**$21,473,056**
Cancelled Classes (1 week)	$3,970,661	$3,512,600
Lab Courses (After Classes Resumed)	$215,004	$186,950
Preparation-Adjusted ERT Refund	$16,803,779	$14,811,255
Total Scenario 2	**$20,989,444**	**$18,510,805**

TABLE 17. SUMMARY OF SCENARIO 1 AND SCENARIO 2 TUITION CLASS DAMAGES,
ALL USC CAMPUSES COMBINED

	Gross Tuition Refund	**Net Tuition Refund**
Cancelled Classes (1 week)	$23,208,181	$18,047,995
Full Refund, ERT Days	$139,338,050	$107,398,169
Total Scenario 1	**$162,546,231**	**$125,446,165**
Cancelled Classes (1 week)	$23,208,181	$18,047,995
Lab Courses (After Classes Resumed)	$2,439,013	$1,809,745
Preparation-Adjusted ERT Refund	$114,082,531	$87,990,353
Total Scenario 2	**$139,729,725**	**$107,848,094**

157. This approach I employ has several advantages. First, with respect to refunds, I use the same classwide methodology, based on the number of days, to calculate the total amount of refund damages. USC uses the same approach to refund students; as USC explains, "All refunds will be based solely on the percentage of time (in days) between the first day of a part-of-term and the last day of a part-of-term. The percentage (in days) will include all Saturdays, Sundays, and

holidays between the start and end dates of each part-of-term"[168] The United States Department of Education uses the same approach when determining the proportion of Title IV funds that a student "earns". As USC describes, "Students 'earn' a percentage of the funds that are disbursed with each day of class attendance."[169] Further, USC also refunds program fees across all students based on the amount of instruction left in the semester.[170]

158. Second, my methodology relies directly on preparation time, the key factor that administrators and professors referenced earlier in his report observed.[171] As such, it retains institutional judgment as the arbiter of educational benefits. This approach recognizes that, if ERT were an acceptable substitute for face-to-face instruction, then universities, who were already facing financial pressure, would not have devoted significant time and resources to preparing online instruction for the fall semester because it would have either been already done, or preparation would only require a matter of days to repeat the same process used in the spring of 2020 for the subsequent fall semester. Second, it accounts for courses already designed for and administered in an online format and provides no refund for them.

D. The difference between ERT and pre-planned online instruction offers a conservative estimate of damages.

159. To the extent that the value proposition between traditional online courses and face-to-face instruction differs and latter exceeds the former, the proposed methodology provides a conservative estimate of the damages suffered by students in the form of tuition overcharges. The formula I propose assumes that the benefits attendant to courses designed to be administered online from the start and those designed for face-to-face instruction are equal, as USC claims. In other words, students, having full information of the facts and being under no pressure to engage in the transaction, would be indifferent between the two types of courses.

160. Available evidence indicates that the approach I describe above provides a

[168] USC Academic Bulletin, Fees and Refunds at 6, *available at* https://academicbulletins.sc.edu/policies-regulations/fees-refunds/fees-refunds.pdf.
[169] *Id.*
[170] *Id.* at 7 ("Accordingly, the University has established a series of refund deadlines commensurate with student progress into the semester.")
[171] Also, Harvard dean of Faculty of Arts and Sciences Claudine Gay explained in a message to the university's community that "Over the summer, the Office of Undergraduate Education has worked diligently with the Bok Center and the Academic Technology Group to deliver trainings to more than 1,000 faculty and teaching fellows to prepare them for remote teaching." John Rosenberg, Fall Comes into Focus, Harvard Magazine, August 6, 2020. Available at https://harvardmagazine.com/2020/08/harvard-fall-student-and-staff-constraints.

conservative estimate of damages, though the formula can easily incorporate an adjustment to address this issue.[172] As noted earlier, then University President Bob Caslen explained in a June 2020 meeting of the Board of Trustees that "the real cost is the interruption to the students' education by changing the delivery of education in a way the student does not desire. Their reaction to this is to forgo higher education and they question the value proposition of higher education."[173]

161. Documents that the University of South Carolina produced in this matter indicate that the University conducted a student survey implemented by the firm Kennedy & Company.[174] The survey results reflected USC President Caslen's sentiment. When asked how likely students were to return in the fall for on campus instruction if COVID-19 in the US were under control by August 2020, 79 percent of undergraduates answered, "extremely likely" and only 4 percent answered "unlikely" or "neither likely no unlikely".[175] In contrast, when asked how likely they were to return in the fall in an online only format, only 31 percent answered "extremely likely" and 39 percent indicated they were "unlikely" or "neither likely no unlikely" to return if classes were held online.[176]

162. When the subset of students who answered "unlikely" or "neither likely no unlikely" to the above questions were asked what USC would need to do to increase students' likelihood of re-enrolling in the Fall of 2020, 83 percent of undergraduate students answered, "Guarantee of on-campus classes".[177] Only 30 percent of undergraduates and 32 of the student body combined indicated that improved online courses would increase their likelihood to stay enrolled at USC.[178]

163. In a 2019 report analyzing online learning, Protopsaltis and Baum (2019) found that "Online education has failed to reduce costs and improve outcomes for students."[179] Likewise,

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[172] Should the calculation need to incorporate the difference in benefits between traditional online courses and face-to-face instruction, we can consider the discounts of approximately 10 percent offered by various universities in the Fall 2020 semester who decided on online versus in-person instruction. This same discount can be applied to the Spring 2020 term tuition, T_i in Table 7, and added to the total refund, up to the amount of the tuition charged

[173] Id., USC Board of Trustees June 19, 2020 meeting minutes.

[174] USC_00014568 and thereafter, USC_00010596 and thereafter.

[175] USC_00014573, USC_00010601 for graduates and undergraduates.

[176] *Id.*

[177] USC_00014574. See also USC_00010602 indicating the same answer for 79% of the combination of undergraduate and graduate students.

[178] USC_00014575, USC_00010603.

[179] Spiros Protopsaltis and Sandy Baum, Does Online Education Live Up to Its Promise? A Look at the Evidence and Implications for Federal Policy, available at http://mason.gmu.edu/~sprotops/OnlineEd.pdf. The paper's findings were

Hoxby (2018) observed that "…online education does not closely resemble "brick-and-mortar" residential college education aimed at 18- to 23-year-olds."[180] Goodman (2019) also indicated that "Most existing online education appears to result, however, in poor learning and labor market outcomes…Existing online higher education options do not appear to pay off economically for the students who enroll in them. "[181] However, many of Goodman's findings include online education programs at for-profit colleges, which, as Goodman points out, creates the challenge of disentangling the labor market impact from these colleges from that of non-profit institutions.[182]

164. Further, Deming et al. (2015) explain that "the impact of online technology on the quality of education remains uncertain", though the authors do note that Table 1 of their paper indicates that "selective institutions are far less likely to have students enrolled in online coursework."[183] In a recent opinion editorial in the New York Times, David Deming, who is the director of the Malcolm Wiener Center for Social Policy at the Harvard Kennedy School, opined that the results from post-secondary institution's emergency move online "have often been ugly" and "the best education continues to be intensive, expensive, and done in person."[184]

165. Deming also reference an article in Education Next, which posits that "it's now painfully clear that schools ought to have had more robust disaster preparedness plans in place in the event of interruptions in their campus operations."[185] As Edward Walton explained in his deposition, USC had no such plan with regard to instruction in the event of an emergency.

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summarized in part in Sandy Baum's February 25, 2020 testimony before the Senate Higher Education Committee. The testimony can be found at https://www.urban.org/sites/default/files/publication/101762/Does%2520Online%2520Education%2520Live%2520Up%2520To%2520Its%2520Promise%2520a%2520Look%2520at%2520The%2520Evidence_0.pdf

[180] Caroline Hoxby, Online Postsecondary Education and the Higher Education Tax Benefits: An Analysis with Implications for Tax Administration, Tax Policy and the Economy, National Bureau of Economic Research, 32(1), 2018. Available at https://www.journals.uchicago.edu/doi/pdf/10.1086/697138

[181] Joshua Goodman, The Challenges of Leveraging Online Education for Economically Vulnerable Mid-Career Americans, Aspen Economic Strategy Group, 2019, available at https://economicstrategygroup.org/wp-content/uploads/2019/12/Expanding-Economic-Opportunity-for-More-Americans-The-Challenges-of-Leveraging-Online-Education-for-Economically-Vulnerable-Mid-Career-Americans.pdf

[182] *Id.* Goodman at 79.

[183] David J. Deming, Claudia Goldin, Lawrence F. Katz, and Noam Yuchtman. "Can Online Learning Bend the Higher Education Cost Curve?" American Economic Review 105, no. 5 (May 2015): 496–501. https://doi.org/10.1257/aer.p20151024.

[184] David Deming, Online Learning Should Return to a Supporting Role, NY Times, April 9, 2020, available at https://www.nytimes.com/2020/04/09/business/online-learning-virus.html.

[185] Michael Horn, Covid-19 Boost to Online Learning May Backfire - Many courses will be poor substitutes for the originals, Education Next, March 12, 2020. Available at https://www.educationnext.org/covid-19-boost-online-learning-may-backfire/

166. Returning to the comparison of online and face-to-face instruction, additional research supports the additional benefits of the latter. The authors of the previously-cited 2015 Public Policy Institute of California report found that only approximately 11 percent of online courses in the 2013-2014 academic year were highly successful, based on the criteria of whether 1) at least 70 percent of its students earned a passing grade, 2) performance is at least as good as traditional versions of the same course, and 3) students in the online course continued to do well in subsequent courses in the same subject.[186] However, the study also noted improvements and a narrower gap between online courses and face-to-face courses over time.[187]

167. A recent Pew Research poll of 10,332 U.S. adults found that 68 percent of respondents said a course taken online does not provide the same educational value as a course taken face-to-face in the classroom.[188] Overall, 75 percent of college graduates with a bachelor's degree or higher said that online classes do not provide the same value as face-to-face instruction.

168. In any case, whether online education has less value than traditional face-to-face instruction is largely peripheral to my analysis. I focus on the emergency remote teaching that occurred in the Spring 2020 Term and compare this form of instruction to traditional online courses offered at the same, or similar institutions. As I observed earlier in this report, if this form of online instruction offers fewer benefits than traditional face-to-face instruction, my analysis would understate the amount of overcharge and hence understate damages to the Tuition Class.

E. Common Impact to Fees Class

169. I have also been asked to estimate class-wide damages for the fees class. I understand that University of South Carolina also imposes certain Board Mandated Fees (BMFs). These include Computer Fees, Athletic Fees, Student Activity fees, and others provided in the table below. I understand that Plaintiffs seek remuneration of the fees that they paid for the portion of the semester when the campus shutdown precluded them from obtaining the benefits for which they paid.

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[186] Hans Johnson, Marisol Cuellar Mejia, and Kevin Cook, Successful Online Courses in California's Community Colleges, Public Policy Institute of California, June 2015.
[187] *Id.* at 8.
[188] Kim Parker, Amanda Barroso, and Richard Fry. Americans are divided on whether colleges that brought students back to campus made the right decision, Pew Research Center, October 26, 2020. Available at https://www.pewresearch.org/fact-tank/2020/10/26/americans-are-divided-on-whether-colleges-that-brought-students-back-to-campus-made-the-right-decision/.

170. To perform this calculation, I relied on total fees provided by USC.[189] These data include the total fees paid by category by semester. The data that USC provided indicates that the University also relied on these same data to calculate its "COVID-19 Fiscal Impact FY 2020". I performed this calculation including and excluding institutional and athletic bonds. Further, to the extent that USC provides more granular data, such as the specific costs covered by such fees, I can update my calculation accordingly.

171. In total, I estimate that the Fees Class suffered damages in amounts ranging from $7.3M to $14.2M, depending on whether institutional and athletic bond fees are included.

Table 18. Damages to Fees Class

BMFs	Total Spring 2020	Adjusted for Transition (49%)
Institutional Bonds	$12,936,622	$6,354,832
Computer Fee	$1,136,786	$558,421
Athletic	$1,302,730	$639,937
Athletic Bonds	$1,024,759	$503,390
Renovation Reserve	$1,136,786	$558,421
Infirmary	$4,723,739	$2,320,433
Law Review	$936	$460
Student Activity	$2,423,571	$1,190,526
Wellness Center	$3,042,873	$1,494,745
Parking	$793,911	$389,991
New Student Union Fee	$345,438	$169,689
Student Recreation Fee	$119,193	$58,551
Total	**$28,987,342**	**$14,239,396**
Total Minus Institutional Bonds	**$16,050,721**	**$7,884,565**
Total Minus All Bonds	**$15,025,961**	**$7,381,174**

VI. Conclusion

172. The relevant literature, university administrators, and educators have indicated that 1) the instruction that universities, including the University of South Carolina, provided after transitioning away from face-to-face courses in the latter portion of the Spring 2020 semester is characterized as emergency remote teaching rather than regular, pre-planned online education, and

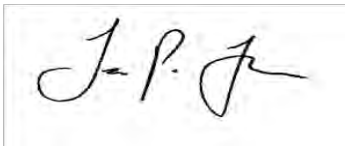
[189] USC-00046352

2) emergency remote teaching represents a different product from face-to-face or regular pre-planned online instruction. Pre-planned online instruction requires significant preparation, which emergency remote teaching could not accommodate. Thus, characterizing the type of instruction that students received after USC and other universities transitioned to ERT in the latter portion of the Spring 2020 semester as pre-planned online learning understates the nature of the impact on students' education.

173. In my opinion, for the foregoing reasons, common methods and evidence indicate that economic harm to student plaintiffs through the reduction of benefits for which they paid and the substitution of face-to-face instruction with ERT, a different product that USC and other universities do not even regularly offer, can be assessed on a class-wide basis. Furthermore, the amount of refunds to be disbursed to student-plaintiffs in the tuition and fees classes can be calculated using a common, formulaic methodology. I have performed such a calculation in this report.

174. Finally, Defendants' anticipated justifications for refusing to offer refunds to student-plaintiffs that I have been asked to address are, in my opinion, unavailing from an economic viewpoint, and, in any case, could be assessed using methods and evidence common to each of the Plaintiff classes.

Respectfully submitted this day of January 4, 2023,



Ted Tatos

Appendix I - Pandemic response plans that colleges and universities prepared prior to the advent of COVID-19 indicate institutions of higher education expected having to refund tuition and fees to students.

175. While the COVID-19 pandemic caused enormous disruption in higher education, colleges and universities had been previously aware of the possibility of a global pandemic that could disturb normal operations. On March 20, 2006, as awareness of various influenza variants such as H5NI (avian flu)[190] spread, the U.S. Centers for Disease Control published its "Colleges and Universities Pandemic Influenza Planning Checklist."[191] The CDC advised institutions of higher educations to perform, among other guidance, the following:

- Plan for different outbreak scenarios including variations in severity of illness, mode of transmission, and rates of infection in the community. Issues to consider include cancellation of classes, sporting events and/or other public events, closure of campus, student housing, and/or public transportation.
- Develop and disseminate alternative procedures to assure continuity of instruction (e.g., web-based distance instruction, telephone trees, mailed lessons and assignments, instruction via local radio or television stations) in the event of college/university closures.
- Disseminate information about the college/university's pandemic preparedness and response plan. This should include the potential impact of a pandemic on student housing closure, and the contingency plans for students who depend on student housing and campus food service, including how student safety will be maintained for those who remain in student housing.

176. This guidance also appears in the United States Homeland Security Council's May 2006 National Strategy for Pandemic Influenza Implementation Plan.[192] Subsequently, colleges and universities across the country drafted pandemic response plans, which proscribed their course of action should such an event occur. I have reviewed several of these plans, including those from the University of Arizona, the University of Kansas, Indiana State University, Vanderbilt University, the University of Toledo[193], and others. These contents of these plans, which are summarized in Exhibit 5, offer two key indications: 1) institutions of higher learning anticipated having to refund tuition and other fees in the event that a pandemic disrupted regular instruction,

[190] US Department of Education, Emergency Response and Crisis Management Technical Assistance Center, Schools respond to infectious disease, Vol. 2, Issue 7, 2006. Available at https://rems.ed.gov/(X(1)S(ew4fl5ao2xawg1mojdw52yqc))/docs/PandemicFluNewsletter_072106.pdf.
[191] https://www.cdc.gov/flu/pandemic-resources/pdf/colleges_universities.pdf.
[192] United States Homeland Security Council, National Strategy for Pandemic Influenza Implementation Plan, May 2006 at 188-191. Available at https://www.cdc.gov/flu/pandemic-resources/pdf/pandemic-influenza-implementation.pdf.
[193] University of Toledo's Institutional Emergency Operations Plan is available at https://www.utoledo.edu/depts/safety/docs/EP-08-019.pdf.

2) institutions were aware of the need to transition to alternative forms of instruction, yet focused funding on other activities, such as sustaining athletic programs through institutional funds and fees levied on the general student body.[194]

177. For at least a decade prior to the advent of the novel coronavirus pandemic, institutions of higher education in the US had been aware of the possibility and potential for a pandemic to affect their operations. The problems with transitioning face-to-face courses to an online format, particularly within the short time frame needed for emergency remote teaching, had also been recognized.

[194] I discuss this issue in detail in my research. Ted Tatos. NCAA Amateurism as an Anticompetitive Tying Restraint. The Antitrust Bulletin, September 2019; 64(3). Available at https://www.academia.edu/39955862/NCAA_Amateurism_as_an_Anticompetitive_Tying_Restraint.

Appendix II - Institutional costs and prices for online versus face-to-face instruction and their relevance to Plaintiffs' claims

178. Counsel for Class Plaintiffs has also asked me to address the relevance of price differentials that may exist between online and face-to-face courses to Class Plaintiffs' claims. First, as I discussed earlier in this report, the key distinction in this matter lies between the actual form of instruction provided during the Spring 2020 semester, emergency remote teaching, and face-to-face instruction, not between online and face-to-face instructional methods.

179. Students at USC received neither the benefits of regular online courses nor those of face-to-face instruction during the latter portion of the Spring 2020 term. Instead, they received emergency remote teaching. Second, to the extent that Defendants claim that the costs associated with online teaching are similar to, or even higher than, those associated with face-to-face instruction, such an argument only underscores the reduction in value and educational benefits that emergency remote teaching represents. This can be seen by comparing the multiple months required to create an online course versus only several days that were spent moving a course designed for face-to-face education to an online format in an emergency mode in latter half of the Spring 2020 term.

180. Setting the issue of ERT aside for the moment, the reported per-credit prices that universities charge for online courses often exceed those charged for face-to-face "brick-and-mortar" courses. A 2016 BMO Markets Report, citing 2013 US News survey data, observed that,

> While acknowledging that different programs may require different numbers of credits, the average per credit, in-state cost for an online bachelor's program was $277, compared with $243 per credit at brick-and-mortar schools based on an August 2013 (latest data available) U.S. News analysis of about 300 ranked programs. A more recent U.S. News study (2015) of 136 online bachelor's degree programs at public colleges and universities found about 46% charge in-state and out-of-state students the same tuition per credit, negating the in-state discount most residents get when attending on campus.[195]

181. The most recent update of the US News data indicates that these results have persisted. US News reported that the average cost per credit hour for an online bachelor's degree was higher than the cost per credit hour of an on-campus degree at public universities. However,

[195] Jeffrey Silber and Henry Sou Chien, The Education Industry: 2018, BMO Capital Markets, September 2018. Available at https://bmo.bluematrix.com/sellside/EmailDocViewer?encrypt=c6e6cceb-2863-460b-9a88-8f4a5ea72fd5&co=bmo&mime=PDF&id=replaceme@bluematrix.com.

as the table below indicates, this relationship reverses for private universities, where an on-campus bachelor's degree costs over twice as much as an online degree on a per credit hour basis.[196] Further, Ray Schroeder, associate vice chancellor for online learning at University of Illinois-Springfield pointed out that "Most commonly in online programs, you do not have health insurance available to you, hence you don't have to pay a health services fee. On balance, it's less expensive per credit hour to take it online than on campus."[197]

Table 2. Per-Credit Hour Prices for Online vs. On Campus Bachelor Degrees

		Per-Credit Tuition Price (in-state for public)	
	# Colleges Responded	**Online**	**On Campus**
Public	170	$316	$311
Private	168	$488	$1,240

Source: US News and World Report

182. The 2018 joint report by Quality Matters, the National Research Center for College and University Admissions (NRCUA) and its research arm, Eduventures Research, titled Changing Landscape of Online Education (CHLOE-2)[198] confirms these results and offers some insight into the reasons for these price differences. The survey reported that most institutions, at each level either charge the same or more for online instruction.

Table 3. CHLOE-2 Results - Percentage of Online Programs Charging Lower/Same/Higher Tuition as On-Campus

(Data from CHLOE2 Fig. 13 at 19)

Level of Institution	**Lower Tuition**	**Standard Tuition**	**Higher Tuition**	**Ratio Standard or Higher to Lower Tuition**
Sample	18%	74%	23%	5.4

[196] Emma Kerr, What You'll Pay for an Online Bachelor's Degree, USNEWS, January 14, 2020. Available at https://www.usnews.com/higher-education/online-education/articles/what-youll-pay-for-an-online-bachelors-degree. The report also points out that online students generally do not have to pay certain fees, such as recreational fees, that schools charge to on-campus students.

[197] *Id.*

[198] Ron Legon and Richard Garrett. The Changing Landscape of Online Education (CHLOE) 2: A Deeper Dive – Quality Matters and Eduventures Survey of Chief Online Offices, 2018, available at https://encoura.org/project/chloe-2/ Approximately 66 percent of the survey sample of 182 institutions consisted of public four-year (34%) and private four-year (32%) institutions (report at 6).

Small	21%	74%	15%	4.2
Mid-Sized	17%	74%	26%	5.9
Large	15%	80%	37%	7.8
Private 4Y	29%	80%	10%	3.1
Public 4Y	20%	65%	43%	5.4
Public 2Y	4%	81%	17%	24.5

Note: Totals > 100% indicate multiple tuition rates at some institutions.

183. While the results above provide information about what universities charge, not the costs they incur to produce online instruction, the CHLOE2 survey provides data regarding the latter as well. The survey confirmed that institutions "characterizing their online programs as revenue generators outnumber those who see online as a drain on resources by nearly three to one (45% vs. 18%), with another 37% reporting wide variation among programs."[199] Of large institutions, 59 percent reported that online courses were a revenue generator[200] versus only 11 percent who reported that these courses represented a net cost. I replicate these results below.

Table 4. CHLOE-2 Results - Percentage of Online Programs Reported as Net Costs or Revenue Generators
(Data from CHLOE2 Fig. 12 at 18)

Level of Institution	Net Cost	Wide Variation	Revenue Generator	Ratio of Revenue Generator to Net Costs
Sample	18%	28%	45%	2.5
Small	17%	33%	42%	2.5
Mid-Sized	22%	26%	42%	1.9
Large	11%	22%	59%	5.4
Private 4Y	17%	24%	54%	3.2
Public 4Y	13%	32%	45%	3.5
Public 2Y	22%	30%	35%	1.6

184. These results indicate that at each level, more institutions report that online courses are revenue generators than either a net cost or that a wide variation exists. In other words, while

[199] *Id.* at 18.
[200] The term "revenue generator" generally refers to programs whose revenues exceed their costs. For example, in NCAA sports, football and basketball are considered "revenue sports" because the revenues they generate exceed their costs.

schools may charge the same or more for online instruction, institutions reporting profiting from these courses outnumber those who report net costs by approximately 2.5 to 1 (45% to 18%).

185. CHLOE-2 also offers additional insights regarding institutional interest in lowering costs, reporting that,

> The least influential of arguments to win resources are initiatives that promise to reduce operating costs. This may be a reflection of skepticism about the possibility of genuine cost reduction rather than a lack of interest in cost savings measures, but it does parallel the minimal interest in this issue that we observe in institutional strategic plans.[201]

186. CHLOE-2 results offer additional evidence that institutions view of cost reduction as an afterthought, with the focus being placed on enrollment growth and revenue generations, though the difference between these two concepts is one of semantics rather than substance.[202] McPherson and Bacow (2015), former senior administrators at Williams College and MIT and former presidents of Macalester and Tufts explained that "To put it bluntly, selective institutions of higher education actually compete to be among the least cost-effective providers of educational services…Indeed, there is a real chance that at least in selective higher education, technology will actually be used to raise rather than lower cost."[203]

187. Both the CHLOE-2 findings and McPherson and Bacow's comments that institutions have shown little appetite for reining in costs are unsurprising.[204] Indeed, they underscore one of the two major cost theories of higher education: Bowen's "revenue theory of cost". In his seminal text, The Costs of Higher Education, Howard Bowen explained that "at any given time, the unit cost of education is determined by the amount of revenues currently available for education relative to enrollment. This statement is more than a tautology. It expresses the fundamental fact that unit cost is determined by hard dollars of revenue and only indirectly and

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[201] CHLOE 2 report at 24.

[202] As the CHLOE 2 report at 23 observes, "It is understandable in terms of their missions that public institutions are twice as likely to cite a goal to increase enrollment as one to generate additional revenue, although, in practical terms, the two go hand in-hand." See also, Derek Newton, Report: Digital and Online College Programs Chase Revenue, Not Savings or Quality, Forbes, July 24, 2018, ("Those leaders also told CHLOE2 that they are most likely to win internal funding and support for their online endeavors when those investments, '… are likely to result in enrollment growth.' For context, 'increasing enrollment' is code for increasing revenue." Available at https://www.forbes.com/sites/dereknewton/2018/07/24/report-digital-and-online-college-programs-chase-revenue-not-savings-or-quality/#4fa1a42e3a5b.

[203] Michael McPherson and Lawrence Bacow. Online Higher Education: Beyond the Hype Cycle, Journal of Economic Perspectives 29 4 135-54 (2015) at 143-144. Available at https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.29.4.135

[204] Figures 17 and 18, p. 24, in the CHOE 2 report indicate that cost reduction ranked last among factors driving resource allocation across both private and public 2 year and 4 year institutions.

remotely by considerations of need, technology, efficiency and market wages and prices." [205] In other words, schools have the incentive to spend the revenues they have, resulting in a cost spiral.[206]

188. This concept is particularly important because it emphasizes that the more revenue universities garner, the more they can potentially spend on online instruction. In the 2017 Wiche Cooperative for Educational Technologies (WCET) February 2017 report[207], Carol Twigg, president and Chief Executive Officer (CEO) of the National Center for Academic Transformation (NCAT) explained that "The simple answer to this question about price and cost is that a distance education course can cost anything you want it to cost, from $1,000 to $1 million."

189. This statement underscores two other characteristic features of higher education: reputation competition and the role of price as an indicator of quality. As Martin and Gillen explain, "In effect, reputation competition becomes a race to spend as much as possible per student, since expenditure is a proxy for quality…Costs at nonprofit institutions are capped by revenue…The combination of quality uncertainty (and therefore competition based on reputation), nonprofit status, and the P/A [principal-agent] problem leads to a persistent revenue-to-cost spiral. Because the spiral consumes any new funding, it undermines attempts to improve college access."

190. Nonetheless, the reasons why the costs of online instruction may either vary or even exceed those of face-to-face courses warrants attention given their relevance to this litigation. The CHLOE-2 report indicates that, of the reasons why some programs charge online students more than face-to-face students, approximately 60 percent attribute this differential to "added cost of online course and program development" and over 60% cite the "added costs of online instruction and support services".[208] These answers evince the distinction between the preparation required for regular online instruction versus the limited time available to transition to emergency remote

[205] Howard Bowen. The Costs of Higher Education: How Much Do Colleges and Universities Spend Per Student and How Much Should They Spend? 1st ed. San Francisco: Jossey-Bass Publishers, 1980 at 19.
[206] Robert Martin and Andrew Gillen, Breaking the Cost Spiral, Inside Higher Ed, August 7, 2009. Available at https://www.insidehighered.com/views/2009/08/07/breaking-cost-spiral (hereafter "Martin and Gillen")
[207] Russell Poulin and Terry Taylor Straut, Distance Education Price and Cost Report, WCET, February 2017 at 4. (hereafter, "WCET Report"). Available at https://wcet.wiche.edu/sites/default/files/Price-and-Cost-Report-2017_0.pdf.
[208] CHLOE 2 report at 20. Of additional interest, 39 percent of the programs that charged less for online instruction cited the "lower cost of delivering online instruction" as a reason for doing so and approximately 47% cited "no cost for campus activities, maintenance, and security" as a reason. However, online programs do charge fees differently or uniquely to online students. (*Id.* at 21).

teaching.

191. Additional sources confirm the CHLOE-2 findings. The aforementioned WCET February 2017 report found that approximately 75 percent of college respondents (n=169) charged distance education and on-campus students the same tuition for a three-credit course.[209] Colleges that responded to the WCET study also compared the costs of preparing distance education courses with those of face-to-face courses. Approximately 67 percent of universities that responded indicated that technology and software preparation costs were higher for distance education courses.[210] Likewise, nearly 69 percent indicated that faculty training costs were higher for distance education courses than face-to-face courses.[211] With regard to the category of "teaching the course", approximately 75 percent and 61 percent indicated that instructional design and creating learning materials for a distance education course, respectively, incurred higher costs than a face-to-face course.[212] The survey also solicited open comments regarding the cost differential between distance education and face-to-face course, which included the following responses, again highlighting the distinction between the preparation needed for online education versus the minimal time available for emergency remote teaching:[213]

- "Teaching online requires much more preparation, time and attention that lecturing in a traditional classroom venue."
- "We require all faculty to be trained before teaching online. The university provides this training…This is a big difference, as faculty are not required to be trained to teach in the face-to-face classroom."
- "Online courses require much more intentional design and delivery - you can't wing it. Therefore, it requires more labor to design and deliver. Sometimes this means higher costs, sometimes this cost is just absorbed by faculty."

192. Institutions of higher education sometimes charge the same or perhaps even more for online versus face-to-face classes. Survey evidence indicates that online courses often cost more to create than face-to-face courses. As the Texas A&M online course manual referenced

[209] WCET Report at 4 and 30-1, ("Of those who responded to this question, the majority, 75.1% of respondents, reported there is no difference in the tuition rate for the three-credit course they selected.")
[210] WCET Report at 39.
[211] WCET Report at 42.
[212] WCET Report at 40.
[213] WCET Report at 44-45.

earlier in this report noted, "The development process of a course planned for online delivery is more rigorous than traditional face-to-face instruction."[214]

193. However, the argument that this fact provides an economic justification for the ERT instruction students received in the latter portion of the Spring 2020 term is exactly backwards. Rather, it calls attention to the deficiency of ERT compared to both regular online and face-to-face courses. Further, as explained earlier in this report, the fact that many universities engage online program management (OPM) companies and often pay them a substantial share of tuition revenue to develop online instruction underscores this point.

[214] TAMU Online Course Manual at 2.

Appendix III - Receipt of financial aid does not reduce the harm to plaintiffs, and even if it did, amount of harm can be assessed on a class-wide basis.

194. The United States Department of Education's March 20, 2020 guidance answered the question of whether a reassessment of the student's financial aid was required in case the institution issued a refund or waive for tuition, room & board or fees:

> *No.* If, as a result of the COVID-19 outbreak, you provide a refund or waiver of expenses for all or part of a student's tuition, fees, room and board charges, or other institutional charges, or if you become aware that a student has moved off campus for the remainder of the term, *the Department will not require a re-evaluation of the student's cost of attendance. Therefore, you are not required to make changes to a student's Title IV awards on the basis of such changes*.[215] (Published March 20, 2020) (emphasis added)

195. The price that colleges and universities report on their official web sites and documents as the annual cost of tuition, fees, room/board (plus additional expenses that yield the total cost-of-attendance, or COA) represents the "sticker price". Financial aid in the form of grants and scholarships from federal, state, and local sources helps reduce this cost, producing a "net price" equal to the sticker price minus any aid that does not require repayment.[216] However, the proportion of federal aid based on students' financial circumstances has declined over the last thirty years, from approximately 91% in 1988-1989 to 33% in 2018-2019. Increases in unsubsidized student loans and PLUS loans for parents have outpaced increases in Pell Grants.[217]

196. Students at the University of South Carolina generally receive financial aid including scholarships/grants[218] and loans. I understand that, as with other post-secondary institutions, USC students can receive multiple grants that fall into several categories: federal need/non-need based grants, aid from private sponsors, USC need/non-need based grants (also known as institutional grants or centrally-awarded aid), and state non-need-based grants. Federal

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[215] US Department of Education, Office of Post-Secondary Education (OPE), COVID-19 Frequently Asked Questions, available at https://www2.ed.gov/about/offices/list/ope/covid19faq.html.

[216] Sara Goldrick-Rab and Nancy Kendall. The Real Price of College, College Completion Series: Part Two, The Century Foundation, March 3, 2016 at 2. Available online at https://production-tcf.imgix.net/app/uploads/2016/02/18123108/TheRealPriceofCollege_RabKendall.pdf. Accessed 9/12/2020.

[217] Sandy Baum, Jennifer Ma, Matea Pender, and CJ Libassi, Trends in Student Aid 2019, New York: College Board (2019) at 3. Available online at https://research.collegeboard.org/pdf/trends-student-aid-2019-full-report.pdf.

[218] Scholarship and grant aid are often used synonymously. While only a semantic difference may exist in many cases, scholarships are often merit-based, while grants are commonly offered on the basis of need. Both have three main funding sources: the federal/state government, the institution, and private organizations. See also The College Board, The Basics on Grants and Scholarships, available at https://bigfuture.collegeboard.org/pay-for-college/grants-and-scholarships/the-basics-on-grants-and-scholarships. Accessed 9/12/2020.

need-based grants include the Pell Grant and Federal Supplemental Education Opportunity Grant (FSEOG). I have been asked to address the question of whether receipt of financial aid offsets damages and whether this question depends on the type of aid received.

A. Universities refund excess tuition using a common formula.

197. The University of South Carolina Bursar's Office explains that "There are a variety of reasons that you may be eligible for a refund including excess of financial aid…"[219] USC also details the common formula it uses to disburse tuition refunds to students explaining that "Student refunds for tuition are calculated based on total hours you're taking plus the liable portion of your dropped or withdrawn courses."[220]

198. I use the financial aid tutorial provided by the University of Michigan to demonstrate the distinction between centrally-awarded and external aid, such as federally-funded Pell Grants, when issuing refunds to students. The University of Michigan's Office of Financial Aid details how this process works in its "Navigating U-M Student Account Information" presentation.[221] U-M uses the Fall 2012 semester as an example for a hypothetical student, who received three sources of aid, including a Federal Pell grant and two U-M funded grants/scholarships:

- M-Pact Scholarship worth $6,850: The M-Pact program "is intended to make a U-M education more affordable by increasing grants and reducing loans for Michigan resident undergraduate students from low- and moderate-income families."[222] Upon announcement of this program the U-M president indicated that private gifts would provide seed money for the first three years, after which focused fundraising would occur with the goal of adding an additional $60M in endowment funding. This grant also has a required self-help component.[223] The M-Pact is need based and available to undergraduates who are Michigan residents.

[219] University of South Carolina Bursar's Office, *available at* https://sc.edu/about/offices_and_divisions/bursar/refunds/index.php.
[220] *Id.*
[221] University of Michigan Office of Financial Aid. Navigating U-M Student Account Information, *available at* https://www.slideshare.net/cmhans/navigating-um-account-information-14018553. Link on U-M site: https://finaid.umich.edu/student-account-and-ebill/. Accessed 9/15/2020.
[222] Michigan Today archives, Questions and Answers About Financial Aid, Available at https://deepblue.lib.umich.edu/bitstream/handle/2027.42/61994/m-pact_Q&A.html. Accessed 9/16/2020.
[223] See https://finaid.umich.edu/about-grants/.

- University of Michigan Grant: This is a need-based, U-M-funded award available for undergraduates through the first ten terms of their enrollment.

199. U-M's calculation explains how these sources of funding, none of which came from the student "personally", can still result in a refund to the student. I have replicated U-M's calculation from its above-referenced presentation in the table below. As U-M explains, "Again, this student has more financial aid than he does billed charges and will be receiving a refund to help cover his off campus living expenses and his books." U-M's example shows that a refund of $5,176.81 would be issued to this student.

Table 5. Example of U-M Refund Issued to Student

Line Item	**Term**	**Amount**
Tuition -Undergraduate - College of Literature, Science, and the Arts - Resident	Fall 2012	$7,225.00
Registration Fee	Fall 2012	$80.00
Student Legal Services	Fall 2012	$8.50
Central Student Government	Fall 2012	$7.19
School & College Government Fee	Fall 2012	$1.50
Total Amount Due		$7,322.19
Minus Financial Aid		
Michigan Grant		-$6,850.00
M-Pact Scholarship		-$2,874.00
Federal Pell Grant		-$2,775.00
Total Amount (negative indicates refund to student)		**-$5,176.81**

200. Clearly, the refund above includes money from awards that U-M funded, because the total amount of the Pell Grant is only $2,775 and the refund equals $5,176.81. In fact, based on this example, the student's tuition and fees would have been more than covered in full even without the Pell Grant, and the student would have still received a refund.

201. Refunds pursuant to Tuition Class Plaintiffs' claims in this litigation can be easily issued in the same manner. To the extent that a reduction in the tuition amount invoiced commensurate with the reduction in benefits to Plaintiffs as a result of the transition to ERT would create a credit balance on a student's account, that credit would be issued as a refund to the student.

202. Second, with respect to federal aid, eligibility and disbursement of Federal Pell Grant aid occurs at the student level, as the above example shows. The federal government disburses the aid on behalf of the student to the institution that the student chooses. The College Board explains that "A Pell Grant is money the government provides for students who need it to pay for college…A college may credit Pell Grant funds to your account, pay you directly or use a combination of these two methods."[224] In some cases, students can receive Pell Grants in excess of the amount needed to cover tuition/fees and room/board. In such cases, the school refunds the Pell Grant award to the student.[225]

203. The use of formulas in financial aid underscore the extent to which damages in this case lend themselves to class-wide, formulaic calculation. In accordance with the 1965 Higher Education Act (HEA) and subsequent amendments, as of October 29, 2011, each postsecondary institution that participates in Title IV federal student aid programs must post a net price calculator (NPC) on its web site. The purpose of the calculator is to allow students, using both institution-provided and student-entered data to calculate an estimated net price of attendance at an institution (defined as cost of attendance minus grant and scholarship aid) based on similar charges paid by students in one or more previous years.[226] The Department of Education's Office of Postsecondary Education (OPE) provides a detailed guide for institutions to implement and customize a net price calculator on their own web sites.[227] The calculator applies a common formula to the inputs provided by each individual student or prospective student.

B. Universities issue refunds to students pursuant to institutional policy and apply them on a common basis using formulaic methodology.

204. The example above is consistent with the general practice of issuing refunds to students in higher education. Universities, including USC, have general policies on the issuance

[224] The College Board, What is A Pell Grant? Available at https://bigfuture.collegeboard.org/pay-for-college/grants-and-scholarships/what-is-a-pell-grant. Accessed 9/13/2020.
[225] CollegeFinance.com, Unused Pell Grant Money: Where Does It Go? (Refunds Explained), Available online at https://collegefinance.com/financial-aid/unused-pell-grant-money-where-does-it-go-refunds-explained. Accessed 9/13/2020.
[226] Integrated Postsecondary Education Data System (IPEDS). Net Price Calculator Information Center. Available online at https://nces.ed.gov/ipeds/report-your-data/resource-center-net-price. Accessed 9/8/2020.
[227] U.S. Department of Education, Office of Postsecondary Education, Net Price Calculator Quick Start Guide. Available online at https://nces.ed.gov/ipeds/netpricecalculator/download/QuickStart.pdf. Accessed 9/8/2020. ("Institutions may use either the Net Price Calculator template developed by the U.S. Department of Education or develop their own calculator, so long as it includes 'at a minimum the same data elements' found in the Department's template.").

of refunds for tuition, fees, and room/board. Such policies explain the policies, procedures, and formulas to be applied in instances that warrant refunds, such as early withdrawal from a semester. Such contingencies closely resemble the issues in this case. Similar formulas and methodology can be applied when issuing the refunds to the Plaintiff classes in this litigation.

205. The treatment of Title IV funds in the event a student withdraws from an institution of post-secondary education is codified in 34 CFR § 668.22. In case a student adds or drops courses prior to the end of the term, the University of South Carolina provides a formula explaining the percentage of charges returned depending on the time of withdrawal. This formula requires no individual inquiry: it reflects a policy that applies on a class-wide basis to students. The only factor that influences the amount of refund is the time of withdrawal.

206. Likewise, the U.S. Department of Education sets guidelines for the return of Title IV funds, commonly referred to as an "R2T4" calculation, in case a student withdraws prior to the end of a semester/term. The federal government mandates that students at a post-secondary institution may only retain the portion of the financial aid they have "earned" up to the time of withdrawal.[228] Using U-M as an example, the University provides a formula to determine how much a student has earned, which it describes as follows:

> To determine what a student earns, we divide the number of calendar days the student has attended classes by the total number of calendar days in the semester (minus any scheduled breaks of 5 days or more). The resulting percentage is multiplied by total federal funds disbursed for the semester. This determines the amount of aid earned and the amount that a student may keep. For example, if the student attended 25 percent of the term, 25 percent of aid disbursed was earned. U-M will return all federal student aid funding to the appropriate Federal Title IV Fund. Students will be billed on their U-M student account for any amount returned to the federal government on their behalf.[229]

207. This pro-rata formula represents a common methodology that is applied on a class wide basis and is similar or nearly identical to the formula that would form the basis for refunds to be administered to each of the Plaintiff classes in this matter. Just as with the formula above, no individual inquiry is necessary, as it would be applied to each member of the tuition and fees classes.

[228] For example, see University of Michigan Information for Entering Students and Their Families, Available online at https://finaid.umich.edu/wp-content/uploads/Info1920.pdf. Accessed 9/9/2020.
[229] Id. at 9.

C. Tuition refunds can be determined on a class-wide basis.

208. The actual amount of tuition to be refunded to each member of the putative tuition class can be determined on a common basis and would require no individual inquiry. Universities across the country already offer refunds on a common, formulaic basis, in case of early withdrawal. In Spring 2020, the University of San Diego, in response to the COVID-19 pandemic, extended the date until which students could receive 60% refunds for early withdrawal until March 20, 2020.[230]

209. Universities in the U.S. have already offered tuition discounts for the 2020-2021 academic year on a common basis. Examples of post-secondary institutions either freezing tuition or offering tuition discounts for the Fall 2020 semester appear in Exhibit 4 to this report. These examples indicate that USC can issue refunds to the tuition class in this matter as well.[231] Further, as discussed earlier in this report, the emergency remote teaching that took place in the spring of 2020 represents a different form of instruction that lacks the benefits of normal online courses. As such, one would expect a refund percentage for ERT to exceed the discount offered for normal online instruction, given the additional amount of preparation time available for the Fall 2020 semester.

210. Princeton University President Christopher Eisgruber announced in a July 6, 2020 letter to the university community that the school would be offering a ten percent discount to all undergraduates:

> Because we anticipate that most undergraduates will have the opportunity to study on campus only for one semester or less, we will discount the University's full-year undergraduate tuition by ten percent for this academic year. This discount will apply to all undergraduates, regardless of when or whether they are on campus. We will also apply other discounts to the undergraduate fee package, including the pro-ration of room and board charges for shortened semesters and the elimination of some fees.[232]

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[230] Mari Payton and Paul Krueger, Colleges, Universities Reveal Tuition-Refund, Credit Policies, NBC San Diego, March 19, 2020. Available at https://www.nbcsandiego.com/news/local/colleges-universities-reveal-tuition-refund-credit-policies/2289387/. Univ. of San Diego's refund schedule is available at https://www.sandiego.edu/one-stop/registration/tuition-refund-schedule.php.

[231] I distinguish between refunds and discount. Refunds reflect a reimbursement to the party that has already paid for a good or service. Discounts reflect a reduction in price often used as an inducement to close a prospective sale. Thus, refunds are retrospective transactions while discounts are prospective.

[232] Princeton University Office of Communications, President Eisgruber's message to University community about 2020-21 academic year, July 6, 2020. Available at https://www.princeton.edu/news/2020/07/06/president-eisgrubers-message-university-community-about-2020-21-academic-year. Accessed 9/20/2020.

211. Princeton also waived its $3,500 student contribution, which covers the estimated out-of-pocket cost to students for books and other personal expenses and replaced it with a grant. Likewise, Georgetown University announced a ten percent reduction in tuition for students who are not invited back to campus for the 2020 Fall semester. Students invited back to campus will be charged the previously announced tuition. The university indicated that it took this step "in recognition that undergraduate students who return to campus will have access to certain services that will be unavailable to off-campus students."[233] The university also announced that tuition credits, equal to $2,900 for the Fall semester, would be posted to students' accounts.[234] Georgetown also announced a 20% reduction in housing and dining charges to account for the reduced length of the semester and that, while some students will be on-campus, "…in recognition of the impacts of the health precautions on residence life, they will be charged the lower double-occupancy rate instead of the higher single-occupancy rate for their housing."

212. The discounts that both Georgetown and Princeton have offered as a result of online, rather than face-to-face, instruction for the Fall 2020 semester differ in one regard to the U-M example I offered above. Princeton has explained that the discount in tuition would not affect a student's expected family contribution. Thus, the student's EFC will represent a higher percentage of the tuition.[235] Georgetown University has noted that "Additionally, students with an Expected Family Contribution (EFC) of $0 will not receive a tuition credit, since their entire tuition

[233] Georgetown University, Fall 2020 Undergraduate Tuition, Housing and Dining Charges, July 21, 2020. Available online at https://www.georgetown.edu/news/fall-2020-undergraduate-tuition-housing-and-dining-charges/. Accessed 9/20/2020.

[234] Georgetown University Revenue and Receivables, FAQs, Available at https://studentaccounts.georgetown.edu/covid-19/faqs/. Accessed 9/20/2020.

[235] Students at Princeton University published an opinion in the Daily Princetonian addressing the tuition discount and its application to EFC. See Guest Contributor (signatories in article), Why Princeton should make fall 2020 discounts apply to expected family contribution, The Daily Princetonian, July 21, 2020. Available at https://www.dailyprincetonian.com/article/2020/07/why-princeton-should-make-fall-2020-discounts-apply-to-expected-family-contribution. Princeton students have also launched a petition to address this issue. The students explain that "By including a tuition discount in the first place, the University is acknowledging that the 2020-2021 school year will provide an inherently less valuable educational experience to all undergraduates. It is unfair for partial aid families to continue to have the same financial burden placed on them for this inherently less valuable semester. The decision to apply the 10% full tuition discount to Princeton's share of the tuition instead of reducing expected family contribution is unfair. This option leaves these students paying just as much as they were before and actually ends up saving the University money rather than the students the aid is intended to assist." By observing that "this is an issue of social equity" students offer a similar argument to the one I explained earlier. Further, as I noted, this point is consistent with the overall goals of financial aid in higher education. The students' petition can be found at https://www.change.org/p/princeton-university-administration-fall-2020-tuition-discounts-for-all-princeton-students.

cost has been covered by GU Scholarship."[236]

213. I offer these examples for two reasons. First, both examples show that refunds can be issued to students on a common, formulaic basis that accommodates variations in financial aid. Second, the examples above reflect prospective adjustments to financial aid. The issue in this case involves refunds to students after aid has been awarded and payment made. Nonetheless, should the finder of fact decide that family EFC should offset a percentage of the refund, the formula I described early can easily accommodate such a modification.

