IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DONRICH YOUNG, on behalf of himself and all others similarly situated, Plaintiffs, v. GRAND CANYON UNIVERSITY, INC. and GRAND CANYON EDUCATION, INC. d/b/a GRAND CANYON UNIVERSITY, Defendants.	CIVIL ACTION FILE NO. 1:19-cv-1707-TCB

O R D E R

I. Background

Plaintiff Donrich Young brings this action against Defendants Grand Canyon University, Inc. and Grand Canyon Education, Inc. d/b/a Grand Canyon University based on his contention that, contrary to the Defendants' representations, he is unable to complete his doctoral degrees in sixty credit hours. He contends that Grand Canyon

University ("GCU") has designed its dissertation program so that doctoral students cannot complete their program and earn degrees in sixty credit hours, contrary to several representations and contractual obligations of Defendants. He brings claims for breach of contract, fraud, intentional misrepresentation, unjust enrichment, and declaratory judgment.

Defendants previously filed two motions: a motion [13] to dismiss and a motion [14] to compel arbitration. In their motions, they argued that only Young's claims (not the other class members') were subject to this Court's jurisdiction but that his claims must be arbitrated. Defendants' motion to dismiss also asserted arguments pursuant to Federal Rule of Civil Procedure 12(b)(6). Although the motion to dismiss was primarily directed at the other (now-dismissed) Plaintiffs' claims, Defendants argued in the motion that, should the Court determine that Young was not required to arbitrate his claims, his claims would be subject to dismissal for the reasons articulated in their motion. [13-1] at 4 n.5.

On August 19, the Court entered an order [24] that granted Defendants' motion to dismiss claims brought by all Plaintiffs other than Young for lack of jurisdiction. The Court also granted Defendants' motion to compel arbitration with respect to Young. The Eleventh Circuit reversed the Court's order compelling arbitration as to Young's claims. The Court then directed the Clerk to re-open the motion [13] to dismiss as to Young's claims. That motion has been fully briefed and is now before the Court.

II. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." This pleading standard does not require "detailed factual allegations," but it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,

550 U.S. 544, 570 (2007); *Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1199 (11th Cir. 2012) (quoting *id.*). The Supreme Court has explained this standard as follows:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Iqbal, 556 U.S. at 678 (citation omitted) (quoting *Twombly*, 550 U.S. at 556); *see also Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1324–25 (11th Cir. 2012).

Thus, a claim will survive a motion to dismiss only if the factual allegations in the complaint are "enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555–56 (citations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citation omitted). While all well-pleaded facts must be accepted as true and construed in the light most favorable to the plaintiff, *Powell v. Thomas*, 643 F.3d 1300, 1302 (11th Cir. 2011), the Court need not accept as true the plaintiff's legal conclusions, including those couched as factual allegations, *Iqbal*, 556 U.S. at 678.

Therefore, evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

III. Discussion

Initially, the Court will address what appears to be a dispute between the parties as to which state's law—Georgia's or Arizona's—to apply to each of the claims.

"In a case founded on diversity jurisdiction, the district court must apply the forum state's choice of law rules." *Federated Rural Elec. Ins. Exch. v. R.D. Moody & Assocs., Inc.*, 468 F.3d 1322, 1325 (11th Cir. 2006) (per curiam) (citing *McGow v. McCurry*, 412 F.3d 1207, 1217 (11th Cir. 2005)). To determine what law is applied to questions of contract interpretation, Georgia courts apply the traditional rule of lex loci contractus. *See Rayle Tech, Inc. v. DeKalb Swine Breeders, Inc.*, 133 F.3d 1405, 1409 (11th Cir. 1998). Under lex loci contractus, "the validity, nature, construction, and interpretation of a contract are

governed by the substantive law of the state where the contract was made." *Lloyd v. Prud. Sec., Inc.*, 428 S.E.2d 703, 704 (Ga. Ct. App. 1993) (quoting *Fed. Ins. Co. v. Nat. Distrib. Co.*, 417 S.E.2d 671, 673 (Ga. Ct. App. 1992)).

