UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 1:15-CV-176

RASHANDA MCCANTS and DEVON RAMSAY, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**DEFENDANT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**
THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL,	)	
Defendants.	)	

NOW COMES the Defendant the University of North Carolina at Chapel Hill (the "University"), through the undersigned counsel, and respectfully submits this Memorandum of Law in support of its Motion to Dismiss.

NATURE OF THE CASE

Plaintiffs Rashanda McCants and Devon Ramsay, both graduates of the University who attended on athletic scholarship, bring their complaint against the University and the National Collegiate Athletic Association ("NCAA") challenging the education and educational opportunities provided to them by the University as an NCAA member institution. Plaintiffs' Complaint, which seeks class-action status, asserts claims for breach of implied contract and breach of implied covenant of good faith and fair dealing

against the University, and claims of negligence and breach of fiduciary duty against the NCAA.

The University takes very seriously the academic improprieties that came to light beginning in 2011 and have been the subject of widespread media coverage ever since. The University immediately commissioned several investigations in order to determine the history and scope of the academic irregularities and instituted broad reforms to prevent the wrongdoing from ever occurring again. While the University cannot diminish the scope and gravity of these improprieties, it has undertaken significant measures to make amends with the affected students.

In 2014, the University introduced the Complete Carolina Initiative, a formalization of its longstanding practice of allowing former student-athletes who withdrew from the University prior to completing their course work to return to complete their degrees with financial support commensurate to their scholarship. Complete Carolina also offers academic and career counseling to any former scholarship student-athlete who withdrew from the University in good standing.

Against this backdrop, Plaintiffs seek to bring claims against the University that are barred by the applicable statute of limitations and the University's sovereign immunity. None of Plaintiffs' claims for money damages or other relief is supported by either the facts pled or North Carolina law. Accordingly, the University moves to dismiss on the grounds more fully set forth below.

STATEMENT OF FACTS

For purposes of this motion, Plaintiffs' Complaint supplies the operative facts. Plaintiffs Rashanda McCants ("McCants") and Devon Ramsay ("Ramsay") attended the University on athletic scholarships for women's basketball and football, respectively. Compl. ¶¶ 9, 12. McCants attended the University from 2005 to 2009 and earned a degree in Communications & Media Productions. *Id.* ¶ 9. Ramsay attended the University from 2007 to 2012 and earned a degree in Public Policy. *Id.* ¶ 12. Plaintiffs allege that in exchange for their enrollment at the University and participation in NCAA-sanctioned athletic programs, the University promised to provide them and every other scholarship athlete with an "education that included academically sound classes with legitimate educational instruction." *Id.* ¶ 250. Plaintiffs further allege that the University's "scholarship agreements with student-athletes . . . promise academically sound instruction in exchange for enrolling at and playing college sports for [the] University." Compl. ¶ 3. According to the Complaint, these agreements are implied contracts between the parties. *Id*. ¶¶ 250-51.

From 1989 until 2011, Plaintiffs allege that instead of providing its student-athletes with academically sound classes with legitimate instruction, the University steered student-athletes into "sham" paper courses offered in the Department of African and Afro-American Studies ("AFAM"). *Id.* ¶¶ 145, 156. Plaintiffs contend that these courses involved no formal instruction, no faculty supervision or interaction, and no class

attendance. *Id*. ¶¶ 145-47, 149-50, 201. A non-faculty administrator assigned and graded the papers, and recorded the allegedly inflated grades. Compl. ¶¶ 149-150.

It is alleged that although thousands of University students enrolled in these irregular classes, the majority of whom were not athletes, their intended target was student-athletes. *Id.* ¶¶ 145-46, 161. To this end, Plaintiffs allege generally that academic counselors registered student-athletes for the classes and encouraged them to enroll and major in AFAM. *Id*. ¶ 156. McCants claims to have taken two irregular courses, one in the Spring of 2006 and another in the Spring of 2008. *Id.* ¶ 10. Ramsay claims he took one irregular class in the Fall of 2007. Compl. ¶ 13. Plaintiffs do not allege that they themselves were "steered" into these courses. Nor do McCants and Ramsay allege that they submitted poor papers or otherwise did no work in these classes. Neither Plaintiff was an AFAM major. *Id.* ¶¶ 9, 12.

