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ELEVENTH CIRCUIT DOCKET NO. 21-12564-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONRICH YOUNG,

Plaintiff/Appellant,

v.

GRAND CANYON UNIVERSITY, INC. and
GRAND CANYON EDUCATION, INC.,

Defendants/Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION
THE HONORABLE TIMOTHY C. BATTEN

BRIEF OF APPELLANT

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11th Circuit Docket Number 21-12564-CC

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, Appellant hereby certifies that the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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Batten, Sr., Timothy C., United States District Court Judge

Casa de Amistad, LLC, Subsidiary of Grand Canyon Education, Inc.

Dickerson, Derin B., Counsel for Appellees

El Vecino de Amigos, LLC, Subsidiary of Grand Canyon Education, Inc.

GC Education, Inc., Subsidiary of Grand Canyon Education, Inc.

Grand Canyon Education, Inc. (LOPE), Appellee

Grand Canyon University, Inc., Appellee

La Fuente de la Comunidad, LLC, Subsidiary of Grand Canyon Education, Inc.

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Nuevo Comienzo, LLC, Subsidiary of Grand Canyon Education, Inc.

Orbis Education Services, LLC, Subsidiary of Grand Canyon Education, Inc.

Orbis Education Management Company, LLC, Subsidiary of Grand Canyon Education, Inc.

Orbis Education II, LLC, Subsidiary of Grand Canyon Education, Inc.

Piedras Bonitas Inversiones, LLC, Subsidiary of Grand Canyon Education, Inc.

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Young, Donrich, Appellant

DATED this 21st day of September, 2021.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rule 34-3(c). Oral argument will assist the Court in considering the important issues raised herein, which affect tens of thousands of students of Grand Canyon University and tens of millions of federal student loan dollars.

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STATEMENT OF JURISDICTION

This appeal arises from a July 22, 2021 ruling from the Northern District of Georgia granting Defendants-Appellees' Motion to Dismiss in its entirety. The district court's order is a "final decision," giving this Court jurisdiction over the appeal. 28 U.S.C. § 1291; *also Edwards v. Prime, Inc.*, 602 F.3d 1276, 1288 (11th Cir. 2010) ("An appeal from a final judgment of the district court, one disposing of all the claims and defenses of all the parties in a lawsuit, poses no jurisdictional problem").

STATEMENT OF ISSUES

1. Whether the district court erred in finding Plaintiff failed to state a claim for breach of contract by subjecting this claim to a heightened pleading standard and by failing to construe all allegations in favor of Mr. Young.

2. Whether the district court erred in finding Plaintiff failed to state a claim for breach of the implied covenant of good faith and fair dealing despite Mr. Young's detailed allegations that Defendants did not exercise their contractual discretion in good faith.

3. Whether the district court erred in finding Plaintiff failed to state a claim for unjust enrichment despite the fact that Mr. Young explicitly pled this claim in the alternative.

4. Whether the district court erred in finding Plaintiff failed to state a claim under the Arizona Consumer Fraud Act even though Defendants' form contracts contained inaccurate information regarding the length of time it takes to complete its doctoral programs.

5. Whether the district court erred in finding Defendants' Motion to Dismiss was aimed at Mr. Young's claims, when Defendants' motion explicitly stated that it was not.

STATEMENT OF THE CASE

This is the second time this case has been before this Court. During the first appeal, this Court reversed the district court's order granting Defendants' motion to compel arbitration, holding that 34 C.F.R. § 685.300(f) prohibited Defendants from enforcing their pre-dispute arbitration agreement with respect to Mr. Young's claims. *See Young v. Grand Canyon Univ., Inc.*, 980 F.3d 814, 821 (11th Cir. 2020). As explained in greater detail herein, even though Defendants never actually moved to dismiss Mr. Young's claims, on remand the district court granted Defendants' purported Motion to Dismiss and entered judgment in favor of Defendants. Reversal is necessary once again.

Grand Canyon University, Inc. and Grand Canyon Education, Inc. (collectively, "GCU") have adopted a scheme to unfairly increase profits at the expense of students and the federal government. The student victims of this scheme must pay, or take out loans to pay, for courses that have no value because GCU does not honor its commitment as to when a doctorate can be completed. GCU represents to its doctoral students that a doctorate can be obtained after completing 60 credit hours. This representation is demonstrably false.

Plaintiff fulfilled his contractual obligations but GCU has not. GCU's Dissertation Milestone Table confirms that the promised 60-credit hour program is

not attainable. This results in students being enrolled for far longer than should be necessary to complete their degree and enables GCU to improperly line its pockets through tuition payments made via federal student loans. Finishing a doctorate within 60 credit hours is unattainable for the several reasons described in the Amended Complaint. In fact, GCU has designed its dissertation program and requirements so that students cannot complete the program within 60 hours and – after they are trapped in GCU's program – must pay for numerous extra courses.

Beyond GCU's promises regarding the completion of the doctoral program within 60 credit hours, Defendants promise to provide doctoral students the "individualized support" needed to timely complete a dissertation. GCU also promises that a doctoral student's dissertation chair and committee members will "work directly" with doctoral candidates. This does not occur.

Procedural History

This case was originally filed on March 7, 2019. *See* Doc. 1. Following removal, Defendants filed a Motion to Dismiss (Doc. 6) and a Motion to Compel Arbitration (Doc. 7). Defendant's Motion to Dismiss indicated that it was "**specifically directed at the claims asserted by Plaintiff Kolb and Jane Does I, II, and III**" and that GCU was independently moving to compel arbitration as to the plaintiffs governed by an arbitration agreement. *See* Doc. 6-1, p. 4 n.5

(emphasis added). In response, the Plaintiffs filed an Amended Complaint (Doc. 10) which added Mr. Young as a Plaintiff. Defendants moved to dismiss the Amended Complaint (Doc. 13) and filed a second Motion to Compel Arbitration (Doc. 14). In their second motion, Defendants again indicated that the motion was

> **directed at the claims asserted by Plaintiff Kolb and Jane Does I, II, and III. Plaintiffs Carr, Stanton, and Young are required to submit their claims to arbitration, pursuant to their signed enrollment agreements. Accordingly, Defendants filed a Motion to Compel Arbitration as to Plaintiffs Carr, Stanton, and Young**.

