No. 21-50352

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ALLISON KING,

Plaintiff - Appellant

v.

BAYLOR UNIVERSITY,

Defendant - Appellee

On Appeal From

United States District Court for the Western District of Texas

6:20-CV-504

BRIEF OF APPELLANT ALLISON KING

SUBMITTED BY:

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Charleston, SC 2940

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Appellants:	**Counsel for Appellants:**
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Allison King	Jeff Edwards of Edwards Law Austin, TX
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Appellees:	**Counsel for Appellees:**
Baylor University	Robert Walters of Gibson, Dunn & Crutcher, L.L.P. Dallas, TX
Baylor University	Russell Falconer of Gibson, Dunn & Crutcher, L.L.P. Dallas, TX
Baylor University	Kyle Hawkins of Gibson, Dunn & Crutcher, L.L.P. Houston, TX

Other Interested Persons: None known.

/s/ Eric M. Poulin
Attorney of record for Allison King

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and 5th Cir. R. 28.2.3, Plaintiff-Appellant Allison King requests oral argument and believes it would significantly aid in the decisional process in this case.

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JURISDICTIONAL STATEMENT

This appeal is from a final judgment that disposes of all claims of Appellant and sole Plaintiff Allison King in this action against Appellee and sole Defendant Baylor University ("Baylor" or "Defendant"). The district court had subject matter jurisdiction over this matter pursuant to the Class Action Fairness Act of 2005, which provides for original jurisdiction of federal district courts over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs, and [that] is a class action in which…any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). The Act further requires that the number of members of all proposed plaintiff classes in the aggregate be greater than 100. 28 U.S.C. § 1332(d)(5)(B).

Defendant is a citizen of Texas. Plaintiff brought this putative class action on behalf of "[a]ll students who paid, or other persons who paid on a student's behalf, Baylor any of the following costs for the Spring 2020 semester: (a) tuition for on-campus instruction and/or (b) Fees and/or (c) meal plans (the 'Class')." The proposed Class encompasses persons who are citizens of states other than Texas. Plaintiff alleged that the amount in controversy exceeds $5 million in the aggregate, exclusive of interest and costs. Finally, Plaintiff alleged that the Class encompassed thousands of proposed members.

The district court issued an order dismissing Plaintiff's case in its entirety and with prejudice on March 31, 2021. The district court entered final judgment on April 14, 2021. Plaintiff timely filed a notice of appeal on April 23, 2021. Thus, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court err when it dismissed Plaintiff's breach of contract claim with prejudice on the ground that the Financial Responsibility Agreement ("FRA") was a fully integrated memorialization of Plaintiff's agreement with Baylor, even though the FRA contained no discernible duties that Baylor owed to Plaintiff with respect to the educational services it was obligated to provide?
2. Did the district court err in dismissing Plaintiff's unjust enrichment claim with prejudice?

STATEMENT OF THE CASE

Plaintiff filed her Complaint on June 5, 2020.[1] She filed her First Amended Complaint ("FAC") on August 10, 2020.[2] Plaintiff alleges in her FAC that she and other similarly situated students enrolled in an on-campus course of study at Baylor, and prepaid tuition and various fees in exchange for Baylor's promise to provide the

[1] ROA.10.
[2] ROA.234.

unique benefits of an in-person, on-campus education experience, including face-to-face academic instruction and a host of other services, extracurricular activities, and access to campus buildings and spaces.[3] But when Baylor cancelled in-person instruction and closed down campus in response to the COVID-19 crisis in March 2020, it refused to refund the tuition and fees paid as consideration for this on-campus experience, breaching its agreement with Plaintiff and similarly situated students and unjustly enriching itself at the expense of its students.[4]

Plaintiff's FAC alleges that Baylor attracts students to its more expensive and separately marketed on-campus programs with promises like the prospect of "a rich campus life that will help you grow intellectually, spiritually and emotionally," enjoying campus-wide events and celebrations, "taking some time to reflect in chapel or just hanging out over coffee," "feel[ing] like a part of the Baylor family from the moment you set foot on Fountain Mall," using "state-of-the-art facilities that blend historic beauty with innovative function," receiving "free tickets to all sporting events," and participating in club and intramural sports—all of which appear prominently in the school's marketing materials and catalog offerings.[5] In response, students enroll in Baylor's on-campus programs and classes because direct

[3] ROA.251 ¶ 86.
[4] ROA.235-36 ¶¶ 9–12.
[5] ROA.238-39 ¶¶ 24–27.

interaction with instructors and students, the multifaceted nature of campus life, and numerous other aspects of in-person education enhance and contribute to the overall educational experience.[6]

In exchange for in-person instruction and these numerous on-campus amenities, students pay higher tuition than students who receive online instruction and pay a bevy of fees for on-campus services.[7] Specifically, Plaintiff and putative class members pre-paid tuition—at the on-campus, rather than online, rate—and fees for the Spring 2020 semester that included a General Student Fee, a Course or Lab Fee, a Chapel Fee, a Parking Fee, a Yearbook Fee, a Student Life Center/Health Center Fee, an Athletic Events Attendance Fee, and payments for an on-campus meal plan.[8] As their names indicate, many of these fees were clearly paid in exchange for access to various on-campus services and facilities. The FAC alleges that these payments created a contract for the promised instruction, services, activities, and access for the Spring 2020 Semester.[9] This contract was in part express, as set forth in various catalogs, circulars and other publications, and in part implied by the parties' course of dealing.[10]

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[6] ROA.238 ¶ 23.
[7] ROA.244-45 ¶¶ 52–54.
[8] ROA.246-47 ¶¶ 60–68.
[9] ROA.257 ¶ 115.
[10] ROA.251-259.

