

IN THE SUPREME COURT OF FLORIDA

CASE NO: SC23-126

ANTHONY ROJAS,

Petitioner,

v.

UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,

Respondent.

APPENDIX IN SUPPORT OF PETITIONER'S INITIAL BRIEF

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served this 1st day of **November 2023**, via the Florida e-Portal Filing System to: **Joseph W. Jacquot, Esq., Lauren V. Purdy, Esq., Jounice Nealy-Brown, Esq.,** GUNSTER, YOAKLEY & STEWART, P.A., *Attorneys for Respondent*, 1 Independent Drive, Suite 2300, Jacksonville, Florida 32202; jjacquot@gunster.com; wpruim@gunster.com; lpurdy@gunster.com; awinsor@gunster.com; jnealy-brown@gunster.com; tkennedy@gunster.com; **Robert J. Sniffen, Esq., Jeffrey D. Slanker, Esq., Matthew J. Carson, Esq.,** SNIFFEN & SPELLMAN, P.A., *Attorneys for Appellant*, 123 North

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Respectfully submitted,

By: /s/ Douglas Eaton
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COMPREHENSIVE CASE INFORMATION SYSTEM

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ALACHUA COUNTY



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Case Number	Filed Date	Disposition Date	County	Case Type	Status	Contested	Jury Trial
012021CA001124XXXXX [87322666]	04/22/2021		ALACHUA	CIRCUIT CIVIL	OPEN	No	Yes

Filing Date	Description	Active	Contested	Judgment Date
04/22/2021	CONTRACT AND INDEBTEDNESS	YES	NO	-

Party Name	Party Type	Attorney	Bar ID
BRASINGTON, MONICA J.	JUDGE		
ROJAS, ANTHONY	PLAINTIFF	MOSKOWITZ, ADAM MATTHEW	984280
UNIVERSITY OF FLORIDA BOARD OF	DEFENDANT	SNIFFEN, ROBERT JACOB	795
ROJAS ANTHONY ON BEHALF OF ALL	PLAINTIFF	MOSKOWITZ, ADAM MATTHEW	984280

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**IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT IN
AND FOR ALACHUA COUNTY, FLORIDA**

CASE NO.: 01-2021-CA-1124
DIVISION K

ANTHONY ROJAS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

THE UNIVERSITY OF FLORIDA BOARD
OF TRUSTEES,

Defendant.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Anthony Rojas, individually and on behalf of all others similarly situated (collectively, the “Class,” as more fully defined below), brings this class action complaint against Defendant, the University of Florida Board of Trustees (“Defendant” or “UFBOT”). Plaintiff makes the following allegations based upon personal knowledge as to his own acts, and upon information and belief, and his attorneys’ investigation, as to all other matters, alleging as follows:

I. NATURE OF THE ACTION

1. This is a class action brought by Plaintiff Anthony Rojas, who was a graduate student at University of Florida (“UF”) during the Spring and Summer 2020 terms, on behalf of all students who (i) entered express contracts with UF for specific on-campus resources and services during the Spring and Summer 2020 terms; (ii) paid UF fees in exchange for receiving or accessing specific on-campus resources and services during the 2020 Spring and/or Summer 2020 terms; (iii) did not receive the on-campus services or access to on-campus resources from UF for

which they paid; and (iv) did not receive from UF a pro-rated portion of the fees they paid, nor any other refund or credit, for the services that UF did not provide to them.¹

2. UF derived millions of dollars in revenue from the fees they charged their students (in addition to tuition) in exchange for UF's express promise to provide students with a variety of on-campus services and resources. However, when UF shut down its campus beginning in the Spring 2020 term in response to COVID-19, UF failed to provide students with the promised on-campus benefits for which Plaintiffs and other students contracted and paid, and UF failed to refund them any of the money the students paid for these services.

3. Students, like Plaintiff, who were struggling financially due to the unique challenges brought on by the pandemic, were nonetheless charged for and paid fees for on-campus services and resources that UF failed to provide them. It is both a breach of an express contract and patently unfair for UF to keep the money students paid UF for on-campus services and resources that UF did not provide those students.

4. Specifically, on March 11, 2020, the Florida Board of Governors ("FBOG") directed all universities to transition to remote learning effective immediately.² Students who lived in on-campus housing, including UF students, were told they had to move out or were strongly encouraged to do so, such that they had no meaningful choice but to comply.³ Further, students were encouraged to stay off campus.

5. UF transitioned to remote learning in March and began closing on-campus services and facilities at that time.⁴ Campus recreation and fitness centers, for example, including the

¹ Plaintiff's claims relate solely to fees for on-campus services that were not provided to students; they do not concern tuition costs.

² See <https://www.flbog.edu/2020/03/11/state-university-system-statement-on-covid-19/>.

³ See e.g., UF's statement to students instructing them that those "who have not gone home yet must do so if possible," available at <http://statements.ufl.edu/statements/2020/march/uf-classes-will-remain-online-for-the-remainder-of-the-spring-semester.html>.

⁴ See <http://statements.ufl.edu/statements/2020/march/classes-moving-online-due-to-covid-19.html>.

Southwest Recreation Center, all closed on March 20, 2020.⁵ As a result, many of the services in exchange for which Plaintiff and Class members paid fees were no longer available. UF campuses remained partially and/or completely closed for the Summer 2020 terms, yet UF continued to charge the mandatory fees to students for campus services that UF knew would not be available for the Summer 2020 sessions.

6. Despite its constructive eviction of students at UF for the remainder of the 2020 Spring and Summer terms and terminating all campus activities for at least that same time period, UF has not refunded the fees paid to cover the cost of certain on-campus services which were not available to students. Other higher education institutions across the United States that also switched to e-learning and requested that students leave campus have recognized the upheaval and financial harm to students and their families from these decisions and have provided appropriate refunds. That is the right thing to do. UF, unfortunately, has taken the opposite approach by refusing to provide refunds of the fees for on-campus services and activities.

7. UF has improperly retained funds for services it did not provide, in violation of its express contracts with students, which allow it to collect fees only for certain statutorily specified purposes. UF's actions are unlawful and unfair, and as a matter of both contract and equity, Plaintiff and Class members are entitled to damages and/or disgorgement of the fees and monies paid.

8. On information and belief, in March 2020, UF considered amending its regulations to allow adjusted amounts for certain student fees (the Health, Athletic, Activity and Service, and Transportation Access Fees). W. Andrew McCollough, the university's associate provost for teaching and technology, stated that "[t]he general rationalization was, with the students gone, it was no longer necessary for them to pay for access to services that will not be where they are."⁶

⁵ See <http://statements.ufl.edu/statements/2020/march/closing-of-rec-center-refunds-su-grade-option.html>.

⁶ See https://www.alligator.org/article/2020/04/proposed-summer-fee-reduction-could-be-by-eight-cents?ct=content_open&cv=cbox_latest.

Despite this limited acknowledgment that certain fees should not be charged to students for the time period that the campuses were closed and therefore students did not have access to campus services, UF did not consider offering prorated discounts for the 2020 Spring semester. Furthermore, the proposed amendment did not ultimately pass.

9. Plaintiff brings this class action against UF for breach of contract (or, in the alternative, unjust enrichment), seeking to enjoin UF from retaining fees paid for services not provided and for damages and/or disgorgement consisting of the pro-rated, unused amounts of fees that Plaintiff and the other Class members paid, but for which they (or the students on behalf of whom they paid) were not provided the benefit.

10. Courts in Florida have concluded that similar class action lawsuits against other public Florida colleges and universities for failing to provide specific, paid-for services state viable causes of action which are not barred by sovereign immunity. For example, in *Verdini v. District Board of Trustees of Miami-Dade College*, Case No. 2020-17924-CA-44 (Fla. 11th Jud. Cir.), the circuit court entered an order denying Miami-Dade College's (MDC) motion to dismiss, determining that the complaint stated a claim for breach of contract that was not barred by sovereign immunity. See **Exhibit A** (order denying motion to dismiss). The court found that the student's invoices, which were both described in, and attached to, the complaint, "sufficiently contain[ed] the express written terms and provide[d] the specific services MDC was contractually obligated to provide in exchange for Plaintiff's payment of 'fees.'" As a result of this express agreement, which may involve "express or implied covenant[s] or condition[s]," the court concluded that MDC waived its defense of sovereign immunity. *Id.* at. 3 (quoting *Champagne-Weber, Inv. C. City of Fort Lauderdale*, 519 So. 2d 696, 698 (Fla. 4th DCA 1988). Moreover, in *Rojas v. Florida Board of Governors*, Case No. 2020 CA 000846 (Fla. 2d Jud. Cir.), the circuit court denied a motion to stay discovery based on defendants' argument that similar claims against Florida's public universities were barred by sovereign immunity. See **Exhibit B** (order denying motion to stay discovery). The circuit court concluded that, by pointing to invoices and other

financial obligation agreements regarding fees and costs, plaintiffs sufficiently alleged the existence and breach of an express contract. *Id.* at 2-3.⁷

II. PARTIES

A. Plaintiff

11. Anthony Rojas is a Virginia citizen, residing in Alexandria, Virginia. During the 2020 Spring and Summer terms, Plaintiff was enrolled in a graduate program at UF. UF issued an invoice, or “Tuition Statement,” to Plaintiff for each of these terms, charging him for various student fees. *See Exhibit C* (Plaintiff’s 2020 Spring semester Tuition Statement).

12. Plaintiff’s Tuition Statement shows that Plaintiff was invoiced the following fees, on a per-credit basis, for the 2020 Spring semester:⁸

- Capital Improvement Trust Fund: \$6.76

⁷ Notably, other courts in Florida have followed this same reasoning and denied defendants’ attempts to dismiss the breach of contract and unjust enrichment claims in these types of cases. *See e.g., Gibson v. Lynn Univ.*, No. 20-CIV-81173-RAR, 2020 WL 7024463 (S.D. Fla. Nov. 29, 2020); *Rosado v. Barry Univ., Inc.*, No. 1:20-CV-21813, 2020 WL 6438684 (S.D. Fla. Oct. 30, 2020); *Rhodes v. Embry-Riddle Aeronautical Univ., Inc.*, No. 6:20-cv-927-Orl-40EJK, 2021 WL 140708 (M.D. Fla. Jan. 14, 2021); *see also Gibson v. Lynn Univ.*, No. 20-CIV-81173-RAR, at ECF No. 69 (S.D. Fla. March 23, 2021). These decisions mirror those of other courts nationwide. *See e.g.*, February 26, 2021 Order in *In Re Columbia Tuition Refund Action*, Case No. 20-CV-3208, 2021 WL 790638 (finding student-plaintiff stated a “plausible claim that Pace [University] breached a contract to provide access to some on-campus facilities and activities in exchange for the fees that [the student] paid and therefore denying the university’s motion for judgment on the pleadings on the breach of contract claim).

⁸ Although the Tuition Statement does not itemize fees, UF’s 2019-2020 schedule of tuition and fees specifies which fees Plaintiff was invoiced. *See Exhibit D* (UF’s schedule of tuition and fees for the 2019-2020 academic year). Plaintiff’s Tuition Statement shows that Plaintiff was assessed \$6,374.28 in “Tuition and Fees” for a total of 12 credits for the 2020 Spring semester. *See Exhibit C*. After removing a \$6 “University DL Fee,” this amounts to a charge of \$530.69 per credit for tuition and fees. Per UF’s own 2019-2020 tuition and fee schedule, \$530.69 is the exact amount of the “Total Florida Resident Rate/Credit Hour” for graduate students. In addition to a per-credit tuition rate of \$448.74, the “Total Florida Resident Rate/Credit Hour” of \$530.69 includes all of the following fees: Capital Improvement Trust Fund (\$6.76); Student Financial Aid (\$22.43); Activity and Service Fee (\$19.06); Athletic Fee (\$1.90); Health Fee (\$15.81); and Transportation Access (\$9.44). Thus, Plaintiff’s Tuition Statement confirms that, by charging Plaintiff \$530.69 per credit for the 2020 Spring semester, UF charged Plaintiff for each of these fees, at the per-credit rates enumerated in its tuition and fee schedule.

- Student Financial Aid Fee: \$22.43
- Technology Fee: \$6.56
- Activity and Service Fee: \$19.06
- Athletic Fee: \$1.90
- Health Fee: \$15.81
- Transportation Access Fee: \$9.44

13. For both the Spring and Summer 2020 terms, Plaintiff paid his invoice in full, thus paying certain fees in order to gain access to on-campus services, resources, and amenities. However, Plaintiff did not receive the benefits for which he paid these fees because UF closed campus during the Spring 2020 term. Plaintiff has neither been offered nor provided a refund of any of the fees he paid, even though many of the services funded by the fees were unavailable.

B. Defendant

14. The University of Florida Board of Trustees is the governing body of the University of Florida, a public university in Florida. UFBOT's principal place of business located at 111 Tigert Hall, Gainesville FL 32611-3517.

III. JURISDICTION AND VENUE

15. This is an action for damages and the amount in controversy exceeds this Court's minimum jurisdictional amount (\$30,000 exclusive of interest, costs, and attorney's fees).

16. This Court has personal jurisdiction over UF because UF is domiciled in Alachua County, Florida.

17. Venue is proper in this District pursuant to section 47.011, Florida Statutes, because UF resides in Alachua County, Florida, and because of Florida's common law home venue privilege.

IV. FACTUAL ALLEGATIONS

A. *Plaintiff and Class Members Paid Fees for the 2020 Spring and/or Summer Terms.*

18. Plaintiff and the other Class members are or were UF students who paid the student fees for the 2020 Spring and/or Summer terms at UF. Each university within the State University System of Florida publishes its own schedule of fees, which can include items such as a Student Services, Capital Improvement, Technology, and Parking, among others. These fees are established in accordance with section 1009.24, Florida Statutes, which delineates which fees the universities can charge and their specific purposes, as well as the Chapter 7 regulations enacted by FBOG and the regulations enacted by the individual boards of trustees at each university.

19. During the 2019-2020 academic year, UF issued invoices to Plaintiff and Class members for a variety of student fees, including the following:

- Activity and Service Fee: \$19.06
- Transportation Access Fee: \$9.44
- Health Fee: \$15.81
- Athletic Fee: \$1.90

See <https://www.fa.ufl.edu/directives/2019-20-academic-year-tuition-and-fees/>. These fees remained the same through the 2020 Fall term.

20. According to Defendant, these fees—the Activity and Service, Health, Athletics, and Transportation Fees—explicitly cover resources and services available to students on or around campus. In fact, UF explains that students are charged “a variety of student fees, in addition to tuition, each semester to provide for valuable services that benefit the entire stud[ent] body.”⁹

21. The Activity and Service Fee, for example, is used to “provide services for all student body and cater to overall enrichment in safety, entertainment, health, professional skills

⁹ See <https://shcc.ufl.edu/fees-and-insurance/university-shcc-fees/student-health-fee/#:~:text=For%20the%20SHCC%2C%20the%20health,services%20initiated%20by%20the%20patient.>

and personal development.”¹⁰ This fee funds student organizations and events, as well as the “SG Bike Repair, SG Print Lab, and the SG Graphics and Copy Center, all of which provide certain services at no charge or a reduced cost to students or student organizations.”¹¹ Moreover, this fee provides access to “[p]articipation in recreational sports and intramurals, access to recreation and fitness facilities, and participation in programs like Gator Nights.”¹²

22. The Transportation Access Fee, “is used to help support the on-campus shuttle bus system”¹³ and to provide “[f]are-free service on the Regional Transit System (RTS).”¹⁴ On-campus students depend on these shuttles to move around the university’s large campus.

23. The Health Fee “is a service fee . . . that goes to many campus-wide health initiatives,”¹⁵ including maintaining the university’s Student Health Service.¹⁶ In exchange for paying this fee, students are “eligible for Student Health Care Center (SHCC) services”¹⁷ and afforded “[a]ccess to the Student Health Care Center and Counseling and Wellness Center.”¹⁸

24. Finally, the Athletics Fee provides students with “[a]ccess to student sections and discounted pricing for athletic events.”¹⁹

25. The fees listed and described above are provided by way of example; the total amount of fees for which this action seeks damages and/or disgorgement thereof—which may include other fees that are not listed herein—will be proven at trial. For purposes of this action, “fees” do *not* include the cost of tuition or the cost of room and board.

¹⁰ See <https://sg.ufl.edu/services/>.

¹¹ See <https://sg.ufl.edu/about/sg-finance/>.

¹² See <https://ufonline.ufl.edu/tuition/optional-fee-package/>.

¹³ See <https://regulations.ufl.edu/wp-content/uploads/2018/06/3.0372.pdf>.

¹⁴ See <https://ufonline.ufl.edu/tuition/optional-fee-package/>.

¹⁵ See <https://shcc.ufl.edu/fees-and-insurance/charges-billing-payment/>.

¹⁶ See <https://archive.catalog.ufl.edu/ugrad/1213/regulations/info/fees.html#studentfees>.

¹⁷ See <https://shcc.ufl.edu/fees-and-insurance/>.

¹⁸ See <https://ufonline.ufl.edu/tuition/optional-fee-package/>.

¹⁹ *Id.*

26. For students enrolled in on-campus programs and courses, the fees detailed above are mandatory. For students enrolled in the University of Florida’s Online programs (“UF Online”), the fees are instead optional. That is, UF Online students can opt to purchase a “UF Online Optional Fee Package,” which includes the (i) Activity and Service, (ii) Health, (iii) Athletics, and (iv) Transportation Fees, in order to gain access to the services that these fees support.²⁰ By purchasing the Optional Fee Package and paying these included fees, UF explains that students will have “an avenue to access a broader range of services.”²¹

27. UF thus issues invoices to (i) all on-campus students and (ii) UF Online students who purchase the Optional Fee Package for certain fees—namely, the Activity and Service, Health, Athletics, and Transportation Fees—which, when paid, are to guarantee students’ access to a wide range of on-campus services, activities, and amenities.

28. Finally, to ensure that students pay their invoices, UF requires that each student sign a Financial Liability Agreement, in which UF’s provision of “educational services” is expressly conditioned on students’ agreement to pay the fees for which they are assessed:

I agree to pay all UF debts and charges pursuant to UF policies. I understand that the university is advancing value to me in the form of educational services and that my right to register is expressly conditioned upon my agreement to pay the costs of tuition, fees, and other charges and any additional costs when those charges become due.

See **Exhibit E** (UF Financial Liability Agreement).

29. By signing the Financial Liability Agreement and paying the fees for which they were invoiced—and which were described in great detail by UF—Plaintiff and Class members each entered an express, written contract with UF for the provision of certain on-campus educational services during the 2020 Spring and/or Summer terms. Specifically, Plaintiff and Class members “agree[d] to pay the costs of...fees”—as set forth in UF’s tuition and fee schedule, as well as the invoices, tuition statements, and other billing materials issued to them by UF—in

²⁰ See <https://ufonline.ufl.edu/tuition/optional-fee-package/>.

²¹ *Id.*

exchange for the “educational services” to be funded and support by the Activity and Service, Health, Athletics, and Transportation Fees, as set forth in Defendant’s various and detailed descriptions of each fee.²²

30. Moreover, UF’s regulations indicate that “registration” consists of “two (2) major components,” one of which is “tuition and fee payments,” and students may not attend classes without paying the required fees. *See* UF-3.037(1), Regulations of the Univ. of Fla.

B. *In Response to COVID-19, UF Got It Half Right: It Required or Encouraged Students to Leave Campus and Not Utilize Campus Services, But Failed to Refund The Mandatory Fees they Paid for Services they Didn’t Receive*

31. In March 2020, several U.S. cities, states, and municipalities began calling for social distancing to slow the spread of COVID-19. Eventually, some cities, states, and municipalities ordered citizens and residents to “shelter-at-home,” effectively requiring them to stay home, other than to receive essential services.

32. On March 9, 2020, Governor DeSantis issued Executive Order 20-52, declaring a Florida State of Emergency due to COVID-10.

33. On or about March 11, 2020, FBOG issued an order directing all universities to implement a process to transition to remote instruction immediately and encourage students to stay home (if they had left their campuses for spring break) or to return home.²³ On or about March 17, 2020, it extended remote learning through the end of the Spring semesters at all Florida universities and directed all universities to develop an alternate schedule or method of delivery for on-campus commencement ceremonies.²⁴

²² Plaintiff alleges that three documents form the express contract which he, and each Class member, entered into with UF during the 2020 Spring and/or Summer terms: (i) UF’s Financial Liability Agreement, (ii) UF’s tuition statements, invoices, and other billing materials issued to each student, assessing certain fees; and (iii) UF’s written materials describing the services to be provided for each of those fees. Plaintiff should be given the opportunity to further establish the existence and terms of these express contracts through discovery directed to UF, which may have additional materials relating to the express contracts in its sole and exclusive possession. *See, e.g., Amiker v. Mid-Century Ins. Co.*, 389 So. 3d 974 (Fla. 1st DCA 1981).

²³ *See* <https://www.flbog.edu/2020/03/11/state-university-system-statement-on-covid-19/>.

²⁴ *See* <https://www.flbog.edu/2020/03/17/state-university-system-extends-remote-learning/>.

34. On March 20, 2020, Governor DeSantis issued Executive Order 20-71, instructing schools to close all campus recreation and fitness centers, which were closed that day. On March 24, 2020, he issued Executive Order 20-83, ordering the Florida Surgeon General and State Health officer to issue a public health advisory recommending all Florida residents avoid social gatherings of ten or more people and encouraging anyone who can work remotely to do so.

35. Pursuant to these orders, UF began the transition to remote learning and began closing its facilities on campus. On-campus services were suspended and university events, including athletic activities, were cancelled.²⁵ Like many other students, Plaintiff was unable to use basic resources, such as the campus shuttle or recreational facilities.

36. The effect of UF's COVID-19-related protocols and messaging was that all students were effectively forced to leave and stay off campus, unless they truly had no other safe place to go. For all students, services were closed or extremely limited.

37. Notwithstanding each of the above-listed facts, UF has not provided UF students refunds of their fees, even though students could no longer use the services nor access the facilities for which those fees were paid.

38. On March 20, 2020, in a letter to students at the University of Florida, the Vice-President of Student Affairs indicated that the University of Florida was "developing plans for issuing refunds, rebates, or credits to students who may no longer be able to utilize their university residence hall and/or dining plan contracts."²⁶ No communications were made concerning the other fees students paid for access to on-campus resources and services beyond their tuition that they paid for the Spring 2020 and later Summer 2020 terms. On March 27, UF announced that it

²⁵ See e.g., https://www.alligator.org/article/2020/06/uf-libraries-to-reopen-at-25-percent-capacity-at-end-of-august?ct=content_open&cv=cbox_latest and <https://www.oconnellcenter.ufl.edu/coronavirus-covid-19-update/>.

²⁶ See <http://statements.ufl.edu/statements/2020/march/closing-of-rec-center-refunds-su-grade-option.html>.

would begin distributing partial housing and dining refunds for students.²⁷ Once again, no mention was made concerning refunding the student fees.

39. While social distancing continues to be recommended by healthcare professionals and even the Centers for Disease Control and Prevention (“CDC”), the resulting impact to the economy—and individual families’ wallets—cannot be overstated. Rather than acknowledge the difficult financial stresses that COVID-19 has placed on families, University of Florida students and their families were expected to bear the brunt of the stress.

40. UF has retained the value of monies paid by Plaintiff and the other Class members for fees, while failing to provide the services for which those fees were paid. UF’s refusal to provide any refunds in consideration of its decision to shutter its campuses and move to remote learning violates its express written contractual agreements with Plaintiff and Class members to provide specific benefits (such as student activities, intercollegiate sports, and access to recreational facilities, health services, and transportation resources) in exchange for certain fee amounts.

41. UF does not have the right to retain the monies that students paid for specific services they were not provided. The inequity is further highlighted by the fact that thus far, the federal government initially allocated well over \$15 million in aid to UF to help cover the costs associated with the COVID-19 disruption,²⁸ and received an additional \$15 million in such federal funding in February 2021.²⁹

²⁷ See <http://statements.ufl.edu/statements/2020/march/partial-housing-and-dining-refunds-for-spring-2020-semester.html>. Students who formally checked out of their on-campus housing before March 24 would be offered a housing refund based on their checkout date. Students who stopped using their meal plan after March 23 would also receive a refund for the unused portion of their meal plan, including flex bucks. These refunds would be automatically distributed to students’ accounts.

²⁸ See <https://www.sfa.ufl.edu/federal-cares-act-spring2020/>.

²⁹ See <https://www.sfa.ufl.edu/federal-cares-act/>.

42. Class members have demanded the return of the unused portions of the fees that they paid through several channels, including online forums.³⁰ In a petition signed by more than a thousand students, UF students demanded that UF refund them the fees that they had paid for the “numerous student services” “due to the fact that the services they cover have either been reduced or are no longer available to [them].”³¹ The students further declared that they are “entitled to the resources that [they] pay for, and when [the resources] are no longer available [they] are entitled to a refund.”³² UF has ignored these demands.

43. Through this lawsuit, Plaintiff seeks—individually and on behalf of the other Class members—a judgment requiring UF to refund the pro-rated, unused portion of fees, proportionate to the amount of time that remained in the 2020 Spring semester when classes moved online and campus services ceased being provided, as well as the fees for the 2020 Summer term when the campus and its facilities and services remained closed and/or unavailable. These amounts must be disgorged and/or returned to Plaintiff and the other Class members. It is inequitable, unfair, and illegal for UF to retain these funds.

V. CLASS ACTION ALLEGATIONS

44. Plaintiff brings this case individually and, pursuant to Florida Rule of Civil Procedure 1.220(a), (b)(2), (b)(3), and/or (c)(4) for damages, equitable relief, and disgorgement on behalf of the Class, defined as:

All persons who paid fees to the University of Florida for on-campus services, facilities, resources, activities, and/or events for the 2020 Spring and/or Summer terms that were not provided to them and who did not receive partial or complete refunds for those fees.

45. Excluded from the Class is UF and any of its respective members, affiliates, parents, subsidiaries, officers, directors, employees, successors, or assigns; the judicial officers,

³⁰ See, e.g., <https://www.change.org/p/university-of-florida-provide-a-partial-refund-of-tuition-fees-for-uf-students>.

³¹ See *id.*

³² *Id.*

and their immediate family members; and Court staff assigned to this case. Plaintiff reserves the right to modify or amend the Class definition, as appropriate, during this litigation.

46. This action has been brought and may properly be maintained on behalf of the Class proposed herein under the criteria of Rule 1.220 of the Florida Rules of Civil Procedure.

47. **Numerosity—Florida Rule of Civil Procedure 1.220(a)(1).** The Class members are so numerous and geographically dispersed that individual joinder of all Class members is impracticable. The precise number of Class members is unknown to Plaintiff, but may be readily ascertained from UF's records and, based upon publicly available information, is presumed to be no less than 52,000 students. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

48. **Commonality—Florida Rule of Civil Procedure 1.220 (a)(2); Predominance—Florida Rule of Civil Procedure 1.220 (b)(3).** This action involves questions of law and fact common to the Class, which predominate over any individual questions, including, without limitation:

- a. Whether UF engaged in the conduct alleged herein;
- b. Whether UF breached its contracts with Plaintiff and the other Class members by retaining fees without providing the services which the fees were intended to cover;
- c. Whether UF was unjustly enriched by retaining fees of Plaintiff and the other Class members without providing the services that the fees were intended to cover;
- d. Whether certification of the Class is appropriate under Florida Rule of Civil Procedure 1.220;

- e. Whether Plaintiff and the other Class members are entitled to damages, and/or prospective declaratory, equitable, or injunctive relief, including disgorgement, and/or other relief; and
- f. The amount and nature of relief to be awarded to Plaintiff and the other Class members.

49. **Typicality—Florida Rule of Civil Procedure 1.220(a)(3).** Plaintiff's claims are typical of the other Class members' claims because Plaintiff and the other Class members each paid for fees for the 2020 Spring and/or Summer terms at UF but were not provided the services that those fees were meant to cover, nor were they reimbursed therefor. Plaintiff and the other Class members each suffered harm—namely, UF retaining their fees and monies paid—as a direct and proximate result of the same wrongful conduct in which UF engaged. Plaintiff's claims arise from the same practices and course of conduct that give rise to the other Class members' claims.

50. **Adequacy of Representation—Florida Rule of Civil Procedure 1.220(a)(4).** Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the other Class members who he seeks to represent. Plaintiff has retained counsel competent and experienced in complex class action litigation, and Plaintiff intends to prosecute this action vigorously. Class members' interests will be fairly and adequately protected by Plaintiff and his counsel.

51. **Declaratory and Injunctive Relief—Florida Rule of Civil Procedure 1.220(b)(2).** UF has acted or refused to act on grounds generally applicable to Plaintiff and the other Class members, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

52. **Superiority—Florida Rule of Civil Procedure 1.220(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. Individualized litigation creates a potential for inconsistent or contradictory judgments and

increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

53. Certification of Specific Issues—Florida Rule of Civil Procedure 1.220(c)(4).

To the extent a class does not meet the requirements of Rules 1.220(b)(2) or (b)(3), Plaintiff seeks the certification of issues that will drive the litigation toward resolution.

VI. CLAIMS ALLEGED

FIRST CLAIM FOR RELIEF

Breach of Contract

On behalf of Plaintiff and the Class

54. Plaintiff repeats and alleges the allegations in Paragraphs 1—53 above, as if fully alleged herein.

55. Plaintiff brings this claim individually and on behalf of the other Class members.

56. Plaintiff and other Class members each entered into an express, written contract with UF whereby Plaintiff and the other Class members would pay fees to UF and, in exchange, UF would provide specific educational services to students during the 2020 Spring and/or Summer terms. This express contract, as well as its express or implied covenants or conditions, is evidenced by: (i) UF's Financial Liability Agreement, signed by each UF student; (ii) the invoices, tuition statements, and other billing materials that UF issued to each UF student, including assessments for certain fees, as set forth in UF's schedule of tuition and fees for the 2019-2020 academic year; and (iii) UF's many detailed statements about the specific services to be provided in exchange for certain fees.

57. Plaintiff and the other Class members fulfilled their end of the bargain when they paid the fees for which they were assessed for the 2020 Spring and/or Summer terms.

58. UF breached its contracts with Plaintiff and the other Class members when it stopped providing services for which the fees were paid, and did not return the fees to students.

59. UF retained monies Plaintiff and the other Class members paid to UF but without providing them the benefit of their bargain.

60. Plaintiff and the other Class members are entitled to the pro-rated, unused amounts of fees that UF charged, and which Plaintiff and the other Class members paid. Plaintiff is not suing to recover monies paid by taxes to the public universities in Florida; rather, Plaintiff files suit against UF, a corporate body that may be sued for damages, for the fees and monies paid by students and their parents, guardians, and families for services not received.

61. Moreover, “Florida law is firmly established that a municipality waives the protections of sovereign immunity . . . when it enters an express written contract.” *See* Order on Motion to Dismiss, *Suarez v. City of Opa-Locka Florida*, Case No. 2017-008285-CA-01. Accordingly, UF has waived its sovereign immunity for breach of contract suits in its own courts. *See, e.g., Pan-Am Tobacco Corp. v. Dep’t of Corr.*, 471 So.2d 4, 5 (Fla. 1984) (“[W]here the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state’s breach of that contract.”). *See also* Exhibits A and B.

SECOND CLAIM FOR RELIEF
Unjust Enrichment
On behalf of Plaintiff and the Class

62. Plaintiff repeats and alleges the factual allegations above, as if fully alleged herein.

63. Plaintiff brings this claim individually and on behalf of the other Class members as an alternative to the breach of contract claim brought on behalf of Plaintiff and the other Class members (the First Claim for Relief, above).

64. UF has received a benefit at the expense of Plaintiff and the other Class members to which it is not entitled. Plaintiff and the other Class members paid fees to UF and did not receive the services for which they paid, yet UF continues to retain the fees Plaintiffs and the Class members paid to UF for those services.

65. Plaintiff and the other Class members paid fees for or on behalf of students, which were intended to cover services for the 2020 Spring and/or Summer terms. In exchange, students were entitled to receive certain campus services during these terms.

66. UF moved classes online, shut down its facilities, cancelled on-campus events and activities, and stopped providing the services the fees were intended to cover.

67. UF has been unjustly enriched by retaining the fees paid by Plaintiff and Class members for these terms while not providing the services for which those fees paid. Equity requires UF to return to Plaintiff and the other Class members the remaining, pro-rated amounts of fees paid for the 2020 Spring semester and the amount of fees paid for the 2020 Summer term.

68. Plaintiff's claim for unjust enrichment is not barred by sovereign immunity. Under well-established Florida law, the state is not entitled to sovereign immunity for a fee charged in violation of law. *See Bill Stroop Roofing Inc. v. Metro. Dade Cnty.*, 788 So. 2d 365 (Fla. 3d Dist. Ct. App. 2001).

REQUEST FOR RELIEF

Plaintiff, individually and on behalf of the other Class members, respectfully requests that the Court enter judgment in his favor and against UF as follows:

a. Certifying the Class as requested herein, designating Plaintiff as class representative, and appointing Plaintiff's undersigned counsel as Class Counsel;

b. Declaring that UF is financially responsible for notifying the Class members of the pendency of this suit;

c. Declaring that UF has wrongfully retained monies paid for fees, which belong to Plaintiff and the other Class members and must be disgorged;

d. Awarding injunctive relief as permitted by law or equity, including enjoining UF from retaining the pro-rated, unused portion of monies paid for fees;

e. Awarding damages in the form of the portion of the fees that should properly be returned to students; and

f. Awarding such other and further relief as may be just and proper.

VII. JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all causes of action so triable.

Dated: April 21, 2021

/s/ Adam M. Moskowitz
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Florida Bar No. 984280
Howard M. Bushman
Florida Bar No. 364230
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Matthew D. Schultz (FBN 0640328)

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Counsel for Plaintiff and the Proposed Class

EXHIBIT A

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

CASE NO. 2020-17924-CA-44

FERNANDO VERDINI, an individual on
behalf of others similarly situated

Judge William Thomas

Plaintiff,

v.