See Doc. 13-1, p. 4 n.5 (emphasis added). Defendants further told the district court that, because Mr. Young was required to submit his claims to arbitration, pursuant to a signed enrollment agreement, that they "filed a Motion to Compel Arbitration" as to Mr. Young's claims. *Id.*[1] Mr. Young opposed arbitration (Doc. 17) and Plaintiffs opposed dismissal (Doc. 19). Defendants filed replies. *See* Doc. 21-22.

On August 19, 2019, the district court granted dismissal on the basis that the court lacked jurisdiction over the claims of all Plaintiffs except Mr. Young. *See* Doc. 24. With respect to Mr. Young, the court compelled arbitration and dismissed the case. *Id.* Mr. Young timely appealed. *See* Doc. 26. This Court reversed, holding that Defendants were barred from seeking arbitration of Mr.

[1] Defendants filed an updated arbitration motion, which informed the district court that it was "amended to reflect that newly added Plaintiff Donrich Young must also arbitrate his claims." *See* Doc. 14-1, p. 1, n.1.

Young's claims. *See Young v. Grand Canyon Univ., Inc.*, 980 F.3d 814, 821 (11th Cir. 2020); Doc. 30.

Following remand, the district court adopted the opinion of this Court as its judgment regarding the arbitration issue. *See* Doc. 33. A month later, after Defendants failed to answer Mr. Young's claims, Plaintiff filed a Motion for Clerk's Entry of Default. *See* Doc. 34. Defendants opposed (Doc. 35) and Plaintiff filed a reply (Doc. 36). On January 21, 2021, the district court denied Plaintiff's request for entry of default, finding that, despite the fact that Defendants' request for dismissal was not directed towards Mr. Young's claims, the court would interpret Defendants' motion as if it were. *See* Doc. 37.[2]

On May 26, 2021, the district court entered an order directing Mr. Young to update the Court within 14 days on whether any of his claims were moot based on this Court's ruling. *See* Doc. 40. Plaintiff complied (Doc. 41) and Defendants filed a response (Doc. 42). On July 22, 2021, the district court granted Defendants' Motion to Dismiss and entered judgment in favor of Defendants. *See* Doc. 43, 44. Mr. Young timely appealed. *See* Doc. 45.

[2] Even though Mr. Young disputes that Defendants actually moved to dismiss his claims, and challenges this determination herein, for the purposes of this brief, Mr. Young presents his arguments as if GCU indeed moved to dismiss his claims. By doing so, Mr. Young does not waive his challenge the district court's determination on the default issue raised herein.

Statement of Facts

A. GCU and Its Doctoral Degree Programs.

GCU is a rapidly growing for-profit college. *See* Amended Complaint, ¶ 14 (Doc. 10). According to Defendants' financial reporting to the Securities and Exchange Commission:

> Our enrollment at December 31, 2017 was approximately 90,300, representing an increase of approximately 10.2% over our enrollment at December 31, 2016. Our net revenue and operating income for the year ended December 31, 2017 were $974.1 million and $282.8 million, respectively, representing increases of 11.5% and 19.2%, respectively, over the year ended December 31, 2016. Our net revenue and operating income for the year ended December 31, 2016 were $873.3 million and $237.2 million, respectively, representing increases of 12.2% and 12.8%, respectively, over the year ended December 31, 2015.

Id. The school has continued to expand rapidly, now enrolling over 111,000 students. *See* 2020 Grand Canyon Education 10-K, p. 5.[3] Nearly 80% of GCU's students are online students and 86% of the online students are age 25 or older. *See* Doc. 10, ¶ 15.

The most important part of GCU's operations is its highly efficient system of pushing students to apply for federal student loans and grants. *Id.* at ¶ 16. Over 71% of GCU's funding comes from the federal government:

[3] Available at: https://investors.gce.com/static-files/8b21c8de-479f-4236-8375-e77a33807bbb.

> During fiscal 2017 and 2016, we derived approximately 71.5% and 72.3%, respectively, of our net revenues (calculated on a cash basis in accordance with Department of Education standards currently in effect) from tuition financed under the Title IV programs. The primary Title IV programs that our students receive funding from are the Federal Direct Loan program or FDL Program, and the Federal Pell Grant, or Pell, Program.

Id. Much of this funding is for graduate programs: "79.1% of our students were enrolled in our online programs, and, of our working adult students (online and professional studies students), 50.5% were pursuing master's or doctoral degrees." *Id.* at ¶ 18. Thus, millions of dollars in annual profits flow to GCU from the federal student loans of doctoral students like Mr. Young. *Id.* at ¶ 10. Undoubtedly a substantial portion of the market capitalization of Grand Canyon (some $5,600,000,000 at the time of the Amended Complaint) can be attributed to the profitability of GCU's online graduate programs. *Id.*

GCU represents that its doctoral programs can be completed after students take 60 credit hours of coursework. *Id.* at ¶ 19. These 60 credit hours include three dissertation courses worth three credit hours each. *Id.* GCU's representation that its doctoral programs can be completed in 60 credit hours is false. *Id.* In reality, only a tiny percentage of students ever complete a doctorate at GCU and those who do are forced to pay for far more than 60 hours of coursework.

