

**COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION I  
CIVIL ACTION NO. 20-CI-00648**

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**PETER REGARD, *et al.***

**PLAINTIFFS**

**v.**

**UNIVERSITY OF KENTUCKY**

**DEFENDANT**

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**ORDER**

This matter is before the Court on Defendant University of Kentucky's ("UK") Motion to Dismiss. UK argues that the General Assembly has not waived sovereign immunity as to the present lawsuit and thus that this action must be dismissed as a matter of law. Upon review of the parties' briefs and papers and otherwise being sufficiently advised, the Court hereby **GRANTS in part** and **DENIES in part** Defendant's Motion for reasons stated below.

**BACKGROUND**

The named Plaintiffs represent a class of UK students enrolled at UK during the Spring 2020 semester. UK is a state university—and therefore an agency of the Commonwealth of Kentucky—which is established and maintained pursuant to KRS 164.100. Each Plaintiff paid tuition and mandatory fees to UK and agreed to pay such tuition and fees by signing electronic agreements. Each named Plaintiff is or was a full-time, on-campus student at UK enrolled in a major degree program. Being on-campus students, Plaintiffs were required to pay multiple mandatory fees in addition to their tuition. These fees granted students access to facilities such as gymnasiums and the student center, and services such as student health and counseling.

In March of 2020, UK decided to shift all classes from in-person instruction to online for the rest of the Spring Semester. This was done to keep students and employees safe from the escalating COVID-19 pandemic. All in-person campus activities were also canceled. With limited exceptions, campus facilities and services were closed for student use. UK students received in-person instruction and access to facilities and services through at least March 23, 2020. Though in-person classes and access to facilities had been suspended, UK students continued to attend classes on an adjusted online format through the end of the Spring 2020 Semester. Students had the opportunity to receive course credit and grades just as they would have if they had attended classes in-person.

The named Plaintiffs then brought this lawsuit on behalf of themselves and the Class. In their First Amended Complaint, Plaintiffs define the Class as “[a]ll students who were enrolled at [UK] for the 2020 Spring semester, and who paid tuition, mandatory fees, or voluntary fees for services and privileges that [UK] has failed to fully provide, and whose tuition and/or fees have not been refunded.” First Amended Complaint at 9. Plaintiffs aver that this Class is composed of approximately 29,000 students. Plaintiffs argue that this suit contains claims that are typical of the claims of the Class and common questions of law and fact.<sup>1</sup>

In this action, Plaintiffs argue that UK breached its contract between the students and UK wherein UK was obligated to provide in-person instruction and access to on-campus facilities and services in exchange for Plaintiffs’ tuition and mandatory fees. Plaintiffs argue that though they have paid their tuition and fees in full that they have not

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<sup>1</sup> Although this case is brought as a class action, the Court has yet to conduct a hearing or certify a class under CR 23, and the Court reserves ruling on the appropriateness of class certification until a hearing is held and findings regarding class certification are made under CR 23.

received the full benefit for which they paid due to UK's closure of campus in response to the COVID-19 pandemic. UK collected over \$160,000,000 in tuition and over \$20,000,000 in mandatory fees for the Spring 2020 semester; Plaintiffs argue that they are entitled to tuition refunds, fee refunds, and other refunds. Plaintiffs also argue, as an alternative to their breach of contract claim, that UK has been unjustly enriched by not providing the students the full services for which they paid.

UK's Motion to Dismiss for failure to state a claim upon which relief can be granted under CR 12.02 is now before the Court. UK argues that Plaintiffs' claim is barred by sovereign immunity and therefore that Plaintiffs have failed to state a claim upon which relief can be granted. UK argues that, because it is a state agency, it is entitled to sovereign immunity unless the legislature has enacted a statutory waiver. It argues that, though KRS 45A.245 provides a waiver of sovereign immunity for claims for breach of contract, that the KRS 45A.245 waiver is limited to "written contracts." UK argues that "written contracts" have a particular definition for purposes of KRS 45A.245 and that the Plaintiffs' agreement with UK does not fall within that definition. UK argues that the documents that Plaintiffs assert create a written contract when read together—bulletins, University Senate rules, university policies, and other such documents—instead merely imply the existence of a contract, which is insufficient for purposes of the KRS 45A.245 waiver. UK also argues that even if Plaintiffs' claim is not barred by sovereign immunity that Plaintiffs have not sufficiently demonstrated that UK has breached its contract with the students; UK argues that universities are held to a heightened standard to demonstrate breach which requires that UK's actions were arbitrary, capricious, or in bad faith. UK also argues that Plaintiffs' unjust enrichment claim is barred by sovereign immunity, as the General

