STATE OF MICHIGAN
IN THE SUPREME COURT

KATELYN ZWIKER,
and all others similarly situated,

Plaintiff-Appellant,

v.

LAKE SUPERIOR STATE UNIVERSITY and BOARD OF TRUSTEES OF LAKE SUPERIOR STATE UNIVERSITY,

Defendants-Appellees.

MSC Case No. 164213

COA Case No. 355128

Court of Claims
Case No. 20-000070-MK
Hon. Michael J. Kelly

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DEFENDANTS-APPELLEES' ANSWER TO PLAINTIFFS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. With regard to the interpretation of the Tuition and Housing Contracts between LSSU and its students, is the interpretation an issue of significant public interest, or does the interpretation involve a legal principle of major significance to the State's jurisprudence, where the Contracts are unambiguous, require only the application of long-standing contract law principles, and affect only LSSU students who were enrolled during the 2019-2020 academic year?

Plaintiff says "Yes."

Defendants-Appellees say "No."

2. Did the Court of Appeals clearly err and cause material injustice in holding that LSSU did not breach the Tuition Contract between LSSU and its students where the Court of Appeals applied long-standing contract law principles to interpret the unambiguous Tuition Contract, where the Tuition Contract explicitly required the payment of "tuition, fees and other associated costs" upon registration for "any class" or receipt of "any service," and where it is undisputed that Plaintiff registered for classes and received services?

Plaintiff says "Yes."

Defendants-Appellees say "No."

The Court of Appeals says "No."

The Court of Claims says "No."

3. Did the Court of Appeals clearly err and cause material injustice in holding that LSSU did not breach the Housing Contract between LSSU and its students where the Court of Appeals applied long-standing contract law principles to interpret the unambiguous Housing Contract, where the Housing Contract prohibited refunds for unused meals, refused refunds for

moving off campus, and excused non-performance of LSSU, where Plaintiff voluntarily chose to leave campus despite provisions of housing and meals had she stayed, and where Plaintiff was permitted to reside in University housing throughout the entirety of the semester?

Plaintiff says "Yes."

Defendants-Appellees say "No."

The Court of Appeals says "No."

The Court of Claims says "No."

4. Did the Court of Appeals clearly err and cause material injustice in dismissing Plaintiff's claims for unjust enrichment where the Tuition and Housing Contracts governed the payment of tuition, fees, and room and board, thereby foreclosing the theory of unjust enrichment?

Plaintiff says "Yes."

Defendants-Appellees say "No."

The Court of Appeals says "No."

The Court of Claims says "No."

INTRODUCTION

This case entails mere application of well-settled contract law. Plaintiff Katelyn Zwiker ("Plaintiff") began her collegiate education at Lake Superior State University ("LSSU")[1] in the fall of 2019. She signed two contracts related to the payment of tuition and fees and room and board: the Financial Responsibility Agreement (the "Tuition Contract") and the 2019-20 Residence Hall / Dining Service Contract, which incorporates by reference the LSSU On-Campus Resident Handbook (collectively, the "Housing Contract"). In accordance with the Tuition Contract, she registered and paid for classes (including tuition and required fees), received educational instruction and opportunity, and achieved academic credit. And, in accordance with the Housing Contract, she paid for housing and meals, occupied a dorm room, and participated in dining services. Then, a global pandemic ensued. At the onset of the COVID-19 pandemic, LSSU complied with guidance from the Centers for Disease Control and Prevention and Governor Whitmer's Executive Orders, which prohibited in-person instruction. LSSU transitioned from "face-to-face instruction" to an "online/virtual learning environment" and encouraged students to abide by the applicable government mandates. In response to critical public health measures, Plaintiff alleged breach of contract and unjust enrichment against LSSU. The Court of Claims and the Court of Appeals held that neither the Tuition Contract nor the Housing Contract were breached, reasoning that the Contracts were unambiguous, and that Plaintiff received all to which she was entitled thereunder, regardless of the modifications necessitated by the pandemic, granting and affirming summary disposition in favor of LSSU.

[1] Plaintiff's Complaint names LSSU and its Board of Trustees (the "Board") as co-defendants. Def. Appx., Ex. 1: Plaintiff's Complaint. LSSU is an improper defendant because only the Board has the "right to sue and be sued." MCL 390.391(2)(c). For simplicity, this Answer references LSSU and the Board, collectively or interchangeably, as "LSSU."

Plaintiff's application for leave to appeal should be denied. Appeals to this Court are reserved for exceptional circumstances, none of which are present here. Plaintiff wildly inflates the complexity of her simplistic contract claims and the consequences if this Court does not intervene. Plaintiff states that "vast numbers of claims now and in the future are affected by the lower court decisions," and that the very "nature of the contractual relationship between all students and public universities in this state are at issue." In actuality, the *only* claims affected by the lower court decisions are those of Plaintiffs[2] because the lower court decisions interpreted *only* the Plaintiffs' specific tuition and housing contracts, meaning the *only* contractual relationships at issue are the contractual relationships between the parties.