GCU makes students pay for additional courses in order to keep moving toward their degree. These dissertation courses are not actual academic classes,

but purport to provide individualized academic support by their dissertation chair and committee members. *Id.* at ¶ 20. When students do not complete their dissertation by the end of their first three dissertation courses, GCU requires students to take what are referred to as "research continuation" courses. *Id.* at ¶ 21.

Research continuation courses are purportedly the vehicle to provide students with continuing individualized support for completing their "dissertation journey." *Id.* at ¶ 22. According to the GCU course catalog, research continuation courses are essentially the same thing as dissertation courses because they allow students "to work directly with their dissertation chair and committee members based on their individual progress plan for completing their dissertation." *Id.* GCU students receive three credit hours for the first five research continuation courses that they take while working on their dissertation. *Id.* at ¶ 23.

These credit hours, however, are worthless because a doctoral student has already completed the 60 credit hours purportedly needed to complete the doctorate before they are enrolled in any research continuation courses. *Id.* at ¶ 24. Doctoral students are charged $650 for each credit hour, for a total of $1,950 per research continuation course. *Id.* at ¶ 25.

Thus, a student taking all of these first five continuation courses will have received 15 additional – *and completely unnecessary* – course credits and paid GCU – either directly or through more student loan debt – an additional $9,750 in

tuition payments. *Id.* at ¶ 26. If a student has not completed his or her dissertation within 75 credit hours, they are enrolled in "dissertation research continuation courses." These courses provide no credit hours and are supposedly designed to "emphasize the finalization of the dissertation" – the same purpose given for the first five "research continuation courses." *Id.* at ¶ 27.

To illustrate how GCU misrepresents its doctoral program, consider a student enrolling in GCU's "Doctor of Business Administration with an Emphasis in Data Analytics" program. GCU's Academic Catalog lists a variety of courses necessary to graduate and then totals the credits earned for each listed course (3 hours each) and shows a total of 60 credit hours required for completion. *Id.* at ¶ 29. A closer review of GCU's doctoral program requirements shows that it is *impossible* to complete the program within only 60 credit hours. *Id.* at ¶ 31. GCU's "Dissertation Milestone Table," attached as "Appendix A" to its "University Policy Handbook" (a 185-page document separate and apart from its 413-page Academic Catalog), shows that GCU requires eight "review levels" leading to "final approval" and publication of a dissertation. *Id.* An examination of the "Dissertation Milestone Table" reveals that GCU in fact requires that its Doctor of Business Administration candidates complete, *at a minimum*, one "research continuation" course just to reach level four (of eight) of the dissertation review process. In order to reach dissertation review level eight, required for

publication and graduation, the student must, *at a minimum*, have completed *all five* of the "research continuation" courses. *Id.* at ¶ 32.

Thus, any and all of GCU's representations that a student could possibly complete a doctorate after 60 credit hours are materially false. This is a material misrepresentation because, among other reasons, there are many other schools offering doctoral degrees that could actually be earned in 60 credit hours. GCU's misrepresentations and omissions make it impossible for a prospective student to estimate the time and cost of earning a degree at GCU. *Id.* at ¶ 33.

Additionally, using GCU's online "net price calculator" also misrepresents that students can complete a doctorate after 60 credit hours. *Id.* at ¶ 34. This online tool promises to show students exactly what their degrees will cost. *Id.* It is a critical piece of GCU's marketing machinery. *Id.* It has been programmed to provide false information to potential doctoral degree candidates. *Id.*

By the time a student figures out GCU's bait-and-switch scheme, it is far too late. After borrowing tens of thousands of dollars for years of coursework and starting on their "dissertation journey," GCU is well aware most students will not leave the program even though they realize they have been duped. *Id.* at ¶ 35. Any and all credits earned as a part of GCU's "dissertation journey" are expressly non-transferable to another degree program. Therefore, even if students did want to

leave after they realize they were fooled, they cannot do so because their work and money will have been wasted. *Id.* at ¶ 36.

All of GCU's doctoral programs requiring dissertations are set up this way. *Id.* at ¶ 37. GCU intentionally misrepresents the actual minimum number of course hours required to earn a doctoral degree – and the tuition expense of doing so – so that students will enroll at GCU. *Id.*

GCU's Academic Catalog promises doctoral students that "the College of Doctoral Studies will be the premier provider of online doctoral education." *Id.* at ¶ 47. It further promises doctoral students that the school will "leverage the knowledge and expertise of faculty, learners, and experts external to the University through learning communities specific to the issues, concepts, and methods of a given discipline." *Id.* at ¶ 48. GCU is not, however, a "premier provider of online doctoral education" that "leverage[s] the knowledge and expertise of faculty" in a fashion that benefits students. Rather, GCU provides its doctoral students with substandard instruction and guidance and an insufficient level of resources to complete dissertations on a timely basis. *Id.* at ¶ 49. GCU has also established mandatory benchmarks and milestones that cannot be achieved within the promised 60-hour format of its doctoral programs. It is literally impossible for doctoral students to complete their dissertation – and therefore their degree – within the time represented by GCU. *Id.* at ¶ 50.

B. Mr. Young's Pursuit of a Doctorate.

Mr. Young enrolled in a Doctor of Education degree from GCU in January 2015. *Id.* at ¶ 68. He received Federal Direct Loans in order to pay for the doctoral program. *Id.* at ¶ 69. Mr. Young was forced to pay for three continuation courses. Despite his best efforts, the necessary guidance and resources were not made available such that his dissertation could have been completed. *Id.* at ¶ 71.[4]

[4] Mr. Young subsequently suspended his pursuit of a doctorate from GCU. He has nothing to show for his efforts, after spending hundreds of hours away from his family and taking out tens of thousands of dollars of federal student loans.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim *de novo*, accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff. *Novoneuron Inc. v. Addiction Research Inst., Inc.*, 326 F. App'x 505, 506 (11th Cir. 2009); *Glover v. Liggett Group, Inc.*, 459 F.3d 1304, 1308 (11th Cir. 2006).