Despite the rule of lex loci contractus, Georgia courts have recognized that "parties by contract may stipulate that the laws of another jurisdiction will govern the transaction." *Manderson & Assocs., Inc. v. Gore*, 389 S.E.2d 251, 254 (Ga. Ct. App. 1989) (citing *Wallace v. Harrison*, 304 S.E.2d 487, 489 (Ga. Ct. App. 1983)). "In the absence of contrary public policy, [Georgia] courts normally will enforce a contractual choice-of-law provision, as the parties by contract may stipulate that the laws of another jurisdiction will govern the transaction." *Scales v. Textron Fin. Corp.*, 622 S.E.2d 903, 904 (Ga. Ct. App. 2005) (quoting *Nationwide Logistics v. Condor Transport*, 606 S.E.2d 319, 322 (Ga. Ct. App. 2004)); *accord Samadi v. MBNA Am. Bank, N.A.*, 178 F. App'x 863, 865 (11th Cir. 2006) (per curiam).

The contract at issue contains a choice-of-law clause providing that Arizona law is to govern the contract. *See* [13-4] at 6 ("This

agreement shall be governed in all respects, whether as to validity, construction, capacity, performance, or otherwise, by the laws of the State of Arizona . . . ."). The parties thus appear to agree that Arizona law will govern Young's claim for breach of contract. That is where the agreement ends. Although the parties do not fully brief the issue, it appears that Young contends that Arizona law should apply to the majority of his claims, while Defendants argue that Georgia law should apply to the claims other than that for breach of contract.

"In determining whether a choice of law [provision] contained in a contract between two parties also governs tort claims between those parties, a court must first examine the scope of the provision." *Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1162 (11th Cir. 2009) (citing *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1300–01 (11th Cir. 2003)). There is a distinction between claims that are "a fairly direct result of the performance of the contractual duties," and thus within the scope of the contractual choice-of-law provision, and those that lack a connection between the cause of action and the contract, which fall outside the scope of the choice-of-law provision. *Id.*

(quoting *Int'l Underwriters AG. v. Triple I: Int'l Invs., Inc.*, 533 F.3d 1342, 1348–49 (11th Cir. 2008)); *see also id.* ("For example, a provision providing that '[t]his release shall be governed and construed in accordance with the laws of the State of [X],' will be construed narrowly as it only purports to govern the agreement itself and does not refer 'to any and all claims or disputes arising out of the' agreement.").

In addition to the claim for breach of contract, Arizona law will apply to Young's claims for breach of the covenant of good faith and fair dealing, violation of the Arizona Consumer Fraud Act, intentional misrepresentation, and declaratory judgment.[1]

However, the Court concludes that Young's claim for unjust enrichment, though arising out of the contract, is not directly brought under the contract such that Arizona law applies.[2] Georgia law will therefore apply to this claim.

[1] However, the Court would reach the same result—dismissal—if Georgia law applied to these claims.

[2] Indeed, Young does not appear to argue that Arizona law applies to this claim.

A. 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." *Pierre-Canel v. Am. Airlines*, 375 F. Supp. 3d 1044, 1057 (D. Ariz. 2019) (citing *Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621 (Ariz. 2013)).

Defendants contend that Young fails to specifically allege the existence of a contract and specifically identify the terms that were breached, instead relying on vague allegations about contracts and student policies.

Young responds that Defendants have breached their "promise to be the premier provider of online doctoral education." [10] ¶¶ 47, 101. However, as Defendants point out, this does not create an express contractual obligation but instead is nonactionable puffery. *Zowine v. Prussin*, No. CV-14-00892-PHX-GMS, 2016 WL 558550, at *6 (D. Ariz. Feb. 12, 2016) (holding that puffery cannot form the basis of breach of contract claim). Courts "may determine as a matter of law whether [an] alleged misrepresentation is a statement of fact . . . or mere puffery."

Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 245 (9th Cir. 1990). "Guarantees, and assurances of success generally, are merely 'puffery,' and therefore are not actionable . . . ." *Metzner v. D.H. Blair & Co.*, 689 F. Supp. 262, 264 (S.D.N.Y. 1988) (holding that statements that stocks were "guaranteed" to recover were not actionable). The Court agrees that this statement is puffery and not actionable.

The amended complaint also alleges that GCU "breaches its contracts . . . by designing its programs in such a way that it is impossible for the student to complete the program in 60 credit hours" and by failing "to ensure that its dissertation chairs . . . provide students with prompt and meaningful feedback." [10] ¶¶ 91–92.

With respect to allegations of insufficient feedback and support from dissertation chairs, Young's amended complaint does not aver facts demonstrating how or when he was denied this feedback and support. This allegation therefore fails to state a claim for breach of contract.

With respect to Defendants' alleged breach of a promise that students can complete their doctoral program within sixty credit hours, Young's claim suffers from several infirmities. First, as Defendants point out, the dissertation milestone table does not (contrary to Young's allegations) demonstrate that it is impossible to complete the program within sixty hours. Rather, the minimum progression point (which Young interprets to be the minimum courses completed for progression) instead represents the latest point at which a student can progress through each level. The optimal progression point column reflects the fastest degree track, which on its face shows the possibility of completion within sixty hours. In addition, there is no promise to a student in the table or elsewhere that they will earn the degree within sixty hours; instead, it provides that a student must complete a minimum of sixty credit hours to earn a degree. Therefore, this allegation fails to support a claim for breach of contract.

Young's claim for breach of contract will be dismissed.

B. Breach of Covenant of Good Faith and Fair Dealing

The duty of good faith and fair dealing is implied in every contract. *Rawlings v. Apodaca*, 726 P.2d 565, 569 (Ariz. 1986) (citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1038 (Ariz. 1985)). "The essence of that duty is that neither party will act to impair the right of the other to receive the benefits which flow from their agreement or contractual relationship." *Id.* (citations omitted).

Defendants argue that because Young fails to identify an express breach of contract, there can be no claim for breach of the implied covenant of good faith. Young counters that 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." *Great W. Bank v. LJC Dev., LLC*, 362 P.3d 1037, 1044 (Ariz. Ct. App. 2015) (citing *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 38 P.3d 12, 29 (Ariz. 2002); *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002)).

The duty of good faith arises from the language of a contract but extends beyond its express conditions. *Rawlings*, 726 P.2d at 569–70;

Wells Fargo, 38 P.3d at 28. To uphold the covenant, each party is to "refrain from any action which would impair the benefits which the other had the right to expect from the contract or contractual relationship." *Rawlings*, 726 P.2d at 570. To determine the benefits that the parties agreed to and would expect to flow from the contract, the Court looks to the contract itself. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1040 (Ariz. 1985).

In *Wagenseller*, the court considered an "at will" employment contract. The plaintiff-employee was terminated from her job and alleged that the proximate cause of her termination was her supervisor's unprofessional behavior toward her. *Id.* at 1029. However, because the contract provided that employment could be terminated "at will," the court found that the contract did not include a "guarantee of continued employment or tenure." *Id.* at 1040. Because of the employment-at-will provision, the court determined that continued employment for a period—or even termination for a particular reason—was not a benefit of the contract. *Id.*