In March 2020, in response to the outbreak of COVID-19, Baylor moved all learning online for the remainder of the Spring 2020 semester, cancelled athletic and other on-campus recreational events, cancelled students' meal plans, and ordered students to stay away from campus.[11] As a result, Baylor students were locked out from all on-campus classes, dining, facilities, and other services and amenities.[12] The FAC alleges that despite these harsh realities, Baylor refused to provide a prorated refund of fees tied to on-campus services and amenities that were not available to students for a significant part of the Spring 2020 semester.[13] In addition, by requiring students to pay (and many to borrow) full tuition for the Spring 2020 semester, Baylor did not take into account the difference in value between the college experience the school is now offering compared to what students were promised.[14]

Thus, the FAC alleges that students like Plaintiff have lost the benefits of the bargain for services and education for which they paid but can no longer access or use, in violation of their contract with Baylor.[15] In the alternative, the FAC alleges that Baylor was unjustly enriched by retaining the full amount of tuition and fees for

[11] ROA.235 ¶ 7.
[12] *Id.* at ¶¶ 7–8.
[13] *Id*. at ¶ 9.
[14] *Id.*
[15] ROA.251-259.

the Spring 2020 semester, while reducing services and cutting operating costs at the expense of its students.[16]

On August 31, 2020, Defendant filed a Motion to Dismiss the FAC for failure to state a claim.[17] The motion was fully briefed by the parties.[18] On January 29, 2021, the Magistrate Judge issued a Report and Recommendation (the "R&R"), recommending that the FAC be dismissed with prejudice.[19]

The Magistrate Judge reasoned that the FRA,[20] a three-page promissory note concerned primarily with establishing the due dates of tuition payments and terms and conditions related to Plaintiff's financial obligations, was a fully integrated contract containing all the terms and conditions of Plaintiff's agreement with Baylor and "does not obligate Baylor to provide in-person, on-campus instruction."[21] Thus, the Magistrate Judge recommended dismissal of Plaintiff's breach of contract and unjust enrichment claims.[22]

On February 11, 2021, Plaintiff filed objections to the R&R.[23] On March 31, 2021, the district court—without any analysis or discussion of Plaintiff's

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[16] ROA.259-260.
[17] ROA.277.
[18] *See* ROA.335 (Plaintiff's Memorandum in Opposition); ROA. 422 (Defendant's Reply in Support).
[19] ROA.805.
[20] ROA.318-20.
[21] ROA.810.
[22] ROA.815-16.
[23] ROA.820.

objections—entered an Order adopting the R&R in its entirety and overruling Plaintiff's objections.[24] Final judgment was issued April 14, 2021.[25] Plaintiff timely filed her Notice of Appeal on April 23, 2021.[26]

SUMMARY OF THE ARGUMENT

In adopting the R&R, the district court refused to consider Plaintiff's contractual allegations as set forth in the FAC. The R&R focused heavily on the FRA, a single three-page document that on its face purports to be a promissory note, not a comprehensive memorialization of the relationship between Plaintiff and Baylor.[27] The district court found that (i) the FRA was a valid, complete, and integrated contract between Baylor and its students, (ii) the FRA did not promise in-person classes or an on-campus educational experience as alleged in the FAC, and (iii) accordingly, because the FRA was an integrated contract, the provisions of the FRA exclusively governed the relationship between the parties, to the exclusion of any other promises or agreements (including those detailed extensively in the FAC), necessitating dismissal of the action. This singular focus on the FRA—and the ruling that followed—were erroneous.

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[24] ROA.879.
[25] ROA.881.
[26] ROA.882.
[27] ROA.318-20.

First, standing alone, the FRA is not a contract at all. It imposes no cognizable obligation on Baylor. While the document purports to bind the student to pay certain costs associated with "educational services" to be provided by Baylor, it does not define or even discuss those services. On its face, the FRA does not obligate Baylor to provide any definable services to the student. It is merely a promissory note that was never intended to be—and cannot be interpreted to serve as—an integrated expression of the parties' contractual relationship.

The FRA also does not incorporate other documents to fill in the many missing terms required under Texas law to form a valid contract. The FRA incorporates three documents for the express purpose of establishing the due dates of certain payments, and nothing more. And even if it *did* incorporate those documents for the much broader purpose of filling in other material terms, the documents do not supply those terms.

Second, even if the FRA *were* a contract, it cannot be the *sole* contract between the parties. The FRA is incomplete and limited in scope. Likewise, the FRA, if governing, is ambiguous at best. Even if the FRA is read in the light most favorable to Defendant (the opposite of the appropriate 12(b)(6) standard) it merely requires Baylor to provide "educational services." Nowhere in the document are such services explained or defined. Those services are clearly set forth in numerous other places, as demonstrated by the FAC, and those other documents clearly establish

that "educational services" was intended by the parties to include an on-campus, in-person educational experience. In light of the FRA's patent ambiguity, the district court erred in refusing to consider this extrinsic evidence, as it was required to do under Texas law.

Accordingly, the district court's dismissal should be reversed.

STANDARD OF REVIEW

"Appellate review of a district court's dismissal for failure to state a claim under Rule 12(b)(6) is *de novo*." *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010). "The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when all well-pleaded facts are assumed true and are viewed in the light most favorable to the plaintiff." *Id.* (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007)). "The court's task is to determine whether the plaintiff has stated a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009)).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S BREACH OF CONTRACT CLAIM

In Texas, "the relationship between a private school and its student has by definition primarily a contractual basis." *Villarreal v. Art Inst. of Houston, Inc.*, 20 S.W.3d 792, 797 (Tex. App. 2000) (internal quotation marks omitted). Such a

contractual relationship may be implied. *See Southwell v. Univ. of Incarnate Word*, 974 S.W.2d 351, 356 (Tex. App. 1998) ("[W]here a private college or university impliedly agrees to provide educational opportunity and confer the appropriate degree in consideration for a student's agreement to successfully complete degree requirements, abide by university guidelines, and pay tuition, a contract exists.").