Assembly has passed no statutory waiver for common law unjust enrichment cases against the Commonwealth.

### STANDARD OF REVIEW

When considering a motion to dismiss, CR 12.02 requires the Court to construe the pleadings liberally “in a light most favorable to the plaintiff” and to take all factual allegations in the complaint to be true. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. Ct. App. 1987) (citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960)). “The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim.” *Mims v. W.-S. Agency, Inc.*, 226 S.W.3d 833, 835 (Ky. Ct. App. 2007) (quoting *James v. Wilson*, 95 S.W.3d 875, 883-84 (Ky. Ct. App. 2002)). In *D.F.Bailey, Inc. v. GRW Engineers Inc.*, 350 S.W.3d 818 (Ky. Ct. App. 2011), the Kentucky Court of Appeals discussed a trial court’s standard of review when ruling on a motion to dismiss. “[T]he question is purely a matter of law. [...] Further, it is true that in reviewing a motion to dismiss, the trial court is not required to make any factual findings, and it may properly consider matters outside of the pleadings in making its decision.” *Id.* at 820 (internal citations omitted).

### ANALYSIS

The Court finds that Plaintiffs’ breach of contract claim for a partial refund of fees is not barred by the Commonwealth’s sovereign immunity for two reasons. First, Plaintiffs’ breach of contract claim falls squarely within the waiver of sovereign immunity set forth in KRS 45A.245. Second, Plaintiffs do not seek damages drawn from the State Treasury but rather seek a refund of their own money which they paid to UK under a written agreement in order to receive specified benefits and programs. The funds paid by Plaintiffs

to UK in exchange for access to student facilities and services were not deposited into the State Treasury, and were not magically transformed into tax dollars after receipt by UK. Those funds were payment for access to services and facilities of UK. Thus, with regard to the claim for a partial refund of those fees (as opposed to tuition), the Plaintiffs have stated a valid claim.

The Court, however, reaches a different conclusion regarding the Plaintiffs' claim for a refund of tuition. On that issue, the Court finds that Plaintiffs have failed to state a claim upon which relief can be granted because they received the full benefit of their tuition in the form of course credit and grades. Plaintiffs paid for academic credit hours, and they received academic credit hours. Likewise, the Plaintiffs' claim for unjust enrichment claims fails because such claims against the Commonwealth are barred by sovereign immunity.

#### **I. Plaintiffs' Breach of Contract Claim Falls Within the Scope of the KRS 45A.245 Sovereign Immunity Waiver**

The Court first finds that Plaintiffs' have demonstrated an agreement with UK that falls squarely within the scope of the KRS 45A.245 waiver and therefore that Plaintiffs' breach of contract claim is not barred by sovereign immunity. KRS Chapter 45A provides a waiver of sovereign immunity for claims for breach of contract brought against the Commonwealth. "Any person [...] having a lawfully authorized written contract with the Commonwealth at the time of or after June 21, 1974, may bring an action against the Commonwealth on the contract, including but not limited to actions either for breach of contracts or for enforcement of contracts or for both." KRS 45A.245(1). "Statutes in derogation of the state's sovereign immunity will be strictly construed in favor of the state

unless the intention of the legislature to do otherwise is clearly expressed in the statute.” *Louisville Arena Authority, Inc. v. RAM Engineering & Const., Inc.*, 415 S.W.3d 671, 680 (Ky. Ct. App. 2013) (quoting *Jones v. Cross*, 260 S.W.3d 343, 345 (Ky. 2008)). State universities, including UK, “are state agencies that enjoy the benefits and protection of governmental immunity except where it has been explicitly waived by the legislature.” *Furtula v. University of Kentucky*, 438 S.W.3d 303, 305 (Ky. 2014).