SUMMARY OF ARGUMENT

Reversal is once again required to correct several errors made by the district court. First, the district court dismissed Plaintiff's breach of contract claim by subjecting the claim to a heightened pleading standard and by failing to construe all allegations in favor of Mr. Young. Second, the district court incorrectly dismissed Mr. Young's claim under the implied covenant of good faith and fair dealing because it ignored what was actually pled in the Amended Complaint. The district court also erred by finding that Mr. Young's claims under the Arizona Consumer Fraud Act and for intentional misrepresentation were required to be pled under Rule 9(b) and that Mr. Young was not allowed to pursue an alternative claim for unjust enrichment at this stage of the proceedings.

Finally, beyond the fact that the district court made several errors when resolving the substance of Defendants' motion, the court also fundamentally erred by finding that Defendants had sought dismissal of Mr. Young's claims. Because Defendants told the district court that their Motion to Dismiss was aimed only at "**the claims asserted by Plaintiff Kolb and Jane Does I, II, and III**" there was no motion pending as to Mr. Young's claims once this matter returned to the district court following this Court's original decision. Therefore, the district court erred by finding that Defendants were not in default based on their failure to timely

file a response to Mr. Young's Amended Complaint. For any of these reasons, reversal is warranted.

ARGUMENT AND CITATION OF AUTHORITY

I. Mr. Young Stated A Valid Breach Of Contract Claim.

The district court erred by finding that Mr. Young failed to state a claim for breach of contract. Under Arizona law, a breach of contract claim requires a plaintiff to show "(1) the existence of a contract, (2) breach of that contract, and (3) resulting damages."[5] *Pierre-Canel v. American Airlines*, 375 F. Supp. 3d 1044, 1057 (D. Ariz. 2019); *Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621 (Ariz. 2013). Mr. Young sufficiently pled these three elements to state a claim for relief.

Mr. Young made explicit reference to the existence of a contract between himself and Defendants via the Enrollment Agreement, Academic Catalog, University Policy Handbook, and Dissertation Milestone Table. *See, e.g.*, Doc. 10, ¶¶ 31-32, 47; *also* Tab 4 to Doc. 6-2 (copy of University Policy Handbook and Dissertation Milestone Table). Mr. Young's Enrollment Agreement, like all other students' agreements, specifically references and incorporates the "current University Policy Handbook, Academic Catalog, and Student Handbook." *E.g.*, Tab 1 to Doc. 6-2, p. 12.

[5] Mr. Young cites Arizona law based on the choice of law provision in the Enrollment Agreement. *See* Doc. 14-2, ¶ 12.

Mr. Young referred to the Academic Catalog on at least six other occasions in the Amended Complaint. *See* Doc. 10, ¶¶ 29, 31, 32, 48, 102, 133.[6] Second, Mr. Young alleged that Defendants breached the terms of Academic Catalog. *Id.* at ¶¶ 100 (alleging Defendants breached contract "by designing its programs in such a way that it is impossible for the student to complete the program in 60 credit hours"), 101, 103 (alleging Defendants failed "to ensure that its dissertation chairs and committee members provide students with prompt and meaningful feedback regarding their dissertations" as promised in Academic Catalog), 113. Finally, Mr. Young alleged resulting damages. *Id.* at ¶¶ 70-71 (alleging damages as to Mr. Young); 113 (alleging damages generally). Mr. Young's specific reference to the Academic Catalog and related documents on ***seven*** different occasions clearly refutes any notion that his breach of contract allegations are "untethered to any specific contract." *See* Doc. 13-1, p. 11.

Mr. Young referenced portions of the Academic Catalog and related documents that Defendants breached through their conduct. For example, even though the Enrollment Agreement states that students like Mr. Young need "60 credits [] for completion of this program of study" (*see* Doc. 14-4, p. 9), the Amended Complaint pointed to specific provisions of the Academic Catalog,

[6] Mr. Young also makes separate reference to the University Policy Handbook and specific provisions therein. *See* Doc. 10, ¶¶ 31-32.

University Policy Handbook, and Dissertation Milestone Table (Exh. A to Handbook) when demonstrating how GCU's 60-credit hour promise is false. *See* Doc. 10, ¶¶ 29-33. Mr. Young also specifically alleged that the Academic Catalog promised that GCU will "assess[] students' needs for support services and provid[e] support throughout the doctoral process," will "provide its doctoral students the 'individualized support' needed to timely complete a dissertation," and will "'work directly' with doctoral candidates to complete his or her dissertation in a timely manner." *See* Doc. 10, ¶¶ 102, 104-05. These specific references refuted Defendants' claims that no contractual obligations were identified by Mr. Young. *See* Doc. 13-1, p. 11. The district court did not need to "divine what agreement and terms were allegedly breached" because Mr. Young spelled out the provisions in detail.

The district court seemed to agree that Mr. Young spelled out the provisions in detail, noting that Mr. Young alleged that Defendants breached their contract by "designing its programs in such a way that it is impossible . . . to complete the program in 60 credit hours" and by "failing to provide students with prompt and meaningful feedback" as promised. *See* Doc. 43, p. 10. But the district court then imposed a heightened pleading standard and required Mr. Young to "demonstrate the how or when" he was denied certain feedback and support. *See* Doc. 43, p. 10.