In *Rawlings*, the defendant/insurer withheld an investigative report that it agreed to deliver to the plaintiff/insured. 726 P.2d at 568. The investigation revealed that the at-fault individual had $100,000 coverage through the insurer, but the insurer only sent the insured a $10,000 check because that was the policy limit. *Id.* After the plaintiff discovered that the insurers had the report, the insurers offered to deliver the report if the plaintiff paid half the cost of the investigation and the report. *Id.* The court reasoned that because insured individuals obtain insurance to protect themselves from financial loss in the event of a catastrophe, the benefits of the contract include the expectation that the insured will not be deprived of recovery to which he is entitled. *Id.* at 570–71. Withholding the report and availability of financial recovery denied the plaintiff the agreed-to benefit of financial security. *Id.* at 571. Therefore, the insurers breached the implied warranty of good faith and fair dealing. *Id.*

Like in *Wagenseller*, Young attempts to recover for a benefit that would not reasonably be expected to flow from the contract. GCU and Young agreed to a contract in the form of the student policy handbook.

In the handbook, GCU represents that it is possible to receive a doctorate degree after taking sixty credit hours and completing a dissertation. It never promises that students will receive a degree but provides ways for them to receive the degree. Students must do their part to work and complete their dissertation whether within sixty credit hours or longer. Ultimately, the agreed benefit is to receive teaching and classes to work towards a doctorate degree. A student's inability to receive a doctoral degree within sixty credit hours does not amount to a violation of the implied covenant of good faith and fair dealing.

And unlike in *Rawlings*, where a breach was found based on failure to provide the agreed-to benefit from an insurance contract, here, the agreed-to benefit is not a degree, but access to classes to assist in student completion of a doctorate and dissertation. 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.

C. Fraud

The parties dispute whether Federal Rule of Civil Procedure 9 applies to Young's claim alleging violation of Arizona's Consumer Fraud Act ("ACFA"). Young relies on his allegation that GCU represented that its doctoral program can be competed in sixty credit hours. He does not allege who (including which Defendant) made the statement or when and where it was made. In Young's response, he does not argue that he satisfies Rule 9's requirements, instead contending that Rule 9 does not apply.

A claim under the ACFA requires a "false promise or misrepresentation made in connection with the sale or advertisement of merchandise and consequent and proximate injury resulting from the false promise." *Riehle v. Bank of Am., N.A.*, No. CV-13-00251-PHX-NVW, 2013 WL 1694442, at *3 (D. Ariz. Apr. 18, 2013) (citing *Kuehn v. Stanley*, 91 P.3d 346, 351 (Ariz. Ct. App. 2004)).

Claims that sound in fraud must meet heightened pleading requirements. *See Williamson v. Allstate Ins. Co.*, 204 F.R.D. 641, 645 (D. Ariz. 2001) (applying Rule 9(b) to the Arizona Consumer Fraud Act).

As one court has stated, claims under the ACFA require a plaintiff to plead "the who, what, when, where, and how of the misconduct charged." *See Silvas v. GMAC Mortg., LLC*, No. CV-09-265-PHX-GMS, 2009 WL 4573234, at *7 (D. Ariz. Dec. 1, 2009) (quoting *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003)).

Young points to *In re Equifax, Inc., Customer Data Security Breach Litigation*, 362 F. Supp. 3d 1295 (N.D. Ga. 2019), which held that various state unfair and deceptive trade practice statutes did not sound in fraud. The court stated that a claim sounds in fraud "when a plaintiff alleges 'a unified course of fraudulent conduct and relies entirely on that course of conduct as the basis of that claim.'" *Id.* at 1335 (quoting *Burgess v. Religious Tech. Ctr., Inc.*, No. 1:13-cv-02217-SCJ, 2014 WL 11281382, at *6 (N.D. Ga. Feb. 19, 2014)). To sound in fraud, "the elements of the claim must be similar to that of common law fraud, including, among other things, proof of scienter, reliance, and injury." *Id.* (quoting *FTC v. Hornbeam Special Situations, LLC*, 308 F.Supp.3d 1280, 1286–87 (N.D. Ga. 2018)).