As discussed below, LSSU entered into binding legal contracts with its students governing the payment of tuition, fees, and room and board. Relying on the unambiguous contract language, the lower courts interpreted the legal contracts and found that students received all to which they were entitled in exchange for their payments. Application of well-settled contract law to the facts of an exceedingly rare and novel fact pattern does not warrant this Court's review.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Plaintiff signed two relevant documents that govern this case: the Tuition Contract and the Housing Contract. Def. Appx., Ex. 2: Tuition Contract; Def. Appx., Ex. 3: Housing Contract.

Pursuant to the Tuition Contract, Plaintiff agreed that, when she registered for "any class" or received "any service" from LSSU, she accepted "full responsibility to pay all tuition, fees and other associated costs assessed at any time as a result of [her] registration and/or receipt of

[2] "Plaintiffs" refers, collectively, to Zwiker and Kevin Horrigan and Jael Dalke, who brought suit against Eastern Michigan University ("EMU") (MSC Case No. 164214) and Central Michigan University ("CMU") (MSC Case No. 164215), respectively. The three cases were consolidated by the Court of Appeals. *Zwiker v Lake Superior State University*, __ Mich App __ (2022) (Docket No. 355128); Pl. Appx., Ex. 1: MCOA Opinion.

services." Def. Appx., Ex. 2: Tuition Contract, p. 1, "Payment of Fees/Promise to Pay." Students were charged a flat "One Rate" fee of $6,000 during the Spring 2020 semester, meaning students paid the same amount regardless of the modality of delivery (i.e., in-person, online, hybrid). Def. Appx., Ex. 4: "One Rate" Tuition Structure. The Tuition Contract also includes a merger clause and, therefore, "constitutes the entire agreement between the parties with respect to the matters described, and shall not be modified . . . ." Def. Appx., Ex. 2: Tuition Contract, p. 2.

Plaintiff also expressly agreed to the Housing Contract. In exchange for room and board payments, LSSU would provide "living space, facilities, furnishings, and meals (as applicable) in accordance with the terms of [the] contract and University policies." Def. Appx., Ex. 3: Housing Contract, "Terms and Conditions." Plaintiff acknowledged that she was ineligible for a refund for "unused meals," or if she moved to private housing during the semester. *Id*., ¶¶ 2, 8, "Period of Occupancy," "Subletting." Even if Plaintiff were to seek any prorated room and board, which LSSU is not required to provide under the terms of the Housing Contract, she must "complete the checkout procedure" as a prerequisite thereto, which includes removing all "personal belongings out of the room." *Id*., "The Navigator," p. 9.[3] The Housing Contract also contains a force majeure provision in the event that LSSU is "prevented from completing performance of any obligations [thereunder] by act of nature [or God] or other occurrences whatsoever which is beyond the control of the parties." *Id*., ¶¶ 22, 23, "Force Majeure," "Other Provisions." Upon the intervening occurrence of the specified events, LSSU is "excused from any further performance of obligations and undertakings." *Id*.

[3] The Navigator is incorporated as part of the Housing Contract: "The LSSU On-Campus Resident Handbook and Residence Hall / Dining Service Contract will constitute the Lake Superior State University Housing Contract. This agreement legally binds both parties when the Residence Hall / Dining Service Contract is received and accepted by Campus Life and Housing and/or when the resident takes occupancy." Def. Appx., Ex. 3: Housing Contract, "The Navigator," p. 2.

LSSU complied with the Tuition and Housing Contracts in response to the COVID-19 pandemic. From January 2020 to March 2020, LSSU provided in-person, hybrid, and virtual educational services. Ex. 1: MCOA Opinion, p. 3. Then, in March 2020, and for student safety, LSSU informed students that it was suspending face-to-face instruction and moving to a virtual format for the provision of educational services. Def. Appx., Ex. 1: Plaintiff's Complaint, ¶¶ 2, 11, 26, 29. Students were permitted to remain in their residence halls and were provided active dining services. Pl. Appx., Ex. 1: MCOA Opinion, p. 5. LSSU requested that students comply with the applicable "stay in place" mandates, if they were to leave campus. *Id*., pp. 5-6. Governor Whitmer's Executive Order 2020-21 prohibited travel between two residences. *Id*., pp. 4-5. Plaintiff, of her own accord, chose to leave campus before the end of the Spring 2020 semester. *Id*., p. 9. LSSU never prohibited Plaintiff from returning to campus, and LSSU students who were not actively on campus after the issuance of the stay-in-place mandates could have returned to campus because deactivated card access could be reversed by request. *Id*., p. 15.