In her FAC, Plaintiff pleaded a straightforward breach of such a contract.[28] The FAC alleges Baylor represented that upon registration and payment of tuition and fees, students were entitled to an entirely in-person, on-campus education and experience, which includes face-to-face academic instruction, along with a host of other on-campus educational services and extracurricular activities.[29] Baylor made this offer in a number of places, including Baylor's website and recruitment brochures, and differentiated between in-person and online courses in its online course descriptions and academic catalogs.[30] The FAC further illustrates this promise by alleging that Baylor uses separate applications for its on-campus and online programs,[31] and floods prospective students with information about the on-campus and in-person experience during its admitted students day and orientation

[28] ROA.234
[29] ROA.251 ¶ 86.
[30] ROA.251-52 ¶¶ 88- 94 (identifying twenty separate representations regarding Baylor's campus and the benefits of attending in person at Baylor).
[31] ROA.255 ¶ 97.

events.[32] The FAC also alleges that Plaintiff accepted this offer and fulfilled her end of the bargain when she paid the tuition and fees due for the Spring 2020 semester.[33] And it alleges that Baylor suspended in-person instruction and ordered students home in March 2020, yet failed to provide students a refund of the tuition and fees that students pre-paid to guarantee those services.[34]

Thus, the FAC alleges all the elements of a breach of contract claim in Texas: "(1) a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach." *Brooks v. Excellence Mortg., Ltd.*, 486 S.W.3d 29, 36 (Tex. App. 2015) (internal quotation marks omitted). Recently, courts throughout the country have denied universities' motions to dismiss on similar breach of contract claims, finding that allegations regarding representations in university handbooks, catalogs, and brochures were sufficient to support a claim for breach of an implied contract.[35]

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[32] *Id.* ¶¶ 99-100.
[33] ROA.257 – 58, ¶ 115.
[34] ROA.241-44, ¶¶ 35-49.
[35] *Ford v. Rensselaer Polytechnic Inst.*, 507 F. Supp. 3d 406 (N.D.N.Y. 2020); *Gibson v. Lynn Univ.*, 504 F. Supp. 3d 1335 (S.D. Fla. 2020); *Nguyen v. Stephens Ins.*, No. 20-CV-04195-JSW, 2021 WL 1186341 (N.D. Cal. Mar. 30, 2021); *Metzner v. Quinnipiac Univ.*, No. 3:20-CV-00784 (KAD), 2021 WL 1146922 (D. Conn. Mar. 25, 2021); *Patel v. Univ. of Vermont & State Agric. Coll.*, No. 5:20-CV-61, 2021 WL 1049980 (D. Vt. Mar. 15, 2021); *Holmes v. Univ. of Massachusetts*, No. 2084CV01025-B, 2021 WL 1099323 (Mass. Super. Ct. Mar. 08, 2021); *Seslar v. Trustees of Purdue Univ.*, No. 79D02-2005-PL-000059, 2021 WL 1235493 (Ind. Super. Ct. Mar. 08, 2021); *In re Univ. of Miami COVID-19 Tuition & Fee Refund Litig.*, No. 20-22207-CIV, 2021 WL 1251139 (S.D. Fla. Mar. 5, 2021); *Moran v. Stonehill Coll. Inc.*, No. 2077CV00431, 2021 WL 965754 (Mass. Super. Ct. Feb. 16, 2021); *Verdini v. Dist. Bd. Of Trs. of Miami-Dade College*, No. 2020-17924-CA-44, 2021 WL 640338 (Fla. Cir. Ct. Feb. 01, 2021); *Little v. Grand*

The district court nevertheless dismissed the FAC without leave to amend. The court did not evaluate Plaintiff's factual allegations of implied contract, but instead dismissed the case based on the FRA,[36] a document that does not form the basis of Plaintiff's claims against Baylor. The court found that Plaintiff failed to establish a breach of contract claim because "the FRA is a valid contract which does not obligate Baylor to provide in-person, on-campus instruction."[37] This was in error. To reach this conclusion, the court ignored the plain language of the FRA,