UK argues that, when strictly construed, “written contract” has a narrow meaning for the purpose of KRS 45A.245. UK argues that not only must a contract be in writing, but that the relied-upon document must include, on its face, an express offer, a definite acceptance, and a particular right or remedy to which an aggrieved party is guaranteed. However, the Court declines to read KRS 45A.245 so narrowly. The Kentucky Supreme Court discussed the KRS 45A.245 waiver in *University of Louisville v. Rothstein*, 532 S.W.3d 644 (Ky. 2017). There, the Supreme Court interpreted the waiver more broadly than UK insists at present. “We deem no necessity to begin parsing out the types of contracts the legislature envisioned when creating this particular statute.” *Rothstein*, 532 S.W.3d at 651. “The legislature chose to utilize this language, without restriction or limitation.” *Id.* The Supreme Court found that it could not impose a restriction on the waiver that the General Assembly did not express or intend. *Id.* “Clearly, the legislature has waived governmental immunity on *all* claims brought by *all* persons on *all* lawfully authorized written contracts with the Commonwealth.” *Id.* (emphasis original).

UK asserts that *Furtula v. University of Kentucky*, 438 S.W.3d 303 (Ky. 2014) stands for the proposition that an implied contract gleaned from a synthesis of university materials (such as handbooks, official policies, or similar documents) is beyond the scope

of KRS 45A.245's "written contract" requirement and thus does not establish a waiver of sovereign immunity. The Court agrees that an implied contract is beyond the scope of KRS 45A.245. Upon closer examination of *Furtula*, however, this Court rejects the argument that this case broadly disqualifies all contract terms gleaned from university materials from the KRS 45A.245 waiver. This Court rather interprets *Furtula* to hold that that university policies and procedures cannot be used to imply the existence of a written contract where one otherwise does not exist.

In *Furtula*, two former employees of UK had applied for disability retirement benefits, arguing that they both had become permanently disabled while working at UK. *Furtula*, 438 S.W.3d at 306. UK's disability benefits program was governed by an employee handbook, human resource policies and procedures, and documents adopted by the UK Board of Trustees. *Id.* Both filed suit after their applications were denied. *Id.* at 307. While the Circuit Courts denied UK's motions to dismiss—wherein UK argued that KRS 45A.245 provided sovereign immunity from the former employees' claims—the Court of Appeals reversed, finding that the documents did not create an implied contract. *Id.* Ultimately, the Supreme Court agreed with the Court of Appeals, determining that UK and the employees did not have an implied contract because UK did not manifest in the disability benefits program documents an intent to be bound to the terms of the program. *Id.* at 307-308. Because the employees did not have a "written contract" within the meaning of KRS 45A.245, the Supreme Court upheld the Court of Appeal's decision to dismiss their claim on the basis of sovereign immunity. *Id.* at 306.

Unlike *Furtula*, the Plaintiffs here have expressly signed a document reflecting an intent by both parties to be bound to a written contract related to instruction, facility access,

and services in exchange for tuition and mandatory fees. This Court finds that a written contract exists between Plaintiffs and UK, and the supplemental materials merely reinforce the terms of that contract and the expectations of the parties—the University and its students—in performance of that contract. The “Obligation-Financial: Student Statement of Obligation,” which each student must accept prior to beginning their classes at UK, states unambiguously that each student is financially liable for all outstanding amounts due to UK:

I am responsible for all outstanding debts and contracts with the University. The University reserves the right to assess financial penalties on any indebtedness. Any past-due accounts may be referred to an outside collection agency or the Department of Revenue, which could result in collection fees. If my account is referred to an outside collection agency, I understand and agree to reimburse the University for any collection agency fees, which may be based on a percentage at a maximum of 33% of the debt, and all costs and expenses, including reasonable attorney’s fees, the University incurs in such collection efforts. If my account is referred to the Department of Revenue, I understand and agree to reimburse the University for any Department of Revenue fees, which are based on a percentage 25% of the debt, plus 6% interest accrued daily, and all costs and expenses, including reasonable attorney’s fees, the University incurs in such collection efforts.

