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CASE NUMBER: 2020-CV-000378

Court: Shawnee County District Court

Case Number: 2020-CV-000378

Case Title: Azriel Azzy Minjarez-Almeida individually & obo all others, et al. vs. Kansas Board of Regents, et al.

Type: MEMORANDUM DECISION AND ORDER

SO ORDERED.

/s/ Honorable Teresa L Watson, District Court Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE

AZRIEL ("AZZY") MINJAREZ-ALMEIDA,
and ANDREA VIERTHALER, individually
and on behalf of all others similarly situated,

Plaintiffs, 2020-CV-378

v.

KANSAS BOARD OF REGENTS and
KANSAS STATE UNIVERSITY,

Defendants.

NOAH PLANK and JOHN GARFOLO,
individually and on behalf of all others
similarly situated,

Plaintiffs, 2020-CV-432

v.

KANSAS STATE UNIVERSITY;
KANSAS BOARD OF REGENTS;
and other affiliated entities and individuals,

Defendants.

MEMORANDUM DECISION AND ORDER

Plaintiffs Azriel Minjarez-Almeida and Andrea Vierthaler (case no. 2020-CV-378) and Noah Plank and John Garfolo (case no. 2020-CV-432) were full-time students at Kansas State University ("KSU") during the Spring 2020 semester. In response to the COVID-19 pandemic, and in the middle of the semester, KSU changed its method of delivery of educational programs and services to students from largely in-person to completely online.

Plaintiffs Minjarez-Almeida and Vierthaler filed a class action lawsuit against KSU and the Kansas Board of Regents ("KBOR") seeking a pro rata refund of their student fees paid for the Spring 2020 semester, among other relief. Plaintiffs Plank and Garfolo filed a separate class action lawsuit against KSU and KBOR seeking a pro rata refund of their tuition paid for the Spring 2020 semester, among other relief.

Defendants KSU and KBOR filed separate motions to dismiss in both case no. 2020-CV-378 and case no. 2020-CV-432. Defendants sought to consolidate the cases while briefing on the motions continued. The Court consolidated the cases under case no. 2020-CV-378. The motions to dismiss were fully briefed and argued to the Court. The parties have filed numerous notices of supplemental authority since the argument, and the Court has considered all that have been filed as of the date of this opinion. The Court is ready to rule.

STATEMENT OF FACTS

This matter comes before the Court on Defendants' motions to dismiss. The Court must decide the issues based on the facts and allegations as pled in the petition, resolving every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief. The following facts are common to both the fee and tuition cases. Additional case-specific facts appear as needed in the analysis portion of the Court's opinion.

Defendant KSU is a public research university, the state's first land-grand college, founded in 1863 in Manhattan, with campuses in Manhattan, Salina, and Olathe. Defendant KBOR is a state agency created by law to govern certain public postsecondary educational institutions in Kansas, including KSU.

KSU charges its students tuition and fees according to a detailed schedule approved by KBOR. Tuition rates differ according to campus, area of study, level of study, and other factors.

There are many types of fees separate and apart from tuition, including mandatory campus fees, college course fees, and program fees, among others. Some of the fees are designed to fund KSU facilities and satisfy costs for maintaining the campus. The fees differ according to campus and area of study, among other factors.

The Spring 2020 semester began on or around January 21, 2020, and was scheduled to conclude on or around May 15, 2020. On March 11, 2020, KBOR in a special meeting voted to allow universities to make changes to academic calendars and determine how best to complete the Spring 2020 semester in light of the COVID-19 pandemic. On the same day, KSU announced it was extending its regularly scheduled spring break, and that beginning March 23, all in-person education and services would transition to online education and services.

On March 17, 2020, KSU began closing housing facilities, and only students who applied for and received an exemption for their health or safety remained living on campus. All campus classes, events, athletic contests, and other co-curricular activities were suspended. Students were encouraged not to return to campus, but to remain at home and complete coursework online. Facilities were closed, and on-campus services were discontinued; in-person, on-campus learning did not resume for the remainder of the semester. KSU agreed to issue partial refunds or credits for housing and dining fees.

Plaintiffs Minjarez-Almeida and Vierthaler were full-time students at KSU during the Spring 2020 semester. Both graduated with undergraduate degrees at the end of the semester. On July 9, 2020, Minjarez-Almeida and Vierthaler filed a class action lawsuit against KSU and KBOR on behalf of themselves and all others similarly situated for the return of a pro rata share of student fees paid for the Spring 2020 semester. They raise four claims against KSU: 1) breach of contract;

2) unjust enrichment; 3) conversion; and 4) money had and received. They make the same claims against KBOR except for breach of contract. This is case no. 2020-CV-378 ("fee case").

Plaintiffs Plank and Garfolo were full-time students at KSU during the Spring 2020 semester. Both graduated with undergraduate degrees at the end of the semester. On August 14, 2020, Plank and Garfolo filed a class action lawsuit against KSU and KBOR on behalf of themselves and all others similarly situated for the return of a pro rata share of tuition paid for the Spring 2020 semester. They later filed a first amended petition. In it, they raise three claims against KSU: 1) breach of contract; 2) conversion and taking; and 3) unjust enrichment. They make the same claims against KBOR except for breach of contract. This is case no. 2020-CV-432 ("tuition case").

CONCLUSIONS OF LAW

STANDARD FOR MOTIONS TO DISMISS.

Generally speaking, Plaintiffs need only file "[a] short and plain statement of the claim showing that the pleader is entitled to relief." K.S.A. 60-208(a)(1). When considering a motion to dismiss under K.S.A. 60-212(b)(6), "the court must decide the issue based only on the well-pled facts and allegations, which are generally drawn from the petition. Courts must resolve every factual dispute in the plaintiff's favor when determining whether the petition states any valid claim for relief. Dismissal is proper only when the allegations in the petition clearly demonstrate that the plaintiff does not have a claim." *Steckline Communications, Inc. v. Journal Broadcasting Group of Kansas, Inc.*, 305 Kan. 761, 767–68, 388 P.3d 84 (2017). But a district court need not accept "conclusory allegations on the legal effects of events the plaintiff has set out if these allegations do not reasonably follow from the description of what happened or if these allegations are contradicted by the description itself." *Grindsted Products, Inc. v. Kansas Corporation Com'n*, 262 Kan. 294, 303, 937 P.2d 1 (1997).

If on a motion under K.S.A. 60-212(b)(6) the parties present and the court considers matters outside the pleadings, the motion must be treated as one for summary judgment. K.S.A. 60-212(d). But as part of a motion to dismiss, the Court may consider the petition itself, any attached exhibits, a document incorporated into the complaint by reference, or any document referred to in the complaint if it is central to the claim and the parties do not dispute its authenticity. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997), cited with approval in *Crosby v. ESIS Ins.*, 2020 WL 6372266, *2-3 (Kan.App. 2020) (unpublished). To the extent the parties ask the Court to consider something other than the four corners of the petitions, the Court will identify what additional items it does and does not take into account for purposes of the motions to dismiss.

AN OVERVIEW OF EDUCATIONAL MALPRACTICE.