Plaintiff filed a lawsuit in the Court of Claims, alleging breach of the Tuition and Housing Contracts and unjust enrichment. Def. Appx., Ex. 1: Plaintiff's Complaint. LSSU filed a motion for summary disposition under MCR 2.116(C)(8) and (10), which the Court of Claims granted, finding there was: (1) no breach of the Tuition Contract because Plaintiff agreed to pay all tuition and fees as a result of her registration and/or receipt of services, which need not be delivered via live, in-person instruction; (2) no breach of the Housing Contract because students were permitted to remain in their residence halls, access dining services, and keep their belongings in on-campus housing through the end of the contractual period, and students were notified of their ineligibility for reimbursement; and (3) no unjust enrichment because the Tuition and Housing Contracts "foreclose[d] [Plaintiff's] ability to proceed" under an equitable theory. Pl. Appx., Ex. 8: COC

Opinion, pp. 8-12. Plaintiff's motion for reconsideration was denied. Pl. Appx., Ex. 9: COC Reconsideration Order. The Court of Appeals affirmed the grant of summary disposition on similar grounds. Pl. Appx., Ex. 1: MCOA Opinion.

STANDARDS OF REVIEW

A party seeking leave to appeal must show at least one of the enumerated grounds for allowing appeal. MCR 7.305(B). Plaintiff asserts, but fails to substantiate, that her claim has "a significant public interest" with regard to the state or one of its agencies/subdivisions, that her claim "involves a legal principle of major significance to the state's jurisprudence," and that the decision by the Court of Appeals is "clearly erroneous and will cause material injustice." MCR 7.305(B)(2), (3), (5)(a).[4]

This Court reviews rulings on motions for summary disposition de novo. *Groncki v Detroit Edison Co*, 453 Mich 644, 649 (1996).

Summary disposition is appropriate under MCR 2.116(C)(8) when the "opposing party has failed to state a claim on which relief can be granted." A motion thereunder "tests the legal sufficiency of the complaint," and must be granted where "no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (internal citation omitted). A motion for summary disposition under MCR 2.116(C)(10) is proper when "there is no genuine issue as to any material fact." Plaintiff "may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial." *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). A court evaluates a "motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition." *Maiden*, 461 Mich at 121. For

[4] Plaintiff appears to mistakenly identify Subsection (4)(b) instead of Subsection (3) of MCR 7.305(B) in the Standard of Review. Pl.'s Application, p. 4.

purposes of summary disposition, "the mere possibility that the claim might be supported by evidence produced at trial" is insufficient. *Id*.

ARGUMENT

I. INTERPRETATION OF THE TUITION AND HOUSING CONTRACTS BETWEEN LSSU AND ITS STUDENTS IS NOT AN ISSUE OF SIGNIFICANT PUBLIC INTEREST AND DOES NOT INVOLVE A LEGAL PRINCIPLE OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE.

In an attempt to demonstrate significance, Plaintiff suggests that the "contractual issue raised by this case" (i.e., "what does a university owe a student who pays tuition, fees, and costs") "applies to *each and every student* at *all universities* across this state *now and in the future*." Pl.'s Application, p. 5. Plaintiff either misunderstands or misrepresents her case because the "contractual issue raised by this case" only asks whether LSSU breached its Tuition or Housing Contracts for the 2019-2020 academic year. The lower courts' rulings in *Zwiker* specifically addressed the unambiguous contracts between LSSU and Plaintiff. There are no far-reaching principles at play, and the public interest is unaffected. Contract interpretation that aligns with decades of precedent is not an issue of "significant public interest."

Plaintiff cites *Page v Klein Tools, Inc*, 461 Mich 703, 718; 610 NW2d 735 (2000) and *Regents of the University of Michigan v Ewing*, 474 US 214; 106 S Ct 507; 88 L Ed 2d 523 (1985) to suggest that this Court ought to hold that "the contractual relationship" between universities and students are not express and, consequently, "must be implied by the nature of the relationship and the totality of the circumstances." Pl.'s Application, pp. 5-6. Plaintiff's argument is logically unsupported and fundamentally flawed. *Page* addressed a negligence claim; *Ewing* addressed a student's property rights; and, most importantly, there are, in fact, express contracts between Plaintiff and LSSU, pre-empting an implied relationship, as discussed below, and negating any proclaimed need to develop "this state's jurisprudence" as to the "legal nature of the student-

university relationship." *Id.*, p. 6. The Tuition and Housing Contracts, not "this state's jurisprudence," control the "legal nature" of the relationship between Plaintiff and LSSU. The case actually turns on the specific language of the contracts at issue. To the extent that contracts between universities and students, now or in the future, contain different terms, the decision in this case only provides that courts must give effect to the parties' contractual terms – this is nothing more than a reiteration of basic contract law principles.

II. THE COURT OF APPEALS DID NOT ERR NOR CAUSE MATERIAL INJUSTICE IN HOLDING THAT PLAINTIFF RECEIVED ALL TO WHICH SHE WAS ENTITLED UNDER THE TUITION AND HOUSING CONTRACTS.

With regard to the Tuition Contract, the Court of Appeals held that the Court of Claims did not err in concluding "that unambiguous terms of the tuition contract rendered students liable for paying tuition once they registered for classes." Pl. Appx., Ex. 1: MCOA Opinion, p. 12. The Court of Appeals agreed with the Court of Claims that parol evidence would be inadmissible in light of the merger and integration clauses and the unambiguous language of the contract, which cannot be superseded by the unsubstantiated "expectations" of live, in-person instruction. *Id.*, p. 13.