Exhibit 6 to First Amended Complaint at 1-2. This document makes clear that each student is personally responsible for paying all tuition and mandatory fees to UK, and UK is able to refer outstanding debts to collections if students do not pay them. Additional fees can be assessed for nonpayment of outstanding debts. Each student must electronically authorize the Statement of Obligation by clicking “accept” after reviewing it.

While the Statement of Obligation represents an express intent to be bound to pay outstanding debt to UK, the terms of the students’ written contract with UK are set forth in other documents. For instance, the UK 2019-2020 Bulletin states in its “fee payment policy” section that each student “become[s] financially obligated to the University of



Kentucky when [he or she] registers for classes.” Exhibit 7 to First Amended Complaint at 21. The document goes on to explain that monthly account statements will be created for students and that a late fee can be assessed if full payment is not received by the due date. *Id.* Clearly, UK expects these financial obligations to be binding upon its students. Likewise, students have a reasonable expectation that UK will honor this contract’s obligations to them in exchange for the payment of these fees.

The Bulletin also provides detailed explanations of the costs associated with attending UK and what UK will provide to students in exchange for such payment. In the table titled “Tuition and Mandatory Fees,” UK provides that full-time students will have to pay a full-time tuition rate per semester. *Id.* at 25-27. In exchange, the students will receive from UK the opportunity to earn a full semester of course credit. Similarly, the Bulletin lists in its 2019-2020 Mandatory Fee Assessment Policy what facilities and services will be provided to students in exchange for their mandatory fees. *Id.* at 30. For “undergraduate and graduate students with at least one class on-campus,” students must pay certain mandatory fees in exchange for access to the Student Center, the Johnson Center (one of UK’s student gymnasiums), Student Health, and Student Wellness. *Id.* In the Court’s view, this document further delineates what students are to receive in exchange for their tuition and fees and strengthens Plaintiffs’ argument that a written contract exists between them and UK.

The parameters of the written contract are further supplied by the University Senate Rules, which more clearly state student rights related to grading and course credit. Section 6.1, titled “Academic Rights of Students,” states that students have the right to be informed of the grading practice to be followed in a particular course and the activities to be

evaluated. Exhibit 9 to First Amended Complaint Section 6.1. Students also have “the right to receive grades based only upon fair and just evaluation of their performance in a course as measured by the standards announced by their instructor(s).” *Id.* And, “[e]valuations determined by anything other than a good faith judgment based on explicit statements of the [standards provided by University Senate Rules] are improper.” *Id.* Though the Court does not believe that the University Senate Rules independently constitute the existence of a contract, those Rules clearly are based on, and arise out of, the University’s contract with students that is contained within the Statement of Obligation. Without the binding written contract set forth in the Statement of Obligation, there would be no need for the supplemental policies that interpret and apply those legal obligation to the academic life of the student body.

To conclude, the Court finds that there is a written contract between the students and UK that falls within the scope of the KRS 45A.245 waiver. Students are required to sign a Statement of Obligation wherein they acknowledge their financial obligation to UK. As explained above, the Statement of Obligation is a sufficient written contract between UK and its students. Other documents provided to students—including those discussed above and others—explain in greater detail the rights and obligations of each student, including access to student services and facilities. These documents, in other words, supply evidence of the scope and intent of the legal obligations that arise from the terms of the written contract set forth in the Statement of Obligation. The Statement of Obligation creates an explicit written contract which waives UK’s sovereign immunity by operation of KRS 45A.245.