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Canyon Univ., No. 20-cv-00795, 2021 WL 308940 (D. Ariz. Jan 29, 2021); *Doe v. Emory Univ.*, No. 1:20-cv-2002, 2021 WL 358391 (N.D. Ga. Jan. 22, 2021); *Grant v. Chapman Univ.*, No. 30202001146699CUBCCX, 2021 WL 684581 (Cal. Super. Ct. Jan. 22, 2021); *Rhodes v. Embry-Riddle Aeronautical Univ., Inc.*, No. 620CV927ORL40EJK, 2021 WL 140708 (M.D. Fla. Jan. 14, 2021); *McCarthy v. Loyola Marymount Univ.*, No. 2:20-cv-04668, 2021 WL 268242 (C.D. Cal. Jan 8, 2021); *Hiatt v. Brigham Young Univ.*, No. 1:20-cv-00100-TS, 2021 WL 66298 (D. Utah Jan. 7, 2021); *In re Bos. Univ. COVID-19 Refund Litig.*, No. CV 20-10827-RGS, 2021 WL 66443 (D. Mass. Jan. 7, 2021); *Bahrani v. Northeastern Univ.*, No. 20-cv-10946, 2020 WL 7774292 (D. Mass. Dec. 30, 2020); *Doe v. Bradley Univ.*, No. 20-1264, 2020 WL 7634159 (C.D. Ill. Dec. 22, 2020); *Bergeron v. Rochester Inst. of Tech.*, No. 20-cv-6283, 2020 WL 7486682 (N.D.N.Y. Dec. 18, 2020); *Chong v. Northeastern Univ.*, No. CV 20-10844-RGS, 2020 WL 7338499 (D. Mass. Dec. 14, 2020); *Saroya v. Univ. of the Pacific*, 2020 WL 7013598 (N.D. Cal. Nov. 27, 2020); *Kishinevsky v. Bd. Of Trs. Of Met. State Univ. of Denver*, No. 20CV31452, 2020 WL 7087313 (Colo. Dist. Ct. Nov. 23, 2020); *Spiegel v. Trustees of Indiana Univ.*, No. 53C06-2005-CT-000771, 2020 WL 7135320 (Ind. Cir. Nov. 19, 2020); *Verlanga v. Univ. of San Francisco*, No. CGC-20-584829, 2020 WL 7229855 (Cal. Super. Ct. Nov. 12, 2020); *Rosado v. Barry Univ.*, No. 1:20-cv-21813, 2020 WL 6438684 (S.D. Fla. Oct. 30, 2020); *Zahn v. Ohio Univ.*, No. 2020-00371JD, 2020 WL 6163919 (Ohio Ct. Cl. Oct. 19, 2020); *Waitt v. Kent State Univ.*, No. 2020-00392JD, 2020 WL 5894543 (Ohio Ct. Cl. Sep. 28, 2020); *Salerno v. Florida S. Coll.*, No. 8:20-cv-1494, 2020 WL 5583522 (M.D. Fla. Sept. 16, 2020); *Garland v. Western Michigan Univ.*, No. 20-000063-MK, 2020 WL 8365183 (Mich. Ct. Cl. Sep. 15, 2020); *Smith v. The Ohio State Univ.*, No. 2020-00321, 2020 WL 5694224 (Oh. Ct. Cl. Sept. 9, 2020); *McDermott v. Ohio State Univ.*, No. 2020-00286JD, 2020 WL 5239892 (Ohio Ct. Cl. Aug. 24, 2020); *Mellowitz v. Ball State Univ.*, No. 49D14-2005-PL-015026, 2020 WL 5524659 (Ind. Super. Aug. 14, 2020); *Milanov v. Univ. of Mich.*, No. 20-000056-MK, 2020 WL 7135331 (Mich. Ct. Cl. July 27, 2020); *Cross v. Univ. of Toledo*, No. 2020-00274JD, 2020 WL 4726814 (Ohio Ct. Cl. July 08, 2020).

[36] ROA.317-20.

[37] ROA.810.

selectively and inconsistently incorporated documents into the FRA without textual support, interpreted the incorporated documents to supply the meaning of terms and conditions that they did not contain or even reference, and improperly resolved factual questions and inferences in favor of Baylor.

A. The FRA Is Not a Contract

Dismissal of the FAC based on the FRA was improper because the FRA is not a valid contract. "To be enforceable, a contract must be based on consideration, also known as mutuality of obligation." *TLC Hosp., LLC v. Pillar Income Asset Mgmt., Inc.*, 570 S.W.3d 749, 760 (Tex. App.--Tyler 2018, pet. denied) (citing *Tex. Gas Utils. v. Barrett*, 460 S.W.2d 409, 412 (Tex. 1970)). "Lack of consideration occurs when the contract, at its inception, does not impose obligations on both parties." *Id.* at 761 (citing *Burges v. Mosley*, 304 S.W.3d 623, 628 (Tex. App.—Tyler 2010, no pet.)).

Here, the FRA imposes no obligation on Defendant. The Agreement reads, in pertinent part, "I understand that when I register or enroll in any class at Baylor University (Baylor) or receive any service from Baylor, I accept full responsibility to pay all tuition, fees, and other associated costs assessed as a result of my registration and/or receipt of services."[38] While the document purports to bind the

[38] ROA.318.

student to pay *associated* costs assessed as a result of receipt of services, the document does not actually require Defendant to provide any services in the first instance.

Likewise, to be enforceable under Texas law, a contract "must address all of its essential and material terms with a reasonable degree of certainty and definiteness." *Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (quoting *Pace Corp. v. Jackson*, 284 S.W.2d 340, 345 (Tex. 1955)). A contract is not legally binding if it lacks material terms "sufficiently definite to enable a court to understand the parties' obligations." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000). The "entire contract falls" if an "essential element" is unreasonably indefinite. *Neeley v. Bankers Tr. Co. of Texas*, 757 F.2d 621, 628 (5th Cir. 1985). Under Texas law, "[a] 'material term' is '[a] contractual provision dealing with a significant issue such as subject matter, price, payment, quantity, quality, duration, or the work to be done.'" *Bill Wyly Dev., Inc. v. Smith*, No. 01-16-00296-CV, 2017 WL 3483225 at *4 (Tex. App. – Houston [1st Dis.] Aug. 15, 2017, no pet.) (quoting *Tonkin v. Amador*, No. 01–07–00496–CV, 2009 WL 1424724, at *3 (Tex. App.–Houston [1st Dist.] May 21, 2009, no pet.)).

The FRA lacks even a barebones description of the essential terms of the agreement between Plaintiff and Baylor, such as the price, the duration of the contract, or Baylor's responsibilities to Plaintiff as an educational provider. That is

because the FRA is exactly what it says it is supposed to be: a loan agreement. The first paragraph states:

> I further understand and agree that my registration at Baylor and acceptance of the terms of this Financial Responsibility Agreement (Agreement) **constitutes a promissory note agreement** (i.e., **a financial obligation in the form of an educational loan** as defined by the U.S. Bankruptcy Code at 11 U.S.C. 523(a)(8)) in which Baylor is providing me educational services, deferring some or all of my payment obligation for those services, and I promise to pay for all assessed tuition, fees, and other associated costs by the scheduled due date as reflected in emails to me; in the invoices, statements, and schedules within the My Account tab of Baylor's electronic billing called the E-Bill System; or in the following link: www.baylor.edu/sfs/duedates.