With regard to the Housing Contract, the Court of Appeals held that the purpose of the Housing Contract was not frustrated by the COVID-19 pandemic because it "expressly contemplated circumstances under which it is necessary to remove students from housing for reasons of health, safety, and welfare." *Id.*, pp. 14-15. Furthermore, Plaintiff "failed to show that [LSSU] breached the housing contract by preventing her from participating in it" because LSSU's "residence halls remained open." *Id.*, p. 15.

As discussed below, in holding that there was no breach of either the Tuition or Housing Contract, the Court of Appeals applied well-settled contract law principles. The decision is correct and will not cause material injustice.

A. The Court of Appeals did not err in affirming the Court of Claims' dismissal of Plaintiff's claims for breach of the Tuition Contract, including other fees charged.

Plaintiff cannot prove there was a breach of the Tuition Contract nor that she suffered damages, as is required. See *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014) (holding a *prima facie* breach of contract case requires a plaintiff to establish that "(1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach"[5]). The Tuition Contract requires students to pay tuition and fees if they register for "any class" or receive "any service." Def. Appx., Ex. 2: Tuition Contract, p. 1. It is undisputed that Plaintiff registered for classes, paid tuition and fees, and consequently received services by way of academic instruction. Def. Appx., Ex. 1: Plaintiff's Complaint, ¶¶ 10-11, 26, 29. LSSU did not breach this clear arrangement because Plaintiff dislikes the instruction provided.[6]

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[5] Though not addressed by the Court of Appeals, the fact that Plaintiff suffered no damages is fatal to her claim. "[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made," and damages are generally limited "to the monetary value of the contract had the breaching party fully performed under it." *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty . . . [T]he damages must not be conjectural or speculative in their nature . . . ." *Doe v Henry Ford Health Sys*, 308 Mich App 592, 601-602; 865 NW2d 915 (2014) (internal citations omitted). Plaintiff alleges that "she is entitled to damages equal to the portion of the semester" during which LSSU failed "to provide instruction for which she paid tuition." Pl's Application, p. 1. Plaintiff's suggestion that there is more value to in-person instruction is speculative, both with regard to Plaintiff's educational experience and to her finances. From an economic standpoint, there is no refund or reduction "commensurate" to the difference between tuition costs for live instruction as compared to tuition costs for online instruction because LSSU assigns an equal monetary value to both in-person and online modalities with the "One Rate" tuition structure. Plaintiff pleads conjecturally that she is damaged because there must exist "unused" funds, but, like every other semester, LSSU set and charged fees at its discretion and provided services to which Plaintiff had access. The transition to remote instruction and programming did not constitute a breach of the Tuition Contract, and neither change caused Plaintiff to suffer any damages.

[6] Plaintiff's argument also ignores the reality of modern university instruction models. Even where course instruction is "in person," there are often online or virtual elements (e.g., lectures, quizzes, notes). "In-person" courses may include cancelled sessions or instructor changes for miscellaneous

1. LSSU did not breach the unambiguous Tuition Contract.

The Tuition Contract states, in relevant part, that, when Plaintiff registered for "any class" or received "any service" from LSSU, she accepted "full responsibility to pay all tuition, fees and other associated costs assessed at any time as a result of [her] registration and/or receipt of services." Def. Appx., Ex. 2: Tuition Contract, p. 1. As the Court of Appeals held, there was no breach of this provision.

A court cannot imply terms of a contract, and it must interpret a contract as written: "This Court examines contractual language and gives the words their plain and ordinary meanings . . . '[I]f the language of the contract is unambiguous, we construe and enforce the contract as written.'" *Coates v Bastian Bros*, 276 Mich App 498, 503-504; 741 NW2d 539 (2007), citing *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Just as the Court "may not impose an ambiguity on clear contract language," neither may Plaintiff. *Coates*, 276 Mich App at 503, citing *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). "If the language of the [Tuition Contract] is unambiguous, we construe and enforce the contract as written" because "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Barshaw v Allegheny Performance Plastics, LLC*, 334 Mich App 741, 748 (2020) (internal citations omitted); see also *Bodnar v St John Providence, Inc*, 327 Mich App 203, 220 (2019) ("A court's primary obligation when interpreting a contract is to determine the intent of the parties . . . A contract is not open to judicial construction unless an ambiguity exists.").

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reasons (e.g., professor is ill, bad weather). If a plaintiff can claim that she did not get what she bargained for because she disliked some element of the instruction, no matter what a university does, it could be subject to potential breach of contract claims under this theory. The lower courts recognized that no promise of a particular mode or method of instruction is made in the unambiguous Tuition Contract, and that Plaintiff did not assert a viable claim based on her dislike of the instruction method received (which was required due to pandemic-related restrictions).