[236] Georgetown University Revenue and Receivables, FAQs

Exhibit 1 – Documents Considered

Documents as referenced in this report

Deposition of Nicole Pressley

Deposition of Edward Walton

Deposition of Mark Bieger

Deposition of Peter Kelly

Deposition of Sandra Kelly

Deposition of Theresa Kelly

Deposition of Kelly Epting

Deposition of Mandy Kiebler

Depositions of Casey Kelly

30(b)(6) Deposition of Mandy Kiebler

30(b)(6) Deposition of Edward Walton

30(b)(6) Deposition of Aaron Marterer

30(b)(6) Deposition of August Grant

Deposition of Casey Kelley

USC_00046352-BMF and Scenarios.xlsx

USC_00007000-Grant Types - CONFIDENTIAL.XLSX

CHE - Moving Online - Bates Stamped.pdf

What Delivery Format Options (Models) Are Available_ - Center for Teaching Excellence _ University of South Carolina.pdf

bot_021921-Revenue Generation p9-11.pdf

USC_00013809-LABS.XLSX

USC_00006704-CONFIDENTIAL.XLSX

USC_00006695-IMPACT WITH FEES - CONFIDENTIAL.XLSX

USC_00000035-Student List.XLSX

USC_00013809-LABS-with calc.xlsx

USC_00043439-Fall Tuition File.xlsx

USC_00043438-Tuition by Campus - Fall 2019.xlsx

USC_00043437-Tuition by Campus-Spring 2020.xlsx

USC_00043435-Upstate SC Registration.xlsx

USC_00014490-Schedule of Courses.xlsx

USC_00041697.xlsx

USC_00043435-Other Campus.XLSX

USC_00042007-Journal Entries.xlsx

USC_00046512-Estimated Impact.xlsx

2021-2022-undergraduate.pdf

acaf200.pdf

acaf203.pdf

annual_report_0122-Moore Business School.pdf

ba_jour_mass_comm_online_approval.pdf

best_practices_synchronous_online_courses.pdf

bot_021921-Revenue Generation.pdf

bot_minutes_august_14_2020.pdf

botcalled_091120v2.pdf

bs_spte_online.pdf

Class Schedule Listing.pdf

COVID-19 Faculty Guidance - Office of the Provost _ University of South Carolina.pdf

COVID19_HigherEducationSupplemental SummaryMemo.pdf

experience_by_design_qep.pdf

fees-refunds.pdf

Financial Aid Authorization and Fee Payment - Financial Aid and Scholarships _ University of South Carolina.pdf

med_psych_rsch_online.pdf

minutes_bot_061920wheader.pdf

Novel Coronavirus (COVID-19) _ University of South Carolina - as of June 2020.pdf

Novel Coronavirus (COVID-19) _ University of South Carolina-Full June 20 2020.pdf

Online Course Development - Center for Teaching Excellence _ University of South Carolina.pdf

online_course_development_timeline.docx

online_course_development_timeline_12week_option.docx

qsoc_checklist.docx

qsoc_review_instrument.docx

Refunds - Bursar's Office _ University of South Carolina.pdf

requirement_6.5.pdf

requirement_8.2.b.pdf

requirement_9.7.pdf

requirement_10.1.pdf

requirement_10.2.pdf

requirement_10.3.pdf

requirement_10.7.pdf

requirement_14.2.pdf

Should Students Pay Full Price for an Online Education During the Pandemic_ _ OnlineU.pdf

SubstantiveChange.pdf

uofsc_return_to_learn_plan.pdf

Literature

Minutes

9_1_guidelines - progressive advancement.pdf

93% of college students say tuition should be cut for online classes.pdf

2018eopbasicplan.pdf

2018-POA-Resource-Manual.pdf

minutes_bot022120wheader.pdf

bot_021420_called.pdf

bot_021220_called.pdf

bot_9am_121421_minutesfinal_noes.pdf

bot_called_120621_minutesfinal_woes.pdf

bot_called_112221_minutesfinal_woes.pdf

bot_101521_minutesfinal_woes.pdf

bot_called_091721_minutesfinal_woes.pdf

bot_082021_minutesfinal_woes.pdf

bot_062521_web.pdf

bot_called_052121_web.pdf

bot_called_042821_web.pdf

bot_called_041421_web.pdf

bot_040921_web.pdf

bot_called_031221.pdf

bot_021921.pdf

bot_called_012221.pdf

bot_called_010421revised.pdf

041422_bot_minutesfinal_woes.pdf

040822_botcalled_minutesfinal_woes.pdf

032422_botcalled_minutesfinal.pdf

bot_021822_minutesfinal_woes.pdf

bot_called_011422_minutesfinal_woes.pdf

bot_called_011222_minutesfinal_woes.pdf

bot_called_010722_minutesfinal_woes.pdf

bot_121520.pdf

bot_called_111320.pdf

bot100920_final.pdf

botcalled_091120v2.pdf

bot_called_083120.pdf

bot_minutes_august_14_2020.pdf

bot_minutes_july_24_2020.pdf

minutes_bot_061920wheader.pdf

botminutes_042420.pdf

botcalled033020minutes_final.pdf

botcalled030630_final.pdf

USC_00043439-CONFIDENTIAL-FERPA.XLSX

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USC_00043441-CONFIDENTIAL-FERPA.XLSX

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USC_00007290.pdf

USC_00007301.pdf

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USC_00007307.pdf

USC_00007310.pdf

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USC_00006503.pdf

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USC_00006528-CONFIDENTIAL.XLSX

USC_00006695-IMPACT WITH FEES - CONFIDENTIAL.XLSX

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USC_00009308-CONFIDENTIAL.XLSX

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USC_00013662.XLSX

USC_00013786.XLSX

USC_00013807.XLSX

USC_00013809-LABS.XLSX

USC_00013890-Debt Service.XLSX

USC_00014490.XLSX

USC_00014491.XLSX

USC_00014687 - Course List.XLSX

USC_00025621.XLSX

USC_00039237-Tuition Refund.XLSX

USC_00039248.XLSX

USC_00039279.XLSX

USC_00039477.XLSX

USC_00041684-CONFIDENTIAL-FERPA.XLSX

USC_00041687-CONFIDENTIAL-FERPA.XLSX

USC_00041697-CONFIDENTIAL-FERPA.XLSX

USC_00042007-CONFIDENTIAL-FERPA.XLSX

USC_00042012-CONFIDENTIAL-FERPA.XLSX

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USC_00046190.XLSX

USC_00046354.XLSX

USC_00000035-CONFIDENTIAL-FERPA.xlsx

Exhibit 2 – Tatos Curriculum Vitae

Ted P. Tatos, MStat, PStat®
Economist and Statistician – EconONE Research

Ted Tatos is an economist and statistician affiliated with EconONE Research. In addition to his consulting practice, where he specializes in empirical analysis, Mr. Tatos is Adjunct Professor of economics at the University of Utah, where he currently teaches Applied Econometrics. He is also the Associate Economics Editor of the *Antitrust Bulletin* journal, where he has also guest-edited two symposia. Mr. Tatos has an M.S. in Statistics with a focus in Econometrics from the University of Utah and has B.A. in Economics from Duke University. Mr. Tatos has earned the Professional Statistician (PStat ®) accreditation from the American Statistical Association. He has over twenty-five years of experience in litigation and non-litigation consulting, with a focus in antitrust, data analytics, higher education, healthcare, intellectual property, labor, and commercial damages. Mr. Tatos has advised both private sector and government clients, such as the Securities and Exchange Commission, on matters requiring complex economic and statistical analysis. He has published on various matters including antitrust issues, intellectual property matters, the use of hedonic analysis to estimate property values and investigate value diminution, labor rights, and athlete safety. His peer-reviewed paper in the Journal of Scientific Practice & Integrity on the use and misuse of college athletes as subjects in concussion research formed the basis of a 2019 documentary authored by the sports journalism outlet *The Athletic* and was produced by filmmaker Andrew Muscato and narrated by eleven-time Emmy winner Armen Keteyian. The documentary can be found at https://theathletic.com/video/21-adhd/.

Email:	ttatos@econone.com
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Office:	(213) 612-7510
Mobile:	(801) 541-6696
Research:	https://utah.academia.edu/TedTatos
	https://www.researchgate.net/profile/Ted_Tatos

Professional Experience

August 2019-Present	EconONE Research
January 2010 to Present	Empirical Analytics Director
July 2008 to January 2010	Wasatch Economics Partner, Salt Lake City, Utah
January 2007 to July 2008	Keystone Strategy/North Harvard Group Statistician, Salt Lake City, Utah
September 2001 to January 2007	LECG, LLC Managing Economist, Washington DC & Salt Lake City, UT
January 2000 to September 2000 March 1997	DynCorp – Healthcare Information Technology Services Statistical Analyst, Reston, Virginia LECG, LLC

to January 2000	Research Analyst, Associate Washington, DC

Education

Duke University, Durham, NC
A.B. Economics, 1995 (*double major, Economics, Psychology*)

University of Utah, Salt Lake City, Utah
M.S. Statistics - Econometrics, 2005 – Thesis published in Intellectual Property Damages: Guidelines and Analysis, 2004 Supplement – *Applying Statistical Analysis to the Market Approach*

Published Research Papers

Ted Tatos and Hal Singer. *Alston v NCAA: lessons American college athletics can offer about concentration and monopsony power in labour markets*. Journal of Antitrust Enforcement, 2022, 00, 1–14, https://academic.oup.com/antitrust/advance-article-abstract/doi/10.1093/jaenfo/jnac007/6599234.

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Ted Tatos and Hal Singer. *Antitrust Anachronism: The Interracial Wealth Transfer in Collegiate Athletics Under the Consumer Welfare Standard*, The Antitrust Bulletin, Vol. 63, Issue 3, Nov. 2021. https://journals.sagepub.com/doi/10.1177/0003603X211029481.

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https://heinonline.org/HOL/LandingPage?handle=hein.journals/fedcb27&div=5&id=&page=.

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https://www.appraisalinstitute.org/transmission-lines-increase-and-decrease-property-values-the-appraisal-journal/.

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Stephen T. Casper, Kathleen E. Bachynski, Michael E. Buckland, Don Comrie, Sam Gandy, Judith Gates, Daniel S. Goldberg, Kathryn Henne, Karen Hind, Daniel Morrison, Francisco Ortega, Alan J. Pearce, Sean Philpott-Jones, Elizabeth Sandel, Ted Tatos, Sally Tucker and Adam M. Finkel. *Toward Complete, Candid, and Unbiased International Consensus Statements on Concussion in Sport*, 49 Journal of Law, Medicine & Ethics 372–377 (2021).
https://www.cambridge.org/core/journals/journal-of-law-medicine-and-ethics/article/toward-complete-candid-and-unbiased-international-consensus-statements-on-concussion-in-sport/54233A9E24B851E9288AEFD03E1C58CE.

Ted Tatos and Rick Hoffman. *Applying Statistical Analysis to the Market Approach.* Intellectual Property Damages: Guidelines and Analysis, 2004 Supplement

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https://www.promarket.org/2022/05/20/ncaa-goes-after-college-athletes-nil-antitrust/.

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Ted Tatos. *Playing Games with College Athletes' Lives*. THE AMERICAN PROSPECT, May 20, 2020. https://prospect.org/health/playing-games-with-college-athletes-lives/.

Presentations, Amicus Briefs, and White Papers

Assisted in drafting and co-authored *Brief of Economists as Amici Curiae in Support of Plaintiffs-Appellants and Reversal*, State of New York et al. v. Facebook. Brief *available at* https://www.cohenmilstein.com/sites/default/files/New%20York%20v%20Facebook%20-%20Economists%20Amicus%20-%20Filed%2001282022.pdf

Hal Singer and Ted Tatos. Subsidizing Universal Broadband Through a Digital Advertising Services Fee: An Alignment of Incentives, October 2021, *available at* https://www.econone.com/wp-content/uploads/2021/09/Digital-Divide-HSinger-TTatos-2.pdf.

Hal Singer and Ted Tatos. Protecting the U.S. Postal Service from Amazon's Anticompetitive Assault. January 2022, *available at* https://www.econone.com/news-article/read-hal-singer-and-ted-tatos-article-protecting-the-u-s-postal-service-from-amazons-anticompetitive-assault/.

Relevant Market Definition and Multi-Sided Platforms After Ohio v. American Express: Evidence from Recent NCAA Monopsony Antitrust Litigation – Presentation at the University of Utah Antitrust Conference, October 2019, Panel discussion *available at* https://www.youtube.com/watch?v=vjJahNWNkes&list=PLqm-AKklxwfYBpEX4vyd0CyKRZ2RiIAbl&index=5

Advanced Patent Litigation: *Maximizing Returns and Protecting Core Technologies* (CLE presentation), Santa Clarita, CA. Oct. 2018. With Bret Bocchieri, Aaron Fahrenkrog, Christine Yun Sauer of Robins Kaplan, LLC.

Clear Law Institute presentation. *Statistics in Class Certification and at Trial: Leveraging and Attacking Statistical Evidence*, with Paul Karlsgodt of Baker Hostetler, LLC, Feb. 25, 2019.

Paul Seabright and Ted Tatos. Presentation before the European Commission – Director General of Competition - Chief Economist's team, Brussels, Belgium pursuant to a white paper co-authored with Mark Glick and Paul Seabright regarding competition and antitrust issues in the computer mainframe industry. August 2009.

Presentation to the Utah Bar Association Annual Summer Convention, Jul. 15-18, 2009. *Economics and the Theory of Your Case*. With Hon. Clark Waddoups, Hon. Deno Himonas, Mark Glick, Steve Hill.

Steve Waters and Ted Tatos. *Determining the Choice Set in a Random Utility Model* - Presentation to American Agricultural Economics Association, Toronto, Ontario, Canada, July 1997

Teaching Credentials

- Adjunct Professor – Spring 2023 – Economics 6630 – University of Utah
- Adjunct Professor – Spring 2006 – Economics 7801 – University of Utah
- Adjunct Professor – Spring 2005 – Economics 7801 – University of Utah
- Adjunct Professor – Spring 2004 – Economics 7801 – University of Utah

Testifying Credentials

- Before the State of California Legislature, Judiciary Committee, pursuant to Assembly Bill 983, June 28, 2022.
- Trial testimony in the matter of Roberts v. Tim Dahle Imports, United States District Court, District of Utah, June 2022.
- Deposition testimony in the matter of Hunter v. Booz Allen Hamilton et al., August 2021
- Deposition testimony in the matter of Sypherd v. Lazy Dog Restaurants, July 2021
- Deposition testimony in the matter of Brittain v. United States (DOJ Natural Resources Div.), May 2021
- Deposition testimony in the matter of Michael Mendell v. American Medical Response, August 2020
- Deposition testimony in the matter of Ademola Adetula and Homer Strickland v. United Parcel Service, January 2020.
- Hearing testimony – Cruz v. Chunga. August 2017.

- Trial testimony – Young Living Essential Oils v. doTerra. June 2017.
- 2nd deposition in the matter of Young Living Essential Oils v. doTerra. October 2016.
- Deposition in the matter of Kinum v. American Agencies. April 2016.
- Deposition in the matter of Young Living Essential Oils v. doTerra. February 2015.
- Deposition in the matter of the Utah Jazz NBA team v. individual members of the Jazz 100. October 2014.
- Deposition in the matter of California College, Inc. v. In Contact. September 2014.
- Testimony in arbitration hearing in Robinson-Patman price discrimination antitrust matter. MB Signal v. AT&T Wireless. June 2014.
- 2nd Deposition testimony in Robinson-Patman price discrimination antitrust matter. Cellular Cellutions/MB Signal v. AT&T Wireless. April 2014.
- Trial testimony in Robinson-Patman price discrimination antitrust matter – 3rd District Court, district of CO. Western Convenience Stores, Inc. v. Suncor Energy USA., March 2014.
- Deposition testimony in Robinson-Patman price discrimination antitrust matter. Cellular Cellutions v. AT&T Wireless. January 2014.
- Trial testimony in breach of contract involving alleged loss of employees to competitor, Layton Construction v. SIRQ, February 2013.
- Trial testimony in breach of contract claim involving purchase of residential and commercial development. Traverse Mountain Enterprise v. Fox Ridge Investments, November 2012
- Deposition testimony in breach of contract claim involving purchase of residential and commercial development. Traverse Mountain Enterprise v. Fox Ridge Investments, February 2011
- Presentation to Utah Public Service Commission on behalf of Utah Industrial Energy Consumers (UIEC) regarding Rocky Mountain Power's use of statistical sampling in estimating cost allocation among consumer classes. July 2010.
- Deposition testimony in matter involving alleged damages to an internet-based entertainment shopping site. PrizeWise v. Oppenheimer, November 2009.

- Presentation before the European Commission – Director General of Competition - Chief Economist's team pursuant to a paper co-authored with Mark Glick and Paul Seabright regarding competition in the computer mainframe industry. t3 Technologies v. IBM, August 2009.
- Deposition testimony in matter involving paid search advertisement bidding on competitor keywords on the Google search engine – 1-800 Contacts v. Lens.com, November 2008
- 2nd District Court, District of Utah. Trial testimony in breach of contract matter involving transfer of insurance agents to a rival firm. Farm Bureau v. American National Insurance Company, August 2008
- Testified before Administrative Law Judge on the use of the Consumer Price Index as a measure of inflation and offered testimony on inflationary pressure on fuel prices – July 2008
- Deposition testimony on statistical sampling issues, Catholic Healthcare v. Blue Cross/Blue Shield of California – March 2008
- Trial testimony in breach of contract matter involving transfer of insurance agents to a rival firm. Farm Bureau v. American National Insurance Company, November 2006
- Testified before Administrative Law Judge on the matter of whether taxicab rates in Salt Lake City should be increased as a result of increased gasoline prices resulting from Hurricanes Katrina and Rita. – January 2006
- Testified before Administrative Law Judge on the matter of whether taxicab rates in Salt Lake City should be increased to reflect inflationary trends – January 2005
- Testified before Administrative Law Judge on the matter of whether Salt Lake City should issue additional taxicab licenses – November 2004

Private & Public Sector Consulting and Litigation Experience

Selected Class Action, Antitrust and Intellectual Property Matters

- Cross et al. v. University of Toledo (class action) – prepared expert report at class certification stage in matter involving tuition and fees refunds resulting from transition to emergency remote teaching in Spring 2020.

Client: Plaintiffs

Law Firm: Milberg Coleman, New York, NY

- Hunter et al. v. Booz Allen Hamilton et al. (class action) – prepared report in class action matter involving no-poach agreement between defense contractors

  Client: Plaintiffs

  Law Firm: Saveri Law Firm, San Francisco, CA

- Sypherd et al. v. Lazy Dog Restaurants (class action) – prepared expert report and offered deposition testimony in matter involving age discrimination claims against a restaurant chain

  Client: Plaintiffs

  Law Firm: Hogue Belong, San Diego, CA

- Michael Mendell v. American Medical Response (class action) – Prepared declaration and offered deposition testimony in class action matter involving notice of recording pursuant to California Invasion of Privacy Act (CIPA).

  Client: American Medical Response

  Law Firm: Akin Gump, Los Angeles, CA

- Lenhoff Enterprises, Inc. v. United Talent Agency, Inc. & International Creative Management Partners, LLC: Prepared statistical analysis and submitted declaration in the matter of regarding antitrust issues in the scripted television market.

  Client: Lenhoff Enterprises

  Firm: Blecher Collins & Pepperman, Los Angeles, CA

- Luxe Hospitality Co. v. SBE et al. - Prepared two expert reports and declaration in matter regarding trademark dispute. Prepared critique of consumer confusion and secondary meaning surveys prepared by SBE experts.

  Client: Luxe Hospitality Company

  Law Firm: Robins Kaplan, Los Angeles, CA

- Western Convenience v. Suncor - Prepared expert reports and testified in deposition and trial on Robinson-Patman price discrimination matter dealing with competitive injury and antitrust damages in retail gasoline industry.

  Client: Western Convenience Stores

  Firms: Polsinelli, Denver, CO

  Bennington Johnson, Biermann & Craigmile, Denver, CO.

- 1-800 Contacts v. Lens.com - Prepared expert report, declaration, and gave deposition testimony in matter involving trademark dispute and keyword bidding on online search

engines. Prepared critique of reports prepared by 1-800 Contacts' damages and survey experts.

Client: Lens.com

Firm: Ray Quinney & Nebeker, Salt Lake City, UT

- Sport Court v. Rhino Sports: Prepared expert report in matter of in matter involving trademark dispute and keyword bidding on online search engines.

  Client: SportCourt, Inc.

  Law Firm: *Ray, Quinney & Nebeker, Salt Lake City, UT*

- J.D. Fields, Inc. v. Nucor - Retained as expert & prepared analysis on competitive injury in Robinson-Patman antitrust price discrimination matter in steel industry.

  Client: J.D. Fields, Inc.

  Firm: Hill Rivkins, Houston, TX.

- Cellular Cellutions v. AT&T, M.B. Signal v. AT&T: Prepared expert reports, declaration, and gave testimony at arbitration hearing in Robinson-Patman antitrust case involving price discrimination in retail cellular telephone industry.

  Client: Cellular Cellutions, M.B. Signal

  Firm: Plunkett Cooney, Bloomfield Hills, MI.

- Prepared econometric and statistical analysis in price-fixing matters in the following matters:

  In Re Industrial Silicon Antitrust Litigation

  Contact Lens Antitrust Litigation

  Commercial Tissue Antitrust Litigation

  Flat Glass Antitrust Litigation

  Vitamins Antitrust Litigation

  Window Blinds Antitrust Litigation

- Co-Authored report with Prof. Paul Seabright and Prof. Mark Glick regarding customer lock-in in the mainframe market. Presented results to European Commission-DG Comp Chief Economist's team. Matter: *t3 v. IBM litigation*.
- Prepared analysis of online advertising market pursuant to investigation of potential competitive effects of Google-DoubleClick merger.
- Prepared analysis of click-through rates, impressions, search terms, and usage rates for online search advertisements pursuant to proposed merger between Microsoft and Yahoo.
- Prepared geographic market analysis for various clients involving mergers in the defense, healthcare, explosives, aircraft engines, and others.

Employment Discrimination, Fair Labor Standards Act, and Benefits Consulting

- Melissa Roberts v. Tim Dahle Imports – Prepared expert report in matter involving the calculation of commissions on new and used automobiles.
  Client: Tim Dahle Imports
  Law Firm: Ray Quinney & Nebeker, Salt Lake City
- Gutierrez v. Stericycle - Prepared declaration in matter involving class action wage and hour claims for Stericycle employees in California.
  Client: Stericycle
  Law Firm: Parsons Behle & Latimer, Salt Lake City, UT
- Land v. EG&G (and other cases in UT, OR, AL) - Retained as expert to prepare analysis on wage and hour matters for various client locations in Utah, Oregon, Arkansas, and Alabama.
  Clients: EG&G division of URS; Battelle Memorial Institute
  Law Firm: Holland & Hart, Salt Lake City, UT
- Jordt v. Federal Express - Retained as consulting expert to advise on statistical matters involving claims of age discrimination.
  Client: Federal Express Freight
  Law Firm: Ray Quinney & Nebeker, Salt Lake City, UT
- Gray v. Oracle - Retained as consulting expert to analyze claims of age discrimination in layoff of employees from major information technology firm. Reviewed layoff records and performed logistic regression to analyze relevant factors in the layoff.
  Client: Oracle, Inc.
  Law Firm: Parsons Behle & Latimer
- Developed regression models to test for statistically significant differences in gender pay rates for big four accounting firm.
- Used parametric and nonparametric statistical techniques to compare gender promotion rates in employment discrimination litigation case.
- Developed statistical models to ensure a company undertaking layoffs is conducting the process randomly without discriminating with respect to gender, race, or age.

Selected Breach of Contract, Non-Solicitation Provisions, and Fraud Matters

- Securities & Exchange Commission v. Colin McCabe/Elite Stock Report – Prepared analysis of stock touting and impacts on stock prices. Issued expert report.

Client: Securities and Exchange Commission

Law Firm: Securities and Exchange Commission-Nancy Ferguson-Denver Office

- Young Living Essential Oils v. doTERRA – Prepared expert report, declaration, two depositions, and gave trial testimony in matter involving breach of non-solicitation agreement. Prepared statistical model of lost profits.

  Client: Young Living Essential Oils

  Law Firm: Ray Quinney & Nebeker
- LIMU v. Zija – submitted expert disclosure detailing calculation of lost revenues – case ongoing.

  Client: LIMU

  Law Firm: Ray Quinney & Nebeker
- SIRQ, Inc. v. Layton Companies – Prepared expert report, gave deposition and trial testimony in matter involving breach of non-solicitation agreement and breach of contract.

  Client: Layton Companies

  Law Firm: Parr Brown Gee & Loveless, Salt Lake City, UT
- Traverse Mountain Enterprises v. Fox Ridge, LLC. – Prepared expert reports, gave deposition testimony, and testified at trial in issue involving breach of contract. Valued property and investments at Traverse Mountain.

  Client: Traverse Mountain Enterprises

  Law Firm: Durham Jones & Pinegar, Salt Lake City, UT
- Farm Bureau v. American National – Gave deposition and trial testimony in matter involving non-solicitation and breach of contract.

  Client: Farm Bureau Life Insurance

  Law Firm: Morgan Minnock Rice & James, Salt Lake City, UT
- Prepared statistical and economic analysis in breach of contract/breach of non-solicitation matters in direct sales/multi-level marketing industry for clients including: Neways, Organo Gold, Max International, LIMU and others.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAVIA BUNCH and CASEY KELLY,
individually and on behalf of others
similarly situated,
Plaintiffs,
vs. Civil Action No. 2020-CP-40-02330
THE UNIVERSITY OF SOUTH CAROLINA,
Defendant.

VIDEOTAPED WEB CONFERENCE
30(b)(6)
DEPOSITION OF: UNIVERSITY OF SOUTH CAROLINA'S CORPORATE REPRESENTATIVE AARON CHARLES MARTERER

DATE: Thursday, October 27, 2022

TIME: 1:54 p.m.

TIME ENDED: 2:37 p.m.

LOCATION: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina

REPORTED BY: YVONNE R. THURSTON-BOHANNON
Registered Merit Reporter,
Certified Realtime Reporter

A. No.

Q. All right. So -- so my understanding of the registration process -- and I'll walk through this. You tell me if I'm right or I'm wrong, and then we'll look at some documents.

But the -- each student generally -- I understand there's certain students that don't register themselves that Ms. Pressley testified to. What I'm trying to understand is for students who go through the normal Self Service Carolina registration process, what that looks like and what they see and are told during that process. So that's where I -- just to give you sort of where I'm going, and you can tell me where I'm wrong.

So to register for a class, the student would first have to have access to Self Service Carolina, correct?

A. Yes.

Q. All right. So once they -- they would get a log-in and a password and they would be able to access that from a Web browser, correct?

A. Yes.

Q. Okay. So they log in to Self Service Carolina, and before they can actually register for classes and build out their schedule, they're

required to accept the Statement of Financial Responsibility; is that correct?

A. Yes.

Q. All right. Once they've accepted this Statement of Financial Responsibility, they go into the academic bulletin that has the courses -- course catalog; is that correct?

A. Yeah, we call it the schedule search.

Q. Schedule search?

A. Yeah.

Q. And that functions like -- I -- when I went to school, we had paper ones.

A. Uh-huh.

Q. But that functions like the academic bulletin with the course catalog; is that correct?

A. Yes. The term academic catalog we refer -- it means something else.

Q. Okay. What do you --

A. Different from a schedule search.

Q. Sure.

What is the academic catalog?

A. That is kind of an annual publication of the courses and programs that the -- that are offered to students and that students could potentially enroll in, and then the schedule search

would be kind of a semester by semester course offerings with course sections.

Q. So -- so the course -- the -- the general academic catalog would be just the names of the courses and the descriptions of what is being taught; is that correct?

A. Yes.

Q. And then the schedule search that the students would use online would have more granular information about the times, the professors, the building locations, the method of instruction, those kinds of --

A. Yes.

Q. -- bits of information? Okay. All right.

And just generally, so a student would log into Self Service Carolina. They would accept this Statement of Financial Responsibility, and then they would start building out their courses based on what time they wanted to take the course on what days, that kind of thing, if it was offered on those days; is that correct?

A. Yes.

Q. And let's just look at an exhibit. We'll walk through it.

filter ahead of time. It would be a prompt that says, "What campus are you taking classes on?" and then you would only be shown those.

Q. Excellent.

You know what, actually let me back up. Let's put this exhibit to the side for a second and let me just show you something else, another document that we have. I think you referred to another document here.

MR. CHAPMAN: So I want to introduce a new exhibit here. This one will be -- what's -- which one are we on consecutively? Is it 73 or 72?

(The court reporter interjected.)

MR. BRUNSON: 73.

MR. CHAPMAN: 73, all right.

(Exhibit 73, Class Schedule Search, marked for identification.)

BY MR. CHAPMAN:

Q. So I'm going to mark Exhibit 73. And -- but this has been marked as Exhibit 73. This is a document we got from one of our clients that shows that the class schedule search function that she was able to use for spring 2020.

Do you -- have you seen this before? Oh, I'm sorry, I'm not even sharing this with you.

I'm sorry.

Have you seen this document before --

A. Yes.

Q. -- and this type of representation?

Okay. So the -- the -- the boxes on the left-hand side, you know, with the scroll-down feature there, those are all filters you could use to select classes with?

A. Yes --

Q. All right.

A. -- to filter down the -- the course offerings so that you can look at them.

Q. So you could select the USC Aiken, and you could select first year seminar. You could select as the campus USC Aiken, and then that would filter out the subjects that were offered on that campus, right?

A. Yes.

Q. And then you could click your subject, and that would filter out further and let you know which courses are offered -- or you can -- you can get that -- get that field of possibilities, right?

A. Yes.

Q. And then --

A. The first two prompts are required

fields.

Q. The first two prompts are required, okay.

And then you can also -- the student can also select -- under "Instructional Method" it says, "Face-to-Face Instruction, Flux Face-to-Face, or Online Palmetto Course." There's different offerings that a student can use to further narrow the course selection; is that right?

A. That's right.

Q. And then as far as the -- and then you could use the other filters on here, like "Course Level" and "Part of Term" to further narrow your searches; is that right?

A. That's correct.

Q. And then you could also filter -- on the second page of Exhibit 73 it looks like you can also filter by start time and end time; is that right?

A. Yes. Correct.

Q. And you could also fill by the days of the week you wanted to take the course, right?

A. Yes.

Q. All right. So you could run through this filter screen first, and then that would take

you to a list of courses; is that correct?

A. Correct.

Q. And I'm going to close out this exhibit and reopen what was previously marked as Exhibit 10. Give me one second. Sorry, not Exhibit 10.

All right. So I've brought back up a document that was previously marked as Exhibit 62 that we were just talking about before. I put Exhibit 73 in front of you.

Going back -- so after the student has filtered for the type of class, campus, type of instructional method, et cetera, that he or she wishes to filter for, they would be brought to a search results page that looks something like this; is that correct?

A. Correct.

Q. All right. And then they could select the class that they wanted based on things like the time of day, the instructor, and the method of instruction; is that right?

A. That's correct.

Q. And they would specifically -- strike that.

The student would then select the

Q. All right. And that -- and so once you've selected all of your classes that you want to take, it would build out the schedule for you, and then you would -- you would be placed in -- into a screen -- like a shopping cart screen, right?

A. Yes.

Q. All right.

A. But there -- there are two ways to register. One is through the shopping cart --

Q. Okay.

A. -- and then there's another one where you would just individually copy/paste the CRNs in one by one.

Q. Okay. And are both -- do you get to both of those -- the functionality that takes you to shopping cart versus the functionality that takes you to just putting in the individual course registration numbers, do you -- does the student get to those different functionalities from different places in the website or can they just select which one they want to use or how does that work?

MR. BRUNSON: Object to the form.

Go ahead.

THE WITNESS: Yeah, there's -- you just go to the registration screen, and you can either add courses in and then have them all loaded in at once or individually add them.

BY MR. CHAPMAN:

Q. Understood.

A. Okay.

Q. So if you do -- if you load in all the courses at once, is that consistent with like the shopping cart scenario that you're talking about?

A. Yes.

Q. All right. So -- but either way you would finish building out your schedule, and then you would click a button to essentially lock those classes in; is that right?

A. Yes. You would have a -- a seat in the course, yes.

Q. So at that point you've -- the student has through the Statement of Financial Responsibility agreed to pay for the classes, right?

A. Yes. I can't speak to the -- the actual statement.

Q. I -- I understand.

A. Yeah.

Q. But the stud -- student has -- has accepted the Statement of Financial Responsibility, right?

A. Yes.

Q. Okay. And the statement -- the student has then gone through and selected classes based on the information that's provided in Exhibit 73, correct -- or, I'm sorry, Exhibit 67 -- 62?

A. Yes.

Q. All right. So after the student selects the classes based on the information set forth in Exhibit 62, the student then goes to a checkout function or there's a button that they click to -- to lock in their selections; is that correct?

A. Yes, to -- to register for the classes.

Q. And then there's a period of time when they could add or drop a class; is that right?

A. Yes.

Q. And how long does that typically last after the registration deadline runs?

A. In a -- in a kind of a normal 14-week course, a student has generally a week. It's called the free drop/add period.

Q. Right.

for courses? I realize there's not a lot of them that don't use Self Service Carolina, but can you walk me through how people that don't use Self Service Carolina would register for courses.

A. So the -- there are no other options for a student to physically register. Self -- Self Service is the only way that they can register. There might be instances where a staff member might register a student.

Q. Like for medical school or something like that? That's one of the --

A. Correct.

Q. -- one of the ones that I understand --

A. That is --

Q. -- runs differently?

A. -- that is an example, yes.

Q. So in -- in all instances where the student is -- has not used Self Service Carolina, somebody other than the student would have had to register them for courses?

A. Correct.

Q. And whether that's -- it could be a high school counselor, right, if they were a high school student taking college classes; is that

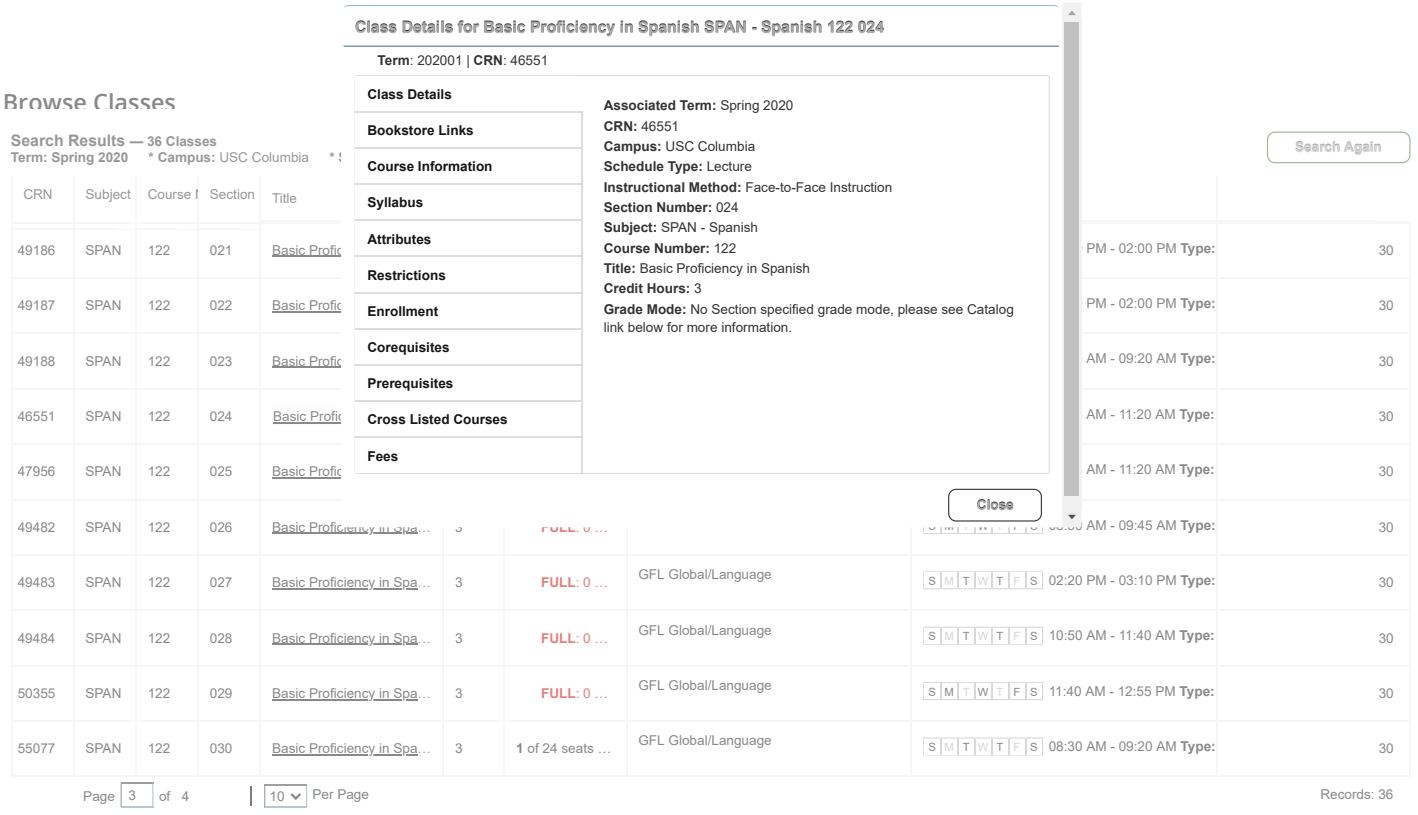


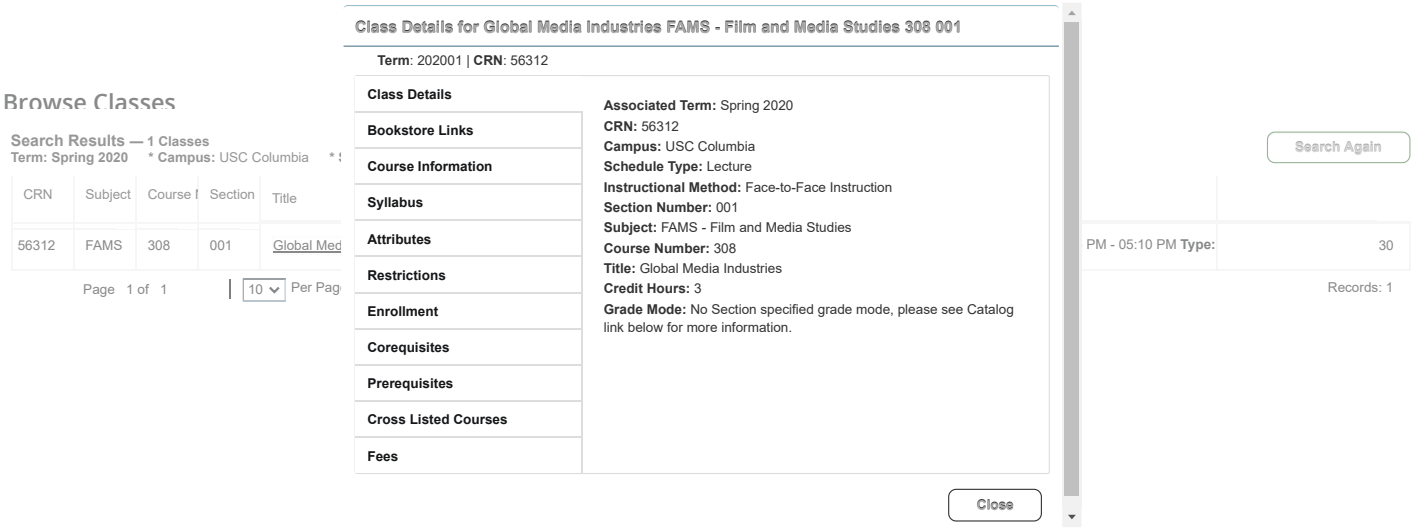
Exhibit
0062
Ed Walton 30(b)(6)

Browse Classes

Search Results — 36 Classes
Term: Spring 2020 *** Campus:** USC Columbia *** Subject:** SPAN - Spanish **Course Number:** 122

CRN	Subject	Course Number	Section	Title	Hou	Status	A	Meeting Times
41803	SPAN	122	019	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 02:20 PM - 03:10 PM **Type:** Class **Building:** Humanities Classroom **Room:** 402 **Sta**
41798	SPAN	122	020	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 12:00 PM - 12:50 PM **Type:** Class **Building:** Humanities Classroom **Room:** 312 **Sta**
49186	SPAN	122	021	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 01:10 PM - 02:00 PM **Type:** Class **Building:** Humanities Classroom **Room:** 207 **Sta**
49187	SPAN	122	022	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 01:10 PM - 02:00 PM **Type:** Class **Building:** Humanities Classroom **Room:** 103 **Sta**
49188	SPAN	122	023	Basic Proficiency in Spanish	3	**4** of 24 seats remain.	G	S M T W T F S 08:30 AM - 09:20 AM **Type:** Class **Building:** Humanities Classroom **Room:** 103 **Sta**
46551	SPAN	122	024	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 10:05 AM - 11:20 AM **Type:** Class **Building:** Humanities Classroom **Room:** 304 **Sta**
47956	SPAN	122	025	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 10:05 AM - 11:20 AM **Type:** Class **Building:** Humanities Classroom **Room:** 316 **Sta**
49482	SPAN	122	026	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 08:30 AM - 09:45 AM **Type:** Class **Building:** Humanities Classroom **Room:** 304 **Sta**
49483	SPAN	122	027	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 02:20 PM - 03:10 PM **Type:** Class **Building:** Humanities Classroom **Room:** 103 **Sta**
49484	SPAN	122	028	Basic Proficiency in Spanish	3	**FULL**: 0 of 24 seats remain.	G	S M T W T F S 10:50 AM - 11:40 AM **Type:** Class **Building:** Humanities Classroom **Room:** 403 **Sta**

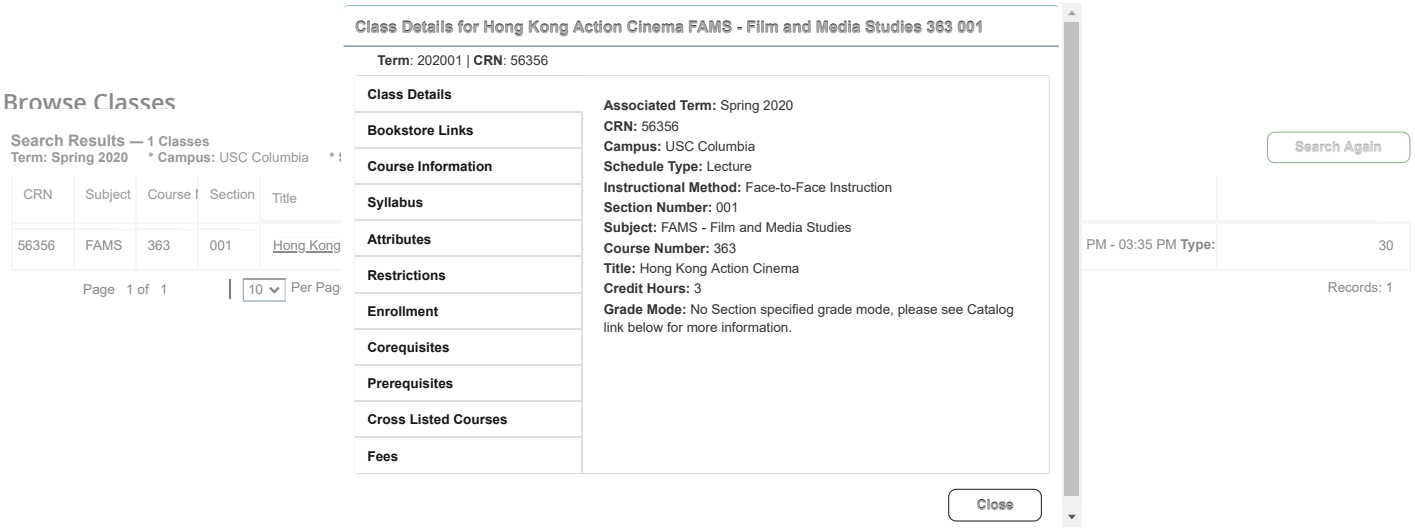
Page 3 of 4 | 10 Per Page


Browse Classes
Search Results — 1 Classes
Term: Spring 2020 * Campus: USC Columbia
Search Again
CRN
Subject
Course
Section
Title
56312
FAMS
308
001
Global Med
PM - 05:10 PM Type:
30
Page 1 of 1
10
Per Pag
Records: 1
Class Details for Global Media Industries FAMS - Film and Media Studies 308 001
Term: 202001 | CRN: 56312
Class Details
Bookstore Links
Course Information
Syllabus
Attributes
Restrictions
Enrollment
Corequisites
Prerequisites
Cross Listed Courses
Fees
Associated Term: Spring 2020
CRN: 56312
Campus: USC Columbia
Schedule Type: Lecture
Instructional Method: Face-to-Face Instruction
Section Number: 001
Subject: FAMS - Film and Media Studies
Course Number: 308
Title: Global Media Industries
Credit Hours: 3
Grade Mode: No Section specified grade mode, please see Catalog link below for more information.
Close

Search Results — 1 Classes
Term: Spring 2020 *** Campus:** USC Columbia *** Subject:** FAMS - Film and Media Studies **Course Number:** 308

CRN	Subject	Course N	Section	Title	Hours	Status	A	Meeting Times
56312	FAMS	308	001	Global Media Industries	3	FULL: 0 of 15 se…		S M T W T F S 03:55 PM - 05:10 PM **Type:** Class **Building:** Gambrell **Room:** 124 **Start Date:** 01/13/2

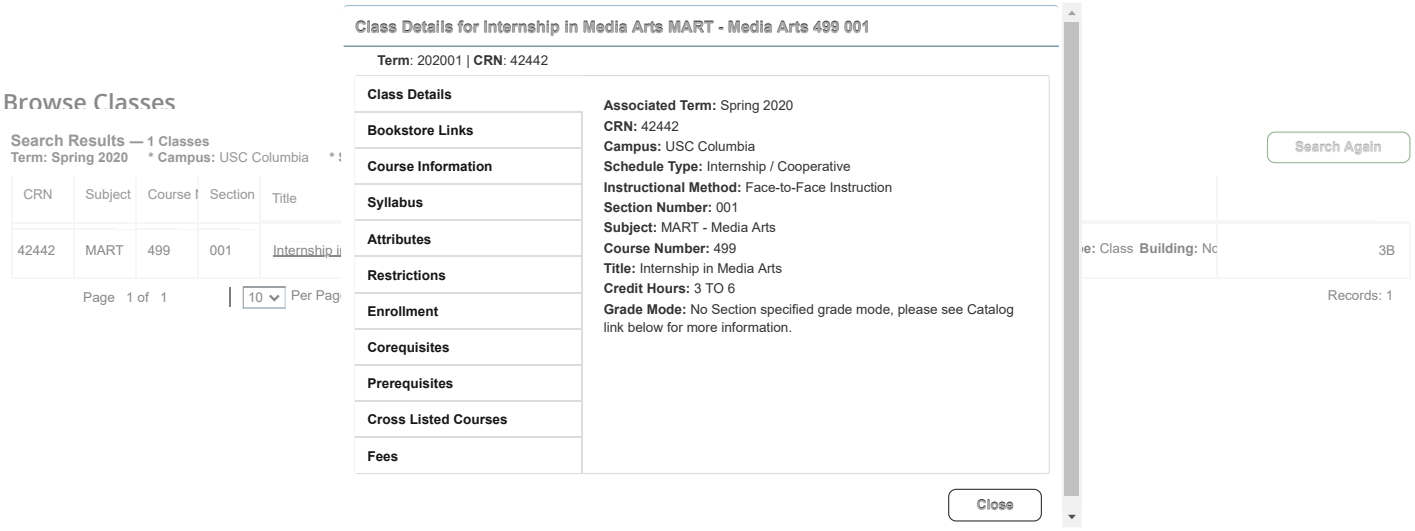
Page 1 of 1 | 10 Per Page

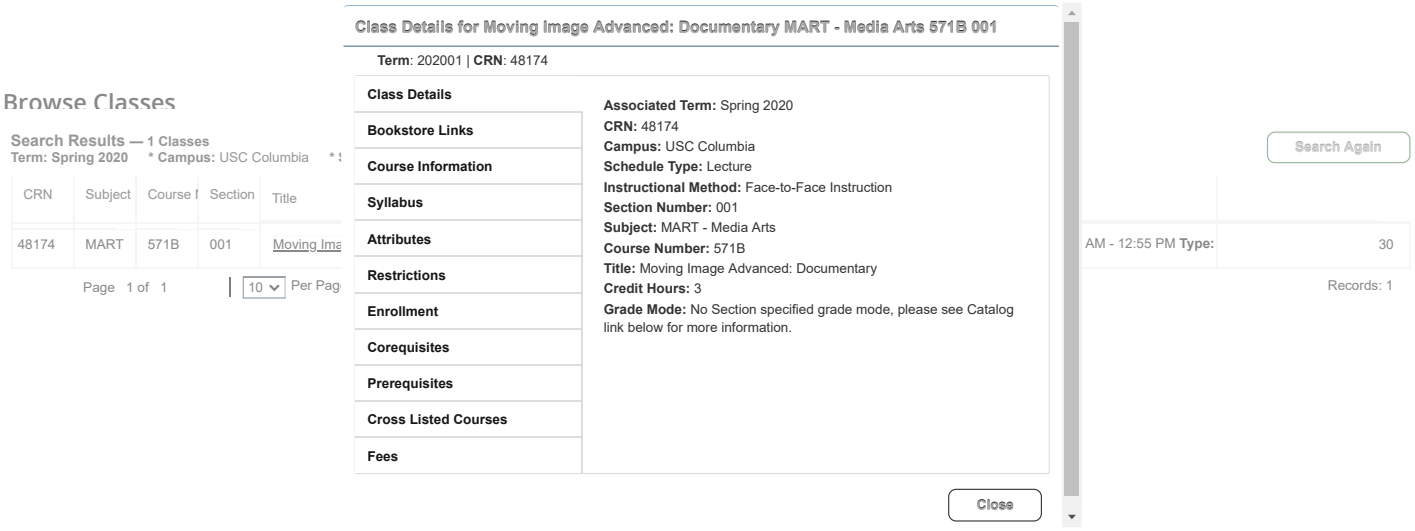

Browse Classes
Search Results — 1 Classes
Term: Spring 2020 * Campus: USC Columbia
Search Again
CRN
Subject
Course
Section
Title
56356
FAMS
363
001
Hong Kong
PM - 03:35 PM Type:
30
Page 1 of 1
10
Per Pag
Records: 1
Class Details for Hong Kong Action Cinema FAMS - Film and Media Studies 363 001
Term: 202001 | CRN: 56356
Class Details
Bookstore Links
Course Information
Syllabus
Attributes
Restrictions
Enrollment
Corequisites
Prerequisites
Cross Listed Courses
Fees
Associated Term: Spring 2020
CRN: 56356
Campus: USC Columbia
Schedule Type: Lecture
Instructional Method: Face-to-Face Instruction
Section Number: 001
Subject: FAMS - Film and Media Studies
Course Number: 363
Title: Hong Kong Action Cinema
Credit Hours: 3
Grade Mode: No Section specified grade mode, please see Catalog link below for more information.
Close

Search Results — 1 Classes
Term: Spring 2020 *** Campus:** USC Columbia *** Subject:** FAMS - Film and Media Studies **Course Number:** 363

CRN	Subject	Course Num r	Section	Title	Hours	S	A	Meeting Times
56356	FAMS	363	001	Hong Kong Action Cinema	3			S M T W T F S 02:20 PM - 03:35 PM **Type:** Class **Building:** Gambrell **Room:** 124 **Start Date:** 01/13/2

Page 1 of 1 | 10 Per Page


Class Details for Internship in Media Arts MART - Media Arts 499 001
Term: 202001 | CRN: 42442
Class Details
Bookstore Links
Course Information
Syllabus
Attributes
Restrictions
Enrollment
Corequisites
Prerequisites
Cross Listed Courses
Fees
Associated Term: Spring 2020
CRN: 42442
Campus: USC Columbia
Schedule Type: Internship / Cooperative
Instructional Method: Face-to-Face Instruction
Section Number: 001
Subject: MART - Media Arts
Course Number: 499
Title: Internship in Media Arts
Credit Hours: 3 TO 6
Grade Mode: No Section specified grade mode, please see Catalog link below for more information.
Close
Browse Classes
Search Results — 1 Classes
Term: Spring 2020
* Campus: USC Columbia
Search Again
CRN
Subject
Course
Section
Title
42442
MART
499
001
Class
Building:
3B
Page 1 of 1
10
Per Pag
Records: 1



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Search Results — 1 Classes
Term: Spring 2020 *** Campus:** USC Columbia *** Subject:** MART - Media Arts **Course Number:** 571B

CRN	Subject	Course Num r	Section	Title	Hours	Status	Att	Meeting Times
48174	MART	571B	001	Moving Image Advanced: Documentary	3	**1** of …		S M T W T F S 11:40 AM - 12:55 PM **Type:** Class **Building:** McMaster College **Room:** 341 **S**

Page 1 of 1 | 10 Per Page

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Sign In Help

Spring 2020
Sep 21, 2021

Class Schedule Search

You must select at least ONE subject .

***Campus:**
USC Aiken
USC Beaufort
USC Columbia

Subject:
ACCT - Accounting
AERO - Aerospace Studies
AESP - Aerospace Engineering
AFAM - African Amer Studies
AFCI - Critical Inquiry
AFYS - First Year Seminar
AMMG - Adv Manufacturing Mgmt
AMST - American Studies
ANES - Anesthesiology
ANTH - Anthropology

Course Number:

Title:

Instructional Method:
Face-to-Face Instruction
Flex Face-to-Face or Online
Palmetto College Course

Credit Range: hours to hours

Course Level:
All
Graduate
Law School

Part of Term:
All
Aiken First Half Term
Aiken Full Term

Attribute Type:

Exhibit
0073
Aaron Marterer 30(b)(6)

000053

All
Aiken at Salkehatchie
Aiken at Sumter

Start Time: Hour 00 Minute 00 am/pm am

End Time: Hour 00 Minute 00 am/pm am

Days: Mon Tue Wed Thur Fri Sat Sun

Class Search Reset

RELEASE: 8.7.2.6

000054

IN THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA, COUNTY OF RICHLAND

DAVIA BUNCH, PETER KELLY, and TERRY KELLY, individually and on behalf of others similarly situated, Plaintiffs, vs. THE UNIVERSITY OF SOUTH CAROLINA, Defendant.	CIVIL ACTION NO.: 2020-CP-40-02330

VIDEOTAPED DEPOSITION OF CASEY KELLY
San Diego, California
Friday, May 6, 2022
Volume I

Reported by:
MONICA M. CLINE
RPR, CSR No. 8933
Job No. 5219288
PAGES 1 - 244

plate. I'm in my early 20s and wanted to get into my social life. And now I have a lot more free time. And like I said previously, I believe it's the right thing to do. I have more time to get involved.