Such specificity is not required to plead a claim for breach of contract. *E.g.*, *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985) ("Under notice pleading, the plaintiff need only give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001) ("Under the liberal system of 'notice pleading' set up by the Federal Rules, Rule 8(a)(2) . . . do[es] not require a claimant to set out in detail the facts upon which he bases his claim"); *Sierra-Sonora Enterprises, Inc. v. Domino's Pizza, LLC*, 2010 WL 1780998, at *2 (D. Ariz. May 4, 2010) ("Under a notice pleading standard, Plaintiffs have sufficiently alleged a breach of contract").

Mr. Young has alleged that he contracted with Defendants for educational services. *See* Doc. 10, ¶ 98. Mr. Young alleged that Defendants breached their contract by forcing him to take more than the 60 credit hours to complete the program and by failing to provide prompt and meaningful feedback regarding his dissertation so that it could be completed on a timely basis. *Id.* at ¶¶ 70-71. Finally, Mr. Jones alleges damages. *Id.* at ¶ 113.

In addition to erroneously imposing a heightened pleading standard on Mr. Young's breach of contract claim, the district court failed to take as true all allegations of material fact set forth in the Amended Complaint and construe Mr. Young's allegations in the light most favorable to the non-moving party as

required by established case law. *E.g.*, *Corey Airport Servs., Inc. v. City of Atlanta*, 181 F. App'x 908, 910 (11th Cir. 2006); *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 601 (9th Cir. 2020), *cert. denied sub nom. Facebook, Inc. v. Davis*, 141 S. Ct. 1684 (2021); *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011).

Mr. Young set forth in great detail how Defendants' breach their promise that students can complete their doctoral program within 60 credit hours set forth in the course catalog. *See* Doc. 10, ¶¶ 19-38. Had the district court applied the proper standard and accepted Mr. Young's allegations as true, his claim would have survived. Rather than accept Mr. Young's allegations, the district court accepted Defendants' assertions. *See* Doc. 43, p. 11 (accepting Defendants' argument that "the dissertation milestone table does not . . . demonstrate that it is impossible to complete the program within sixty hours").

Also unpersuasive is the district court's circular argument that there is no promise that a student will earn their degree within 60 hours, but rather only a statement that "a student must complete a minimum of sixty credit hours to earn a degree." *See* Doc. 43, p. 11. Such a conclusion is contrary to the plain language of the Enrollment Agreement which states that 60 credit hours are necessary for the degree. *See* Doc. 14-4, p. 9. The district court erred by dismissing Mr. Young's breach of contract claim.

II. Mr. Young Stated A Valid Claim For Relief Under The Covenant Of Good Faith And Fair Dealing.

The district court also erred in dismissing Mr. Young's claim for relief under the covenant of good faith and fair dealing. *See* Doc. 43 at 12-15. A claim for breach of the implied covenant of good faith and fair dealing is well recognized under the applicable Arizona law. *See Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co.*, 270 F. Supp. 3d 1112, 1128 (D. Ariz. 2017), *aff'd,* 2019 WL 1758478 (9th Cir. Apr. 18, 2019) ("Arizona law implies a covenant of good faith and fair dealing in every contract"). Mr. Young alleged that Defendants violated the covenant "by failing to offer a reasonable opportunity to complete dissertations during the initial 60-credit hour period." *See* Doc. 10, ¶ 110. Mr. Young also alleged that Defendants violated their obligations through their "refusal to provide meaningful guidance to its doctoral students" in good faith. *Id.*

Even if the district court properly dismissed the straight breach of contract claim, that does not mean good faith and fair dealing was not violated. Under Arizona law, the covenant of good faith and fair dealing "can be breached even where the express terms of a contract are not violated." *E.g.*, *Great W. Bank v. LJC Dev., LLC*, 362 P.3d 1037, 1044 (Ariz. Ct. App. 2015). Mr. Young's claim should have also survived because the district court's justification for dismissal was factually inaccurate.

In dismissing Mr. Young's claim for breach of the implied covenant of good faith and fair dealing, the district court held:

> Because Young does not allege that GCU has not provided guidance and the possibility of completing a doctorate degree in sixty credit hours, GCU has not prevented him from attaining the benefits which flow from the contract. Thus, there was no breach of the implied covenant of good faith and fair dealing. This claim will be dismissed.

See Doc. 43, p. 15. These conclusions, however, are contrary to what is pled in the Amended Complaint. In the Amended Complaint, Mr. Young specifically alleged that GCU failed to provide guidance on at least four separate occasions. First, in paragraph 42, Mr. Young alleged "GCU intentionally understaffs doctoral committees and disincentivizes the members from promptly offering guidance to students." *See* Doc. 10, ¶ 42. In paragraph 49, Mr. Young alleged "GCU provides its doctoral students with substandard instruction and guidance and an insufficient level of resources to complete dissertations on a timely basis." *Id.* at ¶ 49. In paragraph 71, Mr. Young alleged "the necessary guidance and resources have not been made available such that his dissertation could have been completed on a timely basis." *Id.* at ¶ 71. Finally, in paragraph 110, Mr. Young alleged "Defendants' systematic refusal to provide meaningful guidance to its doctoral students is not in keeping with good faith and fair dealing." *Id.* at ¶ 110. Mr. Young also sufficiently alleged that GCU did not exercise its discretion under the Academic Catalog and University Policy Handbook in good faith by, for example,

making it impossible to actually obtain a doctoral degree within the 60 hours of course credits as promised. *See* Doc. 10, ¶¶ 19-38, 119-21.

Clearly Mr. Young has alleged that GCU has prevented him from attaining the benefits which flow from the contract. The district court's conclusion to the contrary is erroneous and must be reversed.

III. Mr. Young Stated Valid Claims For Intentional Misrepresentation And Violation Of The Arizona Consumer Fraud Act.

The district court also erred by dismissing Mr. Young's claims for intentional misrepresentation and violation of the Arizona Consumer Fraud Act.