In order to evaluate the issues presented by the motions to dismiss in these consolidated cases, it is helpful to first understand the Kansas courts' historical treatment of so-called educational malpractice claims. KSU argues that all of Plaintiffs' claims boil down to one for educational malpractice, a cause of action prohibited in Kansas. "Educational malpractice is a tort theory beloved of commentators, but not of courts. While often proposed as a remedy for those who think themselves wronged by educators, educational malpractice has been repeatedly rejected by the American courts." (Internal quotations and citations omitted.) *Finstad v. Washburn University of Topeka*, 252 Kan. 465, 474, 845 P.2d 685 (1993).

There are "strong public policy reasons" for our courts' refusal to recognize claims for educational malpractice: "(1) a lack of a measurable standard of care; (2) inherent uncertainties as to the cause and nature of damages; (3) the potential for a flood of litigation; and (4) the courts' overseeing the day-to-day operation of the schools." *Id.* at 477. Indeed,

> "To entertain a cause of action for educational malpractice would require the courts not merely to make judgments as to the validity of broad educational policies—a course we have unalteringly eschewed in the past—but, more importantly, to sit in review of the day-to-day implementation of these policies. Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies." (Internal quotations and citations omitted.) *Id.* at 475.

Finstad decided only that Kansas courts would not recognize a claim for educational malpractice. It did not define the precise parameters of such a claim or identify its elements. The Kansas Court of Appeals later took a step in that direction in *Florez v. Ginsberg*, 57 Kan.App.2d 207, 449 P.3d 770 (2019). There, Florez sued the University of Kansas and others based on a false representation on the university's website that coursework in the School of Education fulfilled state requirements for an initial teaching license. His claims were pled as negligence and violations of the Kansas Consumer Protection Act ("KCPA"). The district court dismissed the negligence claim on the basis that it was an educational malpractice claim prohibited under Kansas law. *Id.* at 208.

The Kansas Court of Appeals reversed, reasoning that "we must be careful not to reject all claims that arise out of a school environment under the umbrella of educational malpractice. Instead, the specific facts of each case must be considered in light of the relevant policy concerns that drive the rejection of educational malpractice actions." *Id.* at 214. Further:

> "Unlike an educational malpractice claim, Florez' negligence claim is not a challenge to classroom methodology, theories of education, or the quality of the education he received. His claim is unrelated to academic performance or the lack of expected skills. His claim does not bring into question internal operations, curriculum or academic decisions of an educational institution, or any assigned function of a school under state law. Finally, his claim does not interfere with the legislative standards and policies of competency. In sum, we find the district court erred in construing Florez' claim as one for educational malpractice." *Id.* at 212-13.

Neither *Finstad* nor *Florez* dealt specifically with a breach of contract claim or any of the other claims raised by Plaintiffs here. But it is not the claim's label that matters – it is the substance of the complaint articulated. "Where the essence of the complaint is that the school failed to provide an effective education, it is irrelevant whether the claim is labeled as a tort action or breach of contract, since in either situation the court would be forced to enter into an inappropriate review of educational policy and procedures." *Jamieson v. Vatterott Educ. Ctr., Inc.,* 473 F. Supp. 2d 1159, 1160 (D.Kan. 2007). Indeed, "the policy concerns that preclude a cause of action for educational malpractice apply with equal force to bar a breach of contract claim attacking the general quality of an education." *Id.*

Plaintiffs in *Jamieson* sued a private technical school for breach of contract, fraud, and violations of the KCPA. Defendants moved to dismiss the breach of contract claim on the basis that it amounted to an educational malpractice claim not actionable under Kansas law. The *Jamieson* court made clear when a breach of contract claim in the educational context would be recognized:

> "There are, however, at least two situations wherein courts will entertain a cause of action for institutional breach of a contract for educational services. The first would be exemplified by a showing that the educational program failed in some fundamental respect, as by not offering any of the courses necessary to obtain certification in a particular field. The second would arise if the educational institution failed to fulfill a specific contractual promise distinct from any overall obligation to offer a reasonable program. *Gupta v. New Britain General Hosp.,* 239 Conn. 574, 592–593, 687 A.2d 111 (1996); see *Ross,* 957 F.2d at 416 (To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor)." (Internal quotations omitted.) *Id.* at 1159-60.

The court in *Jamieson* denied the defendants' motion to dismiss the breach of contract claim as it related to provisions in the enrollment agreement promising a specific number of hours per week of instruction. *Id.* at 1160. The court granted defendants' motion to dismiss the breach

of contract claim as it related to provisions in the enrollment agreement that were not "detailed or specific." *Id.* "Instead of promising a specific quality of computers and instructors, or cost-free training, Vatterott promised to provide the 'instructors, equipment, laboratories, classrooms and other facilities necessary for teaching' at a rate consistent with its tuition. Consequently, Plaintiffs' allegations based on this general contract language are more analogous to claims attacking the overall reasonableness of an institution's decisions in providing educational services." *Id.*

The court said:

> "Without specific and detailed contractual promises, Plaintiffs' allegations implicate *Finstad's* concern of having courts oversee the general operations of educational institutions. See *Alsides,* 592 N.W.2d at 473 (breach of contract claims against educational institutions may not be brought if the promises to be enforced are general and would require an inquiry into the nuances of educational processes and theories). Indeed, an inquiry into these allegations would require the trier of fact to weigh the qualifications of the instructors and the methods by which they taught; to review of the number and types of classes in the courses of study; to determine what is and is not material in a course of study; to determine the type of equipment, laboratories, classrooms and other facilities necessary to teach students given Vatterott's tuition rate. This is the type of comprehensive review courts have sought to avoid, as it replaces the judgment of educators for those of judges and juries. See *Paladino,* 89 A.D.2d at 90, 454 N.Y.S.2d 868 ('The courts are an inappropriate forum to test the efficacy of educational programs and pedagogical methods.')." *Id.* at 1160-61.

With this background, the Court turns to the analysis of the motions to dismiss in each of the consolidated cases.

MINJAREZ-ALMEIDA, CASE NO. 2020-CV-378 ("FEE CASE")

I. KSU'S MOTION TO DISMISS.

A. BREACH OF CONTRACT CLAIM.

KSU asserts that Plaintiffs fail to state a claim for breach of contract. "The elements of a breach of contract claim are: (1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in

compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach." *Stechschulte v. Jennings,* 297 Kan. 2, 23, 298 P.3d 1083 (2013).

To state a claim for breach of contract in the educational context, "the plaintiff must do more than simply allege that the education was not good enough. Instead he must point to an identifiable contractual promise that the defendant failed to honor." (Internal quotations and citation omitted.) *Jamieson,* 473 F.Supp.2d at 1160. The "specific contractual promise" must be "distinct from any overall obligation to offer a reasonable program" or the "reasonableness of an institution's decisions in providing educational services." *Id.* In *Jamieson,* the court held that a "promise to provide a specific number of hours or weeks of instruction" was sufficiently specific to survive a motion to dismiss. But a promise to provide "equipment, laboratories, classrooms and other facilities necessary for teaching at a rate consistent with its tuition" was not. *Id.*

KSU argues that Plaintiffs fail to state a claim for breach of contract because they do not point to a specific contractual promise between Plaintiffs and KSU that has been breached. KSU reasons that without a specific promise, Plaintiffs' claims amount to nothing more than impermissible accusations of educational malpractice.