The Tuition Contract specifies that all students must "Accept" its terms before they are permitted to register for classes. Def. Appx., Ex. 2: Tuition Contract, p. 1. Here, Plaintiff registered for and received 15 credits, which triggered her obligation to pay "all tuition, fees, and other associated costs." *Id*. She also received educational "services," which encompassed live instruction pre-pandemic and virtual instruction post-pandemic. Def. Appx., Ex. 1: Plaintiff's Complaint, ¶¶ 10-11, 26, 29. Unquestionably, such instruction constitutes the receipt of "any" service under the Tuition Contract.

The Merriam-Webster dictionary defines "service" as "the work performed by one that serves," and "any" as "one or some indiscriminately of whatever kind." *Merriam-Webster's Collegiate Dictionary* (11th ed). This definition is consistent with the common use of the terms "services" and "any." See *Doeren Mayhew & Co v CPA Mutual Ins Co of America Risk Retention Group*, 633 F Supp 2d 434, 440 (ED Mich, 2007) (defining "services" as acts "done for the benefit of others" in reliance upon "common usage and dictionary definitions"). In the context of the Tuition Contract, LSSU performed work for Plaintiff (i.e., academic instruction and programming), and work being of "whatever kind" (i.e., in-person for part of the semester, and remote for the rest), Plaintiff received what LSSU was contractually obligated to provide. There is no ambiguity here. LSSU had the contractual freedom to decide what academic services it provided. And, that it provided some service is all that matters, even if there were some other service that was better. Plaintiff did not bargain for "a" service or "the" service. She bargained for "any" service.

Similarly, like the expense of tuition, Plaintiff was charged certain fees, and she agreed to pay "all . . . fees and other associated costs." Def. Appx., Ex. 2: Tuition Contract, p. 1. Fees did not guarantee access to particular events, venues, or activities, and, throughout the Spring 2020

semester, students continued to have the opportunity to participate in and benefit from programming provided by the Campus Life Office and student government. Def. Appx., Ex. 5: Student Fees; Pl. Appx., Ex. 1: MCOA Opinion, p. 5.

Under the Tuition Contract, LSSU performed its obligations, and Plaintiff was required to "pay all tuition, fees and other associated costs," regardless of the instructional or programming modality.[7] Def. Appx., Ex. 2: Tuition Contract, p. 1.

2. The unambiguous Tuition Contract precludes consideration of additional evidence.

Plaintiff contends, for the first time, that the question as to what constitutes LSSU's obligations under the Tuition Contract remains open because "the contract is implied-in-fact," and, accordingly, subject to an evaluation of the parties' "reasonable expectations based on an objective standard given the totality of the circumstances."[8] Pl.'s Application, pp. 6-7. Presumably, Plaintiff is attempting to re-characterize her argument to align with the plaintiffs' claims in *Shaffer v George Washington University*. *Id*., n. 3; *Shaffer v George Washington University*, United States Court of Appeals for the District of Columbia Circuit Case No 21-7040, Opinion and Order dated March 8, 2022. In *Shaffer*, the federal court in a different jurisdiction evaluated different contracts and permitted the contemplation of implied promises where the jurisdiction's case law contains specific precedent that allows for implied contracts between universities and students based upon

[7] LSSU actually charges an additional fee for online courses. Plaintiff was not charged this additional fee as a result of the transition to virtual instruction. Def. Appx., Ex. 5: Student Fees.

[8] Throughout this litigation, Plaintiff has repeatedly altered her foundational arguments after each ruling in LSSU's favor, putting forth unpreserved and alternative theories at each rung of the appeal process. See Pl. Appx., Ex. 1: MCOA Opinion, pp. 8, 12, 14, n. 3, n. 4. This Court should not award or entertain such inconsistency.

"university publications." *Shaffer* at *13. Plaintiff cites no such precedent in the State of Michigan, highlighting the inapplicability of the *Shaffer* holding here.

Plaintiff likewise cites no precedent for her suggestion that this Court evaluate "the legal nature of the student-university relationship" and conclude that "the nature is contractual, the contract is implied-in-fact, and the terms are a product of each party's *reasonable expectations* based on an *objective standard* given the *totality of the circumstances*." Pl.'s Application, p. 6. LSSU's obligations are clearly and unambiguously delineated in the Tuition Contract, the explicit terms of which preclude Plaintiff's pursuit of the consideration of external publications or "reasonable expectations": "Our Court has held that 'a contract will be implied only if there is no express contract covering the same subject matter . . . 'an implied contract may not be found if there is an express contract between the same parties on the same subject matter.'" *Landstar Express Am, Inc v Nexteer Auto Corp*, 319 Mich App 192, 201-202 (2017) (internal citations omitted) (emphasis removed). This Court may not permit some totality-of-the-circumstances evaluation when, as here, express contracts control.