A. The Heightened Pleading Standard Does Not Apply.

The district court concluded that Mr. Young's claims for violations of Arizona's Consumer Fraud Act must be pled with particularity under Rule 9(b). *See* Doc. 43, pp. 16-18. This conclusion is contrary to the result reached in *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, 362 F. Supp. 3d 1295 (N.D. Ga. 2019). There, in response to a challenge to the unfair and deceptive trade practices claims from all 50 states, including Arizona, the district court found:

> the Court concludes that the Plaintiffs' unfair and deceptive trade practices claims are not subject to Rule 9(b)'s heightened pleading standards. Claims are only subject to these heightened pleading standards if they "sound in fraud." "A claim 'sounds in fraud' when a plaintiff alleges 'a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of [that] claim.'" *Burgess v. Religious Tech. Ctr., Inc.*, 2014 WL 11281382, at *6 (N.D. Ga. Feb. 19, 2014).

> Here, the Defendants have failed to show that the state unfair and deceptive trade practice statutes sound in fraud. They have not shown that the elements of these statutes are similar to the elements of a common law fraud, and they have not shown that the Plaintiffs' theory of recovery rests upon a unified course of fraudulent conduct. Therefore, the Court concludes that the heightened pleading standards of Rule 9(b) do not apply to these particular state statutes.

In re Equifax, 362 F. Supp. 3d at 1335-36. Similar findings are warranted here.

Mr. Young's theory of recovery under the Arizona Consumer Fraud Act does not rest upon one course of fraudulent conduct. Indeed fraud is but one of numerous unlawful practices prohibited by A.R.S. § 44-1522(A), including deception, deceptive or unfair acts or practices, false pretense, false promise, misrepresentation, concealment, and suppression or omission of any material fact with intent that others rely on such concealment. Mr. Young's allegations related to these non-fraud elements of the Act. For example, Mr. Young asserts that the Course Catalog contains statements that misrepresent the amount of time it actually takes to complete the doctoral program. *See* Doc. 10, ¶¶ 126-33. Such allegations are sufficient to overcome a motion to dismiss. *E.g.*, *Raup v. Wells Fargo Bank, NA*, 2013 WL 3216175, at *3 (D. Ariz. June 25, 2013) (allowing Consumer Fraud Act claims about misrepresentation in documents to survive motion to dismiss). These claims are not about fraud – in fact, they do not resemble fraud at all – thus

heightened pleading would make no sense. Because Mr. Young's allegations do not sound in fraud, no heightened pleading standard applies.

B. Actionable Conduct Has Been Alleged.

Even if Mr. Young did allege fraud, he has sufficiently alleged Defendants made statements that were actually misleading or could be justifiably relied upon. A plain reading of the Amended Complaint confirms this fact.

Mr. Young clearly alleged that GCU represented that its doctoral programs can be completed in 60 credit hours, and omitted from this representation the fact that its doctoral programs cannot be completed in 60 credit hours. *E.g.*, Doc. 10, ¶ 119. Mr. Young also alleged that this misrepresentation and omission was material because the minimum number of credit hours required to complete a course controls the dollar cost and amount of time it will take a student to complete the program. *Id.* at ¶ 120. Cost and time are material factors that Mr. Young and other students considered before choosing to enroll with GCU. *Id.* Mr. Young further alleged that GCU knows that its representations are false because the doctoral dissertation requirements that it created and enforces make it impossible for a student to complete a GCU doctoral program in 60 credit hours. *Id.* at ¶ 121. Each of these allegations contradicts the district court's conclusion that "Mr. Young has not pled any false statement by Defendants." *See* Doc. 43, p. 18. Thus, even if the

district court could properly limit Mr. Young to only alleging fraud under the Act, he made sufficient allegations.

As shown above, the plain language of A.R.S. § 44-1522(A) makes it clear that fraud is but one of at least nine unlawful practices prohibited by the statute. The district court's attempt to pigeonhole Mr. Young's claims as being exclusively fraud-based in order to support dismissal is unpersuasive. Once again, to the extent Mr. Young's claims do not sound in fraud, then the allegations certainly do not need to be particularly detailed. For example, Mr. Young states in paragraph 126-34 of the Amended Complaint that Defendants intentionally misrepresented that a student could complete their doctoral program in 60 credit hours, when in reality it takes much longer. These allegations do not relate to fraud and is plenty specific. *E.g.*, *Cheatham v. ADT Corp.*, 161 F. Supp. 3d 815, 826 (D. Ariz. 2016). The district court's analysis improperly narrows the actual scope of the Arizona Consumer Fraud Act, which, as noted above, encompasses far more conduct than just affirmative statements.

IV. Mr. Young Stated A Viable Claim For Unjust Enrichment.

The district court's dismissal of Mr. Young's unjust enrichment claim was defective for three reasons. First, the district court found that Mr. Young did not appeal the earlier order holding his unjust enrichment claim was subject to arbitration. *See* Doc. 43, p. 19 (holding "Young did not appeal the Court's earlier

order holding the unjust enrichment claim was subject to arbitration"). Not true. Mr. Young appealed the district court's arbitration order in its entirety. *See* Doc. 26. This Court reversed the district court's arbitration order. *E.g.*, *Young v. Grand Canyon Univ., Inc.*, 980 F.3d 814 (11th Cir. 2020). Therein, this Court held that 34 C.F.R. § 685.300(f) prohibits Defendants from enforcing their pre-dispute arbitration provision with respect to Mr. Young's claims. 980 F.3d at 821. There is no validity to the district court's suggestion that this Court's order did not apply to all of Mr. Young's claims.