FRA at 1 (emphasis added).[39]

Rather than treating the FRA as a simple promissory note that was part of a larger course of dealing between the parties, the district court read the FRA as something it never purports to be: a "fully integrated" statement of the contractual relationship between Plaintiff and Baylor.[40] Taken on those terms, the FRA's lack of essential terms and its utter failure to describe Baylor's contractual duties render it unenforceable. The only description of the services Baylor even arguably agreed to provide is a passing reference to "educational services" in the first paragraph of the FRA—in a sentence focusing on *Plaintiff's* obligation to pay tuition and fees.[41]

[39] ROA.318.
[40] ROA.814.
[41] *Id.*

There is no description of the type, format, or subject matter of the "educational services" to be performed, or anything else that would shed light on what Baylor was required to provide to Plaintiff.

The FRA also fails to describe any rights or remedies of Plaintiff with respect to the services rendered. For example, the FRA does not ensure placement in any course of study or contemplate the conferral of a degree—an important reason students would seek educational services in the first instance. The district court erred in interpreting the FRA as a "fully integrated" agreement when, on its face, it is an incomplete and ambiguous document that does not contain any ascertainable duties owed by Baylor. Standing alone, the document lacks mutuality of obligation and is therefore invalid. *See City of The Colony v. N. Texas Mun. Water Dist.*, 272 S.W.3d 699, 725 (Tex. App. – Fort Worth 2008, pet dism'd); 49 *Texas Practice Series, Contract Law* § 2.52 ("Because an illusory agreement is one where one party does not in fact have any obligations, it is possible to view such ostensible agreements as unenforceable for lacking mutuality of obligation." (citing *City of The Colony*, 272 S.W.3d at 729–30)).

The R&R (and the district court) did not explain how the FRA supplies a description of the services to be rendered. The R&R stated only that "Baylor agreed that it would provide 'educational services' for which King registered (the

services),"[42] but it did not explain how the mere mention of "educational services" is specific enough to form a material term. Indeed, the R&R did not analyze what the term "educational services" encompasses, or point to any definition or explanation of the scope of "educational services" in either the FRA itself or any other document that the R&R determined to be incorporated by reference into the FRA.

Likewise, the R&R acknowledged that the FRA, standing alone, lacks required essential terms to establish the duration of services and the price that will be paid.[43] However, the R&R forgave this incompleteness by interpreting the FRA to incorporate "three sources" that, according to the court, provided "all of the essential and material terms of 'the parties' agreement regarding the Spring 2020 academic term."[44] The three sources referenced in the FRA are "(1) pertinent email correspondences from Baylor to King, (2) the invoices, statements, and schedules in King's My Account tab of Baylor's E-Bill System, and (3) Baylor's online published payment schedule."[45] The district court concluded that Baylor's registration portal incorporated to define the duration of services, and the statements posted in the E-Bill System incorporated to define the price.[46]

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[42] ROA.812.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

This conclusion ignored the plain language of the FRA, which incorporates the three referenced sources only for the express purpose of establishing the due dates of Plaintiff's payments. In Texas, the plain language of an instrument controls. *Great Am. Ins. Co. v. Primo*, 512 S.W.3d 890, 893 (Tex. 2017). Thus, if the parties wish to incorporate an unsigned document into a contract, "the referring language in the original document must demonstrate the parties intended to incorporate all or part of the referenced document," and Texas courts recognize the longstanding interpretive principle that "reference to a document for a particular purpose incorporates that document only for the specified purpose." *Bob Montgomery Chevrolet, Inc. v. Dent Zone Companies*, 409 S.W.3d 181, 189–90 (Tex. App. – Dallas 2013, no pet.) (citing 17A *C.J.S. Contracts* § 402 (2011)); *see also Valero Marketing & Supply Co. v. Baldwin Contracting Co.*, No. H–09–2957, 2010 WL 1068105, at *5 (S.D. Tex. Mar. 19, 2010) (quote sheet that made general terms and conditions in other agreement applicable to "all prices" did not incorporate forum-selection clause, because forum-selection clause was not relevant to the quotation of prices); *LeBlanc, Inc. v. Gulf Bitulithic Co.*, 412 S.W.2d 86, 93 (Tex. Civ. App.-Tyler 1967, writ ref'd n.r.e.) (subcontract did not incorporate all terms in general contract where general contract stated subcontract incorporated terms of general contract "only insofar as they are applicable to this Sub–Contractor").

Here, the language could not be plainer: the FRA incorporates only the *due date* information from the three sources it references, and it even references this in the term it uses to collectively describe them. The pertinent clause reads:

> I promise to pay for all assessed tuition, fees, and other associated costs **by the scheduled due date as reflected** in emails to me; in the invoices, statements, and schedules within the My Account tab of Baylor's electronic billing called the E-Bill System; or in the following link: www.baylor.edu/sfs/duedates. **These three sources for the due date information are hereinafter collectively referred to as the "PUBLISHED/ASSIGNED DUE DATE."**[47]

As this text makes clear, the FRA relies on the three sources for the sole purpose of establishing due dates, and there was no mutual assent—express or implied—for the documents cited by the trial court to establish the meaning of other terms in the FRA. In the absence of such intent, "[c]ourts cannot make contracts for the parties." *Guzman v. Acuna*, 653 S.W.2d 315, 319 (Tex. App. – San Antonio 1983, dism'd). The district court ignored this foundational rule and the plain language of the FRA's incorporation clause.