BY MR. BRUNSON:

Q Okay. And why do you think it is the right thing to do?

A I believe that I should hold the university accountable.

Q For?

A Paying its students for the time we were on campus.

Q Why?

A Why --

Q Why should the university refund money?

A Because we weren't in class that last semester.

Q You didn't attend classes?

A On campus.

Q You attended online; right?

A Right. But my classes that I was registered in were face-to-face instruction.

Q And do you --

A That is what I paid for.

MR. PRATT: Move to strike. Asked and answered.

You can answer this again if you wish.

She literally answered the question.

MR. BRUNSON: Okay.

THE WITNESS: That's my answer.

BY MR. BRUNSON:

Q What is your answer?

A When my parents -- when my parents paid for the classes that I had signed up for, that was an agreement.

Q Okay. Didn't I ask you whether you signed a document that you understood to be a contract, signed your name to a document?

A Signing up for my classes and paying for those classes was my contract with the university.

Q Okay. I really want to be clear because this is an important point.

You don't remember signing a specific document that was a contract, but you believe you had a contract that consisted of, my parents pay and I get to go to these classes? Did I characterize your testimony correctly?

MR. PRATT: Object to form.

THE WITNESS: That is my answer, yeah.

Q Okay. And as a group, can you tell me just generally what they are?

A The classes that I took in the spring of 2020.

Q Okay. So the first page it has -- it looks like it's a screen print. Is that what this is? That's what it looks like.

A I believe so.

Q And this square box that says "Class Details for Basic Proficiency in Spanish," do you see that?

A Uh-huh.

Q Then it has class details, bookstore links, et cetera. What is that box?

A It's the information for where you go to sign up for the class.

Q Okay. So this is -- just walk me through it. So this is what you would have -- you would have signed on to the website and pulled up -- you would have seen this screen at some point when you were signing up for basic proficiency in Spanish?

A Correct.

Q All right. And what is the list that says "Browse Classes" and then there's a list of Spanish --

that's --

Q Do you know what -- I see where it says spring 2020 under "Class Details."

A Right. Because the fall would have been 2019; right? So --

Q Correct. Or you could have been signing up in the spring for the fall 2020. I'm just trying to understand --

A Yeah, I don't know either. But this is for the spring, so --

Q Do you remember if you took Basic Proficiency in Spanish in the spring of 2020?

A Yes, I did.

Q Okay. And under "Course Information" it says "Schedule Type: Lecture; Instructional Method: Face-to-Face Instruction."

A Yep.

Q And is that -- you made a number of references to face to face. Is that what you're referring to?

A Yep.

Q So you're saying when you went onto the computer to sign up for your classes, if in this dialogue box the description of the course said face-to-face instruction, that meant it to be in a

classroom?
A Correct.
Q Okay. And does -- "Schedule Type: Lecture," does lecture mean anything to you contractually?
MR. PRATT: Object to form.
THE WITNESS: I mean, that it would be -- I mean, not really. It would just be in the lecture hall.
BY MR. BRUNSON:
Q As opposed to what?
A The face-to-face instruction is the most significant.
Q Okay. So my question was what does lecture mean. Do you know or you don't know what that means?
A Well, your question was does the "Schedule Type: Lecture" mean anything to you. And I said it doesn't mean as much as the face-to-face instruction.
Q Okay. Does it mean anything?
A It means that this schedule type is that it's going to be given to me in a lecture.
Q And what does that mean? A professor stands up in front of a classroom and lectures?

that I want to sign up for, you could leave that blank and say, okay, I just want -- like I have to have face-to-face instruction and I know that I -- I want to take it at USC Columbia and it has to be Spanish 122 and it has to be on Monday, Wednesday Friday, but I don't have a specific course number. You could fill out all of those other fields and then it will give you the options that are available for Monday, Wednesday, Friday at UC Columbia with face-to-face-instruction that have seats available and then you can pick from those options and then add it.

Q Okay. That's the part I'm trying to understand. I get it the way you filter.

A Yeah.

Q And then where do you add it? How do you do that?

A I don't -- I don't have a document that showed me that. But it would be later on. Once you have, you know, the seats that are still available, then you say, okay, I'm just going to -- I'm just going to pretend that this is the next page.

Okay. So these are the seats -- you know, we went through all those filters. And then if these three course numbers have the filters that I

want and show me face-to-face instruction on Monday, Wednesday, Friday, have seats left, I'm picking that one, and then you would add it to your five classes and you would go through the rest of the courses that you need to still get. And then you would register for them, because you have -- every group of people has a certain date they get to register, you know. I think it's seniors and then honors or whatever. And you get a certain group of time.

And then you have to pay by a certain group of -- by a certain date. And then if you don't, they drop all of your classes. And that was -- that was the process every semester.

Q So that makes sense to me. You would start with Exhibit 2. You would filter down. You would get a list that met your criteria. That's what that is, Exhibit 1, is your list that has classes that are available and that meet your criteria, and then you pick the one that you want. Is that all -- are you tracking? Does that make sense?

MR. PRATT: Object to form.

THE WITNESS: Say that again. I'm sorry.

BY MR. BRUNSON:

Q Yeah, it was not the best question in the world.

BY MR. BRUNSON:

Q Okay. So we just had a lunch break and we're resuming.

(Exhibit 4 was marked.)

BY MR. BRUNSON:

Q And I want to start by showing you Exhibit Number 4. And if you flip through this, these are documents produced by my client, the university, and I believe it shows for every semester that you attended the classes that you took and the fees and tuition that you paid.

Is that what it looks like to you?

A I'm going to need a second.

Q Sure. I'm going to go through each page with you.

A Okay.

Q Just FYI.

A Repeat your question.

Q There's not -- I don't remember if there was. I think I asked if you were familiar with it, if that's what it looks like to you.

A I was not familiar with this until now.

Q Okay. Well, let's just look at the first page. It appears to be for the fall term of 2016 your charges, including activity fees and various

fees, meal plan and nonresident tuition, for a total of $20,787. Does that look accurate to you?

I realize you probably didn't memorize what all of your fees were. I get that. I just want to know if there is anything here that looks like it's not correct off the top of your head.

MR. PRATT: Object to form.

THE WITNESS: I mean, that is what we paid.

BY MR. BRUNSON:

Q You do believe that's what you paid for your freshman fall semester?

A You would have to ask my parents if that is what they paid, but --

Q Well, did you -- did you know what your parents were paying each semester? Like if they paid 20,000 one as opposed to 18,000 the next? Did you know?

A No. My mom was the one logging in to the website.

Q All right. So the bottom half of the page it looks like your schedule for your freshman first semester; is that correct?

A Correct.

Q All right. Now, let's just go through these fees for a second. The first is a housing

is?
A No.
Q The Meal Plan 1,685, you know what that is?
A Yes.
Q That's a university meal plan as opposed to the Greek meal plan that you used later; right?
A Correct.
Q By the way, when did you join the sorority?
A My freshman year.
Q Fall or spring?
A Fall.
Q Security Network Fee $76. Do you know what that is?
A I believe it was for the WiFi. I could be wrong.
Q Okay. Technology Fee 200. Do you know what that is?
A That was supposed to maintain the campus WiFi and access the computer labs.
Q I think it would be good if you could speak up a little bit for the court reporter. You have a soft-spoken voice sometimes.
A Yes. Sorry.
To maintain the campus WiFi and update the computers and have access to the computer labs.

for their housing spent less on housing?
A Did they get reimbursed on housing?
Q Yes.
A Okay. Then sure, yeah.
Q I think I asked you this before.
Did you ever receive any form of grants or scholarships from South Carolina?
A No.
Q No financial aid at all?
A No.
MR. PRATT: What number are we on?
MR. BRUNSON: 10.
(Exhibit 10 was marked.)
BY MR. BRUNSON:
Q Are you familiar with this document, Exhibit Number 10?
A Yes.
Q And what do you understand this is?
A This is saying that we will pay her bills for her classes.
Q Okay. Is there anything in this document that indicates that the university has an obligation by contract to provide all classes that are designated as face to face in the classroom as opposed to being virtual?

A Sorry.

MR. PRATT: Take your time.

THE WITNESS: Okay. So you said -- you asked the question is anywhere in this document state that --

BY MR. BRUNSON:

Q That classes that are supposed to be --

MR. BRUNSON: Well, just read the question back, please, Madam Court Reporter.

(Record read.)

THE WITNESS: Just that submitting your course registration you're entering into a financial arrangement with the University of South Carolina.

BY MR. BRUNSON:

Q Okay. But that doesn't say anything about classes having to be face to face, does it?

MR. PRATT: The course registration or the -- what do you mean by that?

MR. BRUNSON: What she just read. She can answer the question.

MR. PRATT: Object to form.

THE WITNESS: I mean, your course registration would be your course registration, so that's up to you whether it's face to face, hybrid or online.

BY MR. BRUNSON:

Q If you could just point me to the exact language you're talking about.

A It's right there in that first paragraph in the middle of the paragraph.

Q It says "By submitting course registration I am entering into a financial arrangement with the University and I accept responsibility for all charges billed to my account." That's what you're referring to?

A Uh-huh.

Q And you intend to tell the jury that you believe that means that the university would be breaching this contract by moving classes to a virtual environment as a result of a pandemic?

A Uh-huh.

MR. PRATT: Object to form.

BY MR. BRUNSON:

Q Is that a "yes"? You said "uh-huh."

A Sorry. I mean yes.

Q Okay. That answers my question.

Anything else in Exhibit 10?

A Not that I saw, no.

Q Here's what I'm going to do. I've got about four or five more exhibits that I'm going to

refund that parking charge to you when that service was no longer available after going to online learning?

A That is correct.

Q Is that identified where it says parking COVID ADJ, which I'm guessing means adjustment, COVID adjustment?

A Yes.

Q All right. Now, did you also pay a $200 art lab fee?

A Yes.

Q Once that service was no longer available, did the university reimburse that fee and do a COVID adjustment reimbursing you $200?

MR. BRUNSON: Object to form.

THE WITNESS: No.

BY MR. PRATT:

Q Did you also pay a language lab fee for $130?

MR. BRUNSON: Object to form.

THE WITNESS: Yes.

BY MR. PRATT:

Q After the university went to online learning and that service was no longer available to you, did the university do a COVID adjustment to

reimburse that $130?

MR. BRUNSON: Object to form.

THE WITNESS: No.

BY MR. PRATT:

Q Did you also pay a technology fee for $200?

A Yes.

Q After that service was no longer available to you and the university went to online learning, did they do a COVID adjustment like they did for parking and reimburse your technology fee?

MR. BRUNSON: Object to form.

THE WITNESS: No.

BY MR. PRATT:

Q Flip over to the next exhibit, Exhibit 1. You testified about Exhibit 1 and Exhibit 2 extensively earlier, but let me pin down a couple of other things just so that the record is clear.

Looking at the first page of Exhibit 1, just as an example, that first class, Basic Proficiency in Spanish, do you see where I'm looking?

A Yes.

Q What type of instructional method did you choose?

A Face-to-face instruction.

Did I read that correctly?
A Yes.
Q The course registration that you submitted to the university to form this contract, is that reflected in the two documents we just looked at a moment ago when you selected face-to-face instruction in the classroom?
A Yes.
MR. BRUNSON: Object to form.
BY MR. PRATT:
Q Once the University of South Carolina went to online instruction instead of face-to-face instruction, as you had selected and as you were prompted, did you receive a refund or any kind of reimbursement or reduction of the tuition that was paid for those classes?
A No.
Q They kept the money?
A Yes.
Q They didn't give you any reduction or reimbursement?
MR. BRUNSON: Object to form.
THE WITNESS: Not other than the $200 parking.
///

South Carolina

TERM
Spring 2020

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:26

CHARGES		ACCOUNT INFORMATION *** CREDITS/ANTICIPATED CREDITS	
COL Art Lab Fee	200.00	Web Echeck	18,919.00
COL Frat/Sor Life Act Fee	50.00		
COL Greek Meal Plan CO	1,575.00		
COL Language Lab Fee	130.00		
COL Parking Covid Adj	-200.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	16,764.00		
Refund	200.00		
*** Account Information is real-time	18,919.00		18,919.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	46551	SPAN 122	Basic Proficiency in Span	COL	3.00	RW
30	48174	MART 571B	Moving Image Adv: Documen	COL	3.00	RW
30	56312	FAMS 308	Global Media Industries	COL	3.00	RW
30	56356	FAMS 363	Hong Kong Action Cinema	COL	3.00	RW
3B	42442	MART 499	Internship in Media Arts	COL	3.00	RW

CONFIDENTIAL

USC_00044051

EXHIBIT
3

South Carolina

TERM
Fall 2016

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 15:03:47

ACCOUNT INFORMATION ***

CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Housing Activity Fee	50.00	COL Freshman Enroll Deposit	200.00
COL Housing Bates West	3,150.00	Web Credit Card	20,587.00
COL Housing Temporary	80.00		
COL Mail & Pkg Service Fee	25.00		
COL Matriculation Fee UG	80.00		
COL Meal Plan	1,685.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	15,441.00		
*** Account Information is real-time	20,787.00		20,787.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	10861	ENGL 101	Critical Reading & Comp	COL	3.00	RW
30	11008	GEOG 210	People, Places & Environm	COL	3.00	RW
30	13841	UNIV 101	The Student in the Univer	COL	3.00	RW
30	14195	DANC 101	Dance Appreciation	COL	3.00	RW
30	18017	JOUR 101	Media and Society	COL	3.00	RW

CONFIDENTIAL

USC_00044043

EXHIBIT
4

South Carolina

TERM
Spring 2017

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:26

CHARGES		ACCOUNT INFORMATION *** CREDITS/ANTICIPATED CREDITS	
COL Chemistry Lab Fee	105.00	Web Credit Card	21,427.00
COL Flex Meal Plan	350.00		
COL Frat/Sor Life Act Fee	50.00		
COL Greek Housing CO	1,555.00		
COL Greek Village Student Fee	125.00		
COL Housing Activity Fee	50.00		
COL Housing Bates West	3,250.00		
COL Housing Fine	25.00		
COL Mail & Pkg Service Fee	25.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	15,441.00		
Carolina Ca$h	200.00		
*** Account Information is real-time	21,452.00		21,427.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	-25.00	Current Term Balance	25.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	42670	ENGL 102	Rhetoric and Composition	COL	3.00	RW
30	43314	HIST 112	US History Since 1865	COL	3.00	RW
30	43760	CHEM 105	Chemistry and Modern Soci	COL	4.00	RW
30	50254	JOUR 303	Law and Ethics of Mass Co	COL	3.00	RW
30	55641	SOCY 101	Introductory Sociology	COL	3.00	RW

South Carolina

TERM
Summer 2017

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:34

ACCOUNT INFORMATION ***			
CHARGES		CREDITS/ANTICIPATED CREDITS	
		Web Credit Card	25.00
*** Account Information is real-time	0.00		25.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	25.00	Current Term Balance	25.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS

South Carolina

TERM
Fall 2017

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:43

ACCOUNT INFORMATION ***			
CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Frat/Sor Life Act Fee	50.00	Web Credit Card	10,655.50
COL Greek Housing CO	2,670.00	Web Echeck	11,055.50
COL Greek Housing Res Act Fee	50.00		
COL Greek Meal Plan CO	1,745.00		
COL Greek Village Student Fee	250.00		
COL Mail & Pkg Service Fee	25.00		
COL SJMC UG Program Fee	264.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	15,981.00		
Carolina Ca$h	400.00		
*** Account Information is real-time	21,711.00		21,711.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	13088	MGMT 371	Principles of Management	COL	3.00	RW
30	13808	STAT 110	Intro to Statistical Reas	COL	3.00	RW
30	17440	JOUR 204	Principles of Journalism	COL	3.00	RW
30	18405	HIST 108	Science & Tech in World H	COL	3.00	RW
30	18923	JOUR 291	Writing for Mass Communic	COL	3.00	RW

South Carolina

TERM
Spring 2018

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:52

ACCOUNT INFORMATION ***			
CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Anthropology Lab Fee	210.00	Web Credit Card	10,790.50
COL Art Lab Fee	200.00	Web Echeck	10,905.50
COL Frat/Sor Life Act Fee	50.00		
COL Greek Housing CO	2,670.00		
COL Greek Housing Res Act Fee	50.00		
COL Greek Meal Plan CO	1,745.00		
COL Greek Village Student Fee	250.00		
COL Health Service	39.00		
COL Mail & Pkg Service Fee	25.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	15,981.00		
Refund	200.00		
*** Account Information is real-time	21,696.00		21,696.00

UNIVERSITY OF SOUTH CAROLINA

Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	42773	ANTH 161	Hum Orgns: Intro Biol Ant	COL	4.00	RW
30	42986	SPCH 140	Public Communication	COL	3.00	RW
30	53251	GEOG 105	The Digital Earth	COL	3.00	RW
30	54890	MART 210	Digital Media Arts Fundmn	COL	3.00	RW
3A	47803	THEA 170	Fundamentals of Acting	COL	3.00	RW

South Carolina

TERM
Fall 2018

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:03

CHARGES		ACCOUNT INFORMATION *** CREDITS/ANTICIPATED CREDITS	
COL Art Lab Fee	200.00	Web Credit Card	10,485.50
COL Frat/Sor Life Act Fee	50.00	Web Echeck	11,354.50
COL Greek Housing CO	2,670.00		
COL Greek Housing Res Act Fee	50.00		
COL Greek Meal Plan CO	1,745.00		
COL Greek Village Student Fee	375.00		
COL Mail & Pkg Service Fee	25.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	16,449.00		
*** Account Information is real-time	21,840.00		21,840.00

UNIVERSITY OF SOUTH CAROLINA

Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	10993	MART 201	Foundation of Media Arts	COL	3.00	RW
30	11841	SOST 301	Southern Studies:1580-190	COL	3.00	RW
30	12256	MART 321	Media Writing	COL	3.00	RW
30	19742	JOUR 201	Principles of Public Rela	COL	3.00	RW
30	21259	FAMS 240	Film and Media Analysis	COL	3.00	RW

South Carolina

TERM
Spring 2019

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:10

CHARGES		ACCOUNT INFORMATION *** CREDITS/ANTICIPATED CREDITS	
COL Study Abroad Insurance	180.00	Web Credit Card	180.00
*** Account Information is real-time	180.00		180.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	40007	INTL 503	Study Abroad-Another US I 1	COL	15.00	RW

South Carolina

TERM
Fall 2019

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:18

ACCOUNT INFORMATION ***

CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Art Lab Fee	400.00	Web Credit Card	9,747.00
COL Frat/Sor Life Act Fee	50.00	Web Echeck	9,747.00
COL Greek Meal Plan CO	1,575.00		
COL Greek Village Student Fee	375.00		
COL Language Lab Fee	130.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	16,764.00		
*** Account Information is real-time	19,494.00		19,494.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	10951	MART 371	The Moving Image	COL	3.00	RW
30	18265	MART 380	New Media Art	COL	3.00	RW
30	22484	SPAN 121	Elementary Spanish	COL	3.00	RW
30	23000	MART 521A	Media Wrtng Adv: Screenwr	COL	3.00	RW
30	26051	MART 490	Special Topics in Media A	COL	3.00	RW

South Carolina

TERM
Spring 2020

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: W92304293
Name: Casey A. Kelly

Date: 03-17-2021 14:03:26

ACCOUNT INFORMATION ** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Art Lab Fee	200.00	Web Echeck	18,919.00
COL Frat/Sor Life Act Fee	50.00		
COL Greek Meal Plan CO	1,575.00		
COL Language Lab Fee	130.00		
COL Parking Covid Adj	-200.00		
COL Technology Fee	200.00		
COL UG Nonresident Tuition	16,764.00		
Refund	200.00		
*** Account Information is real-time	18,919.00		18,919.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	46551	SPAN 122	Basic Proficiency in Span	COL	3.00	RW
30	48174	MART 571B	Moving Image Adv: Documen	COL	3.00	RW
30	56312	FAMS 308	Global Media Industries	COL	3.00	RW
30	56356	FAMS 363	Hong Kong Action Cinema	COL	3.00	RW
3B	42442	MART 499	Internship in Media Arts	COL	3.00	RW

UNIVERSITY OF SOUTH CAROLINA

Logged in as: Theresa Kelly
Student Account: Casey A. Kelly

COL Student Account - Spring 2020 - Account Activity

Description	Code	Date	Amount
Refund	0RRG	4/10/20	$200.00
COVID19 Parking Refund	3OCQ	4/8/20	-$200.00
Web Echeck	0WCK	12/17/19	-$18,919.00
COL UG Nonresident Tuition	3TUN	11/21/19	$16,764.00
COL Language Lab Fee	3LLA	11/21/19	$130.00
COL Health Ctr Fee UG 6-11	3FUP	11/21/19	$0.00
COL Technology Fee	3FTF	11/21/19	$200.00
COL Art Lab Fee	3LAE	11/19/19	$200.00
COL Greek Meal Plan CO	3HMH	11/12/19	$1,575.00
COL Frat/Sor Life Act Fee	3HKY	11/12/19	$50.00
Term Balance:			$0.00
Term Balance Including Estimated Aid:			$0.00

000021

EXHIBIT
7

UNIVERSITY OF SOUTH CAROLINA

Logged in as: Theresa Kelly
Student Account: Casey A. Kelly

COL Student Account - Fall 2019 - Account Activity

Description	Code	Date	Amount ($)
COL UG Nonresident Tuition	3TUN	7/18/19	$16,764.00
COL Language Lab Fee	3LLA	7/18/19	$130.00
COL Art Lab Fee	3LAE	7/18/19	$400.00
COL Technology Fee	3FTF	7/18/19	$200.00
COL Greek Meal Plan CO	3HMH	7/15/19	$1,575.00
COL Greek Village Student Fee	3HKZ	7/15/19	$375.00
COL Frat/Sor Life Act Fee	3HKY	7/15/19	$50.00
Term Balance:			**$19,494.00**
Term Balance Including Estimated Aid:			**$19,494.00**

000029

UNIVERSITY OF SOUTH CAROLINA

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

Term: Spring 2020
USC ID: W92304293
Name: Casey A. Kelly
Accepted Date: 10-02-2019 12:55:34 PM

Date: 03-17-2021 02:03:42 PM

UNIVERSITY OF SOUTH CAROLINA
STUDENT STATEMENT OF FINANCIAL RESPONSIBILITY
SPRING 2020

The University of South Carolina requires all students acknowledge the financial arrangement between the student and the University. By submitting course registration I am entering into a financial arrangement with the University of South Carolina and I accept the responsibility for all charges billed to my account.

I understand that my USC bill will be posted online in Self-Service Carolina (SSC) and that all billing notices will be sent to my USC assigned email address and that it is my responsibility to review and pay my bill by the due date.

I understand that accounts not paid when due are subject to a late fee and that current and/or future registration may be cancelled. Delinquent accounts will result in a financial hold on my account that prevents registration and access to grades and transcripts, and release of diplomas and certificates. Seriously delinquent accounts with balances past due for more than 180 days may be placed with an outside collection agency and/or reported to the National Credit Bureau system and/or may be deducted from state income tax refunds. I agree to pay all late payment fees, collection agency fees (which may be based on a percentage at a maximum of 40% of the debt), attorney fees, interest and any other costs and charges necessary for the collection of any amount not paid when due. I understand that if I give consent to an authorized user to make payments or a payment arrangement on my behalf, I am held to the subject matter mentioned above.

I understand that the University may contact me at the telephone number(s) provided in SSC. By providing the telephone numbers, I understand, agree and give express consent that the University of South Carolina or anyone working on the University's behalf, including third party vendors, may contact me at the number(s) provided by manually dialing the number or by using automated dialing technology.

Dishonored Checks/eChecks/Credit Cards
A check, payment card, or an electronic payment processed as a payment for University expenses that is returned unpaid by the bank immediately creates indebtedness to the University. A $30 returned item charge will be assessed for each returned item in accordance with state laws. I understand that use of dishonored checks to pay my tuition and fees may result in the cancellation of current/and or future registrations if not remedied within 10 days of notification.

I understand that all disputes about registration or payment will be governed by South Carolina law and subject to the jurisdiction of the courts in South Carolina. I also understand that if I have more than three returned checks, I may be prohibited from processing checks on my account in the future.

I authorize the University of South Carolina, and their respective agents and contractors to contact me regarding my student receivable balance or my institutional loan(s), including repayment of my student receivable or loans(s), at the current or any future number that I provide for my cellular phone or other wireless device using automated dialing equipment or artificial or pre-recorded voice or text messages.

Message

From: Peter Kelly [peter_j_kelly@me.com]
Sent: 3/25/2020 3:57:24 PM
To: KELLY, CASEY A [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6ee6d84b12d74facb72cc54632850183-CAKELLY]
Subject: Fwd: A message from UofSC President Bob Caslen

Sent from my iPad

Begin forwarded message:

> Begin forwarded message:
>
> On Wednesday, March 25, 2020, 12:49 PM, UofSC Office of Parent & Family Programs <scparents@sc.edu> wrote:

Having trouble viewing this email? Click here

UNIVERSITY OF
South Carolina
Office of the President

Dear Gamecock parents and family members,

The last couple of weeks have challenged us in ways we never could have imagined as recently as one month ago. Our patience and resilience are being tested as we respond to the many challenges posed by the coronavirus. Thank you for your continued support as the university prioritizes the health, safety and well-being of our community. We are working through this uncertain time together.

I know that right now, many of you have questions about what the university is doing to support students as we launch remote education, which will continue for the remainder of the semester. I encourage you to visit our COVID-19 webpage regularly for updated information on student services and support. Here are a few of our efforts:

Remote learning

The South Carolina faculty and staff have worked tirelessly over the past two weeks to prepare for the transition to online courses. Feedback so far is positive, and I commend our faculty and staff for their innovation and our students for their ability to adapt. However, we don't expect perfection, and there may

Exhibit
091

USC_00047970

be some challenges along the way as instructors and students adapt to new methods of teaching and learning. Problems that may arise will be addressed by instructors with flexibility and fairness.

If your student is struggling with aspects of remote coursework, it's important that they let their instructors know as soon as possible. If they have difficulty connecting with their professors, they should contact their advisors or department chairs.

Student success resources
Just as they can every semester, students can still meet with peer tutors, Supplemental Instruction leaders, academic advisers and career coaches, all of whom are committed to your student's educational experience. For the rest of this semester, however, meetings will take place online. Please review the Campus Access and Resources section of the COVID-19 landing page for details.

Mental health and well-being
In a time when students must distance themselves physically from each other, it's more important than ever that they keep in touch with their campus community in other ways. The university is providing avenues for students to do just that. Not only can they meet with peers and staff for virtual academic support, but students also can take an exercise class on Instagram or participate in our Midday Meditation classes on Facebook. We're looking for additional opportunities to host virtual events and activities, and when those plans are developed, we'll share information on the COVID-19 webpage.

Refunds and housing

If your student lives in an on-campus residence hall, has a meal plan, or pays for university parking, it's natural that you have questions about refunds. Governor Henry McMaster has directed the South Carolina Commission on Higher Education (CHE) to develop a coordinated effort on refunds for all state colleges and universities. The University of South Carolina remains committed to issuing refunds within the CHE's approach.

I know you are also eager to know when students can return to campus to retrieve their belongings and move out of their residence halls. We will announce dates and times as soon as it is safe to do so.

Our university, like every other college and university, is navigating a significantly and rapidly changing environment. In the days and weeks to come, we will continue to be challenged by uncertainty, inconvenience and especially -- worry for members of our communities who are affected by COVID-19, whether the illness itself or its economic impact. I will continue to keep you informed as we make plans for the remainder of the semester, and I ask for your continued patience.

I also ask that you support your student by helping them to see this time as an opportunity to take advantage of university resources, to connect with their peers and mentors and to develop resilience that will serve them well for the rest of their lives.

This is a challenge none of us has ever seen before, but we will meet it together.

Forever to Thee,



Bob Caslen
President

University of South Carolina, Office of Parent & Family Programs, 1400 Greene Street, Russell House, Suite 115, Columbia, SC 29208

SafeUnsubscribe℠ terryhkelly@yahoo.com

Forward email | Update Profile | About our service provider

Sent by scparents@sc.edu in collaboration with



Try email marketing for free today!

USC_00047972

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
DAVIA BUNCH and CASEY KELLY,
INDIVIDUALLY AND ON BEHALF
OF OTHERS SIMILARLY SITUATED,
Plaintiffs,
vs. Case No. 2020-CP-40-02330
THE UNIVERSITY OF SOUTH CAROLINA,
Defendant.

VIDEOTAPED
DEPOSITION OF: DAVIA E. BUNCH

DATE: February 17, 2023

TIME: 9:15 AM

LOCATION: Regus
170 Meeting Street, Suite 110
Charleston, SC

REPORTED BY: Sandra K. Bjerke, RDR, CRR, CBC

instruction, and I received not face-to-face instruction for the entirety of the semester.

Q. I understand that, but it doesn't really answer my question. I understand that you wanted face-to-face, and that's not what you got.

A. Um-hum.

Q. What I want to know is: How did that hurt you?

MR. PRATT: Object to form.

THE WITNESS: As a student I wanted to go to the University of South Carolina and I wanted to be a part of the culture and specifically the reputation that they have for a lot of the courses that I wanted to take. That's why I didn't choose to go to Clemson.

And specifically, that last semester I chose classes that -- I knew I was about to graduate and would never have the opportunity to take again. And so some of those courses I specifically chose because of the face-to-face experience and because of the research experience during the second half of the semester.

Once we went to online training the classes were not what I signed up for. Some of the classes stopped altogether.

A. Not specifically, but...
Q. Okay. So in looking back at your answer, you talked about the classes that you chose because you wouldn't have an opportunity to take those again, and you specifically chose them because of face-to-face experience. Did I capture that right?
A. Yes.
Q. Okay. And then you -- first of all, are you saying that the five classes that you signed up for in the spring semester you signed up for because they were face-to-face?
A. There were two classes that I signed up for as online classes and three classes that I signed up for for face-to-face instruction.
Q. Okay. And so you understand that only the three classes that were face-to-face are at issue.
A. Exactly.
Q. You're not seeking damages for the other two; right?
A. Yes.
Q. So as to the three, are you saying you picked those three specifically because they were face-to-face?

A. I do not know.
MR. PRATT: Object to form.
BY MR. BRUNSON:
Q. Do you know if any of the students at any of the branch campuses -- and branch campuses I mean Allendale, Lancaster. I think maybe there's one in Union, Beaufort, Aiken.
A. Like I said for the past two questions, I do not know.
Q. You don't know? You don't know if they're in the class and you don't know if you have anything in common with them; is that fair?
MR. PRATT: Object to form.
THE WITNESS: I do not know.
BY MR. BRUNSON:
Q. Okay. Do you know how nursing students were affected by the pandemic?
A. In similar ways as to I was, yes.
Q. Okay. And how do you know that?
A. Because we all go through the same process of registering online for face-to-face instruction if they so choose to do face-to-face instruction, and we were all stripped of face-to-face instruction versus the second -- in the second half of the spring semester and did not

get a product that we paid for.

Q. Do you know if nursing students register for classes the same way that undergraduate students do?

A. Yes.

Q. You do know?

A. Yes.

Q. And they do?

A. Yes.

Q. And how do you know that?

A. Because we all have the exact same service, Self Service Carolina system.

Q. What about medical students? Do they use that system too?

A. I do not know.

Q. What about law students? Do they sign up for classes like that?

A. I do not know.

Q. Okay. Do you know where the law school is located physically?

A. Yes.

Q. Have you ever been in that building?

A. Maybe.

Q. And which -- where is it, the one you're thinking of?

on the link it should pop.

MR. PRATT: Okay.

THE WITNESS: The folder, Michael Owen? Oh.

MR. BRUNSON: I have no idea.

MR. PRATT: Looks like there's some other cases down here.

THE WITNESS: Oh. I think mine accidentally went to the wrong case. Let me find it.

MR. PRATT: Yeah, there you go. Yeah.

THE WITNESS: Here we are.

MR. PRATT: You're better at that than I am.

MR. BRUNSON: It's like your son and TikTok.

MR. PRATT: Yes, that's right.

THE WITNESS: Gen Z'ers.

BY MR. BRUNSON:

Q. Yeah. Okay. So do you have Exhibit No. 2 -- I'm sorry -- Exhibit No. 99 in front of you?

A. Um-hum.

Q. Okay. And do you recognize this first page as being your -- well, tell me what this first

page looks like to you. I'm not sure what it is.

MR. PRATT: Object to form.

THE WITNESS: It looks like a term balance from a portion of my time at the University of South Carolina to which I used a third-party payment.

BY MR. BRUNSON:

Q. Okay. And this is for the fall of 2014; is that right?

A. Yes.

Q. Okay. And were you in college at this point?

A. No, sir.

Q. So just tell us how it was you were taking classes at that time.

A. I was taking classes through Dorman High School's program to which you can take college classes while you're in high school --

Q. Okay.

A. -- through the University of South Carolina Upstate, I believe.

Q. And you took Introduction to Psychology and Composition I if you scroll to the next page?

A. Yes.

Q. All right. And then go down. Do you

A. Yes.
Q. Okay. And the date of this bill, by the way, up at the top is March 17th of 2021.
A. Um-hum.
Q. So -- that's a yes?
A. Yes.
Q. So this is retrospective if it's looking -- it shows everything that was paid and was billed; correct?
A. Um-hum.
Q. Yes?
A. Yes. Sorry.
Q. That's all right. The next line is technology fee, and you paid that in the spring. It was $200; correct?
A. Yes, sir.
Q. And then undergraduate resident tuition, $6,144. That's what you paid; correct?
A. Yes, sir.
Q. And your electronic refund is $2,161. What is that?
A. That is a refund sent back from the University of South Carolina for overpaying for my bill.
Q. Okay. But it shows up here as a

subject line: Let us know how you're doing. It's dated April 14th, 2020 and at the bottom you see you can complete the survey.

A. Yes.

Q. Did you complete the survey?

A. I did not.

Q. Do you recall receiving this opportunity to complete the survey?

A. I do not recall.

Q. Okay. Did you complete any surveys that you can recall relating to your experience as a student during the pandemic?

A. No, sir.

Q. So let's talk about your technology fee for a minute, the $200 that you paid.

A. Um-hum.

Q. You're seeking some refund for that; right?

A. I refer to my legal team on to which fees that we're seeking --

Q. Okay.

A. -- reimbursement on.

Q. Do you know what the technology fee is used for by the university?

A. I know some of the things that it's

used for.

Q. What do you know?

A. Just technology that you use at the University of South Carolina, Wi-Fi, things of that sort.

Q. Did you know that prior to the spring of 2020?

A. Yeah.

Q. And you'd paid technology fees before; right?

A. Yes. You pay them every semester.

Q. Did you ever have a concern that you weren't getting value for your technology fee?

A. No, because I was getting value for my technology fee.

Q. And what value were you receiving?

A. I used on-campus Wi-Fi, I used computers at the University of South Carolina. I didn't own a printer, so I used the printer system all the time at the University of South Carolina. There's a lot of things that I used that I didn't have at my home.

Q. Are you aware that students who took all online classes were still required to pay the technology fee?

Q. So I guess you don't know if you qualified for it.

A. Yeah, I don't know. I never went out of my way to apply for scholarships either.

Q. Um-hum. Okay. That's interesting.

A. Yeah. Definitely not smart about that.

Q. Did you have an understanding going in to USC what was paid for by tuition and what was paid for through separate fees?

A. Yes.

Q. Okay. And what was that understanding?

A. Well, for example, being a dance major and taking Russian classes, my first few semester on campuses there was different lab fees. So like a dance lab fee or a Russian lab fee or a technology fee. I understood that those were outside of just normal tuition that you pay to take credited classes at the university. Some classes have extra things that go along with the class that aren't covered by tuition that you have to pay for.

Q. Did you have an understanding as to what exactly was covered by your tuition?

MR. PRATT: Object to form.

THE WITNESS: Like a rough understanding, yeah.

financial agreement I agreed to pay the university -- I entered into an agreement with the University of South Carolina to pay for classes that I registered and I registered for face-to-face classes and that I am responsible for paying that and the university would give me what I registered for, which is face-to-face instruction.

Now did I receive face-to-face instruction for the entirety of the semester? No. Does it specifically say face-to-face instruction within the contract? No, but the contract points to my agreement, and the agreement that I made through my registration portal was face-to-face instruction.

BY MR. BRUNSON:

Q. When you say the contract points to the agreement, what contract are you referring to?

A. The statement of financial responsibility.

Q. And when you say it points to the agreement, what are you referring to as the agreement?

A. The registration of my courses at the University of South Carolina.

Q. Okay. So -- and we're going to look at

your classes in the spring of 2020 --

A. Yeah.

Q. -- and you chose face-to-face or online.

A. Um-hum.

Q. You know, whatever mode of instruction you chose. Was it in your head that you were entering into a contractual arrangement and the university was required by contract to provide that mode of instruction for the entire semester no matter what?

MR. PRATT: Object to form.

THE WITNESS: I was telling you what was in my head was that I was entering into a financial arrangement with the University of South Carolina. Whether or not I call it a statement of financial responsibility, as someone who pays for college on their own, I know if I don't pay up the university, in turn, will collect it at some point.

So when I select face-to-face, whether I viewed it as a contract or not, which -- to which I know it is a contract, I was expecting the university to give me face-to-face instruction. So that's what I was thinking when I was clicking the button.

A. I don't remember all of that.
Q. Okay. Did you sign in somehow when you went?
A. No.
Q. When you signed on to the computer did you have to enter any type of credentials?
A. I don't remember.
Q. Did the professor require that you go to the lab a certain number of times or hours or something?
A. Yes. It was built into your schedule. You had -- if you didn't go to the lab you would get an absence.
Q. So it was like a class.
A. It was part of the class, yes.
Q. Okay. Was the lab accessible online from home, or did you have to go sit at that particular terminal?
A. No. You had to go in person.
Q. Okay. And you know that as a fact.
A. Yeah, I believe so.
Q. Okay.
A. I wasn't aware of any online option.
Q. Okay. This schedule for the fall of 2019 also appears you have one online course; is

point did you ever consult with the Undergraduate Studies Bulletin?

A. What do you mean by the word consult with a bulletin?

Q. Did you look at it?

A. Oh. I don't remember.

Q. You were talking about all the research you would do before you would sign up for classes.

A. Um-hum.

Q. I'm wondering, was this one of the sources that you looked at?

A. I couldn't recall if this was one of the resources or not.

Q. And we're talking about Exhibit No. 128 now; correct?

A. No.

MR. PRATT: Mine isn't coming up.

THE WITNESS: Yeah. Mine hasn't. This is 1 -- this is 1467.

BY MR. BRUNSON:

Q. Does it say Exhibit 128?

A. Oh, right here.

Q. I think I just imported it to the wrong place.

A. Oh, yes. Still, I don't recall ever

seeing this specific bulletin.

Q. Okay. If you look down in this first section here to the left of the guy playing the instrument the last paragraph says:

This bulletin is for information purposes only and does not constitute any contractual agreement between a student and the University of South Carolina. The university 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 the university.

Were you aware that that was the position of the university?

A. That was --

MR. PRATT: Object to form. Go ahead.

THE WITNESS: That was not stated in the statement of financial responsibility.

BY MR. BRUNSON:

Q. Okay. I think you testified earlier that you understood the contract included language that wasn't necessarily in the statement of financial responsibility. Do you still feel that

South Carolina

TERM
Fall 2014

USC Union
Business Office
P.O. Drawer 729
Union, SC 29379

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:03

ACCOUNT INFORMATION ***			
CHARGES		CREDITS/ANTICIPATED CREDITS	
UNI UG Resident Tuition	285.00	UNI Third Party Payment	285.00
UPS UG Resident Tuition	198.00	UPS Third Party Payment	198.00
*** Account Information is real-time	483.00		483.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
70	97720	PSYC 101	Introduction to Psycholog	UNI	3.00	RE
80	99476	ENGL U101	Dorman - Composition I	UPS	3.00	RE

EXHIBIT
99

exhibitsticker.com

USC_00000016

South Carolina

TERM
Spring 2015

USC Union
Business Office
P.O. Drawer 729
Union, SC 29379

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:11

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
UNI UG Resident Tuition	285.00	UNI Third Party Payment	285.00
UPS UG Resident Tuition	198.00	UPS Third Party Payment	198.00
*** Account Information is real-time	483.00		483.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
70	32413	STAT 110	Intro to Statistical Reas	UNI	3.00	RE
80	32390	ENGL U102	Composition II	UPS	3.00	RE

South Carolina

TERM
Fall 2015

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:20

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Dance Lab Fee	180.00	COL Freshman Enroll Deposit	200.00
COL Housing Activity Fee	50.00	Fed Direct Unsubsidized Loan	990.00
COL Housing South Tower	2,400.00	Federal Direct Subsidized Loan	1,732.00
COL Language Lab Fee	45.00	Federal Pell Grant	2,888.00
COL Mail & Pkg Service Fee	25.00	SC LIFE Scholarship	2,500.00
COL Matriculation Fee UG	80.00	Theatre Dance Scholarship	500.00
COL Meal Plan	1,707.00	Web Credit Card	1,661.00
COL Parking Tickets	92.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Resident Tuition	5,541.00		
Payment Plan Fee	75.00		
*** Account Information is real-time	10,471.00		10,471.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	12654	RUSS 121	Elementary Russian	COL	4.00	RW
30	13816	DANC 302A	Ballet Technique III	COL	1.00	RW
30	14011	DANC 177	Dance Company I	COL	1.00	RW
30	15035	HIST 112	US History Since 1865	COL	3.00	RW
30	16192	DANC 303	Pointe III	COL	1.00	RW
30	16377	DANC 150	Introduction to Dance	COL	3.00	RW
30	22388	SOCY 101	Introductory Sociology	COL	3.00	RW

South Carolina

TERM
Spring 2016

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:28

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Dance Lab Fee	240.00	Fed Direct Unsubsidized Loan	990.00
COL Health Service	70.00	Federal Direct Subsidized Loan	1,732.00
COL Housing Activity Fee	50.00	Federal Pell Grant	2,887.00
COL Housing South Tower	2,500.00	SC LIFE Scholarship	2,500.00
COL Language Lab Fee	45.00	Theatre Dance Scholarship	500.00
COL Mail & Pkg Service Fee	25.00	Web Credit Card	1,966.00
COL Meal Plan	1,707.00		
COL Parking Tickets	46.00		
COL Security Network Fee	76.00		
COL Technology Fee	200.00		
COL UG Resident Tuition	5,541.00		
Payment Plan Fee	75.00		
*** Account Information is real-time	10,575.00		10,575.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	40249	POLI 201	American National Governm	COL	3.00	RW
30	41378	DANC 302A	Ballet Technique III	COL	1.00	RW
30	41691	DANC 303	Pointe III	COL	1.00	RW
30	42079	DANC 212A	Contemp Dance Technq II	COL	1.00	RW
30	42232	DANC 177	Dance Company I	COL	1.00	RW
30	42800	RUSS 122	Basic Proficiency in Russ	COL	4.00	RW
30	52986	LING 240	Lang Conflict and Lang Ri	COL	3.00	RW

South Carolina

TERM
Fall 2016

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:57

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL 17 Hrs and Above UG Res	80.00	Fed Direct Unsubsidized Loan	990.00
COL Biology Lab Fee	105.00	Federal Direct Subsidized Loan	2,226.00
COL Dance Lab Fee	300.00	Federal Pell Grant	2,533.00
COL Health Service	104.00	SC LIFE Scholarship	2,500.00
COL Language Lab Fee	65.00	SC Need Based Grant	1,000.00
COL Parking Tickets	18.00	Theatre Dance Scholarship	500.00
COL Statistics Lab Fee	105.00	Web Credit Card	230.00
COL Technology Fee	200.00		
COL UG Resident Tuition	5,727.00		
Refund	3,397.00		
*** Account Information is real-time	10,101.00		9,979.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	-122.00	Current Term Balance	122.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	10607	POLI 101	Intro to Global Politics	COL	3.00	RW
30	12263	RUSS 201	Intermediate Russian I	COL	3.00	RW
30	13375	DANC 402A	Ballet Technique IV	COL	1.00	RE
30	13578	DANC 403	Pointe Vriatn for Adv Bal	COL	1.00	RW
30	13617	DANC 212A	Contemp Dance Technq II	COL	1.00	RE
30	19334	BIOL 110	General Biology	COL	4.00	RW
30	21137	STAT 201	Elementary Statistics	COL	3.00	RW
30	25609	DANC 177	Dance Company I	COL	1.00	RW

South Carolina

TERM
Spring 2017

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:48

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL 17 Hrs and Above UG Res	80.00	Fed Direct Unsubsidized Loan	990.00
COL Dance Lab Fee	75.00	Federal Direct Subsidized Loan	2,226.00
COL Geology Lab Fee	105.00	Federal Pell Grant	2,532.00
COL Language Lab Fee	130.00	SC LIFE Scholarship	2,500.00
COL Technology Fee	200.00	SC Need Based Grant	1,000.00
COL UG Resident Tuition	5,727.00	Web Credit Card	655.00
Refund	3,464.00		
*** Account Information is real-time	9,781.00		9,903.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	122.00	Current Term Balance	-122.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	41989	DANC 402A	Ballet Technique IV	COL	1.00	RW
30	42530	RUSS 202	Intermediate Russian II	COL	3.00	RW
30	42531	RUSS 280	Intro to Russian Civiliza	COL	3.00	RW
30	44309	GEOL 101	Introduction to the Earth	COL	4.00	RW
30	48559	SAEL 200	Social Advocacy & Ethical	COL	3.00	RW
30	50222	POLI 350	Public Opinion and Politi	COL	3.00	RW

South Carolina

TERM
Fall 2017

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:51

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Health Service	69.00	Fed Direct Unsubsidized Loan	990.00
COL Health Service	97.00	Federal Direct Subsidized Loan	2,721.00
COL Language Lab Fee	130.00	Federal Pell Grant	2,960.00
COL Technology Fee	200.00	SC LIFE Scholarship	2,500.00
COL UG Resident Tuition	5,931.00		
Refund	2,910.00		
*** Account Information is real-time	9,337.00		9,171.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	-166.00	Current Term Balance	166.00

UNIVERSITY OF SOUTH CAROLINA

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PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	10722	POLI 315	International Relations	COL	3.00	RW
30	12082	RUSS 301	Russian Conversation & Co	COL	3.00	RW
30	17415	JOUR 101	Media and Society	COL	3.00	RW
30	20647	JOUR 201	Principles of Public Rela	COL	3.00	RW
30	22141	POLI 383	Genocide: Comparative Per	COL	3.00	RW

South Carolina

TERM
Spring 2018

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:10

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Language Lab Fee	130.00	Fed Direct Unsubsidized Loan	990.00
COL Technology Fee	200.00	Federal Direct Subsidized Loan	2,721.00
COL UG Resident Tuition	5,931.00	Federal Pell Grant	2,960.00
Electronic Refund	2,744.00	SC LIFE Scholarship	2,500.00
*** Account Information is real-time	9,005.00		9,171.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	166.00	Current Term Balance	-166.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	42347	RUSS 302	Russian Conversation & Co	COL	3.00	RW
30	43401	JOUR 303	Law and Ethics of Mass Co	COL	3.00	RW
30	49256	POLI 341	Contemporary US Foreign P	COL	3.00	RW
30	55450	POLI 446	Int'l Relations of Africa	COL	3.00	RW
30	55697	THEA 170	Fundamentals of Acting	COL	3.00	RW

South Carolina

TERM
Fall 2018

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:18

ACCOUNT INFORMATION ***			
CHARGES		CREDITS/ANTICIPATED CREDITS	
*** Account Information is real-time	0.00		0.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS

South Carolina

TERM
Spring 2019

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:49

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
*** Account Information is real-time	0.00		0.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS

South Carolina

TERM
Fall 2019

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:26

ACCOUNT INFORMATION *** CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Health Service	156.00	COL Scholarship Payment	712.87
COL Language Lab Fee	130.00	Fed Direct Unsubsidized Loan	990.00
COL Technology Fee	200.00	Federal Direct Subsidized Loan	2,721.00
COL UG Resident Tuition	6,144.00	Federal Pell Grant	2,973.00
Electronic Refund	1,922.87	USC Acheivement Schlp	1,000.00
		Web Credit Card	156.00
*** Account Information is real-time	8,552.87		8,552.87
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

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PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	10342	POLI 450	Constitutional Law	COL	3.00	RW
30	16461	JOUR 202	Princ Advertising & Brand	COL	3.00	RW
30	22122	POLI 421	Law & Contemp Intl Proble	COL	3.00	RW
30	26856	RUSS 319	19th Cent Russ Lit in Trn	COL	3.00	RW
30	30863	CLAS 220	Intro to Classical Mythol	COL	3.00	RE

South Carolina

TERM
Spring 2020

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

USC ID: H50038436
Name: Ms. Davia E. Bunch

Date: 03-17-2021 13:03:36

ACCOUNT INFORMATION ***

CHARGES		CREDITS/ANTICIPATED CREDITS	
COL Parking Covid Adj	-22.00	Fed Direct Unsubsidized Loan	990.00
COL Technology Fee	200.00	Federal Direct Subsidized Loan	2,721.00
COL UG Resident Tuition	6,144.00	Federal Pell Grant	2,972.00
Electronic Refund	2,161.00	USC Acheivement Schlp	1,000.00
		UofSC CARES Federal Grant	800.00
*** Account Information is real-time	8,483.00		8,483.00
Authorized Aid	0.00	Other Memos	0.00
Other/Previous Term balance	0.00	Current Term Balance	0.00

UNIVERSITY OF SOUTH CAROLINA

Authorized aid and other memos are funding for the current term that is scheduled for disbursement, with all the disbursement requirements completed. Authorized aid and other memos have been deducted from the total amount due on your bill. You only need to pay the amount listed as Current Term Balance. If the Current Term Balance is a negative number, you do not need to pay an amount at this time.

PART OF TERM	COURSE REGISTRATION NUMBER	COURSE	COURSE TITLE	COURSE CAMPUS	CREDIT HOURS	STATUS
30	41259	DANC 101	Dance Appreciation	COL	3.00	RW
30	45532	JOUR 332	Mass Communications Resea	COL	3.00	RW
30	49540	POLI 365	State Government	COL	3.00	RW
30	52920	POLI 362	Politics and the Mass Med	COL	3.00	RW
30	56115	JOUR 499	Special Topics	COL	3.00	RW

UNIVERSITY OF SOUTH CAROLINA

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

Term: Spring 2020

USC ID: H50038436

Name: Davia E. Bunch

Accepted Date: 10-31-2019 12:21:59 PM

Date: 03-17-2021 01:03:57 PM

UNIVERSITY OF SOUTH CAROLINA
STUDENT STATEMENT OF FINANCIAL RESPONSIBILITY
SPRING 2020

The University of South Carolina requires all students acknowledge the financial arrangement between the student and the University. By submitting course registration I am entering into a financial arrangement with the University of South Carolina and I accept the responsibility for all charges billed to my account.