Second, the district court erred by dismissing Mr. Young's unjust enrichment claim on the merits. The court held that Mr. Young could not assert a claim for unjust enrichment because Plaintiff "pleads a valid contract governs the parties' relationship." *See* Doc. 43, p. 21. Such a conclusion is contrary to the Federal Rules, which allow alternative claims. Federal Rule 8(d) permits plaintiffs to plead alternative claims, even if the alternative claims are inconsistent. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805 (1999) ("Our ordinary Rules recognize that a person may not be sure in advance upon which legal theory she will succeed, and so permit parties to 'set forth 2 or more statements of a claim or defense alternatively or hypothetically,' and to 'state as many separate claims or defenses as the party has regardless of consistency'") (quoting Fed. R. Civ. P. 8); *Texas Ed Tech Sols., LLC v. Authentica Sols., LLC*, 2020 WL 5774015, at *5 (N.D. Ga. Sept.

28, 2020); *S. Coal Corp. v. Drummond Coal Sales, Inc.*, 2017 WL 7550765, at *3 (N.D. Ga. Nov. 15, 2017) ("federal pleading standards apply and allow [plaintiff] to plead claims in the alternative"). Mr. Young pled a claim for unjust enrichment in the alternative to his breach of contract claim. *See* Doc. 10, ¶ 136 ("This Count is pursued only in the alternative to Count One. Plaintiffs acknowledge that if their breach of contract claims are successful they cannot also pursue unjust enrichment"). As a result, he properly exercised his pleading rights under Rule 8(d). *Cleveland*, 526 U.S. at 805; *S. Coal Corp.*, 2017 WL 7550765, at *3.

In *WESI, LLC v. Compass Environmental*, 509 F. Supp. 2d 1353, 1362-63 (N.D. Ga. 2007), the district court explained:

> A claim for unjust enrichment is not a tort, but an alternative theory of recovery if a contract claim fails. The theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated. Other district courts have held, however, that dismissing an equitable count, even at the summary judgment stage, is not appropriate merely because a claimant is prohibited from Georgia law from recovering under a breach of contract theory and an unjust enrichment theory . . . The claimant cannot recover under both legal and equitable claims but will be required at trial to elect under which of these remedies it wishes to proceed. Defendants allege that Plaintiffs unjustly retained the AGL payment to their detriment. The Court finds that Defendants currently are entitled to assert an unjust enrichment claim alternative to their breach of contract claim under the Agreement, though they cannot recover under both theories.

(internal citations omitted); *also Abels v. JPMorgan Chase Bank, N.A.*, 2009 WL 5342768, at *4 (S.D. Fla. 2009) ("Defendant has not conceded that the Plaintiffs

are entitled to recover under the contract, and it is possible that if their contractual claims fail, Plaintiffs may still be entitled to recovery under the unjust enrichment count . . . Therefore, the unjust enrichment count should not be dismissed at this point"); *Manicini Enters., Inc. v. American Express Co.*, 236 F.R.D. 695, 699 (S.D. Fla. 2006) ("Plaintiff should be permitted to plead alternative equitable claims for relief as the existence of express contracts between the Parties has yet to be proven"). Here, the existence of a contract has been alleged but not proven, and the district court could ultimately find that no valid contract exists or that it is unenforceable. Mr. Young may eventually have to choose between his express breach of contract theory and his unjust enrichment theory but, in the meantime, his unjust enrichment claim should survive at this stage of the case.

Georgia law recognizes the theory of unjust enrichment when "there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated." *Clark v. Aaron's, Inc.,* 914 F. Supp. 2d 1301, 1309 (N.D. Ga. 2012) (quoting *Smith v. Serv. Oil Co. v. Parker,* 549 S.E.2d 485, 487 (Ga. Ct. App. 2001)). Only when a party's claim for unjust enrichment itself incorporates allegations related to a contract is it due to be dismissed. *See Trusted Data Sols., LLC v. Kotchen & Low, LLP*, 2015 WL 11251959, at *6 (N.D. Ga. Feb. 6, 2015); *American Casual Dining, LP v. Moe's SW Grill, LLC*, 426 F. Supp. 2d 1356, 1372 (N.D. Ga. 2006); *Tidikis v. Network for Med. Commc'ns &*

Research, LLC, 619 S.E.2d 481, 485 (Ga. Ct. App. 2005).

Here, Mr. Young's claim for unjust enrichment does not incorporate any allegations related to a contract. *See* Doc. 10, ¶¶ 135-45. Instead, Mr. Young properly alleges all three elements of unjust enrichment under Georgia law, namely, (1) a benefit has been conferred, (2) compensation has not been given for receipt of the benefit, and (3) the failure to so compensate would be unjust. *Clark*, 914 F. Supp. 2d at 1309. *See* Doc. 10, ¶¶ 138-40 (alleging a benefit in the form of tuition payments conferred upon Defendants, for which Mr. Young has received nothing, and that it would be unjust for Defendants to retain the benefit). Mr. Young has properly pled a claim for unjust enrichment under Rule 8.

V. The District Court Erred In Finding Defendants' Motion To Dismiss Was Aimed At Mr. Young's Claims, When Defendants Explicitly Stated It Was Not.

In addition to the fact that the district court erred in dismissing Plaintiff's claims on the merits, the district court also erred in concluding that Defendants' Motion to Dismiss (Doc. 13) was actually aimed at Mr. Young's claims. The facts before the district court clearly establish that such a finding was contrary to the record evidence.

It is undisputed that the deadline for Defendants to answer or otherwise respond to the Complaint to May 7, 2019. *See* Webb Affidavit (Doc. 34-2), ¶ 6. On May 7, 2019, in lieu of an Answer, Defendants filed a Motion to Dismiss (Doc.