DISTRICT BOARD OF TRUSTEES OF
MIAMI-DADE COLLEGE

Defendant.

**ORDER ON DEFENDANT, DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE
COLLEGE'S, MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

THIS CAUSE came before the Court on Defendant, District Board of Trustees of Miami-Dade College's ("MDC"), motion to dismiss Plaintiff's complaint. The Court having reviewed the motion, heard argument of counsel, and otherwise being fully advised in the premises, the Court makes the following findings:

A motion to dismiss tests only the legal sufficiency of a complaint and is not intended to determine issues of ultimate fact. "[T]he trial court is necessarily confined to the well-pled facts alleged in the four corners of the complaint." *Lewis v. Barnett Bank of S. Florida, N.A.* 604 So. 2d 937 (Fla. 3d DCA 1992). The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022 (Fla. 4th DCA 1996). The court must draw all reasonable inferences in favor of

EXHIBIT A

the nonmoving party. *Id.* Thus, the question for this court to decide is whether, assuming the well-pleaded factual allegations in the Complaint are true, Plaintiffs would be entitled to the relief requested.

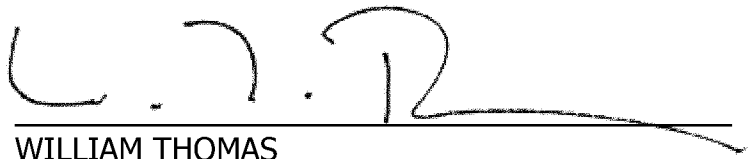
Plaintiff alleges that MDC breached an express, written agreement with him concerning fees that he was required to pay in exchange for registering for courses at MDC. Plaintiff attaches invoices providing the fees he was charged for the Summer 2020 semester—invoices which list the specific purpose of each and every fee—and an invoice demonstrating he was charged similar fees in the Spring 2020 semester. The Plaintiff alleges that these documents constitute an express, written agreement between Plaintiff and MDC to provide specific services authorized by the Florida statutes in exchange for the payment of fees. MDC argues that Plaintiff does not identify the on-campus services or the express written terms that MDC breached by not providing those services. It is the finding of the Court that Plaintiff's invoices, as attached to the complaint, sufficiently contain the express written terms and provide the specific services MDC was contractually obligated to provide in exchange for Plaintiff's payment of "fees" to survive a motion to dismiss. *See Waite Development, Inc. v. City of Milton*, 866 So. 3d 153, 155 (Fla. 1st DCA 2004) (reversing order dismissing claim against City based on sovereign immunity defense finding that "[s]everal writings may constitute a valid and binding written contract when they evidence a complete meeting of the minds of the parties and an agreement upon the terms and conditions of the contract.")

MDC argues sovereign immunity bars Plaintiff's claims. "Sovereign immunity is the 'privilege of the sovereign not to be sued without its consent.'" *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 446 (Fla. 4th DCA 2015) (citation omitted). "Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the

vast number of citizens affected by actions of a government.” *S. Roadbuilders, Inc. v. Lee Cty.*, 495 So. 2d 189, 190 n.1 (Fla. 2d DCA 1986). “[A] [sovereign] waives the protections of sovereign immunity only when it enters into an express contract.” *Israel*, 178 So. 3d at 447. Immunity remains, however, where the claims do not arise from breaches of expressed, written contracts. *See S. Roadbuilders, Inc. v. Lee Cnty.*, 495 So. 2d at 190- 91. In addition, under Florida law, where there is an express written contract, “the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or implied covenant or condition of that contract.” *Champagne-Webber, Inv. v. City of Fort Lauderdale*, 519 So. 2d 696, 698 (Fla. 4th DCA 1988). Therefore, it is

ORDERED AND ADJUDGED that Plaintiff has sufficiently stated a cause of action for breach of an express contract. Therefore, at the motion to dismiss stage, sovereign immunity is no bar to Plaintiff’s well pled breach of contract claim and MDC’s motion to dismiss is **DENIED**. However, as to the Plaintiff’s unjust enrichment claim, the motion to dismiss is **GRANTED** with prejudice as Florida law does not permit a waiver of sovereign immunity based on implied contracts. MDC has 20 days from the date of this order to file an answer.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 02/01/21.



WILLIAM THOMAS
CIRCUIT COURT JUDGE

No Further Judicial Action Required on <u>THIS MOTION</u> CLERK TO RECLOSE CASE IF POST JUDGMENT

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or

hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

EXHIBIT B

IN THE CIRCUIT COURT OF THE SECOND
JUDICIAL CIRCUIT IN AND FOR
LEON COUNTY, FLORIDA

CASE NO.: 2020 CA 000846

ANTHONY ROJAS, AMANDA HEINE,
and JORDAN SPERLING, individually and
on behalf of all others similarly situated,

Plaintiffs,

CLASS ACTION

JURY TRIAL DEMANDED

v.

FLORIDA BOARD OF GOVERNORS,

Defendant.

**ORDER ON DEFENDANT FLORIDA BOARD OF GOVERNOR'S MOTION FOR
PROTECTIVE ORDER AND TO STAY DISCOVERY PENDING FINAL
ADJUDICATION OF DISPOSITIVE MOTIONS**

THIS CAUSE, having come before the Court upon Defendant's Motion for Protective Order and to Stay Discovery Pending Final Adjudication of Dispositive Motions ("Motion to Stay"), the Court having reviewed the motion and the briefs submitted by the parties, conducted oral argument on October 29, 2020, and being duly advised of the premises, the Court finds as follows:

1. The Defendant seeks to stay discovery in this case based on the argument that Defendant intends to raise a sovereign immunity defense. Defendant has cited *State of Florida v. Curcio*, 71 So. 3d 931 (1st Dist. 2011), in support of its argument that discovery is not necessary when sovereign immunity is at issue. The Court does not agree.

2. In *Curcio*, the Appellate Court specifically allowed discovery to proceed "as necessary to resolve the sovereign immunity defense to Counts III & IV." *Curcio*, 71 So. 3d at 933.

Exhibit B

3. In the case at hand, the Defendant argues that the State enjoys sovereign immunity from claims arising out of implied contracts. The Plaintiffs, however, have alleged that they entered into contractual agreements, not implied contracts. *See* Am. Comp. ¶¶ 13, 57.

4. Further, in their opposition to the Motion to Stay, the Plaintiffs provided examples where at least one of Florida's public universities references "agreements" with students for the payment of fees. *See* Pl's Opp. Br. at 11. Specifically, the Plaintiffs provided evidence that at the University of Florida, students had to agree to the following written terms:

I agree to pay all UF debts and charges pursuant to UF policies. I understand that the university is advancing value to me in the form of educational services and that ***my right to register is expressly conditioned upon my agreement to pay the costs*** of tuition, fees, and other charges and any additional costs when those charges become due.

See <https://www.fufl.edu/directives/terms-and-agreements/> (emphasis added).

5. The Plaintiffs also argue at page 15 of their Opposition Brief that students receive and pay written invoices for their fees, and that these invoices should be considered an express contract. *See, e.g. Int'l Star Registry of Illinois v. Omnipoint Mktg., LLC*, 510 F. Supp. 2d 1015, 1022 (S.D. Fla. 2007) ("the invoices constitute contracts between the parties").

6. The State does not enjoy immunity from claims based on express contracts. *See Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So.2d 4, 6 (Fla. 1984); *Corcoran v. Geffin*, 250 So. 3d 779, 786-87 (Fla. 1st DCA 2018). In *Corcoran*, a case that included the Florida Board of Governors as a defendant, the First District Court of Appeal stated that "neither sovereign immunity nor the separation of powers doctrine prohibits respondents from bringing a breach of contract claim." *Corcoran*, 250 So. 3d at 787.

7. At this stage of the proceedings, the Plaintiffs need not prove the existence of express contracts, and the Court need not decide whether there are, in fact, express contracts. Alleging it

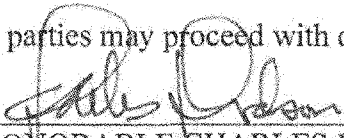
is sufficient. *See Zainulabeddin v. Univ. of S. Fla. Bd. of Trustees*, 2016 WL 1451726 (M.D. Fla. April 13, 2016).

8. Since the Plaintiffs have alleged the existence and breach of an express contract, discovery will be necessary to determine whether the contractual relationships at issue in the case were express or implied in order to resolve the sovereign immunity issue.

9. Defendant has provided no other basis for staying discovery in this case.

IT IS ORDERED AND ADJUDGED:

Defendant's Motion is Denied. The parties may proceed with discovery.

 11/12/20
HONORABLE CHARLES W. DODSON
CIRCUIT COURT JUDGE

Copies furnished to Counsel of Record

EXHIBIT C

Tuition Statement - Anthony Joseph Rojas

Course	Class #	Description	Status	Date	Credits	Amount
LAW 6750	15589	Profess Responsibility	Dropped	2019-10-29	3	\$0.00
PAD 6227	23499	Public Budget/Finance	Enrolled	2019-10-29	3	\$1,592.07
PAD 6946	17207	Internship in Govt	Enrolled	2020-01-08	3	\$1,592.07
PAD 6946	17207	University DL Fee			0	\$6.00
POS 5935	22386	Adv Top Political Sci	Enrolled	2020-01-08	3	\$1,592.07
POS 6476	23519	Bureaucratic Politics	Enrolled	2019-10-29	3	\$1,592.07

Tuition and Fees Assessed Spring 2020 \$6,374.28

Financial Aid Payment -\$6,368.28

Tuition and Fees Balance Due Spring 2020 \$6.00

EXHIBIT D

Home > Knowledge Base > Bursar > Tuition and Fees > Prior Year Tuition and Fees > Tuition and Fees 2019-20 > 2019-20 Academic Year Tuition and Fees

2019-20 ACADEMIC YEAR TUITION AND FEES

Student Fee Calculation Estimate for the 2019-2020 Academic Year

View your estimated fees for the following type of courses:

- Undergraduate
- Graduate
- Design, Construction, and Planning
- JD, SJD, and Law LL.M.
- Tax LL.M.
- Physician Assistant
- Dental
- Medical
- Pharmacy PharmD
- Vet Med
- Phys Therapy
- Masters of Public Health – 2 Year 48 Hour Degree Program
- Masters of Public Health – Accelerated 42 Hour Degree Program

Undergraduate, Graduate, DCP, JD, SJD, Law LL.M., Tax LL.M., and Physician Assistant Course Fees

The following is a breakdown of the per credit hour amount of a student's tuition for a Florida and Non-Florida resident during the 2019-2020 academic year:

	Undergraduate Courses (0000-4999)	Graduate Courses (5000- 9999)	DCP Courses (5000- 9999)	Law-JD Courses Admitted Prior to Fall 2018	Law-Environmental and Comparative LL.M. Courses Admitted Prior to Fall 2018	Law-SJD Taxation Courses	Law-Tax and International Tax LL.M. Courses Admitted Prior to Fall 2018	Physician Assistant Courses
Components								
Tuition	\$105.07	\$448.73	\$539.49	\$652.47	\$652.47	\$724.97	\$724.97	\$590.87
Tuition Differential	\$44.17	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Capital Improvement Trust Fund	\$6.76	\$6.76	\$6.76	\$6.76	\$6.76	\$6.76	\$6.76	\$6.76
Student Financial Aid	\$5.25	\$22.43	\$26.97	\$32.62	\$32.62	\$32.62	\$32.62	\$29.54

Activity and Service Fee	\$19.06	\$19.06	\$19.06	\$19.06	\$19.06	\$19.06	\$19.06	\$19.06
Athletic Fee	\$1.90	\$1.90	\$1.90	\$1.90	\$1.90	\$1.90	\$1.90	\$1.90
Health Fee	\$15.81	\$15.81	\$15.81	\$15.81	\$15.81	\$15.81	\$15.81	\$15.81
Transportation Access	\$9.44	\$9.44	\$9.44	\$9.44	\$9.44	\$9.44	\$9.44	\$9.44
Total Florida Resident Rate/Credit Hour	\$212.71	\$530.69	\$625.99	\$743.31	\$743.31	\$815.81	\$815.81	\$679.94
Non-Resident								
Non-Resident Fee	\$707.21	\$690.21	\$690.21	\$527.14	\$527.14	\$614.76	\$614.76	\$793.74
Non-Resident Student Financial Aid	\$35.36	\$34.51	\$34.51	\$26.35	\$26.35	\$30.73	\$30.73	\$39.68
Total Non-Resident Rate/Credit Hour	\$955.28	\$1,255.41	\$1,350.71	\$1,296.80	\$1,296.80	\$1,461.30	\$1,461.30	\$1,513.36

For an **estimated** fee assessment for a student's tuition semester in the 2019-2020 academic year complete the information below:

Course level	Credit Hours	
0000-4999	14 ▼	☒ Florida Resident ☐ Non-Florida Resident
5000-9999	3 ▼	Florida Prepaid Contract Year: ☐ Tuition through 2007
DCP Courses	0 ▼	☐ Are you a Graduate Assistant?
Law-JD and Law-Environmental and Comparative LL.M. Courses	0 ▼	0.00
		Material and Supply Fee (\$)
Law-SJD and Law-Tax and International Tax LL.M. Courses	0 ▼	
Physician Assistant Courses	0 ▼	☐ Late Payment Fee (\$100.00) ☐ Late Registration Fee (\$100.00)

Based on the information provided your **estimated** cost of tuition is: **\$4,570.01**

Reset

Re-Calculate

Dental, Medical, PharmD, Vet. Med., and Phys. Therapy students, and Law JD and LL.M. students admitted in Fall 2019 and later are assessed tuition and fees for the academic year which are payable in two installments (per-term) in the Fall and in the Spring. All Law programs are assessed the appropriate hourly rate in the Summer semester. Master of Public Health Programs' students are charged tuition and fees for their academic program in four installments across consecutive semesters, beginning with the admission term. The per-term fee structure is listed below:

Student Per Term Costs										
Components	Dental	Medical	PharmD	Vet Med	Phys Therapy	Public Health (48hr)	Public Health (42hr)	Law-JD	Law-Environmental	Law-Inter
								Admitted	and LL.M. Admitted	Comparative A
								Fall 2018 and Later	Fall 2018 and Later	F
Tuition	\$18,781.76	\$16,371.85	\$9,922.37	\$12,624.08	\$9,761.15	\$6,600.91	\$5,775.78	\$9,569.56	\$8,482.11	\$
Capital Improvement Trust Fund	\$135.20	\$135.20	\$121.68	\$135.20	\$131.82	\$81.12	\$70.98	\$99.15	\$87.88	
Student Financial Aid	\$939.08	\$818.59	\$496.11	\$631.20	\$488.05	\$330.04	\$288.78	\$478.43	\$424.06	
Technology Fee	\$78.75	\$78.75	\$78.75	\$78.75	\$78.75	\$78.75	\$78.75	\$77.00	\$68.25	
Activity and Service Fee	\$381.20	\$381.20	\$343.08	\$381.20	\$371.67	\$228.72	\$200.13	\$279.54	\$247.78	
Athletic Fee	\$38.00	\$38.00	\$34.20	\$38.00	\$37.05	\$22.80	\$19.95	\$27.87	\$24.70	
Health Fee	\$316.20	\$316.20	\$284.58	\$316.20	\$308.29	\$189.72	\$166.00	\$231.88	\$205.53	
Transportation Access	\$188.80	\$188.80	\$169.92	\$188.80	\$184.08	\$113.28	\$99.12	\$138.45	\$122.72	
Total Florida Resident Rate/Term	\$20,858.99	\$18,328.59	\$11,450.69	\$14,393.43	\$11,360.86	\$7,645.34	\$6,699.49	\$10,901.88	\$9,663.03	\$10
Non-Resident										
Non-Resident Fee	\$12,609.89	\$13,923.93	\$11,020.70	\$9,988.20	\$4,400.00	\$8,282.62	\$7,247.28	\$7,731.39	\$6,852.82	\$
Non-Resident Student Financial Aid	\$630.49	\$696.19	\$551.03	\$499.40	\$220.00	\$414.13	\$362.36	\$386.46	\$342.55	
Total Non-	\$34,099.37	\$32,948.71	\$23,022.42	\$24,881.03	\$15,980.86	\$16,342.09	\$14,309.13	\$19,019.73	\$16,858.40	\$18

Notes:

If a student registers after the regular registration deadline he/she will be assessed a late registration fee of \$100.00. Likewise, if a student does not pay his/her tuition by the fee payment deadline there is a \$100.00 late payment fee assessed.

Pursuant to Section 1009.285, F.S., each student enrolled in the same undergraduate course more than twice shall be assessed an additional \$192.85 per credit hour in addition to the fees outlined above for each such course.

For an estimate of the average cost of attendance see [Student Financial Aid and Scholarships](#).



University of Florida
Gainesville, FL 32611
(352) 392-3261

RESOURCES



CAMPUS



WEBSITE



EXHIBIT E

Home > Knowledge Base > Bursar > Current and Former Students > Billing, Sponsors and Tuition Waivers > Terms and Agreements

TERMS AND AGREEMENTS

AS A STUDENT AT THE UNIVERSITY OF FLORIDA, I ACKNOWLEDGE AND UNDERSTAND THAT:

- I consent to receive my IRS tax Form 1098-T electronically, now and in subsequent years, via online access to ONE.UF in lieu of a mailed copy. To receive a mailed copy, this consent may be revoked by submitting a signed and dated original completed IRS 1098-T Tuition Statement Paper Request Form to the Bursar.

- **UNIVERSITY OF FLORIDA FINANCIAL LIABILITY AGREEMENT**

I agree to pay all UF debts and charges pursuant to UF policies. I understand that the university is advancing value to me in the form of educational services and that my right to register is expressly conditioned upon my agreement to pay the costs of tuition, fees, and other charges and any additional costs when those charges become due. I understand the university notifies students of debts by UF email. It is my responsibility to view my charges in ONE.UF, or at the location designated by my academic program. I understand that past due student accounts will result in university registration and services being withheld in accordance with university regulations. Delinquent debts may be reported to a credit bureau and referred to collection agencies, or litigated. I agree to pay all costs of collecting unpaid charges, including a percentage based third-party collection fee up to 30%, reasonable attorney's fees, and court costs the university may incur in efforts of collecting my account. This agreement shall be construed in accordance with Florida law and any lawsuit to collect unpaid fees may be brought in the appropriate court sitting in Alachua County, Florida, regardless of my domicile at the time of bringing such suit.

- If I do not pay any amount of my course tuition and fees, or they are not deferred by the published deadline, I may be withdrawn with fee liability from **all** courses. If I am withdrawn, I no longer will be eligible to attend and participate in classes or other university activities. I also will not be able to register for any future term until my outstanding debt is satisfied.

- I will be held liable for course tuition and fees for all courses that are on my schedule as of the end of the drop/add period. This includes any adjustments made to my schedule after the drop/add period ends.

If I received federal financial aid and I complete 60 percent or less of the term prior to withdrawing, **I may be required to repay a substantial portion of my federal financial aid**, or if I enroll in modular courses and I drop one or all of the courses within the term, I may be required to repay a substantial portion of my federal financial aid. For more information, please read the [What You Need to Know before You Go](#) withdrawal policies page on the Registrar's website.

· Exit Counseling Requirement: Any student receiving student loan(s) and/or Federal TEACH Grant while attending UF must complete an Exit Counseling session(s) when he/she graduates, leaves school, or drops below half-time enrollment. This counseling is designed to assist students with understanding their rights and responsibilities as they apply to their student loan(s) and/or Federal TEACH Grant awards. Please note: Until the Exit Counseling requirement is satisfied, a hold will be placed on the UF student's account preventing the receipt of academic transcripts, diploma, and other university services. After Exit Counseling has been completed, the exit counseling hold will be removed from the student's record within 48 hours.

· In accordance with the TCPA (Telephone Consumer Protection Act), requiring certain entities to obtain consent to contact individuals on their cellular telephones, I authorize the University Florida and their respective agents and contractors to contact me regarding any past, current or future financial records at the current or any future number that I provide for my cellular phone or other wireless device using automated telephone dialing equipment or artificial or pre-recorded voice or text messages.

LAST REVIEWED

01/31/2021: reviewed content

RESOURCES

[What You Need to Know before You Go](#)

[TCPA \(Telephone Consumer Protection Act\)](#)

CONTACTS

Bursar: (352) 392-0181

[Ask Bursar Help](#)

STILL HAVE A QUESTION?

Attachments

 [IRS 1098-T Tuition Statement Paper Request Form](#)

Related Articles

-  [Past Due Accounts](#)
-  [Third-Party Sponsor Invoicing](#)
-  [Third-Party Sponsor Overview](#)
-  [Waivers](#)
-  [Non-Tuition Charges](#)
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10/15/2020 10:10:10 AM

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**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**ANTOHN ROJAS, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

Case No.: 01-2021-CA-1124

**UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant.

_____ /

**UNIVERSITY OF FLORIDA BOARD OF TRUSTEES’
MOTION TO STAY DISCOVERY AND FOR A PROTECTIVE ORDER
PENDING FINAL ADJUDICATION OF DISPOSITIVE MOTION**

Defendant, University of Florida Board of Trustees (“UF”), by and through its undersigned counsel and pursuant to FLA.R.Civ.P. 1.280(c), moves to stay all discovery in this matter until the final adjudication of its forthcoming dispositive motion and for a protective order absolving it from any obligation to respond to discovery and from the conduct of depositions.

INTRODUCTION AND SUMMARY OF THE ALLEGATIONS

1. Plaintiff, Anthony Rojas (“Plaintiff”), filed this action on April 21, 2021, on behalf of himself and other similarly situated UF students. Fairly summarized, Plaintiff complains that the class is owed a *pro rata* refund of fees paid for the Spring and Summer 2020 semesters because of public safety measures taken by UF to protect the university community from the COVID-19 pandemic. (Compl. at ¶ 1).

2. The Complaint contains two counts, both of which are barred by sovereign immunity: Count I (Breach of Contract); Count II (Unjust Enrichment).

3. Importantly, sovereign immunity in Florida is not just immunity from liability, *but immunity from suit itself*. Moreover, the defense of sovereign immunity is a defense directed to the subject matter jurisdiction of the Court. *See, Wallace v. Dean*, 3 So. 3d 1035, 1045 n.14 (Fla. 2009); *Brevard County v. Morehead*, 181 So. 3d 1229, 1233 (Fla. 5th DCA 2015) (applying sovereign immunity to unjust enrichment, quantum meruit and implied contract claims and finding circuit court lacked subject matter jurisdiction over them). Accordingly, discovery in this case is unnecessary, unwarranted and intrusive until UF is able to have its sovereign immunity defense adjudicated.

4. Florida university boards of trustees are expressly included in the definition of “state agencies or subdivisions” in Section 768.28(2), Fla. Stat., and therefore are guaranteed the sovereign immunity provided for in Article X, Section 13 of the Florida Constitution. *See* § 768.28(2), Fla. Stat. (2020).

5. Recognizing this bar to his claims, UF expects Plaintiff to conduct extensive discovery early in the litigation.

6. Before discovery is served or responses to discovery are required, and before any depositions are taken, UF is entitled to first obtain adjudication of its dispositive motion raising, as a threshold issue, the sovereign immunity defense.

ARGUMENT AND AUTHORITY

7. This Court has broad discretion and wide latitude to control the timing of discovery. *McClure v. Publix Super Markets, Inc.*, 124 So. 3d 998, 999 (Fla. 4th DCA 2013); FLA.R.CIV.P. 1.280(c). Pursuant to Rule 1.280(c) of the Florida Rules of Civil Procedure, a trial court possesses broad discretion in limiting discovery and protecting parties that come before it, which such discretion includes protecting a party from undue burden or expense upon a showing

of good cause. FLA.R.CIV.P. 1.280(c); *see also*, *Rojas v. Ryder Truck Rental, Inc.*, 641 So. 2d 855, 857 (Fla. 1994).

8. This Court should, and must, exercise its discretion to stay discovery pending the disposition of UF's dispositive motion and enter a protective order with respect to any discovery sought by Plaintiff.

9. Florida appellate courts have long upheld decisions of trial courts staying discovery until a ruling is made on a motion to dismiss. *See, e.g., Hollywood, Inc. v. Broward County*, 90 So. 2d 47 (Fla. 1956) (preventing deposition in class action seeking declaratory relief while motions to dismiss were pending). Where, as here, sovereign immunity is asserted, Florida's First District Court of Appeal has made it clear that a trial court must rule on the defense before authorizing discovery on the merits of a lawsuit. *Florida Dep't of the Lottery v. Curcio*, 71 So. 3d 931, 932 (Fla. 1st DCA 2011) (per curiam) ("We also find that the court must rule on the sovereign immunity defense to Counts I & II before authorizing discovery on the merits of Curcio's claims.").

10. It is clear error to permit discovery to go forward while a motion asserting a sovereign immunity defense is pending, when that defense rests on pure legal grounds and discovery is not necessary to resolve the applicability of the defense. The sovereign immunity defense to be asserted by UF in this case is that there is no express, written contract between the parties and that Plaintiff's unjust enrichment claim is also barred by sovereign immunity. *See, e.g., Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 6 (Fla. 1984) (holding that the state will not be deemed to have waived immunity for breach of contract claims unless such claims are premised on the breach of an express, written contract). This Court need only look at the allegations contained in the four corners of the Complaint and the documents alleged to be

“express, written” contracts as that term is used in the *Pan-Am Tobacco* line of cases, and to analyze the unjust enrichment claim as pled, to determine whether UF has waived its sovereign immunity.

11. The recent decision of the Third District Court of Appeals in *Bank of America, N.A., v. Lisa S. Dulberg De Morales, et al.*, is on point. *See*, Case No. 3D19-1782, --- So. 3d ----, 2020 WL 7233359 (Fla. 3d DCA Dec. 9, 2020). In that case, the Third District noted that when a motion to dismiss “hinges on the application of a complete ... immunity from suit ... requiring a party entitled to that immunity to continue litigating the suit constitutes irreparable harm in and of itself.” *Id.* at *2 (quoting *Univ. of Miami v. Ruiz ex rel. Ruiz*, 164 So. 3d 758, 763 (Fla. 3d DCA 2015); and citing *James v. Leigh*, 145 So. 3d 1006, 1008 (Fla. 1st DCA 2014)). The court then held that “[g]iven the purpose of the immunity asserted, the potentially dispositive nature of the motion, and the circumstances, the trial court abused its discretion in failing to stay discovery until it ruled on the [defendant’s] motion to dismiss.” *Id.* at *2.

12. Importantly, sovereign immunity occupies an even higher plane than the litigation immunity at issue in *Bank of America*. As this Court is well aware, in Florida, “sovereign immunity is both an immunity from liability and an immunity from suit.” *Florida Highway Patrol v. Jackson*, 288 So. 3d 1179, 1185 (Fla. 2020).

13. Because the State of Florida’s immunity from suit in the first instance is addressed by the sovereign immunity defense, “entitlement to sovereign immunity should be established as early in the litigation as possible.” *Id.* The importance of adjudicating the defense at the earliest stage of litigation is particularly important “in light of the separation of powers principles that animate the doctrine of sovereign immunity.” *Id.* Indeed, the Florida Supreme

Court has gone so far as to amend the Florida Rules of Appellate Procedure to permit interlocutory appeals of orders that deny the defense, even if not explicitly. *Id.* at 1186.

14. The unambiguous holding in *Curcio* that trial courts “must rule” on the substantive merits of sovereign immunity before discovery is allowed to commence recognizes the crucial role the defense plays when a party sues the State of Florida and its subdivisions. Courts are called on to play a fundamental gatekeeper role to fully determine, as an initial matter, whether sovereign immunity applies to ensure that the doctrine established in the Florida Constitution is given proper treatment. *See*, Art. X, § 13, Fla. Const. It is only through exercising this gatekeeper function that the purposes of sovereign immunity are given effect. These purposes include “protection of the public treasury”, the “maintenance of the orderly administration of government”, [*Am. Home Assur. Co. v. Nat’l R.R. Passenger Corp.*, 908 So. 2d 459, 471 (Fla. 2005)] and ensuring the judicial branch does not improperly “second guess the political and police power” decisions of coordinate branches of government “absent a violation of constitutional or statutory rights.” *Trianon Park Condo. Ass’n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985).

15. The underlying reason behind the requirement in *Curcio* that questions of sovereign immunity be resolved before discovery is obvious—namely, immunity from suit is effectively lost if the state is forced to litigate claims from which it is immune. *Fuller v. Truncale*, 50 So. 3d 25, 28 (Fla. 1st DCA 2010) (finding irreparable harm where judicial immunity was not granted before trial). The state “cannot be ‘re-immunized’ if erroneously required to stand trial or face the other burdens of litigation.” *Tucker*, 648 So. 2d at 1189. Indeed, the purpose of sovereign immunity is completely lost if the party asserting immunity is forced to engage in defensive litigation on the merits prior to the adjudication of that defense, and this

burden of defensive litigation cannot be remedied on a later appeal. *See, Stephens v. Geoghegan*, 702 So. 2d 517, 521 (Fla. 2d DCA 1997) (holding, in a qualified immunity case, that "[b]ecause of the nature and purpose of a claim of immunity, an appeal after final judgment would not be an adequate remedy"). Stated differently, the cat cannot be put back in the bag.

16. Moreover, any speculation by Plaintiff that there “may” be other documents constituting an express, written contract to which he himself is a party should be rejected out of hand. Were such speculative assertions sufficient to defeat a sovereign’s immunity from suit, then that immunity is meaningless.

17. UF intends to assert a sovereign immunity defense to Plaintiff’s claims based on a pure issue of law for which discovery is not needed. Accordingly, an order staying discovery and a protective order precluding discovery prior to the adjudication of UF’s motion to dismiss or, in the alternative, motion for judgment on the pleadings in which sovereign immunity is asserted is warranted.

CONCLUSION

WHEREFORE, Defendant, the University of Florida Board of Trustees, respectfully requests the entry of an Order staying all discovery and for entry of a protective order preventing any discovery from occurring until final adjudication of its dispositive motion and absolving it from having to respond to discovery, along with such other and further relief as this Court deems appropriate.

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Respectfully submitted,

/s/ Robert J. Sniffen

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*Counsel for the University of Florida
Board of Trustees*

CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of June, 2021, a true and correct copy of the foregoing was electronically filed in the Florida E-Courts Filing Portal to all counsel of record.

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**ANTOHN ROJAS, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

Case No.: 01-2021-CA-1124

**UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant.

**UNIVERSITY OF FLORIDA BOARD OF TRUSTEES' MOTION TO DISMISS CLASS
ACTION COMPLAINT OR, IN THE ALTERNATIVE, MOTION FOR JUDGMENT ON
THE PLEADINGS AND SUPPORTING MEMORANDUM OF LAW**

Defendant, **UNIVERSITY OF FLORIDA BOARD OF TRUSTEES** ("UF"), by and through its undersigned counsel and pursuant to Fla. R. Civ. P. 1.140(b) and (c), moves to dismiss the Class Action Complaint ("Complaint") filed by Plaintiff, **ANTHONY ROJAS** ("Plaintiff"), with prejudice or, in the alternative, moves for judgment on the pleadings. (See, § III, *infra*). Additionally, because UF's dispositive motion to dismiss (or for judgment on the pleadings) seeks the disposal of the named Plaintiff's claims with prejudice, dismissal of the class claims is appropriate, as well. (See, § IV, *infra*).

**I. SUMMARY OF THE CASE AND BASES FOR DISMISSING AND STRIKING
THE CLASS ACTION COMPLAINT**

1. Plaintiff filed this action on April 21, 2021, on behalf of himself and other similarly situated UF students. Fairly summarized, Plaintiff complains that the class is owed a *pro rata* refund of fees paid from the Spring 2020 and Summer 2020 semesters onward because

of public safety measures taken by UF to protect the university community from the COVID-19 pandemic by limiting access to on-campus resources. (Compl. at ¶ 1).

2. The Complaint contains two (2) counts, as follows:

Count I Breach of Contract

Count II Unjust Enrichment

3. Florida university boards of trustees are expressly included in the definition of “state agencies or subdivisions” in Section 768.28(2), Florida Statutes, and therefore are guaranteed the sovereign immunity protections and limitations provided for in Article X, Section 13 of the Florida Constitution, subject to the limited waiver contained in Section 768.28, Florida Statutes. See, § 768.28(5), Fla. Stat. (2020).

4. Importantly, sovereign immunity in Florida is the rule, not the exception. A waiver of sovereign immunity must be strictly and narrowly construed, and may not be arrived at by inference or implication. Moreover, the defense of sovereign immunity is a defense directed to the subject matter jurisdiction of the Court.

5. The Complaint filed in this case is subject to dismissal with prejudice or, alternatively, to an order granting judgment on the pleadings because:

(a) There is no contract between Plaintiff and UF, let alone an express contract, thereby dictating dismissal of Plaintiff’s breach of contract claim based upon sovereign immunity. Plaintiff’s request that this Court accept various documents from multiple sources to arrive at an enforceable express contract does not comport with applicable law. (Count I) (See, §§ III(A) & (B), *infra*).

(b) Unjust enrichment claims are also barred by sovereign immunity. (Count II) (See, § III(B), *infra*).

(c) Additionally, the Florida Legislature did not create a cause of action for the recovery of fees, and did not waive sovereign immunity concerning such claims. (See, § III(C), *infra*).

6. Inasmuch as Plaintiff's claims are subject to dismissal with prejudice (or judgment on the pleadings), the class action claims should also be dismissed. (See, § IV, *infra*).