Plaintiffs' petition states the breach of contract claim as follows:

> "63. Plaintiffs and the other Class Members entered into contractual agreements with Defendant K-State, which provided Plaintiffs and the other Class Members would pay fees for or on behalf of students, and in exchange, K-State would provide facilities, activities, services, and resources to students.
>
> . . .
>
> 65. K-State breached its contracts with Plaintiffs and the other Class Members when it moved classes online, cancelled on-campus events and activities, closed campus and stopped providing facilities, activities, services, and resources for which the fees were intended to pay. In doing so, K-State has and continues to deprive Plaintiffs and the other Class Members from the benefit of their bargains with K-State."

Plaintiffs claim the specific contractual promise appears in the fee portion of KSU's Comprehensive Tuition and Fee Schedule ("CTFS"). Plaintiffs attached the 16-page CTFS as Exhibit 1 to their petition and included in Paragraph 26 of their petition an excerpt relating to certain mandatory fees. Plaintiffs state in Paragraph 27 of their petition that one of these fees, the campus-wide privilege fee, "is used to 'support a variety of non-instructional student service activities' as more fully described on K-State's website." In a footnote, Plaintiffs provide a link to a general page entitled "Frequently Asked Questions About Tuition and Fees" that contains an abundance of additional links to various topics.

The Court will consider the CTFS because it was attached as an exhibit to the petition and parts of it were set forth in the petition itself. Plaintiffs claim that the "fee schedules mandating what students must pay and what those charges related to constitute a contract." (Plaintiffs' response to KSU's motion to dismiss, p. 10) The excerpts relating to certain mandatory fees in Paragraph 26 of Plaintiffs' petition set out certain fees but do little to explain the purpose of the charges. A footnote to the Manhattan campus privilege fee says students residing outside a 30-mile radius of the campus are exempt from campus privilege fees and thus cannot use campus services such as Lafene Health Center and Peters Recreation Complex. A footnote to the College of Business Administration career development fee says the fee funds the college's career development office and will not be charged to students enrolled in the online general business degree completion program. Missing from the fee schedule is any language suggesting a promise that students would receive in-person access to any particular facility, activity, or service in exchange for payment of a fee.

The Court does not accept Plaintiffs' invitation to consider unspecified information available through a link to the KSU website as set forth in Paragraph 27, footnote 4 of Plaintiffs'

petition. This is a link to a general page entitled "Frequently Asked Questions About Tuition and Fees." The link goes to a webpage containing numerous additional links, which takes one to other pages containing more links, and so on. Plaintiffs provide a more direct link in their surreply for the same purpose. (Plaintiffs' surreply, p. 3) Using either link, it is possible for the Court to arrive at a place on the KSU website where, with many more clicks, there appears a 2021-22 school year breakdown of the components of the campus privilege fee (now called a "student services fee"). Plaintiffs assert that this information supports its contract claim by detailing services students "can expect to receive in exchange for payment" of the privilege fees. (Plaintiffs' surreply, p. 3) There is no particular document referenced or incorporated by reference. Plaintiffs do not direct the Court's attention to any specific piece of information. Rather, these links are simply gateways to a rabbit hole of information that the Court declines to consider on a motion to dismiss.

At one point in their briefing, Plaintiffs say the fee schedule is "part of the parties' contract on fees Plaintiffs paid KSU for services, facilities, resources, activities, and so on." (Plaintiffs' surreply, p. 8) Nowhere in the Plaintiffs' petition or briefing do they specify what the other part of the parties' contract might be or point to any specific document containing the alleged other part. For purposes of a motion to dismiss, the Court must focus on what Plaintiffs rely upon in their petition, which is the fee schedule. But reference to the CTFS in whole or in part does not amount to a statement of a specific contractual promise necessary to Plaintiffs' claim for breach of contract. This is reason enough to grant KSU's motion to dismiss the breach of contract claim. See *Jamieson,* 473 F.Supp.2d at 1160; and *Coffman v. Hutchinson Cmty. Coll.,* 2018 WL 3093506 (D. Kan. 2018) (breach of contract claim against community college dismissed for failure to state a claim).

Cases from other jurisdictions are in accord. See, e.g., *Buschauer v. Columbia Coll. Chicago,* 2021 WL 1293829, *6 (N.D. Ill. 2021) (court found that student had not "sufficiently alleged that his payment of the activity, health center, instruction resource, registration, technology, or U-Pass fees entitled him to on-campus, in-person services," and "references to the student handbook and other materials describing the student center, health center, or information technology department merely provide information about what facilities and services Columbia provides students, not any specific promises of access to these facilities and services in-person at all times"); *Hickey v. Univ. of Pittsburgh,* 2021 WL 1630579, *2 (W.D. Pa. 2021) (breach of contract claim for tuition and fee refund dismissed because "it does not identify any specific contractual promise that the University allegedly breached with respect to in-person instruction, tuition, fees, or any other costs"); and *Crawford v. Presidents & Directors of Georgetown Coll.,* 2021 WL 1840410, *7 (D.D.C. 2021) (breach of contract claim for tuition and fee refund dismissed because "the absence of anything approaching an express promise . . . is glaring").

Though the breach of contract claim must be dismissed, a few other points of argument bear mention. KSU asserts that, at page 14 of the CTFS in Exhibit 1 to Plaintiffs' petition, there appears the course refund policy for students who drop one or more courses or completely withdraw from a term. A full refund is given if a course is dropped through its 21st calendar day, a 50% refund is given from the 22nd through the 28th calendar day, and no refund is given thereafter. Students who completely withdraw lose access to all campus services as of the date of withdrawal. KSU says that this is the only existing refund policy. Plaintiffs counter that they do not rely on the refund policy, and further, it does not preclude their breach of contract claim because it applies only to students who drop courses or withdraw, which Plaintiffs did not do. The Court agrees with Plaintiffs on this point, though it is moot given the Court's conclusion above. The refund policy

cited by KSU is not independent grounds for dismissal of the breach of contract claim for failure to state a claim.

Further, KSU in its reply in support of its motion to dismiss references two additional documents that it believes have a bearing on the breach of contract claim: 1) the 2019-20 KSU undergraduate course catalog; and 2) the Financial Responsibility Agreement ("FRA"). Plaintiffs did not reference the course catalog or the FRA in their petition.

KSU in its briefing provided a link to a webpage containing the 2019-20 archived undergraduate course catalog. (KSU reply, p. 8) The catalog's home page contains links to other pages, one of which is entitled "Tuition and Fees." This page contains a link to comprehensive tuition and fee schedules, from which one can link to the 2019-20 CTFS, the same document attached as Exhibit 1 to Plaintiffs' petition. What appears to be the first three introductory pages of the 2019-20 archived undergraduate course catalog are attached as Exhibit 2 to KSU's reply in support of its motion to dismiss. There is a disclaimer on the third page that says: "The material in this catalog is provided for informational purposes and does not constitute a contract. For example, courses, curricula, degree requirements, fees, and policies are subject to constant review and change without notice."

KSU argues that since the CTFS is included in the course catalog, the disclaimer on the course catalog homepage applies to it, to wit: the fee schedule "is provided for informational purposes and does not constitute a contract," and further that "fees" and "policies" are "subject to constant review and change without notice." Plaintiffs do not deny that the CTFS and the disclaimer appear in the course catalog. Instead, they insist that they do not rely on the course catalog or anything in it as a basis for their breach of contract claim. They also argue that the Court should not consider the disclaimer because it was not referenced in the petition.