## **II. Plaintiffs' Breach of Contract Claim is not Barred by Sovereign Immunity Because Plaintiffs Seek a Return of Their Money Paid to UK rather than Damages Paid from the State Treasury**

Further, the Court agrees with Plaintiffs that their breach of contract claim is not barred by sovereign immunity based on the nature of the damages that they seek. Rather than seeking to obtain damages from the state treasury, Plaintiffs are seeking repayment of the money which they have already paid to UK.<sup>2</sup> Kentucky courts conceptualize sovereign immunity as a prohibition against claims against the state treasury. “[S]overeign immunity is a common law doctrine, a ‘bedrock component’ of American government, which prohibits claims ‘against the government treasury absent consent of the sovereign.’” *Beshear v. Haydon Bridge Co., Inc.*, 416 S.W.3d 280, 286 (Ky. 2013) (citing *Caneyville Volunteer Fire Dept. v. Green’s Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 799 (Ky. 2009)). In *Haydon Bridge Co.*, the Supreme Court of Kentucky noted that sovereign immunity in Kentucky is rooted in Sections 230 and 231 of the Kentucky Constitution. *Id.* at 287. Section 230 provides, in relevant part, that “[n]o money shall be drawn from the State Treasury, except in pursuance of appropriations made by law.” Ky Const § 230. Section 231 states that “[t]he General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth.” Ky Const § 231. “[T]hose sections are more accurately viewed as delegating to the General Assembly the authority to waive the Commonwealth’s inherent immunity by direct appropriation of money from

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<sup>2</sup> It further appears that UK has received significant federal funding to address COVID related expenses that do not impact the State Treasury in any way. See *CARES Funding*, UNIV. OF KY., <https://www.uky.edu/coronavirus/academics/cares-funding#:~:text=The%20University%20of%20Kentucky%20received%20its%20CARES%20Act,distributi on%20of%20emergency%20financial%20aid%20grants%20to%20students> (last visited December 29, 2020). Funding from the State Treasury now makes up only a small fraction of UK’s total budget.

the state treasury and/or by specifying where and in what manner the Commonwealth may be sued.” *Haydon Bridge Co.*, 286 S.W.3d at 287.

The fact that Plaintiffs are seeking a return of their money rather than payment from the State Treasury provides further support to a finding that Plaintiffs’ breach of contract claim is not barred by sovereign immunity. As Plaintiffs argue, UK accepted and retained their funds but did not provide the students with the services and facilities access for which they paid. As Plaintiffs note, tuition paid to UK is not paid to the State Treasury. Because Plaintiffs do not seek money from the State Treasury and because KRS 45A.245 provides a waiver for claims against the Commonwealth for breach of contract as noted above, the Court finds that Plaintiffs’ breach of contract claim is not barred by sovereign immunity. Any judgment obtained by the Plaintiffs can be fully satisfied by UK from funds that are separate and distinct from its state appropriation. In fact, the relief being sought is merely a refund of the students’ own money that was advanced to UK for specific services that were not rendered.

The Kentucky Supreme Court has held that the legislature has no power to reallocate private funds through the appropriations process or the budget bill. *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 446-47 (Ky. 1986). Thus, the fact that money paid by students to UK as required fees (for specified UK services and facilities) may have been co-mingled with public funds, does not convert those funds into state funding. Those funds were paid under a contractual obligation, not pursuant to the

taxing power of the state. Accordingly, a refund of fees does not implicate the state treasury or the doctrine of sovereign immunity.<sup>3</sup>

### **III. Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted as to a Refund of Their Tuition, But Have Stated a Claim as to a Refund of Mandatory Fees**

The Court finds that Plaintiffs have failed to state a claim upon which relief can be granted as to a refund of their tuition. In short, the Court finds that the Plaintiffs received the benefit of their tuition paid to UK for the Spring 2020 semester. In exchange for tuition, a student at UK is paying for instruction and academic credit toward a degree. For each class that a student enrolls and pays tuition, they are presented with the opportunity to earn course credit and a grade for their efforts. Though all classes were moved to an online format, students could—and did—earn grades and credits in courses for which they completed the course requirements. Though online instruction is clearly different from in-person instruction, there is no allegation that students did not receive the academic credit for which they paid.