I understand that my USC bill will be posted online in Self-Service Carolina (SSC) and that all billing notices will be sent to my USC assigned email address and that it is my responsibility to review and pay my bill by the due date.

I understand that accounts not paid when due are subject to a late fee and that current and/or future registration may be cancelled. Delinquent accounts will result in a financial hold on my account that prevents registration and access to grades and transcripts, and release of diplomas and certificates. Seriously delinquent accounts with balances past due for more than 180 days may be placed with an outside collection agency and/or reported to the National Credit Bureau system and/or may be deducted from state income tax refunds. I agree to pay all late payment fees, collection agency fees (which may be based on a percentage at a maximum of 40% of the debt), attorney fees, interest and any other costs and charges necessary for the collection of any amount not paid when due. I understand that if I give consent to an authorized user to make payments or a payment arrangement on my behalf, I am held to the subject matter mentioned above.

I understand that the University may contact me at the telephone number(s) provided in SSC. By providing the telephone numbers, I understand, agree and give express consent that the University of South Carolina or anyone working on the University's behalf, including third party vendors, may contact me at the number(s) provided by manually dialing the number or by using automated dialing technology.

Dishonored Checks/eChecks/Credit Cards
A check, payment card, or an electronic payment processed as a payment for University expenses that is returned unpaid by the bank immediately creates indebtedness to the University. A $30 returned item charge will be assessed for each returned item in accordance with state laws. I understand that use of dishonored checks to pay my tuition and fees may result in the cancellation of current/and or future registrations if not remedied within 10 days of notification.

I understand that all disputes about registration or payment will be governed by South Carolina law and subject to the jurisdiction of the courts in South Carolina. I also understand that if I have more than three returned checks, I may be prohibited from processing checks on my account in the future.

I authorize the University of South Carolina, and their respective agents and contractors to contact me regarding my student receivable balance or my institutional loan(s), including repayment of my student receivable or loans(s), at the current or any future number that I provide for my cellular phone or other wireless device using automated dialing equipment or artificial or pre-recorded voice or text messages.



STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
DAVIA BUNCH, PETER KELLY, and TERRY KELLY, individually and on behalf of others similarly situated, Plaintiffs, vs. THE UNIVERSITY OF SOUTH CAROLINA, Defendant.	)	Civil Action No. 2020-CP-40-02330 **DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES (SET ONE)**

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Defendant the University of South Carolina ("Defendant") responds to Plaintiffs Davia Bunch, Peter Kelly and Terry Kelly, individually and on behalf of others similarly situated ("Plaintiffs") First Set of Interrogatories, dated February 24, 2021, as follows:

ANSWERS TO INTERROGATORIES

1. Has DEFENDANT ever taken the position that ONLINE STUDENTS, ON CAMPUS STUDENTS, or any other student(s) are contractually obligated to make payments for tuition or fees to DEFENDANT? If so, please IDENTIFY each instance in which DEFENDANT has taken that position, including (a) the particular student, (b) the date, (c) a description of the dispute, (d) the document(s) DEFENDANT alleged formed the basis of the contract, (e) the outcome of the dispute, and (f) any authority which determined the outcome (e.g., the name of any court(s) adjudicating the dispute).

> ANSWER: Save for certain situations, including, *e.g.*, full scholarships or a student's receipt of financial aid, each student is generally required to pay a specified amount of tuition and fees if the student wishes to enroll in and attend classes with Defendant. In this regard, each student must accept a Student Statement of Financial Responsibility for each

semester of enrollment with Defendant. Defendant has, at times, taken the position that certain students were obligated to make agreed upon payments for tuition and fees to Defendant. For example, some students elect to defer payment in full of their tuition and fees and enter into a payment plan with Defendant whereby the student agrees to pay the balance deferred in a number of installments. Per the student's payment plan agreement with Defendant, Defendant has various options should the student fail to meet the terms of the agreed upon payment plan. Defendant objects to the portion of this Interrogatory which seeks a description and outcome of so-called "disputes," as the intended meaning of this ambiguous term is unknown to Defendant. Defendant further objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, not proportional to the needs of this case, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence because, for example, the temporal scope is unlimited with no start or end date and it seeks a broad scope of information for each and every instance during the entire history of the University where Defendant took the position a student was contractually obligated to make payments for tuition and fees regardless of the date of the incident, the nature of the incident, and the relevance (or lack thereof) of the incident to the claims and defenses in this litigation. Defendant further objects to this Interrogatory on the grounds it seeks confidential student information protected under the Family Educational Rights and Privacy Act ("FERPA"). Defendant would have to comply with FERPA's requirements before it could lawfully produce any FERPA-protected information of its students.

2. Has DEFENDANT ever taken the position that PERSONS who pay tuition or fees to DEFENDANT on behalf of ON CAMPUS STUDENTS, ONLINE STUDENTS, or any other student(s) are contractually obligated to make those payments? If so, please identify each instance in which DEFENDANT has taken that position, including (a) the payor, (b) the date, (c) a description of the dispute, (d) the document(s) DEFENDANT alleged formed the basis of the contract, (e) the outcome of the dispute, and (f) any authority which determined the outcome (e.g., the name of any court(s) adjudicating the dispute).

ANSWER: Defendant objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, not proportional to the needs of this case, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence because, for example, the temporal scope is unlimited and appears to be ongoing or continuing in nature with no precise end date; and it seeks documents and information on every instance where Defendant took the position that persons paying tuition or fees on behalf of students are contractually obligated to make those payments regardless of the content, subject, or nature of the instance and related position. Defendant further objects on the grounds that it seeks confidential student information protected under FERPA. Before Defendant could produce any such FERPA-protected information of its students,

Defendant would have to comply with FERPA's requirements. Subject to and based on these objections, Defendant answers, upon information and belief, that it does not generally take the position that persons who voluntarily pay tuition or fees on behalf of Defendant's students are contractually obligated to make those payments.

3. IDENTIFY the amount of tuition charged for Plaintiff Davia Bunch as a student from January 1, 2019 through the present.

ANSWER: Defendant charged Plaintiff Davia Bunch the following tuition as a student enrolled in the Spring 2019 Semester through the Spring 2020 Semester, her final semester enrolled at the University:

a. Spring 2019 Semester: no tuition charged

b. Fall 2019 Semester: $6,144.00

c. Spring 2020 Semester: $6,144.00

4. IDENTIFY the amount of tuition charged for Casey Kelly as a student from January 1, 2019 through the present.

ANSWER: Defendant objects to this Interrogatory on the grounds that it seeks confidential student information protected under FERPA. Pursuant to the applicable FERPA regulations, absent prior written consent or a court order and requisite notice, Defendant cannot disclose FERPA-protected information as defined in 34 C.F.R. § 99.3. Upon receipt of valid written consent from the student or a court order permitting disclosure and the requisite notice, Defendant will provide an answer to this Interrogatory.

5. IDENTIFY each fee (including the type of fee and the amount of the fee) charged for Plaintiff Davia Bunch as a student from January 1, 2019 through the present.

ANSWER: Defendant charged Plaintiff Davia Bunch the following fees as a student enrolled in the Spring 2019 Semester through the Spring 2020 Semester, her final semester enrolled at the University:

a. Spring 2019 Semester: no fees charged

b. Fall 2019 Semester: $130.00 Language Lab Fee; $200.00 Technology Fee; $110.00 Parking Fee for 2019-2020 academic year

c. Spring 2020 Semester: $200.00 Technology Fee

6. IDENTIFY each fee (including the type of fee and the amount of the fee) charged for Casey Kelly as a student from January 1, 2019 through the present.

ANSWER: Defendant objects to this Interrogatory on the grounds that it seeks confidential student information protected under FERPA. Pursuant to the applicable FERPA regulations, absent prior written consent or a court order and requisite notice, Defendant cannot disclose FERPA-protected information as defined in 34 C.F.R. § 99.3. Upon receipt of valid written consent from the student or a court order permitting disclosure and the requisite notice, Defendant will provide an answer to this Interrogatory.

7. IDENTIFY the amount of tuition charged for online enrollment students of DEFENDANT's Palmetto College branch during the 2018-2019 school year and the 2019-2020 school year.

ANSWER: Defendant objects to this Interrogatory because it asks Defendant to identify the amount of tuition charged to "online enrollment students" without any identification of the "online enrollment students" to which it refers. Defendant further objects to this Interrogatory on the grounds that it is overly broad and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence because it asks Defendant to identify the amount of tuition charged during the 2018-2019 school year, which is not at issue in this litigation. Subject to and based on these objections, Defendant answers it charged the following tuition, per semester, to students enrolled in the University of South Carolina Palmetto College's online degree completion program during the 2019-2020 school year:

a. Resident tuition: $5,199.00 for full-time students and $433.25 per credit hour for part-time students

b. Non-resident tuition: $10,428.00 for full-time students and $869.00 per credit hour for part-time students

The online degree completion program is the only online program offered at the University of South Carolina Palmetto College. Defendant further avers it offers specially priced tuition rates to select groups, including, for example, firefighters, law enforcement officers, and South Carolina residents ages 60 years or older.

8. IDENTIFY the amount of fees (including the type of fee and the amount of the fee) charged for online enrollment students of DEFENDANT's Palmetto College branch during the 2018-2019 school year and the 2019-2020 school year.

ANSWER: Defendant objects to this Interrogatory because it asks Defendant to identify the amount of fees charged to "online enrollment students" without any identification of the "online enrollment students" to which it refers. Defendant further objects to this

Interrogatory on the grounds that it is overly broad and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence because it asks Defendant to identify the fees charged during the 2018-2019 school year, which is not at issue in this litigation. Subject to and based on these objections, Defendant answers it charged the following fees to students enrolled in the University of South Carolina Palmetto College's online degree completion program during the 2019-2020 school year, some of which were required of all students, and others of which were required of less than all students:

a. Technology Fee: $156.00, per semester, for full-time students and $13.00, per semester, for part-time students

b. Nursing Course Fee Per Hour: $40.00 for part-time students

c. Matriculation Fee: $75.00 for full-time degree-seeking students during their entering semester

The online degree completion program is the only online program offered at the University of South Carolina Palmetto College.

9. Did DEFENDANT provide to its faculty at the beginning of the SPRING 2020 SEMESTER instruction regarding how to teach ON CAMPUS STUDENTS through a remote distant learning format? If so, please IDENTIFY (a) the date prior to the beginning of the SPRING 2020 SEMESTER when such instruction was given; (b) the PERSONS who provided the instruction; (c) to which faculty that instruction was provided; and (d) the detailed subject-matter covered in each instruction.

ANSWER: Defendant objects to this Interrogatory because it is unclear what information Plaintiffs seek. The Interrogatory asks about instruction provided to faculty "at the beginning of the SPRING 2020 SEMESTER" but in connection with that asks for "the date ***prior to the beginning*** of the SPRING 2020 SEMESTER when ***such instruction*** was given." (emphasis added.) To the extent this Interrogatory seeks the information regarding instruction for an unlimited period of time before the Spring 2020 Semester, Defendant further objects on the grounds that the Interrogatory is overly broad, unduly burdensome, not proportional to the needs of this case, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

10. IDENTIFY all PERSONS known to DEFENDANT to be witnesses concerning the facts of the case and indicate whether written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER: Defendant objects to this Interrogatory to the extent it seeks confidential student information protected from disclosure under FERPA. Before Defendant could provide any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements. Subject to, based on, and without waiving this objection, Defendant identifies the following individuals who, upon information and belief, are witnesses concerning the facts of the case:

a. Plaintiff Davia Bunch
b. Plaintiff Peter Kelly
c. Plaintiff Terry Kelly
d. Anna Edwards, Associate Vice President for Student Life
e. Lisa Jerald, Ombudsman for Undergraduate Students
f. Sandra Kelly, Vice Provost and Dean of Undergraduate Studies
g. Mandy Kibler, Associate Vice President for Administration and Finance and the University Controller
h. Aaron Marterer, University Registrar
i. Nicole Pressley, University Bursar
j. Ed Walton, Executive Vice President for Administration and Chief Financial Officer
k. Dr. Deborah Beck, Chief Health Officer and Associate Vice President for Health and Well-Being
l. Dr. Dennis Pruitt, Vice President for Student Affairs and Vice Provost

To Defendant's knowledge, no written or recorded statement concerning this litigation or the claims and defenses of the parties have been taken from the above-named individuals.

11. IDENTIFY all PERSONS who participated in the decision not to afford ON CAMPUS STUDENTS any tuition reimbursement after DEFENDANT ceased all in-person in-classroom instruction and shifted to a remote distance form of instruction for the SPRING 2020 SEMESTER.

ANSWER: Defendant answers that guidance on decisions related to refunds during the COVID-19 pandemic was issued by the South Carolina Commission on Higher Education. Defendant further avers that it is still investigating and attempting to identify additional

information responsive to this Interrogatory. Defendant will supplement this response as soon as any responsive information is located.

12. IDENTIFY any courses DEFENDANT offered during the SPRING 2020 SEMESTER for which DEFENDANT could not provide instruction through a remote distance learning form (a) stating each such course; (b) IDENTIFYING the instructor(s) who taught each such course during the SPRING 2020 SEMESTER; (c) IDENTIFYING the students enrolled for each such course during the SPRING 2020 SEMESTER; (d) IDENTIFYING why DEFENDANT could not provide instruction through a remote distance learning form.

ANSWER: Defendant objects to this Interrogatory on the grounds that it seeks confidential student information protected under FERPA. Before Defendant could produce any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements. Subject to and based on this objection, Defendant answers, upon information and belief, that all in-person, on-campus classes offered during the Spring 2020 Semester were transitioned to virtual instruction.

13. Does DEFENDANT intend to resume providing in-person in-classroom courses for enrolled students? If so, explain the reasons for YOUR plan to resume in-person in-classroom instruction as opposed to continuing to offer instruction solely through remote distance instruction.

ANSWER: Defendant has reopened its campuses after months spent working with an interdisciplinary group of public health, clinical medicine, academic, and staff experts from across the University, in collaboration with local, state, and national officials, to develop reopening and risk mitigation plans to create reasonably safe conditions in which to study, work, and live in light of the circumstances. Defendant further answers that the reopening of its campuses is based on acceptable risk, the ability to reasonably contain the spread of the virus, and properly care for those who are infected. As such, Defendant has deployed primary public health controls to slow the transmission and reduce disease impact associated with COVID-19. These control measures include, for example, the availability of appropriate personal protective equipment, mandatory face coverings in all campus buildings, environmental measures such as enhanced cleaning and disinfection, and mitigation strategies such as comprehensive testing, contact tracing, isolation, and quarantine.

14. IDENTIFY all insurance companies which provide liability insurance coverage to DEFENDANT relating to PLAINTIFFS' claims in the FAC and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: Defendant is unaware of any insurance policy that may provide coverage to Defendant relating to Plaintiffs' claims.

15. IDENTIFY any and all expert witnesses whom DEFENDANT proposes to use at the trial of the case.

ANSWER: Defendant has not yet identified any person it intends to call as an expert witness at the trial of this case. Once such testifying expert is retained, Defendant will supplement its answer as may be necessary and appropriate and in compliance with Rule 26(b)(4)(A).

16. INDENTIFY each and every PERSON who provided any information in connection with answers to these Interrogatories and the Requests for Production of Documents and Requests for Admissions served concurrently with these Interrogatories.

ANSWER: Defendant identifies the following individuals who provided information in connection with Defendant's responses to Plaintiffs' first set of discovery requests:

a. Joey Derrick, Director of Student Financial Aid and Scholarships
b. Anna Edwards, Associate Vice President for Student Life
c. Kelly Epting, Associate Vice President for Finance and Budget
d. Edwin Evans, Deputy General Counsel
e. J.C. Huggins, Assistant Vice President for Branding and Digital Strategy
f. Lisa Jerald, Ombudsman for Undergraduate Students
g. Sandra Kelly, Vice Provost and Dean of Undergraduate Studies
h. Mandy Kibler, Associate Vice President for Administration and Finance and the University Controller
i. Aaron Marterer, University Registrar
j. Nicole Pressley, University Bursar
k. Jeff Stensland, Assistant Vice President of Media and External Engagement
l. Scott Verzyl, Associate Vice President for Enrollment Management and Dean of Undergraduate Admissions

17. IDENTIFY any calendars, diaries, logs, notes, journals, or any other written or recorded summary of events maintained by DEFENDANT CONCERNING the factual allegations contained in the FAC.

ANSWER: Defendant objects to this Interrogatory to the extent it calls for information protected by the attorney-client privilege and/or attorney work product doctrine; and on the grounds that it is overly broad and unduly burdensome because, for example, the temporal scope is unlimited and appears to be ongoing or continuing in nature with no precise end date and it purports to seek identification of, for example, each and every note "evidencing, or in any way legally, logically, or factually connected with" the factual allegations asserted by Plaintiff. Defendant further objects to this Interrogatory to the extent it seeks student information and documents containing student information protected from disclosure under FERPA. Before Defendant could provide any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements. Subject to and based on these objections, Defendant answers it will search for and identify relevant, non-privileged, non-protected documents and information responsive to this Interrogatory that can be located with a reasonable search, if any exist, and make such responsive documents available for Plaintiffs at a mutually convenient time and place.

18. IDENTIFY any marketing or advertising DOCUMENTS prepared or used by DEFENDANT in the last four years CONCERNING the on-campus experience or in-person instruction as a benefit to enrolling with DEFENDANT, including, but not limited to, any illustration, or depiction that is designed to effect a sale or create interest, whether the same appears in a press release, video news release, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, stickers, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, instructional or education materials, packaging, package insert, package label, film, streaming video, electronic mail, web page, audio program transmitted over a telephone system, script used to make oral solicitations to consumers, or publication or broadcast in any other medium.

ANSWER: As an initial matter, Defendant objects to this Interrogatory because the term "benefit" is subjective; whether an aspect or feature of the "on-campus experience" or "in-person instruction" is deemed a benefit varies from person to person. Defendant further objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, not proportional to the needs of this case, and seeks information that is irrelevant and not

reasonably calculated to lead to the discovery of admissible evidence because, for example, it seeks identification of the marketing or advertising materials regardless of the recipients of or intended audience for the material (for example, prospective student versus alumni), whether the material was used or not, and whether the material was viewed by the recipients or intended audience or not, much less whether it was viewed by the Plaintiffs. Defendant further objects to this Interrogatory on the grounds that it is vague because, for example, it seeks all marketing and advertising material "concerning the on-campus experience" without any identification or explanation of the "on-campus experience" to which it refers.

19. IDENTIFY all DOCUMENTS CONCERNING any contracts, policies, guidelines, handbooks, or terms and conditions governing or CONCERNING DEFENDANT's obligation to provide ON CAMPUS STUDENTS enrolled in the SPRING 2020 SEMESTER with live in-person classroom instruction in exchange for payment of tuition or fees.

ANSWER: Defendant objects to this Interrogatory on the grounds that it seeks student information and documents containing student information protected from disclosure under FERPA. Before Defendant could produce any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements. Defendant further objects to this request because it incorrectly implies and assumes Defendant is obligated to provide live in-person classroom instruction to certain students in exchange for payment of tuition or fees. Subject to and without waiving this objection, Defendant responds it has located no documents responsive to this Interrogatory.

20. IDENTIFY the difference in price for the 2019-2020 school year tuition that DEFENDANT charges for ONLINE STUDENTS versus ON CAMPUS STUDENTS, including any difference for resident tuition and non-resident tuition.

ANSWER: The only full-time online undergraduate degree program offered by Defendant for the 2019-2020 school year was the online bachelor's degree completion program offered through the University of South Carolina Palmetto College (herein, "Degree Completion Program"). For the 2019-2020 school year, the tuition for the Degree Completion Program was higher than, for example, the tuition charged for on-campus programs at the University of South Carolina Palmetto College. How the Degree Completion Program differed in terms of tuition from the other programs offered by the Defendant varies program to program. In this regard, Defendant directs Plaintiffs to the University of South Carolina Fee Schedule for 2019-20, which is being produced in response to Defendant's Requests for Production. Last, Defendant avers it offers specially priced tuition rates to select groups, including, for example, firefighters, law enforcement officers, active duty military, and South Carolina residents ages 60 years or older.

21. IDENTIFY the difference in price for the SPRING 2020 SEMESTER tuition that DEFENDANT charges for ONLINE STUDENTS versus ON CAMPUS STUDENTS, including any difference for resident tuition and non-resident tuition.

ANSWER: See Defendant's Response to Interrogatory No. 20, which is incorporated herein by reference.

22. IDENTIFY all DOCUMENTS CONCERNING differences in price for the 2019-2020 school year tuition that DEFENDANT charges for ONLINE STUDENTS versus ON CAMPUS STUDENTS, including any difference for resident tuition and non-resident tuition.

ANSWER: Defendant directs Plaintiffs to the University of South Carolina Fee Schedule for 2019-20, which is being produced in response to Plaintiffs' Requests for Production. To the extent this Interrogatory seeks disclosure of tuition prices charged to individual students, Defendant objects on the grounds that the Interrogatory seeks student information and documents containing student information protected from disclosure under FERPA. Defendant would have to comply with FERPA's requirements before it could lawfully produce any FERPA-protected information of its students. To the extent this Interrogatory seeks identification of other documents, including all documents "reflecting, evidencing, or in any way legally, logically, or factually connected to" a difference in tuition, Defendant objects to the Interrogatory as being overly broad, unduly burdensome, and disproportionate to the needs of the case.

23. IDENTIFY all DOCUMENTS CONCERNING differences in price for the SPRING 2020 SEMESTER tuition that DEFENDANT charges for ONLINE STUDENTS versus ON CAMPUS STUDENTS, including any difference for resident tuition and non-resident tuition.

ANSWER: Defendant directs Plaintiffs to the University of South Carolina Fee Schedule for 2019-20, which is being produced in response to Plaintiffs' Requests for Production. To the extent this Interrogatory seeks disclosure of tuition prices charged to individual students, Defendant objects on the grounds that the Interrogatory seeks student information and documents containing student information protected from disclosure under FERPA. Defendant would have to comply with FERPA's requirements before it could lawfully produce any FERPA-protected information of its students. To the extent this Interrogatory seeks identification of other documents, including all documents "reflecting, evidencing, or in any way legally, logically, or factually connected to" a difference in tuition, Defendant objects to the Interrogatory as being overly broad, unduly burdensome, and disproportionate to the needs of the case.

24. IDENTIFY all fees DEFENDANT charged to ON CAMPUS STUDENTS, including, but not limited to laboratory fees, technology fees, or other fees of any kind or character, for any goods or services applicable to the SPRING 2020 SEMESTER, including IDENTIFYING the amount of the fee, what the fee is for, when it is assessed, whether DEFENDANT refunded the fee or some portion of the fee after DEFENDANT implemented online or remote instruction for ON CAMPUS STUDENTS due to COVID-19, and why or why not the fee was refunded.

ANSWER: Defendant objects to this Interrogatory on the grounds that it is overly broad and unduly burdensome to the extent it seeks identification of "other fees of any kind or character." Subject to and based on this objection, Defendant answers that hundreds of different fees existed for the Spring 2020 semester and that the nature, type and amount of those fees varied depending on a number of factors, including the type of enrollment, the campus, and the degree or program for which the student was enrolled. In this regard, Defendant refers Plaintiffs to the University of South Carolina Fee Schedule for 2019-20, which is being produced in response to Plaintiffs' Requests for Production. Defendant notes that the types and amounts of fees it charged each individual student enrolled with Defendant in the Spring 2020 Semester varied by individual student and this Interrogatory seeks identification of fees not charged to or paid by the named Plaintiffs but instead charged to various individual members of the putative class whom the Plaintiffs do not adequately represent. Defendant further answers that Defendant provided prorated refunds for fees related to University housing, meal plans, and parking permits, services that could not be provided to students as a result of the pandemic and that the decision to make such refunds was based upon guidance and direction from the South Carolina Commission on Higher Education. Other fees assessed during the Spring 2020 Semester were not refunded because they related to, for example, educational and technology services that students continued to receive before, during, and after the transition to virtual instruction.

25. IDENTIFY the number of ON CAMPUS STUDENTS enrolled in the SPRING 2020 SEMESTER when DEFENDANT implemented online or remote instruction for ON CAMPUS STUDENTS due to COVID-19.

ANSWER: Defendant directs Plaintiffs to the University of South Carolina Official Enrollment Report by Campus for the Spring 2020 Semester, dated March 25, 2020, which is being produced in response to Plaintiffs' Requests for Production.

26. For each response to the Requests for Admissions served concurrently with these Interrogatories that is not an unqualified admission, state all facts upon which DEFENDANT bases each response.

ANSWER: Defendant objects to this Interrogatory because it seeks to discover the mental impressions, conclusions, opinions, or legal theories of its counsel concerning this litigation.

27. State all underlying facts in support of any affirmative defense DEFENDANT asserts in response to any of the claims in the FAC.

ANSWER: Defendant objects to this Interrogatory because it is overly broad, unduly burdensome, and seeks to discover the mental impressions, conclusions, opinions, or legal theories of its counsel concerning this litigation.

28. IDENTIFY all COMMUNICATIONS with PLAINTIFFS CONCERNING the facts and circumstances alleged in the FAC.

ANSWER: Defendant directs Plaintiffs to its response to Request for Production No. 20, including documents produced therewith.

29. IDENTIFY all non-privileged COMMUNICATIONS between DEFENDANT and any PERSON CONCERNING the facts and circumstances alleged in the FAC.

ANSWER: Defendant objects to this Interrogatory to the extent it calls for documents and information protected by the attorney work product doctrine and on the grounds that it is overly broad and unduly burdensome because, for example, the temporal scope is unlimited and appears to be ongoing or continuing in nature with no precise end date. Defendant further objects to this Interrogatory on the grounds that it seeks student information and documents containing student information protected from disclosure under FERPA. Before Defendant could produce any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements. Subject to, based on, and without waiving these objections, Defendant directs Plaintiffs to its response to Request for Production No. 23.

30. IDENTIFY the reasons, rationales, or other factual bases for DEFENDANT's decision not to refund SPRING 2020 SEMESTER tuition payments, in whole or in part, to PLAINTIFFS and any ON CAMPUS STUDENTS.

ANSWER: Defendant, like virtually every other similarly situated university or college in the nation, was faced with the unprecedented challenge of continuing to provide an education to its students in keeping with governmental and public health guidance and directives to limit personal interactions. With guidance and direction from the South Carolina Commission on Higher Education, Defendant decided to provide prorated refunds for fees related to University housing, meal plans, and parking permits. These are services that could not be provided to students, as a result of the pandemic. Educational services, however, continued through the use of virtual classrooms and by providing instruction online, rather than in the physical classroom. Virtually every other college and university in the nation made the same adjustments to accommodate public health concerns while continuing to operate online. Students continued to receive a robust educational experience, opportunities for interactions with professors and other students online, and full academic credit for the courses they continued to take after the physical campus closed. The university continued, meanwhile, to incur expenses associated with the normal operation of the university, as well as the transition costs associated with moving to a virtual classroom environment. Defendant had no contractual or economically justifiable basis upon which to reimburse tuition and fees for the Spring 2020 Semester, other than the fees specified above. In addition, eligible students, including, for example, Plaintiff Davia Bunch, received payments from Defendant using funds made available by the CARES Act and paid to students for expenses related to the disruption of campus operations caused by the COVID-19 pandemic.

31. IDENTIFY the reasons, rationales, or other factual bases for DEFENDANT's decision not to refund SPRING 2020 SEMESTER fee payments of any kind or character, in whole or in part, to PLAINTIFFS and any ON CAMPUS STUDENTS.

ANSWER: See Defendant's response to Interrogatory No. 30, which is incorporated herein by reference. As discussed therein, Defendant provided prorated refunds for fees related to University housing, meal plans, and parking permits. The other fees assessed during the Spring 2020 Semester which were not refunded related to, for example, educational and technology services that students continued to receive before, during, and after the transition to virtual instruction.

32. IDENTIFY all SPRING 2020 SEMESTER ON CAMPUS STUDENTS.

ANSWER: Defendant objects to this Interrogatory to the extent it seeks student information protected from disclosure under FERPA. Before Defendant could provide any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements. Subject to and based on this objection, Defendant directs Plaintiffs to its response to Request for Production Nos. 30 and 31, including, therewith, its production of directory information identifying students enrolled in the Spring 2020 Semester, in the manner allowed by FERPA, with the exception that this will not include students who opted out of directory information.

33. IDENTIFY all non-privileged COMMUNICATIONS between DEFENDANT and ON CAMPUS STUDENTS CONCERNING the facts and circumstances alleged in the FAC.

ANSWER: Defendant objects to this Interrogatory on the grounds that it is overly broad and unduly burdensome because, for example, the temporal scope is unlimited and appears to be ongoing or continuing in nature with no precise end date. Defendant further objects to this Interrogatory on the grounds that it seeks student information and documents containing student information protected from disclosure under FERPA. Before Defendant could provide any such FERPA-protected information of its students, Defendant would have to comply with FERPA's requirements, the compliance with which would be unduly burdensome given the overbreadth of the Interrogatory because, for example, Defendant would have to conduct extensive redactions effectively destroying the meaning of the information and documents. Subject to and based on these objections, Defendant directs Plaintiffs' to its responses to Request for Production Nos. 12, 13, 20, and 23, including Defendant's response that it will conduct a reasonable search for communications with Plaintiff Davia Bunch as well as documents concerning the same and will produce relevant, non-privileged, non-protected documents and information located through the search.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ ROBERT H. BRUNSON

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Attorneys for The University of South Carolina

Charleston, South Carolina

April 13, 2021

CERTIFICATE OF SERVICE

I, the undersigned paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, The University of South Carolina, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by emailing and mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

DEFENDANT'S ANSWERS TO PLAINTIFFS' INTERROGATORIES (SET ONE)

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Attorneys for Plaintiffs

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Lauren Lynch

April 13, 2021

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAVIA BUNCH and CASEY KELLY,
individually and on behalf of others
similarly situated,
Plaintiffs,
vs. Civil Action No. 2020-CP-40-02330
THE UNIVERSITY OF SOUTH CAROLINA,
Defendant.

VIDEOTAPED WEB CONFERENCE
30(b)(6)
DEPOSITION OF: UNIVERSITY OF SOUTH CAROLINA'S CORPORATE REPRESENTATIVE NICOLE PRESSLEY

DATE: Wednesday, September 7, 2022

TIME: 12:10 p.m.

TIME ENDED: 2:13 p.m.

LOCATION: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina

REPORTED BY: YVONNE R. THURSTON-BOHANNON
Registered Merit Reporter,
Certified Realtime Reporter

Q. And the next sentence says, "Seriously delinquent accounts with balances past due for more than 180 days may be placed with an outside collection agency and/or reported to the National Credit Bureau system and/or may be deducted from state income tax refunds."

Did I read that correctly?

A. Yes.

Q. So backing up, as you -- in your experience as the bursar, are -- does your department handle the collections aspect of -- well, strike that.

The bursar's office is responsible for collecting tuition and fees generally, right?

A. Correct.

Q. All right. If somebody doesn't pay their tuition or fees as agreed, whether that's up front or pursuant to a payment plan, what involvement does the bursar's office have in collecting those payments from the student if they become delinquent?

A. We are responsible for communicating with the students about their delinquent account.

Q. Okay.

A. And as it says here, if an account is

delinquent for more than 180 days, then we start taking steps to place it with an outside collection agency.

Q. Do you have a specific agency that you use to collect unpaid tuition and fees?

A. We have four.

Q. Four.

And how many -- do you have a lot of students that fail -- well, strike that.

Do you have a -- and I -- I'm trying not to put numbers on it, but during your typical semester, to the extent you recall, how many -- how many seriously delinquent accounts do you run across?

A. I don't know the exact amount, but I do know that it's less than one percent of our head count.

Q. Thank you. That's -- that's all. I was just looking for your best estimate there.

So less than one percent approximately of the accounts with the university go to collections; is that right?

A. Correct.

Q. And so the university has the right under the Statement of Financial Responsibility to

percentage of -- I assume that since it's less than one percent that gets -- of the population -- the student population is seriously delinquent that the percentage from which the university deducts the tuition and fee payments from their income tax refunds is a smaller percentage of that one percent, right?

A. That's correct.

Q. To your knowledge has the university ever -- other than for -- other than somebody that goes through the tuition and fees appeal process, are you aware of the university ever allowing a student to be enrolled in the university without paying in full all of the tuition and fees due?

A. Can you -- can you say that one more time? I'm sorry.

Q. Sure. What I'm really asking is, Is there -- has there ever been a situation where somebody fails to pay the tuition and fees and doesn't have a good -- a reason that would qualify them for a tuition refund or an adjustment or anything like that, does the university ever not exercise its rights to collect the tuition and fees from any students who are obligated to pay it to your knowledge?

A. No, not in the sense that we have allowed them to just not pay. Maybe a payment extension --

Q. Uh-huh.

A. -- but to say, "You just don't have to pay your fees," no.

Q. Because the university considers the student to be bound to pay all of the tuition and fees it assesses after they accept this Statement of Financial Responsibility?

A. Correct.

Q. All right. And then the next sentence of the third paragraph on Exhibit 10 says, "I agree to pay all late payment fees, collection agency fees (which may be based on a percentage at a maximum of 40% of the debt), attorney's fees, interest and any other costs and charges necessary for the collection of any amount not paid when due."

Did I read that correctly?

A. Yes.

Q. And within that small -- within that small universe of students who fail to pay as agreed under the Statement of Financial Responsibility, has the university consistently

Message

From: PRESSLEY, NICOLE [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=52837469A2874C6EB3CDB12254455987-KRISTIEP]
Sent: 5/12/2020 3:07:35 PM
To: MCNEIL, KYANA [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=b4133ed40e454d0ba55f7bf99b1ba12d-THOMPS55]; JACOBS, DEON [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=jacobsd@email.sc.edu]
Subject: RE: SPRING 2020 ACCOUNT BALANCE

Also, the Commission on gave a recommendation/guidance to just refund service related fees that the student could no longer use. It wasn't a mandate. I think the university could have decided to refund tuition if we chose to. We want to be careful how we word this.

From: MCNEIL, KYANA <THOMPS55@mailbox.sc.edu>
Sent: Tuesday, May 12, 2020 10:21 AM
To: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>; JACOBS, DEON <jacobsd@email.sc.edu>
Subject: RE: SPRING 2020 ACCOUNT BALANCE

Good Morning,

It appears this parent has been in communication with both Tyra (first), Carlten (second) and Shermiah (third) below are the responses. Shermiah did refer her to speak to the Commission after she initially telling the parent that the tuition and fees would not be changed due to the decision made by the Commission. I will reiterate to them not to refer parent to reach out to the commission but make them aware of the decision and where the additional information the president has provided through the town hall meetings. I apologize for the miscommunication.

Thank you,
Kyana

Thank you,

Student Customer Services
Bursar's Office
University of South Carolina-Columbia

From: AR, BURS <BURSAR@mailbox.sc.edu>
Sent: Monday, May 11, 2020 2:43 PM
To: [redacted]
Subject: Re: [redacted]

The decision was made with the by the South Carolina Commission on Higher Education. You more than welcome to reach out to them.

Thank you,

Student Customer Services
Bursar's Office
University of South Carolina-Columbia
SB

Exhibit
50

From: [redacted]
Sent: Monday, May 11, 2020 1:59 PM
To: AR, BURS <BURSAR@mailbox.sc.edu>
Subject: Re: [redacted]

Good Afternoon,

Is there someone who I can discuss this with further?

I can be reached by phone at [redacted].

Thank you,

[redacted]
On May 11, 2020, at 11:13 AM, [redacted] wrote:

I would like to speak with someone about this. Who would be someone I can escalate this to?

Thank you
On May 11, 2020, at 11:11 AM, AR, BURS <BURSAR@mailbox.sc.edu> wrote:

Unfortunately, due to the continuity of classes being offered online and with the advisement of the Commission on Higher Education, tuition and fees has not changed.

Thank you,

Student Customer Services
Bursar's Office
University of South Carolina-Columbia
SB

From: [redacted]
Sent: Monday, May 11, 2020 11:06 AM
To: AR, BURS <BURSAR@mailbox.sc.edu>
Subject: Re: [redacted]

It seems we shouldn't be required to pay out of state tuition when we are doing classes remotely at home and do not have the benefit of in person practicum observing as was planned pre pandemic.

On May 11, 2020, at 9:30 AM, AR, BURS <BURSAR@mailbox.sc.edu> wrote:

Hello,

Students are billed at a per credit hour rate. As a Non-Resident, that would be $1,397 per credit hour for tuition. If you would like to discuss what is covered by the class and how it has changed due to the outbreak, you would need to contact the student's program.

Arnold School of Public Health: online request
https://www.sc.edu/study/colleges_schools/public_health/about/contact.php

Exercise Science:
803-777-5267

Example
$1,397 * (total credit hours) = tuition
$17 * (total credit hours) = technology fee
$150 * (total credit hours) = program fee

https://banner.onecarolina.sc.edu/applicationNavigator/seamless

<image.png>

https://sc.edu/about/offices_and_divisions/bursar/tuition_and_required_fees/uofsc_columbia_fees_academic/department_fees/index.php

<image.png>

00409705
Thank you,
CG
Student Customer Services
Bursar's Office
University of South Carolina-Columbia

From: [redacted]
Sent: Saturday, May 9, 2020 11:08 AM
To: AR, BURS <BURSAR@mailbox.sc.edu>
Subject: Erin McElhinney[redacted]

Good Morning,

I would like to discuss this summer tuition bill with someone in the Bursar's office.

Before this Pandemic, [redacted] was to do her practicum in person at a local Physical Therapy practice and now this can't happen and she will be taking one online practicum class for 6 credits. I don't understand this cost that has been billed to us.

Please call me at [redacted].

Best Regards,

[redacted]

From: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>
Sent: Tuesday, May 12, 2020 9:56 AM
To: MCNEIL, KYANA <THOMPS55@mailbox.sc.edu>; JACOBS, DEON <jacobsd@email.sc.edu>
Subject: FW: SPRING 2020 ACCOUNT BALANCE

Email from parent is talking with Kim.. you don't have to respond, however, she indicates that she's been talking with our office about getting a reduced tuition rate for a summer class and was told that she "can take it up with the Commission on Higher Ed". I certainly hope this is not the case. We should never refer our students or parents to contact the Commission on Higher Ed directly.

Thanks,

Nicole

From: FRASER, KIM <FARRIS2@mailbox.sc.edu>
Sent: Tuesday, May 12, 2020 9:08 AM
To: [redacted]
Subject: RE: SPRING 2020 ACCOUNT BALANCE

I understand your frustration with everything concerning the pandemic that we are all dealing with. Tuition rates are not decided at the Bursar's Office level and cannot be changed by our office. Our President addressed this concern on April 27th during the town hall meeting with students and parents. You can still view that town hall at our COVID-19 website https://sc.edu/safety/coronavirus/ to hear the decision directly from President Caslen. Tuition rates for online learning is addressed at the 23rd minute mark and online rates for out of state students is addressed at the 41st minute mark. There is other pertinent information posted on this site for parents and students as well. You can also ask questions and express your concerns on that site. I do want to reiterate however that tuition and fees rates will not change for summer classes.

Please let me know if you have any additional questions.

From: [redacted]
Sent: Tuesday, May 12, 2020 8:49 AM
To: FRASER, KIM <FARRIS2@mailbox.sc.edu>
Subject: Re: SPRING 2020 ACCOUNT BALANCE

My question is this cost associated with taking this practicum class this summer. My daughter was to be in a PT practice observing as part of her practicum this summer. Because of the pandemic, she is unable to do this in person now and will be 100% online. I cannot see paying out of state tuition and fees for a summer practicum for almost $10,000.

This has been a huge financial burden with us not working and staying at home. We have been paying our daughter's rent each month she's been home (since March) as she lives off campus and will have to continue to pay each month she is not there. The apartment complex isn't letting anyone out of their lease and now she's paying "out of state" tuition while she sits at home (in MA) and does her summer class.

I'm not sure if even taking this class in state in Massachusetts is even an option at this point.

I emailed back and forth with the bursar's office yesterday asking to speak with someone about this and was told I could take it up with the commission of higher ed. I believe USC could adjust this.

Best Regards,

[redacted]

On May 12, 2020, at 8:34 AM, FRASER, KIM <FARRIS2@mailbox.sc.edu> wrote:

The bursar's office has been working remotely and can only respond via email. What is your question?

From: [redacted]
Sent: Monday, May 11, 2020 4:51 PM
To: FRASER, KIM <FARRIS2@mailbox.sc.edu>
Subject: Re: SPRING 2020 ACCOUNT BALANCE

Hi Kim,

I've been trying to reach someone regarding the tuition costs for online this summer. I've not had any Luck getting hold of someone to discuss.

Best Regards,

[redacted]

On May 11, 2020, at 4:38 PM, FRASER, KIM <FARRIS2@mailbox.sc.edu> wrote:

Our records indicate you currently have a balance with the University of South Carolina. The details of your charges can be viewed online at https://my.sc.edu

STUDENTS: Using the Payment Gateway in Self-Service Carolina, payment can be made by Credit Card or Electronic Check.
EMPLOYEES: Under the Faculty/Staff Tab, under Personal, click on 'view and pay your bill'.
Payment in person by **cash** or **check** can be made in the Cashier's Office at 1244 Blossom St., Columbia, SC 29208 or you may mail in a **check** or **money order** to the same address. Please make check or money order payable to the University of SC and be sure to include your USC ID or VIP ID.

If you have questions regarding your individual charges, please contact Parking Services at 803-777-5160, Student Health Center at 803-777-3174, Housing at 803-777-4283, Carolina Card (meal plan) at 803-777-1708 **or** Student Conduct at 803-777-4333.

If you have paid within the last 24 hours, please disregard this email.

Customer Support
803-777-4233
Bursar's Office – kfraser
<image001.png>
As a **Gamecock**, my service has **No Limits.**

UNIVERSITY OF SOUTH CAROLINA

Bursar's Office
University of South Carolina
1244 Blossom St.
Columbia, SC 29208

Term: Spring 2020

USC ID: H50038436

Name: Davia E. Bunch

Accepted Date: 10-31-2019 12:21:59 PM

Date: 03-17-2021 01:03:57 PM

Exhibit 0055
Nicole Pressley

UNIVERSITY OF SOUTH CAROLINA
STUDENT STATEMENT OF FINANCIAL RESPONSIBILITY
SPRING 2020

The University of South Carolina requires all students acknowledge the financial arrangement between the student and the University. By submitting course registration I am entering into a financial arrangement with the University of South Carolina and I accept the responsibility for all charges billed to my account.

I understand that my USC bill will be posted online in Self-Service Carolina (SSC) and that all billing notices will be sent to my USC assigned email address and that it is my responsibility to review and pay my bill by the due date.

I understand that accounts not paid when due are subject to a late fee and that current and/or future registration may be cancelled. Delinquent accounts will result in a financial hold on my account that prevents registration and access to grades and transcripts, and release of diplomas and certificates. Seriously delinquent accounts with balances past due for more than 180 days may be placed with an outside collection agency and/or reported to the National Credit Bureau system and/or may be deducted from state income tax refunds. I agree to pay all late payment fees, collection agency fees (which may be based on a percentage at a maximum of 40% of the debt), attorney fees, interest and any other costs and charges necessary for the collection of any amount not paid when due. I understand that if I give consent to an authorized user to make payments or a payment arrangement on my behalf, I am held to the subject matter mentioned above.

I understand that the University may contact me at the telephone number(s) provided in SSC. By providing the telephone numbers, I understand, agree and give express consent that the University of South Carolina or anyone working on the University's behalf, including third party vendors, may contact me at the number(s) provided by manually dialing the number or by using automated dialing technology.

Dishonored Checks/eChecks/Credit Cards
A check, payment card, or an electronic payment processed as a payment for University expenses that is returned unpaid by the bank immediately creates indebtedness to the University. A $30 returned item charge will be assessed for each returned item in accordance with state laws. I understand that use of dishonored checks to pay my tuition and fees may result in the cancellation of current/and or future registrations if not remedied within 10 days of notification.

I understand that all disputes about registration or payment will be governed by South Carolina law and subject to the jurisdiction of the courts in South Carolina. I also understand that if I have more than three returned checks, I may be prohibited from processing checks on my account in the future.

I authorize the University of South Carolina, and their respective agents and contractors to contact me regarding my student receivable balance or my institutional loan(s), including repayment of my student receivable or loans(s), at the current or any future number that I provide for my cellular phone or other wireless device using automated dialing equipment or artificial or pre-recorded voice or text messages.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAVIA BUNCH and CASEY KELLY,
individually and on behalf of others
similarly situated,
Plaintiffs,
vs. Civil Action No. 2020-CP-40-02330
THE UNIVERSITY OF SOUTH CAROLINA,
Defendant.

VIDEOTAPED WEB CONFERENCE

DEPOSITION OF: 30(b)(6) & Indv. EDWARD LEE WALTON
DATE: Tuesday, October 18, 2022
TIME: 9:06 a.m.
TIME ENDED: 11:35 p.m.
LOCATION: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina

REPORTED BY: YVONNE R. THURSTON-BOHANNON
Registered Merit Reporter,
Certified Realtime Reporter

Q. Oh, yeah. No problem. Take -- let me know if you have any technical errors.
A. Tell me where we are --
Q. Yes, sir.
A. -- please.
Q. About three-quarters -- half, three-quarters of the way down the fifth page of Exhibit 25, it says, "Possible --
A. Yes.
Q. -- "refund."
A. In a box, uh-huh.
Q. Okay. And so there was an extended spring break of March 16th through March 22nd of 2020. Was that correct?
A. Yes.
Q. All right. And during the week of March 16th to March 22nd, the university did not provide any instruction; is that correct?
A. Extended spring break. We had spring break which is normal, and then we needed another week to -- I think it was to satisfy the two-week requirement of -- of the CDC maybe and to give us a little bit of time. So, yeah, during that two weeks, we said, "Everybody take off and we'll get back together when -- when it's over."

same subject. So let's assume he must have forwarded that to somebody and I got it and now I'm replying, correct?

Q. Correct. That -- that's what it appears to be.

A. Yes.

Q. And it says, "Mark, what your peers must consider is housing and foodservice are made available by contract. Students pay. We deliver. We don't deliver, then students don't pay."

A. That's right.

Q. Did I read that correctly?

A. For the housing and food, that's correct. And you read it correctly.

Q. All right. And if the students pay for something that they didn't get, then in your view the right thing to do would be to compensate them for that, correct?

A. In my -- in my business way of doing and thinking, here, you know, students pay for a certain number of foods, a certain number of nights to sleep, and if they don't get those, then, yes. We've got their money because they paid it in advance, and now we have to pay them -- we have to -- we have to return that money.

Q. All right. And because the university had contracts with students for housing, food and parking, it refunded those on a pro rata basis, right?

A. We did.

Q. And -- and that was because the university could not deliver what those contracts required, right?

A. That's correct.

Q. All right. And the next sentence here says that "Full ride scholarship especially Pell Grants provide a twist, but the contractual relationship remains and we'll figure out the twist case by case in the back office."

Did I read that correctly?

A. That's correct.

Q. Can you -- what did you mean by the "full schol -- full ride scholarships and Pell Grants provide a twist"? What does that -- what did you mean by that?

A. The thinking in that sentence would have -- would have -- the thing behind that sentence would have been that someone else paid on their behalf, so it may not be the student that actually receives the refund. It may be a

Message

From: SMITH, JAMES [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=74205F0331A04259AB3C71F7DC95BC24-JSMITHJR]
Sent: 3/18/2020 5:56:39 PM
To: WALTON, ED [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=6c4b86d88f774482a847e85aae562618-WALTONE]
Subject: RE: COVID-19 Chief of Staff Thread

LOL… too easy.

From: WALTON, ED <WALTONE@mailbox.sc.edu>
Sent: Wednesday, March 18, 2020 5:54 PM
To: SMITH, JAMES <JSMITHJR@mailbox.sc.edu>
Subject: Re: COVID-19 Chief of Staff Thread



Amateurs. How will one justify counting revenue one didn't earn?

On Mar 18, 2020, at 5:50 PM, SMITH, JAMES <JSMITHJR@mailbox.sc.edu> wrote:

Ed:

I want to share with you something I am hearing from our colleagues at other institutions.

Other Universities are going to take the position that they have issued bonds for the construction of some housing which depends on the housing revenue for the payment of those bonds? Our answer might be the same – that regardless of the legal authority to deny refunds it is the moral right to issue them… particularly given the tough financial times that are ahead for everyone. I am sure the President might hear this tomorrow during the call.

I think in the end it will be important for us all to be together in our request for relief. I think ultimately they tell me they are going to issue refunds but they want to get a nod from legislators that there will be relief when they do. We have chosen for good reasons to start on a different path but we will all be heading the same direction eventually.

Best, J

From: WALTON, ED <WALTONE@mailbox.sc.edu>
Sent: Wednesday, March 18, 2020 5:32 PM
To: BIEGER, MARK <MBIEGER@mailbox.sc.edu>
Cc: CASLEN, ROBERT <BOBCASLEN@sc.edu>; BON, SUSAN <BONS@mailbox.sc.edu>; STENSLAND, JEFFREY G <STENSLAN@mailbox.sc.edu>; MCKAY, SALLY <MCKAYST@mailbox.sc.edu>; SMITH, JAMES <JSMITHJR@mailbox.sc.edu>
Subject: Re: COVID-19 Chief of Staff Thread

Mark, What your peers must consider is that housing and food service are made available by contract. Students pay. We deliver. We don't deliver then students don't pay. Full ride scholarships and especially Pell Grants provide a twist, but the contractual relationship remains, and we'll figure-out the twists case-by-case in the back office.

Food service is an even bigger no-brainer. You can't charge for food you don't deliver. Our meal plans charge $X for #Y meals.

Moreover, once you understand the student and/or his or her benefactor(s) as customers, we have a longer relationship to preserve. Once we told students to stay away, we created a refund situation or an opportunity for them to no longer trust or be a part of USC.

Tuition is another thing altogether. Provide as much learning and academic progression on-line or through other alternatives as possible, and avoid creating a tuition refund scenario. That's my favorite.

On Mar 18, 2020, at 5:08 PM, BIEGER, MARK <MBIEGER@mailbox.sc.edu> wrote:

Sir - FYSA

Vr
Mark

From: Maxwell Allen <maallen@clemson.edu>
Sent: Wednesday, March 18, 2020 4:39 PM
To: Travis E. Overton <toverton@coastal.edu>; BIEGER, MARK <MBIEGER@mailbox.sc.edu>; Adam Taylor <ataylor@lander.edu>; tom.philipkosky@citadel.edu; Montgomery, Lisa P. <montgoml@musc.edu>; Patrick, Paul David <patrickpd@cofc.edu>
Subject: Re: COVID-19 Chief of Staff Thread

Travis and others,

Here is what we are saying on this topic. We have been asked by state legislators as well.

Clemson University has not finalized any decision regarding potential refunds related to housing and dining. We know the issue is a concern of our students and families. We are taking the immediate steps needed to protect health and safety and implement e-learning so our students can get credit for this semester. Please know we are working through possible solutions to this issue and will communicate with students and families as soon as possible.