But there are reasons that this Court can consider the disclaimer in the context of a motion to dismiss despite its absence from the petition. In its motion to dismiss, KSU cites *Coffman,* 2018 WL 3093506, *16 (D.Kan. 2018). There, plaintiff alleged a breach of contract citing the student handbook (which was in fact the course catalog) as the source of enforceable contract provisions. Plaintiff did not attach the catalog to his petition, and later submitted only certain portions of the catalog, but defendant attached a complete copy to its motion to dismiss. The catalog included a disclaimer similar to the one forwarded by KSU here. The *Coffman* court said the disclaimer "plainly states that the catalog does not constitute a contract and that all information found in it was subject to the college's unilateral change" and dismissed plaintiff's breach of contract claim because plaintiff's allegations of the existence of a contract were merely "conclusory," and more so in light of the disclaimer. *Id.* at *16-17.

In their response to KSU's motion to dismiss, Plaintiffs tried to distinguish *Coffman* because "KSU points to no such disclaimer here." (Plaintiffs' response to KSU's motion to dismiss, p. 11, fn. 20) Not surprisingly, KSU followed in its reply with a copy of the disclaimer as it appears in the course catalog, which also contains the CTFS. The court in *Coffman* considered the disclaimer on a motion to dismiss despite the fact it was not part of plaintiff's petition. And here, there seems little reason to ignore the disclaimer because Plaintiff does not deny its existence, but argues only that it does not apply to the CTFS.

The Court has already determined that Plaintiffs' breach of contract claim against KSU must be dismissed. But if considered, the disclaimer would only add to the reasons for dismissal of the breach of contract claim. The plain statement that the information put forth by KSU was not a contract, and further that "courses, curricula, degree requirements, fees, and policies are subject to constant review and change without notice," makes clear that KSU reserved the right to

reasonably respond to the COVID-19 pandemic or any other emergent situation without exposing itself to a claim for breach of contract.

KSU in its reply also points to the FRA. It is attached to KSU's reply in support of its motion to dismiss as Exhibit 1. It appears to be a page from the KSU website and says in part:

> "I understand that when I register for any class at Kansas State University or receive any service from Kansas State University, **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.** I further understand and agree that my registration and acceptance of these terms 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 **Kansas State University 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 published or assigned due date.**
>
> I understand and agree that if I drop or withdraw from some or all of the classes for which I register, I will be responsible for paying all or a portion of tuition and fees in accordance with the published tuition refund schedule at Kansas State University. **I have read the terms and conditions of the published tuition refund schedule and understand those terms are incorporated herein by reference.** I further understand that my failure to attend class or receive a bill does not absolve me of my financial responsibility as described above.
>
> . . .
>
> **This agreement supersedes all prior understandings, representations, negotiations and correspondence between the student and Kansas State University, 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.** This agreement may be modified by Kansas State University if the modification is signed by me. Any modification is specifically limited to those policies and/or terms addressed in the modification."

Plaintiffs did not reference the FRA in their petition or in their response to KSU's motion to dismiss. KSU raised it for the first time in its reply in support of its motion to dismiss, but points out that the FRA was raised in briefing in the *Plank* consolidated case. Plaintiffs do not deny the existence of the FRA or its content, but assert that the FRA should not be considered at all because it is not referenced in the petition. Given the Court's dismissal of the breach of contract claim for

other reasons, there is no need to consider whether the FRA provides an additional basis for dismissal.

For the reasons set forth above, the Court grants KSU's motion to dismiss the breach of contract claim against it.

B. UNJUST ENRICHMENT AND MONEY HAD AND RECEIVED CLAIMS.

Defendants argue that Plaintiffs' unjust enrichment and money had and received claims must fail because Plaintiffs did not comply with the requirements of K.S.A. 46-903 and K.S.A. 46-907, which provide:

> **46-903. Payment of claims based upon implied contracts, when.** No money or funds shall be disbursed from the state treasury or any special fund of the state of Kansas in part or full satisfaction or payment of any claim or judgment based in whole or in part on an implied contract, unless the payment of such claim or judgment has been specifically authorized by act of the legislature.
>
> **46-907. Submission of certain claims to joint committee on special claims against the state.** All claims proposed to be paid from the state treasury or any special fund of the state of Kansas, which cannot be lawfully paid by the state or any agency thereof except by an appropriation of the legislature shall be submitted to the joint committee on special claims against the state before final action thereon is taken by either house of the legislature.

Unjust enrichment and money had and received are claims based on the existence of an implied contract. *Sharp v. State,* 245 Kan. 749, 754, 783 P.2d 343 (1989) (unjust enrichment); *Missimore v. Hauser,* 130 Kan. 20, 285 P. 558 (1930) (money had and received). Thus, the claims are subject to K.S.A. 46-903 and K.S.A. 46-907. The definition of a state agency includes: "any state office or officer, department, board, commission, institution, bureau or any agency, division or unit within any office, department, board, commission or other state authority or any person requesting a state appropriation." K.S.A. 75-3701(3). KSU meets this definition of a state agency. See also K.S.A. 76-712 ("the state educational institutions are separate state agencies").

K.S.A. 46-903 and K.S.A. 46-907 were "part of a package of laws which became effective on the repeal of K.S.A. 46-901, which had previously granted immunity from suit to the State and its agencies." *Wheat v. Finney,* 230 Kan. 217, 220, 630 P.2d 1160 (1981). These laws were designed to "provide an orderly and expeditious procedure to aid the legislature in the consideration and evaluation of those claims against the state which cannot be lawfully paid by the state or any agency thereof except by appropriation act of the legislature." K.S.A. 46-919.

K.S.A. 46-903 and K.S.A. 46-907 "provide a statutory requirement that claims based on implied contracts be filed with a special claims committee; such filing and processing are held to be conditions precedent to the maintenance of an action. An action may not be maintained against the State without first filing a claim on which payment is denied." *Wheat,* 230 Kan. at 221. It is not sufficient to file a claim with the joint committee concurrent with the filing of a lawsuit in state or federal court. Unless the claim has been filed with and denied by the joint committee on special claims against the state, the condition precedent has not been met and the action must be dismissed. *Sharp,* 245 Kan. at 754.

Plaintiffs in this case have not presented their implied contract claims to the joint committee on special claims against the state. KSU argues that this requires dismissal of the claims. Plaintiffs assert that the Kansas Supreme Court's decisions in *Wheat* and *Sharp* are wrong because neither K.S.A. 46-903 nor K.S.A. 46-907 specifically requires that an implied contract claim be presented to or rejected by the joint committee prior to filing suit. Rather, the statutes combine to say that prior to payment of a claim or judgment from the state treasury, the matter "shall be submitted to the joint committee on special claims against the state before final action thereon is taken by either house of the legislature." Indeed, reference to payment of a judgment necessarily contemplates that the matter has been decided in a court of law prior to presentment to the joint

committee. Plaintiffs may have a point. But this Court is duty bound to follow the direction of the Kansas Supreme Court absent some indication of movement away from its position. *Majors v. Hillebrand*, 51 Kan. App. 2d 625, 629-30, 349 P.3d 1283 (2015). Based on *Wheat* and *Sharp,* Plaintiffs' failure to present the implied contract claims to the joint committee for special claims against the state requires their dismissal from this lawsuit.