II. STANDARDS OF REVIEW

A. Motions to Dismiss

"Florida is a fact-pleading jurisdiction." *Cont'l Baking Co. v. Vincent*, 634 So. 2d 242, 244 (Fla. 5th DCA 1994). "Mere statements of opinions or conclusions unsupported by specific facts will not suffice." *Brandon v. Pinellas Cnty.*, 141 So. 2d 278, 279 (Fla. 2d DCA 1962) (citations omitted). "To state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 495 (Fla. 4th DCA 2001) (citations omitted). Florida law requires plaintiffs to plead every fact essential to their cause of action "distinctly, definitely, and clearly." *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 716 (Fla. 1st DCA 1963). *See also*, *Beckler v. Hoffman*, 550 So. 2d 68, 70 (Fla. 5th DCA 1989) ("We find these allegations to be too general and vague and conclusory and therefore, insufficient."). The defense of sovereign immunity is appropriately considered on a motion to dismiss. *City of Gainesville v. State, Dept. of Transp.*, 778 So. 2d 519, 531 (Fla. 1st DCA 2001); *Charity v. Bd. of Regents of Div. of Univ. of Fla. Dep't of Educ.*, 698 So. 2d 907 (Fla. 1st DCA 1997) (en banc).

B. Motions for Judgment on the Pleadings

A motion for judgment on the pleadings is governed by the same legal test as a motion to dismiss for failure to state a cause of action. *Henao v. Profl Shoe Repair, Inc.*, 929 So. 2d 723, 725 (Fla. 1st DCA 2006).

III. ARGUMENT AND AUTHORITY – MOTION TO DISMISS AND MOTION FOR JUDGMENT ON THE PLEADINGS

A. Plaintiff’s Breach of Contract Claim Fails Because There is no Contract Between the Parties and Certainly no “Express Contract” Sufficient to Overcome Sovereign Immunity

1. There is no Express Contract

Plaintiff has not attached the express contract guaranteeing him the return of student fees where access to on-campus resources and services were limited for any reason, let alone a worldwide pandemic. Rule 1.130, Florida Rules of Civil Procedure, requires as much; however, even putting that Rule aside, at a basic level, for an enforceable contract to exist, there must be a meeting of the minds on terms which are: (1) absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly stated within the offer. *See, Thomas v. Thomas*, 304 So. 3d 819, 820 (Fla. 1st DCA 2020). An acceptance must contain an assent - or meeting of the minds - to the essential terms contained in the offer. *See, e.g., Central Properties, Inc. v. Robinson*, 450 So. 2d 277, 280 (Fla. 1st DCA 1984). “The rule is generally recognized that for the parties to have a contract, there must be reciprocal assent to certain and definite propositions.” *Truly Nolen, Inc. v. Atlas Moving & Storage Warehouses, Inc.*, 125 So. 2d 903, 905 (Fla. 3d DCA 1961).

“An express contract is an actual agreement between the parties, the terms of which are openly uttered or declared at the time of formation.” *Jenks v. Bynum Transp., Inc.*, 104 So. 3d 1217, 1223 (Fla. 1st DCA 2012); *see generally*, Ballentine’s Law Dictionary (2010 ed.) (defining “express contract” as “[a] contract which expresses the intentions of the parties in words.”); *Baron v. Osman*, 39 So. 3d 449, 451 (Fla. 5th DCA 2010) (“A contract based on the parties’ words is characterized as express, whereas a contract based on the parties’ conduct is said to be implied in fact.”). The formation of an express contract “depends not on the agreement of two

minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.” Blackhawk Heating & Plumbing Co., Inc. v. Data Lease Fin. Corp., 302 So. 2d 404, 407 (Fla. 1974) (quoting Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957)).

Here, Plaintiff has not alleged concrete facts demonstrating a meeting of the minds, nor the existence of an express written contract sufficient to overcome sovereign immunity. Plaintiff has not established his absolute and unconditional acceptance of an “express offer” by UF to return payment of fees under certain conditions, nor can he do so. *See, e.g., Shaffer v. George Washington Univ.*, No. 20-1145 (RJL), 2021 WL 1124607, at *2-*3 (D. D.C. March 21, 2021) (rejecting breach of contract claim in a similar action on motion to dismiss and noting “plaintiffs do not identify any language or other evidence, in these university documents or elsewhere, indicating GW’s intent to be bound to provide in-person instruction.”).

Instead, Plaintiff summarily alleges that he and other class members agreed to pay student fees “in express written contracts with UF.” (Compl. at ¶ 29). Plaintiff then cobbles together, cites and attaches to the Complaint various documents evidencing the “express contracts” he claims exist, including: a tuition statement, “billing materials,” a schedule of tuition and fees, “many detailed statements about the specific services to be provided in exchange for certain fees,” and invoices. (Compl. at ¶¶ 11, 56). Simply stated, the hodgepodge of documents Plaintiff relies on is a far cry from what is required to create an express contract.

Numerous courts have held that the nature of the relationship between a college or university student and a public institution is not that of an express contractual relationship. Williams v. Florida State University, No. 4:11-cv-350-MW/CAS, 2014 WL 340562, at *5-*6 (N.D. Fla. Jan. 29, 2014) (applying sovereign immunity and holding a student’s relationship with

a university is an implied, not an express, written contract), *aff'd sub nom*, Williams v. Becker, 608 Fed. App'x 905 (11th Cir. 2015); Pinkston v. University of South Florida Board of Trustees, No. 8:18-cv-2651-T-33SPF, 2019 WL 1383467, at *3-*4 (M.D. Fla. Mar. 27, 2019) (citing Williams and concluding that no express contractual relationship exists between a Florida university and its students); Hamke v. Univ. of Central Fla., No.: 10-cv-1828-ORL-19KRS, 2011 WL 881699, at ¶¶ (E)(1)-(4) (M.D. Fla. Feb. 7, 2011) (describing the nature of student and public post-secondary institutions). Even in cases where a signed writing is in place, courts have refused to find a contract exists between a public university and its students. *See*, Acosta v. District Board of Trustees of Miami-Dade Community College, 905 So. 2d 226, 228 (Fla. 3d DCA 2005).

In Acosta, the Third District Court of Appeal held that no contract existed between students in a medical assistant program and Miami-Dade Community College although the students were provided an acceptance letter – that they signed – which outlined specific program costs. *Id.* After the students were accepted, the college increased the fees charged to the students. *Id.* The student-plaintiffs sued the college for breach of contract. *Id.* In reaching its conclusion, the court noted “[t]he rule is generally recognized that for the parties to have a contract, there must be reciprocal assent to certain and definite propositions. *Id.* It is well established that a meeting of the minds of the parties on all essential elements is a prerequisite to the existence of an enforceable contract.” *Id.*¹

¹ For private universities, an implied contract can arise between a student and the institution in certain limited circumstances. *See*, Jallali v. Nova Southeastern University, 992 So. 2d 338, 342 (Fla. 4th DCA 2008) (citing John v. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924)); Univ. of Miami v. Militana, 184 So. 2d 701, 704 (Fla. 3d DCA 1966); Salerno v. Florida Southern College, Case No. 8:20-cv-1494-30SPF, 2020 WL 5583522 (M.D. Fla. Sept. 16, 2020).

Simply stated, there is no enforceable written contract between Plaintiff and UF. And because there is no *express contract* between the parties, as § III(A)(2) *infra* makes clear, Plaintiff's breach of contract claim is barred by sovereign immunity.

2. The Breach of Contract Claim is Barred by Sovereign Immunity

Even if an implied contractual relationship existed between Plaintiff and UF, Plaintiff's breach of claim still fails and should be dismissed because the Florida Legislature has not waived sovereign immunity from suits alleging the breach of an implied, unwritten contract. "The doctrine of sovereign immunity, which provides that a sovereign cannot be sued without its permission, ... was a part of the English common law when the State of Florida was founded and has been adopted and codified by the Florida Legislature." American Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 471 (Fla. 2005); City of Key West v. Florida Keys Community College, 81 So. 3d 494, 497 (Fla. 3d DCA 2012) (citing Am. Home Assurance Co.). In Florida, "sovereign immunity is both an immunity from liability *and an immunity from suit.*" Florida Highway Patrol v. Jackson, 288 So. 3d 1179, 1185 (Fla. 2020) (emphasis added).

Article I, Section 13 of the Florida Constitution authorizes the Florida Legislature to waive the State's sovereign immunity "by general law." Only the Florida Legislature has authority to enact a general law that waives the state's sovereign immunity. Am. Home Assurance Co., 908 So. 2d at 471 (citing Manatee County v. Town of Longboat Key, 365 So. 2d 143, 147 (Fla.1978)).

The state's limited waiver of sovereign immunity is codified in Section 768.28, Florida Statutes, which provides:

In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.

“In Florida, sovereign immunity is *the rule, rather than the exception...*” Pan-Am Tobacco Corp. v. Dep’t of Corr., 471 So. 2d 4, 5 (Fla. 1984) (emphasis added); City of Key West, 81 So. 3d at 497. It is well established that “any waiver [of sovereign immunity] must be clear and unequivocal.” Am. Home Assurance Co., 908 So. 2d at 471–72 (citing Longboat Key, 365 So. 2d at 147; Rabideau v. State, 409 So. 2d 1045, 1046 (Fla. 1982)). Legislative waivers of sovereign immunity must be strictly construed. Id. (citing Longboat Key, 365 So. 2d at 147); *see also*, Hightower v. Fla. Dept. of Highway Safety and Motor Vehicles, -- So. 3d --, 2020 WL 5988204, at *2 (Fla. 1st DCA Oct. 9, 2020). Accordingly, “waiver will not be found as a product of inference or implication.” Id. (citing Spangler v. Fla. State Tpk. Auth., 106 So. 2d 421, 422 (Fla.1958)).

Furthermore, the defense of sovereign immunity asserted herein is a defense directed to the subject matter jurisdiction of the Court. *See*, Wallace v. Dean, 3 So. 3d 1035, 1045 n.14 (Fla. 2009); Brevard County v. Morehead, 181 So. 3d 1229, 1233 (Fla. 5th DCA 2015) (applying sovereign immunity to unjust enrichment, quantum meruit and implied contract claims and finding circuit court lacked subject matter jurisdiction over them). Therefore, since UF has not waived sovereign immunity, this Court lacks subject matter jurisdiction to hear Plaintiff’s breach of contract claim.

There is no question UF is a public entity for purposes of the limited waiver of sovereign immunity set forth in Article X, Section 13 of the Florida Constitution and Section 768.28, Florida Statutes. *See*, § 768.28(2), Fla. Stat. (2020). Therefore, UF cannot be sued for breach of contract in the absence of an express, written contract.

In Florida, the seminal case regarding state sovereign immunity in contract actions is Pan-Am Tobacco v. Dep’t of Corr., 471 So. 2d 4 (Fla. 1984). In Pan Am, the Florida Supreme

Court explained that while the Florida Legislature waived sovereign immunity for tort actions, there was “no analogous waiver in contract.” *Id.* at 5. Although the Court held that sovereign immunity will not protect a state agency from an action arising from a breach of a contract legislatively authorized by general law, a situation not present here, the Court emphasized that its holding was specifically limited “to suits on express, written contracts into which the state agency has statutory authority to enter.” *Id.* at 5-6; *See also, Charity*, 698 So. 2d at 907-08 (applying sovereign immunity to bar breach of contract claim by student who was prevented from pursuing a doctoral degree); *Williams*, 2014 WL 340562, at *5-*6 (student’s breach of contract claim against university barred by sovereign immunity because “[w]hile a student’s relationship with his university is contractual in nature, it is an implied contract and not an express, written contract.”).

Student tuition and fees are established in Section 1009.24, Florida Statutes. The fact that the Legislature set specific amounts to be charged to public post-secondary institutions such as UF is not evidence of the existence of an express written contract, nor is it a clear, positive, unequivocal waiver of sovereign immunity. Quite the contrary. The decision in *City of Key West*, 81 So. 3d 494 is on point. There, a community college sought declaratory relief establishing that it enjoyed sovereign immunity from suit for non-payment of stormwater fees the city was statutorily authorized to charge. *Id.* The Third District Court of Appeal held the college was entitled to sovereign immunity and the mere fact that the applicable statute allowed municipalities to collect charges from entities served by its public works facilities was not evidence of the Legislature’s intention to waive sovereign immunity. *Id.* at 497.

Here, the non-existence of an express written contract between Plaintiff and UF is a fundamental deficiency that is fatal to Plaintiff’s breach of contract claim and cannot be cured

with an amendment. The documents Plaintiff points to in his attempt to establish an express written contract in the university setting are nothing more than the typical documents exchanged between a university and its students. This Court may only arrive at the conclusion that these documents are, in their totality, an express contract by inference and implication, an exercise Florida Courts have time and again held is inappropriate for sovereign immunity purposes. While Plaintiff has alleged, at most, implied contractual terms, public universities in Florida are not liable for breach of implied contractual promises. As U.S. District Judge Mary Scriven aptly found in *Hamke*, *supra*:

The nature of the relationship between a student and a school (whether college or university) is not contractual and certainly not commercial. While there is payment (tuition and fees) for a service (university services, including courses), the relationship is fundamentally one of educational experience and extends well beyond the classroom -- in a sense, the entire university experience is intended to be educational, from navigating the benefits and pitfalls of dormitory life to interacting with campus officials on any number of matters (*i.e.*, grades, assignments, office hour appointments, withdrawal from courses, getting course overrides for a full course, utilizing campus services, etc)... ***Plaintiff's educational experience with UCF was not a contractual relationship.*** As such, Plaintiff's breach of contract claim fails.

Hamke, 2011 WL 881699 at ¶¶ (E)(1)-(4) (citations omitted) (emphasis added).

Accordingly, this Court should dismiss Count I, ***with prejudice***, as any attempt at amendment would be futile. *See*, *Charity*, 698 So. 2d at 607 (affirming trial court's order dismissing breach of contract claim with prejudice and noting "[w]e...hold that failure to allege the existence of an express written contract was properly considered on the motion to dismiss...We also hold that the trial court properly dismissed the complaint because it failed to allege an express written contract.") (citing, *inter alia*, *Pan Am*, 471 So. 2d at 6); *See also*, *City of Gainesville*, 778 So. 2d at 531 (citing *Charity*, *supra*, and holding the lack of an express written contract is properly considered on a motion to dismiss).

B. Sovereign Immunity Bars Plaintiff's Unjust Enrichment Claim

Because Plaintiff has no viable breach of contract claim against UF as a matter of law, he attempts to assert an unjust enrichment claim. This claim fares no better.

Plaintiff's claim for unjust enrichment must also be dismissed, with prejudice. Plaintiff's unjust enrichment claim complains of the same actions as the breach of contract claim and is pled in the alternative to the extent it is determined a contract does not exist or otherwise apply. (Compl. at ¶¶ 76-77). "[A] claim for unjust enrichment is an equitable claim based on a legal fiction which implies a contract as a matter of law even though the parties to such an implied contract never indicated by deed or word that an agreement existed between them." 14th & Heinberg, LLC v. Terhaar and Cronley General Contractors, Inc., 43 So. 3d 877, 880 (Fla. 1st DCA 2010).

As set forth above, Plaintiff must establish the existence of an express, written contract, rather than an implied contract, to overcome the sovereign immunity bar. Because an unjust enrichment claim is necessarily based on an implied contract, sovereign immunity bars the claim, and dismissal with prejudice is required. *See, City of Ft. Lauderdale v. Israel*, 178 So. 3d 444, 447-48 (Fla. 4th DCA 2015) (claim for unjust enrichment barred by sovereign immunity); *Morehead*, 181 So. 3d at 1232-33 (holding that sovereign immunity barred claims for unjust enrichment, quantum meruit and implied contract and stating: "When an alleged contract is merely implied ... sovereign immunity protections remain in force."); *see also, Lee Memorial Health Sys. v. Hilderbrand*, 304 So. 3d 58, 61-62 (Fla. 2nd DCA 2020) (holding that unless the monies at issue were extracted in direct contravention of a direct legislative mandate or because the public entity ignored clearly established law prohibiting the tax or fine assessed, sovereign immunity bars unjust enrichment claims); *Calderone v. Scott*, No. 2:14-cv-519-FtM-29CM, 2015 WL 1800315, at *2 (M.D. Fla. April 16, 2015) ("Because unjust enrichment claims are not torts,

Florida's legislature has not waived sovereign immunity pursuant to Fla. Stat. § 768.28.”); *Brandt v. Public Health Trust of Miami-Dade County*, No. 10–22376–CIV, 2010 WL 4062798, at *1 (S.D. Fla. Oct. 15, 2010) (finding sovereign immunity barred unjust enrichment claim and plaintiff’s claim that Section 768.28 waived immunity for such claims “frivolous”).

C. The Florida Legislature Has Not Created a Statutory Cause of Action for the Recovery of Fees

Plaintiff’s attempt to manufacture a cause of action from the statutory provisions requiring the payment of tuition and other fees by students is yet another fundamental reason to dismiss the Complaint with prejudice, or to grant judgment on the pleadings. The recovery of unused or partially unused student fees, based upon the subjective feelings of students who, in the face of a worldwide emergency, feel they were shortchanged, are not the types of concerns that may be pursued as a private cause of action against UF.

Student fees are authorized in Section 1009.24, which does not authorize a private cause of action for students, parents, or others responsible for paying fees, who are dissatisfied with the fees charged. Simply put, there is no language in Chapter 1009, *Florida Statutes*, even remotely evidencing an intent by the Legislature to create a private cause of action for recovery of the costs to attend a public university. *See, Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 985 (Fla. 1994). “The question of whether a statute establishes a duty to take precautions to protect or benefit a particular class of persons is no longer determinative on the question of whether a cause of action should be recognized.” *Sorenson v. Professional Compounding Pharmacists*, 191 So. 3d 929, 934 (Fla. 2d DCA 2016) (citing *Murthy*, 644 So. 2d 985). “[L]egislative intent, rather than the duty to benefit a class of individuals, should be the primary factor considered by a court in determining whether a cause of action exists when a statute does not expressly provide for one.” *Id.* at 934.

This is consistent with the rationale for sovereign immunity in the first place: “a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the vast number of citizens affected by the actions of a government. [Sovereign immunity], at least to the extent retained by the legislature and courts, is a positively necessary and rational safeguard of taxpayers’ money.” *Southern Roadbuilders, Inc. v. Lee County*, 495 So. 2d 189, 190 n.1 (citing Prosser, Law of Torts 971 (4th Ed. 1971)). Had the Legislature intended a different result, it would have provided the avenue of relief Plaintiff seeks here. It did not.

In fact, in its latest expression of intent on the issue, the Florida Legislature passed HB 1261, which makes it clear that public colleges and universities are shielded from liability for actions taken during the COVID-19 pandemic and, codifying existing law, that cobbling together the documents typically exchanged between a public university and its students do not amount to express contracts. As of the filing of this Motion, HB 1261 is before Governor DeSantis for consideration and, if signed by the Governor, will become law. See, <https://www.flsenate.gov/Session/Bill/2021/1261> (last viewed 5/16/2021). Thus, in the legislative session that ended weeks ago, with dozens of cases such as this one pending throughout the State, the Florida Legislature had the opportunity to provide the very cause of action Plaintiff has attempted to construct in the case *sub judice*. Instead of authorizing lawsuits such as this one, the Legislature shielded public colleges and universities from being bankrupted by class action litigation.

It is also notable that there is no express waiver of sovereign immunity for claims asserted based upon the fees established in Section 1009.24, *Florida Statutes*. Courts find a waiver of sovereign immunity based on legislative intent. *E.g.*, *Royal World Metro., Inc. v. City of Miami Beach*, 863 So. 2d 320, 322 (Fla. 3d DCA 2003) (“[W]e find that a fair reading of

Section 70.001(1), Florida Statutes, evinces a sufficiently clear legislative intent to waive sovereign immunity....”). That intent does not exist here. That intent is easily found when the legislature enacts a statute *expressly* waiving sovereign immunity for tort claims or where the legislature expressly authorizes the sovereign to enter into contracts, which must have mutuality of remedies to be enforceable.²

IV. DISMISSAL OF CLASS CLAIMS

Given that this civil action was filed as a putative class action, but has not been certified, a stay of the Court’s consideration of the class action allegations is warranted until after the substantive bases for dismissal are fully adjudicated. *See, Newberg on Class Actions* § 7:10 (5th ed.) (due to the early nature of most motions to dismiss, courts will often handle them prior to deciding a motion for class certification); *see also, Hollywood, Inc. v. Broward County*, 90 So. 2d 47 (Fla. 1956) (during the pendency of motions to dismiss, court stayed certain discovery until the dispositive motions were resolved); *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1321 (S.D. Fla. 2000) (merits of a motion to dismiss considered prior to any consideration of class certification as “[t]he vast majority of courts have held that dispositive motions may be considered before ruling on a motion for class certification.”).³

Because Plaintiff has failed to state any viable claim in his individual capacity, this Court

² Notably, Florida’s voluntary payment doctrine provides an additional basis upon which Plaintiff’s claim may be dismissed. Pursuant to the voluntary payment doctrine, “money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability.” *Hall v. Humana Hosp. Daytona Beach*, 686 So. 2d 653, 657 n.7 (Fla. 5th DCA 1996), *rev. denied*, 694 So. 2d 738 (Fla. 1997); *Ruiz v. Brink’s Home Sec., Inc.*, 777 So. 2d 1062, 1064 (Fla. 2d DCA 2001) (“The voluntary payment doctrine provides that ‘where one makes a payment of any sum under a claim of right with knowledge of the facts, such a payment is voluntary and cannot be recovered.’”) (citation omitted).

³ Because Florida’s class action rule is based on Federal Rule of Civil Procedure 23, Florida courts look to federal cases as persuasive authority in their interpretation of Rule 1.220. *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 352–53 (Fla. 1st DCA 2003).

should dismiss the action before proceeding to class certification inasmuch as dismissal of the claims of the named Plaintiff terminates the civil action, and renders moot the question of whether to certify the case as a class action. *See, Osceola v. Florida Dept. of Revenue*, 893 F.2d 1231, 1232 (11th Cir. 1990) (“The district court granted the state's motion to dismiss and denied Osceola's motion for class certification because the issue was moot.”); *Henley v. Turner Broad. Sys., Inc.*, 267 F. Supp. 3d 1341, 1357 (N.D. Ga. 2017) (when the named plaintiff lacks a cause of action, the court should dismiss the action before proceeding to class certification). Indeed, the determination of whether Plaintiff has stated a viable claim - and whether he even has standing to serve as a named plaintiff - represents a threshold inquiry that must be made before addressing whether the case is properly maintainable as a class action.⁴ A named plaintiff who cannot establish the requisite case or controversy cannot seek relief on their own behalf or any other member of the putative class. *Taran v. Blue Cross*, 685 So. 2d 1004, 1006 (Fla. 4th DCA 1997).

Moreover, ruling on a motion to dismiss is a more efficient procedure given that it will often render moot the necessity of the Court expending resources ruling on class certification. *See, Newberg on Class Actions* § 7:9 (5th ed.) Assuming, *arguendo*, Plaintiff's claims against UF survive dismissal (which they should not), UF reserves the right to fully challenge the adequacy and appropriateness of the proposed class at that time.

V. CONCLUSION

Payment of student fees is not a “pay as you go”, “fee for service” model as Plaintiff would have this Court believe. The fees charged UF students are mandated by statute and Plaintiff's attempt to recover a *pro rata* portion of the tuition and other fees paid for the Spring

⁴ *See also, Policastro v. Stelk*, 780 So. 2d 989, 991 (Fla. 5th DCA 2001) (“A civil action does not become a ‘class action’ simply because the complaint bears the legend ‘class action complaint’ or, as required by Florida Rule of Civil Procedure 1.220, ‘class representation.’”).

2020 and subsequent semesters is barred by sovereign immunity. No amendment can cure this fundamental defect. Accordingly, dismissal of this action with prejudice is required.

Respectfully submitted this 23rd day of June, 2021.

Respectfully submitted,

/s/ Robert J. Sniffen

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of June, 2021, a true and correct copy of the foregoing was electronically filed in the Florida E-Courts Filing Portal to all counsel of record.

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

IN THE CIRCUIT COURT OF THE
EIGHT JUDICIAL CIRCUIT IN
AND FOR ALACHUA COUNTY,
FLORIDA

No. 01-2021-CA-001124

ANTHONY ROJAS, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

UNIVERSITY OF FLORIDA BOARD OF
TRUSTEES,

Defendant.

**PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS**

Plaintiff, Anthony Rojas (“Plaintiff”), responds in opposition to Defendant University of Florida Board of Trustees’ (“Defendant” or “UF”) Motion to Dismiss Plaintiff’s Class Action Complaint Or in the Alternative, Motion for Judgment on the Pleadings and Supporting Memorandum of Law (the “Motion”).

INTRODUCTION

This is one of numerous cases filed in the State of Florida against public colleges and universities that charged their students fees which students paid for specific services that were admittedly never provided due to the COVID-19 pandemic, and that have refused to provide any refunds. Multiple motions to dismiss have been filed raising sovereign immunity as a defense to the students’ claims. To date, only two courts in Florida have squarely analyzed and ruled on the sovereign immunity issue raised in UF’s motion. And, in the two, almost identical cases, the

answer as to whether sovereign immunity protects a public college or university from a breach of contract claim concerning the payment of fees in exchange for providing specific services on campus *has been a resounding no*. These cases make clear that where, as here, a university enters into a written agreement in which the students agree to pay certain fees in exchange for specific services, that document constitutes an express (*not* implied) contract that operates to waive sovereign immunity for breach of contract claims.

In the first case, *Verdini v. Miami-Dade College District Board of Trustees*, No. 2020-17924-CA-44, 2021 WL 640338 (Fla. 11th Jud. Cir. 2021)—a nearly identical case asserting the same claims—Judge William Thomas of the Eleventh Judicial Circuit Court’s Complex Business Litigation Division denied the motion to dismiss filed by the college, finding that the documents plaintiff attached to his complaint—similar to the documents attached to Plaintiff’s Complaint—“sufficiently contain[ed] the express written terms and provide[d] the specific services [the school] was contractually obligated to provide in exchange for Plaintiff’s payment of ‘fees.’” *Verdini*, 2021 WL 640338, at *1. The court held that the express contracts precluded sovereign immunity and that the plaintiff stated a valid claim for breach of an express contract. *See id.* This order is attached as **Exhibit A**.

In the second case, *Moore v. The University of South Florida Board of Trustees*, No. 21-CA-002445, which is pending in the Thirteenth Judicial Circuit of Florida in Hillsborough County, the plaintiff, just like Plaintiff here, alleged that the University of South Florida breached its express contracts with students when it closed its campus and facilities due to the COVID-19 pandemic, but continued to charge its students for fees for on-campus services that it did not provide. The university moved to dismiss the complaint, arguing that sovereign immunity barred

the plaintiff's claim. The Honorable Judge Farfante disagreed and denied the motion in part, allowing the breach of contract claim to proceed. This order is attached as **Exhibit B**.

As in *Verdini* and *Moore*, sovereign immunity does not bar Plaintiff's claim for breach of contract because UF waived sovereign immunity when it entered an express written contract with Plaintiff concerning the fees. Attached to the Complaint are the documents that constitute Plaintiff's express written contract with UF. Accepting the Complaint's allegations to be true and construing them in the light most favorable to Plaintiff, Plaintiff has certainly pled sufficient facts concerning the existence and substance of his express contract with UF to preclude dismissal at this stage of the litigation.

UF's Motion also argues that (1) Plaintiff's unjust enrichment claim is barred by sovereign immunity; (2) Plaintiff cannot pursue his claims there is no statutory cause of action; (3) Plaintiff's claims are barred by the voluntary payment doctrine; and (4) the class allegations in the Complaint should be dismissed or stayed. None of these arguments provide a basis to dismiss the complaint.

First, Plaintiff may properly bring his unjust enrichment claim because, pursuant to well-established Florida law, UF is not entitled to sovereign immunity for a fee charged in violation of law. Plaintiff alleges that UF violated Florida law when it charged students fees without using those fees to provide the services that the Florida Statutes specifically require those fees to fund.

Second, Plaintiff does not need a statutory cause of action to assert his claims because his allegations are based upon an express contract which incorporates statutory obligations. Plaintiff's written agreement with UF obligated UF to provide specific services in accordance with Florida law. UF's failure to follow the law's provisions is a breach of its express written contract with Plaintiff. Moreover, by adjudicating this breach of contract claim, the Court will ensure the

mutuality of UF's express contracts with its students, which is one of the principles underlying Florida's sovereign immunity jurisprudence.

Third, the Court should reject UF's voluntary payment doctrine because it is an affirmative defense that cannot be resolved on a motion to dismiss. Furthermore, even if the affirmative defense could be raised at this stage, it should still be rejected because UF has not shown that Plaintiff made his payments knowingly and voluntary—the doctrine's two prerequisites. The affirmative defense also fails because it is precluded by section 725.04, Florida Statutes, which precludes application of the voluntary payment doctrine where, as here, the plaintiff alleges that the payment in dispute was made outside of the terms in the parties' contract. Plaintiff's contract with UF does not allow UF to charge fees for services that it does not make available for students.

Fourth, the Court should neither dismiss nor stay Plaintiff's well-pleaded class allegations. Courts ordinarily deny such premature requests to dismiss class allegations, particularly in a case such as this where the motion to dismiss is likely to be denied. The Court should likewise deny a stay of class issues because UF has failed to meet its burden to justify depriving Plaintiff of the discovery mechanism. Further, given the challenges that students have had to face due to the COVID-19 pandemic (e.g., record-high unemployment and an economic recession), Plaintiff and the Class would be prejudiced by a stay if they are unable to continue to push their case forward while allowing UF to continue retaining money paid for services that were never provided.

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Motion.

FACTUAL ALLEGATIONS

This is a class action brought by Plaintiff Rojas, who was a graduate student at the University of Florida during the Spring and Summer 2020 academic semesters. Compl. ¶ 1. Plaintiff brings this class action complaint against UF and seeks to certify a class of all persons

who paid fees for the Spring and Summer 2020 academic semesters, pursuant to a contract with UF, because they did not receive the benefits of the services for which they paid those fees and did not receive a refund or waiver of those fees. *Id.* ¶¶ 1, 2, 7, 9, 44–68. Plaintiff and Class members did not receive the full benefit of the fees that they paid because UF closed its campuses due to the COVID-19 pandemic. *Id.* Section 1009.24, Florida Statutes, and the regulations promulgated thereunder by the Florida Board of Governors (“FBOG”), in addition to UF’s regulations, establish the types of fees that UF may charge, the amounts of those fees, and the specific purposes for those fees. *Id.* ¶¶ 18–27, 30.

The boards of trustees of public universities in Florida, including UF, establish “fees” to charge all enrolled students, subject to the limitations provided by statute and the corresponding regulations. *Id.* These fees encompass a variety of charges that fund on-campus services, including but not limited to, a fee for health services, transportation, athletics, and activity and services. *Id.*

Plaintiff and all putative Class members agreed to pay—and did pay—fees pursuant to their express written contracts with UF. *Id.* ¶¶ 13, 18. These contracts are constituted by the following documents: (1) the Financial Liability Agreement that students are required to execute when they register for courses (*id.* at Ex. E); (2) student’s invoices assessing the fees (such as Plaintiff’s “Tuition Statement”) (*id.* at Ex. C); and (3) the tuition and fee schedules that UF provides to its students, such as the one that Plaintiff attached to his Complaint as Exhibit D, that itemize the fees and the specific services to be provided for each fee (hereinafter, the “Fees Schedule”). *See also id.* ¶¶ 27–29. Plaintiff attached his contracts with UF to his Complaint for the 2020 Spring and Summer semesters. *See id.* at Exs. C–E.

Pursuant to the terms of the Financial Liability Agreement that, as with Plaintiff, every student agrees to when they register for classes at UF, the student “agree[s] to pay UF debts and

charges pursuant to UF policies,” including “the costs of tuition, fees and other charges and any additional costs when those charges become due.” *Id.* at Ex. E. The Agreement also provides that “past due student accounts will result in university registration and services being withheld in accordance with university regulations” and that “[d]elinquent debts may be reported to a credit bureau and referred to collection agencies, or litigated.” *Id.* The student is also obligated “to pay all costs of collecting unpaid charges, including a percentage based third party collection fee up to 30%, reasonable attorney’s fees, and court costs” that the university incurs in trying to collect on the student’s account. *Id.*

The Tuition Statements and Fees Schedule, which are provided to every putative Class member, identify the fees charged to every student, and their specific purpose and price. *See id.* at Exs. C and D. Plaintiff’s Tuition Statement states the amount of credit hours that Plaintiff agreed to pay for tuition and fees (per credit hour), and did pay, during a particular semester, and the Fees Schedule identifies the specific fees that Plaintiff paid. *Id.* Together, these documents show that, for every credit hour, he was charged \$6.76 for Capital Improvement Trust Fund Fee, \$22.43 for the Student Financial Aid Fee, \$19.06 for the Activity and Service Fee, \$1.90 for the Athletic Fee, \$15.81 for the Health Fee, and \$9.44 for the Transportation Access Fee. *Id.*; *see also id.* at 5 n.8.

In March 2020, UF shut down its campuses in response to the COVID-19 pandemic and orders issued by the Governor of Florida and the Florida State Board of Governors. *Id.* ¶¶ 4–5, 31–35. Because of the shutdown, UF denied students, including Plaintiff, the on-campus services for which they paid with a host of fees for the Spring and Summer 2020 semesters. *Id.* ¶¶ 6–7, 36–38. While UF’s decision to transition to online classes and to request or encourage students to leave and stay off campus was a responsible decision, it is unfair and unlawful for UF to subsequently retain the excess amounts in fees and force the students and their families, who suffered during a

once-in-a-century pandemic, record-high unemployment, and an economic recession, to bear the costs that UF assumed as a part of doing business. *Id.* ¶¶ 39, 43.