Max Allen
Vice President and Chief of Staff
Clemson University
201 Sikes Hall
Clemson, SC 29634-5002
(864) 656-3413

From: Travis E. Overton <toverton@coastal.edu>
Sent: Wednesday, March 18, 2020 11:27 AM
To: Mark Bieger; Maxwell Allen; Adam Taylor; tom.philipkosky@citadel.edu; Montgomery, Lisa P.; Patrick, Paul David
Subject: Re: COVID-19 Chief of Staff Thread

Thank you for creating this chain, greatly appreciated.

The refund discussion for us is heavily driven by whether we stay online for the rest of the semester. Are any of your schools factoring this component? As of now, we have only announced being online until April 3rd.

Get Outlook for Android

From: Patrick, Paul David <patrickpd@cofc.edu>
Sent: Wednesday, March 18, 2020 10:33:54 AM
To: Mark Bieger <mbieger@sc.edu>; Maxwell Allen <maallen@clemson.edu>; Adam Taylor <ataylor@lander.edu>;

tom.philipkosky@citadel.edu <tom.philipkosky@citadel.edu>; Montgomery, Lisa P. <montgoml@musc.edu>; Travis E. Overton <toverton@coastal.edu>
Subject: COVID-19 Chief of Staff Thread

All,

Mark Bieger, Max Allen (respective Chiefs of Staff at UofSC and Clemson) and I have been communicating fairly often during the saga of COVID-19. We thought it would be helpful to broaden the circle and get wisdom from other campuses as well.

Included here are also:
Adam Taylor – COS at Lander
Travis Overton – COS at Coastal
Tom Philipkosky – SVP for Ops and Admin at Citadel
Lisa Montgomery – EVP for Finance and Ops at MUSC

If you know other folks to bring into this thread that might be helpful, please feel free to add them on.

The biggest thing we are trying to wrap our arms around right now is the idea of refunds.

Paul Patrick '04
Chief of Staff
Office of the President
College of Charleston

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND

DAVIA BUNCH, PETER KELLY, AND TERRY KELLY, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs. CIVIL ACTION NO. 2020-CP-40-02330

THE UNIVERSITY OF SOUTH CAROLINA,

Defendant.

VIDEOTAPED
DEPOSITION OF: MANDY M. KIBLER
(APPEARING VIA VIRTUAL ZOOM)
DATE: June 16, 2022
TIME: 9:10 AM
LOCATION OF
THE DEPONENT: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
TAKEN BY: Counsel for the Plaintiffs
REPORTED BY: TERRI L. BRUSSEAU
(APPEARING VIA VIRTUAL ZOOM)

Q. Do you know -- when you submitted the survey, those were estimated impacts that the -- do you know why -- do you know why the Commission on Higher Education was asking for those numbers?

A. I do not.

Q. All right. And ultimately they issued guidance to the University based on the survey information you had provided, right?

A. To the best of my knowledge.

Q. All right. I'm going to introduce what's been marked as Exhibit 30.

(EXHIBIT 30, E-mail chain dated 3/19/2020, USC_00003429 to 00003430, was marked for identification.)

BY MR. CHAPMAN:

Q. Let me know if you've seen that document before.

A. Okay. I can see the document.

Q. All right. It says: Dear students, families, faculty and staff. Well, strike that. Let me back up.

This is an e-mail from Bob Caslen and it says to Mark Bieger. And I can't tell if this is a draft or something else, but is it consistent with your recollection that the -- that Mr. Caslen

announced that the University would be shutting down its on-campus operations as of March 19th, 2020?

A. I am aware of this e-mail going out.

Q. All right. Did you -- were you copied on this e-mail or an e-mail similar to it?

A. This e-mail went out to all students, faculty and staff and I believe student families to the extent that they had e-mail addresses.

Q. Understood. And you didn't participate in the decision to shut down campus, did you?

A. No, I did not.

Q. All right. And so as of March, and it says: On-line instruction will begin on Monday, March 23rd, and continue through the completion of final exams in May. Did I read that correctly?

A. Yes, you did.

Q. And that's -- that's what happened, correct?

A. Yes.

Q. And the -- the way that the classes were delivered starting on March 23, that was -- that was different than what -- how the classes were -- were being taught at the beginning of the semester, right?

Message

From: SOBIERALSKI, JOE [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=4B7C250C45534A398E4134D65D87A87C-SOBIERAL_B5]
Sent: 3/12/2020 11:22:15 AM
To: WUCHENICH, CHRIS [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=fb6541bf4ece4189bb5ca69577cff693-CLW]
Subject: FW: Analysis and Bullet Points for President - COVID Financial Impact
Attachments: Covid.Impact.Talking.Points.3.11.2020.pdf; FInancial.Impact.COVID.19.Draft.3.11.20.pdf

Importance: High

Because you asked…. Please to not share as Mark seemed to have an "intended audience."

Joe

From: BIEGER, MARK <MBIEGER@mailbox.sc.edu>
Sent: Wednesday, March 11, 2020 3:40 PM
To: CASLEN, ROBERT <BOBCASLEN@sc.edu>
Cc: BON, SUSAN <BONS@mailbox.sc.edu>; WALTON, ED <WALTONE@mailbox.sc.edu>; SOBIERALSKI, JOE <SOBIERAL@mailbox.sc.edu>; PARHAM, TERRY <TERRY@mailbox.sc.edu>; HARDING JR., TAYLOE HARDING <tharding@mozart.sc.edu>; PRUITT SR, DENNIS <DPRUITT@mailbox.sc.edu>
Subject: FW: Analysis and Bullet Points for President - COVID Financial Impact
Importance: High

Sir

Some great analysis attached, from Ed's Team this am, key points:

• The goals of the "online strategy" is to protect our people, mitigate the spread of the virus and continue to allow the student to progress. Success in this area will also "protect" the tuition/fee revenue stream.

• If refunds of tuition become necessary the results will be severe. If only 10% of students request refunds for a partial semester (the period from March – May), the estimated impact is in excess of $16.3M*.

• Refunds of approximately $7.5M* should be expected related to the decision to modify the class schedule for the next three weeks. This relates specifically to the auxiliary units of Housing ($4.76M), Dining ($2.06M) and Parking ($0.67M).

• It is reasonable to expect an additional refund requirements of $2.5M* per week for each week beyond April 3.

• While State and Federal dollars will be sought to support these refunds, they are not guaranteed, and if granted will undoubtedly lag.

• Central reserves will likely be depleted if auxiliary refunds run through the end of the semester (exceed $20M). If tuition refunds are considered, it will be even sooner.

• It is likely that if the period extends beyond a few weeks the University will be forced to employ budget reductions scenarios. Academic units and administrative units will be impacted.



• There are certain costs related changing schedules that need to be considered that are not currently quantifiable. These include any increased costs related to increased online teaching and teleworking, costs of transportation of students who may return to campus and are then asked to return home, and additional costs if an outbreak is confirmed.

Bottom line: if all students ask for refunds for housing, food and parking for this next 3-week period (the time covered by this morning's decision), it will cost approximately $7.5M. For every week after … another $2.5M.

If students begin to ask for refunds in tuition in large numbers, we will have some serious challenges.

For your review and consideration.

VR
Mark

From: SOBIERALSKI, JOE <SOBIERAL@mailbox.sc.edu>
Sent: Wednesday, March 11, 2020 3:22 PM
To: BIEGER, MARK <MBIEGER@mailbox.sc.edu>
Cc: WALTON, ED <WALTONE@mailbox.sc.edu>; EPTING, KELLY <EPTINGK@mailbox.sc.edu>; PERKINS, JEFF <PERKINJL@mailbox.sc.edu>
Subject: Analysis and Bullet Points for President - COVID Financial Impact
Importance: High

Mark –
Attached are .pdfs of the bullet points for the President.

Let me know if this gets you what you need.

Thanks to all for their efforts in getting this together.

Joe Sobieralski, CMA, CFM, CIA
Assistant Vice President of Administrative Operations and Chief of Staff
Division of Administration and Finance
University of South Carolina
Osborne Administration Building
Columbia, SC 29208
803.576.5631
sobieral@mailbox.sc.edu

U of SC Columbia

Tuition

- The goal of the "online strategy" is to continue to allow the student to progress. Success in this area will also "protect" the tuition/fee revenue stream.

- If refunds of tuition become necessary the results will be severe. **If only 10% of students request refunds for a partial semester (the period from March – May), the estimated impact is in excess of $16.3M*.**

Auxiliary Revenue

- **Refunds of approximately $7.5M* should be expected related to the decision to modify the class schedule for the next three weeks.** This relates specifically to the auxiliary units of Housing ($4.76M), Dining ($2.06M) and Parking ($0.67M).

- It is reasonable to **expect an additional refund requirements of $2.5M* per week** for each week beyond April 3.

Funding for Refunds

- While State and Federal dollars will be sought to support these refunds, they are not guaranteed, and if granted will undoubtedly lag.

- **Central reserves will likely be depleted if auxiliary refunds run through the end of the semester (exceed $20M).** If tuition refunds are considered, it will be even sooner.

- It is likely that if the period extends beyond a few weeks **the University will be forced to employ budget reductions** scenarios. Academic units and administrative units will be impacted.

Cost Considerations

- There are certain costs related changing schedules that need to be considered that are not currently quantifiable. These include any increased costs related to increased online teaching and teleworking, costs of transportation of students who may return to campus and are then asked to return home, and additional costs if an outbreak is confirmed.

**** Best estimate could be higher or lower***

U of SC System Institutions

Tuition

- Just as in Columbia, the goal of the "online strategy" is to continue to allow the student to progress while also "protecting" the tuition/fee revenue stream. System institutions need to be considered is preparation for moving online.

Auxiliary Revenue

- Housing and meal plans will require consideration at each system institution. Parking is less of a concern outside of Columbia.

Funding for Refunds

- Generally system institutions do no have significant reserves.

- It is possible system institutions will look to U of SC Columbia for financial support.

CALCULATION OF POTENTIAL FINANCIAL IMPACTS OF COLUMBIA CAMPUS SHUTDOWN DUE TO COVID-19

This analysis makes assumptions related to potential financial impacts due to a theoretical campus shutdown due to COVID-19. While auxiliary revenue loss and possible expense changes could be impactful, the single most influential financial impact is to tuition and fees. The University's ability to find ways to continue through the semester and earn the balance of the spring and summer revenue will be vital to the continued financial health of the University.

Beginning of Spring Term (Per Bulletin)	1/13/2020
End of Testing for Spring Term (Per Bulletin)	5/6/2020
# of Days in Spring Term	114
# of Weeks in Spring Term	16
Date of Analysis	3/10/2020
End of Testing for Spring Term (Per Bulletin)	5/6/2020
# of Days between Analysis Date and End of Spring Term	57
% of Term	50.0%

SPRING SEMESTER REFUNDS - 100% Impact					
Impact	Full Semester Impact	Partial Semester Impact	Weekly Impact	Daily (w/weekends)	% of Students Impacted (if <100%)
Tuition	(326,578,428)	(163,289,214)	(20,411,152)	(2,864,723)	10%
Housing	(25,390,152)	(12,695,076)	(1,586,884)	(222,721)	10%
Meal Plans	(11,000,000)	(5,500,000)	(687,500)	(96,491)	10%
Parking	(3,588,274)	(1,794,137)	(224,267)	(31,476)	10%
TOTAL	**(366,556,855)**	**(183,278,427)**	**(22,909,803)**	**(3,215,411)**	

SPRING SEMESTER REFUNDS - Mitigated Impact			
Full Semester Impact	Partial Semester Impact	Weekly Impact	Daily (w/weekend)
(32,657,843)	(16,328,921)	(2,041,115)	(286,472)
(2,539,015)	(1,269,508)	(158,688)	(22,272)
(1,100,000)	(550,000)	(68,750)	(9,649)
(358,827)	(179,414)	(22,427)	(3,148)
(36,655,685)	**(18,327,843)**	**(2,290,980)**	**(321,541)**

Possible Refund Impacts [1] Based on Decisions to Date:	100% Impact	Mitigated Impact [2]	Estimated Impact [3]	Estimated Impact Notes:
Extended Spring Break (March 16-22)	(22,909,803)	(2,290,980)	(22,410,073)	(100% tuition reimbursement, 80% reimbursement of others)
Modified Class Delivery - Week 1 (March 23 - 29)	(22,909,803)	(2,290,980)	(4,040,036)	(10% tuition reimbursement, 80% reimbursement for others)
Modified Class Delivery - Week 2 (March 30 - April 3)	(22,909,803)	(2,290,980)	(4,040,036)	(10% tuition reimbursement, 80% reimbursement for others)
TOTAL	**(68,729,410)**	**(6,872,941)**	**(30,490,145)**	

[1]Additional cost related to online courses, teleworking and grant employees are not included here but may be an added impact.
[2] Based on % of Students Impacted Assumption.
[3] Current best estimate, based on assumptions noted to the right.

Definitions/Notes:

"Full Semester Impact" assumes refunds for the entire semester.
"Partial Semester Impact" assumes the portion of semester from the "date of analysis" until the end of the semester is refunded.
"Weekly Impact" is full semester impact divided by 16 weeks.
"Daily Impact" is based on the full semester impact divided by the # of days in the spring term.
"100% Impact" assumes all students receive refunds.
"Mitigated Impact" assumes the number of impacted students is <100% (highlighted in gray box).
Assumes no loss in state appropriations.
Assumes grant related revenue may be delayed, but not lost.
Analysis excludes athletics, bookstore, foundation and system institutions (including schools of medicine).

3/11/2020 3:18 PM

Message

From: Bob Caslen [president@sc.edu]
Sent: 3/19/2020 4:59:05 PM
To: BIEGER, MARK [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49b2fe4527c143d6a1891e6487916719-MBIEGER]
Subject: UofSC COVID-19 Update from President Bob Caslen

Exhibit 30
Mandy Kibler



March 19, 2020

Dear Students, Families, Faculty and Staff,

It is with heavy hearts but firm resolve that in consultation with our senior administration and with guidance from public health experts, we have made the decision to extend remote learning for students through the remainder of the Spring semester. Online instruction will begin on Monday, March 23 and continue through the completion of final exams in May.

Our students and the university's administration are deeply appreciative of the efforts of faculty and staff to adjust to this situation — all of us know it has not been easy and is now even harder.

We also announce to you that the university will follow Governor McMaster's executive order, released this afternoon, which says that only those employees whose presence is necessary in order to maintain continuity of remote educational offerings and to ensure the health and safety of their campuses need report to work. All other employees will continue to work remotely.

In addition, traditional May commencement ceremonies will be postponed. We are committed to and are actively exploring options for rescheduled, in-person ceremonies when it is safe to host them and will be planning experiences for graduates to celebrate their achievements. This change will not impact the degree completion status of those students who were scheduled to graduate in May. All other campus events are canceled through the end of the semester.

We realize that these actions will be deeply disappointing to our students, particularly those of you who are about to graduate and were looking forward to a final semester on campus. This is difficult for you and for your loved ones. It is also difficult for us.

And yet, the decision was clear. The coronavirus presents a serious risk to public health, and we must take these actions in order to best protect our students, faculty and staff. Social distancing is essential to slow the spread of this disease. The nation, and the world, are facing an extraordinary challenge. We believe that it is precisely during such challenging times that we often see the best of each other. We're proud of the entire UofSC family for rising to the occasion with strength, compassion and resiliency.

There will be many questions in the hours and days to come, and we are working as quickly and thoughtfully as possible to answer them. Here's what we know now:

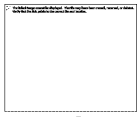
- Students previously granted permission to remain on campus due to extenuating circumstances will be allowed to stay.

- All other students residing in residence halls will have an opportunity to retrieve their belongings at a later date.
- In consultation with Student Health Services and the SC Department of Health and Environmental Control, University Housing is developing a schedule for retrieval and will update students as soon as possible.
- The state's Commission on Higher Education also is coordinating with colleges and universities in order to address housing and other service reimbursements to ensure student investments are protected.

The coronavirus website is updated regularly, so please continue to visit it daily.

Gamecocks, we're in this together. Thank you for your continued patience, support and creativity as we navigate this uncertain time and look forward to being back together on campus in the future.

Forever to Thee,



Bob Caslen, President



Tayloe Harding, Executive Vice-President for Academic Affairs and Provost, Interim

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
DAVIA BUNCH, PETER KELLY, and TERRY KELLY, individually and on behalf of others similarly situated, Plaintiffs, vs. THE UNIVERSITY OF SOUTH CAROLINA, Defendant.	)	Civil Action No. 2020-CP-40-02330 **DEFENDANT'S RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION (SET ONE)**

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Defendant the University of South Carolina ("Defendant") responds to Plaintiffs Davia Bunch, Peter Kelly and Terry Kelly, individually and on behalf of others similarly situated ("Plaintiffs'") First Set of Requests for Admission, dated February 24, 2021, as follows:

RESPONSES TO REQUESTS FOR ADMISSION

1. Admit that PLAINTIFFS paid tuition to DEFENDANT in exchange for on-campus, live classes.

RESPONSE: Defendant admits Plaintiff Davia Bunch made tuition payments to Defendant for the Spring 2020 Semester, mainly through University scholarship and grant funding. Defendant further admits Plaintiffs Peter and Terry Kelly made tuition payments to Defendant for the Spring 2020 Semester. Defendant denies Plaintiffs' tuition payments were "in exchange for on-campus, live classes."

2. Admit that PLAINTIFFS paid certain fees to DEFENDANT for specific on-campus benefits and services.

RESPONSE: Defendant objects to this Request because it seeks admission regarding payment of "certain fees" without any identification of the "certain fees" to which is refers. Subject to and based on this objection, Defendant admits only that Plaintiffs' payments to Defendant for the Spring 2020 Semester included charges for fees related to on-campus

benefits and services. In further responding to this Request, Defendant avers that it provided its students, including, for example, Plaintiff Davia Bunch, with refunds for these fees, including, but not limited to, those associated with parking services. Otherwise, this Request is denied.

3. Admit that, during the 2020 SPRING SEMESTER, DEFENDANT transitioned the classes and education paid for by PLAINTIFFS from an in-person, physical classroom curriculum to a virtual, online, or remote instruction curriculum.

RESPONSE: Defendant objects to this Request because it seeks admission regarding the "education" paid for by Plaintiffs without any explanation of the "education" to which it refers. Subject to and based on this objection, Defendant admits that, during the Spring 2020 Semester, it transitioned all in-person, on-campus classes to virtual instruction, including the in-person, on-campus classes paid for by Plaintiff's tuition payments. Otherwise, this Request is denied.

4. Admit that DEFENDANT offers an online bachelor's degree through Palmetto College that does not include in-person, physical classroom learning.

RESPONSE: Denied.

5. Admit that DEFENDANT charges less tuition to students who enroll in its online bachelor's degree program through Palmetto College than it charges ON CAMPUS STUDENTS.

RESPONSE: Defendant admits only that it charges less tuition to resident and nonresident undergraduate students who enroll at the University of South Carolina Palmetto College than it charges to resident and nonresident undergraduate students, respectively, who enroll at the University of South Carolina Columbia. Otherwise, this Request is denied.

6. Admit that DEFENDANT did not refund any tuition to PLAINTIFFS for the 2020 SPRING SEMESTER after DEFENDANT implemented virtual, online, or remote instruction and transitioned the classes paid for by PLAINTIFFS to same.

RESPONSE: Defendant admits it did not refund tuition payments to Plaintiffs when it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020 Semester. However, Defendant avers that eligible students, including, for example, Plaintiff Davia Bunch, received monetary payment from Defendant that was funded by the CARES Act and paid to students for expenses related to the disruption of campus operations caused by the COVID-19 pandemic.

7. Admit that PLAINTIFFS were required to pay certain mandatory fees for enrollment with DEENDANT [sic] for the 2020 SPRING SEMESTER.

RESPONSE: Defendant objects to this Request because it seeks admission regarding payment of "certain mandatory fees" without any identification of the "certain mandatory fees" to which it refers. Subject to and based on this objection, Defendant admits Plaintiff Davia Bunch was required to pay the mandatory technology fee for enrollment with Defendant for the Spring 2020 Semester. Otherwise, this Request is denied. Defendant specifically denies that Plaintiffs Peter and Terry Kelly were required to pay any fees to Defendant because, for example, they were not enrolled at the University for the Spring 2020 Semester.

8. Admit that DEFENDANT's campus in Columbia, South Carolina was closed during the 2020 SPRING SEMESTER starting on March 11, 2020.

RESPONSE: Denied.

9. Admit that after the closure of DEFENDANT's campus in Columbia, South Carolina, ON CAMPUS STUDENTS were not permitted to access to DEFENDANT's on-campus services or facilities.

RESPONSE: Defendant admits only that after Governor McMaster's executive orders directed the closure of all state-supported universities, Defendant closed all system institutions to everyone except those with extenuating circumstances. Otherwise, this Request is denied

10. Admit that after the closure of DEFENDANT's campus in Columbia, all DEFENDANT's in-person events, meetings and travel were canceled.

RESPONSE: Denied.

11. Admit that, after the closure of DEFENDANT's campus in Columbia, all face-to-face or in-person instruction in lectures, discussion sections, labs, seminars and other similar classroom settings were cancelled.

RESPONSE: Defendant admits only that it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020 Semester. Otherwise, this Request is denied.

12. Admit that DEFENDANT did not refund, in whole or in part, the mandatory fees paid by PLAINTIFFS for the SPRING 2020 SEMESTER.

RESPONSE: Defendant objects to this Request because it seeks admission regarding refunding "mandatory fees" without any identification of the "mandatory fees" to which it refers. Subject to and based on this objection, Defendant admits only that it did not refund the mandatory technology fee payments to Plaintiffs when it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020 Semester. However, Defendant avers that eligible students, including, for example, Plaintiff Davia Bunch, received monetary payment from Defendant that was funded by the CARES Act and paid to students for expenses related to the disruption of campus operations caused by the COVID-19 pandemic. Otherwise, this Request is denied.

13. Admit that DEFENDANT did not refund, in whole or in part, the mandatory fees paid by the FEES CLASS for the SPRING 2020 SEMESTER.

RESPONSE: Defendant objects to this Request because it seeks admission regarding refunding "mandatory fees" without any identification of the "mandatory fees" to which it refers. Subject to and based on this objection, and subject to Defendant's challenges and objections to the definition and legality of the purported class and reserving all rights, challenges, and objections as to class certification, Defendant admits only that it did not refund the mandatory technology fee when it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020 Semester. However, Defendant avers that eligible students received monetary payment from Defendant that was funded by the CARES Act and paid to students for expenses related to the disruption of campus operations caused by the COVID-19 pandemic. Otherwise, this Request is denied.

14. Admit that DEFENDANT did not refund the technology fee paid by Plaintiff, Davia Bunch, for the SPRING 2020 SEMESTER.

RESPONSE: Admitted. However, Defendant avers that eligible students, including, for example, Plaintiff Davia Bunch, received monetary payment from Defendant that was funded by the CARES Act and paid to students for expenses related to the disruption of campus operations caused by the COVID-19 pandemic.

15. Admit that DEFENDANT did not refund the technology fee paid by the FEES CLASS for the SPRING 2020 SEMESTER.

RESPONSE: Subject to Defendant's challenges and objections to the definition and legality of the purported class and reserving all rights, challenges, and objections as to class certification, Defendant admits it did not refund the mandatory technology fee when it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020

Semester. However, Defendant further avers that eligible students received from Defendant funding through the CARES Act related to the disruption of campus operations caused by the COVID-19 pandemic.

16. Admit that DEENDANT [sic] did refund any portion of the tuition paid by PLAINTIFFS for the SPRING 2020 SEMESTER.

RESPONSE: Defendant admits it did not refund tuition payments to Plaintiffs when it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020 Semester. Defendant further avers that eligible students, including, for example, Plaintiff Davia Bunch, received from Defendant funding through the CARES Act related to the disruption of campus operations caused by the COVID-19 pandemic.

17. Admit that DEENDANT [sic] did refund any portion of the tuition paid by the TUITION CLASS for the SPRING 2020 SEMESTER.

RESPONSE: Subject to Defendant's challenges and objections to the definition and legality of the purported class and reserving all rights, challenges, and objections as to class certification, Defendant admits it did not refund tuition payments when it transitioned all in-person, on-campus classes to virtual instruction during the Spring 2020 Semester. However, Defendant avers that eligible students received monetary payment from Defendant that was funded by the CARES Act and paid to students for expenses related to the disruption of campus operations caused by the COVID-19 pandemic.

18. Admit that the TUITION CLASS meets the numerosity requirement of SRCP 23(a)(1).

RESPONSE: Defendant objects to this Request because Plaintiffs bear the burden of proving all elements of class certification, including numerosity, and Plaintiffs cannot shift this burden, nor the cost of this burden, to Defendant through a Rule 36 request for admission. Subject to this objection, Defendant responds as follows. Defendant denies the Request on the grounds that this case is not suitable for class certification and the TUITION CLASS, as defined by Plaintiff, includes individuals who lack standing or are otherwise precluded from obtaining any relief and, therefore, should not be included in a numerosity evaluation; otherwise, Defendant admits the number of students who paid tuition for the Spring 2020 Semester (or for whom tuition was paid for the Spring 2020 Semester) and received virtual instruction in place of in-person, on campus instruction exceeds 1,000.

19. Admit that the TUITION CLASS meets the commonality requirement of SRCP 23(a)(2).

RESPONSE: Denied.

20. Admit that the TUITION CLASS meets the amount in controversy requirement of SRCP 23(a)(5).

RESPONSE: Defendant objects to this Request because Plaintiffs bear the burden of proving all elements of class certification, including the requisite amounts in controversy, and Plaintiffs cannot shift this burden, nor the cost of this burden, to Defendant through a Rule 36 request for admission. Subject to this objection, Defendant responds as follows. Defendant denies the Request on the grounds that this case is not suitable for class certification and the TUITION CLASS, as defined by Plaintiff, includes individuals who lack standing or are otherwise precluded from obtaining any relief and, therefore, have *no* amount in controversy. Furthermore, for those individual members of the putative class that may have standing and are otherwise not precluded from obtaining relief, the information known or readily obtainable by Defendant is insufficient to enable it to admit or deny this request after reasonable inquiry.

21. Admit that the FEES CLASS meets the numerosity requirement of SRCP 23(a)(1).

RESPONSE: Defendant objects to this Request because Plaintiffs bear the burden of proving all elements of class certification, including numerosity, and Plaintiffs cannot shift this burden, nor the cost of this burden, to Defendant through a Rule 36 request for admission. Subject to this objection, Defendant responds as follows. Defendant denies the Request on the grounds that this case is not suitable for class certification and the FEES CLASS, as defined by Plaintiff, includes individuals who lack standing or are otherwise precluded from obtaining any relief and, therefore, should not be included in a numerosity evaluation; otherwise, Defendant admits that the number of people who paid fees to Defendant for or on behalf of students enrolled in classes with Defendant for the Spring 2020 Semester—some of which were fees for on-campus benefits or services, some of which were not fees for on-campus benefits or services, some of which were refunded, and some of which were not refunded—exceeds 1,000.

22. Admit that the FEES CLASS meets the commonality requirement of SRCP 23(a)(2).

RESPONSE: Denied.

23. Admit that the FEES CLASS meets the amount in controversy requirement of SRCP 23(a)(5).

RESPONSE: Defendant objects to this Request because Plaintiffs bear the burden of proving all elements of class certification, including the amounts in controversy, and Plaintiffs cannot shift this burden, nor the cost of this burden, to Defendant through a Rule 36 request for admission. Subject to this objection, Defendant responds as follows. Defendant denies the Request on the grounds that this case is not suitable for class certification and, upon information and belief, the purported FEES CLASS, as defined by Plaintiffs, includes individuals, for example, Plaintiff Davia Bunch, who received a refund for fees paid in exchange for on-campus benefits or services that were not provided and, therefore, have no amount in controversy.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ ROBERT H. BRUNSON

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Attorneys for The University of South Carolina

Charleston, South Carolina

April 6, 2021

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, The University of South Carolina, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by emailing and mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

DEFENDANT'S RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION (SET ONE)

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Administrative Assistant

April 6, 2021

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAVIA BUNCH and CASEY KELLY,
individually and on behalf of others
similarly situated,
Plaintiffs,
vs. Civil Action No. 2020-CP-40-02330
THE UNIVERSITY OF SOUTH CAROLINA,
Defendant.

VIDEOTAPED WEB CONFERENCE
30(b)(6)
DEPOSITION OF: THE UNIVERSITY OF SOUTH CAROLINA'S REPRESENTATIVE KELLY MORGAN EPTING and KELLY MORGAN EPTING INDIVIDUALLY
DATE: Thursday, October 27, 2022
TIME: 9:40 a.m.
TIME ENDED: 12:32 p.m.
LOCATION: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina

REPORTED BY: YVONNE R. THURSTON-BOHANNON
Registered Merit Reporter,
Certified Realtime Reporter

current, which are more operating related, and then noncurrent funds. And so you're seeing a breakout of that item that has the garnet box around it.

Q. All right. And so the -- the current funds means that's -- let's go down to the bottom of page six of Exhibit 60.

So that would mean that -- and correct me if I'm wrong, but the $58,432,000 approximately would have been the amount of cash -- or not cash, but funds on hand to -- to pay for current expenses; is that right or is that the overage?

A. That is the -- you -- another term for it would be net income.

Q. Okay. All right. And so that was as of June 30th of 2020?

A. Correct.

Q. All right. So the university was in the black on current funds by approximately -- or the university's system was in the black by approximately 58 million dollars at the end of fiscal year 2020; is that right?

A. Correct.

Q. And so if you look at the next slide, and page seven of Exhibit 60 says for 2020 that the actual amount of revenue exceeded the budget by --

FY2020 Year-End Budget to Actual Information

Presented to Finance and Infrastructure Committee
November 13, 2020

UNIVERSITY OF South Carolina

Exhibit
0060
Kibler 30(b)(6)

Operating Budget Summary

FY2020

- The University ended FY2020 in a strong financial position. System revenues exceeded budget and prior year, netting $27.6 million to its fund margin.
- COVID impacts, including issuance of refunds for partial-term housing, meal, parking, and athletic tickets and COVID expenditures, were mitigated with cost containments.

FY2021, 1st Quarter - Columbia

- Approved Budget reflected a reduction in tuition and fees of 13% ($39 million) by reducing support unit expense budgets by 10% and academic unit budgets by 5%.
- Units actively continue to adjust to budget reductions with cost cutting, personnel reductions, etc.
- At the end of the first quarter, Fall term actuals were better than anticipated, resulting in tuition and fee reductions of only 2.2% ($8.1 million) from the prior year.
- The University continues to operate under approved budget. To identify systemic cost restructuring, the University has stood up a Cost Savings and University Transformation structure.

UNIVERSITY OF South Carolina

Current Funds and Noncurrent Funds

Total Current Funds – Economic resources supporting the general operations of the University in carrying out its primary mission.

- Restricted Funds – Limitations or stipulations
  - Derived from gifts, grants, and contracts.
  - Used predominantly for research and student scholarship activities.

- Unrestricted Funds – No limitations or stipulations (other than those set by State procurement, mission and University policies and procedures)
  - Derived from state appropriations, student fees, institutional revenues, and auxiliary operations.
  - Used for educational and general operations.

Noncurrent Funds – Not available to support general obligations. These resources include student loan, institutional loan, endowment, unexpended plant, debt service and fixed asset funds.

UNIVERSITY OF South Carolina

Financial Statements and Budget

Current + Noncurrent Funds = Financial Statement reporting

- Based on Generally Accepted Accounting Principles (GAAP); subject to audit.
- Main users: rating agencies, financial institutions, regulatory bodies and executive leadership.

Current Funds = Budget reporting

- Operationally driven; subject to internal governance and approvals.
- Main users: institutional leaders (e.g. Board of Trustees, Deans, Directors, Executive leadership) and certain regulatory bodies.

UNIVERSITY OF South Carolina

FY20 Total Funds for System

(000's)

	Revenue	Direct Expenses	Expense Reimb/ Transfers	Margin (Change in Fund Balance)
Budget Presentation				
Current Funds	$ 1,753,908	($ 1,733,458)	$ 37,983	$ 58,432
Noncurrent Funds	103,714	(186,702)	52,128	(30,860)
USC System - Total Funds	**$ 1,857,622**	**($ 1,920,160)**	**$ 90,110**	**$ 27,572**
Annual financial statement adjustments:				
Scholarships reclassed to contra-revenue	(353,913)	353,913	-	-
Indirect cost recovery/Interest on capital reclassifications	(25,021)	25,021	-	-
Intra-University expense reimbursements removed	-	90,110	(90,110)	-
Other presentation items moved to revenue	(178)	178	-	-
Consolidated Annual Financial Report	**$ 1,478,510**	**($ 1,450,938)**	**-**	**$ 27,572**

UNIVERSITY OF South Carolina

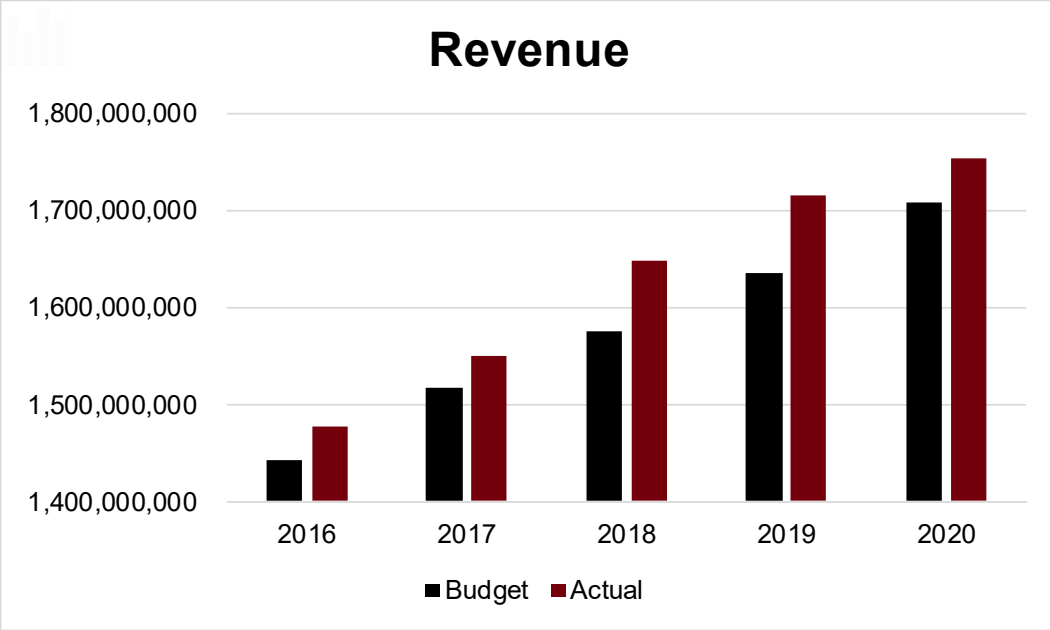
Total Current Funds by System Institution

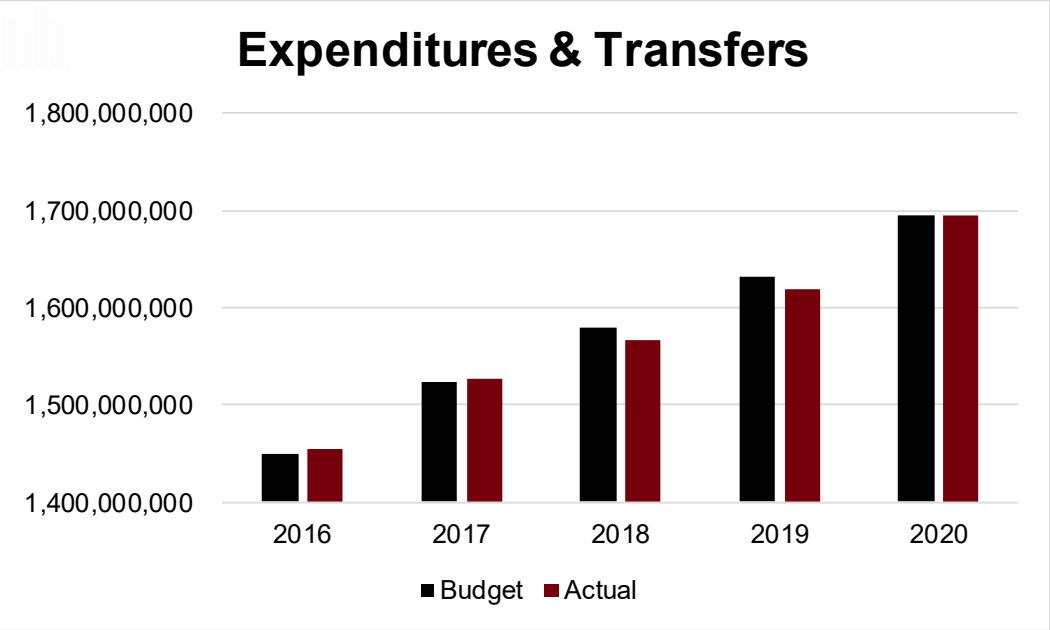
(000'S)

	Revenue	Direct Expenses	Expense Reimb/ Transfers	Margin (Change in Fund Balance)
Flagship:				
USC Columbia	$ 1,348,346	($ 1,338,308)	$ 40,764	$ 50,803
Schools of Medicine:				
School of Medicine – Columbia	90,288	(89,129)	1,721	2,880
School of Medicine – Greenville	25,695	(24,223)	58	1,530
Comprehensive Universities:				
USC Aiken	70,176	(69,758)	(2,296)	(1,878)
USC Beaufort	43,921	(42,903)	476	1,493
USC Upstate	117,341	(112,341)	(2,084)	2,916
Palmetto Regional Colleges:				
USC Lancaster	19,464	(18,669)	69	864
USC Salkehatchie	11,992	(12,179)	103	(83)
USC Sumter	16,389	(15,667)	(1,029)	(307)
USC Union	10,295	(10,281)	200	215
USC SYSTEM TOTAL	**$ 1,753,908**	**($ 1,733,458)**	**$ 37,983**	**$ 58,432**

Total Current Funds do not include noncurrent funds such as loan activity, endowment activity, capital project, debt service, fixed asset activity and financial statement activity. Noncurrent funds are included in the annual Comprehensive Annual Financial Report (CAFR).

USC System - Budget To Actual Variance





Activity includes all current fund types. Expenditures over budget can occur if prior year carryforward balance is expended on one-time expenses or if new restricted grant awards are expended.

UNIVERSITY OF South Carolina

FY20 Total Current Funds Columbia

(000's)

	Budget Allocations/ Revenue	Direct Expenses	Expense Reimb/ Transfers	Margin (Change in Fund Balance)
USC Columbia – Academic Units:				
Arts & Sciences	$ 154,110	($ 156,563)	$ 6,797	$ 4,344
Education	30,179	(34,786)	2,206	(2,401)
Engineering & Computing	60,989	(70,134)	5,695	(3,450)
Hospitality, Retail and Sports Mgmt	17,451	(16,865)	(60)	526
Law	23,995	(23,593)	151	553
Information & Communication	13,247	(13,664)	246	(171)
Darla Moore School of Business	58,935	(60,290)	400	(955)
Nursing	18,826	(16,715)	378	2,489
Pharmacy	19,450	(20,985)	589	(947)
Arnold School of Public Health	61,864	(64,479)	3,719	1,104
Music	10,484	(11,152)	862	194
Social Work	21,379	(23,009)	649	(981)
Academic Unit Total	**$ 490,908**	**($ 512,236)**	**$ 21,632**	**$ 304**

Instances with negative margins primarily are planned uses of fund balance. In circumstances where the use of fund balance was larger than planned, units are engaged actively by the Provost and Budget Office for action plans.

FY20 Total Current Funds Columbia

(000's)

	Budget Allocations/ Revenue	Direct Expenses	Expense Reimb/ Transfers	Margin (Change in Fund Balance)
USC Columbia – Auxiliary Units:				
Athletics	$ 123,994	($ 117,479)	($ 10,598)	($ 4,083)
Student Health	16,975	(16,680)	(633)	(338)
Housing	45,558	(39,806)	(8,300)	(2,548)
Parking Services	9,071	(10,217)	1,096	(50)
Auxiliary Unit Total	**$ 195,598**	**($ 184,181)**	**($ 18,435)**	**($ 7,018)**

Total Current Funds do not include noncurrent funds such as loan activity, endowment activity, capital project, debt service, fixed asset activity and financial statement activity. Noncurrent funds are included in the annual Comprehensive Annual Financial Report (CAFR).

FY20 Total Current Funds Columbia

(000's)

	Budget Allocations/ Revenue	Direct Expenses	Expense Reimb/ Transfers	Margin (Change in Fund Balance)
USC Columbia – Support Unit Cost Pools:				
Academic Affairs	$ 36,319	($ 31,721)	($ 5,324)	($ 727)
Honors College	6,005	(5,944)	64	125
Academic Access/Degree Completion	12,680	(9,307)	(2,334)	1,039
Enrollment & Scholarships	155,500	(161,827)	7,495	1,168
Executive Affairs	7,000	(9,965)	294	(2,671)
Information Technology	33,015	(53,562)	16,779	(3,769)
Library	22,740	(22,854)	80	(33)
Facilities	51,030	(66,735)	18,127	2,422
Research	10,240	(13,279)	1,549	(1,491)
Academic Support/Student Services	29,533	(30,581)	2,296	1,248
Central Services & Administration (Development, HR, Finance, Safety, etc.)	294,995	(233,177)	(1,459)	60,359
Support Unit Total	**$ 659,056**	**($ 638,953)**	**$ 37,567**	**$ 57,670**

Total Current Funds do not include noncurrent funds such as loan activity, endowment activity, capital project, debt service, fixed asset activity and financial statement activity. Noncurrent funds are included in the annual Comprehensive Annual Financial Report (CAFR).

FY20 Total Current Funds Columbia

(000's)

	Budget Allocations/ Revenue	Direct Expenses	Expense Reimb/ Transfers	Margin (Change in Fund Balance)
USC Columbia				
Academic Unit Total	$ 490,908	($ 512,236)	$ 21,632	$ 304
Auxiliary Unit Total	195,598	(184,181)	(18,435)	(7,018)
Support Unit Total	659,056	(638,953)	37,567	57,670
Pass-Through Unit: Small Business Development Center	2,785	(2,938)	0	(153)
Auxiliary Unit Total	**$ 1,348,346**	**($ 1,338,308)**	**$ 40,764**	**$ 50,803**

Total Current Funds do not include noncurrent funds such as loan activity, endowment activity, capital project, debt service, fixed asset activity and financial statement activity. Noncurrent funds are included in the annual Comprehensive Annual Financial Report (CAFR).

FY20 Total Actual Current Funds Columbia

Analysis of Year-End Margin (Change in Fund Balance)

(000's)

Academic Units:		
Year-end margin net contributions (12 colleges)		$ 304
Auxiliary Units:		
Athletics – Reduced revenues partially offset by expenditure cutting measures	($ 4,083)	
Housing – Refunds (Spring semester) partially offset by expenditure cutting measures	($ 2,548)	
Other – Use of reserves (Parking, Student Health)	($ 387)	($ 7,018)
Support Units:		
Central Services – Excellence/Efficiency Initiatives	$ 41,536	
Central Services – Fall and Spring tuition variance; pending Summer tuition transfers	$ 10,713	
Central Services – Planned increase of reserves (debt service, capital project, etc.)	$ 7,025	
Central Services – Financial statement accruals/reversals (restricted funds)	$ 3,921	
Central Services – Dining commissions and reserves for food service projects	$ 2,135	
Central Services – BMF's held in escrow (student union, student recreation, law school)	$ 1,794	
Central Services – COVID expenses (non-recurring)	($ 7,850)	
Central Services – Other central support net contribution (13 units)	$ 1,084	
Information Technology – PeopleSoft HCM stabilization, Heliocampus Phase 1, network costs, etc.	($ 3,769)	
Other support – Year-end margin net contribution (29 units)	$ 1,080	$ 57,670
Small Business Development Center		($ 153)
COLUMBIA CURRENT FUNDS CONTRIBUTION TO MARGIN TOTAL		**$ 50,803**

Excellence and Efficiency Initiative Balances

Excellence Initiative				
	Source	Use	Annual Balance	Cumulative Balance
FY18 Funding	$17,000,000	--	$ 17,000,000	$ 17,000,000
FY19 Funding	17,000,000	$ (4,902,000)	12,098,000	29,098,000
FY20 Funding	17,000,000	(4,342,000)	12,658,000	41,756,000
FY21 Funding (Budget)	17,000,000	(4,330,000)	12,670,000	**54,426,000**

Efficiency Initiative				
	Source	Use	Annual Balance	Cumulative Balance
FY20 - Recurring	$27,093,124	--	$27,093,124	27,093,124
FY20 - Nonrecurring	2,450,000	(665,265)	1,784,735	28,877,859
FY21 – Funding (Budget)	27,093,124	(38,569,450)	(11,476,326)	**17,401,533**

UNIVERSITY OF South Carolina

FY2021 Budget to Actual Update September 30, 2020

UNIVERSITY OF South Carolina

Budget Model

FY21 Budget

Direct Revenue:
- Academic Fees
- Summer Tuition
- Grants & Contracts
- Historical indirect cost recovery [IDC] split (37.5%) related to grants
- Sales & services and other revenue

Applied Revenue:
- Fall/Spring Tuition (based on 70/30 methodology)
- State Appropriations (based on 70/30 methodology)
- Direct State Appropriations
- Remaining IDC (62.5%)

	A	*B*	*C=A+B*	*D*	*E= C+D*
Unit	**Revenue (Direct & Applied)**	**Expense (Direct)**	**Margin Prior to Model Allocations**	**Model Allocations & Indirect Expense**	**Margin after "Internal Rebalancing"**
Arts & Sciences	240,202,809	(146,790,763)	93,412,046	(93,134,045)	278,001
Education	31,136,977	(25,661,015)	5,475,962	(5,416,923)	59,039
Engineering & Computing	90,336,076	(62,479,325)	27,856,751	(27,735,291)	121,460
Hospitality, Retail and Sports Management	37,857,005	(14,432,801)	23,424,204	(23,403,004)	21,200
Law	27,810,665	(23,860,065)	3,950,600	(3,950,600)	-
Information & Communication	26,128,259	(12,568,291)	13,559,968	(13,559,968)	-
Darla Moore School of Business	91,996,493	(55,903,417)	36,093,076	(35,901,051)	192,025
Nursing	25,024,375	(15,438,833)	9,585,542	(9,399,542)	186,000
Pharmacy	25,728,520	(17,217,374)	8,511,146	(8,548,197)	(37,051)
Arnold School of Public Health	82,951,759	(58,850,368)	24,101,391	(24,101,391)	-
Music	7,669,334	(9,600,646)	(1,931,312)	1,517,988	(413,324)
Social Work	29,592,967	(21,127,899)	8,465,068	(8,498,709)	(33,641)
Academic Unit Total	**716,435,239**	**(463,930,797)**	**252,504,442**	**(252,130,733)**	**373,709**
Athletics	127,136,400	(125,670,400)	1,466,000	-	1,466,000
Student Health	15,866,958	(15,807,410)	59,548	-	59,548
Housing	48,523,104	(48,523,104)	-	-	-
Parking	5,466,214	(5,685,509)	(219,295)	-	(219,295)
Auxiliary Unit Total	**196,992,676**	**(195,686,423)**	**1,306,253**	**-**	**1,306,253**
Support Unit Total	**318,003,862**	**(570,498,659)**	**(252,494,797)**	**252,130,733**	**(364,064)**
Pass-Through Unit Total	**2,062,386**	**(1,975,386)**	**87,000**	**-**	**87,000**
Current Funds Total	**1,233,494,163**	**(1,232,091,265)**	**1,402,898**	**-**	**1,402,898**

Direct Expense:
- Operating expenses
- Expense recoveries
- Net transfers

Indirect Expense:
- Costs related to administrative/support units allocated to academic units

Model Allocations:
- Participation fee (tax)
- Legacy model adjustment (HRSM)
- Subvention (balancing funds for units whose revenue do not fully cover expenses.)

Budget Model

FY21 Actuals (through 9/30/20)

Direct Revenue:
- Academic Fees
- Summer Tuition
- Grants & Contracts
- Historical indirect cost recovery [IDC] split (37.5%) related to grants
- Sales & services and other revenue

Applied Revenue:
- Fall/Spring Tuition (based on 70/30 methodology)*
- State Appropriations (based on 70/30 methodology)*
- Direct State Appropriations
- Remaining IDC (62.5%)

*Included as estimates – entries occurred in October.

	A	*B*	*C=A+B*	*D*	*E= C+D*
Unit	**Revenue (Direct & Applied)**	**Expense (Direct)**	**Margin Prior to Model Allocations**	**Model Allocations & Indirect Expense**	**Margin after "Internal Rebalancing"**
Arts & Sciences	137,588,352	(31,523,789)	106,064,563	(23,283,511)	82,781,052
Education	18,971,256	(7,732,353)	11,238,903	(1,354,231)	9,884,672
Engineering & Computing	48,415,789	(14,785,593)	33,630,196	(6,933,823)	26,696,373
Hospitality, Retail and Sports Management	22,590,446	(3,019,301)	19,571,145	(5,850,751)	13,720,394
Law	14,280,778	(5,337,642)	8,943,135	(987,650)	7,955,485
Information & Communication	16,230,752	(2,533,181)	13,697,571	(3,389,992)	10,307,579
Darla Moore School of Business	54,971,147	(13,322,943)	41,648,205	(8,975,263)	32,672,942
Nursing	14,941,528	(3,861,610)	11,079,918	(2,349,885)	8,730,033
Pharmacy	14,888,590	(5,174,771)	9,713,818	(2,137,049)	7,576,769
Arnold School of Public Health	40,218,828	(13,323,787)	26,895,041	(6,025,348)	20,869,693
Music	6,563,190	(2,243,674)	4,319,516	379,497	4,699,013
Social Work	11,239,223	(5,569,756)	5,669,467	(2,124,677)	3,544,790
Academic Unit Total	**400,899,879**	**(108,428,400)**	**292,471,479**	**(63,032,683)**	**229,438,796**
Athletics	17,198,502	(22,708,255)	(5,509,753)	-	(5,509,753)
Student Health	5,545,394	(3,791,619)	1,753,775	-	1,753,775
Housing	24,626,861	(12,863,003)	11,763,859	-	11,763,859
Parking	2,914,240	(1,868,016)	1,046,224	-	1,046,224
Auxiliary Unit Total	**50,284,997**	**(41,230,893)**	**9,054,105**	**-**	**9,054,105**
Support Unit Total	**130,308,385**	**(211,325,756)**	**(81,017,371)**	**63,032,683**	**(17,984,688)**
Pass-Through Unit Total	**1,160,813**	**(791,769)**	**369,044**	**-**	**369,044**
Current Funds Total	**582,654,073**	**(361,776,818)**	**220,877,256**	**-**	**220,877,256**

Direct Expense:
- Operating expenses
- Expense recoveries
- Net transfers

Indirect Expense:
- Costs related to administrative/support units allocated to academic units

Model Allocations:
- Participation fee (tax)
- Legacy model adjustment (HRSM)
- Subvention (balancing funds for units whose revenue do not fully cover expenses.)