Finally, Plaintiffs assert that their implied contract claims are not barred by K.S.A. 46-903 and K.S.A. 46-907 because the pleadings do not demonstrate that any recovery by Plaintiffs would be paid from the state treasury or any special fund of the state of Kansas. But KSU points out that it is required by law to deposit all money it receives from tuition and fees into the state treasury. See K.S.A. 76-719(b).

In the context of Eleventh Amendment immunity, state universities in Kansas have been held to be an alter ego or instrumentality of the state because of the degree of guidance and control exercised over them by the state, and also because revenue generated by the universities is passed through to the state treasury, and money provided to the universities from the state is subject to the legislative budget process. This means that any claim or judgment owed by state universities would be paid out of the state treasury. See *Holt v. Wesley Med. Ctr., LLC,* 2002 WL 1067677, *5 (D.Kan. 2002) (University of Kansas School of Medicine-Wichita is an arm or alter ego of the State in part based on the conclusion that "the judgment would be satisfied from the state treasury, not from any property of a corporation or other entity"); and *Mayer v. Fort Hays State Univ.*, 2006 WL 8448069, *3 (D.Conn. 2006) (Fort Hays State University is an arm or alter ego of the State in part based on the conclusion that "if Mayer were to prevail on his claims for damages, the state treasury would reimburse the defendants"). Plaintiffs' argument to the contrary fails.

For the reasons set forth above, the Court grants KSU's motion to dismiss the claims against it for unjust enrichment and money had and received.

C. CONVERSION CLAIM.

KSU argues that Plaintiffs' conversion claim must be dismissed for failure to state a claim. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another." *Carmichael v. Halstead Nursing Ctr., Ltd.,* 237 Kan. 495, 500, 701 P.2d 934 (1985). "Intangible personal property, as well as tangible personal property, may be the subject of a claim for conversion." *Moeller v. Kain,* 2008 WL 4416042, *5 (Kan.App. 2008) (unpublished). But in order to state a claim for conversion, "the intangible property must be merged with tangible property capable of being converted, i.e., a document." *Id.,* citing 18 Am.Jur.2d, Conversion § 7, p. 159.

In Kansas, money withheld or owed cannot be the basis for a conversion claim. "An action will not lie for conversion of a mere debt or chose in action. Hence, where there is no obligation to return identical money, but only a relationship of debtor and creditor, an action for conversion of the funds representing the indebtedness will not lie against the debtor." *Temmen v. Kent-Brown Chevrolet Co.,* 227 Kan. 45, 50, 605 P.2d 95 (1980).

Plaintiffs point to *Rezac Livestock Com'n Co., Inc. v Pinnacle Bank,* 255 F.Supp.3d 1150 (D.Kan. 2017). There, Rezac sold nearly $1 million in cattle to Dinsdale through an agent, Leonard. Leonard wrote a check to Rezac for the cattle. Leonard's account was at Pinnacle Bank, also owned by Dinsdale. Dinsdale knew Leonard was behind on personal payments owed to Pinnacle Bank. When Dinsdale wired the money to Leonard's account to cover the check to Rezac, Pinnacle Bank took the money as a setoff to Leonard's debt to Pinnacle Bank. As a result, Pinnacle Bank would not honor Leonard's check to Rezac. In the meantime, Rezac had delivered the cattle

to Dinsdale. When payment was refused on Leonard's check, Rezac demanded that Dinsdale return the cattle. Dinsdale refused. Rezac sued Dinsdale for conversion of the cattle. *Id.* at 1156.

Dinsdale moved to dismiss the conversion claim because Rezac sought money damages rather than return of the cattle. Dinsdale argued that this made Rezac's claim one for money owed, or a debt for purchase of the cattle, and it could not be recovered under a conversion theory. The district court disagreed, reasoning that the claim was for the taking of the cattle without payment, and the refusal to return them, and this fits the definition of a conversion whether Rezac sought return of the cattle or their money value. *Id.* at 1170.

Plaintiffs also cite two bankruptcy cases but they are inapposite. *Rezac* does not help Plaintiffs because the conversion claim there was grounded on the taking of the cattle. The conversion claim here is not based on the taking of goods or personal chattels belonging to Plaintiffs. Rather, Plaintiffs claim KSU converted their "right to the services, resources, and access to [KSU's] facilities for the Spring 2020 term." (Petition ¶82) Even assuming that educational services and resources qualify as intangible property, such an interest supports a conversion claim only when merged with a tangible property interest. *Moeller,* 2008 WL 4416042, at *5. Plaintiffs made no such allegation in their petition.

Further, Plaintiffs do not allege they are entitled to return of identical money. *Temmen,* 227 Kan. at 50. Rather, they seek the difference in value between an in-person education experience versus the value of an online education experience. See *Ford v. Rensselaer Polytechnic Inst.,* 507 F.Supp.3d 406, 420 (N.D.N.Y. 2020) (dismissing students' conversion claim based on remote education during COVID-19 pandemic, finding "conversion cannot enforce a simple obligation to pay money . . . unless the money is in the form of a specific, identifiable fund subject to an obligation to return or otherwise treat in a particular manner.").

For the reasons set forth above, the Court grants KSU's motion to dismiss the conversion claim against it.

D. OTHER ISSUES.

KSU raises additional arguments in favor of its motion to dismiss, including: 1) the express and implied contract claims cannot co-exist at the pleadings stage; and 2) the petition fails to state a claim under the KJRA. Given the Court's dismissal of all of Plaintiffs' claims against KSU for the reasons set forth above, there is no need to address KSU's other issues.

II. KBOR'S MOTION TO DISMISS.

Plaintiffs make only three claims against KBOR: 1) unjust enrichment; 2) conversion; and 3) money had and received. They do not claim KBOR committed a breach of contract. KBOR raises the same successful arguments made by KSU for dismissal of these three claims. The unjust enrichment and money had and received claims must be dismissed because they were not first presented to and denied by the joint committee on special claims against the state. The conversion claim must be dismissed because it is based on money withheld or owed, and this will not support a conversion claim in Kansas.

As an additional and independent reason for dismissal, KBOR argues that Plaintiffs have failed to state a claim against it because it is a legal entity separate and apart from KSU, and Plaintiffs failed to allege in the petition how or why KBOR is responsible for the acts or omissions underlying Plaintiffs' claims. Plaintiffs' petition alleges that KSU made the decision to transition to online classes and services on March 23, 2020 (Petition ¶37); KSU has not offered or provided students any refund of mandatory fees paid for the Spring 2020 semester (Petition ¶44); KSU has refused any requests to do so (Petition ¶48); and KSU has taken a "no refund on fees" position (Petition ¶50).