The Court is not persuaded by Young's reasoning. Indeed, he alleges with respect to the ACFA that (1) GCU knows its misrepresentation is false; (2) GCU intended that Young rely on the misrepresentations and omissions; (3) Young was injured by GCU's misrepresentations and omission; and (4) the misrepresentations and omissions were willful. Thus, rather than supporting Young's position, *Equifax* does the opposite: it compels the conclusion that because Young pleads the elements of fraud, his claim indeed sounds in fraud. In other words, although the ACFA covers various types of wrongdoing, Young has pleaded a fraud-based claim.

The Court agrees with the overwhelming majority of Arizona case law holding that claims under the ACFA sound in fraud. And Young's allegations confirm this. Young does not contest that his allegations do not contain the specific information required by Rule 9.

Further, for the reasons discussed above with respect to the claim for breach of contract, Young has not pled any false statement by Defendants. This bars any claim for intentional misrepresentation and would bar his ACFA claim even if it were pled with specificity.

Therefore, his claims for violation of the ACFA and intentional misrepresentation will be dismissed.

D. Unjust Enrichment

Defendants argue that Young fails to state a claim for unjust enrichment because a valid contract exists and Young has failed to allege the absence of a justification for the alleged enrichment.

The parties dispute whether the Eleventh Circuit's ruling renders Young's claim for unjust enrichment moot. Even assuming it is not moot, the claim is subject to dismissal.

Initially, as the Eleventh Circuit points out, Young did not appeal the Court's earlier order holding the unjust enrichment claim was subject to arbitration. Therefore, the claim must be arbitrated.

Alternatively, the claim fails on the merits. Unjust enrichment is an equitable principle that allows parties to recover when "there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated." *Tidikis v. Network for Med. Commc'ns & Rsch.*, 619 S.E.2d 481, 485 (Ga. Ct. App. 2005) (holding that because the benefit received by the defendants resulted

from a provision in the contract, "the unjust enrichment claim fail[ed] as a matter of law."); *see also Watson v. Sierra Contracting Corp.*, 485 S.E.2d 563, 570 (Ga. Ct. App. 1997) (physical precedent only).

When "there [is] no express or implied contract," an unjust enrichment claim can be brought to prevent unjust benefit of one party. *Collins v. Athens Orthopedic Clinic*, 849 S.E.2d 213, 216 (Ga. Ct. App. 2020) (citing *Watson*, 485 S.E.2d at 570). An unjust enrichment claim cannot be brought as a distinct and separate cause of action; instead, it is an alternate method of recovery from a failed contract. *Collins*, 894 S.E.2d at 216.

The cases in which Georgia courts have allowed an unjust enrichment claim to survive involve contracts that were found to be void or otherwise invalid. *See, e.g.*, *Cochran v. Ogletree*, 536 S.E.2d 194, 196 (Ga. Ct. App. 2000). Young originally contended that if the challenged contract terms (related to issues including arbitrability) were found to be integral and non-severable, the contract would fail.

However, although the Eleventh Circuit's ruling clarifies that Defendants may not enforce the arbitration provision, the issue is not a

failed contract. Indeed, in Young's supplemental briefing, he does not identify any specific reason that the contract fails. Rather, as Young pleads, a valid contract governs the parties' relationship. This claim, if not required to be arbitrated, is therefore subject to dismissal.

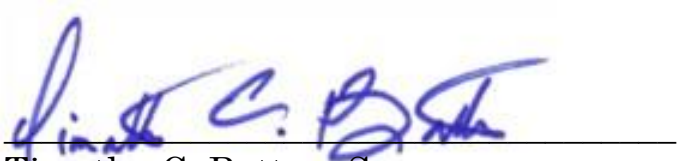
E. Declaratory Judgment

Young agrees that his declaratory judgment claim is moot based on the Eleventh Circuit's holding. This claim will therefore be dismissed.

IV. Conclusion

For the foregoing reasons, Defendants' motion [13] to dismiss Young's claims is granted, and the Clerk is directed to close this case.

IT IS SO ORDERED this 22nd day of July, 2021.



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