Budget Model

Comparison of FY21 Budget to Actuals (through 9/30/20)

Academic Units

Revenue Benchmarks As of 9/30:

Total Revenue
50-55% of budget collected

Based on the historical collection rates:

- 50% of Tuition
- 100% of Appropriations
- *25-30% of Grants, Contracts and Gifts (including IDC)*
- *25-30% of Sales, Services and Other*

Expense Benchmarks As of 9/30:

Total Expense
25.0% of budget expended
(1/4 of year)

Unit	Revenue (Direct & Applied)	Expense (Direct)	Notes
Arts & Sciences	57%	21%	Revenue/Expense meets or exceeds expectations.
Education	61%	30%	Revenue meets or exceeds expectations. Expense is 30% of budget due to increased grant/restricted fund activity. Unrestricted fund expenses are 22% of budget and therefore meet expectations.
Engineering & Computing	54%	24%	Revenue/Expense meets or exceeds expectations.
Hospitality, Retail and Sports Management	60%	21%	Revenue/Expense meets or exceeds expectations.
Law	51%	22%	Revenue/Expense meets or exceeds expectations.
Information & Communication	62%	20%	Revenue/Expense meets or exceeds expectations.
Darla Moore School of Business	60%	24%	Revenue/Expense meets or exceeds expectations.
Nursing	60%	25%	Revenue/Expense meets or exceeds expectations.
Pharmacy	58%	30%	Revenue meets or exceeds expectations. Expense is 30% of budget partially due to increased grant/restricted fund activity. Unrestricted fund expenses are 28% of budget due to an increase in personnel expense related to increased hiring to meet accreditation requirements.
Arnold School of Public Health	48%	23%	Revenue is 48% of budget due to the timing of grant/restricted fund activity. Unrestricted revenues are 68% of budget and therefore meet expectations. Expense meets or exceeds expectations.
Music	86%	23%	Revenue/Expense meets or exceeds expectations.
Social Work	38%	26%	Revenue is 38% of budget due to the timing of grant/restricted fund activity. Unrestricted revenues are 70% of budget and therefore meet expectations. Expense is 26% of budget due to increased grant/restricted fund activity. Unrestricted fund expenses are 23% of budget and therefore meet expectations.
Academic Unit Total	56%	23%	See comments above

Budget Model

Comparison of FY21 Budget to Actuals (through 9/30/20)

Auxiliary Units

Revenue Expectations As of 9/30:

Total Revenue

Based on the following historical collection rates:

- Athletics – 25-29%
- Stud. Health – 38-39%
- Housing – 50-54%
- Parking – 45-49%

Expense Expectations As of 9/30:

Total Expense

Based on the following historical spending rates:

- Athletics – 25%
- Stud. Health – 25%
- Housing – 25%
- Parking – 25%

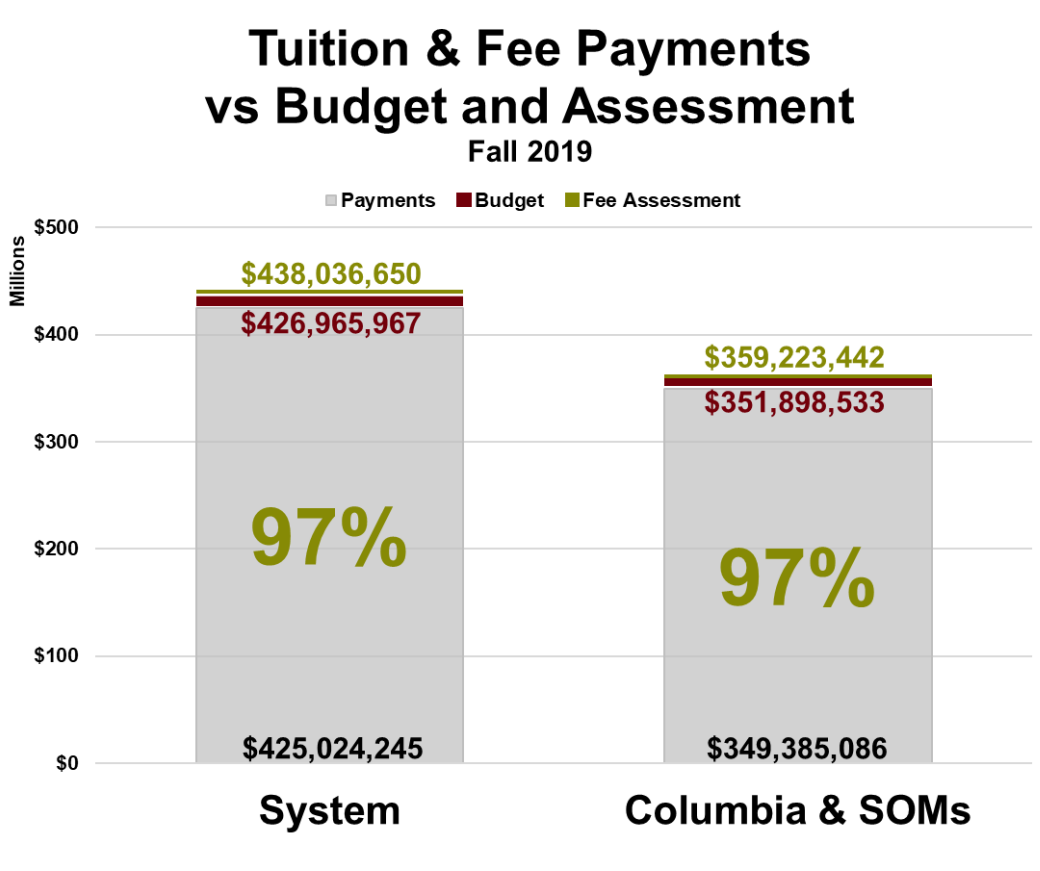
Unit	Revenue (Direct & Indirect)	Expense (Direct)	Notes
Athletics	14%	18%	Revenue is 14% of budget due to Fall revenue reductions related to COVID. Expense meets or exceeds expectations.
Student Health	35%	24%	Revenue is 35% of budget due to a first quarter decline in Student Health Services fee-for-service revenue (e.g. Lab, Allergy, Immunizations and Travel (AIT), Pharmacy). Expense meets or exceeds expectations.
Housing	51%	27%	Revenue meets or exceeds expectations. Expense is 27% of original budget due to additional contracted services for cleaning/dorm preparation, PPE supplies, and insurance charged annually at beginning of year. Additionally, occupancy rates are higher than original expectations leading to increased revenues and costs.
Parking	53%	33%	Revenue meets or exceeds expectations. Expense is 33% of budget budget primarily due to the timing of revenues/costs related to new transportation contract. Significant annual costs (i.e. insurance) were paid in July, while revenues are billed to departments monthly. Parking has also incurred additional COVID costs.
Auxiliary Unit Total	26%	21%	See comments above
Support Unit Total	41%	37%	Revenue/Expense meets or exceeds expectations.
Pass-Through Unit Total	56%	40%	Revenue/Expense meets or exceeds expectations.
Current Funds Total	47%	29%	See comments above

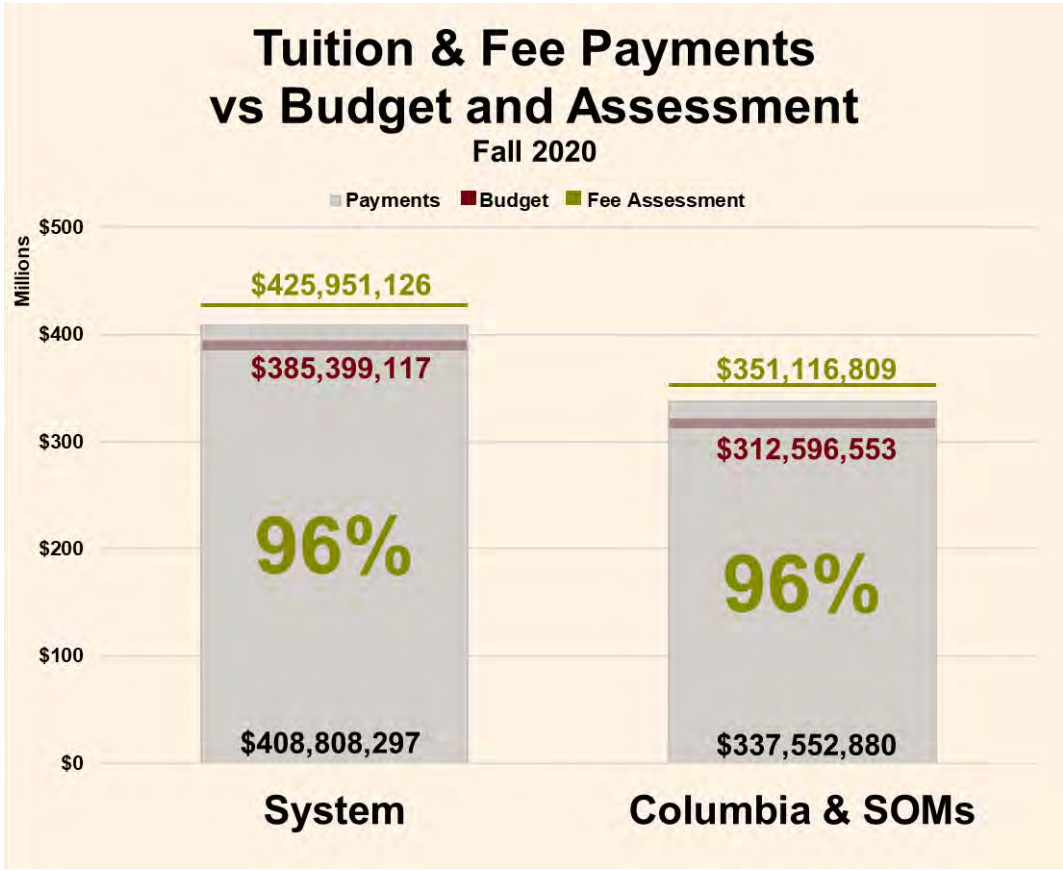
COVID IMPACTS FY2020 AND 2021
COLUMBIA

Impacts	Estimated Total	COVID Expenses thru 10/31	COVID Expenses Remaining
PPE & Health and Safety	$ (14,535,224)	$ (10,083,752)	$ (4,451,472)
IT and Distance Learning	(6,258,750)	(5,568,757)	(689,993)
Academics and Support	(14,758,990)	(2,871,122)	(11,887,868)
Total nonrecurring expenses	**$ (35,552,964)**	**$ (18,523,630)**	**$ (17,029,334)**
Adjustment for additional testing, see SC CARES support below *	(8,000,000)	(452,000)	(7,548,000)
Total nonrecurring expenses, adjusted	**$ (43,552,964)**	**$ (18,975,630)**	**$ (24,577,334)**
Other impacts - reconciliation to state report			
Columbia Spring 2020 reimbursements	$ (18,085,047)	$ (18,085,047)	-
Student emergency grants, Spring 2020	(10,707,565)	(10,707,565)	-
Total nonrecurring expenses and refunds/payments	**$ (72,345,576)**	**$ (47,768,242)**	**$ (24,577,334)**
Other system institution impacts	(18,326,327)	(14,707,007)	(3,619,320)
Reporting totals	**$ (90,671,903)**	**$ (62,475,249)**	**$ (28,196,654)**

Strategy to Address Impacts	
Federal HEER CARES for students	$ 10,707,565
Federal HEER CARES for University	10,707,565
FEMA	200,000
SC CARES - Phase I estimate	11,662,147
SC CARES - Phase II estimate	16,410,150
SC CARES Testing and Tracing Funding estimate *	9,046,980
State COVID Response Reserve - Testing and Tracing estimate *	3,367,300
University Carryforward (reserves)	43,703,922
Total available to Address Impacts	**$ 105,805,629**

Tuition and Fees





As of October 26, 2020

Notes:

- As of 10/26/20, Columbia has payment plans totaling $8.4M for an additional 2.4% paid ($10.6M, 2.5% for the System).
- An additional $1.6M in outstanding receivables has not committed to a payment plan for Columbia ($3.4M for the System). This population contains students with partial payments.

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
COUNTY OF RICHLAND
DAVIA BUNCH, PETER KELLY, TERRY KELLY, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs. Case No. 2020-CP-40-02330

THE UNIVERSITY OF SOUTH CAROLINA,

Defendant.

VIDEOTAPED
DEPOSITION OF: SANDRA J. KELLY, PhD

DATE: July 27, 2022

TIME: 11:20 AM

LOCATION: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC

REPORTED BY: Sandra K. Bjerke, RDR, CRR, CBC
(Appearing via Zoom)

Message

From: PRESSLEY, NICOLE [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=52837469A2874C6EB3CDB12254455987-KRISTIEP]
Sent: 8/14/2020 10:00:17 AM
To: KELLY, SANDRA [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5bb449e4c1bd4845837050261f15cc02-SJKELLY]; TATE, WILLIAM [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=03f0674c89454974a0e7c8f94661fbdd-WTATE]; PROVOST, OFFICE OF [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=71ed67c7605047449bc2b4f443a951d8-PROVOST]
Subject: RE: Student fees associated with labs that student will not be attending in person

Thanks Dr. Kelly,

I appreciate your willingness to always help us understand what's happening on the academic side of the world.

Nicole

From: KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Sent: Friday, August 14, 2020 9:59 AM
To: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>; TATE, WILLIAM <WTATE@sc.edu>; PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu>
Subject: RE: Student fees associated with labs that student will not be attending in person

Thanks Nicole. Yes, the online labs will have a f2f component that is not required and I will have specifics about that. I will be sure to let you know so you can have the explanation for your team's information. Best, Sandra

---

From: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>
Sent: Friday, August 14, 2020 9:55 AM
To: KELLY, SANDRA <SANDRA-KELLY@sc.edu>; TATE, WILLIAM <WTATE@sc.edu>; PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu>
Subject: RE: Student fees associated with labs that student will not be attending in person



Below is information provided to Kelly Epting by Doug Foster considering the technology fee.

There are so many investments that are made with the student tech fee that don't really have to do with the students physical location. Our network underwent a significant upgrade to facilitate higher levels of traffic moving both on and off campus. We have equipped classrooms for multi-mode delivery so regardless of whether the student is on campus, off campus or a combination of both, their experience will be consistent. We have also invested in a 24/7 support function that benefits everyone regardless of location. I could continue but hopefully this helps.

The level of investment in student facing technology over the past year easily exceeds $20 million and the plans for the coming year are in the same range.

One final point is that we can't make infrastructure investments based on a one student or one semester at a time investment model. That would mean charging a student for everything they access every time they access something. The overhead and inaccuracy of that kind of "pay by usage" model would end up being far more expensive than our current fee based model.

Dr. Kelly, for clarification, are the students enrolled in online chemistry and certain biology labs going to be able to rotate into the lab or is that rotation only for students enrolled in traditional face to face labs?

Thanks,

Nicole

From: KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Sent: Friday, August 14, 2020 9:47 AM
To: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>; TATE, WILLIAM <WTATE@sc.edu>; PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu>
Subject: RE: Student fees associated with labs that student will not be attending in person

Good morning,

I have a request into the chairs of the specific department for more detailed explanation and I don't know a lot about the language fees. Here is my general explanation (see below). Mary is looking into how the technology fee which goes into DoIT is being used this year - -I suspect it is being used for COVID related expenses. I will share a more complete explanation when I hear back from the chairs. Best, Sandra

Course specific laboratory fees are necessary to cover the costs for a specific course offering such as materials, chemicals, and supplies; breakage for laboratory equipment and glassware. The laboratory fees are essential to ensuring instructional capacity is maximized to enhance the student's educational experience. While some of these lab courses are online and not in person we are still utilizing equipment, materials, glassware, etc. in order to create videos of experiments that will hopefully give students as close to an in-lab experience as possible. Videos are filmed in our labs using our equipment and our materials and give the students a birds eye view of the experiment they will be writing about and answering questions about. One video sometimes requires multiple takes which means we are performing the experiment multiple times. In order to make sure that each experiment has videos and usable data for the student to view and use it requires resources that previously were not needed for face-to-face labs. While the student may not be using the materials there are a different set of costs associated (filming equipment, editing, personnel to run the experiment-film-edit-prepare online material-monitor online material).

Our science departments have been very creative in offering labs. For example, chemistry has created mirror sections for all of their labs, such that sections meet on alternating weeks. They have adapted the experiments so that only 12 students will be in a lab room at a given time, with additional remote learning during non in person weeks. Biology has adapted to a similar mode of instruction for a number of classes. However, some courses, such as Biology 101, 102, and 301 labs, will only be offered online due to space and equipment constraints. These labs are currently being adapted to online delivery with College support and the Center for Teaching Excellence. In addition, the biology teaching labs are going to open during the normal meeting times that a student signed up for. Students can choose to come each week (or every 2 weeks depending on the curriculum) for a short mini-session to learn a skill/technique and have the opportunity to ask questions directly. Note – this is an optional activity and no in person lab work will be graded. Perhaps the most difficult series of courses to address are those in Dance and Theater. They have also reduced the number of students within a specific section and are reworking their activities to eliminate direct touch while following appropriate health precautions.

From: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>
Sent: Friday, August 14, 2020 9:44 AM
To: TATE, WILLIAM <WTATE@sc.edu>; PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu>
Cc: KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Subject: RE: Student fees associated with labs that student will not be attending in person

Provost Tate,

I'll just chime in to say that this a question that we receive often. The language lab fee has been questioned for many years because parents and students think when they are charged a lab fee that they should physically go to a laboratory. If you find that the fee is in fact justified, might I suggest changing the description of the fee to maybe a "language course fee" instead of "language lab fee".

Since the pandemic we have gotten countless complaints about the lab fees and technology fee being assessed for online classes. We've followed in Dr. Kelly's explanation of why the online labs still constitute a fee. For the technology fee, we let the students and parents know that the students are not banned from campus. If they are in the local area, they can still come on campus to use the library, computer labs, wifi and other amenities that we have for students.

Also, it might be worth the time to look into how the lab that this particular student took over the summer was carried out. That has probably set the tone of her expectations for the fall labs.

Thanks,

Nicole Pressley
University Bursar

From: TATE, WILLIAM <WTATE@sc.edu>
Sent: Friday, August 14, 2020 8:11 AM
To: PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu>
Cc: PRESSLEY, NICOLE <KRISTIEP@mailbox.sc.edu>; KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Subject: Re: Student fees associated with labs that student will not be attending in person

Mary,

I am interested in the answer to this question. How can we charge a lab fee for a course with no lab? We need to understand how these courses are organized. Sometimes simulators are purchased.

Bottom line if there is no lab this family and others deserve a reconsideration of their bill.

Best,

BT

Sent from a secondary device and my apologies for any typos.

On Aug 14, 2020, at 7:56 AM, PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu> wrote:

Provost Tate,

Please see email below. I've copied the Bursar to this message in the event she could provide additional information.

Mary

From: [redacted]
Sent: Thursday, August 13, 2020 9:55 AM
To: PROVOST, OFFICE OF <PROVOST@mailbox.sc.edu>

Cc: AR, BURS <BURSAR@mailbox.sc.edu>
Subject: Student fees associated with labs that student will not be attending in person

Mr.Tate,

I am concerned about the fees that are being applied to my son's tuition for the upcoming semester. [redacted]–[redacted].
His Fall 2020 term bill includes the following fees:
<image001.png>
First of all, I would like to know what is being covered by the technology fee, biology lab fee and language lab fee.

I have attached his schedule that includes the format in which he will be attending class.
Currently all of his labs are online which means that he will not be utilizing any of the lab equipment for any of these labs.
There is a language lab fee for a class that appears to not have a lab. How can we be charged for a language lab when it is only a class and a virtual class at that?

Only one of his classes will actually meet in person each week. All others are virtual either to watch during the class period or on your own schedule.
So what does the standard technology fee cover when in essence we are utilizing our own technology in the way of a student computer and Wi-Fi?
Also, I feel that we are being charged tuition for a full class experience where we can communicate with the teachers in a face-to-face environment but are now being forced to learn from home. This takes away from the ability to learn in my opinion.
I know that he had several classes over the summer that were all virtual that we were also charged the additional fees for and the attention to requests for assistance was minimal to the point of almost being non-existent. I was under the impression that professors at the university are being paid to teach a student not expect them to already know the material. If they already know the material what is the teacher good for.

I am asking that these lab fees especially be removed from the bill and that the university take a hard look at how much they are charging for tuition especially since this represents a teacher present in a classroom and a personal interaction between the teacher and the students.
Tuition has increased but the value of the classes being virtual has decreased. What can be done to accommodate the lack of interaction in way a tuition reduction???

As a matter of fact just today the lab fees were increased on his fall term from when I set up payments just this week.
Again, I am very frustrated with the fact that all these fees have been tacked onto the bill and there is clearly not going to be any lab interaction for my child.
Tuition is extreme considering the fact that my son can only attend one of the 8 classes he is taking this semester at USC.

I would also like to have the tuition and fees evaluated for the summer courses.

<image002.png>

Again, there was not an in-person lab he was to attend. So he never used any lab equipment. And the technology he used was purchased by us in way of a computer and Wi-Fi.
As in my comments for the current term I feel that charging these extra fees that were clearly not utilized by my son and the high price of tuition were not justified by the avenue in which he had to learn and the response he received from the faculty teaching those classes. We paid $3174 for two classes and 1 lab during the summer and it seems like extortion considering the faculty involvement. I will just state that I know that one professor had limited office hours and these were during the time of the other class was online. Shouldn't the professors have many more hours now that they are not pressed to be in class any longer. Most of his class notes were prerecorded and available any time so there was no need for the professor to be there during the class.

If you are not able to comment on my request please let me know who at USC can.

Thanks,

[redacted]

[redacted]

<FALL 2020 SCHEDULE.docx>

Message

From: KELLY, SANDRA [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5BB449E4C1BD4845837050261F15CC02-SJKELLY]
Sent: 4/7/2020 10:49:12 AM
To: [redacted]
Subject: RE: Approved Spring 2020 Pass/Fail Scale for Undergraduate Students

Dear Ms. [redacted],

In the online teaching space, technology and technical support are the lab supplies necessary to deliver the content to the student. Best regards, Sandra Kelly

From: [redacted]
Sent: Monday, April 6, 2020 5:20 PM
To: KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Subject: Re: Approved Spring 2020 Pass/Fail Scale for Undergraduate Students

Thank you for the update. The issue I have is that the fee is for lab supplies which are not being not being utilized, therefore I do not understand why I am not having a portion returned to me. Please advise. Thank you.

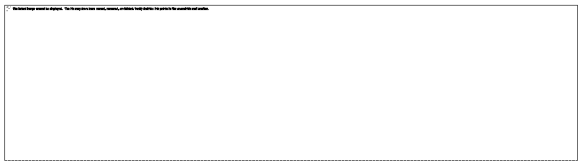
Sincerely,

[redacted]

On Mon, Apr 6, 2020, 4:51 PM KELLY, SANDRA <SANDRA-KELLY@sc.edu> wrote:

> Der Ms. [redacted],
>
> We are obligated to follow the guidance of the SC Commission of Higher Education which has indicated there is not to be refunds of academic fees. UofSC has continued to offer labs in an online format and your student is still writing lab reports and acquiring the learning objectives that stem from these labs. The labs have not been cancelled which would impair progress towards degree for many students. Expenses for labs such as teaching assistant support continues and rather than continued use of lab supplies, there are new support costs such as technology and additional technical support.
>
> I hope that you and your family are safe and healthy. Best regards, Sandra Kelly
>
> Sandra J. Kelly, Ph.D.
> Vice Provost and Dean of Undergraduate Studies
> Office of the Provost
> Osborne Administration Building, Suite 102
> University of South Carolina
> Columbia SC 29208
> sandra-kelly@sc.edu
> T: 803-777-2808 F: 803-777-9502

Exhibit 49



From: [redacted]
Sent: Wednesday, April 1, 2020 7:53 PM
To: PARENTS PROGRAMS, SA <SAPARENT@mailbox.sc.edu>
Subject: Re: Approved Spring 2020 Pass/Fail Scale for Undergraduate Students

Dear President Caslen,

Are you going to refund lab fees that I was charged for my childrens science with lab tuition? Considering they are not having any lab and doing something not nearly as beneficial how do you justify the lab fees?

Please let me know. Thank you

Sincerely,

[redacted]

On Wed, Apr 1, 2020, 7:47 PM UofSC Office of Parent & Family Programs <scparents@sc.edu> wrote:

> Having trouble viewing this email? Click here
>
> Dear South Carolina Families,
>
> We hope this message finds you and your loved ones safe and well. Please see this important message that was sent to our campus this evening.
>
> This email is still being delivered to all student email accounts, so there is a chance your student has yet to receive it. Please know it is on its way.
>
> Sincerely,
>
> Office of Parent & Family Programs

UNIVERSITY OF
South Carolina

Office of the Provost

As we continue to move the university forward during this semester with online classes and remote instruction, I want to again acknowledge all of the efforts of our faculty and staff to navigate this process and support the instructional needs of our students. To our students, we are listening to your feedback and we understand that the transition to online has been difficult for some of you.

Today, the university's Faculty-Senate voted to expand the pass/fail scale for undergraduate students and make it applicable to Spring 2020 classes. Spring 2020 classes that were completed prior to Spring break are not eligible for this option. Classes from previous semesters are not eligible.

Graduate and professional students will hear from the Dean of the Graduate School and Deans of the professional schools and programs about grading accommodations directly. Undergraduate students taking graduate or professional classes will follow the decisions of the dean of the particular graduate program.

The following is what the Faculty Senate has approved for undergraduate students.

- All courses will be graded as originally planned according to grading criteria established by the instructor.

- After grades are submitted at the end of the semester, undergraduates can choose, on a course-by-course basis, to request a pass/fail grade for the Spring 2020 semester.
  - The following pass/fail scale will be used: Earned grades of A, B+, B, C+, and C will be replaced with S+, earned grades of D+ and D will be replaced with S, and an earned grade of F or FN will be replaced with U.

- If you select the S+/S/U grading scale for a course, points will not be factored into the GPA. Courses with S+ and S will count towards earned semester hours.

- Courses graded with the S+/S/U scale will count as appropriate towards applicable curricular, major, continuation, and graduation requirements. For example, if a course requires a C or better in a prerequisite, students selecting this alternative grading scale would need an S+ in the prerequisite course.

- The deadline to decide to replace a course letter grade with the S+/S/U is July 1, 2020.
  - This process will occur through the Registrar's Office. A form will be available on the Registrar's website for you to request that a letter grade be replaced with the S+/S/U scale.

- You also have the option to retake undergraduate courses in which you have earned an S+, S, or U during Spring 2020. Any undergraduate courses retaken under this provision will not count towards the number of courses currently allowed by the current grade forgiveness policy [pdf]. In addition, students who were retaking a class for grade forgiveness in Spring 2020 can retake the class another semester, without penalty.

If you are considering taking advantage of the pass/fail scale for your Spring 2020 classes, I strongly encourage you to **contact your academic and financial aid advisor prior to making a final decision** as there are many factors to consider including financial aid, scholarships, athletic eligibility and progression toward a degree implications for changing a course grade.

In the coming weeks, my office will provide additional information about the grading accommodations and the grade forgiveness policy on the Provost's Office website.

I wish to extend my deep gratitude to the UofSC Faculty Senate for their marvelous and diligent work on this policy.

Be well and continue to be safe,



Tayloe Harding
Executive Vice-President for Academic Affairs and Provost, Interim

University of South Carolina, Office of Parent & Family Programs, 1400 Greene Street, Russell House, Suite 115, Columbia, SC 29208

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Sent by scparents@sc.edu in collaboration with



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Message

From: CASLEN, ROBERT [/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A928B5723E4B4A8C9116C0C095FC9344-RCASLEN]
Sent: 7/19/2020 12:03:51 PM
To: BIEGER, MARK [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=49b2fe4527c143d6a1891e6487916719-MBIEGER]
CC: KELLY, SANDRA [/o=ExchangeLabs/ou=Exchange Administrative Group (FYDIBOHF23SPDLT)/cn=Recipients/cn=5bb449e4c1bd4845837050261f15cc02-SJKELLY]
Subject: RE: Follow-up

Got it. Sandra's response is about as good as I've seen by anyone on this topic.

(Thank-you Sandra!)

From: BIEGER, MARK <MBIEGER@mailbox.sc.edu>
Sent: Sunday, July 19, 2020 11:57 AM
To: CASLEN, ROBERT <BOBCASLEN@sc.edu>
Cc: KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Subject: FW: Follow-up

Sir

Sandra has been corresponding with a disappointed parent and she has insisted that this message make its way to you for your awareness.

Sandra wanted to make sure she followed through on that promise.

Vr
Mark

From: KELLY, SANDRA <SANDRA-KELLY@sc.edu>
Sent: Friday, July 17, 2020 9:32 AM
To: BIEGER, MARK <MBIEGER@mailbox.sc.edu>
Subject: FW: Follow-up

Mark,

The email below is from a parent who would like in-state tuition for their out-of-state student. I promised that I would share with President Caslen and thought it would be best to route it through you. It is just fyi. Best regards, Sandra

Sent from Mail for Windows 10

From: KELLY, SANDRA
Sent: Friday, July 17, 2020 9:20 AM
To: [redacted]
Subject: RE: Follow-up



Dear Ms. [redacted],

Please know that your student's safety is our first priority; the second is providing an excellent educational experience. I am sorry that you are disappointed. I will be sure to share your email with President Caslen. Sincerely, Sandra Kelly

Sent from Mail for Windows 10

From: [redacted]
Sent: Friday, July 17, 2020 8:45 AM
To: KELLY, SANDRA
Subject: Re: Follow-up

Sandra,

Thank you for taking the time to respond. You are correct I am extremely disappointed in the response. You made valid points but at the end of the day all I hear is that to u have a budget and my daughter is a dollar sign. Please know that we have exhausted all financial aid and scholarship options. As previously stated we were not eligible for tuition reduction as an incoming freshmen and she does don't fall under any of the criteria for the scholarships that are available to ongoing students.

If you can please make sure this email makes it into the president of the schools hands, that would be greatly appreciated. I realize that he alone didn't make these sort of decisions but it would be nice to now that he will have first hand knowledge of how his decisions are effecting parents.

Sincerely,

[redacted]

Sent from my iPhone

On Jul 16, 2020, at 4:15 PM, KELLY, SANDRA <SANDRA-KELLY@sc.edu> wrote:

Dear Ms.[redacted],

I am very pleased to hear that your daughter had a great first year despite the disruption of having to move residence and a pandemic. I suspect engaging in our on- and off-campus activities helped with that.

Please know that your student may make changes to her schedule through dropping and adding semester courses until 26 August and there are courses with an in-person component available. Also, please know that we are adding face-to-face and hybrid courses throughout this month; this process is slow because we are also adjusting our currently schedule classes into classes where social distancing can be accomplished. She should consult with her advisor if she needs guidance on how she changes her courses. She might not get the courses that she currently has but her advisor will make sure that she is progressing towards degree while taking more courses with face-to-face instruction.

Regarding remote instruction, it is unfortunately often assumed that online instruction is necessarily inferior to face-to-face instruction and that such inferiority should represent a reduced cost. It is also assumed that somehow online instruction is easier for faculty to do. Please know that our instructors and faculty have been working for months to develop engaging online and hybrid courses for those that either cannot be taught face-to-face, or must be offered as an option to those students who cannot safely attend in person. As the state's flagship research institution, we are focused on ensuring all of our classes—no matter how they are taught--meet ambitious learning objectives that position our students for future success. We do this every semester for every course regardless of its modality, face-to-face, hybrid, or online and we do not subscribe to theory that online instruction is necessarily inferior.

Please know that the University is also working hard to offer many out-of-classroom experiences for our students this fall. They will be different because there will be smaller groups of students involved but there will be more of them for

students to participate. Our staff are being very creative in offering experiences for our students that allow social interaction while keeping people safe.

Tuition is mostly a reflection of the overall cost of earning an academic degree, the quality of instruction in that degree, and the fixed costs associated with providing it. The University of South Carolina is home to world-class faculty and instructors who are leaders in their field. Whether they are delivering face-to-face, online, or hybrid instruction, students can expect from them a high level of academic rigor and attention to students' needs that results in the quality and the degree mentioned.

Please know the out-of-state tuition is determined by whether a student is a resident or not of SC. Residency is governed by state law and that is not under our control. We as a state institution must follow state law that requires out-of-state tuition because of the tax support of the University of South Carolina. The only way that we could reduce your daughter's tuition is through a scholarship of some kind. Your daughter should be encouraged to reach out to the Office of Financial Aid and Scholarship to determine her eligibility for institutional and non-institutional scholarships and apply. It is critical that we treat all of our students in the same manner so it is important to use the formal processes of awarding financial aid of any kind. Any global reduction in tuition for non-resident and/or resident students would have to be approved by the Board of Trustees and the budget including tuition has already been approved for this year.

I know this is not what you wanted to hear but I hope that you will re-consider any decision to not allow your daughter to attend the University of South Carolina. Thank you for entrusting your daughter's education to us.

Best regards, Sandra Kelly

Sandra J. Kelly, Ph.D.
Vice Provost and Dean of Undergraduate Studies
Office of the Provost
Osborne Administration Building, Suite 102
University of South Carolina
Columbia SC 29208
sandra-kelly@sc.edu
T: 803-777-2808 F: 803-777-9502



From: [redacted]
Sent: Wednesday, July 15, 2020 3:22 PM
To: ADAMS, LYNZIE <ADAMSLJ4@mailbox.sc.edu>
Subject: Follow up

[redacted]

I would like to thank you for taking the time to discuss my concerns yesterday referring to the return to school. I appreciate the time you took to really listen and acknowledge and validate my thoughts and concerns. I realize that we are in unchartered territories as a nation and appreciate that everyone is doing the best that they can with the ever changing information. With that being said I would just like to recap my thoughts and concerns from yesterdays discussion.

As I write this email I would like to begin by stating that my daughter, who is a incoming sophomore, wants nothing more then to be able to come to University of South Carolina and continue her experience there. As her first year was quite the roller coaster ride, she was [redacted] then it seemed like she was just getting settled again before the pandemic hit, but at the end of the day she loves the school. [redacted]

[redacted] She has immersed herself in everything your school has to offer. And even though her first year was rockier than most other freshmen around the country she cannot see herself anywhere else.

Which makes our decision that much more difficult. As her parents and the source of her college tuition payment we are having a very difficult time justifying paying full out-of-state tuition for her to go back and have 4 out of her 5 classes online. I absolutely understand and appreciate that you have bills to pay on your end and those do not change much whether these students are in-class or online, my intention with this email is not to receive anything that I do not believe is fair. [redacted] immersed herself in all that college has to offer an I feel is a true asset to your school. Sadly when she was accepted out of high school she did not qualify for any of your tuition reduction scholarships. [redacted] Anyway, even with the full-price out-of-state tuition she fell in love with your school the moment she stepped foot on campus. My husband and I wanted nothing more for her than to be at her dream school. We could have made her stay in our state [redacted] we could have made her choose another school that offered her money, but we wanted to support her dream. So off to South Carolina she went, without ever looking back. But now we are at a crossroads. We very much want her back at your school but also feel as if the full out-of-state sticker is not something we are willing to pay for online classes. I have been on the phone with about 4 different employees from departments across your campus just wanting for someone to hear my concerns and maybe, just maybe, come up with some sort of compromise.

I am not looking for free tuition, I am not looking for University of Phoenix tuition (I am sure that is something you hear a lot from parents) I am just looking for some fairness with tuition costs during these difficult times. From what I understand there is not any concrete plan on reduction of tuition at this time. I am pleading with the powers that be to rethink that. As I stated earlier in this email I understand you have definitive costs, and I absolutely appreciate that. But at the end of the day are you willing to risk losing all of my students tuition? I am sure you will not be getting as many sophomores transferring into your university as you might usually. Would it be fair to maybe give out of staters in-state tuition until the school gets fully back? To me, I would feel like then we are all on the same playing field. These are just some of my thoughts and ideas on the subject. Believe me, I am not know or have ever been the president of a university, I understand and appreciate that the decisions you make effect so many more things that the amount my daughter pays for tuition. As I cannot speak for all the parents for all the out of state students you have there, I would have to assume I am not the only one that feels the way I do.

I have received many emails of late from President Caslen, and I do appreciate how he keeps us informed and emphasizes that we are all a family and we are here for each other. I would like for him to take this opportunity to come up with some solution that would be fair to all parties. Something that makes us feel like we actually ARE a family and are being heard, not just a dollar sign.

I apologize for the length of this email, and appreciate it greatly if you have read it all the way through. I felt that a bit of a background would be helpful. I want all parties to know that pulling my daughter from your school is not something I want to do, but sadly if our tuition bill says the same I most likely will have no other choice.

Feel free to reach out to me with any questions or to further discuss this matter at any time.

Sincerely,

[redacted]

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

The University of South Carolina ("USC"), by and through its undersigned counsel, hereby submits this brief in further support of its Motion for Summary Judgment and in reply to Plaintiffs' Response in Opposition ("Response").

I. Plaintiffs continually fail to demonstrate any damages that do not arise from an allegedly deficient education, and hence Plaintiffs lack standing.

Plaintiffs have not and cannot show any damage they suffered as a result of USC's pivot to online instruction during the pandemic, and therefore, all of their claims must be dismissed. To succeed on any of their claims, Plaintiffs must show they were injured ***as a result of*** the transition to remote learning. But Plaintiffs cannot show damages here unless they were harmed by having remote learning instead of face-to-face instruction – and any such claim is precluded because it would constitute a claim for educational malpractice. That is because it is undisputed that Plaintiffs received the ***same*** courses for the ***same*** credits taught by the ***same*** faculty for which they allegedly contracted, and that the cost per credit hour at USC was the ***same*** no matter the mode of instruction. By their very nature, Plaintiffs can only assert purported damages based on the relative value and quality of receiving that same education remotely instead of in-person.

Plaintiffs have continually sought to 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 defense), while simultaneously alleging they were damaged because they received an education that is materially different from what they bargained for. In arguing their alleged injury was not receiving the "product" for which they contracted, they fail to explain how they can establish they were damaged without comparing the value of the two (supposedly) different products and showing that what they received had less value than what they bargained for.

Plaintiffs' argument that Plaintiff Bunch has standing regardless of who paid her tuition because she was the "one who contracted with the University" is also completely off base. Resp. at 25. USC never argues that Plaintiff Bunch does not have standing to bring her breach of contract claim. What USC has contended, however, is that Plaintiff Buch lacks standing because she suffered no injury as she did not have to pay any tuition out-of-pocket, just as the federal court in Vermont held in *Patel* v. *Univ. of Vermont & State Agric. Coll.*, No. 5:20-CV-61, 2021 WL 42523683 (D. Vt. Oct. 1, 2021). There, the court found that the student "lack[ed] constitutional standing to seek the return of tuition they had not actually paid." *Id.* at *1, 6; s*ee also* USC's Memorandum in Support of Motion for Summary Judgment ("USC's Brief") at 15. Plaintiffs do not even attempt to address or distinguish the *Patel* case in their Response. Because Plaintiffs have not submitted any evidence – much less enough to create a genuine issue of material fact – that they were actually damaged, and any such evidence would only support an impermissible claim for educational malpractice, all of Plaintiffs' claims must be dismissed.

II. Plaintiffs remain unable to point to any contractual language promising in-person instruction and, thus, fail to overcome the legal deficiencies in their breach of contract claims.

Plaintiffs' entire contract theory is that they paid tuition and fees in exchange for in-person classes and on-campus services. However, Plaintiffs have not identified *any* specific and enforceable contractual promise in the Academic Bulletin, course registration, Statement of Financial Responsibility, or any other publication or document contractually obligating USC to provide a particular mode of delivery for its curriculum or unlimited access to its campus. This failure is fatal to their claims because without a certain and definite promise that they would receive in-person instruction and on-campus services under all circumstances, USC is entitled to summary judgment on Plaintiffs' breach of contract claims as a matter of law.

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

As Plaintiffs admit, students sign the Statement of Financial Responsibility before registration—meaning, they accept the financial responsibility of paying the costs of their tuition and fees before ever knowing the method of instruction for their classes. *See* Resp. at 10. In fact, students might not even see the instructional method at all after signing the Statement of Financial Responsibility and completing registration.[1] (*See* Exhibit W to USC's Brief, Marterer Aff., ¶ 30).

Plaintiffs argue that the Statement of Financial Responsibility "expressly incorporates 'course registration' as part of the contract." Resp. at 27. The Statement of Financial Responsibility

[1] This includes Plaintiff Kelly who Plaintiffs allege in their Response filtered for a specific instructional method (*see* Resp. at 8) but who, in reality, never even saw the Class Schedule Search feature, shown on page 9 of Plaintiffs' Response. Plaintiff Kelly, instead, chose to register by typing in course registration numbers to specify the course for which she intended to register. (Exhibit L to USC's Brief, C. Kelly Dep. at 126:1-6 ("Q: But it seems to me like what you're saying is that you started with Exhibit 2 and you would filter down based on your criteria. A: You could. I didn't do it that way. I would browse classes, pick my CRN number and make it my schedule myself.").)

does not, however, state or even imply that when a student registers for a course with a particular instructional method, USC promises to honor that selection no matter what may occur between registration and the end of the next semester. It also does not state that USC is obligated to provide the classes selected by the student at all, much less with the same professors, at the same locations, at the same times, in the same classrooms or even in the same buildings, or using any particular type of instructional method. Instead, it simply provides that a student is obligated to pay tuition when they submit their course registration. (Exhibit V to USC's Brief, USC_00001466 ("By submitting course registration I am entering into a financial arrangement with the University of South Carolina and I accept the responsibility for all charges billed to my account.").)

Plaintiffs' contract claims depend entirely on their contention that the Statement of Financial Responsibility "incorporates course registration." But in fact, it does no such thing. The Statement 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*** course registration or any part of it. Plaintiffs' interpretation does great violence to the English language as we know it. The phrase "by submitting" does not under any circumstances mean "hereby incorporating." The term "to submit" in any dictionary is not defined as a synonym of the term "to incorporate." This is a far cry from when contractual language actually incorporates terms and conditions. To conclude that the Statement of Financial Responsibility, by requiring students to agree to pay tuition as a prerequisite to submitting their course registration, contractually obligates USC to provide every class in every detail as described in the registration process constitutes purely magical thinking.

In addition, to accept Plaintiffs' unreasonable interpretation 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 after registration or even mid-semester, or when the Self Service Carolina registration portal incorrectly indicates a course is online, when it is actually hybrid, or when it is reflected as face-to-face, but is actually hybrid or online. Such an interpretation is plainly absurd 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).

B. Courts in cases cited in USC's Brief have rejected arguments that are remarkably similar to Plaintiffs' assertions, finding that the course registration process does not create an express promise of face-to-face instruction.

Plaintiffs' argument that the cases cited by USC are "entirely unlike" this case is entirely untenable. Instead, these cases demonstrate the fallacy of Plaintiffs' argument here that USC made a specific promise of face-to-face instruction through the course registration process via Self Service Carolina. First, in the *Zwiker v. Lake Superior State Univ.,* 986 N.W.2d 427, 443 (Mich. Ct. App. 2022) (oral argument scheduled on application for leave to appeal by Michigan Supreme Court), the tuition contracts on which the plaintiffs relied were financial responsibility agreements. Just like in *Zwiker*, Plaintiffs here attempt to rely on the Statement of Financial Responsibility, which is strikingly similar to the ones in *Zwiker*, [2] and its reference to "course registration" to

[2] Lake Superior University's and Eastern Michigan University's financial responsibility agreements stated that students "accept full responsibility to pay all tuition, fees and other associated costs assessed at any time as a result of [the student's] registration and/or receipt of services . . . ." (*id*. at 441–42), and Central Michigan University's agreement stated that "[b]y completing registration at [the university] for this semester, [the student] agree[s] to financial responsibility for all charges, including tuition and fees on your student account" (*id*. at 433).

fabricate a supposed contractual obligation of in-person instruction. The appellate court in *Zwiker* found "no error in the trial courts' conclusions that the financial agreements between the parties were unambiguous and did not promise live, in-person instruction" (*id*. at 444), which is exactly what USC argues here. And just like Plaintiffs do in this case, one of the student plaintiffs in *Zwiker* "provided screenshots and excerpts from the [university's] registration portal and course catalog, as well as marketing information," and the court found that "[n]one of the[se] documents promised that if [the student] paid tuition, the [university] 'would exclusively provide in-person instruction.'" *Id*. at 443.

Further, the court in *Bergeron v. Rochester Inst. of Tech.*, No. 20-CV-6283 (CJS), 2023 WL 1767157 (W.D.N.Y. Feb. 3, 2023) (appeal filed) rejected all of the same arguments made by Plaintiffs in this case. The court in *Bergeron* found that the terms of the financial responsibility agreement, again very similar to the one at issue here,[3] were "not ambiguous;" that it established a "clear agreement [that] in exchange for the student's promise to pay all assessed tuition and fees, subject to [the institute's] refund policies, [the institute] grants the student the privilege of registering for classes and receiving services at the university"; and that it did "not contain any promises of the provision of in-person, on-campus instruction or services." *Id*. at *4-6. The *Bergeron* court further held that the plaintiffs' claims failed an implied contract analysis, finding among other things, 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

[3] The financial responsibility agreement in *Bergeron* provided "that upon registration for 'any class' at [the institute] or receipt of 'any service' from [the institute], the student accepts 'full responsibility to pay all tuition, fees, and other associated costs assessed at any time as a result of [his or her] registration and/or receipt of services.'" *Id*. at *4.

experiences, and are not proof of the existence of such a promise." *Id*. at *7-8. Importantly, the *Bergeron* court emphasized that the plaintiffs "have not identified any express statements in the bulletin or elsewhere 'promising that these aspects of a course were not subject to change, or suggesting that [the institute] 'relinquished its authority to alter the modality of its course instruction.'" *Id*. at *8. Like in *Bergeron*, USC did not relinquish its authority to change the mode of instruction, and, in fact, USC expressly reserved its right to alter its courses and policies.

Likewise, in *Lindner v. Occidental Coll.*, No. CV 20-8481-JFW(RAOX), 2020 WL 7350212 (C.D. Cal. Dec. 11, 2020), the court again found that the "course schedule and syllabi do not promise in-person instruction or that the courses will always meet in the specific rooms stated on the course schedule or syllabi," and that "although the course schedule and syllabi may state a specific room where each class will meet, the 2019-2020 Catalog specifically states that '[f]ees, tuition, programs, courses, course content, instructors, and regulations are subject to change without notice.'" *Id*. at *8. Just like in *Lindner*, USC's course registration website does not promise in-person instruction at all times or that the instructional method will always be in-person, and USC's 2019-2020 Academic Bulletin expressly reserves USC's right to amend or alter its curricula, course offerings, and academic policies.

As for Plaintiffs' argument that USC mischaracterizes *Miller v. Lewis Univ.*, 533 F. Supp. 3d 678 (N.D. Ill. 2021), USC does no such thing. The court in *Miller* did reject the student's argument that the instructional method listed during course registration somehow constitutes a promise of in-person instruction, which is the exact argument Plaintiffs make here. In *Miller*, the court considered the same fact pattern as here, with Plaintiffs trying to impose a contractual obligation over a purely informational notation of instructional method that students may see while they register for courses. Plaintiffs' argument is as unavailing here as it was in *Miller*, and,

moreover, in USC's case, students may not even necessarily see the notation of the instructional method at all during course registration, depending on how they register – as explained below and in USC's Brief (*see* pp. 25-28 and Exhibit W, Marterer Aff.), it is a matter of particular clicks in Self Service Carolina.[4]

C. Course registration is not akin to "clickwrap" agreements.

Plaintiffs also argue that by electronically submitting their class registration in Self Service Carolina, they entered into a "clickwrap" agreement which presumably would entitle them to sue the University over any class detail that changed between the time of registration and their completion of the class. Resp. at 31. This argument fails because choosing classes in the registration process did not embody any of 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.

The cases Plaintiffs cite in support of this argument all find "clickwrap" agreements to exist only when contract formalities are demonstrated. For example, in *Lampo v. Amedisys Holding, LLC*, the court of appeals observed that "[c]ourts are not licensed to ignore the old chestnuts—cases that remind us that (1) certain formalities are required for a contract to be formed . . . and (2) when the formalities are met, a contract it does make . . . ." 437 S.C. 236, 244, 877

[4] While it is true, as Plaintiffs point out, that the plaintiffs in *Chong v. Ne. Univ.*, 494 F. Supp. 3d 24 (D. Mass. 2020) did not plead course descriptions comprised part of the parties' contract, this still does not change the fact that the court in *Chong* looked at the language of the financial responsibility agreement that is similar to the one on which Plaintiffs rely here and found, just as USC argues here, that it did not include "a right to in-person instruction." *Id*. at 28. The *Chong* court found as follows: "[The university] argues that plaintiffs fail to state a claim because they have not plausibly established that the parties' agreement included a right to in-person instruction. The court agrees. The [financial responsibility agreement] provides for students to 'pay all tuition, fees, and other associated costs' incurred as a result of 'registering for any class or receiving any service from Northeastern.' It ties the payment of tuition to registration for courses, not to the receipt of any particular method of course instruction." *Id*.

S.E.2d 486, 491 (Ct. App. 2022), *reh'g denied* (Aug. 30, 2022). The court in *Lampo* cited with approval *Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC*, 993 F.3d 253, 260 (4th Cir. 2021), in which the Fourth Circuit noted, "The electronic age has not made the formalities of contract less crucial, but more so . . . ." Applying the traditional test of whether a contract exists, the *Rowland* court found that "[b]ased on the undisputed evidence submitted by both parties, there was no such meeting of the minds—and thus no contract—because both parties did not agree to the same terms." *Id.* at 259. In *Lampo*, the court reached the opposite conclusion, but based on very different facts. The court held that an arbitration agreement was formed, but only because plaintiff received an email offer from her employer, clicked on an acknowledgement form notifying her that her legal rights would be affected, and signified her acceptance by not opting out. 437 S.C. at 239-40, 877 S.E.2d at 488.[5]

Here, the undisputed facts show the instructional method–which is only one of many details pertaining to classes and which only appears if the student clicks a hyperlink to review additional information—was not identified in the screenshots pasted onto pages 9-10 of Plaintiffs' Response (or elsewhere) as a term having legal significance at all. The class registration dialogue in Self Service Carolina does not show an "I agree" box, it does not state that the instructional method is

[5] The necessary contractual language is evident in *Lampo,* as it is in the other cases Plaintiffs rely upon. In each case where a contract was formed, the offer was clearly contractual in nature, and it was identified as such. The person who was bound by clicking had been informed that the click was a matter of legal significance. *See, e.g. Kraft Real Estate Investments, LLC v. HomeAway.com, Inc.,* No. 4:08-CV-3788, 2012 WL 220271, at *7 (D.S.C. Jan. 24, 2012) (by affirmatively clicking "I agree," to contractual terms offered electronically, a contract may be formed); *Church v. Hotels.com L.P.*, No. CV 2:18-0018-RMG, 2018 WL 3130615, at *2 (D.S.C. June 26, 2018) (plaintiff clicked "I agree" in response to electronic offer of contract terms); *Rock v Solar Rating & Certification Corp*., No. 8:17-CV-3401-DCC-JDA, 2018 WL 3750617, at *5 (D.S.C. July 23, 2018), *report and recommendation adopted*, No. 8:17-CV-3401-DCC, 2018 WL 3745057 (D.S.C. Aug. 7, 2018) (contract found where plaintiffs likewise clicked a box attesting their agreement to be bound by the terms of a contract).

a contractual offer (much less a promise), and nothing indicates that submitting the electronic registration has any effect on the parties' legal rights and obligations. As measured by the test of whether such a contract-by-clicks exists, it is clear that there was no meeting of the minds and no contractual agreement that USC would provide face-to-face instruction at all times or stand in breach of contract.