In contrast, Plaintiffs' petition alleges that KBOR "is responsible for governing" KSU (Petition ¶20); approves KSU's tuition and fee schedule (Petition ¶21); KBOR "sets a calendar and procedure for all student tuition rates and fees adjustments, which generally require KBOR review and approval" (Petition ¶34); KBOR voted to allow state universities "make changes to academic calendars and determine best methods for delivering courses in light of COVID-19" (Petition ¶35); and "KBOR had and has the authority to adopt and approve an across-the-board adjustment regarding tuition and fees, including refund, and to direct the universities to implement such adjustment." (Petition ¶36)

The Court considers these allegations against the backdrop of pertinent statutes describing the nature and function of KBOR. The six state educational institutions, including KSU, are separate state agencies under the management and supervision of KBOR. K.S.A. 76-712. KBOR is a separate nine-member government agency created by statute, as required by Article 6, Section 2(b) of the Kansas Constitution. K.S.A. 74-3202a. It provides "leadership, supervision and coordination for postsecondary educational institutions" in Kansas. K.S.A. 74-3201a(b). K.S.A. 76-738 says KBOR "may adopt policies governing the refund of any tuition, fees or charges collected by institutions under the supervision and control of the state board of regents and may authorize the collecting institutions to make direct refunds of tuition, fees or charges from the appropriate fee agency accounts and to adopt procedures for such refunds." The chief executive officers of the state educational institutions, including KSU, are appointed by KBOR. K.S.A. 76-714. The chief executive officer of each state educational institution administers the affairs of the institution. K.S.A. 76-725.

K.S.A. 76-719(b) indicates that KBOR is not a repository of tuition or fees collected by state universities from students. Rather, it says:

> "All moneys received by a state educational institution for tuition fixed by the state board of regents shall be deposited in the state treasury and credited to the general fees fund of the state educational institution. All moneys received for any student-activity fee or for any other fees or charges fixed by the state board of regents shall be deposited in the state treasury and credited to the appropriate account of the restricted fees fund of the state educational institution or to another appropriate special revenue fund of the state educational institution."

The question is whether Plaintiffs' allegations state a claim against KBOR for unjust enrichment, money had and received, and conversion. Unjust enrichment has three elements:

> "(1) a benefit conferred upon one person by another; (2) an appreciation or knowledge of the benefit received; and (3) the acceptance or retention of the benefit by the individual receiving the benefit under such circumstances as to make it inequitable for the individual to retain the benefit without payment of its value." *Security Benefit Life Ins. Corp. v. Fleming Companies, Inc.,* 21 Kan. App. 2d 833, Syl. ¶5, 908 P.2d 1315 (1995).

A claim for money had and received requires that one party "holds money which, in equity and good conscience, belongs to" another. *Coppock v. J.C Nichols Inv. Co.,* 146 Kan. 372, 69 P.2d 701 (1937). Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another." *Carmichael,* 237 Kan. at 500.

Under K.S.A. 76-719(b), the fees when collected were "deposited in the state treasury and credited to the appropriate account of the restricted fees fund" of KSU. Plaintiffs assert that KSU made the decision to move to online only classes and services and decided not to refund any portion of the mandatory fees. Plaintiffs fail to plead facts that indicate that through these actions some benefit was conferred upon KBOR, or that it would be inequitable for KBOR to retain it. Likewise, Plaintiffs fail to plead facts that indicate KBOR holds money belonging to Plaintiffs, or that KBOR assumed or exercised ownership of goods or chattels belonging to Plaintiffs.

To the extent Plaintiffs allege generically in their petition that "Defendants" accepted benefits or retained money or exercised ownership over something belonging to Plaintiffs, these

are conclusory allegations when it comes to KBOR, notably in light of K.S.A. 76-719(b). This Court is not required to accept such conclusory allegations. *Grindsted*, 262 Kan. at 303.

For the reasons outlined above, the Court grants KBOR's motion to dismiss the claims against it for unjust enrichment, money had and received, and conversion.

***PLANK*, CASE NO. 2020-CV-432 ("TUITION CASE")**

I. KSU'S MOTION TO DISMISS.

A. EDUCATIONAL MALPRACTICE.

KSU argues that all of Plaintiffs' claims should be dismissed because they amount to claims of educational malpractice. The treatment of educational malpractice claims in Kansas has been described above in the introduction to this Court's conclusions of law.

In their first amended petition, Plaintiffs state the following in regard to all of their claims:

> "30. The online learning options being offered to [KSU's] students are sub-par in practically every aspect as compared to what the educational experience afforded Plaintiffs and the members of the Class once was. During the online only portion of the Spring and Summer 2020 semesters, [KSU] principally used programs by which previously recorded lectures were posted online for students to view on their own, or by virtual Zoom meetings. Therefore, there was a lack of classroom interaction among teachers and students and among students that is instrumental in educational development and instruction.
>
> 31. The online formats being used by [KSU] do not require memorization or the development of strong study skills given the absence of any possibility of being called on in class and the ability to consult books and other materials when taking exams. Further, the ability to receive a Pass/No Pass grade rather than a letter grade provides educational leniency that the students would not otherwise have with the in-person letter grading education that was paid for and expected."

These allegations are the embodiment of an educational malpractice claim. They challenge classroom methodology, internal operations, curriculum, academic decisions of an educational institution, and the resultant quality of the education provided. See *Florez*, 57 Kan.App.2d at 212-

13. They implicate the policy concerns described in *Finstad,* and they lack an anchor to a specific contractual promise as required in *Jamieson.*

A federal district court in California applied *Jamieson* to dismiss similar claims. See *Lindner v. Occidental College,* 2020 WL 7350212 (C.D. Cal. 2020). There, plaintiffs alleged a contract for in-person education arose from school publications and marketing materials, and it was breached when COVID-19 forced a transition to "sub-par" online instruction that was not "worth the amount charged" and not equivalent to an in-person education. *Id.* at *7. The court, citing *Jamieson* among other cases, dismissed plaintiffs' claims for breach of contract, breach of implied contract, unjust enrichment, conversion, and money had and received because they amounted to impermissible claims of educational malpractice. *Id.*

Plaintiffs here do not plead any specific contractual promises, as set forth below in Section I(B). Plaintiffs allege that they contracted with KSU for in-person classes, but fail to reference any specific contractual language to that effect.

Even if they had, as KSU points out, Plaintiffs' damages would be hard to measure. Plaintiffs claim they are entitled to a tuition refund for every day of the semester they received online rather than in-person instruction. But Plaintiffs completed the coursework they paid for in the Spring 2020 semester and thereafter graduated from KSU. Plaintiffs cannot argue that the online instruction they received was wholly worthless – if nothing else, completing it allowed Plaintiffs to earn their degrees. So if Plaintiffs' claim succeeds, a court or a jury will have to determine the value of each online instructional day in calculating what tuition refund, if any, is due. To do this would require the weighing of the relative merit or value of in-person versus online instruction, which would likely differ depending on the subject (among other things), and certainly implicate the public policy concerns set forth in *Finstad.*

Plaintiffs attempt to cast their claims in breach of contract, conversion and taking, and unjust enrichment. But in reality they are educational malpractice claims in thin disguise. Plaintiffs cannot "repackage" an impermissible educational malpractice claim, however artfully, to avoid dismissal. *Jamieson*, 473 F.Supp. at 1160-61. For this reason, all of Plaintiffs' claims against KSU are dismissed. Additional reasons for the dismissal of each specific claim are set forth below.