Plaintiff alleges that “UF has improperly retained funds for services it did not provide, in violation of its express contracts with students which allow it to collect fees only for certain statutorily specified purposes.” *Id.* ¶ 7. The Complaint further alleges that while “[o]ther higher education institutions across the United States that also switched to e-learning” have done “the right thing” by providing “appropriate refunds” concerning the fees for on-campus services and activities,” UF “has taken the opposite approach by refusing to provide refunds.” *Id.* ¶ 6. Based on the foregoing allegations, the Complaint asserts causes of action against UF for breach of an express contract and, in the alternative, unjust enrichment. *Id.* ¶ 9; *see also id.* ¶¶ 44–68.

LEGAL STANDARD

A defendant’s burden to prevail on a motion to dismiss is heavy. To state a cause of action, a complaint need only contain “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.” *See* Fla. R. Civ. P. 1.110(b); *Shahid v. Campbell*, 552 So.2d 321, 322 (Fla. 1st DCA 1989); *Railey v. Skaggs*, 212 So. 2d 86, 87 (Fla. 3d DCA 1968). The Court must assume that the well-pleaded factual allegations in the Complaint are true and draw all reasonable inferences in favor of Plaintiff in determining whether to grant a motion to dismiss. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996); *Thompson v. Martin*, 530 So. 2d 495, 496 (Fla. 2d DCA 1988). “[A] complaint should not be dismissed for failure to state a cause of action ‘unless the movant can establish beyond any doubt that the claimant could prove no set of facts whatever in support of his claim.’” *Meadows Cmty. Ass’n, Inc. v. Russell-Tutty*, 928 So. 2d 1276, 1280 (Fla. 2d DCA 2006) (citing *Ingalsbe v. Stewart Agency, Inc.*, 869 So. 2d 30, 35

(Fla. 4th DCA 2004)) (emphasis added); *see also Gandy v. Trans World Computer Tech. Grp.*, 787 So. 2d 116, 118 (Fla. 2d DCA 2001).

A motion for judgment on the pleadings is governed by the same legal test as a motion to dismiss for failure to state a cause of action. *Henao v. Prof'l Shoe Repair, Inc.*, 929 So. 2d 723, 725 (Fla. 5th DCA 2006).

ARGUMENT

I. PLAINTIFF'S CLAIMS ARE NOT BARRED BY SOVEREIGN IMMUNITY.

A. UF Waived Sovereign Immunity for Plaintiff's Breach of Contract Claim.

UF acknowledges that it will be deemed to have waived its sovereign immunity if the fees Plaintiff paid in exchange for the services UF offered are governed by an express written contract. *See* Mot. at 8–9 (acknowledging the holding in *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984)). “[T]he Florida Supreme Court has found an implied waiver of sovereign immunity for breach of contract claims [which] applies to claims for breach of the express and implied conditions of a written contract[.]” *Calderone v. Scott*, No. 2:14-CV-519-FTM-29CM, 2015 WL 1800315, at *1 (M.D. Fla. Apr. 16, 2015); *see also Maynard v. Bd. of Regents of Civ. of Univs. of Fla. Dep't of Educ. ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1287 (11th Cir. 2003) (quoting *Pan–Am Tobacco Corp.*, 471 So. 2d at 5) (“[W]here the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state’s breach of that contract.”)).

Given the legal standards governing motions to dismiss (as with motions for judgment on the pleadings), when a plaintiff alleges sufficient facts showing that a state agency breached an express contract, it is axiomatic that sovereign immunity cannot bar a breach-of-contract claim at that stage. *See Corcoran v. Geffin*, 250 So. 3d 779, 786-87 (Fla. 1st DCA 2018). In *Corcoran*, the

court affirmed the denial of a motion to dismiss because, at that stage, sovereign immunity could not preclude a breach-of-contract claim against state officials and entities, including the FBOG, reasoning that:

Here, neither sovereign immunity nor the separation of powers doctrine prohibits respondents from bringing a breach of contract claim against governmental entities. A number of issues remain for the court to determine, including whether the gift agreements were express written contracts that the governmental entities were authorized to enter into, which entities were parties to those contracts, and whether any of the parties breached those contracts. However, assuming respondents can prove this claim, the trial court may have the authority to establish an appropriate remedy for breach of contract.

Id. at 787. While Plaintiff believes that no additional facts are necessary to determine that an express contract exists between him and UF regarding fees and services—especially since *he attached the very documents that constitute the contract*—at a minimum, it cannot be said that, “beyond any doubt[,] the claimant could prove no set of facts whatever in support of h[is] claim.” *Russell-Tutty*, 928 So. 2d at 1280. Accordingly, UF’s motion to dismiss should be denied. *Id.*¹

Plaintiff alleges sufficient facts to show that UF breached its express, written agreement with him by failing to provide all the services for which Plaintiff paid with fees and attaches that contract to the Complaint: the Financial Liability Agreement, the Tuition Statement, and the Fees Schedule, which provides which fees he was charged for—and paid—for the Spring and Summer semesters in 2020. *See* Compl. at Exs. C and E. Plaintiff’s invoices show the specific fees charged, the amounts charged for the fees, and the payments made by Plaintiff. *Id.* Together, these

¹ *See also Zainulabeddin v. Univ. of S. Fla. Bd. of Trs.*, No. 16-cv-637-T-30TGW, 2016 WL 1451726, at *3 (M.D. Fla. Apr. 13, 2016) (denying motion to dismiss breach of contract claim against university based on sovereign immunity because plaintiff alleged that it “entered into a contractual relationship with the University of South Florida,’ one in which ‘[s]ome terms . . . [were] contained within the University of South Florida College of Medicine Medical Student Handbook.’ This factual pleading is sufficient to survive a motion to dismiss. Whether the allegation will be supported by evidence is a question for summary judgment.”).

documents constitute an express, written agreement between Plaintiff and UF to provide specific services established by the Florida Statutes in exchange for the payment of fees.

UF's main argument is that Plaintiff "cobbles together" various documents to allege an express contract and that this is insufficient to show a "meeting of the minds." Mot. at 5. In Florida, however, any one document, or even several documents together, may constitute an *express* contract so long as they show an "offer, acceptance, and consideration." See *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012); *Waite Dev., Inc. v. City of Milton*, 866 So. 2d 153, 155 (Fla. 1st DCA 2004) ("[S]everal writings may constitute a valid and binding contract written contract when they evidence a complete meeting of the minds of the parties and an agreement upon the terms and conditions of the contract."). In fact, the Second DCA recently analyzed this issue in *Sarasota County Public Hospital District v. Venice HMA, LLC*, No. 2D19-3745, 2021 WL 2446276 (Fla. 2d DCA 2021), concluding that several documents may together constitute an express contract that waives sovereign immunity. The Court should rely on the Second DCA's reasoning to deny the motion to dismiss the breach of contract claim based on sovereign immunity.

In *Sarasota County*, plaintiffs, a group of private hospitals, sued Sarasota County for reimbursement of medical expenses pursuant to a Special Act requiring the county to reimburse hospitals for the provision of indigent healthcare services. *Id.* at *1. As in this case, the county argued that the claims were barred by sovereign immunity because plaintiffs "'never produced an express written contract' in the course of discovery[,]" implying "in its phrasing of its argument [] that without a unified, finalized, typed, paginated document, signed by the parties in a suitable place (or something to that effect), there can be no enforceable express contract." *Id.* at *7. In response, plaintiffs claimed that the county waived sovereign immunity because the Special Act,

“when considered in conjunction with their providing indigent healthcare services in reliance upon the Special Act, created an express contract that could be enforced notwithstanding the County’s claim of sovereign immunity.” *Id.* at *2. In denying the writ of prohibition, the Second DCA rejected Defendant’s argument, concluding it was “an overly cramped view of what makes an express contract. While express contracts are frequently set forth in that kind of manner, they do not have to be.” *Id.* at *8. (recognizing that although this “may be a somewhat unique manner of forming an express contract, it is certainly not unheard of” and that it was not “beyond the ken of what Florida law would recognize for purposes of waiving sovereign immunity”). The Court concluded that the circuit court correctly denied summary judgment concerning whether sovereign immunity barred plaintiff’s claims because the question of “whether a potentially valid express contract was, in fact, formed” is “a disputed question of material fact.” *Id.*

Applying *Sarasota County* to this case, the Court should conclude that documents Plaintiff attaches to his Complaint sufficiently allege the existence of an express contract that governs the parties’ contractual relationship and waives sovereign immunity.

First, the charges of fees constitute an *offer* by UF to provide the services that the Florida Statutes and FBOG regulations require to be funded by those fees. These legal requirements provide the specific duties that UF offers to undertake in exchange for students’ fees because when “parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract.” *Citizens Ins. Co. v. Barnes*, 124 So. 722, 723 (Fla. 1927); *see also Shavers v. Duval Cnty.*, 73 So. 2d 684, 689 (Fla. 1954) (en banc) (citations omitted) (“It has long been firmly established that the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction,

discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein.”). By specifically referencing fees that UF is authorized to charge under Florida law, Plaintiff’s contract incorporates the legal requirements surrounding those fees.

Moreover, Florida law is clear that “where a suit is brought on an express, written contract entered into by a state agency under statutory authority, the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or *implied condition or covenant* of that contract.” *Champagne-Webber Inc. v. City of Ft. Lauderdale*, 519 So. 2d at 698, *aff’d*, *Cnty. of Brevard v. Miorelli Eng’g, Inc.*, 703 So. 2d 1049 (Fla. 1997) (emphasis in original). Here, UF’s obligation to provide the services specified in the Fees Schedule and in section 1009.24 is an implied covenant or condition of its express agreement with Plaintiff.

Furthermore, even fees that section 1009.24 authorizes UF to charge but which are not further elaborated in that statute must still be spent for their statutorily authorized purpose because “if a fee is described in a contract as for a specific purpose . . . , then not using the fee for that purpose . . . could constitute a breach.” *Maor v. Dollar Thrifty Auto. Grp., Inc.*, 303 F. Supp. 3d 1320, 1325 (S.D. Fla. 2017). Plaintiff sufficiently alleges that UF committed a breach of contract when it collected fees from students but did not spend all sums collected from those fees on the services they are intended to provide. *See Id.* (denying motion to dismiss claim for breach of contract based on allegations that “administrative fee” charged by car rental company was much greater than defendant’s cost to process tolls and concluding that “to decide the meaning of the disputed terms at this preliminary stage would entail a factual inquiry more appropriate at a further stage of the proceedings”); *see also Costa v. Kerzner Int’l Resorts, Inc.*, No. 11-60663-CV, 2011 WL 2519244, at *4 (S.D. Fla. June 23, 2011) (“the Court would agree with Plaintiff if she alleged

that some of the money collected for the ‘mandatory housekeeping gratuity and utility service fee’ went to neither the housekeeping staff nor to pay the utility service fee,” her breach of contract claim would have survived a motion to dismiss).

Second, Plaintiff’s Financial Liability Agreement, his Tuition Statements, and the Fees Schedule show that he *accepted* UF’s offer because they show the amounts that Plaintiff paid for the various fees. *See* Compl. at Exs. C–E.

Third, these documents attached to the Complaint show *consideration*, an exchange of value, by identifying the amounts of money that Plaintiff owed and paid in exchange for services to be provided, which are specified by statute and the FBOG regulations for each fee. *See, e.g.*, UF Regulation 3.0375 (identifying UF’s fees with reference to FBOG Regulations and section 1009.24, Florida Statutes).

Because Plaintiff’s documents demonstrate offer, acceptance, and consideration, the Court should conclude that these writing sufficiently contain the relevant terms or conditions necessary to constitute a complete meeting of the minds between Plaintiff and UF concerning the fees and therefore the express contract that operates to waive UF’s sovereign immunity. Consequently, Plaintiff adequately alleges that he entered an express contract with UF regarding fees and the services to be provided by those fees. This is the exact conclusion drawn by the Eleventh Judicial Circuit of Florida when, earlier this year, it denied Miami Dade College’s motion to dismiss in a similar case. *See* Ex. A at *1–*2. The *Verdini* court rejected the college’s sovereign immunity defense, finding that the documents attached to the plaintiff’s complaint “list the specific purpose of each and every fee . . . [and] demonstrat[e] he was charged [] fees” for various semesters in 2020. *Id.* As such, the documents “sufficiently contain the express written terms and provide the specific services [the college] was contractually obligated to provide in exchange for Plaintiff’s

payment of ‘fees’ to survive a motion to dismiss.” *Id.*² More recently, the Thirteenth Judicial Circuit of Florida came to the same conclusion in the *Moore* case, when, after careful consideration of the defendant’s sovereign immunity argument, the court denied the request to dismiss the plaintiff’s breach of contract claim. *See* Exhibit B.

The Court should reject UF’s attempt to liken the parties’ contractual relationship to an implied contract. *See* Mot. at 7–10. While courts have hesitated to find an express contract governing claims that students were not provided with the educational experience they were promised—particularly in the absence of an express written agreement—Plaintiff’s case is different because, as shown above, the Financial Liability Agreement, Tuition Statement, and Fees Schedule contain all the elements of an express contract concerning fees for on-campus services.

B. None of UF’s cases are helpful because unlike Plaintiff, the plaintiffs in the cases failed to allege the necessary terms to constitute an express contract or raised tuition and educational malpractice claims.

Cases cited by UF are distinguishable because, unlike in this case, plaintiffs in those cases failed to present documents containing all the items needed to sufficiently allege an express contract. *See, e.g., Pinkston v. Univ. of S. Fla. Bd. of Trs.*, No. 8:18-CV-2651-T-33SPF, 2019 WL 1383467, at *4 (M.D. Fla. Mar. 27, 2019) (failing to allege an express written contract between the parties); *Charity v. Bd. of Regents of the Div. of Univs. of the Fla. Dep’t of Educ.*, 698 So. 2d 907, 908 (Fla. 1st DCA 1997).

For example, UF cites *Hamke v. University of Central Florida*, No. 10-cv-1828-ORL-19KRS, 2011 WL 881699 (M.D. Fla. Feb. 7, 2011) (Mot. at 6, 10), where the court concluded that a student who was expelled from her program of study failed to state a claim for breach of contract

² Tellingly, UF fails to make *any* reference to *Verdini* in its Motion, even though it is one of the *only two cases* in Florida to squarely analyze the sovereign immunity issue raised in UF’s Motion.

based on a student handbook because the handbook did not contain all the terms governing the student-university relationship and, indeed, did not even include a material term containing duties relevant to plaintiff's claims. *Id.* Here, by contrast, the Financial Liability Agreement, the Tuition Statement, and Fees Schedule together contain all the terms necessary to support Plaintiff's claims for breach of contract for UF's failure to provide services in exchange for specific fees.

UF's reliance on *Acosta v. District Board of Trustees of Miami-Dade County College*, 905 So. 2d 226 (Fla. 3d DCA 2005) (Mot. at 6), is similarly misguided. There, the plaintiff argued that the university breached its contract to students in a medical assistant program because it increased the tuition after the students had signed an acceptance letter. *Id.* at 228. The acceptance letter informed students that the college planned to increase the tuition but that "[a]t this particular time the exact amount of the increase has not been finalized." *Id.* The Third DCA in Florida held that, "[a]s there was no price quoted in the contract, there could be no contract" between the school and the students because "price is generally recognized as an essential element to a contract." *Id.* Unlike the plaintiff's document in *Acosta*, the specific costs of each fee at issue in this case can be easily identified using the documents that Plaintiff attached to his Complaint. *See* Compl., Ex. C-E.

The Court should also reject Defendant's attempt to analogize this case to cases concerning tuition and other forms of educational malpractice. For example, Defendants cites *Williams v. Florida State University*, No. 4:11-CV-350-MW/CAS, 2014 WL 340562 (N.D. Fla. Jan. 29, 2014), *aff'd sub nom. Williams v. Becker*, 608 F. App'x 905 (11th Cir. 2015) (Mot. at 5, 9), where plaintiff brought a breach of contract claim against a public university for admitting him into a doctoral program which he later discovered did not offer a certain specialization. *Id.* at *2. On summary judgment (not a motion to dismiss or for judgment on the pleadings), the district court

concluded that the university’s “program of study” did not constitute a contract between the party sufficient to waive sovereign immunity. *Id.* at *6. Similarly, in *Shaffer v. George Washington Univ.*, 2021 WL 1124607 (D.D.C March 21, 2021) (Mot. at 6), the district court concluded that a student did not sufficiently allege breach of contract claim because it identified no language in any document obligating the university to provide “in-person instruction.” *Williams* and *Shaffer* highlight the distinction between cases seeking tuition based on educational malpractice—claims Plaintiff does *not* assert—and claims for reimbursement of fees based on documents and statutes which obligate UF to provide specific services in exchange for payment.

Moreover, UF’s argument that Plaintiff’s documents are insufficient to obligate UF to provide Plaintiff (and Class members) with any services in exchange for their payments of the fees because they are just “typical [university] documents” (Mot. at 10) defies both the law and common sense. UF wants to have it both ways: not be held liable to students for failing to provide services that UF was paid to provide while simultaneously imposing penalties and forcing students into collections for failing to pay those fees. *See e.g.*, Regulation 3.037, UNIV. OF FLA. (“A student is liable for all tuition and fees associated with all courses for which the student is registered...The University shall temporarily suspend further academic progress of any student who has not paid the entire balance of their tuition and fee liability . . . by placing a financial hold on the student’s record, which will prevent the student from receiving grades, transcript, and/or diploma and the student’s registration will be denied for future terms until the account has been paid in full.”)³;

³ Plaintiff respectfully requests that the Court take judicial notice of these and other UF regulations cited herein, published on UF’s website, as state agency rules and as undisputed facts whose accuracy can be readily determined by unquestionably accurate sources. Fla. Stat. § 90.202(11)-(12); *see Nationwide Mut. Fire Ins. Co. v. Darragh*, 95 So. 3d 897, 900, 899 (Fla. 5th DCA 2012) (holding that “the factual tables copied from the [government] website would qualify for judicial notice under section 90.202(12)” except for the tables that were generated based on numerical information that the party seeking judicial notice input because the accuracy of the inputted

Regulation 3.042, UNIV. OF FLA. (“The University shall use due diligence and exert every effort in the collection of all accounts” and “shall employ the services of a collection agency when deemed advisable in collecting delinquent accounts.”). This lack of mutuality would make a contract illusory, which is *the exact basis* for the Florida Supreme Court’s ruling that express contracts constitute a waiver of sovereign immunity. *See Pan-Am Tobacco Corp. v. Dep’t of Corrections*, 471 So. 2d 4, 5 (Fla. 1984); *see also M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 441 (2015) (instructing “courts to avoid constructions of contracts that would render promises illusory because such promises cannot serve as consideration for a contract”); *Fla. Dep’t of Env’tl Protection v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1270 (Fla. 2008) (“a contract that grants one party the right to sue, but also affords the other party the right to declare that it has no legal obligation to pay, is void for lack of mutuality of remedy”). The Court should reject a legal position that, if adopted, would inappropriately transform UF’s written agreements with its students into empty promises.

Finally, contrary to UF’s contention, *City of Key West v. Florida Keys Community College*, 81 So. 3d 494, 497 (Fla. 3d DCA 2012) is not applicable to this case, much less “on point.” Mot. at 9. In *City of Key West*, there was “no written contract or agreement between the City and the college obligating the college to pay the City’s stormwater utility fees,” so the Court held that a municipal ordinance imposing utility fees to all developed property through the City’s municipal area was insufficient to waive the college’s immunity from suit. *Id.* at 496. Conversely, this case

information were “based on [the user’s] assumptions” and could not be tested). This document is readily available online without needing to input any information that would alter the information provided by those websites. *See Darragh*, 95 So. 3d at 900; *see also Freimuth v. State*, 272 So. 2d 473, 475 (Fla. 1972) (abrogating prior rule that required authenticated copy of regulations and holding that “courts may take judicial notice of official records of administrative agencies without more”).

is akin to *Waite*, where the city *did* enter into a written agreement with the landowner, so when the city failed to live up to the requirements of an ordinance passed in connection with that agreement, the First DCA concluded that the city could be held liable for breach of an express written contract. *Waite Dev., Inc.*, 866 So. 2d at 155. As in *Waite*, the Financial Liability Agreement, Tuition Statement, Fee Schedule, and Florida law combined constitutes a complete contract between UF and Plaintiff. *See also Sarasota Cnty.*, 2021 WL 2446276 at *8. The Court should conclude, in accordance with the decisions in *Verdini* and *Moore*, that Plaintiff's documents, which *UF created*, contain all the necessary information to find the existence of an express contract.⁴

In summary, Plaintiff adequately alleges that UF breached an express, written contract by refusing to provide prorated refunds or waivers of the fees that he was charged, which he also paid, for services that he was not provided because UF closed its campuses and/or substantially reduced its services to students during the Spring and Summer academic semesters in 2020. And, Plaintiff attaches the documents that constitute his express contract with UF to his Complaint. The Court should conclude that these documents constitute an express contract and, therefore, a waiver of sovereign immunity from Plaintiff's breach-of-contract claim.⁵

⁴ This conclusion accords with longstanding Florida precedent that invoices such as the Tuition Statement are express contracts. *See, e.g., Elof Hansson Paper & Board, Inc. v. Caldera*, No. 11-20495-CIV, 2011 WL 13115561, at *4 (S.D. Fla. Sept. 6, 2011) (denying motion to dismiss breach of contract claim based on allegations that invoices attached to complaint were "valid and enforceable contracts"); *Int'l Star Registry of Ill. v. Omnipoint Mktg., LLC*, 510 F. Supp. 2d 1015, 1022 (S.D. Fla. 2007) ("[T]he invoices constitute contracts between the parties[.]"); *see also Mancini Enters., Inc. v. Am. Exp. Co.*, 236 F.R.D. 695, 699 (S.D. Fla. July 31, 2006) (denying motion to dismiss quantum meruit claim based on conclusion that whether invoices created an express contract would be decided "at a later juncture").

⁵ Because UF has waived its sovereign immunity, the Court has subject matter jurisdiction to adjudicate this case and should dismiss UF's arguments to the contrary. *See Mot.* at 8.

C. Sovereign Immunity Does Not Bar Plaintiff's Alternative Claim for Unjust Enrichment.

While UF argues that Plaintiff's unjust enrichment claim is barred by sovereign immunity, Mot. at 11–12, the state is not entitled to sovereign immunity where, as is the case here, it has charged a fee in violation of law. *See Bill Stroop Roofing Inc. v. Metro. Dade Cnty.*, 788 So. 2d 365, 366 (Fla. 3d DCA 2001) (denying sovereign immunity defense because a sovereign cannot “improperly demand and extract monies from its citizens, then, when caught with its hand in the citizen's pocket, simply decline to return the funds”); *see also Parker v. Am. Traffic Solutions, Inc.*, No. 14-CIV-24010-MORENO, 2015 WL 4755175, at *4 (S.D. Fla. Aug. 10, 2015) (denying motion to dismiss the unjust enrichment claim based on sovereign immunity because, under Florida law, “state actors are not immune from suit for unlawful monetary exactions”) (citing *Bill Stroop Roofing, Inc.*, 788 So. 2d at 366).

Plaintiff alleges in his Complaint that, by charging students and retaining the fees for services that UF did not provide, UF acted in violation of its legislative mandate which governs how UF may use—and how it may not use—the funds that it receives from each fee. Compl., ¶¶ 60–66. For example, pursuant to statute, any “non-associated” fee that UF charges must “be based on reasonable costs of services.” § 1009.24(14), Fla. Stat. More specifically, the funds that UF collects from its “Transportation Access” Fee must be used “to increase student access to transportation services.” § 7.003(10), FBOG Reg.⁶ With UF's campuses completely or partially

⁶ Where, as here, a document is “impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss.” *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. 4th DCA 2015) (finding that “the trial court did not err in considering the contents of the insurance policy that was filed in connection with the insurer's motion to dismiss” because “[t]he complaint refer[red] to the policy”); *see also Veal v. Voyager Prop. & Cas. Ins. Co.*, 51 So. 3d 1246, 1249–50 (Fla. 2d DCA 2011) (“Accordingly, since the complaint impliedly incorporates the terms of the agreement by reference, the trial court was entitled to review the terms of that agreement to determine the nature

closed during various semesters in 2020 due to the COVID-19 pandemic, the university's shuttles were completely inaccessible or accessible with limited availability. UF, therefore, provided limited to no services to "increase students access to transportation services." Accordingly, UF's charging and retaining of the Transportation Access Fees during this time violates section 1009.24(14), Florida Statutes, and the corresponding regulations.

Plaintiff and Class members have a particularly strong argument that UF's charging of the fees equates to an illegal extraction, "a particularly unjust form of property deprivation" because Plaintiff's (and Class members') "deprivation was caused by the unlawful acts of [UF]." *Parker*, 2015 WL 4755175, at *4. UF does not even attempt to address the clear holding of *Bill Stroop Roofing*. Instead, it cites to *Lee Memorial Health Sys. v. Hilderbrand*, 304 So. 3d 58 (Fla. 2d DCA 2020) (Mot. at 11), a case that is inapposite because the plaintiffs there were challenging charges that were billed to them pursuant to a law that was eventually declared unconstitutional, but not at the time the charges were made. *Id.* at 62. While the plaintiffs in *Lee* "d[id] not have an argument that [the defendant's] refusal to comply with a legislative mandate resulted in the payment of illegal charges" (*id.*), Plaintiff does here.

UF's other cases fare no better. The plaintiff in *Brandt v. Public Health Trust of Miami-Dade County*, No. 10-022376-CIV-MOORE, 2010 WL 4062798, at *1 (S.D. Fla. Oct. 15, 2010) (Mot. at 12) argued that Section 768.28(1), Florida Statutes, which expressly waives sovereign immunity for torts, provided a waiver of sovereign immunity for unjust enrichment claims, an allegation that Plaintiff does not make here.

of the claim being alleged.") (citations omitted). Because Plaintiff referenced these regulations in his Complaint, (*see* Compl., ¶ 17), the Court may and should consider them in ruling on the motion to dismiss. Additionally, Plaintiff respectfully requests that the Court take judicial notice of the regulation for the reasons previously discussed.

In sum, in accordance with the holding in *Bill Stroop*, UF “can be made to disgorge sums collected by it *in violation of a state statute.*” *Id.* at 367 (emphasis added). UF cannot use sovereign immunity to shield itself from the consequences of its decisions.

II. PLAINTIFF DOES NOT REQUIRE A STATUTORY CAUSE OF ACTION TO ASSERT HIS BREACH OF CONTRACT CLAIM AGAINST UF.

The Court should also reject UF’s argument that Plaintiff’s claims must be dismissed because the Florida Legislature has not created a statutory cause of action for recovery of the fees. Mot. at 12. This argument is flawed because it fundamentally misconstrues the Complaint’s allegations. As argued above, it is the *combination* of the Financial Liability Agreement, the Tuition Statement, and the Fees Schedule *with* Florida law providing the university’s duties and obligations for imposing fees that together form the complete express contract between UF and Plaintiff. *See Waite*, 866 So. 2d at 155; *Sarasota Cnty*, 2021 WL 2446276 at *8. In *Waite*, because the city had entered into a written agreement with the landowner, when the city failed to live up to the requirements of an ordinance passed in connection with that agreement, the First DCA concluded that the city could be held liable for breach of an express written contract. *Waite Dev., Inc.*, 866 So. 2d at 155. Similarly, in *Sarasota County*, the Second DCA held that the enactment of a special act of legislation and the subsequent incorporation of that statute as a county ordinance, couple with the Hospital’s provision of indigent healthcare services and remittance of bills,” was sufficient to create a genuine issue of material fact concerning whether an express contract was formed. *Sarasota Cnty.*, 2021 WL 2446276 at. Both appellate decisions support the conclusion that the combination of the documents that Plaintiff attached to his Complaint *with* Florida law constitutes a complete contract between the parties. UF’s failure to follow the provisions of the law supports a claim for breach of its express written contract with Plaintiff (and Class members),

notwithstanding any statutory cause of action. *See Waite*, 866 So. 2d at 155; *Sarasota Cnty*, 2021 WL 2446276 at *8.

The case law relied upon by UF is distinguishable because, in those cases, the plaintiff was unable to assert claims for breach of contract based on the violation of an express written agreement and, instead, stretched to assert causes of action based solely on the violation of alleged statutory duties. For example, in contrast to *Murthy v. Sinha Corp.*, 644 So. 2d 983 (Fla. 1994) (Mot. at 12), Plaintiff does not bring any claims against UF based *solely* on the alleged breach of a statutory duty. *See id.* at 985 (concluding plaintiff could not bring claims against defendant based solely on breach of duties imposed upon defendant by Florida statute where defendant “was not a party to the contract” with plaintiff). Nor does Plaintiff assert a claim of negligence *per se* based on an alleged statutory duty, as in *Sorenson v. Professional Compounding Pharmacists of Western Pennsylvania, Inc.*, 191 So. 3d 929, 934 (Fla. 2d. DCA 2016) (Mot. at 12). Instead, Plaintiff brings his claims based upon an express contract which *incorporates* statutory obligations. Plaintiff does not need an independent statutory cause of action to assert his claims against UF because UF provided Plaintiff with the written agreement— Financial Liability Agreement, the Tuition Statement, and the Fees Schedule—which obligated UF to provide specific services in accordance with Florida law.

Importantly, UF fails to take into account that judicial determination of whether UF is fulfilling the promise that it made to its students to provide certain services in exchange for receiving payment of the fees simply expresses one of the main principles underlying Florida’s sovereign immunity jurisprudence. In *Pan-Am Tobacco Corp.*, 471 So. 2d at 5, the Court’s decision was guided by “basic hornbook law that a contract which is not mutually enforceable is an illusory contract,” explaining that “[w]here one party retains to itself the option of fulfilling or

declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound.” *Id.* (citing *Miami Coca-Cola Bottling Co. v. Orange-Crush Co.*, 291 F. 102 (S.D. Fla. 1923), *aff’d*, 296 F. 693 (5th Cir. 1924)). UF cannot stop students from bringing claims against it for not providing on-campus services for which they paid fees but, at the same time, send students’ accounts to collections for non-payment of these fees. By adjudicating this breach of contract claim, the Court will ensure the mutuality of UF’s express contracts with students.⁷

III. THE VOLUNTARY PAYMENT DOCTRINE DOES NOT BAR PLAINTIFF’S CLAIMS.

According to UF, “Florida’s voluntary payment doctrine provides an additional basis upon which Plaintiff’s claim may be dismissed.” Mot. at 14, n 2. The Court should not even consider this defense because the doctrine “may not be raised on a motion to dismiss, as it entails a fact-based inquiry not suited for resolution on a Rule 12(b)(6) motion.” *Deere Construction, LLC v. Cemex Construction Materials Florida, LLC*, 198 F. Supp. 3d 1332, 1342 (S.D. Fla. 2016). *See also Pacific Mut. Life Ins. Co. of Cal. v. McCaskill*, 126 Fla. 82, 170 So. 579, 583 (1936) (same); *United States v. Cayman Vill. Condo. Ass’n, Inc.*, 12-61797-CIV, 2013 WL 1665846, at *1 (S.D. Fla. Apr. 17, 2013) (same).

Even if the Court considers the voluntary payment doctrine, it should conclude that it does not apply here. The voluntary payment doctrine is an affirmative defense with “narrow application” that allows a defendant who has unlawfully charged money to keep that money if,

⁷ The Court should also not entertain UF’s argument regarding Section 768.39, Florida Statutes (whose former bill was the HB 1261 that UF references in the Motion, at 13). The argument is based solely on wishful thinking. UF has done nothing to show that the Florida Legislature meant to have the statute apply to the fees at issue in this litigation, as opposed to tuition only claims. In any event, the Florida Legislature intended for Section 768.39 to apply *prospectively* (as of July 1, 2021) and thus the statute has no relevance in this case.

and only if, the payment was made (1) voluntarily and (2) with “full knowledge of all the facts” that make the charge unlawful. *Brink v. Raymond James & Assocs., Inc.*, 341 F. Supp. 3d 1314, 1319 (S.D. Fla. 2018). The defense is inapplicable to this case because Plaintiff’s payments do not meet either requirement.

First, “the voluntary payment doctrine requires the party asserting it to show that the person who made the payment had full knowledge of the relevant facts, including allegedly wrongful conduct.” *Carrero v. LVNV Funding, LLC*, No. 11-62439-CIV, 2014 WL 6433214, at *6 (S.D. Fla. Oct. 27, 2014). Where a “plaintiff makes the allegedly excessive payments to a defendant without the knowledge of the factual circumstances rendering them excessive or illegal, the voluntary payment affirmative defense does not apply.” *Brink*, 341 F. Supp. 3d 1314 at 1320. Here, Plaintiff paid the fees in the Spring 2020 semester unaware that months later, a pandemic would lead the school to stop providing all or most services funded by the fees. Compl. ¶¶ 67–79. Plaintiff also did not know—nor could have known—that UF would ultimately refuse to refund the excess amounts. As such, Plaintiff paid the fees without full knowledge of all facts and the doctrine does not apply. *See Maor*, 303 F. Supp. 3d at 1326–27 (refusing to apply the doctrine because when plaintiff paid the fee, “he did not know that the fee w[ould] be mostly retained by [defendant] as profit, instead of being used to cover the costs of toll processing”); *Ruiz v. Brink’s Home Sec., Inc.*, 777 So. 2d 1062, 1064 (Fla. 2d DCA 2001) (rejecting defense because the charges exceeded the agreed-upon purpose of covering defendant’s tax without plaintiffs’ knowledge); *see also In re NationsRent Rental Fee Litig.*, No. 06-CIV-60924-BROWN, 2008 WL 11333813, at *2 (S.D. Fla. Jan. 3, 2008) (rejecting voluntary payment doctrine defense because plaintiffs allegedly were unaware that the “Environmental Charge” that they agreed to pay would not be used for “environmental-related” activities).