However, Plaintiffs have sufficiently pled a breach of contract claim sufficient to survive UK's Motion to Dismiss as to their mandatory fees. As previously explained, students' mandatory fees are applied toward facilities access, student services, and other amenities. The Plaintiffs have alleged they did not receive a full semester of access to things for which they paid mandatory fees. Whether Plaintiffs will ultimately prevail on their breach of contract claim is yet to be seen. But, in reviewing the present factual allegations

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<sup>3</sup> Moreover, UK's refusal to refund fees when the students have not received the services and benefits required under their contract with UK might be classified as a constitutional taking of property without just compensation. *See* Ky. Const. § 13.

in a light most favorable to Plaintiffs, as is required when evaluating a motion to dismiss, Plaintiffs have presented a sufficient claim as to their mandatory fees.

#### **IV. Plaintiffs' Unjust Enrichment Claim is Barred by Sovereign Immunity**

Finally, the Court agrees with UK that Plaintiffs' Unjust Enrichment claim is barred by sovereign immunity and must be dismissed. Again, sovereign immunity bars all claims against the Commonwealth unless there has been a specific waiver by the legislature of a particular claim, and "state universities of this Commonwealth [...] are state agencies that enjoy the benefits and protection of governmental immunity except where it has been explicitly waived by the legislature." *Furtula*, 438 S.W.3d at 305.

Unlike claims for breach of contract, there has been no limited statutory waiver of claims for unjust enrichment against agencies of the Commonwealth. Unjust enrichment is a common law, equitable claim. *See Superior Steel, Inc. v. Ascent at Roebling's Bridge*, 540 S.W.3d 770, 778 (Ky. 2017). The General Assembly has not enacted a waiver of sovereign immunity for claims in equity, including unjust enrichment claims. *See Lipson v. University of Louisville*, 556 S.W.3d 18, 28 (Ky. Ct. App. 2018) ("[w]hatever the merits of [Plaintiff's] unjust enrichment claim against the University may be, [Plaintiff] cannot recover against the University under this equitable remedy because there is no waiver of immunity for anything other than a written contract."). Thus, Plaintiffs' unjust enrichment claim is still subject to UK's sovereign immunity for such claims and is properly dismissed.

#### **CONCLUSION**

While Plaintiffs are financially bound to pay their agreed-upon tuition and fees to UK and UK is able to institute collection actions to obtain late payments from its students, UK asserts that it is immune from suit for breach of contract if it does not uphold its end

of the bargain. However, the Court finds that there is a sufficient written contract between UK and its students such that UK's sovereign immunity has been waived. Each student is required to accept a Student Statement of Obligation, which makes clear that students are bound to pay required tuition and fees. What this contract requires UK to provide to students in exchange for their payment of tuition and fees is more thoroughly explained in other documents, which provide that students are entitled to receive course credit for completed work in exchange for payment of tuition. Likewise, students are entitled to certain services and facilities access in exchange for payment of mandatory fees. Waiver of sovereign immunity in the instant case is further supported by the fact that Plaintiffs do not seek damages that draw on the State Treasury, but rather seek a return of money that they have already paid to UK.

However, the Court also finds UK's Motion should be granted in part. The students who attended UK received the benefit of their bargain as related to their tuition payments. Each student continued to receive instruction after UK switched from in-person to online classes, and each student who completed the required assignments for each course received course credit and a grade. The Court finds that Plaintiffs' tuition was payment for grades and course credit, which students were able to earn irrespective of class format. Further, Plaintiffs' claim for unjust enrichment must also be dismissed, as the General Assembly has not waived the sovereign immunity of state agencies as to equitable claims.

**WHEREFORE**, the Court hereby **GRANTS** UK's Motion as to Plaintiffs' breach of contract claim for repayment of tuition and as to Plaintiffs' unjust enrichment claim. The Court **DENIES** UK's Motion as to Plaintiffs' breach of contract claim insofar as Plaintiffs seek repayment of mandatory fees.

So **ORDERED** this 30th day of December, 2020.



PHILLIP J. SHEPHERD, JUDGE  
Franklin Circuit Court, Division I

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