B. BREACH OF CONTRACT CLAIM.

The essence of Plaintiffs' contract claim is that KSU agreed to provide them an in-person and on-campus education. KSU asserts that Plaintiffs fail to state a claim for breach of contract because they do not point to a specific contractual promise between Plaintiffs and KSU that has been breached. Plaintiffs' first amended petition states the breach of contract claim as follows:

> "58. By accepting tuition . . . the University agreed to, among other things, provide an in-person and on-campus live education as well as the services and facilities to which the tuition they paid pertained throughout those semesters. As a result, Plaintiffs and each member of the Class entered into a binding contract with the University.
>
> . . .
>
> 60. [KSU] has agreed to provide in-person educational opportunities, experiences, and services to enrolled students."

Plaintiffs further allege that KSU "held out in the course catalog and class descriptions that Plaintiffs would receive in-person educational services and opportunities" (First Amended Petition ¶65) and that in "marketing materials and other documents provided to . . . Plaintiffs" KSU "promoted the value of the in-person education experiences, opportunities, and services" KSU provided (First Amended Petition ¶62). Plaintiffs do not reference any specific contractual provision in the first amended petition. The most pointed reference is to the course catalog as a whole and unspecified class descriptions.

Without reference to any specific contractual promise sufficient to state Plaintiffs' claim for breach of contract, it must be dismissed. See *Jamieson,* 473 F.Supp.2d at 1160; and *Coffman,* 2018 WL 3093506. See also *Buschauer,* 2021 WL 1293829, *6; *Hickey,* 2021 WL 1630579, *2; and *Crawford,* 2021 WL 1840410, *7. This is an additional reason to dismiss the breach of contract claim against KSU.

Though the breach of contract claim must be dismissed, a few other points of argument are mentioned here. KSU references the course refund policy for students who drop one or more courses or completely withdraw from a term. This is described in greater detail in Section I(A) of the *Minjarez-Almeida* analysis above. Suffice it to say that Plaintiffs insist that they do not rely on the refund policy, and further, it does not preclude their breach of contract claim because it applies only to students who drop courses or withdraw, which Plaintiffs did not do. The Court agrees with Plaintiffs on this point, though it is moot given the Court's conclusion above. The refund policy cited by KSU is not independent grounds for dismissal of the breach of contract claim for failure to state a claim.

KSU also points to the FRA, which was not referenced in Plaintiffs' first amended petition. It was attached as an exhibit to KSU's motion to dismiss, and Plaintiffs do not dispute its content. The FRA says in part:

> "I understand that when I register for any class at Kansas State University or receive any service from Kansas State University, **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.** I further understand and agree that my registration and acceptance of these terms 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 **Kansas State University 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 published or assigned due date.**

> I understand and agree that if I drop or withdraw from some or all of the classes for which I register, I will be responsible for paying all or a portion of tuition and fees in accordance with the published tuition refund schedule at Kansas State University. **I have read the terms and conditions of the published tuition refund schedule and understand those terms are incorporated herein by reference.** I further understand that my failure to attend class or receive a bill does not absolve me of my financial responsibility as described above.
>
> . . .
>
> **This agreement supersedes all prior understandings, representations, negotiations and correspondence between the student and Kansas State University, 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.** This agreement may be modified by Kansas State University if the modification is signed by me. Any modification is specifically limited to those policies and/or terms addressed in the modification."

KSU argues that the FRA is the only express contract between Plaintiffs and KSU. KSU asserts that it does not promise in-person learning, nor does it allow for the creation of separate implied contracts that make such a promise. Given the Court's dismissal of the breach of contract claim for multiple reasons, there is no need to consider whether the FRA provides an additional basis for dismissal.

For the reasons set forth above, the Court grants KSU's motion to dismiss the breach of contract claim against it.

C. UNJUST ENRICHMENT CLAIM.

KSU argues that Plaintiffs' unjust enrichment claim must fail because Plaintiffs did not comply with the requirements of K.S.A. 46-903 and K.S.A. 46-907. For the reasons set forth in Section I(B) of the *Minjarez-Almeida* analysis above, Plaintiffs fail to state a claim for unjust enrichment, and the claim must be dismissed.

D. CONVERSION AND TAKINGS CLAIMS.

1. CONVERSION CLAIM.

KSU argues that Plaintiffs' conversion claim must be dismissed for failure to state a claim because it is based on money owed. For the reasons set forth in Section I(C) of the *Minjarez-Almeida* analysis above, Plaintiffs fail to state a claim for conversion, and the claim must be dismissed.

2. TAKINGS CLAIM.

KSU asserts that Plaintiffs' takings claim must be dismissed for failure to state a claim. Plaintiffs' takings claim is grounded in the Takings Clause of the Fifth Amendment to the United States Constitution, which says "private property" shall not be "taken for public use, without just compensation." U.S. Const. amend V. It applies to the states through the Fourteenth Amendment. U.S. Const. amend XIV.

Plaintiffs also rely on Section 18 of the Kansas Constitution Bill of Rights, which says: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay." Section 18 of the Kansas Constitution Bill of Rights has not been held by Kansas courts to be an analog of the Fifth Amendment's Takings Clause. Rather, Section 18's guarantee is one akin to a general guarantee of due process under the Fourteenth Amendment. Plaintiffs do not assert that Section 18 extends protections beyond the protections afforded by the Fifth or Fourteenth Amendments to the federal constitution, and it has not been held to do so. See *State v. Boysaw,* 309 Kan. 526, 537, 439 P.3d 909 (2019).

Takings claims are most familiar in the context of eminent domain and inverse condemnation cases. Eminent domain cases "are initiated by a governmental condemning authority for the purpose of acquiring an interest in private real property" and are creatures of

statute. *GFTLenexa, LLC v. City of Lenexa,* 310 Kan. 976, 980, 453 P.3d 304 (2019). Inverse condemnation cases are usually initiated by a property owner where the government "reduced or evaporated private property interests without formally instituting eminent domain procedures." *Id.* These are grounded in the Takings Clause and are not based in statute. *Id.* The elements of both are the same – a private property interest taken for public use. *Creegan v. State,* 305 Kan. 1156, 1161, 391 P.3d (2017). The existence of a compensable taking is a question of law for the Court. *Frick v. City of Salina,* 290 Kan. 869, Syl.¶3, 235 P.3d 1211 (2010).

"[T]he constitutional requirement of just compensation for the taking of private property for public use is addressed to every sort of interest which the citizen may possess in the physical thing taken." *Isely v. City of Wichita,* 38 Kan. App. 2d 1022, 1025, 174 P.3d 919 (2008). Plaintiffs correctly assert that a takings claim may succeed even where there is no real property at stake, or personal property affixed to real estate.

A "protected due process right must encompass an interest recognized by the Constitution." *Kansas Racing Mgmt., Inc. v. Kansas Racing Com'n,* 244 Kan. 343, 354, 770 P.2d 423 (1989). "To establish a property interest in a particular benefit, appellant must have a legitimate claim of entitlement to it." *Id.* Property interests are not created by the Constitution, but are created and defined by "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Harrison v. Long,* 241 Kan. 174, 178, 734 P.2d 1155 (1987). "Without the existence of such rules or understandings, the person has only an abstract desire for or a unilateral expectation of the benefit." *Kansas Racing Com'n,* 244 Kan. at 354.