D. Plaintiffs cannot overcome the hurdle of USC's express reservation of right to amend its courses and policies.

The Court should also reject Plaintiffs' arguments that USC's alleged non-performance is not excused by the supposed "bait and switch" of changing instructional methods after registration or preempted by USC's reservation of the right to change curricula and course offerings when necessary, as expressly set forth in USC's 2019-2020 Academic Bulletin. First, reserving a right to change a detail about a class after students have registered is hardly a bait-and-switch, which could only exist if USC made changes to its curricula and offerings without first expressly reserving the right to do so.[6] 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.)

[6] Plaintiffs' citation to a COVID-19 Faculty Guidance for the Fall 2022 semester for the propositions that (1) students registering for classes have an "expectation that the class will be taught in the method that is specified in Self Service Carolina," and (2) "the University acknowledges that the 'Instructional Method' is so important that it cannot be changed absent permission of a dean" is inaccurate. Resp. 11-12. The Guidance document Plaintiffs reference is strictly for the Fall 2022 semester and was not even available during the Spring 2020 semester at issue in this litigation. Further, unsurprisingly, Plaintiffs misconstrue the plain language of the material included in the Guidance. While the Guidance directs that decisions to change a modality should be made "at the level of the dean," the Guidance goes on to state that temporary modality changes, such as changes to hybrid instruction, may occur, allows for classes to move online under "exceptional circumstances," and permits even "permanent changes in teaching method . . . when there is a documented health issue or disability making online teaching a necessity."

Second, Plaintiffs' reliance on a tuition refund case in California in which the court did not enforce a disclaimer is misplaced. In *In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig*., in denying a motion to dismiss, the court found the disclaimer "relates only to academic classes," but it did not apply to alleged claims for breach of express contracts relating to non-academic benefits students were allegedly denied during the pandemic. *Id*., No. CV204066DMGPVCX, 2021 WL 3560783, at *7 (C.D. Cal. Aug. 6, 2021). The court in the "*other USC*" case did not find the disclaimer to be unenforceable as applied to breaches relating to academics.[7]

Third, the Court should reject Plaintiffs' circular argument that the disclaimer is unenforceable because it is not a part of the contract. This argument is based on the premise that class registration details are contractual, but the disclaimer is not. That is, the argument presupposes the very issue that USC is contesting – that the registration details are contractual. In fact, neither the submission of registration for classes nor the reservation of rights disclaimer is contractual, and the Academic Bulletin merely makes that explicit by stating that USC can make changes to curricula and offerings whenever needed. For the Court to find the class registration details are a part of the contract, it would have to find a meeting of the minds notwithstanding the express statement of USC that it reserves the right to make changes to those details when such changes are justified. The disclaimer precludes such a finding.

[7] The other decisions cited on page 32 of Plaintiffs' Response are irrelevant on their face because USC is not applying a subjective, after-the-fact meaning to the contract (*Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603 & n.3, 799 S.E.2d 912, 917-18 & n.3 (2017)); it is not seeking to change the terms of a contract unilaterally (*Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 405, 581 S.E.2d 161 (2003)), but rather is contending that no contractual term as alleged by Plaintiffs ever existed; and this is a summary judgment motion, not a motion for class certification (*In re Univ. of S. California Tuition & Fees COVID-19 Refund Litig.*, No. CV204066DMGPVCX, 2023 WL 6453814 (C.D. Cal. Sept. 29, 2023)).

Plaintiffs also seek to distinguish the disclaimer here from that in *Dixon v. Univ. of Miami*, 75 F.4th 1204, 1209 (11th Cir. 2023), where the court held, "if Miami 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." *Id*. The exact same logic applies here. If the University objectively intended to be contractually bound to honor at all times every detail about classes 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 undisputed terms of the disclaimer preclude a meeting of the minds, which would be necessary to conclude USC could not make changes to the curricula and offerings in its classes, even in the event of a pandemic.

E. The notation of instructional method during course registration, which students may not even see depending on how they filter their course searches, is purely informational and does not create a contractual obligation.

Plaintiffs seek to create a factual issue regarding whether the process of registering for classes in Self Service Carolina creates a contract between USC and Plaintiffs that binds USC to provide courses with all of the informational characteristics reflected in Self Service Carolina when students register. USC submitted the Affidavit of Aaron Marterer in support of its motion for summary judgment, which, contrary to Plaintiffs' argument, does not conflict with his prior sworn deposition testimony. While Mr. Marterer completely and truthfully answered all questions in his deposition, he included more detailed information about the registration process in his Affidavit than was sought in his deposition. Mr. Marterer explained in his Affidavit that there are multiple ways students could navigate Self Service Carolina in registering for classes without ever seeing the instructional method for the class. This is not in dispute; in their Response, Plaintiffs do not attempt to argue that students *must* view and select the mode of instruction for a class when they register. This type of information is available only through various hyperlinks depending upon

how any given student registers, but to view this information, the student must seek it out specifically. (Exhibit W to USC's Brief, Marterer Aff., ¶¶ 13, 14, 17.)[8]

Plaintiffs simply misrepresent certain aspects of Mr. Marterer's deposition testimony and offer no evidence to contradict his Affidavit. For example, Plaintiffs state, "The University unqualifiedly promised to provide the face-to-face instruction during the Spring 2020 semester," citing to Mr. Marterer's deposition at 24:16-23. Resp. at 28. But Mr. Marterer said no such thing. In the cited excerpt, Mr. Marterer simply agreed with Plaintiffs' counsel that students first accept the Statement of Financial Responsibility, "and then they would start building out their courses based on what time they wanted to take the course, on what days, that kind of thing, if it was offered on those days . . . ." (Exhibit F to Plaintiffs' Motion for Class Certification, Marterer Dep. at 24:16-23.) Later, in the Promissory Estoppel section of their Response, Plaintiffs state, "the University promised to provide certain courses to Plaintiffs in a specific modality when they registered for courses," citing to deposition Exhibits 62 and 73. Resp. at 37. Neither of these exhibits reflects a promise to provide certain courses in a specific modality; they are merely screenshots from Self Service Carolina indicating one possible view of the course information available for students to consider when they register for classes. Exhibit 62 shows information that is only available when a student clicks on a class name to see "more details" about that class. Those details are purely descriptive and informational and do not create contractual obligations. As Mr. Marterer emphasized in his deposition, the Self Service Carolina registration site contains "a lot of information" and "it's all ***informational***." (Exhibit F to Plaintiffs' Motion for Class Certification, Marterer Dep. at 31:23-32:13 (emphasis added).) He certainly did not testify that

[8] The three YouTube videos incorporated by reference in the Marterer Affidavit provide a very brief and clear explanation of how students may register for classes and show that the instructional method is a characteristic that a student must seek specifically by clicking on hyperlinks. *See id*.

any of the descriptive information on USC's registration web site was intended to constitute a "promise" or a contractual obligation that all face-to-face classes would remain face-to-face in all circumstances, even if public health concerns dictated otherwise.

III. Plaintiffs' claims fall under their definition of "subjective" claims barred by the educational malpractice doctrine and require an impermissible qualitative evaluation of USC's educational programs.

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.[9] In any event, in South Carolina, the law on educational malpractice is clear, and the Court here need not go any 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). 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. There is simply no basis for the Court to deviate from this well-established precedent.

To get around this clear bar, Plaintiffs argue that their claims are "objective" and somehow

[9] The cases cited by Plaintiffs themselves in their Response demonstrate this. The courts in *Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211, 1218 (M.D. Fla. 2020) and *Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1342 (S.D. Fla. 2020) made brief and almost off-hand comments, at the motion to dismiss stage, that they did not view these cases as being about the quality of the students' education, and these courts certainly did not consider the implications of the fact that it is impossible to prove damages without delving into the educational value and processes, particularly

not tied to the subjective quality of the education they received. Resp. at 20. That argument, however, ignores Plaintiffs' allegations repeatedly criticizing the instruction USC offered after the transition.[10] It also ignores the report of Plaintiffs' own expert, which is replete with references claiming that there is a quality difference between the level of instruction provided during face-to-face instruction and, what Ted Tatos refers to as, Emergency Remote Teaching ("ERT"). (*See* USC's Brief at 18 (citing 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 musings on the alleged "quality differential" of ERT.

Plaintiffs' argument that their claims are "objective" because there exists "a specific, identifiable contractual promise that the University failed to honor" (Resp. at 20 (internal quotations and citations omitted), is circular – it presumes that Plaintiffs have identified a specific contractual term promising in-person instruction that was breached. As noted above in Section II, Plaintiffs have failed to point to any such contractual promise. Plaintiffs are unable to identify any

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in a case such as ours where the tuition cost is the same for both online and in-person classes. Similarly, the court in *Ford v. Rensselaer Polytechnic Inst*., 507 F. Supp. 3d 406, 417 (N.D.N.Y. 2020) declined to bar plaintiffs' claims under the educational malpractice doctrine at the motion for judgment on the pleadings stage, and the court likewise did not consider the fact that plaintiffs would not be able to show damages without impermissibly weighing the quality and value of education. The court in *Saroya v. Univ. of the Pac*., 503 F. Supp. 3d 986, 996 (N.D. Cal. 2020) did decline to dismiss plaintiff's claim as barred under the educational malpractice doctrine at the motion to dismiss stage, but Plaintiffs conveniently fail to mention that the court later granted the university's motion for summary judgment, finding that "nowhere in the [financial responsibility agreement, which is similar to the one in this case,] did it promise to provide in-person instruction or access to on-campus services," and that plaintiff could not establish an implied contract because "[s]tatements in the course catalog about the 'days and times' and the 'location' of courses are not express promises to provide in-person instruction." *Randall v. Univ. of the Pac*., No. 5:20-CV-03196-EJD, 2022 WL 1720085, at *4-6 (N.D. Cal. May 28, 2022) (Saroya withdrew as named plaintiff and Randall was substituted in as proposed class representative).

[10] *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).

term of the contract that constitutes an objective promise that USC will provide classes 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 or pandemics. No such promise exists objectively.

Instead, the instant case fits directly into Plaintiffs' definition of "subjective" claims barred by the educational malpractice doctrine. Plaintiffs quote the court in *Hendricks* when defining subjective claims as "those alleging that students received '*deficient* academic services' or that they have 'not received the *education* they ha[ve] been promised.'" Resp. at 20 (emphasis in original and citation omitted). But Plaintiffs argue throughout their Response that the so-called "promised" educational product of face-to-face instruction was substituted by "an inferior product," ERT. *Id.* Plaintiffs simply cannot have it both ways.

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 entirely. In that case, the Seventh Circuit stated, "[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. That is the antithesis of this case. Plaintiffs do not contend that USC provided *no* education; they challenge the *type* and *quality* of the instructional methods employed by USC. Where the "essence of the complaint is that the school breached its agreement by failing to provide an effective education," it is barred by the educational malpractice doctrine. *Id.* Here, even if the mode of instruction is deemed to be a part of the contract, which USC denies, Plaintiffs' claims still fail

because USC did provide Plaintiffs with instruction in the courses for which Plaintiffs registered. That is, USC did provide an education 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)). Thus, the question here is not whether USC performed; it undisputedly did. The only question is whether the performance was materially inferior, and, therefore, Plaintiffs' "claim calls for an adjudication of the *deficiency* of [USC's] services." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 461, 578 S.E.2d 711, 717 (2003).[11]

IV. The doctrine of impossibility excused USC's performance.

Even if Plaintiffs could identify a contractual term requiring USC to provide in-person instruction at all times, which USC vigorously denies, the global pandemic and the Governor's resulting orders, in turn, ***substantially frustrated*** the purpose of any alleged contract for in-person instruction and on-campus services, making performance impossible. *See, e.g., Burt v. Bd. of Trs. of the Univ. of R.I.*, 84 F.4th 42 (1st Cir. 2023) (in affirming the trial court's discharge of the

[11] Plaintiffs also argue that because this Court rejected educational malpractice as a ground for dismissal of their complaint at the motion to dismiss stage, that ruling somehow is dispositive now. However, at the summary judgment stage, the Court can and should consider evidence (or lack thereof) proffered by Plaintiffs in an attempt to avoid the educational malpractice doctrine. "[T]he denial of a motion to dismiss does not establish the law of the case and the issue 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.").

University of Rhode Island's duty to perform in a related COVID-19 case, the court held that the pandemic and the 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").[12]

It is undisputed that USC was required to stop in-person instruction 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. *See* USC's Brief at 32-34. Because of that requirement, the law mandates the conclusion that any contractual obligation USC may have had 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").

[12] *See also Restatement (Second) of Contracts* § 261 (1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."). The Restatement provides an illustration in which a port of delivery is closed by a quarantine and the seller is unable to deliver goods to the buyer. *Id.* at § 261, comment b., illustration 1. Under such circumstances, the Restatement concludes the seller's duty to deliver is discharged. *Id*. In one of the other Restatement illustrations on point, a seller chooses not to make delivery to a port because a war has erupted in the nation where the delivery is to be made and performance would be too dangerous. *Id.* at § 261, comment d., illustration 7. The seller's duty in that instance was also discharged. *Id.*

Plaintiffs' shocking attempt to avoid the obvious impact of the doctrine of impossibility by arguing that it "was not impossible for the University to perform on its promise to provide face-to-face instruction and access to campus services," borders on the absurd. Resp. at 34. Plaintiffs inevitably contradict themselves by admitting elsewhere in their Response that the Governor's executive orders required the University to stop in-person instruction. *Id.* at 19. Nonetheless, 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). The Governor's orders directly affected USC's performance in such a way that it was impossible for USC to both comply with the orders and to provide in-person, on-campus instruction in the wake of a global pandemic. Because of this discharge, there is no breach as a matter of law.

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." Resp. at 35. But nothing in the law, including the Restatement, states that Plaintiffs should be entitled to restitution. It is true, as Plaintiffs mention, that another state's court in *In re Boston Univ. COVID-19 Refund Litig.*, No. CV 20-10827-RGS, 2023 WL 2838379, at *4 (D. Mass. Apr. 7, 2023) stated that even though the university's performance was excused, it "must still provide restitution for the ***difference in value*** between what they were promised and what they received." *Id.* (emphasis added). That court rejected, however, the opinion of plaintiffs' expert on the amount of "any possible restitution damages" and found that the expert's testimony was "insufficient to create a genuine dispute of material fact as to the existence or amount of any restitution damages." Similarly, here, Plaintiffs have failed to proffer any theory of determining the existence or amount of any restitution damages, let alone a theory that does not impermissibly stray into the province

of educational malpractice.[13]

Moreover, Plaintiffs here have not shown that they would be entitled to any restitution in any event. 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 robust educational experience to its students while keeping them and the rest of the USC community safe and complying with the Governor's orders. Thus, summary judgment should be granted in favor of USC as a matter of law because the doctrine of impossibility discharged USC's duty to perform under the contract and no restitution to Plaintiffs is warranted.

V. Plaintiffs cannot circumvent South Carolina's sovereign immunity as to their claims simply because there exists a contract between the parties.

Plaintiffs agree USC is a governmental entity entitled to sovereign immunity. Plaintiffs' only dispute is whether this immunity was waived.[14]

Plaintiffs repeatedly contend that they can overcome USC's sovereign immunity due solely to there being a contractual relationship between USC and Plaintiffs. Plaintiffs' Response fails, however, to identify a statute waiving USC's sovereign immunity to Plaintiffs' breach of contract claims, and, despite Plaintiffs' allegations, USC cannot expressly contract away its immunity. Plaintiffs' reference to a brief filed by Nelson Mullins years ago only reiterates USC's position.

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[13] As for *In re Pepperdine Univ. Tuition & Fees COVID-19 Refund Litig.*, No. CV 20-4928-DMG (KSX), 2023 WL 2576766, at *6 (C.D. Cal. Mar. 7, 2023), Plaintiffs are correct that the court allowed plaintiff to "pursue restitution on a quasi-contract theory" because performance of any implied contract "has been rendered impossible." The court, however, perplexingly went on to state that it would not constitute educational malpractice to allow plaintiffs to "calculate [their] damages [on said quasi-contract claim] by determining the ***objective value of an in-person education relative to an online-only education***." *Id.* (emphasis added.) USC respectfully submits that comparing the value of in-person versus online education is exactly what South Carolina's educational malpractice doctrine prohibits.

[14] The fact that the Court declined to apply sovereign immunity as a ground for dismissal of Plaintiffs' complaint at the motion to dismiss stage is not dispositive now on summary judgment. *See* footnote 11.

There, the plaintiff cited to *Kinsey Constr. Co. v. S.C. Dep't of Mental Health* to argue, "[I]t is still good law that 'wherever the State of South Carolina ***pursuant to statutory authority*** enters into a valid contract, the State implicitly consents to be sued and waives its sovereign immunity to the extent of its contractual obligations.'" Resp., Exhibit 15 at 13 (citing 272 S.C. 168, 172, 249 S.E.2d 900, 903 (1978)) (emphasis added). Unlike Plaintiffs' contention here that *Sloan Constr. Co. v. Southco Grassing, Inc*., 377 S.C. 108, 118 n.6, 659 S.E.2d 158, 164 n.6 (2008) restored *Kinsey*, Nelson Mullins never took this position. *See* Resp., Exhibit 15 at 12-16. Instead, it argued:

> [Defendant] received statutory authority to provide tort liability insurance to governmental entities in S.C. Code Ann. § 1-11-140 and to insure public buildings and contents in S.C. Code Ann. § 10-7-10, *et seq*. These statutes do not establish that the [Defendant] is immune from breach of contract lawsuits. Therefore, the State has implicitly consented to be sued be creating statutory authority for the [Defendant] to enter into insurance contracts.

Id. at 13. Accordingly, it is solely for the General Assembly to determine when and under what circumstances the state may be sued, and Plaintiffs do not and cannot identify a waiver of USC's sovereign immunity pursuant to statutory authority as to the type of breach of contract claims asserted here.

Even if Plaintiffs were correct that South Carolina law allows a state to implicitly consent to be sued by entering into contracts, which USC denies, any such waiver of sovereign immunity for contract claims reasonably could pertain only to suits on express, written contracts ***detailing the terms at issue in the dispute***. *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 the trial court's order of dismissal on sovereign immunity grounds and in favor of the 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). The court in *Goldstein* concluded that there was "simply no basis for [it] to ignore sovereign immunity" where the university had "taken no action requiring [the court] to apply the breach of contract exception." *Id.* at *3. The court acknowledged "the effects COVID-19 had on the loss of certain college experiences for thousands of students across the state," but the court was "also mindful of the additional responsibilities at state institutions of higher learning to accommodate the health, safety, and education needs of their students during the pandemic." *Id.* at *3. The court emphasized, "As our sister court explained in another case involving the collection of student fees during the pandemic, '[courts] are powerless to redress some losses under the law.'" *Id.* (quoting *Heine v. Fla. Atlantic Univ. Bd. of Trs.,* 360 S. 3d 412, 420 (Fla. Dist. Ct. App. 2023).

Because Plaintiffs here cannot identify a waiver of USC's sovereign immunity pursuant to a specific statutory authority enacted by the General Assembly or an express contractual term the breach of which Plaintiffs assert here (*i.e.*, an express term requiring USC to provide in-person instruction at all times), the doctrine of sovereign immunity completely bars Plaintiffs' first and fifth causes of action for breach of contract.

The doctrine of sovereign immunity also completely bars Plaintiffs' unjust enrichment and promissory estoppel claims.[15] 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

[15] Plaintiffs' Response argues that the South Carolina Tort Claims Act ("SCTCA") waives sovereign immunity on their conversion claims, but Plaintiffs expressly concede later in their Response that "***summary judgment is appropriate on their conversion claim***." Resp. at 36 n.18 (emphasis added). As a result, there is no need for USC to address this argument, and the Court should grant summary judgment on Plaintiffs' conversion claims.

nature." (citation and internal quotation marks omitted)). The General Assembly has not waived sovereign immunity for equitable cases of action seeking monetary relief against governmental entities. The SCTCA does not include a waiver of sovereign immunity for a non-tort cause of action 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, Plaintiffs' second, fourth, sixth, and eighth claims for unjust enrichment and promissory estoppel are barred.

VI. Plaintiffs acquiesced in USC's transition to virtual instruction.

Plaintiffs have failed to demonstrate a genuine issue of material fact to combat summary judgment based on Plaintiffs' waiver of their right to bring their claims by acquiescing to USC's provision of remote instruction necessitated by the COVID-19 pandemic. Plaintiffs do not dispute that they: (1) failed to lodge any objection to USC's shift to virtual instruction at the time of the transition in Spring 2020; (2) voluntarily remained enrolled in their courses after the pivot to remote instruction; (3) failed to ask for any reimbursement or refund at the time of the transition; (4) accepted the prorated refunds that USC issued to students for non-academic fees related to university housing, meal plans, and parking permits; and (5) accepted and enjoyed all the benefits that USC provided for the remainder of the Spring 2020 semester, which included, among many other things, the provision of full course credit and degrees. Plaintiffs' argument that the lawsuit was filed immediately after the end of the Spring 2020 semester is unavailing because it further highlights the fact that Plaintiffs waited to object *until after* they received all their credits and degrees from USC.

Plaintiffs' assertion 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 simply misses the mark. Instead, the requisite change in position and reliance to its detriment are in the fact that USC undisputedly expended tremendous 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.").

VII. Plaintiffs' equitable claims fail because the parties' relationship is governed by contract that covers the subject matter of Plaintiffs' claims.

Plaintiffs continue to argue they should be able to plead their claims for unjust enrichment and promissory estoppel in the alternative to their breach of contract claims because "the existence

of the contract is contested." Resp. at 37. Plaintiffs' position is insupportable. Plaintiffs concede throughout their Response that the parties' relationship is based on a contract.[16] Further, 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,[17] thus impermissibly attempting to *reframe* their breach of contract claims as equitable claims. *See Atherton v. Tenet Healthcare Corp.,* No. 2005-UP-362, 2005 WL 7084013, at *5-6 (S.C. Ct. App. May 25, 2005). Simply put, Plaintiffs' equitable claims are based exactly on the same, albeit faulty, premise as their breach of contract claims, which is that USC allegedly promised in-person instruction at all times.

Contrary to Plaintiffs' argument, USC does not deny the *existence* of a contract. Instead, USC merely contends that the *terms* of the contract do not include a promise of in-person instruction as alleged by Plaintiffs, and that Plaintiffs cannot rely on equitable doctrines to fabricate a term of the contract that does not actually exist.[18] Plaintiffs' failure to prove that a *particular term* of the contract existed does not mean a contractual relationship did not exist between USC and its students, and in fact, it is undisputed here that a contractual relationship did exist. Plaintiffs rely on the Statement of Financial Responsibility for their contract claims in this case, and just

[16] *See, e.g.*, Resp. at. 5 ("Indeed, the University concedes it has a contract with Plaintiffs, but disputes it terms…"); *id.* at 7 ("Notably, the University concedes that a contract existed between the University and Plaintiffs.").

[17] *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).

[18] *See* USC's Brief at 40 ("It is undisputed and acknowledged by Plaintiffs that a contractual relationship exists… Plaintiffs cannot attempt to rely on equitable theories of unjust enrichment to fill purported gaps in a contract, contradict a contract's terms, or, in this case, correct their failure to identify a specific term of the contract that was supposedly breached.").

because said contract does not actually contain a promise of in-person instruction, as Plaintiffs wish it did, does not change the fact that the contract covers the subject matter of Plaintiffs' claims – that is, student payment obligations when registering for courses. *See, e.g., Zwiker v. Lake Superior State Univ.,* 986 N.W.2d 427 (Mich. Ct. App. 2022) (oral argument scheduled on application for leave to appeal by Michigan Supreme Court) (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.").

CONCLUSION

For all the reasons set forth in USC's Motion for Summary Judgment, USC's Brief in support of the same, and above, the Court should grant summary judgment in favor of USC as to all of Plaintiffs' claims.

[*SIGNATURE BLOCK ON FOLLOWING PAGE*]

Respectfully submitted,

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November 16, 2023

STATE OF SOUTH CAROLINA) IN THE CIRCUIT COURT 5

COUNTY OF RICHLAND) DOCKET NO. 2020-CP-40-02330

Davia Bunch and Casey Kelly,)

Plaintiffs,)

versus)

)

The University of South Carolina,)

Defendant.)

H E A R I N G

DATE: November 20, 2023
LOCATION: South Carolina Circuit Court 5
JUDGE: Jocelyn Newman
TRANSCRIBED BY: Jeanne Meldrim

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EXHIBITS

(No exhibits marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

THE COURT: Mr. Brunson.

MR. BRUNSON: Yes, thank you. And I was also just going to introduce my other two colleagues, Olesya Bracey, and Gina Horseman, Your Honor.

Your Honor, so we --- we do have two motions here today, one is for summary judgment, the other is for class certification. I will be arguing the summary judgment motion and Rush Smith will argue class certification.

We would recommend that you hear class certification first, although I don't know if you intend today --- a ruling on class certification could certainly affect how --- sorry, a ruling on summary judgment could certainly affect rulings on class certification. So in our view, we should go in that order if that's acceptable to the Court.

THE COURT: It is. I don't know that I intend to rule today. And for that reason it doesn't matter to me which order they come in. But I'm happy to do whatever.

MR. BRUNSON: Okay. So unless anybody has an objection then we'll proceed with our summary judgment motion.

MR. PRATT: No objection here.

MR. BRUNSON: Okay. Thank you.

THE COURT: Let's do it.

MR. BRUNSON: May it please the Court, the University of South Carolina has filed a motion for summary judgment as to all counts in the plaintiff's purported class action complaint. There are a couple of overriding issues that pervade our summary judgment motion that I'd like to highlight at the beginning.

Number one is a question: How were the plaintiffs harmed? It --- it just goes throughout this entire case, you had a pandemic situation in which the university was forced to change instruction from being in-person to online, and the plaintiffs are seeking damages because of that transition, which sometimes we just refer to as the pivot.

And yet we don't know how they were harmed. That is to say, it --- the --- the plaintiff's theory seems to be that anything that's different from what they expected at the outset of the semester causes some sort of inherent harm. But the actual harm, we don't know what it is.

And if the plaintiffs were to say, for example, what one might expect in a case like this is that I didn't learn as much online as I would in person. The instruction wasn't as good online as it is in person. Or as one of the plaintiffs --- one of the class representatives has said, I just don't do as well online. I have to work a lot harder in order to --- in order to

make my grades that semester.

Any of those answers would put us into the field of educational malpractice where the claim really is that I did not --- I received an education, but I didn't receive a --- an education that was as good as it should have been and therefore I have damages. And that is a claim that is not allowed in South Carolina, absolutely black letter law that we'll talk about some more later.

Hendricks versus Clemson. You cannot sue a school for not teaching you as well as you thought they should have or for providing services that were in your mind deficient. So what's the harm is the first question we'd like for you to be thinking about.

Secondly, where is there a promise anywhere from the University of South Carolina that it would at all times honor what's on its registration Web site as to the mode of instruction or instructional method in any of its classrooms?

In order for there to be a breach of contract, in order for there to be a promissory estoppel claim, there must be a clear and unequivocal promise from the university that it would provide face-to face instruction throughout the semester for every class in which a student registered for face-to face-instruction. No such promise exists.

So with those overriding --- with those overviews, let's walk into our various arguments. The first of which is there are no damages and therefore the plaintiffs have no standing. And therefore the Court lacks subject matter jurisdiction.

To succeed on any of their claims, the plaintiffs are going to have to show that they were injured as a result of the transition to remote learning. That is remote learning instead of face-to-face instruction.

As the Court I'm sure is aware at this point, in the second half of the semester of 2020, USC pivoted from in-person to remote. It didn't have a choice, it was ordered to do so by the governor of South Carolina. And I'm sure we all recall the health --- public health concerns that drove everybody indoors in that time period.

The --- the question then becomes, well what did USC do when it had to send everybody home from campus and couldn't allow students into the classroom? Well, USC exerted Herculean efforts to have their entire faculty teaching around 40,000 students in a far-flung university with campuses all over the state, undergraduate, graduate, medical, law, nursing. All of those had to convert in some form or fashion to online instruction.

And we did that. And USC continued to provide all

of the same courses to the same students. They awarded the same credits. They used the same faculty. And the cost is the same even if every student had signed up for online classes at the beginning of the semester, they would have had to have paid the same tuition that they pay for in-person tuition.

For example, one of the class representatives is Davia Bunch. Davia in her spring semester 2020 registration signed up for two on-line classes. She had three class that were in-person. Her tuition was exactly the same as it would have been if she had signed up for five in-person classes.

So with those things in mind, our suggestion to you is that the instruction did not stop, it continued and therefore the plaintiffs suffered no damages at all. They continued to receive their education.

Now, as we have --- and I explained just a moment ago, if plaintiffs were to claim that they were somehow damaged, it would have to be because they got an --- an inferior education because they were online instead of in-person. And that is --- that theme flows through the plaintiff's second amended complaint. That theme flows through Mr. Tato's (phonetic) expert report. He's the plaintiff's expert witness. In his lengthy 80-page report, about half of it is devoted to how --- what he

calls emergency remote education or emergency --- emergency remote teaching is different and --- and inferior to in-classroom teaching.

But if that is the theory of damages then the case has to be dismissed, all claims, because that is an educational malpractice claim. There's no other way to look at it other than to say you gave me an education but it wasn't good enough. That is educational malpractice, and that is barred in this --- in the State of South Carolina.

Now, with respect to the plaintiff Davia Bunch, we do have other particular arguments relating to her lack of damages and --- and her lack of standing. The fact is, Ms. Bunch, for a variety of reasons, didn't have to pay any money to attend the university in the spring of 2020 semester. Between scholarships and financial aid, she was totally covered. There's no factual dispute as to that whatsoever.

Now, the damages that plaintiffs are seeking for Ms. Bunch or that she's seeking for herself is disgorgement of the tuition and fees that they paid in that semester. There's nothing to disgorge. And therefore Ms. --- Ms. Bunch had no standing at all, and she of course can't represent the class as well.

There's one case that we have included in our

briefing, and it is from Federal Court in Vermont. It's the Patel versus University of Vermont and State Agriculture College case. It is a tuition refund case from October of this year. And in that case, we have virtually the same situation. A student had no standing to seek disgorgement of tuition that they had not actually paid.

And the course --- and the course followed chain of logic that I just set out. In the briefing for summary judgment, the plaintiffs have not even made an effort to distinguish the ruling in the Patel case from --- from the facts that we have here with respect to Ms. Bunch.

Now, we're going to move to the --- to the next argument, and that is that there was no specific enforceable contractual promise that the University of South Carolina made to its students at the beginning of --- or prior to the spring 2020 semester that the students would always have in-person, face-to-face education for classes in which they registered for a class that was to be in person and face-to-face. There's just no promise at all to that effect.

Now, the plaintiffs' entire contract theory relies upon a single document, and that's the statement of financial responsibility. But you're --- we're going to walk through that document in just a moment. But when we

do, you will see, there's no promise in there at all about any aspect of what USC is to perform with respect to classes that students register for. There's also no such promise in the academic bulletin, there's nothing in the course registration which we will also walk through with you. Nothing in any publications or other documents. There's simply no written contract that says what the plaintiffs would need for it to say in order to sue for a breach of contract. And that is fatal to the breach of contract claim.

Now, I'm going to attempt to share my screen if it's okay with Your Honor, so that I could show some things. I don't use Webex a lot, so I appreciate you bearing with me. Okay. So you should now be seeing the title screen to a PowerPoint. Okay. Now the screen with everybody on it went to be about the size of a dime. So I'm going to see if I can make that a little bigger. There we go. I like to see you when I can.

So this is the statement of financial responsibility, the pertinent portion of it. And can you see my cursor? Okay. As you can see, in the very first paragraph, it says: University of South Carolina requires all students to acknowledge the financial arrangement between the student and the university by submitting course registration, I am entered into a

financial arrangement with the University of South Carolina, and I accept the responsibility for all charges billed to my account.

Then it goes into more detail below about, you know, what happens if you don't pay and so forth. But the really --- the --- the key operative language is right there in that first paragraph and that's what we understand the plaintiffs are hanging their hats on. They're saying because the statement of financial responsibility makes a reference to submitting course registration that assume how that incorporates a promise or expresses a promise that when you register with a course that you're agreeing to pay for and the course is designated to be in-person face-to-face. It has to be in-person face-to-face or you're breach of contract.

And we simply say it's a --- it's torturing the English language to --- to say that this paragraph says what the plaintiffs want it to say. It simply says nothing to the effect of what classes you might be able to register for or not register for, whether you have enough seniority to register for a class whether you're guaranteed to have the same professor throughout the semester, regardless if they might get sick or get fired, or --- or not be around for any reason. Or --- or what might happen if there's a hurricane. There's just ---

there's just nothing in here that obligates the university to --- to do anything other than allow the --- the students to register for their courses in exchange for payment of tuition.

Now, when --- when a student registers for their courses and --- and this is really at the crux of the plaintiffs' breach of contract argument, they have to go through Self Service Carolina and this is what I'm showing you now is all from an affidavit that we sub --- submitted from Aaron Marterer in support of our motion for summary judgment.

There are three different ways that a student can register for classes online. The first alternative is to go to Self Service Carolina, which you can see here and click on student and then click on this registration tap. That then takes you to this screen where you click on register for classes. You have to enter in the fall of 2019 or --- or spring of 2020, whatever the semester is.

Then when you go to search for classes that you might want to take. Initially Self Service Carolina only gives you two options, campus and subject. But you also have the option here of just entering the course number which is your CRN if you've already done your research and for whatever reason you already know what classes you want to take. You just enter that here and that's

another way of doing this and we'll explain that --- explain that further.

But in my --- my label here got misaligned. This red box is supposed to be here over advanced search, because you can click on advanced search if you want to see more information than you have here.

And when you do click that you see another longer list of criteria pertaining to classes that you can use to identify what types of classes you want to register for. And one of them is here in the middle, instructional method where you could indicate you want to take an on-line class, you want to take a hybrid class which is one that's partially online and partially in-person. Or you can take what --- what's referred to in the registration materials as a face-to-face class.

But you --- as --- you don't get there unless you specifically click on the box that I showed you of additional information. Now, when you do click on that, you --- after you click on the search button, on that last screen, based on whatever criteria you entered, then you get a list classes that match the criteria that you have specified. And across the top here you see the different information that's available in each of those columns of this spreadsheet.

I've taken the liberty of writing them out over here

because it's kind of hard to read them on this slide. But it's CRN, which is the course number, subject, course section, title, hours, instructor. The point being nowhere on that does it say face-to-face or instruction type online. None of that information appears when you run this filter for these classes.

The only way from --- from that screen to access the instructional method for your given class is you have to go to the name of the class and it's hyperlinked. You click on that and then it takes you to this screen or it takes you to a screen that shows you --- shows you what the instructional method is.

Now, we're going to a registration alternative number two now. I showed you the first way to register for your classes. This is the second way. And note in the first alternative again, the instructional method is something that you really have to look for. It's available, but you have to click and go find it in order for you to even indicate that you want your class to use a certain instructional method.

Now, in alternative number two, you just enter the CRN number that you get from your course catalog and then that will pull up each of the classes that you are registering for. When you do that, that you see here the instructional method is only available by clicking on the

course hyperlink right here.

So you enter the CRN number, this screen comes up. It shows you that hyperlink, and you can click on that to see what type of class it is.

Now, this is the method that was used by Casey Kelly who in addition to Davia Bunch who we've already talked about, is one of the class representatives. And you just click on submit there after you have entered the numbers for the classes that you would like to take.

Now, this is the screenshot that the plaintiffs claim provides the specific written contract well promise, page 26 of their brief. This screen you can only see when you click on the hyperlink to name of the course. The information contained here is not automatically placed in front of a student.

And of course it does have specific information about the campus, schedule, type, section number, et cetera. And that the instructional method as of this point is face-to-face instruction.

But that is not a promise. It is not a promise when you have a segment of financial responsibility that says when you register for your classes, you agree to pay. And then you go online and you register for your classes, which happen to include some that are designed to be --- planned to be face-to-face instruction classes.

But there's nothing even on this screen that the plaintiffs paste into their briefs that tells you and this class is always going to be face-to-face. Every class will be face-to-face throughout the entire semester. Doesn't matter if we have a hurricane, and --- and the building blows down. It doesn't matter if we have a pandemic and we're ordered to go online and instruct everybody. There is no contract that makes that kind of promise. And that is the promise that plaintiffs are seeking to enforce here, that USC promised it would provide face-to-face instruction no matter what.

And this is alternative number three for registering for your classes. This --- this time you go to the advisement planning and click on schedule planner. You select the term and you select the campus that you're on. Then you add the courses by subject or by course name by clicking these buttons.

And when you do that you have this options icon next to the courses that you're interested in registering for. If you click on that --- because as you can see here none of these courses say whether they're face-to-face or online, it's just --- just information is just not contained on this particular screen. But if you click on that options button, then that takes you to this page. Well, this page has more information on it, but it still

doesn't have instructional method on it. In order to see what the instructional method for any class is, you have to click on these little blue --- I'm sorry, yeah, they're blue --- blue circles with a white eye and what we recognize as an information circle. And then when you do that, you're allowed to --- to see what type of instructional method it is.

Next you click on generate schedules. This is the --- this is the list of courses that we hypothetically selected. And we're going to click on generate schedules and your schedule comes out. And again, when you're looking at your schedule, there is nothing in here that says the instructional method for any of these classes that you're now in the process of registering for. The only way to get that information is to click on the view button over here on the side, and that provides more information, but still it doesn't show the instructional method.

After you click that view button, here's the additional information that you're getting, or the information, but as you can see still on this page there's nothing that tells you whether it is face-to-face instruction or --- or --- or otherwise.

So then you click send in order to send your registration materials to the shopping cart. And in the

shopping cart you can locate your schedule in the shopping cart tab. And in order to finalize your registration, you click the submit button over here.

Now, note when you click the submit button, there is no reference anywhere on this screen to the instructional method for the class. This is the last button you click. You're also not asked to acknowledge that you're undertaking an act of some legal significance or that your legal rights will be affected when you click the submit button. It's very clear after going through this process that what you're doing is you're submitting your selections for classes that you want to take, but that you're not entering into a contract as to whether those classes will have all of the same characteristics when you show up in the beginning of the next semester that they had here.

Now, and I'm going to get the resurrection of rights in just a second. Let me go back. I also want to point out at this point that even if there was some contractual indicia of clicking the submit button when you submit your registration, bear in mind that when students show up for class on the first day, they receive a syllabus. And the syllabus may very well tell you that there's something different about this class from what you thought it was when you registered. For example, in

several of the classes that Casey Kelly signed up for, she signed up for face-to-face to instruction. But when she got to the first day of class, the syllabus said that it was a hybrid class, that up to 49 percent of the classes were going to be online.

Now, she had a full week to drop. If you didn't want to have that online class, you got a free drop/add period. You can drop that class, you can go add something that you would rather have. Casey Kelly did not do that. So to the extent that she did enter into --- into a contract with specific terms that the class would be face-to-face, when she got there on day one, she got the syllabus it says not face-to-face, it's hybrid, she had the opportunity to walk away from that class and she didn't do it. And every student who signs up has that opportunity and basted on what we've seen with these class representatives is certainly not uncommon for the registration site to show classes face-to-face, but when you get there it's not at all face-to-face --- or not entirely face-to-face.

Now, we mentioned that there's also a resurrection of rights. This is the --- the undergraduate studies bulletin also referred to as the academic bulletin. This lawsuit, Your Honor, is not just USC Columbia, it's not just USC undergraduate, it's USC entirely, every campus,

every school.

This is just an example, but each of the academic bulletins for the different schools have the same language. And as you can see in the red box here, it says this --- this bulletin is for information purposes only, and does not constitute any contractual agreement between student and the University of South Carolina. The University reserves the right to make changes in curricula degree --- 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 interests of students and the university.

Now, the plaintiffs have argued at their briefing that this disclaimer is of no effect because it is not itself contractual, because it says this is not a contractual agreement. I got to give them that. It does say that and this is not a part of the contract. But --- but the next part --- part of the argument doesn't make any sense. They're saying so it --- it can't preclude the registration process from being contractual because it's --- because it is contractual.

Well, that's a circular argument. The --- the point is the registration process is not contractual, this is not contractual either. And this is simply making it

very clear that the university has the right to change all these different things about the curriculum and the course offerings at any time that they think it's in the best interest of everybody. This is a disclaimer that's telling you when you're signing up for these classes, you're not locking into a contract. We have the right to make the changes.

And how could it be any other way? When you have a university of 40,000 students, it --- I don't even know anymore how many campuses all around the state in different undergraduate and graduate schools. You have to have the flexibility in order to operate your campus. You can't be locked in with every registration to promise every student you're going to have that professor, it'll be online, or in-person, it'll be in that building in that same room number. That's just not a feasible contract that the university could ever enter into even if it intended do so which it did not.

Now, we have included in our briefing cases from other jurisdictions, other tuition refund cases that have faced similar facts --- I didn't mean to be on this slide yet. I'll go back. Similar facts to what we've presented to you here. Similar theories that the plaintiffs are asserting here.

So again, the plaintiffs assert we have to do the

financial responsibilities statement which references registration, and therefore that means the university's obligated to give us everything we registered for.

Zwiker versus Lake Superior State University, a case from the Michigan Court of Appeals now pending before the Michigan Supreme Court. The facts were almost identical, a financial arrangement made a reference to registration materials just like here, but there was no language specifically promising that a student would receive the instructional method that they signed up for in the registration process. And that court found no language promising in-person instruction and hence the plaintiffs could not maintain a claim for breach of contract.

Now, let's go to --- well, I want to address the clickwrap argument. Plaintiffs also have argued in their opposition brief that the registration process is --- is like a clickwrap agreement --- excuse me. And we're all familiar with click --- it's hard to say, clickwrap agreements, because those are contracts that you enter into online by clicking I agree or something to that effect. And in South Carolina as we've laid out in our reply brief clickwrap agreements are recognized, but in order for a clickwrap agreement to be a contract, it has to meet all the same formalities as any other contract which means that there has to be a meeting of the minds.

And when you review the cases in South Carolina, those --- and elsewhere --- those that recognize a click --- clickwrap agreement as being enforceable find that it has, for example, before you click that last button, it tells you you are --- I --- I recognize I am entering into a contract or something to the effect of I recognize that my legal rights are being affected when I click this button.

That establishes the formalities necessary to have a contract and a meeting of the minds. There is no such a button in the registration process that we just walked through and therefore, there's an absence of formalities that would be required for the registration process to be a clickwrap agreement.

Now, let's talk about educational malpractice. I mentioned earlier that educational malpractice claims are not sustainable in South Carolina. The lead case Hendricks versus Clemson from 2003. Hendricks was a plaintiff. He was a baseball player. He met with his academic advisor and the academic advisor allegedly gave him bad information that ultimately made it so that he couldn't play baseball which was the reason he came to the university in the first place. And he made it clear that he was not challenging. And the Court makes it clear in the decision that the plaintiff was not

challenging the quality of the education that the plaintiff received.

But nonetheless, the Court right ruled Hendricks' claim calls for an adjudication of the deficiency of Clemson's services. As such, allowing Hendricks' claim to proceed would invite courts to engage in just the type of subjective analysis that courts prohibiting educational malpractice claims in --- in court --- in tort and contract have avoided.

The Court also recognized that if it were to open the door to --- for plaintiffs to sue Clemson or other universities for deficient services, that there would be pandemonium. Students would have a greatly enhanced opportunity to sue if the professor wasn't a very good one. And if the professor's English wasn't very good and the --- and the student couldn't understand what was being taught in the class. If the professor changed the location of a class so that it was too far for the plaintiff to walk to. I mean, all the different things that you could sue a university for. If this door were to be opened like plaintiffs are trying to do in this case would be catastrophic and unmanageable from a public policy standpoint.

Now, it's very clear here that the plaintiffs are seeking damages for educational harm. What they like to

say, though --- they --- they've been dancing on this tightrope for three and a half years now the entire time this lawsuit has been pending, by trying to have their cake and eat it too. And say well, online instruction is definitely inferior. There's no question about that, but we're just suing because we didn't get what we contracted for. What was delivered was --- the product that was delivered was different from the product that we contracted to receive.

The problem is you can receive a product that is different from what you signed up for and it can be better than that. Just because what you receive is different doesn't mean you were harmed in any way. What if the university had said we're going to switch out our professors this semester and not give you those who you signed up for registration. Instead, we're bringing in all Stanford and Harvard professors for this semester and they're going to teach our courses. Well, that's different from the plaintiffs side up for sure. But would they really be able to argue that they were harmed by that?

Well, this is paragraph 67 of the second amended complaint and it makes clear that the plaintiffs are claiming as of direct and proximate result and the defendant's breach, plaintiffs are legally and equitably

entitled to damages to be decided by the trier of fact in this action to include but not limited to disgorgement of the difference between the value of the online learning which was being provided versus the value of live, in-person instruction in a physical classroom on defendant's campus that was contracted for. This paragraph, this allegation makes it clear that the damages are to be measured by the difference in value between two different ways of conveying the same educational instruction. That is educational malpractice. And it is absolutely barred in South Carolina.

Now, let's move to cyber immunity, which of course is the doctrine that provides that the state as a sovereign cannot be sued without its permission. And that doctrine the Tort Claims Act was enacted in South Carolina to create opportunities under certain circumstances and restrictions for people to bring lawsuits against the state that are based in tort.

Of course this is a --- not a tort action and so the tort claims act doesn't apply here so the --- the question becomes with --- where and when did the State of South Carolina give --- give permission to students to sue state universities for breach of contract? There is no statute. There is no statute whatsoever that gives

permission for students to sue.

And so the question becomes, well, can students just sue for a breach of contract on the basis that if the state enters into a contract it waives sovereign immunity with respect to that contract? And that's what the Court in the Kinsey case held in 1978 and it made the logical point that if you didn't allow people to sue the state for breach of contract, then parties contracting with the state would have no remedy whenever their contracts were breached.

Well, in 2001 the Supreme Court considered a different case. Unisys versus the State Budget and Control Board. That was a --- a case in which Unisys had contracted with the state to provide an automated child support system and the state and Unisys sued each other back and forth about various issues relating to the implementation of that software system.

And in that case, the Court found that the legislature had enacted a procurement statute that provided that whenever a private party enters into a procurement contact with the state disputes over those contracts must be resolved as set forth in the procurement statute. And that was the exclusive means by which one may bring a claim against the state for a procurement contract dispute.

And the court found there that the --- that statute provided exclusive means and that strict construction of the term "exclusive means" which was required. We barred any other claims in Circuit Court and the court dismissed the claims of the Circuit Court.

It also held that another statute which had been an issue in both Kinsey and the Unisys case which says basically Circuit Courts have broad jurisdiction to hear disputes in the state that that case does not trump the procurement code. The --- the procurement code was enacted later and is a more specific statute. And therefore it takes precedence over 15-77-50.

So in the process of doing this, the Court overruled Kinsey specifically and expressly, and said that South Carolina --- South Carolina waiver of immunity statute must be strictly construed and that by entering into a contract there is not necessarily a waiver of sovereign immunity. And so our argument is there's no waiver of sovereign immunity. There's nothing in the contract, there's no statute and therefore all of the plaintiff's claims are barred by sovereign immunity.

And --- and I should point out that not only do we have the breach of contract claim, but the other surviving claims at this point are unjust enrichment and promissory estoppel, both --- both of which are

quasi-contractual claims in which there's also been no waiver of sovereign immunity with respect to those.

We do want to draw your attention to a case from Florida, one of the tuition refund cases, it's Goldstein versus the University of Central Florida. And there the Court held that even if there is a broader waiver of sovereign immunity with respect to private parties who have entered into a contract with the state --- in other words if --- if whenever a party enters into a contract with the state, the state is waiving sovereign immunity with respect to that contract and may be sued for disputes arising from it. That there still has to be clear and express language in the contract that's being sued upon.

Quoting from the case, Goldstein attached the statement of charges for the spring 2020 semester. And UCF student financial responsibility statement and promise to pay to the complaint. Very similar documents as the plaintiffs here are relying upon. However, because neither of those documents state that UCF agreed to or was obligated to provide on-campus in-person services in exchange for the various fees collected and because none of the documents provided state that students would be entitled to a prorated refund for any unused fees, our analysis aligns with Rojas in holding

that the assorted documents attached to the complaint did not constitute an express written sufficient to overcome sovereign immunity.

So we argued before there is no specific promise at all, now we're arguing with respect to sovereign immunity because there is no specific promise. Not only do you not have a breach of contract claim, but you also don't get past the sovereign immunity bar.

Now, I want to talk about impossibility. And I'm done with my PowerPoint slides. So is it off the screen now? There. Okay. I had --- I had to press one more button.

So impossibility of course, is the doctrine that holds whenever parties enter a contract and one party's unable to perform the contract due to an act of God, or something outside the control of the parties that renders performance impossible. The --- the performing parties' obligations are discharged by the impossibility.

Here, it certainly was impossible for the University of South Carolina to continue having classes during a pandemic, not only because it would have been reckless with respect to the public health, but also because the governor had ordered USC and all of the schools in the state to stop providing in-person instruction and instead to --- to education their students otherwise.

The governor issued a mandate on March 15th, an executive closure closing all state-supported universities and authorizing university officials to establish a means to deliver virtual instruction and remote learning.

Now, surprisingly, the plaintiffs argue in their summary judgment briefing for the first time that well, no, wasn't really impossible, you could have gone ahead and done it. Which we found to be a rather outlandish argument that --- that any college in this state notwithstanding the orders from the governor, could have proceeded to have in-person classes available to students during the pandemic.

And under South Carolina law a party to a contract has to perform its obligations unless its performance is rendered impossible by the act of God, law, or by a third party. Here we have I would call a pandemic an act of God and also the law from Governor McMaster that we just looked at.

And the plaintiffs also have no factual support for their argument that it wasn't really impossible.

Have we lost the judge? Oh, there you are. Okay. You moved to a different block on the Hollywood Squares, so --- so I lost you.

So at any rate, our argument is because performance

was impossible as agreed, and this is assuming that there was a contract for providing in-person instruction whenever a student signed up for an in-person class that --- that performance was discharged and that the university by providing a substitute performance of online instruction fully performed under the contract, and there is no cost difference that should be --- no restitution that should be made to students, no disgorgement to students based upon the difference between those two. Because if the Court finds that the substituted performance of online instruction is inadequate in some way, that again, would have to be educational malpractice. That's the only way you can get there.