Despite Plaintiff's pursuit for the consideration and admission of external documents, she is further barred under the parol evidence rule. Pl.'s Application, pp. 1-2, 8. "The parol evidence rule may be summarized as follows: '[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.'" *UAW-GM Human Resource Ctr v Ksl Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998) (internal citations omitted). As established above, the Tuition Contract is clear and unambiguous, precluding the admission of documents or the performance of discovery. Quite simplistically, Plaintiff alleged breach of a contract in Defendants' possession, and Defendants presented the contract in their possession (i.e.,

the Tuition Contract). When frustrated with its explicit terms, Plaintiff alludes to potential additional contract terms with no specificity. Plaintiff does not identify what discovery is needed or what discovery will show, prohibiting her admission of and/or search for parol evidence. *Liparoto Construction, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009) (holding that the "clear and unambiguous contractual language" precluded the admission of parol evidence and warranted summary disposition under MCR 2.116(C)(10) despite plaintiff's claim that dismissal was premature because "there [was] no fair likelihood that further discovery would yield support for plaintiff's action").

Also for the first time, Plaintiff seeks to downplay the Tuition Contract as a mere "financial responsibility statement," arguing that "the lower courts dramatically over-emphasized the importance of these acknowledgements" because it would be "legally, factually, and practically absurd" to conclude that the Tuition Contract "constitutes the *entire agreement* between the parties." Pl.'s Application, p. 8 (emphasis in original). However, the Tuition Contract explicitly includes a merger clause and, therefore, "constitutes" and was intended to constitute "the entire agreement between the parties with respect to the matters described." Def. Appx., Ex. 2: Tuition Contract, p. 2. Parol evidence is only admissible in the presence of a merger clause "for the rare situation when the written document is obviously incomplete 'on its face,'" and parol evidence is "necessary 'for the filling of gaps.'" *UAW-GM Human Resource Ctr*, 228 Mich App at 494-495. This is not that "rare situation." The Tuition Contract is explicit and unambiguous as to the parties' obligations, evidenced by Plaintiff's attempts at enforcement in the lower courts. Indeed, it delineates the only enforceable promise. The plain language of the Tuition Contract confirms that it is legally, factually, and practically the "entire agreement" as to the payment of tuition and fees,

and the Tuition Contract contains no guarantee that students will receive live, in-person instruction. Plaintiff cannot flout contract law principles and ask this Court to hold otherwise.

3. Judge Swartzle's partial dissent has no application to LSSU.

In his partial concurrence and dissent, Judge Swartzle expresses general hesitation to affirm summary disposition as to the Plaintiffs' tuition-based breach of contract claims in the consolidated cases related to LSSU, EMU, and CMU. *Zwiker v Lake Superior State University*, __ Mich App __ (2022) (Docket No. 355128) (SWARTZLE, J., concurring in part and dissenting in part); Pl. Appx., Ex. 2: MCOA Partial Concurrence / Dissent, p. 2. Judge Swartzle reasons generally that "[r]egistration in-and-of itself is not an education benefit to a student," so registration alone cannot serve as sufficient consideration for the payment of tuition.[9] *Id*. But, whatever the merits of Judge Swartzle's reasoning, as it relates specifically to LSSU, the parties explicitly contracted and agreed that registration alone triggered Plaintiff's payment obligations. See Def. Appx., Ex. 2: Tuition Contract, p. 1 (requiring Plaintiff to "pay all tuition, fees and other associated costs" upon the registration for "any class" or receipt of "any service" from LSSU). Even if registration is an insufficient trigger, as Judge Swartzle suggests, receipt of "any service" is undeniably sufficient to trigger Plaintiff's payment obligations. And here, Plaintiff received services from LSSU throughout the entirety of the Spring 2020 semester and, therefore, must "pay *all* tuition, fees and other associated costs." *Id*. (emphasis added).

Judge Swartzle next opines generally that, in order to consider whether the Universities breached their tuition contracts, courts must consider – and a record must be developed related to

[9] Plaintiff exaggerates Judge Swartzle's reasoning and argues in hypotheticals that a university could "take the student's tuition and fees and then provide *absolutely nothing more*." Pl.'s Application, pp. 6-7. Regardless, that is not the case here. Plaintiff registered for classes, LSSU provided educational instruction, and Plaintiff received credits. There is nothing unreasonable or unfair about this transaction, and LSSU has never suggested that it need not provide educational instruction.

– the provision of educational services along a spectrum. Pl. Appx., Ex. 2: MCOA Partial Concurrence / Dissent, p. 3. On the spectrum, Judge Swartzle labeled live, in-person instruction as definite fulfillment of the contractual obligations and the mid-March cancellation of all courses as definite breach of the contractual obligations. *Id*. He asks, "Did the pivot to emergency remote teaching result in a partial breach analogous to the outright canceling of courses, or was the emergency remote teaching sufficient under the tuition agreements?" *Id*., pp. 3-4.