Second, the doctrine applies only if the payments are *voluntary*. Plaintiff's payments were not. Payment is involuntary if "the potential consequences of non-payment are sufficiently severe so as to leave little or no choice but to tender payment," *City of Key*, 81 So. 3d at 500. Plaintiff was required to pay the fees (*see, e.g.*, Compl., ¶¶ 13, 26, 28, 30); otherwise, he would have had his registration cancelled, student accounts placed on hold, transcripts withheld, and accounts sent to a collection agency, resulting in "additional collections fee[s]," a "cloud" of impaired credit following them for years. *Disc. Sleep of Ocala, LLC v. City of Ocala*, 300 So. 3d 316, 324 (Fla. 5th DCA 2020). Faced with these consequences, Plaintiff had no choice but to pay the fees. The payments were therefore involuntary. *See Broward Cnty. v. Mattel*, 397 So. 2d 457, 459–60 (Fla. 4th DCA 1981) ("Pay[ing] an illegal tax, even without protest, [] to avoid forfeiture of the right to do business is not a voluntary payment.").

The Court should also conclude that the voluntary payment doctrine defense is precluded by section 725.04, Florida Statutes, which provides that "[w]hen a suit is instituted by a party to a contract to recover a payment made pursuant to the contract and by the terms of the contract there was no enforceable obligation to make the payment or the making of the payment was excused, the defense of voluntary payment may not be interposed by the person receiving payment to defeat recovery of the payment." § 725.04, Fla. Stat. The statute "applies to claims to recover overpayments," such as Plaintiff's, "when the parties dispute payments that allegedly exceeded or did not fall under terms or categories expressed in the parties' contract." *Brink*, 341 F. Supp. 3d at 1322. Plaintiff's contracts with UF do not allow UF to charge fees for services that it does not make available for students. As such, section 725.04 bars use of the doctrine here. *See Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp.*, 581 F. Supp. 2d 1215, 1225 (S.D. Fla. 2008) (concluding statute barred defense where additional amount under defendants' contract

interpretation was not enforceable obligation); *see also Saglio v. Chrysler First Commercial Corp.*, 839 F. Supp. 830, 834–835 (M.D. Fla. 1993) (concluding statute precluded voluntary payment doctrine defense in suit to recover money improperly paid under a guaranty).

UF has the burden of proof and fails to prove that the doctrine applies in this case. Accordingly, its defense must be rejected. *See Southern Wind Aviation, LLC v. Cessna Aircraft Co.*, No. 6:12-CV-1376-ORL22DAB, 2014 WL 12570958, at *12 (M.D. Fla. July 15, 2014) (rejecting defense because defendant failed “to show that Plaintiffs voluntarily paid the sums [] knowing that they were excessive”); *Ruiz*, 777 So. 2d at 1064; *McDermott v. L.A. Fitness Int’l, LLC*, No. 2:11-CV-192-FTM36DNF, 2012 WL 13098143, at *5 (M.D. Fla. Mar. 21, 2012) (same).

IV. A DISMISSAL OR STAY OF THE CLASS ALLEGATIONS IS NEITHER PROPER NOR WARRANTED.

At the very end of its Motion, UF asks the Court for dismissal of the class allegations and/or a stay of the class issues. Mot. at 14–15. Neither request is warranted, much less proper, at this early stage of the case.

Putting aside the legality and propriety of the relief that UF seeks, its request makes little sense given that Plaintiff has not even moved for class certification yet, and the hearing on UF’s Motion is scheduled for September 1, 2021. Therefore, it is almost guaranteed that the Court will rule on the motion to dismiss prior to considering “whether to certify the case as a class action” without UF asking it to do so. Mot. at 15.

In any event, had Plaintiff already filed his motion for class certification, UF’s request is nonetheless improper because Florida Rule of Civil Procedure 1.220, which governs class actions in Florida, makes clear that a court’s decision on certification should be made at the very first opportunity available: “*As soon as practicable* after service of *any pleading* alleging the existence of a class under this rule and before service of an order for pretrial conference or a notice for trial,”

the Court “shall enter an order determining whether the claim or defense is maintainable on behalf of a class on the application of any party or on the court’s initiative.” *See* Fla. R. Civ. P. 1.220(d)(1) (emphasis added). As noted by *Webster v. Royal Caribbean Cruises, Ltd.*, 124 F. Supp. 2d 1317, 1318 (S.D. Fla. 2000), cited by UF, courts have indeed recognized that there are circumstances that *permit* the Court to consider a dispositive motion *prior* to considering class certification. In *Webster*, the Court recognized this concept and began its analysis by noting that there were circumstances in which “ruling on a dispositive motion prior to addressing class certification issues may be appropriate,” such as “where there is sufficient doubt regarding the likelihood of success on the merits of a plaintiff’s claims, where inefficiency would result, or where neither plaintiffs nor members of the putative class would be prejudiced.” *Webster*, 124 F. Supp. 2d at 1321 (citing *Thornton v. Mercantile Stores Co., Inc.*, 13 F.Supp.2d 1282, 1289 (M.D.Ala.1998)). It ultimately decided that because the motion to dismiss was based on improper venue, it was proper to consider the merits of the motion to dismiss prior to ruling on the motion for class certification. *Id.*

Further, the Court should deny UF’s request for dismissal of Plaintiff’s class allegations, as “courts faced with motions to dismiss or strike class allegations prior to class certification have declined to rule on class certification due to the prematurity of such motions.” *Burke v. Credit One Bank, N.A.*, No. 818CV00728EAKTGW, 2019 WL 1468536, at *3 (M.D. Fla. Feb. 5, 2019); *see also Chaney v. Crystal Beach Cap., LLC*, No. 8:10-CV-1056-T-30TGW, 2011 WL 17639, at *2 (M.D. Fla. Jan. 4, 2011) (declining to rule on class certification at the motion to dismiss stage of litigation because “class certification is generally not addressed on a motion to dismiss” and the plaintiffs had not yet moved for class certification). “[UF’s] arguments related to Plaintiff[s] class allegations are better suited to an opposition to a motion for class certification, rather than as a basis for a motion to dismiss.” *Oginski v. Paragon Properties of Costa Rica, LLC*, No. 10-21720-

CIV, 2011 WL 3489541, at *3 (S.D. Fla. Aug. 9, 2011) (rejecting the defendants’ “argument for dismissal based on insufficient class action allegations” because “[d]ismissal at this stage is an *extreme* remedy appropriate only where a defendant demonstrates ‘from the face of [the] complaint that it will be impossible to certify the classes alleged by the plaintiff[] regardless of the facts the plaintiff[] may be able to prove’”) (emphasis added). Once Plaintiff has moved for class certification, UF will have the opportunity to address its arguments in opposition at that time.

Finally, to the extent that UF seeks to stay discovery on class issues, this request should likewise be rejected. In Florida, “[t]he trial court may limit discovery *only* when the movant has made an affirmative showing of good cause.” *Smith v. S. Baptist Hosp. of Fla., Inc.*, 564 So. 2d 1115, 1118 (Fla. 1st DCA 1990) (emphasis added); *see also Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 710 So. 2d 1022, 1025 (Fla. 1st DCA 1998) (same). It is well established that the pendency of UF’s unresolved motion to dismiss “is not sufficient ‘good cause shown’ within the purview of Rule 1.280(c) to justify postponing discovery.” *Deltona Corp. v. Bailey*, 336 So. 2d 1163, 1169 (Fla. 1976); *see also Orlando Sports Stadium, Inc. v. Sentinel Star Co.*, 316 So. 2d 607, 611 (Fla. 4th DCA 1975) (finding no good cause for stay of discovery due to pending motion to dismiss). In fact, motions to stay discovery are “not favored” because “when discovery is delayed or prolonged it can create case management problems which impede the Court’s responsibility to expedite discovery and cause unnecessary litigation expenses and problems.” *Feldman v. Flood*, 176 F.R.D. 651, 652 (M.D. Fla. 1997). Because UF fails to mention any burden or prejudice in support of its request for a stay, it has wholly failed to meet the required showing justifying the stay. UF also cites to no authority to support its request, other than *Hollywood, Inc. v. Broward Cnty.*, 90 So. 2d 47, 47 (Fla. 1956) (Mot. at 14). But the *Deltona* Court reversed the trial court’s order prohibiting discovery based on *Hollywood*, specifically stating that it deemed *Hollywood*

“inconclusive.” *Deltona Corp.*, 336 So. 2d at 1169.⁸ The default in Florida is to allow discovery and UF has not made a showing to justify depriving Plaintiff of the discovery mechanism.

CONCLUSION

Based on the foregoing arguments and authorities, Plaintiff respectfully requests that the Court deny the Motion to Dismiss.⁹

Dated: August 24, 2021

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⁸ It should be noted that UF has also already moved for a stay of discovery in this case. *See* Motion to Stay Discovery and for a Protective Order Pending Adjudication of Dispositive Motion, filed on June 23, 2021 [Filing No. 129306949].

⁹ Should the Court decide to grant UF’s Motion, it should give Plaintiff leave to amend his Complaint, in accordance with Florida law. *See* Fla. R. Civ. P. 1.190 (“Leave of court [to amend a pleading] shall be given freely when justice so requires”). Indeed, “all doubts should be resolved in favor of allowing an amendment, and the refusal to do so generally constitutes an abuse of discretion unless it clearly appears that allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.” *Quality Roof Servs., Inc. v. Intervest Nat’l Bank*, 21 So. 3d 883, 885 (Fla. DCA 2009) (quoting *Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003; *Cason v. Fla. Parole Comm’n*, 819 So. 2d 1012, 1013 (Fla. 1st DCA 2002) (internal quotation marks omitted); *see also Yun Enters., Ltd. v. Graziani*, 840 So. 2d 420, 422 (Fla. 5th DCA 2003) (reversing as abuse of discretion refusal to allow amendment of breach of contract claim)).

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Counsel for Plaintiff and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2021, a true and correct copy of the foregoing was e-filed via the Court's e-Filing portal which will notify all counsel of record.

By: /s/ Adam Moskowitz

Exhibit A

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, IN
AND FOR MIAMI-DADE COUNTY,
FLORIDA

CASE NO. 2020-17924-CA-44

FERNANDO VERDINI, an individual on
behalf of others similarly situated

Judge William Thomas

Plaintiff,

v.

DISTRICT BOARD OF TRUSTEES OF
MIAMI-DADE COLLEGE

Defendant.

**ORDER ON DEFENDANT, DISTRICT BOARD OF TRUSTEES OF MIAMI-DADE
COLLEGE'S, MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

THIS CAUSE came before the Court on Defendant, District Board of Trustees of Miami-Dade College's ("MDC"), motion to dismiss Plaintiff's complaint. The Court having reviewed the motion, heard argument of counsel, and otherwise being fully advised in the premises, the Court makes the following findings:

A motion to dismiss tests only the legal sufficiency of a complaint and is not intended to determine issues of ultimate fact. "[T]he trial court is necessarily confined to the well-pled facts alleged in the four corners of the complaint." *Lewis v. Barnett Bank of S. Florida, N.A.* 604 So. 2d 937 (Fla. 3d DCA 1992). The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022 (Fla. 4th DCA 1996). The court must draw all reasonable inferences in favor of

the nonmoving party. *Id.* Thus, the question for this court to decide is whether, assuming the well-pleaded factual allegations in the Complaint are true, Plaintiffs would be entitled to the relief requested.

Plaintiff alleges that MDC breached an express, written agreement with him concerning fees that he was required to pay in exchange for registering for courses at MDC. Plaintiff attaches invoices providing the fees he was charged for the Summer 2020 semester—invoices which list the specific purpose of each and every fee—and an invoice demonstrating he was charged similar fees in the Spring 2020 semester. The Plaintiff alleges that these documents constitute an express, written agreement between Plaintiff and MDC to provide specific services authorized by the Florida statutes in exchange for the payment of fees. MDC argues that Plaintiff does not identify the on-campus services or the express written terms that MDC breached by not providing those services. It is the finding of the Court that Plaintiff's invoices, as attached to the complaint, sufficiently contain the express written terms and provide the specific services MDC was contractually obligated to provide in exchange for Plaintiff's payment of "fees" to survive a motion to dismiss. *See Waite Development, Inc. v. City of Milton*, 866 So. 3d 153, 155 (Fla. 1st DCA 2004) (reversing order dismissing claim against City based on sovereign immunity defense finding that "[s]everal writings may constitute a valid and binding written contract when they evidence a complete meeting of the minds of the parties and an agreement upon the terms and conditions of the contract.")

MDC argues sovereign immunity bars Plaintiff's claims. "Sovereign immunity is the 'privilege of the sovereign not to be sued without its consent.'" *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 446 (Fla. 4th DCA 2015) (citation omitted). "Sovereign immunity is a doctrine designed to protect the public treasury from what would otherwise be countless claims filed by the

vast number of citizens affected by actions of a government.” *S. Roadbuilders, Inc. v. Lee Cty.*, 495 So. 2d 189, 190 n.1 (Fla. 2d DCA 1986). “[A] [sovereign] waives the protections of sovereign immunity only when it enters into an express contract.” *Israel*, 178 So. 3d at 447. Immunity remains, however, where the claims do not arise from breaches of expressed, written contracts. *See S. Roadbuilders, Inc. v. Lee Cnty.*, 495 So. 2d at 190- 91. In addition, under Florida law, where there is an express written contract, “the defense of sovereign immunity does not protect the state agency from an action arising out of a breach of either an express or implied covenant or condition of that contract.” *Champagne-Webber, Inv. v. City of Fort Lauderdale*, 519 So. 2d 696, 698 (Fla. 4th DCA 1988). Therefore, it is

ORDERED AND ADJUDGED that Plaintiff has sufficiently stated a cause of action for breach of an express contract. Therefore, at the motion to dismiss stage, sovereign immunity is no bar to Plaintiff’s well pled breach of contract claim and MDC’s motion to dismiss is **DENIED**. However, as to the Plaintiff’s unjust enrichment claim, the motion to dismiss is **GRANTED** with prejudice as Florida law does not permit a waiver of sovereign immunity based on implied contracts. MDC has 20 days from the date of this order to file an answer.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 02/01/21.



WILLIAM THOMAS
CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or

hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

Exhibit B

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION**

Valeriemarie Moore
Plaintiff

Case No: 21-CA-002445

vs

Division: L

The University of South Florida Board of Trustees
Defendant

ORDER ON MOTION TO DISMISS

THIS MATTER came before the Court for hearing via Zoom video-conference on July 22, 2021 at 9:30 a.m. (the "Hearing") on Defendant's Motion to Dismiss (Dkt. No. 14) filed on April 28, 2021 (the "Motion"). Appearing at the Hearing were Howard M. Bushman, Esq. for Plaintiff and Richard C. McCrea, Esq. for Defendant. The Court reviewed the Motion, the Complaint filed on March 19, 2021 (Dkt. No. 3) (the "Complaint"), Plaintiff's Memorandum in Opposition (Dkt. No. 15), applicable legal authority, and considered the argument of Counsel at the Hearing. Accordingly, for the reasons stated orally at the Hearing, it is ORDERED that

1. The Motion is GRANTED, in part, and DENIED, in part, as specifically set forth herein.
2. The Motion is GRANTED as to Count I of the Complaint for Breach of Contract only to the extent Plaintiff shall amend her complaint on or before July 29, 2021 to include the Registration Agreement filed with the Court on July 16, 2021 (Dkt. No. 27) as an additional exhibit. With respect to the other relief requested in the Motion as to Count I, the Motion is DENIED.
3. With respect to the relief requested in the Motion as to Count II for Unjust Enrichment, the Motion is GRANTED, and Count II is DISMISSED, without prejudice.

Done and Ordered in Hillsborough County, Florida this 29th day of July, 2021.

ELECTRONICALLY CONFORMED 7/29/2021

Darren D. Farfante, Judge

Copies Furnished To:

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Defendant

The University of South Florida Board of Trustees
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**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**ANTHONY ROJAS, on behalf of himself
and all other similarly situated,**

Plaintiff,

v.

Case No.: 2021 CA 1124

**THE UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant.

_____ /

**UNIVERSITY OF FLORIDA BOARD OF TRUSTEES'
NOTICE OF FILING SUPPLEMENTAL AUTHORITY**

Defendant, **UNIVERSITY OF FLORIDA BOARD OF TRUSTEES**, by and through its undersigned counsel, hereby files the following attached Report and Recommendation and Order adopting the Report and Recommendation issued by the United States District Court, Middle District of Florida in the case styled: *J. Lafleur, et al. v. State University System of Florida, et al.*, M.D. Fla. Case No.: 8:20-cv-1665-KKM-AAS (Doc. 74 and Doc. 77) (Attached as **Exhibit 1** and **Exhibit 2**).

Dated this 31st day of August, 2021.

/s/ Robert J. Sniffen

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Trustees*

CERTIFICATE OF SERVICE

The undersigned certifies that on this 31st day of August, 2021, a true and correct copy of the foregoing was electronically filed in the Florida E-Courts Filing Portal to all counsel of record.

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

J. LAFLEUR, et al.,

Plaintiffs,

v.

Case No.: 8:20-cv-1665-KKM-AAS

**STATE UNIVERSITY SYSTEM OF
FLORIDA, et al.,**

Defendants.

_____ /

REPORT AND RECOMMENDATION

Defendants move to dismiss the plaintiffs' first amended complaint and to strike the plaintiffs' claim for punitive and treble damages. (Docs. 20, 36). Plaintiffs oppose the defendants' motion. (Docs. 31, 41). The undersigned **RECOMMENDS** that the defendants' motion (Doc. 20) be **GRANTED**.

I. BACKGROUND

This putative class action brings claims by students who attend universities in the State of Florida and request a return of a portion of tuition and fees because the universities moved classes to online learning in response to the Novel Coronavirus Disease 2019 (COVID-19). (Doc. 15). Plaintiffs Jarrett LaFleur, Amber Grey, Lindsey Relue, Joshua Harkness, Stacey Lee

Field, Nick Capps, and Alyssa Coates are students enrolled at universities within the State University System of Florida. (*Id.*). The plaintiffs allege they did not receive the in-person benefits and services they contracted and paid for when Florida universities transitioned to remote online learning in Spring 2020 and canceled events, clubs, and organizations. (*Id.*).

In their five-count amended complaint, Plaintiff LaFleur and the other six named plaintiffs sue Defendants State University System of Florida (State University System) and Timothy M. Cerio, Richard Corcoran, Aubrey Edge, Patricia Frost, H. Wayne Huizenga, Jr., Darlene Luccio Jordan, Sydney Kitson, Charles H. Lydecker, Brian Lamb, Alan Levine, Ally Schneider, Steven M. Scott, Eric Silagy, William Self, Kent Sermon, and Norman D. Tripp in their capacity as members of the Board of Governors (the Board of Governors) (collectively, the defendants),¹ alleging state and federal claims. (*Id.*).

Specifically, the plaintiffs' amended complaint asserts claims against the defendants for breach of contract (Count I), violations of the Takings Clause and due process under 42 U.S.C. § 1983 (Counts II and III), conversion (Count IV), and unjust enrichment (Count V). (*Id.*). The defendants move to dismiss

¹ The complaint names each individual member of the Board of Governors "in their capacity as members of the Board of Governors." (Doc. 15, p. 1). Thus, this lawsuit is brought against the Board of Governors, not the officials. See *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1981).

the plaintiffs’ amended complaint and move to strike the plaintiffs’ claim for punitive and treble damages. (Doc. 20). The plaintiffs responded in opposition to the defendants’ motion. (Doc. 31). The defendants replied in opposition to the plaintiffs’ response. (Doc. 36). The plaintiffs sur-replied. (Doc. 41). Both parties filed supplemental authority supporting their respective positions. (*See* Docs. 23, 33, 48, 50, 52, 71, 73).

II. LEGAL STANDARD

This court has diversity jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d), and federal question jurisdiction under 28 U.S.C. § 1331 and § 1343(a)(3). Substantive issues for state law claims, including sovereign immunity, are governed by Florida law. *See Fluid Dynamics, LLC v. City of Jacksonville*, 752 F. App’x 924, 925–26 n.1 (11th Cir. 2018).

“The Eleventh Amendment restricts the judicial power under Article III.” *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72–73 (1996). Asserting Eleventh Amendment immunity tests subject matter jurisdiction. *Seaborn v. State of Fla., Dep’t of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998). Federal Rule of Civil Procedure 12(b)(1) governs motions to dismiss for lack of subject matter. *Meyer v. Fay Servicing, LLC*, 385 F. Supp. 3d 1235, 1238 (M.D. Fla. 2019). These challenges take two forms—facial and factual. *Id.* at 1239. On

facial attacks, like this one, “the Court takes the allegations in the complaint as true.” *Id.*

Motions to dismiss for failure to state a claim follow the Federal Rule of Civil Procedure 12(b)(6) standard. A complaint must recite “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A facially plausible claim allows a “court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

III. ANALYSIS

The defendants argue the plaintiffs’ amended complaint should be dismissed because: (1) the State University System is not a legal entity with the capacity to be sued (Doc. 20, pp. 3–6; Doc. 36, pp. 1–2); (2) sovereign immunity bars the plaintiffs’ state law claims (Doc. 20, pp. 6–11; Doc. 36, pp. 2–3); (3) the defendants do not qualify as a “person” under Section 1983 and plaintiffs’ constitutional claims are barred (Doc. 20, pp. 11–12); and (4) the plaintiffs’ state law claims fail to state a claim for which relief can be granted

(*Id.* at pp. 13–17). The defendants also argue the plaintiffs’ claim for punitive and treble damages should be stricken and the plaintiffs’ class claims should be dismissed. (Doc. 20, pp. 17–20; Doc. 36, pp. 3–4).

The plaintiffs respond that: (1) the State University System is a legal entity created by the Florida Constitution (Doc. 31, p. 4); (2) the defendants waived sovereign immunity (*Id.* at pp. 5–11); (3) the constitutional claims should not be dismissed (Doc. 31, p. 11; Doc. 41); and (4) the amended complaint adequately states a claim for breach of contract, unjust enrichment, and conversion (Doc. 31, pp. 12–18; Doc. 41). The plaintiffs also argue punitive and treble damages are available, and any dismissal should be without prejudice. (Doc. 31, pp. 18–20).

A. State University System’s Capacity to be Sued

The capacity of an entity to be sued is governed by the law of the state where the district court is located. Fed. R. Civ. P. 17(b); *United States v. Olavarrieta*, 812 F.2d 640 (11th Cir. 1987). Under Florida law, only legal entities, personal or corporate, can be sued. *Florida Med. Assoc., Inc. v. Spires*, 153 So.2d 756 (Fla 1st DCA 1963). The Florida Constitution empowers the Florida Legislature to authorize suits against the state or any of its agencies. *See Daniels v. State Rd. Dep’t.*, 170 So.2d 846, 849 (Fla. 1964) (“[m]any state

agencies, although purely public bodies, are or have been in the past designated as a 'body corporate' by statute and given many of the attributes of a private corporation, such as the right to sue and be sued").

The State University System, including the board of governors and boards of trustees, was created by Article IX, Section 7 of the Florida Constitution. Section 7 of Article IX provides, in part:

(b) State University System. There shall be a single state university system comprised of all public universities. A board of trustees shall administer each public university and a board of governors shall govern the state university system.

(c) Local Boards of Trustees. Each local constituent university shall be administered by a board of trustees consisting of thirteen members dedicated to the purposes of the state university system. The board of governors shall establish the powers and duties of the board of trustees. Each board of trustees shall consist of six citizen members appointed by the governor and five citizen members appointed by the board of governors. The appointed members shall be confirmed by the senate and serve staggered terms of five years as provided by law. The chair of the faculty senate, or the equivalent, and the president of the student body of the university shall also be members.

(d) Statewide Board of Governors. The board of governors shall be a body corporate consisting of seventeen members. The board shall operate, regulate, control, and be fully responsible for the management of the whole university system. These responsibilities shall include, but not be limited to, defining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the wellplanned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs.

The board's management shall be subject to the powers of the legislature to appropriate for the expenditure of funds, and the board shall account for such expenditures as provided by law. The governor shall appoint to the board fourteen citizens dedicated to the purposes of the state university system. The appointed members shall be confirmed by the senate and serve staggered terms of seven years as provided by law. The commissioner of education, the chair of the advisory council of faculty senates, or the equivalent, shall also be members of the board.

Art. IX, § 7(b)-(d), Fla. Const. The board of governors is the responsible constitutional body for establishing system-wide policies and the boards of trustees are responsible for implementing these policies in their respective institutions. *See id.*; § 1001.70, Fla. Stat.

Under Section 1001.72(1), Florida Statutes, each state university's board of trustees "shall be a public body corporate . . . with all of the powers of a body corporate, including the powers to . . . sue and be sued, to plead and be impleaded in all courts of law of equity . . ." Similarly, the board of governors is a body corporate under Florida law. *See* Article IX, § 7(d), Fla. Const.; § 1001.70, Fla. Stat.

The plaintiffs provide no statutory provision or otherwise direct where the Florida Legislature provided the State University System with the capacity to be sued.² The Board of Governors—not the State University System—is the

² In *United States v. Olavarrieta*, the Eleventh Circuit affirmed the district court's dismissal of a complaint against the University of Florida and stated: "Under Florida

correct entity to sue. *See* § 1001.72(1), Fla. Stat. Thus, the claims alleged against the State University System should be dismissed. *See U.S. E.E.O.C. v. Fla. Gulf Coast Univ.*, No. 2:06-CV-326-FtM-29SPC, 2007 WL 2077577, at *2 (M.D. Fla. July 16, 2007) (“The Court concludes that The Gulf Coast University Board of Trustees is the proper party, and that The Gulf Coast University should be dismissed.”); *Souto v. Fla. Int’l Univ. Found., Inc.*, No. 19-21935-CIV-LENARD/O’SULLIVAN, 2020 WL 1036537, at *11–12 (S.D. Fla. Mar. 3, 2020) (same).

B. Sovereign Immunity

The Eleventh Amendment protects a nonconsenting state from suit in federal court by its own citizens. *See Hans v. Louisiana*, 134 U.S. 1, 10, 20–21 (1890). Likewise, “Eleventh Amendment immunity bars suits brought in federal court when...an ‘arm of the State’ is sued.” *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)).

“In Florida, sovereign immunity is the rule, rather than the exception.”

law, the University of Florida is not endowed with an independent corporate existence or the capacity to be sued in its own name. Rather, those characteristics are bestowed on the Board of Regents as the head of Florida’s university system . . . Therefore, the University of Florida is not a proper party in this action, and the district court was correct in dismissing the third-party complaint asserted against it.” 812 F.2d 640, 643 (11th Cir. 1987).

Pan-Am Tobacco Corp. v. Dep’t of Corr., 41 So. 2d 4, 5 (Fla. 1984). Sovereign immunity extends to the state itself and arms of the state. *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003). The Board of Governors is defined as “part of the executive branch of state government,” § 1001.71(3), Fla. Stat.; § 1000.21(6), Fla. Stat., and so it is an arm of the state. *See Univ. of S. Fla. Bd. of Trustees v. CoMentis, Inc.*, 861 F.3d 1234, 1235 (11th Cir. 2017) (“The USF Board is an arm of Florida because the State of Florida defines the USF Board to be a part of its government, exercises great control over it, funds it, and pays judgments entered against it.”).³

State sovereign immunity does not apply when a state waives its immunity for certain types of claims. *See Camm v. Scott*, 834 F. Supp. 2d 1342, 1347 (M.D. Fla. 2011) (describing the exceptions to sovereign immunity). The plaintiffs argue the Board of Governors waived sovereign immunity for the plaintiffs’ state law claims of breach of contract, unjust enrichment, and conversion. (Doc. 31, pp. 5–11).

1. Breach of Contract

“The test to determine if a state has waived its sovereign immunity ‘is a

³ It is a well-settled proposition that Florida’s universities and their boards are arms of the state and are therefore just as entitled to Eleventh Amendment and other sovereign-immunity protection as the state itself. *See, e.g., Souto*, 446 F. Supp. 3d at 990 (collecting cases).

stringent one.” *Barnes v. Zaccari*, 669 F.3d 1295, 1308 (11th Cir. 2012) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)). “A waiver of Eleventh Amendment immunity must specifically permit suits in federal court.” *Id.* “A State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation.” *Fla. Prepaid*, 527 U.S. at 676. “[A]bsent an express waiver by the state, the Eleventh Amendment bars state law claims against a state in federal court.” *Maynard v. Bd. of Regents of Div. of Univ. of Fla. Dep’t of Educ.*, 342 F.3d 1281, 1287 (11th Cir. 2003). “For these reasons, a waiver of sovereign immunity ‘will be strictly construed, in terms of its scope, in favor of the sovereign.’” *Sossamon v. Texas*, 563 U.S. 277, 285 (2011).

The Board of Governors “enjoys Florida sovereign immunity from contractual liability unless the action is based on an ‘express, written contract [] into which the state agency has statutory authority to enter.’” *Williams v. Becker*, 608 F. App’x 905, 906 (11th Cir. 2015) (quoting *Pan–Am Tobacco Corp.*, 471 So. 2d at 6); see also *Charity v. Bd. of Regents of the Div. of Univ. of Fla. Dept. of Ed.*, 698 So. 2d 907, 908 (Fla. 1st DCA 1997) (holding that the board has sovereign immunity and affirming dismissal due to lack of express written contract). “Unless the language of the contract expressly provides for a waiver

of the state's immunity from being haled into federal court, the Eleventh Amendment bars suit.” *Wells v. Bd. of Trustees of Fla. Gulf Coast Univ.*, No. 2:19-CV-859-JLB-NPM, 2021 WL 883333, at *3 (M.D. Fla. Feb. 8, 2021) (citation omitted).

The plaintiffs' breach of contract claim alleges:

By accepting payment, Defendants entered into contractual arrangements with Plaintiffs and Class Members to provide educational services, experiences, opportunities, and related services for the Spring Semester 2020 and Summer Semester 2020.

(Doc. 15, ¶ 54). These allegations do not establish the “express, written, contract” required to overcome the Board of Governors' sovereign immunity. The plaintiffs neither provide contract language nor append a contract to the complaint to serve as a “clear declaration” of the state's intent to submit to federal jurisdiction. *See Parfitt v. Fla. Gulf Coast Univ.*, No. 2:19-CV-727-FTM-38NPM, 2020 WL 1873585, *4 (M.D. Fla. Apr. 15, 2020).

The plaintiffs' breach of contract claim against the defendants should be dismissed based on sovereign immunity.⁴

⁴ The court notes that several federal courts in Florida – applying Florida law – have denied similar motions to dismiss breach of contract claims brought against *private* colleges and universities following COVID-19 transitions to remote learning. *See, e.g., Rosado v. Barry Univ. Inc.*, 499 F. Supp. 3d 1152 (S.D. Fla. 2020); *Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335 (S.D. Fla. 2020); *Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211 (M.D. Fla. 2020); *Rhodes v. Embry-Riddle Aeronautical Univ., Inc.*, No.

2. Unjust Enrichment

The plaintiffs argue their unjust enrichment claim falls within the court's jurisdiction to the same extent as their breach of contract claim does. (*See* Doc. 15, pp. 22–24). As stated above, however, sovereign immunity bars the plaintiffs breach of contract claim.

A claim for unjust enrichment sounds in equity and is based on an implied contract. *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 805 (11th Cir. 1999). With no waiver of immunity for claims in equity, the state continues “to enjoy sovereign immunity from quasi-contractual claims such as unjust enrichment” even in its own courts. *Veolia Water N. Am. - S., LLC v. City of Everglades City*, No. 2:18-CV-785-FTM-99UAM, 2019 WL 1921900, *4 (M.D. Fla. Apr. 30, 2019); *see also Calderone v. Scott*, No. 2:14-CV-519-FTM-29CM, 2015 WL 1800315, at *2 (M.D. Fla. Apr. 16, 2015) (dismissing unjust enrichment claim with prejudice); *Llorca v. Rambosk*, No. 2:15-CV-17, 2015 WL 2095805, at *2 (M.D. Fla. May 5, 2015) (rejecting the plaintiff's claims of oral contract provisions and dismissing unjust enrichment claim with prejudice); *Fin. Healthcare Assocs., Inc. v. Public Health Trust of Miami-Dade* 6:20-CV-927-ORL-40EJK, 2021 WL 140708 (M.D. Fla. Jan. 14, 2021). However, because those cases involved private universities, they do not have the same protections as Florida's public universities and their governing boards.

County, 488 F. Supp. 2d 1231, 1236 (S.D. Fla. 2007) (holding claim based on implied contract barred by sovereign immunity).

Thus, like the beach if contract claim, the plaintiffs' unjust enrichment claim should be dismissed based on sovereign immunity.

3. Conversion

Conversion is not just "the possession of property by the wrongdoer, but rather such possession in conjunction with a present intent on the part of the wrongdoer to deprive the person entitled possession of the property." *Brand v. Old Republic Nat'l Title Ins. Co.*, 797 So.2d 643, 646 (Fla. 3d DCA 2991).

While Section 768.28, Florida Statutes, waives, with certain limitations, Florida's sovereign immunity from tort actions brought in its own courts, this does waive its Eleventh Amendment immunity. *See Schopler v. Bliss*, 903 F.2d 1373, 1379 (11th Cir. 1990). Section 768.28(18), Florida Statutes, states:

No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court.

There is no such waiver here.

* * * *

The court's subject matter jurisdiction does not extend to the plaintiffs' state law claims. Thus, the plaintiffs' state law claims (counts I, IV, and V) should be dismissed.

C. Federal and State Constitutional Claims

Counts II and III of the amended complaint assert a Takings claim under 42 U.S.C. § 1983 and a procedural due process claim under 42 U.S.C. § 1983 and the Florida Constitution. (Doc. 15, pp. 18–21).

1. Sovereign Immunity and § 1983 Claims

Under the Florida Constitution, “provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.” § 13, Art. X, Fla. Const. Section 768.28, Florida Statutes, provides a limited waiver of sovereign immunity for certain common law tort claims against the state.