Even if the FRA had purported to incorporate these sources for more than just the establishment of due dates, the sources do not supply any of the essential terms missing from the FRA, and *especially* do not support the district court's dispositive conclusion that Baylor was not obligated to provide in-person instruction. For one,

[47] ROA.318.

other than referencing due dates, the FRA does not specify or even address the contents of the documents to be incorporated or where to look for missing terms. Moreover, the documents themselves—to the extent they can be identified at all, *see infra*—simply contain no support for the sweeping claim that Baylor could provide instruction in any format it chose. And the district court wholly failed to conduct any analysis with respect to the inclusion or absence of any language in the referenced sources that defines "educational services" or otherwise discusses the mode of instruction that Baylor was obligated to provide. Thus, the district court's conclusion that Baylor was not required to provide in-person instruction is not actually tethered to the purportedly incorporated sources.

Indeed, with the exception of Baylor's online published payment schedule, the referenced sources are not even specifically identifiable. The FRA's reference to "emails to me" does not identify which emails, from whom they were sent, or when they were sent, and the district court could not evaluate them to determine whether they provided any definition of "educational services" because they were not a part of the pleadings. Similarly, Baylor provided only a snippet of the "invoices, statements, and schedules within the My Account tab of Baylor's electronic billing called the E-Bill System" as an exhibit to its motion to dismiss, and that snippet did not even contain a listing of the classes for which Plaintiff registered, much less any guidance on the "educational services" Baylor agreed to

provide or the mode of instruction required.[48] And the only incorporated document that can actually be identified, Baylor's published payment schedule, contains nothing but a list of due dates for particular semesters.[49]

Even though Baylor's online registration portal is not among the three sources referenced by the FRA, the district court also concluded—without explanation—that "Baylor's exclusive registration portal" ("BearWeb") is incorporated by reference to specify the duration of the contract (the Spring 2020 semester).[50] This conclusion has even less grounding in the text of the FRA. The FRA does not purport to incorporate all or part of that online platform (it is a website, not a specific document or set of documents). The FRA's only references to BearWeb are that a student may use it to drop classes or update their contact information. ROA. 318 ("In order to receive a full refund of applicable paid tuition and fees or a credit for applicable assessed tuition and fees, I must drop my classes via BearWeb or notify the Cashier's Office by email . . . ."); *id.* at 319 ("I understand and agree that I am responsible for keeping Baylor records up to date with my current physical addresses, email addresses, and phone numbers via BearWeb.").

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[48] *See* ROA.312-13 (showing illustrations of individual pages within Baylor's E-Bill system, none of which provided any information on specific courses).
[49] *See 2020-2021 Payment Due Dates*, https://www.baylor.edu/sfs/index.php?id=963223 (last visited May 17, 2021).
[50] ROA.812.

In fact, if the FRA somehow silently incorporated the BearWeb registration portal, that would only be another reason that Plaintiff's claim must survive a motion to dismiss. The FAC alleges that the registration portal contains representations, wholly ignored by the district court, about classes being provided in-person and on-campus (as compared to online).[51] And even the snippets from BearWeb provided in the declaration attached to Baylor's motion to dismiss show *physical, on-campus* locations for the registered classes. *See* ROA. 311 (referencing on-campus locations such as "Brooks College CHAPEL" and "Old Main 274").

Thus, in attempting to save the FRA and dismissing the FAC, the district court ignored Plaintiff's specific allegations, selectively incorporated documents, and drew every inference in favor of *Defendant*—all in contravention of the legal standard on a motion to dismiss. The FRA simply lacks too many essential terms of the parties' agreement to constitute an enforceable contract, much less the *sole* governing contract.

B. Even If the FRA Was a Valid Contract, It Is Incomplete and Ambiguous

Assuming for sake of argument that the FRA was a valid contract—it is not—its incompleteness and ambiguity concerning Baylor's obligations precluded dismissal of the FAC. The district court concluded that the FRA's merger clause

[51] ROA.256-57, ¶¶ 101-105.

"extinguishes any implied contracts separate from the FRA, including any promise of in-person instruction."[52] That is incorrect. Because the FRA is manifestly ambiguous, the district court should have considered Plaintiff's extrinsic evidence allegations to fill in the FRA's gaping holes notwithstanding the limited merger clause.

In Texas, a merger clause will not bar extrinsic evidence if a contract "is incomplete or ambiguous on its face." 49 *Tex. Prac., Contract Law* § 8.9 (2020); *Probado Techs. Corp. v. Smartnet, Inc.*, No. CIV.A. C-09-349, 2010 WL 2232831, at *6 (S.D. Tex. June 2, 2010) (citing *ISG State Operations, Inc. v. Nat'l Heritage Ins. Co.*, 234 S.W.3d 711, 719–20 (Tex. App. – Eastland 2007, pet. denied)) ("A court may disregard an integration clause and look to prior agreements if there is evidence of 'ambiguity, fraud, or accident' in the written contract."). "Such is the case where the instrument itself refers to terms or understandings not embraced in its provisions, or where the instrument is a mere skeleton note or reminder obviously not designed to be complete." *Allstate Ins. Co. v. Furr*, 449 S.W.2d 295, 301 (Tex. Civ. App. – Amarillo 1970, writ ref'd n.r.e.) (quoting McCormic & Ray, 2 *Texas Law of Evidence* 451). For example, the presence of a merger clause in an agreement "which refers to delivery numerous times and yet contains no delivery date" will not

[52] ROA.813.

bar extrinsic evidence. *Bob Robertson, Inc. v. Webster*, 679 S.W.2d 683, 689 (Tex. App. – Houston [1st Dist] 1984, no writ.).