Regarding LSSU, the searching inquiry Judge Swartzle contemplates cannot be reconciled with the clear and unambiguous Tuition Contract. As discussed, the Contract obligated Plaintiff to pay all tuition and fees upon receipt of "any service." See Def. Appx., Ex. 2: Tuition Contract, p. 1. The appropriate question, then, is, "Did Plaintiff receive *any service* during the Spring 2020 semester?" And, clearly, it is undisputed and admitted that she received service during the Spring 2020 semester. See Def. Appx., Ex. 1: Plaintiff's Complaint, ¶¶ 26, 29, 37, 58, 61 (acknowledging that Plaintiff received live, in-person instruction during the first portion of the Spring 2020 semester and online instruction for the remainder of the Spring 2020 semester). To examine the quality[10] of the educational services Plaintiff received along the "educational spectrum" would render the word "any" in the Tuition Contract nugatory and would be tantamount to rewriting the parties' contract in violation of Michigan law. See *Coates*, *supra* ("[I]f the language of the contract is unambiguous, we construe and enforce the contract as written.").

[10] To examine the quality of the education services would also interfere with LSSU's constitutionally-guaranteed academic freedom to determine the means of providing course content. See *Regents of the University of Michigan v Ewing*, 474 US 214, 225-227; 106 S Ct 507; 88 L Ed 2d 523 (1985) (affording public universities wide latitude in the effectuation of "academic freedom" and emphasizing that the court's role is "narrow" in its determinations as to whether university decisions constitute "a substantial departure from accepted academic norms").

Accordingly, whatever the merits of Judge Swartzle's opinion, it has no application to LSSU's clear and unambiguous contract.

B. The Court of Appeals did not err in affirming the Court of Claims' dismissal of Plaintiff's claims for breach of the Housing Contract.

The Housing Contract obligates Plaintiff to pay room and board costs in exchange for housing and meals in its residence halls. Def. Appx., Ex. 3: Housing Contract, "Terms and Conditions." LSSU did not breach this contract because Plaintiff was permitted to stay on campus for the entirety of the Spring 2020 semester. Pl. Appx., Ex. 1: MCOA Opinion, p. 15. When she abandoned her dorm room during the Spring 2020 semester, Plaintiff "moved" off campus and restricted her own access to housing and dining services, precluding reimbursement for unused housing and meals, as specified in the Housing Contract. Def. Appx., Ex. 3: Housing Contract, ¶¶ 2, 8. Furthermore, the force majeure provisions of the Housing Contract provide protections to LSSU and excuse assertions of non-performance. *Id*., ¶¶ 22, 23.

1. LSSU did not breach the Housing Contract.

LSSU repeatedly emphasized that students were free to remain on campus throughout the entirety of the semester, and students were merely asked not to return to campus if they chose to leave early. Pl. Appx., Ex. 1: MCOA Opinion, p. 4-6. The Court of Appeals recognized that LSSU "submitted documentary evidence showing that . . . the residence halls remained open." *Id*., p. 15. LSSU residence halls also stored student belongings, including the personal belongings of Plaintiff, beyond the semester conclusion. Def. Appx., Ex. 6: Ltr. dated April 28, 2020; Def. Appx., Ex. 7: "Move Out" Appointment. LSSU enacted policy modifications as necessitated by the COVID-19 pandemic, and Plaintiff acknowledged at the time of her signature to the Housing Contract that LSSU may implement new "rules, regulations, and procedures" that affect her housing and dining options. Def. Appx., Ex. 3: Housing Contract, "Terms and Conditions."

LSSU's request that students abide by the State's stay-in-place mandates, including Governor Whitmer's Executive Order 2020-21, and LSSU's commencement of health and safety precautions in the provision of dining services are such adjustments authorized by the Housing Contract. *Id*.

Well before she left campus, Plaintiff was warned and agreed that moving to other housing does not terminate her financial responsibilities under the Housing Contract. *Id*., ¶¶ 2, 8. She further acknowledged the she would not be eligible for "prorated room and board" if she did not complete the checkout procedure when seeking to conclude on-campus living – a process which included, inherently, removal of all personal belongings from the residence hall. *Id*., "The Navigator," p. 9. Plaintiff stored her belongings in her residence hall throughout and beyond the Spring 2020 semester, meaning, when she voluntarily abandoned her dorm room, she did not "move out," and she knowingly utilized LSSU's residence hall for storage. Def. Appx., Ex. 7: "Move Out" Appointment. The Housing Contract is also explicit that there is no refund for unused meals. Def. Appx., Ex. 3: Housing Contract, ¶ 2. These facts negate Plaintiff's conclusory and inaccurate allegations that she was denied room and board benefits, or that there is a contractual remedy available to her.

Even if there were a breach, two additional contractual provisions preclude a remedy for the unanticipated changes in policy necessitated by COVID-19: the "Force Majeure" and "Other Provisions" clauses. The Force Majeure clause excuses LSSU "from any further performance of obligations and undertakings" related to the Housing Contract if prevented from doing so "by act of nature or other occurrences whatsoever which is beyond the control of the parties." *Id*., ¶¶ 22. The "Other Provisions" clause provides that, "[i]n the event that the University shall be prevented from completing performance of any obligations hereunder by act of God or other occurrences whatsoever which are beyond the control of the parties hereto, then the University shall be excused