Under Section 768.28, Florida Statutes, “the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.” In *Hill v. Dept. of Corr.*, 513 So. 2d 129, 133 (Fla. 1987), the court held that Section 768.28, Florida Statutes, was intended to render the state and its agencies liable for damages for traditional torts under state law, but to exclude liability for “constitutional

torts.” *Id.* The United States Supreme Court overruled *Hill*’s prohibition against bringing § 1983 claims in Florida courts, but did not disturb *Hill*’s statement that the waiver of sovereign immunity under § 768.28, Fla. Stat., did not extend to “constitutional torts.” *See Garcia v. Reyes*, 697 So. 2d 549, 550 (Fla. 4th DCA).

In *Bd. of Regents of State of Fla. v. Snyder*, 826 So. 2d 382 (Fla. 2nd DCA 2002), the court held the Board of Regents was entitled to sovereign immunity for civil rights action brought under § 1983 and stated:

It is well established in both federal and state courts that a state and its agencies are immune from suit arising under 42 U.S.C. § 1983 (citations omitted). Although this state has waived its sovereign immunity for state tort actions, that waiver does not extend to civil rights actions. *See* 768.28, Fla. Stat. (200); *Spooner*, 514 So.2d at 1078; *Hill*, 513 So.2d at 132. Federal law is enforceable in state courts, but only municipal corporations, local government entities, individual officers and other actors who are not arms of the state may be liable under 42 U.S.C. § 1983. *See Howlett v. Rose*, 496 U.S. 356, 376–77 (1990). *Id.* at 387.

Because sovereign immunity was not abrogated by § 768.28, Fla. Stat., for constitutional torts, the plaintiffs’ § 1983 claims should be dismissed.

2. Eleventh Amendment and § 1983 Claims

Section 1983 authorizes assertion of a claim for relief against a “person” who has acted under color of state law. The Board of Governors is a state entity and not a “person” under § 1983. *Will v. Michigan Dep’t of State Police*, 491

U.S. 58, 70 (1989) (“[S]tate and governmental entities that are considered ‘arms of the state’ are not ‘persons’ subject to liability for purposes of 42 U.S.C § 1983 action.”). Nor has Congress abrogated Eleventh Amendment immunity for § 1983 actions. *Williams v. Bd. of Regents of the Univ. System of Georgia*, 477 F.3d 1282, 1301 (11th Cir. 2007); *see also Bell v. Florida*, No. 6:17-CV-326, 2017 WL 1399975, at *4 (M.D. Fla. Mar. 13, 2017) (hold the plaintiff’s § 1983 claims against the State of Florida are barred by Eleventh Amendment immunity).

Based on Eleventh Amendment immunity, the plaintiffs’ § 1983 claims should be dismissed.

3. Constitutional Takings Claim Under § 1983

Besides the immunity doctrines above, the plaintiffs’ takings claim under § 1983 is not viable because the plaintiffs’ voluntary tuition and fee payments do not qualify as a “taking.”

“The first inquiry for section 1983 is whether the defendant deprived the plaintiff of a constitutionally protected property right.” *Key W. Harbor Dev. v. City of Key W.*, 987 F.2d 723, 727 (11th Cir. 1993). In *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564 (1972), the Supreme Court held:

In order for an individual to have a protected property interest, a person clearly must have more than an abstract need or desire for

it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . that support claims of entitlement to those benefits. *Id.* at 577.

“Whether Florida law has created a property interest is a legal question for the Court to decide.” *City of Key West*, 987 F.2d at 727. If a property interest asserted in a takings claim is created by state statutory law, the right must be gleaned from the statute itself. *Checker Cab v. Miami-Dade*, 899 F.3d 908, 917 (11th Cir. 2018).

The plaintiffs pleaded no Florida statutory basis for their claimed property interest in tuition and fees voluntarily paid. The payment of fees is required by statute. *See* § 1009.24(2), Fla. Stat. (“All students shall be charged fees except students who are exempt from fees or students whose fees are waived.”). Nothing in the Florida statutes create a present possessory interest in any funds paid as tuition or fees, nor do students have an individually identified interests in such fees.

To “take” property under the Fifth Amendment means to deprive an owner of his own property against his will. The plaintiffs do not cite, nor can the court find, any case that holds a voluntary tuition and fee payment to a

public university constitutes a “taking.” For these reasons, the plaintiffs’ constitutional takings claim (count II) should be dismissed.

D. Failure to State a Claim for Relief⁵

The defendants argue the plaintiffs’ state law claims (counts I, IV, and V) fail to state a claim upon which relief can be granted. (Doc. 20, pp. 13–17).

1. Breach of Contract

“For a breach of contract claim, Florida law requires the plaintiff to plead and establish: (1) the existence of a contract; (2) a material breach of that contract; and (3) damages resulting from the breach.” *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009).

The plaintiffs’ amended complaint does not identify a specific contractual provision that establishes an obligation to provide in-person educational service. However, throughout the amended complaint, the plaintiffs point to publications in which some type of online learning is provided by the same universities for reduced pricing. These allegations are sufficient at this early stage, especially considering that Florida law recognizes that a college/student contract can be implied by university publications. That said, this implication

⁵ As stated above, the court finds that the plaintiffs’ state law claims should be dismissed based on sovereign immunity. However, because this is a Report and Recommendation, the court also will address the defendants’ additional arguments.

involves cases against *private* universities. *See Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211, 1217 (M.D. Fla. 2020) (“[U]nder Florida law, a student and a *private* university have a contractual relationship.”) (emphasis added); *Sharick v. Southeastern Univ. of Health Sciences, Inc.*, 780 So. 2d 136, 138–39 (Fla. 3d DCA 2000) (holding that the terms of that contractual relationship may include the publications of the private university).

Although the plaintiffs’ breach of contract claim should be dismissed based on sovereign immunity, the claim otherwise is adequately pleaded to survive the alternative argument that the plaintiffs failed to state a claim for breach of contract.

2. Unjust Enrichment

Under Florida law, unjust enrichment claims require that: (1) the plaintiff conferred a benefit on the defendant; (2) the defendant knows of the benefit and voluntarily accepts and retains it; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit. *See Duty Free World v. Miami Perfume Junction, Inc.*, 253 So. 3d 689, 693 (Fla. 3d DCA 2018).

“It is well settled in Florida that . . . a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning

the same subject matter.” *Wiand v. Wells Fargo Bank, N.A.*, 86 F. Supp. 3d 1316, 1332 (M.D. Fla. 2015). Here, the defendants deny a contract existed for on-campus education and related services. When parties dispute an underlying contract, dismissal of an unjust enrichment claim is premature. *See Salerno*, 488 F. Supp. 3d at 1218. The plaintiffs may also allege alternative claims. *Id.* (collecting cases).

Although the plaintiffs’ unjust enrichment claim should be dismissed based on sovereign immunity, the claim otherwise is adequately pleaded to survive the alternative argument that the plaintiffs failed to state a claim for unjust enrichment.

3. Conversion

“Under Florida law, conversion is an intentional tort consisting of an unauthorized act which deprives another of his property, permanently or for an indefinite time.” *Furmanite America, Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1134, 1143 (M.D. Fla. 2007). “[T]he elements of conversion are (1) an act of dominion wrongfully asserted; (2) over another's property; and (3) inconsistent with his ownership therein.” *Joe Hand Promotions, Inc. v. Creative Entertainment, LLC*, 978 F. Supp. 2d 1236, 1241 (M.D. Fla. 2013).

The property, in-person learning, is insufficiently tangible to be the

subject of a conversion claim. An obligation to pay money, is also insufficiently tangible to qualify as “property.” *Salerno*, 488 F. Supp. 3d at 1218 (“[I]n-person learning[] is intangible and not the proper subject of a conversion claim” and “an obligation to pay money, like [plaintiff’s] claim for tuition reimbursement, is also insufficiently tangible to qualify as ‘property.’”). Accordingly, the conversion claim should be dismissed. *See id.* at 1219 (dismissing a similar conversation claim with prejudice).

E. Damages

The plaintiffs request an award of punitive and treble damages. (Doc. 15, p. 24). These damages are not legally cognizable on the plaintiffs’ state law claims. *See, e.g., CCCS Int’l v. Fontainebleau Resorts, LLC*, No. 09-CIV-21881-UNGARO, 2009 WL 10667775, at *4 (S.D. Fla. Sept. 18, 2009) (“As with actions for breach of express contracts, punitive damages are unavailable in an action for unjust enrichment or quantum meruit.”); § 768.28(5), Fla. Stat. (“The state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances, but liability shall not include punitive damages . . .”). Similarly, plaintiffs cannot recover punitive damages on their constitutional claims. *See Bradsheer v. Florida Dep’t of Highway Safety and Motor Vehicles*, 20 So.3d 915,

920 (Fla. 1st DCA 2009).

F. Dismissal with Prejudice

A second amended complaint would not cure the deficiencies here, which present legal barriers that cannot be cured by amendment. *See Rance v. Winn*, 287 F. App'x. 840, 841 (11th Cir. 2008) (affirming dismissal of original complaint with prejudice because “district courts need not permit amendment where it would be futile to do so). Dismissal of the plaintiffs’ claims requires dismissal of the entire complaint. *Murray v. U.S. Bank Trust*, 365 F.3d 1284, 1293 (11th Cir. 2004) (“Thus, just as plaintiff cannot pursue an individual claim unless he proves standing, a plaintiff cannot represent a class unless he has standing to raise the claims of the class he seeks to represent.”).

Because the plaintiffs stated no viable claims against the defendants,⁶ the court should dismiss the action before proceeding to class certification and no notice of this involuntary dismissal need be given to putative class members.

IV. CONCLUSION

The State University System is not a legal entity with the capacity to be sued. The plaintiffs’ state law claims are barred by sovereign immunity and

⁶ Although the plaintiffs adequately pleaded its claims for breach of contract and unjust enrichment, the claims are barred by sovereign immunity.

the plaintiffs' constitutional claims fail as a matter of law.

For these reasons, it is **RECOMMENDED** that the defendants' motion to dismiss the plaintiffs' first amended complaint and to strike the plaintiffs' claim for punitive and treble damages (Doc. 20) be **GRANTED**.

ENTERED in Tampa, Florida on August 2, 2021.



AMANDA ARNOLD SANSONE
United States Magistrate Judge

NOTICE TO PARTIES

The parties have fourteen days from the date they are served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. § 636(b)(1); 11th Cir. R. 3-1. A party's failure to object timely in accordance with 28 U.S.C. § 636(b)(1) waives that party's right to challenge on appeal the district court's order adopting this report's unobjected-to factual findings and legal conclusions. 11th Cir. R. 3-1.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

J. LAFLEUR et al.,

Plaintiffs,

v.

Case No. 8:20-cv-1665-KKM-AAS

STATE UNIVERSITY SYSTEM OF
FLORIDA, et al.,

Defendants.

ORDER

Defendants move to dismiss Plaintiffs' First Amended Complaint and strike Plaintiffs' claim for punitive and treble damages. (Doc. 20.) The Magistrate Judge issued a report recommending that the Court grant Defendants' motion. (Doc. 74.)

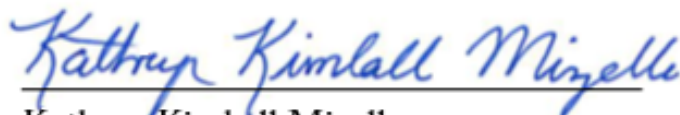
Upon the Plaintiffs' request, the Court extended the fourteen-day deadline to file objections to the Report & Recommendation, yet no timely objections were filed. (Doc. 76.) After a de novo review, the Court concludes that the motion should be granted for the reasons stated in the Magistrate Judge's Report. (Doc. 74.) The Court concludes, though, that because sovereign immunity under the Eleventh Amendment bars Plaintiffs' claims, dismissal without prejudice is appropriate because the Court essentially lacks subject matter jurisdiction. *See Seaborn v. State of Fla., Dep't of Corr.*, 143 F.3d 1405, 1407 (11th Cir.

1998) (“An assertion of Eleventh Amendment immunity essentially challenges a court’s subject matter jurisdiction . . . [and] therefore may be asserted for the first time on appeal.”); *Stalley v Orlando Reg’l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (“A dismissal for lack of subject matter jurisdiction is not a judgment on the merits and is entered without prejudice.”). And “[i]f a court lacks subject matter jurisdiction, it also lacks the power to dismiss the complaint with prejudice as an adjudication on the merits.” *McQueary v. Child Support Enforcement*, 812 F. App’x 911, 914 (11th Cir. 2020) (vacating and remanding for “district court to reenter its judgment as a dismissal without prejudice” because dismissal based on lack of subject matter jurisdiction).

The following is **ORDERED**:

1. Defendants’ Motion to Dismiss and Strike (Doc. 20) is **GRANTED**.
2. This action is **DISMISSED without prejudice**.
3. The clerk is directed to enter judgment as dismissed for lack of subject matter jurisdiction, terminate all pending motions, and **CLOSE** this case.

ENTERED in Tampa, Florida, on August 23, 2021.


Kathryn Kimball Mizelle
United States District Judge

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**ANTOHN ROJAS, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

Case No.: 01-2021-CA-1124

**UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant.

_____ /

NOTICE OF CORRECTION

The undersigned Counsel for Defendant, **UNIVERSITY OF FLORIDA BOARD OF TRUSTEES**, hereby provides notice of the following correction to the Motion to Dismiss or, in the Alternative, Motion for Judgment on the Pleadings filed on June 23, 2021:

1. Page 6 – The following citation and parenthetical should be deleted: Hamke v. Univ. of Central Fla., No.: 10-cv-1828-ORL-19KRS, 2011 WL 881699, at ¶¶ (E)(1)-(4) (M.D. Fla. Feb. 7, 2011) (describing the nature of student and public post-secondary institutions).
2. Page 10 – The blocked quote containing the case and citation to Hamke v. Univ. of Central Fla., No.: 10-cv-1828-ORL-19KRS, 2011 WL 881699, at ¶¶ (E)(1)-(4) (M.D. Fla. Feb. 7, 2011) should be deleted.

Dated this 7th day of September, 2021.

Respectfully submitted,

/s/ Robert J. Sniffen

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*Counsel for the University of Florida Board of
Trustees*

CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of September, 2021, a true and correct copy of the foregoing was electronically filed in the Florida E-Courts Filing Portal to all counsel of record.

/s/ Robert J. Sniffen

ROBERT J. SNIFFEN

HEARING DISPOSITION FORM

DATE/TIME: 9/1/21 2:30pm - 4:30pm

CASE #/STYLE: 2021-CA-1124, Anthony Rojas, on behalf of himself and all other similarly situated v. The University of Florida Board of Trustees

SUBJECT OF HEARING: Motion to Dismiss

Zoom

ATTY FOR PL: *Howard Bushman/Barbara Lewis*
JOHN YANCHUNIS/ADAM MOSKOWITZ
ATTY FOR DEF: ROBERT SNIFFEN

☒ PRESENT ☐ PHONE
☒ PRESENT ☐ PHONE

COURT REPORTER PRESENT ☒ YES ☐ NO

RULING MADE: _____

reserved

FILED
CK 104
2021 OCT 18 AM 10:20
CLERK OF COURT
ALACHUA COUNTY, FL

10/15 - grant/deny, in part

ORDER TO BE PREPARED BY: *Compching - Sept 13*

OTHER COMMENTS: _____

J disclosed: attended UF x2

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**ANTHONY ROJAS, on behalf of himself
and all other similarly situated,**

Plaintiff,

v.

Case No.: 01-2021-CA-1124

**THE UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant.

**ORDER GRANTING, IN PART, AND DENYING, IN PART, DEFENDANT'S MOTIONS
TO DISMISS**

THIS CAUSE CAME TO BE HEARD upon Defendant, University of Florida Board of Trustees' ("UF" or "Defendant") Motion to Dismiss Class Action Complaint or, in the Alternative, Motion for Judgment on the Pleadings ("Motion"). The Motion seeks dismissal of this action with prejudice or, alternatively, for entry of judgment on the pleadings and is filed pursuant to Fla. R. Civ. P. 1.140(b) and (c).

Having reviewed the Defendant's Motion and Plaintiff's response thereto, the filings of record, the cases submitted by the Parties, and after having heard argument of counsel at the September 1, 2021 hearing, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that UF's Motion to Dismiss Count I is DENIED. UF's Motion to Dismiss Count II, is GRANTED, with prejudice. UF's request for judgment on the pleadings is DENIED as to Count I and moot as to Count II. In support of this Court's determination, the Court finds as follows:

Background

1. Plaintiff is a former UF student who alleges that UF charged and refused to refund fees he paid for services that UF did not provide to students during the Spring and Summer academic semesters in 2020 due to the closure of UF's campuses in response to the COVID-19 pandemic. Based on these allegations, Plaintiff asserts claims on behalf of himself and other students against UF for breach of contract or, in the alternative, unjust enrichment.

2. The Complaint contains two counts: Count I - Breach of Contract; Count II – Unjust Enrichment. Among the attachments to the Complaint are several documents related to the statutorily mandated tuition and fees paid by UF students.

Applicable Standards of Review

3. To survive a motion to dismiss, a complaint need only contain “a short and plain statement of the ultimate facts showing that the pleader is entitled to relief.” *See* Fla. R. Civ. P. 1.110(b); *Shahid v. Campbell*, 552 So.2d 321, 322 (Fla. 1st DCA 1989); *Railey v. Skaggs*, 212 So. 2d 86, 87 (Fla. 3d DCA 1968). In ruling on the motion to dismiss, the Court assumes that the well-pleaded factual allegations in Plaintiff's Complaint are true and must draw all reasonable inferences in favor of Plaintiff. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996); *Thompson v. Martin*, 530 So. 2d 495, 496 (Fla. 2d DCA 1988). A motion for judgment on the pleadings is governed by the same legal test as a motion to dismiss for failure to state a cause of action. *Henao v. Prof'l Shoe Repair, Inc.*, 929 So. 2d 723, 725 (Fla. 5th DCA 2006).

4. “Whether a complaint should be dismissed is a question of law.” *City of Gainesville v. State, Dept. of Transp.*, 778 So. 2d 519, 522 (Fla. 1st DCA 2001). For purposes of ruling on the motion to dismiss, this court must accept as true all of the Complaint's well-pleaded allegations, including those allegations that incorporate attachments. *Id.* The court must

also confine itself to the Complaint and attachments thereto. Id. In rendering its opinion, this Court has followed this well-established standard.

5. The defense of sovereign immunity is appropriately considered on a motion to dismiss. City of Gainesville, 778 So. 2d at 531; Charity v. Bd. of Regents of Div. of Univers. of Fla. Dep't of Educ., 698 So. 2d 907 (Fla. 1st DCA 1997) (en banc). The facts on which a waiver of sovereign immunity depends must be pleaded in the complaint. Levine v. Dade County Sch. Bd., 442 So.2d 210, 213 (Fla.1983); see also, Department of Transp. v. White Constr. Co., 452 So.2d 33, 34–35 (Fla. 1st DCA 1984) (stating “that conditions precedent in a waiver of sovereign immunity statute must not only be complied with before a suit may be maintained, but also the complaint must specifically allege compliance with the conditions precedent”).

6. Additionally, while this lawsuit is styled as a class action, the determination of whether the Plaintiffs have stated a viable claim - and whether they have standing to serve as named plaintiffs - represents a threshold inquiry this Court must make before addressing whether the case is properly maintainable as a class action. “A civil action does not become a ‘class action’ simply because the complaint bears the legend ‘class action complaint’ or, as required by Florida Rule of Civil Procedure 1.220, ‘class representation.’” Policastro v. Stelk, 780 So. 2d 989, 991 (Fla. 5th DCA 2001). A named plaintiff who cannot establish the requisite case or controversy cannot seek relief on their own behalf or any other member of the putative class. Taran v. Blue Cross, 685 So. 2d 1004, 1006 (Fla. 4th DCA 1997). Therefore, this Court’s ruling today is confined to the Defendant’s Motion to Dismiss and this Court makes no determination concerning whether class certification is appropriate, or not, in this case.

Sovereign Immunity

7. Article I, Section 13 of the Florida Constitution authorizes the Florida Legislature to waive the State's sovereign immunity "by general law." Only the Florida Legislature has authority to enact a general law that waives the state's sovereign immunity. Am. Home Assurance Co., 908 So. 2d at 471 (citing Manatee County v. Town of Longboat Key, 365 So. 2d 143, 147 (Fla.1978)).

8. The state's limited waiver of sovereign immunity is codified in Section 768.28, Florida Statutes, which provides:

In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act.

9. "In Florida, sovereign immunity is the rule, rather than the exception..." Pan-Am Tobacco Corp. v. Dep't of Corr., 471 So. 2d 4, 5 (Fla. 1984); City of Key West v. Florida Keys Community College, 81 So. 3d 494, 497 (Fla. 2012). It is intended to "protect[] the state from burdensome interference from the performance of its governmental functions and preserve[] its control over state funds, property and instrumentalities." Davis v. State, Dep't of Corr., 460 So. 2d 452, 461 (Fla. 1st DCA 1984).

10. Additionally, the defense of sovereign immunity is a defense directed to the subject matter jurisdiction of the Court. See, Wallace v. Dean, 3 So. 3d 1035, 1045 n.14 (Fla. 2009); Brevard County v. Morehead, 181 So. 3d 1229, 1233 (Fla. 5th DCA 2015) (applying sovereign immunity to unjust enrichment, quantum meruit and implied contract claims and finding circuit court lacked subject matter jurisdiction over them).

11. Florida university boards of trustees are expressly included in the definition of "state agency and or subdivision" in Section 768.28(2), Florida Statutes, and therefore are guaranteed the sovereign immunity protections and limitations provided for in Article X, Section

13 of the Florida Constitution and Section 768.28, Florida Statutes. See, § 768.28(2), Fla. Stat. (2021).

Plaintiff's Breach of Contract Claim is Not Barred by Sovereign Immunity

12. In Pan-Am Tobacco, *supra*, the Florida Supreme Court held “where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state’s breach of that contract.” 471 So. 2d at 5. In other words, when a governmental entity enters into an express, written contract that is authorized by the powers granted to it by the Legislature, it waives its sovereign immunity. *Id.* at 6.

13. Plaintiff alleges that UF breached an express, written agreement with him concerning fees that he paid when he registered for courses at UF. *See* Complaint at ¶¶ 3, 7, 9, 40, 54-61, He attaches to his Complaint invoices assessing the fees and tuition and fee schedules of the university which itemize the fees that Plaintiff was charged and the specific services to be provided for each fee. *See id.*, at Exhibits C and D, *see also* ¶¶ 11-13. Plaintiff also attaches a document from the university called a “Financial Liability Agreement” which provides that he agreed that he was incurring a legal debt to pay the fees and further provides that his account can be sent to a collection agency should he fail to pay the charges. *See id.*, at Exhibit E; *see also* ¶¶ 28-29. Plaintiff alleges that these documents constitute the express, written contract between him and UF to provide specific services authorized by Florida statutes in exchange for the payment of fees. *See id.*, at ¶¶ 1-3, 29, 56.

14. Plaintiff adequately supports his allegations by attaching to his Complaint documents which identify the specific fees charged to Plaintiff, their purpose and their price, and the amounts that Plaintiff agreed to pay, and did pay, for the fees for each semester. *See id.*, at

Exhibits C-E. These documents are sufficiently definite to constitute an express contract because they incorporate section 1009.24, the law applicable to Plaintiff's invoices. See Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954) ("It has long been firmly established that the laws existing at the time and place of the making of the contract and where it is to be performed which may affect its validity, construction, discharge and enforcement, enter into and become a part of the contract as if they were expressly referred to or actually copied or incorporated therein."); see also Citizens Ins. Co. v. Barnes, 124 So. 722, 723 (Fla. 1927) ("[W]hen parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes part of the contract.").

15. In addition, the Financial Liability Agreement specifically states that a UF student "agree[s] to pay UF debts and charges pursuant to UF policies," including "the costs of tuition, fees and other charges and any additional costs when those charges become due." *See* Complaint at Exhibit E. It further lists the consequences that occur should the student not pay, such as having their account sent to collections. *See id.*

16. It is the Court's finding that, at this stage of the litigation, Plaintiff has adequately plead the existence of an express contract between himself and UF in which Plaintiff agreed to pay fees in exchange for specific services to be provided by UF during the Spring 2020 and Summer 2020 semesters, in accordance with section 1009.24, Florida Statutes, and its corresponding regulations. "A contract is made under Florida law when three elements are present: offer, acceptance, and consideration." SCG Harbourwood, LLC v. Hanyan, 93 So. 3d 1197, 1200 (Fla. 2d DCA 2012). Plaintiff alleges that his invoices from UF contain written information establishing that UF offered to provide specific categories of services and that

Plaintiff accepted that offer by providing consideration in the form of monetary payment. *See* Complaint, at ¶¶ 11-13, 18-29; *see also* Exhibits C-E.

17. Defendant argues that the Third District Court of Appeals' decision in Acosta v. District Board of Trustees of Miami-Dade Community College, 905 So. 2d 226, 228 (Fla. 3d DCA 2005), should persuade this court to dismiss Plaintiff's breach of contract count. In Acosta, the court held that no contract existed between students in a medical assistant program and Miami-Dade Community College despite the fact that the students were provided an acceptance letter – that they signed – which outlined specific program costs. Id. After the students were accepted, the college increased the fees charged to the students. Id. The student-plaintiffs sued the college for breach of contract. Id. The court found no express contract between the student-plaintiffs and the College, stating “[t]he rule is generally recognized that for the parties to have a contract, there must be reciprocal assent to certain and definite propositions.” Id. (citation omitted) and in that case the court held that there was no contract, because there was no price quoted in the contract. The court there noted “[i]t is well established that a meeting of the minds of the parties on all essential elements is a prerequisite to the existence of an enforceable contract.” Id. (citation omitted). This court notes that Acosta was decided on a Motion for Summary Judgment, not on a Motion to Dismiss and that the price for fees is quoted in the documents that Plaintiff alleges purports to create a contract in this case, unlike the contract in Acosta. In addition, this court notes that the Acosta court further held that “[w]hat constitutes the essential terms [of a contract] will vary widely according to the nature and complexity of the transaction and will be evaluated on a case by case basis”. Id. Accordingly, Acosta does not require this court to dismiss Plaintiff's breach of contract claim.

Sovereign Immunity Bars Plaintiff's Unjust Enrichment Claim

18. Sovereign immunity clearly bars Plaintiff's unjust enrichment claim. Plaintiff's unjust enrichment claim complains of the same actions as the breach of contract claim and is pled in the alternative to the extent it is determined a contract does not exist or otherwise apply. (Complaint at ¶¶ 76-77). "[A] claim for unjust enrichment is an equitable claim based on a legal fiction which implies a contract as a matter of law even though the parties to such an implied contract never indicated by deed or word that an agreement existed between them." 14th & Heinberg, LLC v. Terhaar and Cronley General Contractors, Inc., 43 So. 3d 877, 880 (Fla. 1st DCA 2010).

19. As discussed above, Plaintiff must establish the existence of an express, written contract, rather than an implied contract, to overcome sovereign immunity. Because an unjust enrichment claim is by definition based on an implied contract, sovereign immunity bars the claim, and dismissal with prejudice is appropriate. See, City of Ft. Lauderdale v. Israel, 178 So. 3d 444, 447-48 (Fla. 4th DCA 2015) (claim for unjust enrichment barred by sovereign immunity); Morehead, 181 So. 3d at 1232-33 (holding that sovereign immunity barred claims for unjust enrichment, quantum meruit and implied contract and stating: "When an alleged contract is merely implied ... sovereign immunity protections remain in force."); see also, Lee Memorial Health Sys. v. Hilderbrand, 304 So. 3d 58, 61-62 (Fla. 2d DCA 2020) (holding that unless the monies at issue were extracted in direct contravention of a direct legislative mandate or because the public entity ignored clearly established law prohibiting the tax or fine assessed, sovereign immunity bars unjust enrichment claims); Calderone v. Scott, No. 2:14-cv-519-FtM-29CM, 2015 WL 1800315, at *2 (M.D. Fla. April 16, 2015) ("Because unjust enrichment claims are not torts, Florida's legislature has not waived sovereign immunity pursuant to Fla. Stat. § 768.28."); Brandt

v. Public Health Trust of Miami-Dade County, No. 10-22376-CIV, 2010 WL 4062798, at *1 (S.D. Fla. Oct. 15, 2010) (finding sovereign immunity barred unjust enrichment claim and plaintiff's claim that Section 768.28 waived immunity for such claims "frivolous").

20. Accordingly, the Court finds Plaintiff's unjust enrichment claim must be dismissed with prejudice.

Additional Bases for Dismissal and Issues for Disposition

21. The Court does not find the two additional reasons argued by Defendant in support of dismissal of Plaintiff's claims to be persuasive.

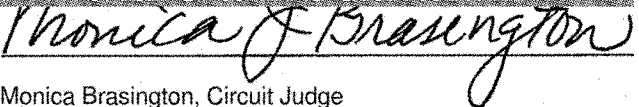
Conclusion

22. For the foregoing reasons, Defendant's Motion to Dismiss Count I of the Complaint is DENIED. Defendant shall file an Answer to Count I within twenty (20) days.

23. Defendant's Motion to Dismiss Count II of the Complaint is GRANTED. Count II is dismissed with prejudice.

24. Defendant's Motion for Judgment on the Pleadings is DENIED as to Count I and moot as to Count II.

DONE AND ORDERED on Friday, October 15, 2021.

01-2021-CA-001124 10/15/2021 03:29:12 PM

Monica Brasington, Circuit Judge
01-2021-CA-001124 10/15/2021 03:29:12 PM

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies have been furnished by U.S. Mail or via filing with the Florida Courts E-Filing Portal on Monday, October 18, 2021.

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01-2021-CA-001124 10/18/2021 10:09:25 AM

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant/Appellant.

Case No.: 01-2021-CA-1124

v.

**NOTICE OF APPEAL OF A NONFINAL
ORDER**

**ANTOHN ROJAS, individually and on
behalf of all others similarly situated,**

Plaintiff/Appellee,

_____ /

NOTICE OF APPEAL

NOTICE IS GIVEN that the **UNIVERSITY OF FLORIDA BOARD OF TRUSTEES** (“UF”), appeals to the Florida First District Court of Appeal, the order of this court rendered on October 15, 2021, granting, in part, and denying, in part, UF’s Motion to Dismiss or, in the Alternative, Motion for Judgment on the Pleadings. The nature of the order is a non-final order that denies a motion that asserts entitlement to sovereign immunity.

Respectfully submitted this 8th day of November 2021,

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*Counsel for the University of Florida Board
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November 2021, a true and exact copy of the foregoing was furnished via the Florida Court's E-Filing Portal to all counsel of record as well as by U.S. Mail, Postage Prepaid, to all counsel of record including:

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ROBERT J. SNIFFEN

**IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA**

**ANTOHN ROJAS, individually and on
behalf of all others similarly situated,**

Plaintiff,

v.

Case No.: 01-2021-CA-1124

**UNIVERSITY OF FLORIDA
BOARD OF TRUSTEES,**

Defendant.

_____ /

NOTICE OF FILING TRANSCRIPT FROM SEPTEMBER 1, 2021 HEARING

Defendant, **UNIVERSITY OF FLORIDA BOARD OF TRUSTEES** (“UF” or “Defendant”), hereby files the original September 1, 2021, Hearing Transcript from the hearing on Defendant’s Motion to Dismiss Class Action Complaint or, in the Alternative, Motion for Judgment on the Pleadings and Supporting Memorandum of Law. The hearing transcript is attached hereto and made part of the record of this proceeding.

Dated this 23rd day of November, 2021.

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Respectfully submitted,

/s/ Jeffrey D. Slanker

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of November, 2021, a true and correct copy of the foregoing was electronically filed in the Florida E-Courts Filing Portal to all counsel of record.

/s/ Jeffrey D. Slanker

JEFFREY D. SLANKER

PHIPPS REPORTING

Raising the Bar!

IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT
IN AND FOR ALACHUA COUNTY, FLORIDA

CASE NO.: 2021 CA 1124

ANTHONY ROJAS, on behalf of
Himself and all other similarly
Situating,

Plaintiff,

vs.

THE UNIVERSITY OF FLORIDA.
BOARD OF TRUSTEES.

Defendant.

_____ /

MOTION TO DISMISS CLASS ACTION COMPLAINT

VOLUME 1 (Pages 1 - 72)

DATE TAKEN: Wednesday, September 1, 2021
TIME: 2:30 p.m. to 4:03 p.m.
PLACE: WEB CONFERENCE HEARING
BEFORE: MONICA J. BRASINGTON, Circuit Judge

This cause came on to be heard at the time
aforesaid, when the following proceedings were
stenographically reported by:

STENOGRAPHICALLY REPORTED BY:

KIMBERLY S. BARTHOLOMEW
Professional Stenographer

Job No. 200824

1 APPEARANCES: (All appearing via Web conference.)

2

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1 Proceedings began/continued at 2:30 p.m.:

2 THE COURT: We're here on behalf of Anthony
3 Rojas, on behalf of himself and all other similarly
4 situated v. University of Florida, Board of
5 Trustees.

6 I do note we have a court reporter, so for her
7 benefit if we could go around and have everybody
8 identify themselves, and that way we can check your
9 microphones.

10 Let's start with counsel for plaintiff.

11 MR. BUSHMAN: Thank you, Your Honor.

12 Howard Bushman along with my associate Barbara
13 Lewis from The Moskowitz Law Firm for the
14 plaintiff.

15 THE COURT: Thank you.

16 Ms. Lewis, are you're going to speaking? If
17 so, we'll test your mic. If not, it's okay.

18 MS. LEWIS: I don't think so.

19 THE COURT: Okay. We can hear you if you do.
20 Counsel for the defense.

21 MR. SNIFFEN: Good afternoon, Your Honor.

22 Rob Sniffen, Sniffen & Spellman, on behalf of
23 University of Florida, Board of Trustees.

24 THE COURT: Great. Thank you.

25 And I think we've identified everyone on

1 camera. Is there any one off camera that is with
2 us that we just can't see.