Here, for all the reasons described above, neither the FRA nor the three sources it references for due date information supplied the essential terms of the parties' agreement, including any description of the "educational services" for which Plaintiff agreed to pay. Recently, the Michigan Court of Claims was presented with a very similar set of facts in *Garland v. Western Michigan University*, No. 20-000063-MK, 2021 WL 305744, (Jan. 6, 2021). There, as here, a financial responsibility agreement contained a merger clause, and the defendant university sought summary disposition on the ground that the document constituted the complete agreement between it and the student. *Id.* at *3. The court rejected the university's argument because, "notwithstanding the merger clause in the agreement, parol evidence is required due to the fact that the Financial Responsibility Agreement is incomplete on its face." The court explained:

> Notably, the Financial Responsibility Agreement refers to "services" and "fees," but missing from the agreement is what the "services" or "fees" cover. That is, while it is apparent that students are liable for payment under the Financial Responsibility Agreement, it is not apparent from the face of the document that for which students are liable to pay. The subject-matter of the agreement is missing. The types of services for which the students are contracting, as well as the mode, manner, and frequency of instruction, or even the credit conferred upon completion of classes or the conditions upon conferring credits, are completely missing from the agreement. Also missing from the agreement are critical terms such as how much WMU charged students per credit hour or per semester. A contract that charges students for

> services, but without specifying how much is charged or what the services even are, appears to be incomplete on its face. As a result, the Court agrees with plaintiff that parol evidence appears to be necessary "for the filling of gaps" in the parties' agreement, notwithstanding that the agreement purports to be integrated.
> *Id.*

Garland is not controlling authority, but it is instructive. When, as in *Garland* and here, a document is incomplete on its face, extrinsic evidence may be used to fill in essential terms notwithstanding the presence of a merger clause. *ISG*, 234 S.W.3d at 719. Other courts have reached similar conclusions in this context:

> [University of Miami] argues that prior to registering for classes all students must sign and submit a Financial Responsibility Statement through which the students assume responsibility "to pay any and all tuition, fees and/or other miscellaneous charges" in exchange for registering for classes. UM notes that the Financial Responsibility Statement does not distinguish between in-person or remote classes and, therefore, UM had no contractual duty to provide in-person instruction. Plaintiffs respond that the Financial Responsibility Statement is not a contract in that it does not address numerous material terms concerning the students' enrollment, including the cost and amount of tuition and fees owed. The Court agrees. The Financial Responsibility Statement may be relevant to the formation of the alleged contract between Plaintiffs and UM, but it is not the entirety of the parties' agreement.

Univ. of Miami COVID-19 Tuition & Fee Refund Litig., No. 20-22207-CIV, 2021 WL 1251139, at *5 (S.D. Fla. Mar. 5, 2021).

Indeed, the FRA's merger clause does not even *claim* to extinguish all implied agreements between Baylor and Plaintiff on subjects beyond the scope of the FRA. Rather, the limited merger clause states:

> This Agreement supersedes all prior understandings, representations, negotiations, and correspondence between the student and Baylor, constitutes the entire agreement between the parties **with respect to the matters described**, and shall not be modified or affected by any course of dealing or course of performance.[53]

The "matters described" in the FRA are matters related to financial obligation, payments, billing, and a few other topics like privacy of student records, but nothing about the "educational services" Baylor was obligated to provide in exchange for Plaintiff's financial obligations. If the parties intended to treat the FRA as the full expression of their agreement, they could have said so. They did not.

Any provision must be interpreted in light of the contract as a whole and the circumstances present when the contract was entered into. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). Here, the FRA purports to place a wide range of obligations on Plaintiff related to her financial responsibility, but it contains no concrete description or information regarding the key benefit of the bargain for Plaintiff: the scope and nature of the "educational services" that Baylor agreed to provide to her.

Under Texas law, this lopsidedness is directly relevant to ascertaining the scope of the FRA's merger clause. In *Kelly v. Rio Grande Computerland Group*, 128 S.W. 3d 759 (Tex. App. – El Paso 2004, no pet.), a purchase agreement

[53] ROA.320. (**emphasis added**).

contained a merger clause which stated that the agreement extinguished all previous negotiations "with respect to the subject matter of this Agreement." *Id.* at 765. The court found that it was reasonable to interpret "the subject matter of this Agreement" to be referring only to the purchase of stock (the primary focus of the purchase agreement), rather than "all agreements between the parties," and held that extrinsic evidence should be allowed to evaluate the terms of the deal between the parties. *Id.* at 768. The court further found that "[t]he broader range of subjects" discussed by the parties in documents other than those in the purchase agreement made it "reasonable that the Purchase Agreement was only one of a number of contracts to follow the initial agreement of the parties." *Id.* at 769. And, in finding that the parties' agreements were not clearly merged as a matter of law, the court also found it instructive that the purchase agreement discussed "all the benefits flowing" to one party but "none of the benefits that were to flow" to the other party. *Id.*

Here, just as in *Kelly*, the FRA contains all the benefits that flow to Baylor, but nothing about Plaintiff's essential rights and remedies. And the FRA's scope is narrow, with its central purpose clearly being to serve as a promissory note establishing *Plaintiff's* financial obligations.

This incompleteness, ambiguity, and one-sidedness demonstrates the parties' lack of mutual intent to make the FRA the exclusive agreement between them. *See Kishinevsky v. Bd. of Trustees of Metropolitan State University of Denver*, No.

20CV31452, 2020 WL 7087313, at *2 (Colo. Dist. Ct. Nov. 23, 2020) (observing that student financial responsibility agreement "purports to be a promissory note without stating the principal debt amount, which necessarily indicates that other documents must be resorted to flesh out its terms"). Thus, the district court should have looked to extrinsic evidence to ascertain the full scope and terms of Plaintiff's agreement with Baylor. That inquiry is a question of *fact* that cannot be resolved on the pleadings. *See Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n*, 205 S.W.3d 46, 56 (Tex. App. – Dallas 2006, pet. denied) (ascertaining the intent of the contracting parties is an issue of fact); *Harrison v. Thompson*, 447 F.2d 459, 460 (5th Cir. 1971) (questions of fact render it "inappropriate to dispose of the case by dismissal").