from any further performance of obligations and undertakings hereunder, to the full extent allowed by law." *Id*., ¶¶ 23. "Generally, the purpose of a force-majeure clause is to relieve a party from penalties for breach of contract when circumstances beyond the party's control render performance untenable or impossible." *Kyocera Corp. v Hemlock Semiconductor, LLC*, 313 Mich App 437, 438-439; 886 NW2d 445 (2015). A force majeure clause will excuse nonperformance "if the event that caused the party's nonperformance is specifically identified," and the contract itself evidences the parties' intent. *Kyocera*, 313 Mich App at 446-447. Here, Plaintiff agreed to excuse breaches caused by circumstances "beyond the control of the parties." A global pandemic of unprecedented scope and attendant government-imposed restrictions are exactly the type of events intended to be covered. Such events are, by definition, beyond the control of the parties. Thus, even if there were a breach, there is no contractual remedy available to Plaintiff because of these clauses.

2. The purpose of the Housing Contract was not frustrated by the onset of COVID-19.

The purpose of the Housing Contract was not frustrated by the COVID-19 pandemic. By the explicit terms of the Housing Contract, its purpose was to provide a living space and meals. Def. Appx., Ex. 3: Housing Contract, "Terms and Conditions." LSSU continuously provided both in a manner consistent with its policies, including those responsive to the health risks posed by COVID-19. Plaintiff voluntarily chose not to partake in the Housing Contract.

Even if the Housing Contract were frustrated, the "Force Majeure" and "Other Provisions" clauses excuse all non-performance by Defendants. *Id*., ¶¶ 22, 23. The inclusion of such clauses preclude Plaintiff's frustration of purpose argument, which requires that the "purpose" of the contract be "frustrated by an event not reasonably foreseeable at the time the contract was made" and "the risk of which was not assumed." *Molnar v Molnar*, 110 Mich App 622, 626; 313 NW2d 171 (1981). Though the specifics of the COVID-19 pandemic were not reasonably foreseeable, the

parties knew that an "act of nature" or an "act of God" beyond the control of the parties was entirely plausible and provided a remedy: the excusal of any non-performance by LSSU. Def. Appx., Ex. 3: Housing Contract, ¶¶ 22, 23. Having specifically contracted for such an occurrence, the provision must be given effect. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (emphasizing that "courts must . . . give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory"); see also *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 136; 676 NW2d 633 (2003) (holding that the plaintiff could not claim relief under the doctrine of frustration of purpose where "the parties expressly accounted for the instant situation in their contract").

3. Plaintiff suffered no damages.

No refund is appropriate because Plaintiff voluntarily chose to leave her residence hall and voluntarily forfeited dining services; she stored her belongings in her dorm room beyond her date of abandonment, continuing to receive value; and, students waive the right to reimbursement for unused meals by signing the Housing Contract. There was no breach of the express contract, and, even if there were, Plaintiff suffered no damages.

C. The Court of Appeals did not err in affirming the Court of Claims' dismissal of Plaintiff's claims for unjust enrichment.

"To sustain a claim for unjust enrichment, [a] plaintiff [needs] to show that [the defendant] received a benefit from plaintiff and that an inequity resulted to plaintiff as a consequence of defendants' retention of that benefit. In such a situation, a contract will be implied by law to prevent unjust enrichment. But a contract cannot be implied when an express contract already addresses the pertinent subject matter." *Liggett Restaurant Group, Inc*, 260 Mich App at 137. The Tuition Contract and Housing Contract serve as express contracts on the "pertinent subject matter" of the unjust enrichment claims, warranting dismissal as a matter of law. Because of these

Contracts, Plaintiff received: instruction in exchange for tuition; housing, meals, and storage in exchange for room and board payments; and, resources in exchange for fees. LSSU retained no unwarranted funds or benefit. As to the fees paid, Plaintiff had months of access to sporting events, standard and online classroom materials, and student organizations. Services were continued, albeit in different forms, as the pandemic swept across the world. LSSU collected fees from students, as it does every semester, to provide students with resources accessible in-person and/or virtually. The Tuition and Housing Contracts speak to the "pertinent subject matter" of Plaintiff's claims, specifically the payment of tuition, fees, and room and board. It would be absurd to suggest that the Tuition and Housing Contracts must address the infinite number of hypothetical scenarios implicated by such payments to remain express and controlling. Accordingly, Plaintiff cannot maintain claims for unjust enrichment where the Tuition and Housing Contracts squarely address her allegations, an issue which this Court should consider settled.

CONCLUSION

Based on the foregoing, Defendants request that the Court deny Plaintiffs' application for leave to appeal to this Court, or, alternately, enter an order affirming the decision of the Court of Appeals.

Respectfully submitted,

BODMAN PLC

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Dated: April 21, 2022

CERTIFICATE OF SERVICE

I hereby certify that, on April 21, 2022, I electronically filed the foregoing Defendants-Appellees' Answer to Plaintiffs-Appellants' Application for Leave to Appeal, Appendix of Exhibits and this Certificate of Service with the Clerk of the Court using the MiFILE TrueFiling system, which, upon processing, will serve all counsel of record.

/s/ Kimberly Jarvis