3 MR. BUSHMAN: Not for the plaintiff, Your
4 Honor.

5 MR. SNIFFEN: My assistant, Gracie Jennings,
6 who is leaving now. She was just making sure I got
7 all hooked up and ready to go.

8 THE COURT: Thanks good. I appreciate it.

9 Okay. Well, we're here on motion to dismiss.
10 And so you know, I've read that motion and also the
11 response in opposition. I haven't made my way
12 through all of the case law that you all have
13 provided, though I will say I've read many of those
14 cases in other court proceedings but I haven't
15 recently re-reviewed those. So I will probably
16 take a look at those before I rule.

17 But we've got two hours reserved. We'll start
18 with Mr. Sniffen and allow him to make his
19 arguments, and then Mr. Bushman. And if we have
20 additional time, Mr. Sniffen, I'll give you a
21 chance to respond. Okay?

22 MR. SNIFFEN: Thank you, Your Honor. May it
23 please the Court.

24 Before the Court today is a two count
25 complaint. Count I is breach of contract, Count II

1 is for unjust enrichment. The plaintiff was a
2 graduate student during the spring and summer 2020
3 semesters. He claims that the University of
4 Florida, Board of Trustees entered into express
5 written contracts with him that guaranteed him a
6 pro rata refund of statutorily required fees he
7 paid during those semesters because of measures
8 taken by UF to keep its students, faculty, staff
9 and the University community safe during the COVID
10 pandemic.

11 The measures taken by the University followed
12 the March 11, 2020 directive from the Florida Board
13 of Governors to transition from in-person to online
14 instruction. This directive came two days after
15 Governor DeSantis issued Executive Order 20-51
16 declaring a state of emergency in this state. All
17 that is set forth in the plaintiff's complaint in
18 the history of how we got to the point where
19 students were finishing their semester in an online
20 setting.

21 We seek dismissal of the complaint, Your
22 Honor, with prejudice or judgment on the pleadings
23 based upon several grounds. I'll summarize them as
24 follows:

25 One, there is no contract between plaintiff

1 and the University of Florida, Board of Trustees
2 let alone an express contract thereby dictating
3 dismissal of plaintiff's breach of contract claim
4 based upon sovereign immunity.

5 The Court is well aware of well-settled
6 principle that one may not gobble together
7 documents from various sources, paste them together
8 to arrive at an express written contract.

9 Secondly, we believe the unjust enrichment
10 claim asserted by plaintiff is also barred by
11 sovereign immunity.

12 And then thirdly, and this is sort of an
13 overlay more for the breach of contract claim but
14 also for the unjust enrichment claim to a lesser
15 extent, the Florida legislature knows how to create
16 causes of action for the return of monies from the
17 state. (Technical interruption) they did not do so
18 here. And in fact, as we've noted in our papers,
19 in the latest expression by the Florida
20 legislature, as to whether or not a cause of action
21 exists, all be it with an effective date following
22 the filing of this lawsuit, the Florida legislature
23 made it clear that public institutions who take
24 measures to keep people safe during COVID, and
25 universities and colleges in particular, public

1 universities and public colleges, may not be sued
2 unless there is an express written contract. And
3 in that new legislation, and we've cited that in
4 our papers, the legislature codified existing law
5 about what is and what is not an express written
6 contract.

7 Turning first, Your Honor, to the breach of
8 contract claim. I'm going to let that siren go by.
9 I apologize. The vagaries of being downtown.

10 The documents that the plaintiff claims
11 demonstrate that he entered into express written
12 contracts with the University are listed in
13 paragraph 56 the complaint. They're all listed
14 there.

15 The plaintiff alleges that there are financial
16 liability agreements whereby he promised to pay his
17 tuition and fees for the specific semesters in
18 question, invoices, tuition statements, billing
19 materials, assessments of fees set forth in the
20 2019, 2020 fee schedule. And detailed statements
21 about the specific services that the University
22 would provide to him as a student.

23 I think it's worth noting, Your Honor, that
24 the plaintiff does not allege, nor can he, that any
25 of these documents promise a pro rata refund of

1 monies, of fee monies, for any reason, and
2 certainly not when the University is facing a
3 worldwide pandemic.

4 Equally notable, Your Honor, throughout the
5 complaint the plaintiff promotes the theory that
6 the services that students receive are pay as you
7 go. You go to the gym, you pay a certain fee. You
8 go and use an intermural practice field, you pay a
9 certain fee. It's not that well defined. Fees
10 nowhere in section 1009.24, which is, as Your Honor
11 may be aware, the fee statute, the fee and tuition
12 statute for public four-year institutions, state
13 University system institutions.

14 That is the statutory basis for requiring
15 students to pay fees, and that language is
16 mandatory. In Subsection 2 of 1009.24 the statute
17 reads: All students shall be charged fees, except
18 students who are exempt from fees or students whose
19 fees are waived. And then the statute later on
20 talks about who gets a fee waiver or who is exempt
21 from fees. There is various provisions for
22 veterans who are returning to school things and
23 things of that nature where their fees are going to
24 be waived.

25 The plaintiff does not allege in the complaint

1 that he was exempt from paying fees or eligible for
2 a fee waiver. He simply claims that because he
3 could not complete the remainder of the semester in
4 person at the University, that he should receive a
5 pro rata refund of the fees that he paid.

6 Your Honor, the University knows how to enter
7 into express contracts with its students. It does
8 so on various subjects. For example, students who
9 are in dorms or other student housing enter into an
10 express written contract with the University almost
11 like a lease agreement for staying in that
12 particular property. Students on a meal plan have
13 express written contracts with the University about
14 what the meal plan will provide them during the
15 semester.

16 There are not express written contracts
17 between the University and with the plaintiff on
18 the subject of this lawsuit. The fees paid for the
19 variety of services that are provided to students,
20 not only the actual service but the overall cost of
21 those services, the overall maintenance cost, et
22 cetera, all of which are built into fees.

23 The express written contracts that I mentioned
24 a moment ago, the housing, the meal plan, that's
25 not what we're talking about here. What we're

1 talking about is general statements from various
2 documents exchanged between the University and the
3 plaintiff, and those that are set out to explain to
4 students, you know, how much they're going to be
5 charged for fees, various things that they are
6 eligible for, et cetera. They're not the express
7 written contracts that you have, for example, in
8 the housing or in the food situation.

9 General contract law in and of itself, Your
10 Honor, discusses what is and what is not an express
11 written agreement, and that law in and of itself
12 prevents the construct that the plaintiffs wish to
13 create from being created at all.

14 Perhaps more importantly, and we'll talk about
15 sovereign immunity in a little bit, what the
16 plaintiff asks for this Court to do with regard to
17 the breach of contract claim is to engage in the
18 very type of inference and implication that Florida
19 law on sovereign immunity does not permit, to take
20 various documents, infer certain things, string
21 those documents along, and say that there is a
22 contract, would in and of itself require the Court
23 to make that stretch to infer or implicate a
24 contract where one does not exist.

25 As the Court is well aware under the Pan-Am

1 Tobacco case, 471 So.2d 4, if there is no express
2 written contract, sovereign immunity bars the
3 claim.

4 Your Honor, I always feel bad sending these
5 large notebooks to you, because I know you have
6 plenty to read, and I'm sure my worthy opponents
7 feel the same. We sent you a lot to read. We're
8 sorry.

9 THE COURT: I do appreciate that both of you
10 sent it to me ahead of time. What is more
11 difficult is when I get those big binder six days
12 after the hearing, and it's really difficult to go
13 back. So don't ever feel bad about sending them to
14 me. As long as you send them to me ahead, I'm
15 happy.

16 And both of you, so you know, we have another
17 judge in our circuit who, once I'm done, and I
18 recycle the papers, she takes the binders and gives
19 them to disadvantaged schools. So your binders are
20 going somewhere worthy.

21 MR. SNIFFEN: Good. Good. That's great.

22 MR. BUSHMAN: Is there through a formal
23 program, Your Honor?

24 I'm sorry to interrupt, Mr. Sniffen.

25 THE COURT: It's not. She set it up herself

1 and she does it informally. She calls the schools
2 and asks if they're interested. I think there are
3 six or seven now on the regular rotation that we
4 give them to.

5 MR. BUSHMAN: That's excellent.

6 MR. SNIFFEN: I actually have wondered where
7 the binders go after I send them. Now I know. I
8 should mention that to the judges up here.

9 MR. BUSHMAN: Yeah, I was just thinking the
10 same thing. I just wrote a note to myself.

11 THE COURT: The binders are super expensive.

12 MR. BUSHMAN: They are.

13 THE COURT: I mean, a lot of these kids, it's
14 a lot to have to purchase the binders for their
15 reports and things. So they've been very
16 appreciative. So thanks to all the attorneys
17 indirectly.

18 MR. SNIFFEN: Absolutely.

19 Of the litany of cases that we sent you, Your
20 Honor, I would like to focus in on a few that I
21 think will provide the Court a road map for
22 assessing this issue.

23 And the first is Acosta v. District Board of
24 Trustees of Miami-Dade College, 905 So.2d 226, a
25 Third District Court of Appeal case from 2005.

1 That is, I think, if not the most germane, one of
2 the most germane cases that apply to this case.

3 In Acosta, the Third DCA held that no contract
4 existed between Miami-Dade, then Miami-Dade
5 Community College, now Miami-Dade College, between
6 their students in a medical assistance program and
7 the college, even though the students were provided
8 an acceptance letter that they signed and returned
9 that outlined specific program costs.

10 As the case makes clear at page 228, the
11 failure to sign the acceptance letter resulted in
12 the student losing his or her spot in the class.
13 After the students were accepted, after they signed
14 the acceptance letter, they were told by the
15 college that the fees would be increased for the
16 semester.

17 The student plaintiff sued the college for
18 breach of contract, and the Third DCA reached the
19 conclusion that there was no contract. In so doing
20 the Court noted, quote, "The rule is generally
21 recognized that for the parties to have a contract
22 there must be reciprocal assent to certain
23 indefinite propositions. It is well established
24 that a meeting of the minds of the parties on all
25 essential elements is prerequisite of the existence

1 of an enforceable contract."

2 I think the acceptance letter in Acosta, Your
3 Honor, is analogous to the financial liability
4 agreement pled in paragraph 56 of the complaint in
5 this case. In this case there is no allegation
6 that fees were raised after receiving the financial
7 liability agreement, only that they were not
8 returned after they were already paid for the
9 semester.

10 There is a difference, Your Honor, and I don't
11 want to make too much of this, there is a
12 difference between public and private universities
13 and colleges on this point. In the complaint -- in
14 the response to the motion to dismiss opposing
15 counsel cites a lot of those cases, but they don't
16 apply here, because the case law with respect to
17 private colleges and universities is that there is
18 inherently a contractual relationship between
19 student and college, whereas in the public college
20 and university setting that is different.

21 At most what we have here, and I don't even
22 think that it exists in the first place, but at
23 most what we have is an implied contract between
24 the plaintiff and UF.

25 There are a few cases that I would like to

1 highlight on this point that describe the
2 relationship between public university students and
3 their public university institutions that talk
4 about the fact that there is an implied contractual
5 relationship, not an express contractual
6 relationship.

7 We have cited them in our papers, I'm not
8 going to go through all of them. But I think the
9 language of two of the cases in particular are
10 instructive for the Court's consideration.

11 The first case is Hamke v. University of
12 Central Florida. This is a case from the middle
13 district of Florida, Judge Mary Scriven presiding.
14 And in that case the plaintiff alleged that the UCF
15 handbook set forth policies that rose to the level
16 of an express contract. UCF moved to dismiss with
17 prejudice.

18 And, Your Honor, I'm going to doublecheck
19 this, but I am not sure we sent you the correct
20 Hamke opinion. You know, sometimes there are
21 several that get reported in Westlaw. I'm going to
22 doublecheck that when we conclude, and I apologize
23 for that. I think that may have just been an
24 administrative oversight. I'll make sure you have
25 it. And of course I'll copy Mr. Bushman and

1 Ms. Lewis.

2 Judge Scriven did a good job in that case, I
3 think, of analyzing philosophically the nature of
4 the relationship between a student and a public
5 university. And here is what she said about that,
6 quote, "The nature of the relationship between a
7 student and a school, whether college or
8 university, is not contractual, and certainly not
9 commercial." And that is actually the heading of
10 this section in the opinion. The heading used by
11 the court is, relationship of university students
12 is not contractual and certainly not commercial. I
13 think that was done for emphasis.

14 While there is payment, tuition and fees for a
15 service, university services, including courses,
16 the relationship is fundamentally one of
17 educational experience and extends well beyond the
18 classroom. In a sense, the entire university
19 experience is intended to be educational, from
20 navigating the benefits and pitfalls of dormitory
21 life to be interacting with campus officials on any
22 number of matters, i.e. grades, assignments, office
23 hour appointments, withdrawal from courses, getting
24 course overrides for a full course, utilizing
25 campus services, et cetera.

1 Plaintiffs educational experience with UCF was
2 not a contractual relationship. As such,
3 plaintiff's breach of contract claim fails.

4 A little bit further down on that same page
5 Judge Scriven cites the Acosta case that we just
6 mentioned and said, quote, "Not every student
7 university interaction, even if in writing, can be
8 said to create a contract," close quote.

9 And in that case the court went on to
10 distinguish the relationship between public and
11 private colleges (technical interruption) whether a
12 breach of contract will lie, and cited various
13 cases, some of which the plaintiff in this case has
14 cited, that discuss the difference.

15 The second case that I would like to call the
16 Court's attention to is Williams v. Florida State
17 University, an opinion issues by Honorable Mark
18 Walker, where he takes the implied versus expressed
19 contractual relationship analysis and applies
20 sovereign immunity to it.

21 The court said at pages five and six of this
22 Westlaw opinion, I'll give it to you Your Honor,
23 2014 Westlaw 340562. And I'm reading from pages
24 five and six. Quote, "While a student's
25 relationship with his university is contractual in

1 nature, it is an implied contract and not an
2 express written contract."

3 A little further down, in this case plaintiff
4 was not a student at a private university, but an
5 institution of higher learning which is a part of
6 the Florida state university system. Even
7 accepting that there is an implied contractual
8 relationship between plaintiff and the defendant,
9 because sovereign immunity has not been waived from
10 students alleging the breach of an implied
11 unwritten contract, summary judgment should be
12 granted in defendant's favor.

13 As this finding is conclusive, there is no
14 need to address defendant's remaining arguments
15 concerning the dismissal of the breach of contract
16 claim, because there is no express contractual
17 relationship here, just as the court in Williams
18 found sovereign immunity should be applied to the
19 plaintiff's breach of contract claim.

20 And I know the Court is well versed in the law
21 on sovereign immunity in Florida. We set it out in
22 detail in our motion. I won't belabor the point.
23 The Court can probably repeat it backwards and
24 forward, and quote the cases.

25 I just want to point out a couple of

1 principles within that overall rubric concerning
2 sovereign immunity, and I mentioned it earlier, and
3 I would like to come back to it and loop it in
4 here.

5 As the Court is aware in Florida, sovereign
6 immunity is the rule rather than the exception.
7 And it's well established that any waiver of
8 sovereign immunity must be clear and unequivocal.
9 And waiver will not be bound as a product of
10 inference or implication.

11 I think here, you know, the fact that -- and I
12 understand they have been pled in the all the
13 alternative. I don't blame plaintiff's counsel for
14 doing that. I probably would have done the same
15 thing. I think that shows that there is no express
16 contract here. What the Court would have to do to
17 find the contract is put together various documents
18 that have been exchanged between the parties and
19 hold them up against different fee schedules, et
20 cetera, and from that make believe that the
21 plaintiff is entitled to a pro rata refund. And
22 that, in our opinion, runs smack dab into that
23 principle, the waiver cannot be found as a product
24 of inference or implication. To get -- to put it a
25 different way, to get where the plaintiff wants to

1 go, the Court must use inference and implication.

2 If an express written contract, like a housing
3 contract was in play, it may be different. But to
4 find an express written contract here, you have to
5 engage in that string together of documents type of
6 analysis that Pan-Am in its progeny prevent the
7 Court from doing.

8 As the First DCA recognized in the Charity v.
9 Board of Regents case cited in our papers, it is
10 perfectly appropriate for the Court to consider
11 sovereign immunity in a motion to dismiss. And
12 where an express written contract is not alleged,
13 it is appropriate to dismiss the complaint with
14 prejudice.

15 So as to the breach of contract claim, we
16 request that the Court dismiss it with prejudice,
17 or if the Court thinks it's more appropriate, grant
18 judgment on the pleadings.

19 I'll turn next to the unjust enrichment claim.
20 And our argument here is very straightforward, Your
21 Honor. An unjust enrichment claim is, by its very
22 nature, an equitable claim based upon legal
23 fiction. A legal fiction which implies a contract
24 as a matter of law even though the parties to such
25 an implied contract never indicated by deed or word

1 that an agreement existed between them. And I'm
2 reading from a First DCA case called 14th and
3 Heinberg, it's cited in our papers, 43 So.3d 877.

4 Plaintiff has to establish the existence of an
5 express written contract rather than an implied
6 contract to overcome sovereign immunity. And
7 because an unjust enrichment claim is necessarily
8 based upon the implied contract theory, sovereign
9 immunity bars the claim.

10 We have cited various cases for this principle
11 from District Courts of Appeal from around the
12 state, including the First District Court of
13 Appeal. We've also cited some cases from the
14 Middle and Southern District of Florida that say
15 basically that because unjust enrichment claims are
16 torts, Florida's legislature has not waived
17 sovereign immunity

18 Section 768.28 is very explicit about what it
19 waive and what doesn't waive. Unjust enrichment
20 claims are quasi-contractual claims, and Pan-Am
21 simply does not permit that.

22 The plaintiffs cite a case from that is
23 currently on appeal at the Third DCA from
24 Miami-Dade County. It's the Verdini (phonetic)
25 case v. Miami-Dade College. We're very familiar

1 with that case. As I said, the Third DCA is
2 deciding it.

3 Even in that case where the judge very
4 respectfully but regrettably found that several
5 documents put together amount to an express written
6 contract, even the judge in that case found that
7 unjust enrichment claims are barred by sovereign
8 immunity.

9 Lastly, Judge, I want to talk a little bit
10 about the fact that the legislature did not create
11 a cause of action. I mentioned that during the
12 beginning of my remarks, and I would like to expand
13 on that with the Court's indulgence.

14 Plaintiff's attempt to manufacture a cause of
15 action from the statute provision, in particular
16 1009.24, that requires the payment of tuition and
17 fees by its students, it finds no support anywhere
18 in the Florida Statutes. The recovery of unused or
19 partially unused student fees or recovery of a pro
20 rata share of fees based upon the subjected
21 expectations of students, who following the
22 worldwide pandemic felt they were shortchanged are
23 not the types of issues that may be pursued as a
24 private cause of action against the University.

25 I cited the Court before to Section 1009.24.

1 There is nothing in there that provides a cause of
2 action or any kind of appellate right for students
3 who feel like they should receive a portion of
4 their fees back. And the legislature knows how to
5 do that, it knows how to create cause of action, it
6 knows how to expressly waive sovereign immunity.
7 It understood the words that must be used to waive
8 sovereign immunity. And nowhere in all of Chapter
9 1009 is there any indication that the legislature
10 intended do so.

11 The Murthy case, M-U-R-T-H-Y, at 644 So.2d 983
12 talks about bringing causes of action into
13 statutory language or other provisions of law as do
14 other cases. We cited a case called Sorensen v.
15 Professional Compounding Pharmacists at 191 So.3d
16 99 where the Court said the question of whether a
17 statute establishes a duty to take precautions to
18 protect or benefit a particular class of persons is
19 no longer determinative on the question of whether
20 a cause of action should be recognized.
21 Legislative intent rather than the duty to benefit
22 a class of individuals should be the primary factor
23 considered by a court in determining whether a
24 cause of action exists when a statute does not
25 expressly provide for one.

1 And this principle that the legislature has to
2 spell it out for the cause of action to exist is
3 consistent with the rationale for sovereign
4 immunity in the first place. You know, sovereign
5 immunity, the underlying basis for sovereign
6 immunity, there is several reasons why we have it
7 in the state of Florida. One of those reasons is
8 that it's, quote, "Designed to protect the public
9 treasury from what would otherwise be countless
10 claims filed by the vast number of citizens
11 effective by the actions of government. Sovereign
12 immunity at least to the extent retained by the
13 legislature imports to the positively necessarily
14 and rational safeguard of the taxpayer's money."
15 And that comes from a case called Southern Road
16 Builders v. Lee County at 495 So.2d 189.

17 Mentioned a moment ago, we -- the statute that
18 the legislature passed in this last session in
19 2021, the statute or the bill number is CS/HB
20 12-61. It was signed by the Governor and became
21 law, I believe the effective date was July 1 of
22 this year. And in that -- it's a very telling
23 bill. I think that when they were passing the bill
24 and were doing the various bill analysis, they
25 understood that these cases had been filed all

1 around the state, and the legislature made its
2 position clear that universities should not and
3 cannot be penalized for doing what was at the
4 herculean task of taking, in the instance of UF,
5 50,000 students, some of whom were already taking
6 some online classes, some of whom were taking a
7 mixture of online and in-person; what a lift to
8 take 50,000 students, keep them safe, put them in
9 an online format to keep them safe, to keep the
10 City of Gainesville safe, to keep its faculty and
11 staff safe. And as the Court knows, these issues
12 are still are reverberating to this day with issues
13 about masking, vaccines, et cetera. We're by no
14 means, you know, so out in the distance from what
15 was going on in 2020 that very much has changed.
16 The world changed and the university and the entire
17 state university system had a heavy lift. They
18 could have said, you know what, we're just going to
19 cancel the rest of the semester. They understood
20 the massive disruption that would have taken place
21 were they to take that position. They understood
22 how lives would be changed if they took that
23 position.

24 What they did instead was something that the
25 modern student understands very well. I am old

1 enough that we didn't have online classes back when
2 I was at UF. We had one economics class that would
3 be taped very early in the morning that we would
4 then go watch in an old VHS cassette. We popped it
5 in and we watched it. I always struggled not being
6 there live. Students today don't struggle with
7 that. They look into a screen and they take online
8 classes all the time. A lot of them come out of
9 the Florida Virtual School or maybe took a class in
10 Florida Virtual School. And so the University
11 transitioned them to a place that, you know, most
12 of them understand.

13 The University also understood, you know, much
14 is made in the complaint about COVID relief in the
15 Cares Act that the University received. Students
16 received Cares Act monies as well. They were very
17 much a part of the Cares Act funding mechanism.
18 Congress provided dollars to assist students who
19 would struggle as a result of COVID, provided
20 monies to universities to help them do that. And
21 so, you know, what the University did here was
22 reasonable and rational, and allowed students and
23 continues to allow students to matriculate toward
24 getting their degree. The other thing about
25 1009.24 that I think further supports our argument

1 is that there is no express waiver of sovereign
2 immunity. The legislative could have said
3 something as broad as, and any claim brought for
4 the recovery of tuition and/or fees established by
5 1009.24, the legislature hereby waives sovereign
6 immunity. It didn't have to do it through a
7 specific cause of action, it could have done it
8 just by saying, whatever type of claim you wish to
9 bring, whether it be a contract claim, whether it
10 be a tort claim, however you wish to fashion it,
11 sovereign immunity will be waived. There is
12 nothing in 1009.24 that speaks to this at all.

13 The intent that is demonstrated by the
14 legislative is done expressly, whether it's
15 immunity for tort claims, whether it's immunity for
16 contract claims, or any other remedy. The
17 legislature knows how to waive sovereign immunity,
18 and it did not do it here.

19 We have also in a footnote, Your Honor, noted
20 the voluntary payment doctrine. I won't spend any
21 time on that. It's in the papers. It's not a
22 primary thrust of our argument. But if the Court
23 wishes in its questioning for us to discuss it in
24 more detail, we can. I just simply note these
25 money were voluntary paid -- these are not fees

1 that are extracted from students. These aren't
2 when you get your car booted because you have too
3 many tickets and you have to pay a fee to get the
4 nice person to come unboot your car. These aren't
5 fees that are extracted. These are fees that go to
6 the provision of students to buildings, to hiring
7 employees, to provide services to students. These
8 are not costs that you pay as you go. Some of the
9 costs are fixed. Students control the student
10 government where certain of these monies are going
11 to go. It would be impossible to tell which
12 services students continue to use. Certainly there
13 is some they didn't use after they were no longer
14 on campus; but there are certainly certain other
15 services that students did use while they were
16 learning remotely.

17 The last thing I'll say, Your Honor, is we
18 commend the Court to our papers, but we also cited,
19 and I apologize that this was only filed on Monday.
20 I doubt Your Honor has had a chance to read it yet.
21 But it's a case that was decided about two or so
22 weeks ago out of the Middle District. It's Lefleur
23 v. State University System of Florida. It's a case
24 from the Middle District. The magistrate judge
25 there issued a multiple page report and

1 recommendation, same types of claims that exist
2 here, plus some others that were pled in that case.
3 And I think that the magistrate's order does a good
4 job of explicating some of the principles that
5 we're talking about here.

6 The report and recommendation was adopted by
7 the district judge. We sent that in as a notice of
8 supplemental authority. We think that that is
9 another case that will be helpful to the Court as
10 it considers our motion. There is a lot of
11 discussion there of 11th Amendment immunity as
12 well, and certainly that doesn't apply in this
13 case. But there is language that discusses
14 sovereign immunity as well and how it applies to
15 this type of situation where a plaintiff claims
16 that there are multiple documents out there that
17 when read together create an express written
18 contract. The District Court in that case rejected
19 that and said that sovereign immunity applies.

20 I do want to say this: The University
21 understands the frustration of students during this
22 time of COVID. We don't enjoy being in litigation
23 with the students. We understand that students
24 went through a lot during 2020. The University
25 community as a whole went through a lot during 2020

1 and still does to this day. We just think that
2 this lawsuit is misplaced and that sovereign
3 immunity is there to protect public institutions,
4 like the University of Florida, from claims such as
5 this that attempt to extract monies that are not
6 founded upon express written agreements and which
7 cannot be the basis of implied-type contracts and,
8 therefore, cannot be the subject of an unjust
9 enrichment claim.

10 Thank you for your time, Your Honor

11 THE COURT: Thank you.

12 All right. Mr. Bushman.

13 MR. BUSHMAN: Thank you, Your Honor. Thank
14 you for giving us so much time today. We really do
15 appreciate the Court's consideration. Again, my
16 name is Howard Bushman. I represent the plaintiff
17 in this matter, Anthony Rojas.

18 This is one of numerous cases filed throughout
19 the state of Florida against public colleges and
20 universities that charged students for fees for on
21 campus services that were admittedly never provided
22 due to the Covid-19 pandemic shutdown. The
23 defendant refused to pay any kind of refund or
24 credit to students, and we allege that that
25 violated the express contracts that the school has

1 with each and every student. The class action
2 complaint against the University of Florida, and
3 for ease I'll refer to them as UF. But, Your
4 Honor, if that gets confusing, just let me know.

5 But the class action against UF seeks to
6 certify a class against all persons who paid the
7 fees for the spring and summer academic semesters.
8 We allege that Florida State 1009.24 and the
9 regulations promulgated thereunder by both the
10 Florida Board of Governors and UF established the
11 types of fees that UF may charge and the amounts of
12 fees and the specific purpose for those fees.
13 Those fees are listed in our complaint.

14 These fees are charged to all enrolled
15 students subject to the limitations provided by the
16 statute and the corresponding regulations. These
17 fees encompass a variety of charges for on-campus
18 charges.

19 Plaintiff and all punitive class members
20 agreed to pay and did pay fees pursuant to these
21 express written contracts with UF.

22 And just to make this clear, Your Honor, we
23 are only seeking compensation for on campus fees
24 that were charged to students for the services that
25 were not provided. This is not a case seeking

1 tuition, this is not a case saying that the tuition
2 claimed that we had to take online classes and,
3 therefore, those are worthless. So we are razor
4 focused in this case on only fees for on-campus
5 services.

6 Now, we allege that UF had an obligation to
7 provide the services that plaintiff and the class
8 paid for. The financial liability agreement that
9 students are required to execute when they register
10 for courses, which is Exhibit E to our complaint,
11 they're invoices assessing those fees, such as
12 plaintiff's tuition statement, which is Exhibit C
13 to the complaint, and the tuition and fee schedules
14 provided to students, such as the one plaintiff
15 attached as Exhibit D to the complaint, itemized
16 the fees and specific services provided for for
17 each fee.

18 And we attached to the complaint these three
19 exhibits and we contend that this creates an
20 express contract that this Court can consider,
21 adjudicate, and find as valid between the students
22 and the University of Florida.

23 Now, pursuant to the financial liability
24 agreement, as with every plaintiff and every class
25 member, the students agrees that when they register

1 for classes at UF the student has to, quote, "Pay
2 UF debts and charges pursuant to UF's policies,
3 including the cost of tuition, fees and other
4 charges, and any additional cost when those charges
5 become due.

6 "The agreement also provides that past student
7 accounts will result in University registration and
8 services being withheld in accordance with
9 University regulations. And that delinquent debts
10 may be reported to the credit bureau and referred
11 to collection agencies or litigated. The student
12 is also obligated to pay all costs of collecting
13 unpaid charges, including a percent based on
14 third-party collection fees up to 30 percent,
15 attorney's fees and court costs that the University
16 may incur trying to collect from students.

17 "The tuition statements and fee schedule was
18 provided to every student. Identify the fees
19 charged to student and their specific purpose and
20 price. The plaintiff's tuition statement
21 illustrates the amount that the plaintiff agreed to
22 pay and did pay during the particular semester, and
23 the fee schedule identifies the fees that
24 plaintiffs paid.

25 "Together these documents show that for every

1 credit hour the plaintiff was charge \$19.06 for the
2 active and service fee, \$1.90 for the (inaudible)
3 fee, \$15.81, and \$9.44 for the transportation
4 access fee.

5 "These are the amounts that plaintiff and
6 other class members agreed to pay and did pay for a
7 particular semester. UF explain to every student
8 that these fees are charged -- that students are
9 charged a variety of these fees in addition to
10 tuition, each semester provide valuable services
11 for the benefit of the entire student body. For
12 example, the activity fee provides for participate
13 of recreational sports and intermurals, access to
14 the recreation and fitness facilities, and
15 participate of programs such as Gator nights. The
16 health fee is for access to the health center. The
17 athletics fee provides students with access to
18 student sections at discounted pricing for athletic
19 events, all which were not provided to students
20 once the school shutdown.

21 One of the University's provost even said,
22 when the school was considering amending the fees
23 due to the closure, quote, "The general
24 rationalization was, with students gone it was no
25 longer necessary for them to pay for access to

1 services that will not be where they are. Though
2 the fees were never reduced or credited back."

3 This provost, Mr. McCollough, his deposition
4 will need to be taken in this case to figure out
5 what he meant by that statement.

6 We allege that it was unfair and unlawful for
7 UF to subsequently retain the access amounts and
8 fees, and force students and their families to bear
9 those costs. We allege that UF improperly retained
10 the funds for services it did not provide in
11 violation of the express contracts which
12 students -- which allowed it to collect fees only
13 for certain statutorily specified purposes. And we
14 asserted causes of action for breach of express
15 contract, and in the alternative, unjust
16 enrichment.

17 Now the defendant has moved to dismiss the
18 complaint on multiple arguments. And we'll take
19 those each in turn.

20 The first argument is that UF is protected by
21 doctrine of sovereign immunity. Now, multiple
22 motions to dismiss have been filed against
23 plaintiffs who have raised these similar claims
24 across the state. And as Your Honor knows, the
25 burden to prevail on a motion to dismiss is heavy.

1 The Court must assume that the well pleaded factual
2 allegations in the complaint are true, and that all
3 reasonable inferences in favor of plaintiff must be
4 taken in determining whether to grant a motion to
5 dismiss.

6 A complaint should not be dismissed for
7 failure to state a cause of action unless the
8 movant can establish beyond any doubt that the
9 claimant could prove no set of facts, whatever, in
10 support of their claim.

11 Given those legal standards, Your Honor, when
12 a plaintiff alleges sufficient factual under the
13 state agency, breached an express contract,
14 sovereign immunity cannot bar a breach of contract
15 claim at this stage.

16 To date only two courts, only two, in Florida
17 have squarely analyzed the Rule on Sovereign
18 Immunity issues against a college or university.
19 Both have denied motions to dismiss. These cases
20 made clear where, as here, a university enters into
21 a written agreement in which students agree to pay
22 certain fees in exchange for specified services.
23 That document constitutes an express contract that
24 operates to waive sovereign immunity for breach of
25 contract claims.

1 The first case, which Mr. Sniffen mentioned,
2 is Verdini, Verdini v. Miami-Dade College District
3 Board of Trustees. It's a Westlaw citation of 2021
4 Westlaw 640338.

5 In that case Judge William Thomas denied a
6 motion to dismiss filed by the college finding the
7 documents plaintiff attached to the complaint, very
8 similar to the ones we attached here, Your Honor,
9 sufficiently contained the express written terms
10 and provided the specific services the school was
11 contractually obligated to provide in exchange for
12 plaintiff's payment of fees. The Court held that
13 the express contracts precluded sovereign immunity
14 and the plaintiff stated a valid claim for breach
15 of express contract.

16 After ruling on the motion to dismiss, the
17 defendant in that case has taken an appeal to the
18 Third DCA. UF has sought to overturn the Verdini
19 decision itself through an Amicus pleading.