6) and a Motion to Compel Arbitration (Doc. 7). *See* Doc. 34-2, ¶ 7. In response to these Motions, Plaintiffs filed an Amended Complaint, which, among other things, added Donrich Young as a named Plaintiff. *See* Doc. 10; Doc. 34-2, ¶ 8. Thereafter, Defendants filed their second Motion to Dismiss (Doc. 13) and their second Motion to Compel Arbitration (Doc. 14). *See* Doc. 34-2, ¶ 9.

Below, Defendants argued that their Motion to Dismiss the Amended Complaint sought a "complete dismissal of all claims brought against Defendants" and that they simultaneously "moved to compel arbitration as to certain plaintiff's claims, including Mr. Young's claims." *See* Doc. 35, p. 2. The plain language in their motion, however, contradicts this claim. Defendants unequivocally told the district court that their Motion to Dismiss was "**directed at the claims asserted by Plaintiff Kolb and Jane Does I, II and III**." *See* Doc. 13-1, p. 4 n.5 (emphasis added). Defendants further told the district court that, because Mr. Young was required to submit his claims to arbitration, pursuant to a signed enrollment agreement, that they "filed a Motion to Compel Arbitration" as to Mr. Young's claims. In light of Defendants' clear pronouncement that their Motion to Dismiss was **not** directed at the claims asserted by Mr. Young, the district court's conclusion to the contrary was erroneous.

Defendants' decision was not an oversight or mistake, but rather a continuation of the strategy employed in response to the initial complaint. This

Court need only look at Defendants' request for dismissal of the initial complaint filed in this case, wherein GCU specifically stated that the Motion to Dismiss was "**specifically directed at the claims asserted by Plaintiff Kolb and Jane Does I, II, and III**" and that GCU was moving to compel arbitration as to the plaintiffs they contended were governed by an arbitration agreement. *See* Doc. 6-1, p. 4 n.5 (emphasis added). Defendants made a strategic choice to not seek dismissal of claims they felt were subject to arbitration. Perhaps GCU made this choice in order to avoid any semblance of a waiver argument – *e.g.*, *Fed. Nat'l Mortg. Ass'n v. Prowant*, 209 F. Supp. 3d 1295, 1307 (N.D. Ga. 2016) ("a party acts inconsistently with the arbitration right when the party 'substantially invokes the litigation machinery prior to demanding arbitration'") – by filing a merits based dismissal motion. Regardless of Defendants' reasoning, however, they chose not to seek dismissal of Mr. Young's claims.

Because Defendants overtly stated that they were not seeking dismissal of Mr. Young's claims, the district court's conclusion to the contrary was erroneous. The district court's conclusion that the motion to dismiss applied to Mr. Young's claims was based entirely on the following language from a footnote on page four of their motion: "If the Court determines that those Plaintiffs are not required to arbitrate their claims, then their claims should also be dismissed for the reasons stated herein." *See* Doc. 13-1, p. 4 n.5. This Court, however, has made it clear that

failing to prominently raise an issue constitutes a waiver or abandonment of that issue. *E.g.*, *Henderson v. McMurray*, 987 F.3d 997, 1002 (11th Cir. 2021); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014).

In *Sapuppo*, for example, this Court held that "[a] party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it, 'for instance by devoting a discrete section of his argument to those claims.'" 739 F.3d at 681 (quoting *Cole v. U.S. Att'y Gen.*, 712 F.3d 517, 530 (11th Cir. 2013)). There, the plaintiffs failed to devote even a small part of their brief to arguing the merits of an issue. *Sapuppo*, 739 F.3d at 681. Instead, the plaintiffs merely made passing references to the issue, without advancing any arguments or citing any authorities to support their position. *Id.* Therefore, this Court held that the issue was abandoned because only a passing reference was made to it in a perfunctory manner without supporting arguments and authority. *Id.* *See also Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278 (11th Cir. 2009) (explaining that "simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal"). Defendants' fleeting reference to Mr. Young in a footnote to its Motion to Dismiss does not trump their overt statement that they were seeking dismissal of only "**the claims asserted by Plaintiff Kolb and Jane Does I, II, and III**." *See* Doc. 13-1, p. 4 n.5 (emphasis added).

Following this Court's reversal of the district court's arbitration decision, there was no pending motion as to Mr. Young's claims. Therefore, the district court erred by absolving Defendants of their obligation to timely respond to Mr. Young's allegations. Because Defendants had no motion pending as to Mr. Young's claims, pursuant to Federal Rule of Civil Procedure 12(a)(4)(A), Defendants had 14 days from that date to file a responsive pleading. Defendants failed to do so. *See* Doc. 34-2, ¶ 14. Therefore, according to Federal Rule of Civil Procedure 55(a), Defendants were in default. *See* Fed. R. Civ. P. 55(a). The entry of default requested by Mr. Young was appropriate. Absolving Defendants of their obligation to answer or file a motion as to Mr. Young's claims was erroneous.

CONCLUSION

Appellant Donrich Young, like thousands of other Grand Canyon students, has been victimized by Defendants' scheme to unfairly increase profits at the expense of students and the federal government. For the second time in this matter, the district court erred by dismissing Mr. Young's claims. Mr. Young's Amended Complaint contains sufficient allegations to state claims for breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the Arizona Consumer Fraud Act, and unjust enrichment. Reversal is warranted.

DATED this 21st day of September, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-face and volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7) as follows: the type face is Times New Roman, proportionally spaced, fourteen-point font, and the number of words in this brief is 7,709, which is less than the limitation of 13,000.

/s/ G. Franklin Lemond, Jr.
G. Franklin Lemond, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified below either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ G. Franklin Lemond, Jr.
G. Franklin Lemond, Jr.