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S UNJUST ENRICHMENT CLAIM

Under Texas law, it is well established that claims based on unjust enrichment may be brought *in the alternative*, especially when one party challenges the contract upon which the other party seeks contractual relief. As the court explained in *Click v. Gen. Motors LLC*, No. 2:18-CV-455, 2020 WL 3118577 (S.D. Tex. Mar. 27, 2020), unjust enrichment may be pleaded "when *the validity or terms* of the express contract are in dispute," and both "the Texas Supreme Court and the Fifth Circuit have recognized unjust enrichment claims." *Id.* at *9 (emphasis added, quoting *Team Healthcare/Diagnostic Corp. v. Blue Cross & Blue Shield of Texas*, No. 3:10-

CV-1441-BH, 2012 WL 1617087, at *7 (N.D. Tex. May 7, 2012)). Other cases are in accord. *See, e.g., PharMerica Corp. v. Advanced HCS LLC,* No. 2:17-CV-180-JRG, 2017 WL 7732174, at *4 (E.D. Tex. July 13, 2017) ("Plaintiffs are permitted to plead unjust enrichment in the alternative;" "While the Texas Supreme Court has not answered this question unequivocally, it has repeatedly suggested in several cases that unjust enrichment is a separate cause of action"); *Leal v. Bank of Am., N.A.*, No. CIV.A. M-11-346, 2012 WL 1392089, at *5 (S.D. Tex. Apr. 20, 2012) ("While [p]laintiffs cannot *recover* for *quantum meruit* where a valid express contract exists, a party to a contract may nonetheless seek alternative relief under both contract and quasi-contract. Thus, even though Leal's claims arise out of the contractual agreement, her claim for unjust enrichment does not fail for this reason") (emphasis in original; internal quotation marks omitted); *see also Assure Re Intermediaries, Inc. v. Western Surplus Lines Agency, Inc.*, No. 1:20-CV-189-H, 2021 WL 2402485, at *6 (N.D. Tex. June 11, 2021) ("Assure Re is entitled to plead inconsistent facts in support of its alternative claims").

Here, Plaintiff has asserted a claim for breach of contract and, *in the alternative*, for unjust enrichment. As stated in the FAC and herein, Plaintiff's breach of contact claim is based not on the FRA, but on implied contracts evidenced

by the circumstances surrounding their formation, including the parties' communications, conduct, and course of dealing.[54]

However, the district court erroneously concluded that Texas does not recognize an independent claim for unjust enrichment, and then recommended dismissal of the claim—even if treated as one for *quantum meruit*.[55] Thus, the district court (i) improperly ignored case law that rightly focuses on the nature of the unjust enrichment being asserted, and (ii) prematurely determined that the FRA, as characterized by Defendant, was a valid contract that wholly governed Defendant's relationship with Plaintiff. The district court thus erroneously failed to address and follow well-established authority permitting alternate pleading, and applying that principle here, unless and until the FRA or some other agreement is deemed the sole contract between the parties and its terms are not in dispute, Plaintiff can (and did) properly plead *an alternate* claim for unjust enrichment. *See Click*, 2020 WL 3118577 at *9; *PharMerica Corp.*,WL 7732174 at *4; *Leal*, 2012 WL 1392089 at *5; *Assure Re Intermediaries.*, 2021 WL 2402485 at *6. And the district court also erroneously recommends that Plaintiff not be permitted to amend in order to assert her unjust enrichment claim in another form, such as for money had and received. *See, e.g., Assure Re Intermediaries, Inc*, 2021 WL 2402485 at *6 ("To prove a claim

[54] *See* ROA.251-58, ¶¶ 86-115.
[55] ROA.815-16.

for money had and received, a plaintiff must show that a defendant holds money which in equity and good conscious belongs to [the plaintiff]…[T]he FAC clearly alleges that Western Surplus has failed to pay Assure Re under the 2011 and 2013 agreements from July 2019 until the present, despite continuing to receive commission and payouts from the OG Program and the Auto Program. [] And any evidence to the contrary is more appropriately considered on summary judgement or at trial.").

In sum, the district court (i) wrongly and prematurely determined contractual questions in Defendant's favor so as to preclude a free-standing unjust enrichment claim, (ii) compounded that error by applying such determination to also preclude a *quantum meruit* claim, and (iii) failed to consider any other quasi-contractual claim based on unjust enrichment, such as money had and received.[56]

[56] Several similar cases with students seeking refunds from colleges and universities in the wake of COVID-related campus closures have applied other states' similar laws recognizing the propriety of pleading equitable claims in the alternative. *See, e.g., Botts v. Johns Hopkins Univ.*, No. CV ELH-20-1335, 2021 WL 1561520, at *18 (D. Md. Apr. 21, 2021) ("[A]lthough a plaintiff may not recover under both contract and quasi-contract theories, [she] is not barred from pleading these theories in the alternative where the existence of a contract concerning the subject matter is in dispute.") (internal quotation marks omitted); *Hiatt v. Brigham Young Univ.*, No. 1:20-CV-00100-TS, 2021 WL 66298, at *5 (D. Utah Jan. 7, 2021) ("[H]ere, as mentioned previously, Plaintiff's Complaint does not necessarily allege an express contract. One of the questions presented by the Complaint is whether there is an enforceable contract between the parties. The facts and evidence may establish an express contract, an implied-in-fact contract, or no enforceable contract between the parties. Thus, the unjust enrichment claim is not precluded at this stage.").

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system, which sends notification of such filing to the parties that are registered or otherwise entitled to receive notices in this action, including Counsel for Defendant-Appellee:

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I further certify that (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the filed document in compliance with Fifth Circuit Rule 25.2.1; (3) the document has been scanned with the most recent version of Avira antivirus software and is free of viruses.

/s/ Eric M. Poulin

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