20 In the second case, Your Honor, Moore v. The
21 University of South Florida, Board of Trustees,
22 which is a case number 21 CA 002445. We attached
23 that to our brief, Your Honor. In the 13th
24 Judicial Circuit, in and for Hillsborough County,
25 Judge Farfante denied a similar motion to dismiss

1 as the one that is here.

2 What's important about that case, Your Honor,
3 from the -- aside from the denial of the motion to
4 dismiss is that, like the defendant here, they
5 maintain that no express contracts existed and
6 sought to stay all discovery, similar to what was
7 done here.

8 In USF the court did grant limited discovery
9 into the sovereign immunity issues. USF answered
10 the discovery and they stated that no contracts
11 existed, but we investigated further, we took a
12 deposition, and we located a registration agreement
13 that students are required to fill out online and
14 agree to. But those agreements were actually never
15 sent to the students. So as it turned out, USF's
16 representations that contracts didn't exist turned
17 out to be false.

18 THE COURT: I'm sorry, I didn't quite follow
19 that factually. So as far as the registration
20 agreement, you said there was a registration
21 agreement, I'm trying to picture what that actually
22 means. But it existed as a form but then the
23 University didn't send it to the students?

24 MR. BUSHMAN: Right. So Mr. Sniffen liked to
25 talk about when he was in college, and we can talk

1 about that too, so... Back when I went to college,
2 you handwrote in your application to go, you signed
3 your contracts, you handwrote in your registration,
4 and you mailed it in or turned it in to the
5 department.

6 Here everything is filled out online. So the
7 registration agreement is filled out online and
8 executed by the student. And then the student
9 moves to the next window. The student is then
10 never sent to the registration agreement itself,
11 it's just that the school maintains it. And so
12 when we located that registration agreement, it had
13 all of the material terms of what we're talking
14 about here, the students were required to pay for
15 their courses, they were required to pay for their
16 fees, they were required -- if they didn't pay,
17 they had to go to collections, that the schools
18 regulations applied to this agreement. And so
19 after that bit of discovery, it turned out when
20 they said there are no contracts it turned out that
21 there were.

22 And so in many of these cases, and we'll get
23 to this, Your Honor, maybe we're going to be moving
24 to defendant's failure to respond to any discovery
25 despite it being due and not having an order

1 granting any stay, but what we found is that once
2 submitted to discovery, there are more agreements
3 than possibly what we've attached to the complaint,
4 and we believe that if Your Honor will allow this
5 case to move forward past the motion to dismiss and
6 we're able to get into discovery, we would find
7 that there are possibly similar registration
8 agreements and possibly other ones that are
9 applicable in this particular case.

10 In any event --

11 THE COURT: Have you already -- have you
12 already done like a public records request or
13 you've just gone through discovery?

14 MR. BUSHMAN: We did a public records request.
15 I do not believe we've received the documents yet
16 from University of Florida. We have done
17 discovery. We served them discovery. They moved
18 for a stay of all discovery, which has not yet been
19 heard by Your Honor. But even though the stay was
20 not granted, they still didn't do responses and
21 they hadn't set it for hearing, so we're going to
22 have to set it for hearing or move to compel on our
23 discovery responses, either way.

24 However, by the time those issues were -- just
25 as a matter of practicality, by the time the motion

1 to compel would be done, we had already set Your
2 Honor's hearing on the motion to dismiss, and we
3 didn't think we could get before Your Honor on
4 another lengthy hearing, so we decided to go
5 forward here first.

6 THE COURT: No, and I'm sorry to disrupt your
7 train of thought. I wasn't following the
8 registration agreement, so that was helpful. Thank
9 you.

10 And when you were saying, when you were in
11 college you had to handwrite and fill out an
12 application, I was the same. But it did jog my
13 memory that I should probably disclose to both
14 side, I went to UF twice, undergrad and law school.
15 I rule on their cases all the time. I don't see
16 any reason to disqualify myself. But I'll just
17 disclose it so both sides are aware of that.

18 MR. BUSHMAN: If you're comfortable with it,
19 Your Honor, we're comfortable.

20 But in any event, so in USF it turned out that
21 the students -- that the schools' protestations
22 that there were no contracts turned out to not to
23 be true. Judge Farfante denied the motion to
24 dismiss. Last Friday the school filed a notice of
25 appeal for that motion and will be going back to

1 litigate that.

2 But as in Verdini and Moore, they both found
3 that sovereign immunity does not bar the
4 plaintiff's claim for breach of contract, because
5 UF waived sovereign immunity when it entered into
6 express contracts concerning fees. And these
7 rulings in Verdini and Moore are consistent with
8 Florida law on the issue.

9 And I don't think anybody denies, neither the
10 defendant or us, that it's well established that
11 if -- that UF will have waived its sovereign
12 immunity defense if the fees and services paid --
13 offered to the plaintiff and paid by the plaintiff
14 are governed by an express contract. And that's
15 the Mannard (phonetic) case and Pan-Am case that
16 have been cited for Your Honor.

17 In addition, another case, Your Honor, Concord
18 v. Geffen (phonetic). The Court affirmed denial of
19 a motion to dismiss because at that stage sovereign
20 immunity could not preclude a breach of contract
21 claim against state officials and it is precluding
22 the Florida Board of Governors.

23 And I'm going to butcher the next case, Your
24 Honor, but I'm going to try it anyway. In another
25 Zann LaBetton v. The University of South Florida,

1 2016 Westlaw 1451726 (phonetic). It's Middle
2 District of Florida case. The Court denied a
3 motion to dismiss a breach of contract claim
4 against the university based on sovereign immunity,
5 because the plaintiff alleged and it, quote,
6 "Entered into a contract with the University of
7 South Florida. One in which, some terms
8 contained -- some of the terms of the contract were
9 contained in the University of South Florida's
10 College of Medicine handbook." That factual
11 pleading was sufficient to survive a motion to
12 dismiss.

13 And the next quote for Your Honor from the
14 court is very important. Quote, "Whether the
15 allegation will be supported by evidence is a
16 question for summary judgment, not for a motion to
17 dismiss."

18 And I've already discussed the allegations
19 that we've made in the complaint, I don't want to
20 belabor them, Your Honor. But accepting the
21 complaint's allegations as true (technical
22 interruption) certainly pled sufficient facts
23 concerning the existence of substance is an express
24 contract with UF to preclude dismissal at this
25 stage.

1 Now, UF has made a couple of arguments that I
2 think are important to highlight. One of them is
3 that you need like a fully executed, all in one
4 contract, which contains every term and condition,
5 signed by the plaintiff in order to have this
6 express contract, and that's not true in Florida.
7 In Florida, any one document or even several
8 documents together can constitute an expressive
9 contract, so long as they show offer of acceptance
10 and consideration.

11 In the Waitt Development case, which is 866
12 So.2d 153 where the First DCA held that, quote,
13 "Several writings may institution a valid and
14 binding contract, written contract, when the
15 evidence, a complete meeting of the minds of the
16 parties in agreement upon the terms and conditions
17 of that contract," end quote.

18 Recently, Your Honor, in June, 2021, the
19 Second District Court of Appeal in Sarasota County
20 Public Hospital District v. Venice case, which is
21 46 Fla. L. Weekly, D1415, with a Westlaw citation
22 2021 Westlaw 2446276, and that's cited in our
23 brief, and hammers this home completely, Your
24 Honor.

25 In Sarasota County the plaintiffs were a group

1 of private hospitals that sued Sarasota County for
2 reimbursement of medical expenses pursuant to a
3 special act requiring the county to reimburse
4 hospitals for the provision of indigent services --
5 indigent health care services, specifically. The
6 hospitals would perform the indigent care and then
7 invoice the county. So you have a special law and
8 you have invoices.

9 As in this case, the county argued that the
10 claims were barred by sovereign immunity because
11 the plaintiffs, quote, "Never produced an express
12 written contract." In the course of discovery --
13 and defendant in that case argued that without a
14 unified finalized typed paginated document signed
15 by the parties in a suitable place or something to
16 that effect, there could be no enforceable express
17 contract.

18 In a response, the plaintiff claimed that the
19 county waived sovereign immunity, because the
20 special act, when considered in conjunction with
21 their providing indigent health care services and
22 reliance upon the special act, created an express
23 contract that could be enforced notwithstanding the
24 county's claim of sovereign immunity.

25 The Second District Court of Appeal sided with

1 the plaintiffs on the issue, Your Honor, concluding
2 that the defendant's argument was an overly-crimped
3 view of what makes an expressed contract. While
4 expressed contracts are frequently set forth in
5 that kind of manner, they don't have to be. And
6 the appellate court recognized that although this
7 may be somewhat of a unique manner of forming an
8 express contract, it certainly wasn't unheard of
9 and it wasn't beyond the (inaudible) of what
10 Florida law would recognize for the purposes of
11 waiving sovereign immunity.

12 So here you had special law, you had invoices,
13 and you had performance, and that created the
14 express contract. And if you apply Sarasota County
15 here where you had the statute, the course of
16 conduct and the invoices, you can find that we have
17 an express contract here.

18 The second issue that the University of
19 Florida raised was somehow that there were
20 implied -- you can't have an implied contract on a
21 sovereign immunity issue. And we agree. An
22 implied contract doesn't work here, you have to
23 have an express contract. But what you can have,
24 is you can have implied terms inside of an express
25 contract. Florida law is clear that, quote, "Where

1 a suit is brought under an express written contract
2 entered into by a state agency under statutory
3 authority, the defense of sovereign immunity does
4 not protect a state agency from an action arising
5 out of a breach of express or an implied condition
6 or covenant of that contract."

7 And that's the Champagne-Webber case, Your
8 Honor, which is 519 So.2d 696. Champagne was a
9 construction case, Your Honor, where the soil that
10 the construction company was supposed to be digging
11 into was supposed to only be sand, but it turned
12 out it was actually sand and rock, which the city
13 failed to disclose. So there was an express
14 contract, but the court found that there was an
15 implied covenant of the contract not to hinder or
16 delay work, and the giving of inaccurate or
17 misleading information by the city frustrated that
18 implied covenant and consequently the breach -- the
19 express competence of the contract by increasing
20 the quantity and scope of the work.

21 And the Court goes on to say virtually every
22 contract contains implied covenants and conditions
23 for example, every contract includes an implied
24 covenant that the parties will perform in good
25 faith. And the Fourth DCA went on to hold that it

1 seems neither logical nor within the principles of
2 fairness enunciated in the Pan-Am Tobacco case to
3 construe the restrictive language of that case to
4 mean that the defense of sovereign immunity is
5 waived only for the states's breach of an express
6 covenant or a condition of an express written
7 contract.

8 And so what they're saying is that you can
9 have breaches of implied covenants within express
10 contracts and you still waive sovereign immunity.

11 Based on the foregoing, Your Honor, that
12 plaintiff adequately alleges that she entered
13 into -- I'm sorry, that he entered into an express
14 contract with UF regarding fees and services
15 provided by those fees. This is exact conclusion
16 of Verdini and was followed by Moore.

17 And finally, Your Honor, the defendant's cases
18 do not help them in any way. First, one their
19 purported cases that was highlighted today, Your
20 Honor, by Mr. Sniffen and highlighted significantly
21 in their brief wasn't even a case. We learned --
22 we just learned, Your Honor, I don't know if it's
23 sloppiness or what it was, but this Hamke v.
24 University of Central Florida case that was just
25 cited by University of Florida, that's not a case,

1 that's a motion to dismiss that they're passing off
2 as a case. The 2011 Westlaw 881699 citation that
3 University of Florida makes, which was supposed to
4 be a Judge Scriven opinion out of the Middle
5 District of Florida that they cite at page six and
6 they do a very large block note on page 10 of their
7 brief was actually the defendant's motion to
8 dismiss in that case and not an opinion.

9 I've never seen in 20 years, Your Honor, of
10 practicing class action law where a defendant tried
11 to pass off a motion to dismiss as an order by the
12 Court, but they did that here. We only saw it,
13 because UF sent a letter to Your Honor saying here
14 are the cases for the hearing, but didn't send us
15 the cases. So then I had to have my office pull
16 all of these cases, and pull all of these cases.
17 And finally I went through them and I necessitated
18 that it was a motion to dismiss, it was not the
19 order.

20 Your Honor, Judge Scriven, who I'm litigating
21 a major poncy scheme case in front of right now, I
22 know her writing very well, she didn't write what
23 UF said she did. And I can put up on the screen
24 the quote from -- that UF put.

25 But in any event, the actual order is 2011

1 Westlaw 13298734, and it reveals that the case was
2 not dismissed on sovereign immunity, but it was
3 reversed on -- it was dismissed on 11th Amendment
4 immunity, which Mr. Sniffen said earlier has no
5 application here, and it doesn't.

6 In that case the plaintiff didn't argue that
7 any exception to the 11th Amendment immunity
8 applied in that case. We're glad we caught -- I'm
9 at least glad I caught UF's error in time for the
10 hearing so the record is clear and Your Honor
11 doesn't rely upon that Hamke decision in any way.

12 But certainly Judge Scriven did not provide
13 any of the context or dicta that Mr. Sniffen raised
14 before the Court today, and I ask that Your Honor
15 not consider the Hamke decision at all.

16 Another case cited by UF is the Williams v.
17 Florida State University case. That case was a
18 summary judgment case, Your Honor. We're at the
19 motion to dismiss stage. And in that case, the
20 plaintiff failed to provide any evidence of an
21 express contract, which we have done here.

22 Another case cited by University of Florida,
23 the Pinkstein v. University of South Florida.
24 There the amended complaint didn't allege an
25 express contract promising anything. And the

1 students sought for specific performance. Here we
2 have alleged an express contract.

3 In the Acosta case the ruling by the Court was
4 a little different than what was put out by the
5 defendant. The students were not told a specific
6 price of an enrollment prior to enrolling while at
7 orientation and before they went to school. They
8 were given a range and the students signed an
9 acceptable letter without knowing what the specific
10 price was going to be. Only a warning that -- or
11 an acknowledgment that they were aware that the
12 price would increase, or could increase.

13 And the Court found that the price was the
14 essential element of the contract. And since there
15 was no price quoted there was no contract. And
16 here that is definitely not the case, we definitely
17 have a price.

18 Two other cases they cite, Your Honor. The
19 City of Key West case is a summary judgment case.
20 There was no written contract or agreement between
21 the city and anybody in that particular case. And
22 here we allege a contract.

23 And finally, Your Honor, the Lefleur case,
24 which Mr. Sniffen raised at the end of his
25 argument. That wasn't against colleges or

1 universities, that was against the Florida Board of
2 Governors and the State university system, which
3 obviously doesn't have contracts with students.
4 They didn't provide a contract with these entities
5 in their contracts, and they only made a bare
6 allegation of some sort of contractual argument.
7 The Lefleur case really doesn't help them here.

8 Moving on, Your Honor, to the unjust
9 enrichment argument. We allege that sovereign
10 immunity doesn't apply to the unjust enrichment
11 claim because we allege that their failure to pay
12 back these fees was a violation of the law. And
13 you're not entitled -- they're not entitled to
14 sovereign immunity whereas charged a fee in
15 violation of the law. And that's the Bill Stroop
16 Roofing case, Your Honor, which is 788 So.2d 365.
17 And they denied a sovereign immunity defense,
18 because the sovereign cannot, quote, "improperly
19 demand and extract monies from citizens, and then
20 when caught with his hands in the citizen's pocket
21 simply decline to return the funds."

22 And we allege that that's what's happening
23 here, Your Honor. And we do acknowledge that it's
24 pled in the alternative, and that if at the end of
25 the case Your Honor find that if there is an

1 express contract and a jury awards us an award on
2 the express contract theory that we wouldn't have
3 an unjust enrichment damage, a double-dip type of
4 damage. So we acknowledge that. But we believe
5 for purposes of the motion to dismiss, Your Honor,
6 you can allow both claims to go through.

7 Further, we don't allege a statutory violation
8 in this case. We do allege that we have a contract
9 in the statute. 1009 requires the defendant to
10 only use the fees for certain purposes and collect
11 the fees from students, and they didn't do that,
12 and that the combination of the contracts that we
13 provided along with the law, the regulations from
14 the University of Florida, all together make a
15 contract that allows us to move forward.

16 But there is no claim for a violation of any
17 type of statute, but it can be used as evidence for
18 the breach of contract, and will be used as
19 evidence for the breach of contract.

20 As then to the voluntary payment doctrine,
21 Your Honor, that's really a summary judgment issue.
22 It's a defense, it's not really for a motion to
23 dismiss. But we would argue that you don't get --
24 you can't apply that when all the facts are not
25 (technical interruption) when it's involuntary.

1 And here, our client paid the fees in spring
2 of 2020, and unaware that months later the school
3 closed down and they were unaware that they would
4 pay the money back. So he wasn't aware of all the
5 facts.

6 And then also, as I outlined earlier in our
7 argument, Your Honor, if he refused to pay those
8 fees, he would be kicked out of school. He would
9 have his classes canceled. He would be sent to
10 collections. So there is no voluntary nature here.
11 If didn't pay it, you know, his life would have
12 been ruined. So to say that there is some sort of
13 voluntary payment defense is just -- we don't think
14 it comports with the facts.

15 And finally, Your Honor, I know Mr. Sniffen
16 spent a little bit of time on it, this new immunity
17 bill or statute, which is 768.39, as Mr. Sniffen
18 said, it applies to effectively after the filing of
19 the suit, July 1st. It's not applicable to this
20 case. The statute could have had a retroactive
21 application. It was actually considered in both
22 the house and senate bills for this particular
23 statute, and ultimately it was put in and then it
24 was taken out. So it was clear, legislative intent
25 to not allow it to apply retroactively.

1 Whenever you apply a statute, there is a
2 two-prong test as to retroactivity, whether there
3 is clear evidence of legislative intent to apply
4 the statute retroactively and whether retroactive
5 applications are constitutionally permissible.

6 And, Your Honor, as I said earlier, they took
7 out the retroactive application. So we know for a
8 fact they didn't want retroactive language in
9 there.

10 And then secondly, Your Honor, we allege a
11 breach of contract in this case, and to apply it
12 retroactively when there was no clear legislative
13 intent to do so would be constitutionally
14 impermissible, because the right to contract is
15 sacrosanct in the state of Florida. And we
16 outlined the constitutional argument in our brief.
17 But because this would impair or right to contract,
18 retroactive application would just be improper.

19 And then finally, substantively, Your Honor, I
20 personally went to the senate hearings and argued
21 not in favor of the bills, but Senator Gruters at
22 the senate hearing specifically said that the fees
23 that were in that particular statute that we're
24 talking about in this case are not included in that
25 statute. Although fees were never really defined,

1 he said it was more for tuition and tuition-related
2 fees, and not for things like parking and other
3 on-campus services. And we cite that in our brief.
4 And I can provide Your Honor with a video of the
5 hearing, because they don't do -- they don't do the
6 videos. But we did have a court reporter
7 transcribe and you can read it for yourself, they
8 did not intend for this to be on-campus fees. You
9 pay -- if you're a student and you pay for parking,
10 and then they closed down the lots, you should get
11 your money back. And we believe that that's the
12 case.

13 Your Honor, I personally don't have anything
14 else. I'm sorry I went on for a while. I'm happy
15 to answer any questions you have. Otherwise, we'll
16 rest on our papers.

17 THE COURT: I don't think I have any
18 questions. I think the only thing I was thinking
19 about is, as far as the class certification, which
20 I'm not sure we're to yet, but you said you're
21 not -- your complaint does not encompass anything
22 related to the actual tuition itself, if I
23 understand you correctly.

24 So the kids who do the -- there is a section
25 at UF that does just online, even before COVID, I

1 think they're called, like, UF online. You would
2 not be trying to certify them as any part of this
3 class because they did everything online anyway.
4 So presumably they would not have been charged the
5 same types of fees that you're alleging in this
6 complaint. That's a question I don't really know
7 the answer.

8 MR. BUSHMAN: Well, you're a hundred percent
9 correct, Your Honor. Actually, it's outlined in
10 our complaint, and I believe we outlined it in our
11 brief, but I know we definitely did in our
12 complaint where online students have the ability to
13 opt in to a particular structure of payment where
14 they pay a fee and, for example, they might get
15 access to certain things --

16 THE COURT: Gym.

17 MR. BUSHMAN: -- if they want it. But if
18 they're an online student they're not automatically
19 charged the fees that we're talking about here and
20 here. The plaintiff in our class are on-campus are
21 students who were automatically charged these fees.

22 And so online students who paid for a separate
23 package -- what they did is they paid one fee for a
24 package of services, meld it together, they weren't
25 charged line item fee by line item fee.

1 THE COURT: So you're not trying to include
2 them in any certification you're doing?

3 MR. BUSHMAN: I don't believe so, Your Honor.
4 Discovery may show something differently once we
5 get past the motion to dismiss that they were
6 treated the same, that the money was allocation the
7 same, that there were different allegations for the
8 same. So I don't want to preclude it a hundred
9 percent. But at this stage, Your Honor, I don't
10 believe that we're including that, just because
11 they paid this overarching tuition package as
12 opposed to -- as opposed to -- I'm sorry,
13 overarching fee package as opposed to a line item
14 one by one where they are automatically charged it.

15 THE COURT: Okay. Thank you. I appreciate
16 it. I think factually and legally I'm clear on
17 both your positions.

18 But I'll let Mr. Sniffen have the last word.
19 You're muted, Mr. Sniffen.

20 MR. BUSHMAN: You're muted.

21 MR. SNIFFEN: Thank you. I didn't want you
22 guys to hear my sirens anymore while Mr. Bushman
23 was speaking.

24 A couple of quick things, Your Honor. First
25 of all, Mr. Bushman talks about discovery as if

1 it's a right in this case. The law is clear,
2 sovereign immunity and the defense of sovereign
3 immunity is immunity from suit. It's not, well,
4 you kind of get immunity and then we may get a
5 little discovery and we may find different
6 documents that add to our argument.

7 I think Mr. Bushman did not correctly describe
8 what we think is and is not an express contract.
9 We just don't believe that the contracts that they
10 attached, which is their burden and that they could
11 have asked for more in a public records request --
12 I don't know the status of that, our firm isn't
13 dealing with that.

14 But if these express contracts exist and if
15 they're so sure that the ones they've attached
16 their complaint are the express contracts, those
17 contracts do not get them where they want. I go
18 back to the principle that you have to infer and
19 read and add together and throw in a regulation
20 throw in a statute. That's not an express written
21 contract for purposes of the Pan-Am analysis.

22 Alleging we may find more, they've cited in
23 the complaint the Hamaker (phonetic) case. The
24 Hamaker case is your standard, hey, the insurance
25 company has my policy, they won't give it to me,

1 let me have some discovery to get that policy.

2 That's not what we have here. What they want to
3 do, and this is what turns the principle of
4 sovereign immunity as immunity from suit on its
5 head, is they want to get in there, they want to
6 look for additional documents that when you string
7 them together say what they want them to say, which
8 is they get a pro rata refund. They do not.
9 Nothing in the contracts or speaking of the
10 documents that they've attached say you get a pro
11 rata refund for any reason.

12 The hospital case that Mr. Bushman cited, let
13 me refer the Court to the City of Key West case
14 that we cite in our papers. And that's the City of
15 Key West v. Florida Keys Community College, 81
16 So.3d 494. There the community college filed a
17 declaratory judgment establishing that it enjoyed
18 sovereign immunity from suit for nonpayment of
19 storm water fees the city was statutorily
20 authorized to charge. So here we have a statute
21 that says, you can charge this precise fee.

22 The Third DCA held that the college was
23 entitled to sovereign immunity, and the mere fact
24 that the applicable statute allowed municipalities
25 to collect charges from entities served by its

1 public works facilities was not evidence of the
2 legislature's intent to waive sovereign immunity.

3 Again, they have got to find somewhere in
4 1009.24 where the legislature intended to waive
5 sovereign immunity with respect to the payment of
6 fees. There is nothing in 1009.24 that does that.
7 There is nothing in a regulation that entitles them
8 to a pro rata return of fees. But even if there
9 was, it doesn't matter. Only the legislature can
10 waive sovereign immunity, and they did not do so in
11 1009.24.

12 What the legislature said is that if you have
13 an exemption from fees, you don't have to pay them,
14 or if you get a fee waiver, you don't have to pay
15 them, and that is it. In all other instances in
16 Subsection 2 of that statutory provision it says,
17 students shall pay fees.

18 I don't quite understand the very quick
19 comment Mr. Bushman made about Lefleur doesn't help
20 them. Lefleur absolutely helps us. It doesn't
21 matter if it is against the university state system
22 or not. The very principles that are at stake in
23 this motion to dismiss also applied in that case,
24 and the court ultimately by adopting the report of
25 recommendation did that.

1 You know, the argument that we may find more,
2 we may find more if we just get a little discovery,
3 we may find more. What their obligation to do is
4 to say, hey, there are these documents called X,
5 we're entitled to those in discovery. Where the
6 exceptions have been made in these cases for
7 plaintiff's lawyers to go forward in very limited
8 circumstances, we just litigated this case up in
9 Jacksonville in the circuit court there, and the
10 judge said, I'm going to give you really limited
11 discovery, and these are the types of things I'm
12 going to let you get.

13 What the plaintiff sought in that case was,
14 again, this wide open we get to come in, we get to
15 start taking corporate rep depos, we get to start
16 taking what people have said in the newspaper and
17 throwing that back at them. That's what they want,
18 but that's what they don't get. Because sovereign
19 immunity is immunity from suit. It's not immunity
20 and we get a little bit of discovery.

21 None of the discovery that they've served
22 said, hey, there is these documents out there, I've
23 never heard of these registration agreements, I
24 don't even know if UF has those, but they didn't
25 ask for that. What they want is any and all, any

1 and all, any and all, they want corporate
2 representative depositions, they want us to expend
3 tens of thousands of dollars in discovery, and I'd
4 probably do the same thing. But sovereign immunity
5 doesn't let them do that. Sovereign immunity says,
6 you cannot sue the sovereign unless you show up
7 with an express written agreement, and they have
8 not done that here. There is nothing in 1009.24
9 that says otherwise.

10 In terms of this fee being some sort of Bill
11 Stroop extraction, it's not. These are fees that
12 are paid by students who want to be students at the
13 University of Florida. A plaintiff doesn't have to
14 go to a university. But once you do, you consent
15 to certain things. What the legislature says those
16 things are, are the payment of tuition and the
17 payment of fees. This is not some illegal fee that
18 has been extracted from them. And it's not, as I
19 noted before, the type of fee, for example, where
20 you get your car booted and you have to pay a fee
21 to get your car unbooted.

22 These are the every day fees that students
23 pay, for example, so they can have a gym built for
24 them, so that they can have facilities there.
25 There is ongoing fixed costs that have to be paid.

1 This is not a pay as you go type of situation,
2 that's how they framed it. I understand that they
3 framed it that way, because what they want to do is
4 they want to take the exact moment that students
5 went off semester and they want to be able to
6 quantify that somehow.

7 You can't quantify the services that are paid
8 for through the student fees, you simply can't.
9 That cannot be done. It's not as simple as cut the
10 semester off here, we get the rest of the fees for
11 that. There are fixed cost, there are employees
12 who are paid through fees. All of this. So it's
13 not as easy as the plaintiffs make it sound.

14 You know, we believe the Charity case, you
15 know, and I realize what they want is they want
16 discovery and then they want summary judgment, but
17 the First DCA in Charity said that a court may
18 decide sovereign immunity on a motion to dismiss,
19 and we respectfully request that the Court grant
20 us -- grant the motion to dismiss and find that
21 sovereign immunity applies to both Counts.

22 Thank you, Judge.

23 THE COURT: Thank you. I appreciate it.

24 As far as the Lefleur case, I think you said,
25 Mr. Sniffen you sent that Monday. I'm not sure if

1 you sent it in hard copy. I haven't seen it yet.
2 But if you sent it, no need to send it again. And
3 you're also going to send me the correct version of
4 the Hamke case, the order itself, right?

5 MR. SNIFFEN: I'm not sure if we sent the
6 correct one or not. There is, as Mr. Bushman
7 notes, a motion to dismiss out there. If I read
8 from the motion to dismiss, I apologize. But that
9 portion of the motion to dismiss cites cases for
10 those principles. And there are plenty of other
11 cases that stand for the same proposition. The
12 Williams case in particular talks about the nature
13 of the relationship between a public university
14 student and its public institution that it is --
15 and the cases that are cited in their motion -- in
16 the Hamke motion all stand for that same
17 proposition, that a student and a public
18 university -- it's not a commercial relationship.

19 The cases they cite are commercial cases. And
20 in the commercial context this may make sense. But
21 public universities are different, and you cannot
22 apply that commercial analysis to the types of
23 breach of contract claim that they've asserted
24 here.

25 So, yes, Your Honor I'll doublecheck to make

1 sure I didn't send you the motion to dismiss, that
2 I sent you the case instead.

3 THE COURT: I think you did. I'm looking in
4 my bind, so everyone is on the same page, what I
5 have in my binder behind Hamke is 2011 Westlaw
6 13298734. And it does say order, Mary Scriven,
7 United States District Judge, and the order was
8 entered the 15th, day of July, 2011. So I think
9 that I have the correct one, Mr. Bushman.

10 MR. BUSHMAN: Right. But that order, Your
11 Honor, doesn't have any of the quotes that
12 Mr. Sniffen spent a significant amount of his brief
13 and a significant amount of is argument regaling
14 for the Court. And it's just important to note
15 that -- and I don't want it whitewashed over, that
16 had we not raised it, it would have gone forward
17 with Your Honor. You could have read that brief
18 and taken this completely irresponsible citation
19 and put it in an order, and it should not be --
20 that should not be overlooked what they did.

21 MR. SNIFFEN: Your Honor, if Mr. Bushman can
22 cite a case that stands for the opposite
23 proposition, I'm happy to take him at his word, but
24 he can't, because there are plenty of cases out
25 there that stand for the proposition that I read to

1 the Court.

2 This is not a poncy scheme case, this is not a
3 commercial litigation case. This is a case about
4 the nature of the relationship between a public
5 university and its students. And the quote that I
6 read, and regaled about, is the law. And there are
7 plenty of cases that back that up.

8 Now, if Mr. Bushman can cite me a case to the
9 contrary, I'm happy to hear it, but I guaranty he
10 can't.

11 MR. BUSHMAN: No, what he did, what
12 Mr. Sniffen did --

13 THE COURT: Hold on a second.

14 MR. BUSHMAN: No, I appreciate -- I don't
15 want --

16 THE COURT: But I want to stop, because I feel
17 like this is devolving into personal issues that
18 are really not at all helpful to me.

19 I promise that whatever order I enter, if I
20 cite to a case I'm going to have reviewed the
21 actual case. And if it's an appellate opinion,
22 I'll cite directly from that and not from any
23 motions.

24 MR. BUSHMAN: Thank you, Your Honor.

25 THE COURT: So I can assure you all that I'll

1 do that.

2 So what I need from you all at this point is
3 some kind of time frame in which you will get me
4 proposed orders. And just in the interest of
5 transparency so everyone knows how it works in my
6 division, I have these binders that everyone gave
7 me. I don't start actively reviewing and trying to
8 come to a decision until I have everything from you
9 all. So that will conclude your competing proposed
10 orders. Because I don't know what I'm going to do.
11 If I knew my ruling, I'd just tell you what it was.

12 So it's totally up to you all how much time
13 you need to get me proposed orders. You sort of
14 don't get in the line for me to start considering
15 your case until I have everything. So I always
16 kind of explain that caveat, and then it's up to
17 the attorneys, if you tell me you want 10, 20, 30
18 days, I'm okay with that, and I'll note that on my
19 sheet. But like I said, until I have the competing
20 proposed orders from each of you, you don't get
21 into the line for me to have you on the list to
22 start actively reviewing and considering the case.

23 So with that in mind, how much time do you all
24 think you need to get me proposed competing orders?

25 MR. BUSHMAN: How about ten days, Your Honor?

1 THE COURT: Mr. Sniffen?

2 MR. SNIFFEN: Yes, ma'am, that works for us.

3 THE COURT: I know there is a holiday coming
4 up, so why don't we say the 13th. Does that work
5 for everybody?

6 MR. BUSHMAN: Yes, Your Honor.

7 MR. SNIFFEN: Yes, ma'am.

8 THE COURT: All right. Great.

9 So when you do that, because they're
10 competing, if you would each send them in Word
11 format so I can edit, as necessary, that would be
12 great. Send them to my judicial assistant in the
13 Word format. But in the body of the email so if
14 you would note for her that they are competing
15 orders, she processes those in a different way than
16 she does orders that everyone agreed to or I've
17 already ruled on. So if you could just make sure
18 and note that, that will help her in processing the
19 orders and getting them to me and then me getting
20 them on the list of things to start considering.
21 Okay?

22 MR. BUSHMAN: The 13th, yes, ma'am.

23 MR. SNIFFEN: We'll do, Your Honor.

24 THE COURT: Okay. Sounds good.

25 All right. Well, thank you all for your

1 arguments. I appreciate it. I think I understand
2 where everyone is coming from. I just need to dive
3 in to the actual documents that plaintiff attached
4 to his complaint and look at the case law, and then
5 I should be able to get you a ruling. Okay?

6 MR. SNIFFEN: Thank you, Your Honor.

7 MR. BUSHMAN: Thank you, Your Honor.

8 THE COURT: Thank you all. Have a good day.

9 (The proceedings were conclude at 4:03 p.m.)

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CERTIFICATE OF REPORTER

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STATE OF FLORIDA)
COUNTY OF LEON)

I, KIMBERLY S. BARTHOLOMEW, Professional Court
Reporter, certify that I was authorized to and did
stenographically report the foregoing proceedings,
and that the transcript is a true and complete
record of my stenographic notes.

DATED this 21st day of November, 2021.

A handwritten signature in dark ink, appearing to read "Kimberly S. Bartholomew", is written over a horizontal line.

KIMBERLY S. BARTHOLOMEW,
Professional Stenographer
Kimesuu@aol.com

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