Plaintiffs assert that they have a compensable interest in the portion of tuition paid for in-person learning for the period of time in which only online learning was provided. (First Amended

Petition ¶¶76-87) KSU counters that there is no independent source such as state law to support the Plaintiffs' claimed interest. Plaintiffs cite *Stewart v. Norwood*, 2017 WL 4284971, *10-11 (D.Kan. 2017), which said that an inmate has a protectable property interest in the interest on his inmate trust account because a state statute entitled him to earn it. *Stewart* is distinguishable because there is no state statute that entitles students to an in-person education, or a tuition refund from a state university when in-person classes are switched to online only. Further, Plaintiffs have failed to point to any other independent source that supports their entitlement to a tuition refund in this situation. For lack of a protectable property interest, Plaintiffs' takings claim fails.

Cases from other jurisdictions dealing with takings claims for tuition and fee refunds due to the COVID-19 pandemic are in accord. See, e.g., *Student "A" v. Hogan*, 2021 WL 119083, *5 (D.Md. 2021) (no authority that "any fee paid to the government for a service may form the basis of a takings claim if a citizen later believes they have not received the service they paid for"); *Miller v. Bd. of Trustees of the California State Univ.*, 2021 WL 358376, at *5-6 (C.D.Cal. 2021) (under similar facts, there is no protectable property interest and the claim was dismissed); *Student "C" v. Anne Arundel Cty. Cmty. Coll.*, 2021 WL 82919, *6 (D.Md. 2021) (Takings Clause "was not meant to protect property owners in their voluntary dealings with the government" and is not a vehicle for "a claim that they have an interest in receiving the benefit of [their] bargain"); and *Student "B" v. Howard Cty. Cmty. Coll.*, 2021 WL 75139, *5 (D.Md. 2021) (same).

Further, Plaintiffs here admit they did not allege the element that property was taken for a public use, but seek leave if necessary to amend their petition. KSU argues additionally that the takings claim fails because it acted pursuant to its police power in transitioning to online classes based on a public health emergency. Given the Court's conclusion in regard to the lack of a protectable property interest, there is no need to address these issues here.

3. DUE PROCESS CLAIM.

Finally, to the extent Plaintiffs attempt to state a separate claim for due process violations against KSU, they admit it fails as pled. While Plaintiffs may pursue such a claim under 42 U.S.C. §1983 against "persons" acting under color of state law, the State of Kansas and its agencies are not persons who may be sued for damages under Section 1983. *Wendt v. Univ. of Kansas Med. Ctr.,* 274 Kan. 966, 980-81, 59 P.3d 325 (2002). Plaintiffs ask the Court to allow them to amend their petition in order to sue individual members of KBOR and other unnamed state officials in an effort to build a Section 1983 claim. Plaintiffs' request is denied.

For the reasons set forth above, Plaintiffs fail to state a claim for a constitutional taking or otherwise for a violation of due process, and the claims must be dismissed.

E. OTHER ISSUES.

KSU raises additional arguments in favor of its motion to dismiss, including: 1) the express and implied contract claims cannot co-exist at the pleadings stage; and 2) the petition fails to state a claim under the KJRA. Given the Court's dismissal of all of Plaintiffs' claims against KSU for the reasons set forth above, there is no need to address KSU's other issues.

II. KBOR'S MOTION TO DISMISS.

Plaintiffs clarify in their response to KBOR's motion to dismiss that they make only two claims against KBOR: 1) unjust enrichment; and 2) conversion/taking. Plaintiffs do not claim KBOR committed a breach of contract. KBOR raises the same successful arguments made by KSU for dismissal of these claims. The unjust enrichment claim must be dismissed because it was not first presented to and denied by the joint committee on special claims against the state. The conversion claim must be dismissed because it is based on money withheld or owed, and this will

not support a conversion claim in Kansas. The takings claim must be dismissed for lack of a protected property interest.

As an additional and independent reason for dismissal, KBOR argues that Plaintiffs have failed to state a claim against it because it is a legal entity separate and apart from KSU, and Plaintiffs failed to allege in the petition how or why KBOR is responsible for the acts or omissions underlying Plaintiffs' claims. Plaintiffs' first amended petition alleges that on or around March 12, 2020, KSU made the decision to transition to online classes and services for the remainder of the Spring 2020 semester (First Amended Petition ¶20); and KSU has not provided students any tuition refund or reimbursement, or information about the same, for the Spring 2020 semester (First Amended Petition ¶27, 36).

In contrast, Plaintiffs' petition alleges that KBOR "is a constitutional entity that coordinates the board of control for the entire State of Kansas" (First Amended Petition ¶11); and "makes all relevant decisions with regard to the cancellation and closures of classes and decisions regarding the refund of tuition at Kansas State University." (First Amended Petition ¶12). Plaintiffs make no other specific reference to KBOR in their first amended petition.

The Court considers these allegations in the context of statutes describing the nature and function of KBOR as described in Section II of the *Minjarez-Almeida* analysis above. The question is whether Plaintiffs' allegations state a claim against KBOR for unjust enrichment or conversion/taking.

Unjust enrichment has three elements:

> "(1) a benefit conferred upon one person by another; (2) an appreciation or knowledge of the benefit received; and (3) the acceptance or retention of the benefit by the individual receiving the benefit under such circumstances as to make it inequitable for the individual to retain the benefit without payment of its value." *Security Benefit Life Ins. Corp.*, 21 Kan. App. 2d 833, Syl. ¶5.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another." *Carmichael*, 237 Kan. at 500. The elements of a constitutional taking include private property taken for public use without just compensation. Any due process claim against KBOR fails for the same reasons it failed against KSU as outlined in Section I(D)(3) above.

Under K.S.A. 76-719(b), the tuition when collected "shall be deposited in the state treasury and credited to the general fees fund" of KSU. Plaintiffs assert that KSU made the decision to move to online classes and decided not to refund any portion of tuition paid. Plaintiffs fail to plead facts that indicate that some benefit was conferred upon KBOR, or that it would be inequitable for KBOR to retain it. Plaintiffs fail to plead facts that indicate KBOR assumed or exercised ownership of goods or chattels belonging to Plaintiffs. Plaintiffs fail to plead facts that indicate that KBOR took Plaintiffs' private property for public use.

To the extent Plaintiffs allege generically in their petition that "Defendants" received and retained a benefit from Plaintiffs, exercised ownership over something belonging to Plaintiffs, or took private property from Plaintiffs, these are conclusory allegations when it comes to KBOR, notably in light of K.S.A. 76-719(b). This Court is not required to accept them. *Grindsted*, 262 Kan. at 303.

For the reasons outlined above, Plaintiffs fail to state a claim against KBOR for unjust enrichment and conversion/taking, and the claims against KBOR must be dismissed.

CONCLUSION

MINJAREZ-ALMEIDA, CASE NO. 2020-CV-378 ("FEE CASE")

Plaintiffs fail to state a claim against KSU. KSU's motion to dismiss is granted.

Plaintiffs fail to state a claim against KBOR. KBOR's motion to dismiss is granted.

PLANK, CASE NO. 2020-CV-432 ("TUITION CASE")

Plaintiffs fail to state a claim against KSU. KSU's motion to dismiss is granted.

Plaintiffs fail to state a claim against KBOR. KBOR's motion to dismiss is granted.

The entirety of this consolidated case is dismissed and terminated in favor of Defendants. No further journal entry is necessary.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically on the date stamped on the order, providing notice to the following:

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