Last, I want to talk about acquiesce. This is a very straightforward concept that holds simply put, when the pandemic hit, it was very publicly announced that USC was closing its campus and that the classes were moving to online instruction. Neither of the plaintiffs in this case decided to attempt to get a refund. None of them complained. None of them tried to drop out.

Instead, both of them seniors, proceeded to attend their classes to make even better grades than their cumulative GPA had been before that semester, and to receive their degrees and go on to get jobs. That is

quintessential acquiescence. You are accepting the substitute performance that is being provided and when there is acquiescence then a plaintiff is --- is not allowed to move forward on its --- on its claims.

Last, the --- we understand that the plaintiffs had dropped their conversion claim from the briefs that were not addressing that. Plaintiffs have conceded summary judgment there.

That leaves unjust enrichment and promissory estoppel claims, both of which are barred because the contract exists here. Unjust enrichment and promissory estoppel are not available when contractual --- when the parties are in a contractual relationship.

And even though we are arguing strenuously that the contract between USC and its students does not include specific promises about what types of instruction you'll receive in your class, there is nonetheless a contract. When students acknowledge the statement of responsibility --- financial responsibility and register for classes, they have entered into a contract and agree to pay tuition. And that --- because that contractual relationship exists both unjust enrichment and --- unjust enrichment rather and promissory estoppel are barred.

Now, plaintiffs claim that they should be able to plead those two equitable claims in the alternative to

their breach of contract claims because the existence of the contract is contested. But that's unsupportable because the parties concede that the relationship between the --- between them is a contractual relationship. The existence of a contract between the university and its students is not disputed. All that is disputed is whether it contains the promise that the plaintiffs claim includes.

Also in their complaint the plaintiffs don't plead their unjust enrichment claims in the alternative to the breach of contract claims. Instead the plaintiffs incorporate in their claims for promissory estoppel and unjust enrichment all of their allegations regarding their contractual relationship with USC.

For example, in paragraph 71 and 101, the plaintiffs reference the benefit of the bargain if their causes of action for unjust enrichment. And in paragraphs 86 and 115 of their causes of action for promissory estoppel, plaintiffs reference the statement of financial responsibility which plaintiffs admit is a contract between the students and the university.

So simply put these equitable claims are based on exactly the same, albeit faulty premise that their breach of contract claim which is that USC allegedly promised in-person instruction at all times.

Now, with respect to the unjust enrichment claim, additionally the plaintiffs argue that the university was unjustly enriched because at the end of the day after the spring of 2020-semester for the fiscal year 2020, the university had a budget surplus rather that a budget deficit. They say the surplus was something like $50 million. I've seen other numbers. I do think it is correct that university did end up with a budget surplus.

But bear in mind that the university received over $100 million in funding from the Federal and State governments. And that of the CARES Act funding that USC received, half of it was distributed to students in need.

And in fact, Davia Bunch received an $800 stipend from the university, of CARES Act funds. So if you were to say the university was unjustly enriched because the Federal and State governments were very generous frankly, to universities and other enterprises as a result of the pandemic, then what you're basically saying is the university should have given us more of that money that semester rather than using it in other ways to --- that are designated by the Federal Government when it --- when it issues this money.

In other words, the budget surplus was a reflection of receiving a lot of money from the Federal and state governments not because students overpaid their tuitions

for online education.

Now, on the promissory estoppel equitable argument, in order to establish that the plaintiffs have to show an unambiguous promise by the promisor. And here as we've demonstrated already in detail, and I'm not going to go back through it again, there is no unambiguous promise from the university that it would provide at all times in-person instruction for students who signed up for an in-person class. The plaintiff simply can't establish a genuine issue of material fact with respect to that issue.

Just looking through my notes if I could have a second.

One last point on the unjust enrichment claim is that in order to establish unjust enrichment, the plaintiffs have to establish that it --- that --- that the plaintiffs have conferred a --- a benefit on the university and that it would be unjust for the university to retain that benefit. We'll --- what the --- what the students did was they paid their tuition as they were contractually obligated to do. They received their education to the extent that the university received what --- what anybody could consider an unjust benefit would be the Federal funds that it received. But as noted, it distributed half of those to the students as it

was required to do.

And I would suggest that --- that the Court consistent with public policy couldn't rule that Federal --- receiving Federal funding constitutes unjust enrichment to any beneficiary of those funds at any time. That would contravene Federal law to --- to hold --- to hold that way.

So I'm going to wrap up by ending where I began, that is to say I hope the Court will listen very carefully. And I do appreciate your attention to my argument as the plaintiffs explain and give answers to my two big questions, and that is how were the plaintiffs harmed? And where is the specific promise that they would receive in-person education at all times no matter what. Thank you.

THE COURT: Okay. We're going to pause here for five to seven minutes before I hear from the plaintiffs. Just a short break.

(Off the record)

THE COURT: Back to it. Let me hear the plaintiff's response to summary judgment.

MR. PRATT: Thank you, Your Honor. This is Bradley Pratt with Bayuk Pratt, here on behalf of the plaintiffs.

I'm here with my co-counsel, Nathan Chapman and Danny Dalton. And we're believed to be here on behalf of

our clients Davia Bunch who Casey Kelly who are both students at the University of South Carolina in the spring of 2020.

We're here on this summary judgment motion on our case filed by these two students. But our students, as the Court knows, are seeking to have a class certified on behalf of similarly situated students. And so in some ways although the only issues before the Court on this motion are summary judgment for these two individuals, they're making arguments that resonate with literally hundreds and hundreds of students who raise these very complaints with the university and their parents frankly.

And we received so many of those complaints in discovery. I think some of them have been attached to the briefing.

Both Davia and Casey love the University of South Carolina they are --- they love their time there, they're glad and they're proud to have been students there. And they've brought this case because they expect the university to live up to its values and to the values that it taught them. And they're disappointed because they feel the university has not done so in this instance. And that's what this case is about.

I --- I'm --- I'm going to go right into the legal issues in just a moment, but before I do I want to start

by framing them in the context of the legal standards that are before the Court on these issues on the summary judgment posture and on the contract questions.

And I'm --- I want to do this because Mr. Brunson in his remarks from our point of view, has to reframe our complaint and reframe our contract, and reframe our expert report and reframe our arguments in a way that doesn't measure with the legal standards in order for the defenses to work.

So I want to start there --- and I say that --- I have enjoyed working with Mr. Brunson on this case thoroughly. This has been hard fought and --- and a lot of fun frankly. And he's a excellent lawyer.

But to start out, summary judgment is the exception to the norm as the Court knows. It's not to be granted, and the case isn't to be taken out of the jury's hands unless it's perfectly clear that there's no genuine issue of material fact. And we --- as the Court will hear in the moment have many factual disputes that are important.

At summary judgment Courts must liberally construe all the evidence in favor of the nonmovants, that's the plaintiffs. Mr. Brunson has asked you with a PowerPoint slide to construe certain pieces of evidence in defendant's favor and against the nonmovant's favor, but we can't do that at summary judgment. The courts must

give nonmovants the benefit of all favorable inferences.

Mr. Brunson has asked the Court to make inferences on behalf of the defendant, but at summary judgment he can ask the jury to do that. But at summary judgment that's not proper. If evidence is conflicting or raises more than one reasonable inference, the issue should be submitted to the jury. That's straight out of the Hendricks case that --- that was in the PowerPoint slide a moment ago. Courts must construe any doubts and all ambiguities in a contract that's written by one party and hear that one party is USC against the drafter. That's the Ellis (phonetic) case and that's the Duke Power case that are cited in our brief.

With this --- with these standards in mind, we would ask the Court to look at the contract that the university wrote and not the contract that the university wishes that it had written. And we're going to talk about that in more specifics.

Whether a contract was breached by defendant is a question of fact for the jury. That's the Roberts case and that's the Laser Supply case, those are on page 23 of our brief.

The measure of damages is a question of fact for the jury and the amount of damages is a question of fact for the jury. That's the H.I.S. Global case cited on page

24.

Whether a defendant provided what was contracted for is a jury question in South Carolina. That's the Roberts case and that's the Laser Supply case, both on page 23.

So all of these questions are questions that the defendant wants the Court to answer at summary judgment. But on this posture and under the law for summary judgment and the law for these issues in a breach of contract case, these are jury questions that are not appropriated if the summary judgment feigns.

Now, let me move into what is the contract from the plaintiff's point of view from Ms. Bunch and Ms. Kelly's point of view. The contract --- the --- if there is one most important document in the case and the parties may well agree about this is the statement of financial responsibility that Mr. Brunson brought up.

And I --- I'm going to ask my colleague Mr. Chapman to bring that up for us. And Nathan I'm going to keep talking while you --- oh, you're faster than I thought. Okay. And let's --- if you can, let's Zoom in on it so that we can look at that first paragraph a little bit more closely.

There are a number of tuition and fee refund and reimbursement cases around the country arising out of spring of 2020 and COVID. And Your Honor has seen cites

to so many of these cases by both parties in the brief --- in the briefing, and they've come out different ways and different circumstances. But I would submit that the documents --- the --- the through line in these cases is that the documents make the difference. And the specific documents that we have in this case are the strongest documents on contract formation that we've seen in any of the cases that are out there around the country.

So and Nathan maybe take that highlighting off just because it makes is hard to read to. But that is the sentence that I want to talk about first.

The second sentence in the first paragraph of this statement of financial responsibility which the university requires students to sign says by submitting court registration I'm entering into a financial arrangement with the University of South Carolina. And I agree --- and I accept the responsibility for all charges billed to my account. This financial arrangement is a contract. The two parties to the contract are the student and the university.

The first clause in this sentence is extremely important. It says, by submitting course registration --- so by taking that action the contract is entered into between the student and the university. It

does not say by signing this letter I'm entering into a financial arrangement. It does not say by enrolling or going to USC as a student I'm entering into a financial relationship. It does not say by staying in school and not withdrawing I'm entering into a financial response --- relationship.

Instead it says, by submitting your course registration, you form the contract. And that's important because that sentence then tells us what performance is expected by the student and what performance is expected by the university.

On the side of the student, the student's expected to pay. Now, the student may have a parent who pays for him or her, the student may have a scholarship that helps pay for him or her or a grant. There are a variety of ways or a student may pay themselves. But the student is the party to the contract and the student's responsible for that payment regardless of the third-party payer. And the university, their side of the bargain is the course registration. By --- by the student submitting that course registration they then undertake the responsibility to pay for what they get in that course registration. Those are the two sides of the contract in this case.

And Nathan, or Mr. Chapman, if you could scroll down

some more please, to --- yeah, that's good right there.

So I --- here there are a number of paragraphs and sentences about what will happen from the university's point of view if the student breaches their half of that obligation. If the student breaches their half or if --- so if mom and dad don't pay, or if the student doesn't pay, or if the scholarship falls through and the student doesn't pay, then the university will sic collections and lawyers which the student will pay for and all matter of other things on the student to enforce this contract if they breach.

And now Mr. Chapman, let's go down to the second paragraph, please.

All right. In the second to last paragraph, the first sentence is also important. The university in this contract tells the student, I understand that all disputes about registration or payment will be governed by South Carolina law and subject to the jurisdiction of the courts in South Carolina. It does not say all --- well, first of all, it says, "or," registration or payment. And the fact that these are broken out is different here in this paragraph just like in the --- in the first paragraph we looked at is critically important. It shows the university's obligation under the contract and the student's obligation under the contract. Provide

the courses registered for in the registration for the payment.

It does not say the university enjoys sovereign immunity and therefore don't bother bringing issues about your registration under South Carolina law and into courts in South Carolina. It says the opposite of that. In fact, it doesn't say any of the defense terms that have been referenced here. There's no force majeure clause, there's no waiver clause. Many of the things that Mr. Brunson talked about are --- are clauses that could have been in this contract. And that if the university wants can be added to this letter tomorrow and they'll be in there for the next contract. But the university has to deal with the contract they wrote and not the contract they wish they wrote.

Now, the course registration is referenced here in this contractual document can only be undertaken through Self Service Carolina, that's where the course registration is. And that doc --- that registration is incorporated explicitly by reference here by --- in the words by submitting your course registration. Before the --- there are different methods of selecting classes in that course registration that Mr. Brunson went through. At the end of all of those methods the --- the --- and whether there's a drop-down that says

face-to-face in one method, or a hyperlink that takes you to face-to-face in another, all of them show you the method of instruction face-to-face that's available to you when registering your courses, and critically importantly when you come out on the other side and you've --- I've made your --- you've picked your courses and you're going to be told this is --- this is now your registration. The thing that you're submitting to enter into the contract.

That's the course detail and that course detail --- Nathan, can you bring that up for us please. That course detail tells you it's --- the method of instruction, and the method of instruction that our case is about is face-to-face instruction. So any other method of instruction chosen by any other student or students who chose different methods of instruction for different classes, that's not our case, we're not seeking damages for that. We're not trying to certify a class for that. We're trying to certify a class and seek damages for one and only one thing and that's where the method of instruction was identified in the course registration as part of the contract as face-to-face. Can you Zoom in on that? Nathan's very --- my old eyes can't read it. Okay. There we go. So --- right, so instructional method, face-to-face instruction. And if I'm not

mistaken, and I know that Mr. Brunson will correct me if I am mistaken, but I believe that the university has taken the position in this case that there is a contract.

The university has taken the position in this case that the term that we believe is in here is not in here and even if it is, it's educational malpractice. And we're going to talk about that in a moment.

And the university has also taken the position that a term that is in the contract, but that is not educational malpractice is the credit hour term. And the --- I --- the --- in other words, you get three credit hours for your course, and that's something that has changed as a breach of contract. My understanding is that the university has --- has used that as an example of what is in the contract. I would just --- I mentioned that to point out to the court that the credit hour term is found right here in the class detail in the exact same place as the instructional method term. Face-to-face instruction.

Nathan, you can --- you can back out of that now.

The university also says that the course registration doesn't have the words "always," beside the method of instruction. And I --- I suppose that's --- that's true, but that strikes me as a odd argument. It doesn't say it will --- Spanish class will always be

Spanish class and not change to history class. I'm not --- I'm not sure I understand that. I think the presumption under the plain language is that what it says is what it means. And I believe that's supported by South Carolina law.

Let me shift --- oh, and I --- I do want to mention the Aaron Marterer was deposed in this case as the 30(b)(6) witness, so speaking on behalf of the university. And that testimony in that corporate representative capacity is binding of the university. In that testimony, page 36, lines 5 to 16. Mr. Marterer agreed that the class detail, which is doc --- which is Exhibit 62, referenced by him in that exchange. That whichever route you take to register for your classes in your course registration, you go through that class detail at the end, which is going to give you your method of instruction, which is going to give you face-to-face.

In his deposition, he testified that there were two ways, not three ways, but two ways to --- to register for classes. There was no errata to that transcript that changed this to what we see in the affidavit. I --- I don't --- I'm not even 100 percent sure I understand what's in the affidavit. All I know is it conflicts with the corporate representative testimony under oath earlier for which there's no errata. And it wasn't presented

until the summary judgment stage which the case law says you can't use an affidavit at summary judgment to conflict prior sworn testimony.

And we think it should be disregarded if it is different, although I'm not sure that it is, because the testimony and what I understand to be true is that regardless of how you do your course registration the face-to-face method of instruction is there. You get your course registration at the end, it says what it is. Whether that's arrived by pop-up or hyperlink, or otherwise. And --- and that is the term that we're here about today.

The other terms that are absent from the contract that the university wishes were in the contract bear some mention. There --- the PowerPoint slide that Mr. Brunson brought up included a bulletin. The bulletin is not part of Self Service Carolina registration. So, again, when we --- when we think about that statement of financial responsibility that establishes the contract, quote, by submitting course registration, it's not talking about the document that Mr. Brunson put in the PowerPoint, the bulletin, or a bulletin. That bulletin is not part of Self Service Carolina registration. It is not part of the contract.

But I started the plaintiff's remarks by talking

about the construction of evidence. It's summary judgment in favor of the nonmovant and against the movant. And inferences in favor of the movant and against the nonmovant and South Carolina law saying that any contract terms that are ambiguous or about which there is a question, if the contract is written by one party, and here that's South Carolina, the University of South Carolina, that it should be construed against that party because to the extent that there's any kind of dispute about this, whether this is in or out of the contract, it should be resolved by the jury and not at summary judgment.

But the plaintiff's position is that there --- there cannot be a dispute, because it's not part of Self Service Carolina. It literally isn't part of the contract by the university's own terms in its statement of financial responsibility.

And even if it was, as Mr. Brunson pointed out, it says right there on its face, for informational purposes only. Does not constitute a contractual agreement. Those phrases that I just read that are in the bulletin are not in what we say is the contract. They are not in the statement of financial responsibility and they are not in the Self Service Carolina course registration. And those are the two items that make up the contract.

The statement of financial responsibility and the Self Service Carolina registration ending in the case detail.

So again, this case is about the terms that are in the contract, not terms that the university perhaps wishes were in the contract. And perhaps next semester we will see them in the contract. It would be a good idea to add them to the contract if the university wants to take these positions.

There's no signature or acknowledgement on that bulletin as well by the way. And it's not submitted in order to enter into the financial arrangement with the university. And it says nothing about the mode of instruction in any event.

I also want to direct the Court to something that didn't come up at all in the university's remarks a moment ago, but that's really important. There are sort of two time periods within this spring of 2020 case. The first is one week after spring break there was full cancellation of classes. There was nothing. And full cancellation of on-campus services for which fees are charged. There was nothing. So that one week is --- is factually different than the following period which I'll talk about in a moment.

When we talk about the concept of educational malpractice, and --- and some of these other --- in all

of these other issues frankly, 99 percent of the arguments that the university raises as defenses in this case are inapplicable to that one week where there is no class and no services.

And then the balance of the spring 2020 semester was a move --- movement from --- for our plaintiffs in the case that we're bringing and --- and our --- our plaintiffs as said, are the ones who selected face-to-face as the mode of instruction in their course registration by submitting which they entered into the contract.

The mode of instruction was changed from face-to-face to emergency remote learning or training. Sometimes known as ERT. And that --- and that is the balance --- even then the on-campus services were not provided. The university has for --- for some reason picked and chosen which services to --- to reimburse.

And I think it's probably fair to acknowledge that there --- there are factual disputes that have to be resolved by a jury about whether their picks are right or wrong and whether their additional on-campus services that --- that should be reimbursed for the --- for the very same reason. The university understands that it has a contract with students. It reimbursed housing, it reimbursed parking, but didn't reimburse some of the

on-campus lab fees, for example, that were paid by students but they were not able to use.

Let's talk about educational malpractice and let's talk about what the courts have said about this concept and --- and then apply that to the case that we're bringing. Not the case that the university wishes we're bringing, but the one that I just described that's born of the statement of financial responsibility and the Self Service Carolina registration with the case detail at the end.

The Hendricks case which --- again if the --- about a vague claim of improper academic advisement about eligibility to maintain eligibility, as an NCAA basketball player. Apparently an advisor advised the student to change his courses that in a way that affected his eligibility. The Court had two holdings here. I mean, they didn't just talk about the --- the South Carolina Supreme Court didn't just talk about educational malpractice, it also said there's no written or implied promise here. Where --- where did this --- where do you come up with the idea of an advisor's vague advice is --- or is not part of the contract. It's certainly not a objective specific defined term. Method of instruction face-to-face that's in the course registration referenced in our contract. The Hendricks case cited --- and so in

that way we --- we think the Hendricks case strongly supports our position that a contract is here for an objective term.

The Hendricks case cites the Ross (phonetic) case from the 7th Circuit. That case was about a promise to a basketball player to participate in the curriculum through providing tutoring and so forth and based on the facts of that case. The Ross court held that that was not educational malpractice, there was a breach of contract.

Hendricks also cited the Syncore (phonetic) case out of Colorado. The Syncore case talked about several different claims that are breach of contract and not educational malpractice. One was the failure to offer any classes. And that is exactly like what we have in the first week of after spring break in the spring of 2020 semester. Under Syncore, that claim certainly survives.

The second is a failure to provide a number of hours of instruction that were promised. And that is just like the failure to --- to provide face-to-face instruction. The objective term in our contract.

So the case law --- the South Carolina case law in educational malpractice and the cases cited by Hendricks all support the plaintiff's version of the contract. The

contract that we've presented in our complaint and that we're presenting to the jury. And support that that does not make out an educational malpractice claim.

The --- the university has attempted to rewrite our claim by reference to what they want our damages model to be. I'm going to --- I'm going to address that, but first I want to give the Court an analogy to help express what our clients are saying about why they were wronged here, what their --- what is their breach? What is the breach of the contract?

And it's --- I have 9-year-old daughter and a 11-year-old daughter, and if I'm to split the difference --- if you imagine --- you have a 12-year-old, daughter, and you tell her we're going to take you to the Taylor Swift concert, or the Beyoncé concert, or something that they love. And you buy a ticket for the show and the show is canceled but Taylor Swift or Beyoncé's people say tough luck, we're keeping the money but don't worry, we'll send you a link, your daughter can watch it on YouTube. I can promise you that my daughters and I bet everybody's daughters would say, that is not the same thing, Dad. Watching the concert through a YouTube link and going to the concert are just not the same. It's a different product, it's a different experience. And in that way face-to-face instruction and

emergency online learning are totally different.

And every college student in America will tell you that being at college is a huge part of the experience that face-to-face matters to them. And that's why we are limited our case to those courses for those students that were specifically selected and provided in the course registration as face-to-face. It is on objective thing. And it matters. It matters to --- to everybody.

And we've --- the measures of damages under South Carolina law for breach of contract are the difference in value between what was promised and what was delivered. That's the law. And so we have to measure that in some way.

And our expert has offered alternative damages methodologies to do so. Now, the first semester --- the first week after spring break, again is easy. There's no class no services. So that's --- we're sort of carving that out, and think all of these arguments that the defendant has made don't apply to that week. But for the balance with ERT, he offers scenario one, which is 100% refund for the ERT days only. That is not a qualitative analysis in any way.

Scenario two, is he offers a percentage of what was paid refund based on academic literature for the amount of time that is used to create ERT versus the time that

is used to create pre-planned online courses.

And this is a recognized metric in the academic literature. It is different from quality. I mean, it's true that online is inferior to face-to-face, but that's not --- it's distracting that that is true, but that isn't what our case is about.

The --- the metric that he uses, time, in creation, and under the literature that he cites, is about --- is a reflection of effort and resources which is itself, a reflection of value. And the jury can accept or reject this methodology, but that's what he says in his report.

That's --- those are the first two scenario options. But he also talks about what the university itself talked about, because the university did a survey internally to determine the value of ERT. And the university in its own analysis and by the words of the president of the university at the time, ERT had no value, and there was no market for it.

And there's a fourth way of measuring value, and that is the university's own cost review for review --- for refunding tuition. They did an analysis to see what the cost would be, they produced it in discovery. And it --- it isn't based on anything qualitative and that could be presented to the jury as well.

The --- one of the reasons that I started

plaintiff's remarks by pointing to the South Carolina law holding that the measure of damages and the calculation of damages are jury questions is for this very reason, we're going to present to the jury evidence-based alternative routes to damages, none of them are based on quality, it is only by rewriting the approach that we will take to damages that the university is able to recharacterize it as about quality.

Let me move to --- to standing. The --- the --- Davia Bunch and Casey Kelly brought these --- brought their breach of contract claims based on their contracts with the university through the statement of financial responsibility and this Self Service Carolina registration that it expressly incorporates. They're bringing it for the objective-specific term of face-to-face method of instruction which was not provided.

It's in the course registration, it was not provided, but it was paid for. That's their damage. Their damage is they didn't get what was promised. That's how they were injured. That's how they were harmed.

And damage --- your harm in a breach of contract case can --- can have out-of-pocket dollar cost, but doesn't have to. There's been some discussion of

third-party payers for students in various cases, and the effect of that on the ability to have standing to bring a claim. I find that a little bit interesting. Our --- originally we had Casey Kelly's parents who paid for --- paid for some of her college as plaintiffs in this case. And the university through counsel asked us to remove them because they did not have standing and replace them with Casey Kelly, the student who does have standing. Because she is the party to the contract, and we did so. And so it's a --- a --- it is a bit surprising to be then criticized for third-party payers for Davia Bunch. It shouldn't matter, because under the law those are down-stream issues.

Mr. Brunson directed the Court to the Patel case out of the University of Vermont. And I would --- I'll --- I'll see Mr. Brunson's one case and I'll raise him three cases. I'll direct the Court to the little case out of the district of Arizona, the Erin Dondo (phonetic) case out of the Central District of California and the Nanny Voggy (phonetic) case out of the District of Delaware. All three of which are discussed on page 25 of our brief in opposition to --- to summary judgment.

All three of these cases say it doesn't matter who paid. It doesn't matter if it's a scholarship, or a parent, or the student themselves. Downstream

obligations to a third party are not part of this case. And if a third party wants --- if --- if students were successful and they --- as parties to the contract in this case, and they receive a damages award, if a downstream third-party payer wants to come to the student and say, hey, we'd like to be reimbursed too, we want our piece, that's between the student and the third-party payer based on their contract if they have one in agreement. But that's not part of the contract that's before the Court today.

So the harm here is you didn't get what you paid for. And it's a material term. Whether it's the credit hours as the university would agree, or face-to-face as instruction as --- as we assert here. And --- and by the way, as we know from the University's own testimony in its 30(b)(6) and statement of financial responsibility, if any of these third-party payers fell through and a student had to pay but couldn't on their own, we know what would happen, the university would send collections after them and send lawyers after this and make them pay. They'd hold the --- consider them in breach.

Let me move to sovereign immunity. This is an issue that all of these defenses were raised at the motion to dismiss phase of the case and they were all rejected, because of various factual disputes I haven't raised that

yet, on any of --- any of these arguments. But it's important for sovereign immunity because it's a purely legal argument. And nothing has changed today since the Court previously rejected this argument, denied the motion to dismiss and held that there --- the sovereign immunity did not apply. And of course that is law of the case.

Again, we know that the university knows it doesn't have immunity for breach of contract claims because it refunded charges for dining, and for parking, and for housing. And it did so because it was obligated. The law in South Carolina supports and says that contractual immunity is eliminated where the university or --- where an agency of the state has entered into a contract. This is no immunity for that contract.

And that makes good sense. The Kinsey (phonetic) court held that, the Unisys court overruled Kinsey only as it related to the portion of that decision related to venue. It did not overrule the portion of Kinsey that waived sovereign immunity for breach of contract claims when the --- when the agency of the state entered into a contract.

How do we know that? We can see that just from reading Unisys and from reading Kinsey, but we also know that because the Hodges (phonetic) case from the Supreme

Court of South Carolina says we eliminated contract immunity in Kinsey. We know that because the Sloan case years after Unisys said the same thing. And this is an old holding that has been around for a very, very long time undisturbed. It goes all the way back to Chesterfield in 1936, where the Court held that breach of contract against the state can proceed, there's no waiver. And in fact, Chesterfield said it doesn't matter whether the right under the contract is based on statute or not.

It just also makes sense as a matter of public policy, the state Canada bind others and sue others based on a contract, but the simultaneously be immune itself. I don't know how the university or any other agency of the state would operate. I don't know how they would sell their buildings or enter into other agreements with vendors if --- if this were not the case. The state can provide a service, or it --- the state can either provide the service and keep the money, or not. It cannot refuse to provide the service, but also keep the money. And we're asking that they return the --- the money.

Let me move, Your Honor, to impossibility. Again, we want to focus on the contract that the university wrote, not the contract that they didn't write. And the statement of financial responsibility, and the --- and

the course registration with the class detail do not contain a force majeure clause. There is no force majeure clause. They can add that tomorrow. There is a parade of horribles of gosh, could people sue for X, Y, Z, under their course registration? This would be chaos.

These are solvable problems, and they're solvable through terms in a contract, but they're not solvable through wishing that those terms were there and retroactively applying them in court. The --- the university must live with the contract that they wrote.

The remedy for not performing, again, is returning the money. It's rescission. Impossibility, it --- it was not the --- there are multiple ways this could have been handled that are factual disputes for a jury, but let me just give a couple of examples.

It's --- it's not impossible to do make-up classes. Nobody stopped the universe --- nobody said the university couldn't bring these students back later and provide what they promised face-to-face. It's not impossible to give the money back. It's money that came from the students either out of their own pockets or through their parents, or other third-party payers, or some combination thereof. But they can't not give what was promised and keep the money. Certainly not impossible to do so. There's no integration clause in

those documents. So when the university tries to bring in other bulletins and documents that are not part of the contract, it's not permitted to do so. And again, whether there's a breach of a contract is a jury question, it's fact question. Not one for summary judgment.

Again and this --- the --- we --- our position is the government order does not have the force of law, but --- but it's really immaterial, it's a bit of a distraction because make-up classes could have been done regardless of the government order later. And return of money could have been regardless of the government order later. And in fact, there are universities around the country that chose that path rather than this path.

Acquiescence. Acquiescence under the law is inherently a factual dispute. The record is replete with hundreds of complaints by parents and students about the very things that Ms. Kelly and Ms. Bunch are complaining about. In fact, some of those complaints came from Ms. Kelly's parents. They're redacted, but believe that they are her --- her dad.

And Ms. Kelly and Ms. Bunch sued immediately. We brought this case promptly after the events in question. So this is a hotly disputed factual issue for the jury. And the law says that intent is required. There must be

evidence of intent for acquiescence. Ms. Kelly and Ms. Bunch certainly did not intend to acquiesce in the very thing that they were complaining about, and that hundreds of students were complaining about, and that they sued about shortly thereafter.

It's also undisputed --- it's undisputed that the university would have cancel classes for within week after spring break and done ERT thereafter regardless of what Casey Kelly and Davia Bunch did. That matters because for acquiescence to be a defense, there must be detrimental reliance by the defendant on that acquiescence. Because the university would have done what it did regardless of what the students did. There --- there is no acquiescence. There can be no acquiescence under the law. And to the extent there's any question about that, that's a factual dispute.

And then practically it cannot be the case that a student's only recourse if there's a breach of contract is to drop out of school. That doesn't make sense. That's not what the contract says. And here we know what the university would have done had that occurred under the statement of financial responsibility, they --- they would have kept the money.

The alternative claims that we have brought for unjust enrichment and promissory estoppel apply if the

Court finds that we don't have a contract to go to the jury, and we --- we are entitled to present them in the alternative to the jury, because as these factual issues are determined by our jury, we will either be --- the --- the --- the jury will have the choice of what the --- the facts support in the verdict form.

Our contract is disputed. The university says we agree that there is a contract, but they do not agree it's the contract that we --- that we say is present. And that's the --- that is the dispute, that is precisely the reason why unjust enrichment, for example, is here in the alternative and why that's allowed to be presented to the jury in the --- in the alternative. Unjust enrichment requires a benefit to be conferred by the plaintiff to the defendant, and here it's the payment of tuition and fees for face-to-face instruction and on campus services that were not provided. It requires realization of the benefit by the defendant, which they --- they kept the money. And retention of the benefit even though it's in equitable to retain it.

And that's the heart of the unjust enrichment claim. The university if they're going to provide a different service, or in the case of the one week after spring break provided no service at all, they can't keep all the money. They have to add just what the student is charged

based on what was actually provided.

Promissory estoppel requires an unambiguous promise. Face-to-face instruction, it doesn't get any more unambiguous than that. Reasonable reliance on it, these are selected in the course registration and injury from that reliance.

And here the students, just like bringing your child to YouTube instead of the Taylor Swift or Beyoncé concert would be an outrage because it's not the same thing. Here we have a different product, an entirely different product. First --- for one week, no product, and then thereafter an entirely different product. And then it's a much easier analysis of course, was on-campus services which were not provided, which the students didn't have access to. This is a big deal to students.

The --- the --- in closing, a couple of --- of comments. As I said at the outset, Casey Kelly and Davia Bunch really do love their university. This is --- they have nothing but positive feelings for the University of South Carolina except with respect to this place where they believe that it fell down on the job and did not live up to its values. They're disappointed by that and all they're asking is that it honor its bargain with students, that it do what it promised to do in exchange for tuition.

There was a budget surplus at the time. We're talking about --- and the --- Mr. Brunson brought up CARES Act money and I --- what I think to bring it kind of back to what's at issue in this case, what the plaintiffs in this case are asking for is not new additional money beyond what was paid for tuition and for on-campus services. So we're talking about dollars back that were dollars paid into the university's pocket.

If we --- if we step back and imagine for a moment that there was no pandemic, if we imagine for the moment this would be an issue that's separate from the impossibility argument, right? Which is implicated by the pandemic.

But if we just imagine what if there's no pandemic? What if a student registers for classes, they sign the statement of financial responsibility, they enter into that contract by submitting their course registration. The course registration includes face-to-face instruction. And --- because they chose it. And the university says student John Doe, we don't like you and for no reason at all whatsoever, you don't get to come to school for half a semester. And thereafter, we're going to make up --- we're going to give you some ERT. Is that a breach of contract? And very clearly would be a breach of contract. There would be no excuse for doing that.

It would not be justifiable under the law. I don't think the university would contest that --- that case. The only difference here is the pandemic. And I think that reflects --- which --- which going to the impossibility arguments, but that thought exercise underscores why this is at its heart a breach of contract case.

So, Your Honor, we appreciate your time and attention to this. And we know it's been a long morning already. Last thoughts from the plaintiff are --- other than thank you, are we ask that --- we point out to the Court that it is only by giving the defendant the benefit of every doubt, and thought, and ambiguity, and inference, and construction of evidence that summary judgment could be granted in this case. And we respectfully submit that that would not be proper on this posture. Thank you.

THE COURT: Okay. Back to Mr. Brunson, do you have any reply? Oh hold on, you're muted. I got you. Go ahead.

MR. BRUNSON: Okay. Got it now. There are a few points I would like to make if --- if it please the Court and I'll try to --- to --- to be as --- as quick as I can. If I could have just a second here. So just --- I'm going to state an argument that --- that --- that the plaintiffs made and didn't (unintelligible) responses to

it so we can move quickly.

One is Mr. Pratt argued that the cases that have found there to be legal malpractice claims in these tuition refund cases in our jurisdictions he referred the Court to those cases. In general, those are cases that were decided at the motion to dismiss stage very early in a case. And prior to when the Court was to consider the damage theories and the extent to which the damages theory did, in fact, create a legal malpractice problem. So those cases really aren't --- aren't very persuasive, and they certainly aren't controlling when you have Hendricks versus Clemson which is just dead on point with --- with our situation.

Secondly, the academic bulletin that --- our position on the academic bulletin, number one, is that Mr. Pratt stated incorrectly that it's not on my Carolina --- the academic bulletin is a tab when you go into --- into Self Service Carolina --- sorry. It is there, and so it is juxtaposed with the registration process and that students go through. But even if it wasn't, the academic bulletin is binding on all students as a --- as a --- a part of the policies and procedures of the university. And it's not contractual, and it does say that the university reserves the right to change curricula and course offerings at its discretion. It

doesn't have to be a part of the contract to say that. It --- but the existence of that disclaimer, or reservation of rights in and of itself prevents the university from meeting minds with the plaintiff to a contract that --- that the plaintiffs would like to have and that doesn't exist. There is no contract. It says if you sign up for a class in the registration portal for it to be face-to-face, it will be face-to-face and that is our contractual agreement to you. There's nothing even remotely close to that anywhere in this case.

It's --- it's magical thinking to go from the statement in the --- statement of financial responsibility and says by registering you agree to pay. And then the registration process which includes your ability to see if a given course is or is not in-person or online. And therefore, that's a guarantee that if it's --- if you sign up for an in-person class, it's going to be in-person throughout the entire next semester. The --- these two things aren't linked. There is no promise. It's a --- it's a --- it's a registration for a class, but that doesn't make it a contract.

The university services that are discussed and really aren't addressed factually what services it is the plaintiffs claims that they didn't get, and what is the value of those services, and why does that constitute a

material breach of contract. And it's the plaintiff's burden to create a factual issue at summary judgment once the defendant has filed a motion for summary judgment.

In addition, again, back to the Clemson case, the --- the malpractice case, remember, that was a services case. It was --- that was not about what was happening in the classroom, that was about one of the services that was provided by the university, counseling services. And hence, the medical practice bar applies equally to whatever services it is the plaintiffs are trying to get reimbursed for.

Now, Mr. Pratt attempted to, several different times, answer one of my fundamental questions, and that is how are you harmed? Okay? And I'm sure you remember the --- Beyoncé Taylor Swift concert analogy. So that is completely different from what we're talking about here in a lot of ways. But most fundamentally in order for his daughters to be harmed by watching those concerted online instead of in-person, there has to be some qualitative difference between those two. Watching it online has to be inferior. It has to be something that they would have paid less money for. We don't have that here.

Here, the online courses cost exactly the same when you --- when you sign up and pay your bills. And as I

pointed out, Davia Bunch signed up for two of them. They didn't pay less because 40 percent of her classes were online by her choice. She paid --- well, she didn't pay anything, but --- but her charges were the same that she --- that she didn't pay, notwithstanding the fact that some were online. But in order to say the value is less of watching a concert online than in-person, that means it's deficient. The concert is being presented in a way that is deficient, and that is educational malpractice when you apply that to the classroom.

Because what the plaintiffs cannot say and they --- they know they can't say it, is the online education we got in the second half of the spring 2020 semester was unsatisfactory because we didn't learn as much as we would have if it had been in-person. And that is right in the center of the target of educational malpractice. They cannot bring that claim. And if they can't establish damages that way and we made no secret, it was the first thing I said when I started my argument, where is the harm? What is the harm? What is the harm? We still don't have an answer to that question that gets you around the educational malpractice bar.

The --- the --- Mr. Pratt talked about the expert damages report and --- and the various ways --- the alternative ways that he calculated damages. The ---

one --- one of those and the one that --- that they're going to have to pursue is his argument that normally when you have an online class it takes a certain number of hours to prepare the online class in advance. Whereas here you didn't --- the instructors didn't have that much time in order to present their online class to the students. And so it would be --- he estimated how much time they --- they did have during the pandemic to prepare, and then the ratio between those two constitutes his damages theory.

We got a whole lot of problems with that damages theory, but it really doesn't matter, because that all boils down to a deficient education. I mean, the --- the fact that it took less time to prepare the class and only be harmful to the students if it meant the result was they received a lesser education than they would have. Again, you have the educational malpractice bar.

He talked about surveys showing that students don't like --- didn't line online courses. I wasn't exactly sure what survey he was --- he was referring to there, but it --- it's --- it's really immaterial because that, again, would be educational malpractice if you're saying online courses were bad because students didn't like it as much as they did being in the classroom. Well, number one, I'm not sure that's true when you're having a

pandemic that students really want to go sit in the classroom with other students instead of sitting at home in isolation to watch it. And you --- and you --- and you have to --- the --- the pandemic was there. It --- you --- you can't assume there was no pandemic and look at this case completely differently because it was there.

And in addition, the fact that students perhaps didn't like online instruction would, again, go to malpractice damages. That would only be because --- because they preferred in-person instead of --- instead of being online. And that --- that you can't bring a claim for that in South Carolina.

On to the impossibility argument, Mr. Pratt said that there's no force majeure term in this contract. But a force majeure claim is not required in a contract in order for the impossibility doctrine to apply. So that --- that argument is really of no effect.

With respect to acquiescence, we argue that the plaintiffs did not complain. There was no rebuttal to that. One of the fathers sent in an e-mail, but neither of the two plaintiffs in this lawsuit claimed at the time. Neither of them asked for a refund. Neither of them took any actions whatsoever to --- to convince the university that they should continue with in-person education even though there was a pandemic. Neither of

them ever --- either --- either of them ever said anything to that effect.

And with respect to their argument that the university did not rely to its detriment on the plaintiffs acquiescence in switching to online learning, in fact, it's undisputed that the university expended tremendous efforts to continue providing the classes and services to the plaintiffs in the midst of the global pandemic. And they allowed students to make interrupted progress towards their degrees. They did in fact provide the course credits and awarded the degrees before the plaintiffs lodged any objection or expressed their dissatisfaction.

You know, all of those things, the --- the university relied upon in order --- because the plaintiffs didn't complain, didn't come and ask for a refund. There is a policy for pursuing refund from --- of your tuition from the university. None of those --- neither the students pursued those policies to seek a refund. And so they accepted the benefits of what the university did and the university relied to its detriment in providing those.

Now, towards the end Mr. Pratt gave another analogy which I would like to address, he gave an example of let's assume that this case was taking place in the

absence of a pandemic, which is a pretty big assumption, frankly, to make. We wouldn't be here. And you had a case in which the university singled out one student and said, all right, you can't come to class anymore. You have to go home and watch your courses online.

And Mr. Pratt said, I'm sure the university would agree that student could sue. No, he couldn't. It's the --- the same defenses apply. That student doesn't have a contract that allows him to be in the classroom at all times. And therefore, he couldn't sue for a breach of contract just as these plaintiffs can't for a breach of contract. Secondly, how is that plaintiff harmed? He's harmed because he's having to watch the classes online instead of in the classroom. And therefore he's --- believes he's getting a deficient education. That's educational malpractice. You can't bring a claim for educational malpractice.

In fact, that is the Hendricks case. The Hendricks case, remember, was just one guy who wanted to play basketball, and because his academic adviser apparently gave him bad advice, he wasn't able to. And one guy singled out didn't get what he --- a service that he wanted from the university. No question that he was harmed, but he could not bring that claim. And this is the South Carolina Supreme Court.

The reason he couldn't bring that claim is because it would be a claim for educational malpractice. And the courts are clear, we do not want to open the doors to litigation and second guessing about what teachers do in the classroom, what college and schools do in terms of providing services to those students. That is academic freedom that the courts grant only to educators.

So I appreciate your attention very much, Your Honor, and we're ready to proceed now however you wish.

MR. PRATT: Your Honor, could we respond briefly to any of those, or --- okay. Thank you, Your Honor.

I --- I --- I will be brief. Although Mr. Brunson's heard me say this before, what does it mean when a Baptist preacher puts his --- his watch on the lectern? Absolutely nothing. It's --- it's like a lawyer saying I'll be brief.

I --- but I do want to address the harm question, and I do want to address the Hendricks case briefly, because I think it does go to the things we talked about a lot. It's important that the Court be presented with those issues from our point of view as accurately as possible.

The Hendricks case and also the Ross case and the Syncore case that are cited by it, talk about the difference between subjective and objective. This is ---

this is critical here. Because our claim is based on an objective method of instruction term in the contract. Face-to-face instruction. It's objective, it either exists or it doesn't. It's not something capable of interpretation. And the Hendricks case was about what the plaintiff believed was bad advice. Bad advice, subjective. Capable interpretation. Certainly barred by educational malpractice.

But --- but here, we're talking about an objective term. That puts us on the right side of Hendricks, and Ross, and Syncore. And that's why those cases support our claims. Face-to-face is a different product than online. And certainly, the ERT. And the --- it's a very under --- it is distracting that many, many, many people believe that online is inferior to face-to-face. That's why Mr. Brunson and the university want to rewrite our claims to be about that --- the inferiority or the quality difference, but that is not what they're about.

Just like my daughter, I --- I wouldn't say that Ms. Swift or Beyoncé didn't sing as good in the --- in the YouTube, right? They're singing just as good. It's --- it's the same --- I --- I --- I --- it is --- you know, the quality issues of being that that's not what we're talking about. It's a different product, it's a different experience.

And I would guess that if you ask any college student in America, being at school campus in the classroom is important to them when they choose face-to-face. It's a material term. It's different from online. I would suspect that they're going to say absolutely. That's why they choose to go to USC and not the University of Phoenix. And we're not asking for damages for claims for any selections other than face-to-face.

And then lastly, I just want to --- to note --- well --- well two things: One, our damages calculations are not based on quality metrics. Our expert gave four different alternatives. It's for the jury to decide. We can't rewrite them here to make them fit a defense. And then lastly, I don't want the Court to forget I tried to say it a lot of times to make sure it was mentioned, because it's not in the defendant's briefing, there is one week where the defendant offers nothing. There's no quality issue there.

All right. That's all. Thank you, Your Honor. Thank you for letting me reply to --- to those responses.

MR. BRUNSON: Your Honor, could I have 30 seconds?

THE COURT: Sure.

MR. BRUNSON: Okay. I'll go very quick. First, on the objective/subjective Hendricks, what --- what

Hendricks and Ross, which is a Federal case that is cited in it, what it --- what it is saying is very clear, is that if the educator provides nothing, then you can sue for that. But if the educator provides something and the --- and the question is the quality of it, that is educational malpractice.

Here that's exactly what happened. The university did not shut down and fail to complete the semester. It took one week to get the online transition in place and then completed the semester teaching all the students the same things they would have taught them giving them the same amount of credit, et cetera.

And that leads me to the question of the one week. The one week is just part --- the one week after spring break that the school took without students on campus in order to transition. That's just a part of the transition process. I could see if they --- if the students lost an entire week of instruction out of the semester, but there's no --- there's no facts to support that at all. The only facts are that the students completed the semester got all the same credits that they would have received.

And what's before the Court on this motion are just these two plaintiffs. And there's no question, I mean, even Casey Kelly, one of her classes was an internship,

and she completed it before --- before the --- pivot actually even took place. And --- and so neither of the two plaintiffs are complaining that they did not get the quantity of education that they sought because of that one week that --- that they took off. Thank you.

THE COURT: Okay. As suspected, I don't intend to rule on summary judgment today, which leads me to the next thing. And the plan was to hear class certification today, we've gone on a bit longer than I anticipated on summary judgment. And if I were to grant summary judgment then that would moot the class certification issue; would it not? Yes.

MR. BRUNSON: It --- it would moot it and it could change --- like if you grant summary judgment on some but not all claims, that changes how you look at the class cert.

THE COURT: So what I would propose to do is not hear the motion for class certification today, but to hear that at a later date to give me time to make a determination on summary judgment. And then perhaps --- I'm looking at the calendar, the week of December 11th maybe we can hear the motion for class certification then; how does that suit? I'm looking at towards the end of that week.

MR. CHAPMAN: Your Honor, this is Mr. Chapman for

the plaintiffs. I --- I would be arguing the motion for the plaintiffs and if we could do it, I'm --- I'm tied up on the 13th and the fourth of that week. But I could do it on the 15th.

THE COURT: Okay.

MR. CHAPMAN: Or at another time that works for all counsel, but I just want to let you know that that Friday would be workable for me.

THE COURT: Sure. Can we do it on Friday the 15th?

MR. SMITH: Your Honor, this is Rush Smith, that would work for me.

THE COURT: Okay. So let's do it Friday the 15th via Webex again. I will (technical difficulty) --- I will have a court reporter, but I --- logistically, I don't --- I don't know where I'll be. That's sort of --- I'm --- will probably be finishing a trial in Beaufort the beginning of the week which is why I don't want to do it then. I'm scheduled to be in Lexington. So I don't know if I'll have be court reporter in Beaufort, Lexington, Richland --- I have no idea. So Webex is the easier thing do. Maybe 10:00 what morning? Does that suit?

MR. SMITH: Yes, Your Honor.

MR. BRUNSON: Yes, Your Honor.

MR. PRATT: Yes, Your Honor.

THE COURT: Okay. So I'll get you a decision on summary judgment and, you know, depending on how that goes we'll figure out what issues, if any, or what --- you know, how that changes class certification. So Friday December 15th, 10:00 a.m., via Webex. Sound good?

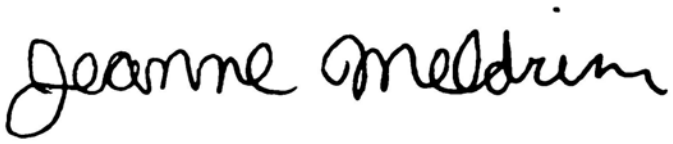
(PROCEEDINGS CONCLUDED)

CERTIFICATE OF TRANSCRIBER

I, JEANNE MELDRIM, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of CIRCUIT COURT 5 for RICHLAND COUNTY, South Carolina, on the 20th Day of November, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 18, 2024



Jeanne Meldrim

Transcriber

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

DAVIA BUNCH and CASEY KELLY,
individually and on behalf of others
similarly situated,
Plaintiffs,
vs. Civil Action No. 2020-CP-40-02330
THE UNIVERSITY OF SOUTH CAROLINA,
Defendant.

VIDEOTAPED WEB CONFERENCE
30(b)(6)
DEPOSITION OF: UNIVERSITY OF SOUTH CAROLINA'S CORPORATE REPRESENTATIVE AARON CHARLES MARTERER

DATE: Thursday, October 27, 2022

TIME: 1:54 p.m.

TIME ENDED: 2:37 p.m.

LOCATION: Nelson, Mullins, Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, South Carolina

REPORTED BY: YVONNE R. THURSTON-BOHANNON
Registered Merit Reporter,
Certified Realtime Reporter

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Brad Graham, Videographer

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would be kind of a semester by semester course offerings with course sections.

Q. So -- so the course -- the -- the general academic catalog would be just the names of the courses and the descriptions of what is being taught; is that correct?

A. Yes.

Q. And then the schedule search that the students would use online would have more granular information about the times, the professors, the building locations, the method of instruction, those kinds of --

A. Yes.

Q. -- bits of information? Okay. All right.

And just generally, so a student would log into Self Service Carolina. They would accept this Statement of Financial Responsibility, and then they would start building out their courses based on what time they wanted to take the course on what days, that kind of thing, if it was offered on those days; is that correct?

A. Yes.

Q. And let's just look at an exhibit. We'll walk through it.

you to a list of courses; is that correct?

A. Correct.

Q. And I'm going to close out this exhibit and reopen what was previously marked as Exhibit 10. Give me one second. Sorry, not Exhibit 10.

All right. So I've brought back up a document that was previously marked as Exhibit 62 that we were just talking about before. I put Exhibit 73 in front of you.

Going back -- so after the student has filtered for the type of class, campus, type of instructional method, et cetera, that he or she wishes to filter for, they would be brought to a search results page that looks something like this; is that correct?

A. Correct.

Q. All right. And then they could select the class that they wanted based on things like the time of day, the instructor, and the method of instruction; is that right?

A. That's correct.

Q. And they would specifically -- strike that.

The student would then select the

course that they wanted based on the information that's shown here where it says, "Class Details"; is that right?

A. Yes. That -- this is a pop-out box --

Q. Yeah.

A. -- from the search, and so -- and there's a -- there's a lot of information that -- you know, you the see the tabs going down the side. There's all kinds of information there that -- so it's all informational -- students can review that pop-out box --

Q. All right.

A. -- prior to making a course selection.

Q. Right.

And they -- and there's also -- so before they review the pop-out box, they would see -- if you look down here at the bottom of the first page of Exhibit 62, it says -- for example, the last entry is 55077, SPAN 122, and it says there's one of 24 seats left, and it gives the days of the week that it's offered and it gives the times.

And then there's more information that's not necessarily captured by the screen, right, that they can scroll over to?

CERTIFICATE OF REPORTER

I, Yvonne R. Thurston-Bohannon, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public for the State of South Carolina at Large, do hereby certify:

That reading and signing of the foregoing deposition by the witness is not waived.

That the foregoing transcript was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal November 15, 2022, at Columbia, Richland County, Sou



Yvonne R. Thurston-Bohannon
Registered Merit
Reporter, CRR
My Commission expires
May 6, 2025