Although Plaintiffs contend that the irregular courses began in 1989, and that McCants enrolled in one of the "paper classes" as early as 2006, Plaintiffs claim that they and the proposed class members were not aware that the "AFAM paper classes lacked a lecture component or faculty involvement" until October 2014. *Id.* ¶¶ 215, 218. According to the Complaint, the University misrepresented and concealed the irregular nature of these courses by listing these courses in the University's undergraduate bulletin and maintaining its accreditation by the Southern Association of Colleges and Schools Commission on Colleges. *Id.* ¶¶ 201-08, 210. The University ceased offering the "paper

classes" in 2011 after the accounts of the academic irregularities were published by the media. Compl. ¶ 184.

Plaintiffs allege the NCAA knew or should have known of the University's alleged academic fraud, and failed to protect student-athletes from it. *Id.* ¶¶ 238, 244-48. The majority of Plaintiffs' allegations in the Complaint are stated against the NCAA. Plaintiffs set forth almost thirty distinct examples of the NCAA's alleged failures to safeguard the education of student-athletes, *id.* ¶¶ 57-87, and assert that its commitment to profits comes at the expense of allegedly mistreated student-athletes. *Id.* ¶¶ 88-107, 196-99. Plaintiffs claim the NCAA breached its duty to protect the education and educational opportunities of student-athletes by negligently failing to ensure member schools provided student-athletes with academically sound educations. Compl. ¶ 235-41; 244-48.

Plaintiffs contend that the University breached its promise to provide Plaintiffs and class members courses with meaningful educational instruction and the NCAA failed to prevent University's breach, and as a result Plaintiffs suffered unspecified economic losses and other damages. *Id.* ¶¶ 253, 259. Against the backdrop of these factual allegations, Plaintiffs, on behalf of themselves and two classes of the University's scholarship athletes, filed suit against the NCAA and the University in the Superior Court of Durham County, North Carolina on January 22, 2015. The NCAA timely removed Plaintiffs' action to this Court under the Class Action Fairness Act.

Counts I and II of Plaintiffs' Complaint are claims for negligence and breach of fiduciary duty against the NCAA. Count III asserts a breach of implied contract claim against the University and Count IV asserts that the University breached the implied covenant of good faith and fair dealing with Plaintiffs. Plaintiffs claim to suffer unspecified "economic losses, and other general and specific damages." *Id.* ¶¶ 253, 259. Plaintiffs seek monetary damages and declaratory and injunctive relief, including "the formation of an independent commission to review, audit, assess, and report on the academic integrity" in the athletic programs of the "more than 1,100 member institutions" of the NCAA and "certify member-school curricula as providing comparable educations and educational opportunities to athletes and non-athletes alike." *Id.* ¶¶ at 17, 98-99.

QUESTIONS PRESENTED

1. Whether Plaintiffs' state law claims for breach of implied contract and breach of the implied covenant of good faith and fair dealing against the University are barred by the Eleventh Amendment.

2. Whether Plaintiffs' claims against the University are barred by the statute of limitations.

3. Whether Plaintiffs' breach of implied contract claim against the University should be dismissed for failure to state a claim upon which relief can be granted.

4. Whether Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing should be dismissed for failure to state a claim upon which relief can be granted.

DISMISSAL STANDARD

A plaintiff bears the burden of showing that federal jurisdiction is appropriate when subject-matter jurisdiction is challenged by the defendant. *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009); *see also Evans v. B. F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). A motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure may assert either that the complaint fails to state facts upon which subject-matter jurisdiction may be based, or attack the existence of subject matter jurisdiction in fact, apart from the complaint. *Kerns v. U.S.*, 585 F.3d 187, 192-93 (4th Cir. 2009) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)).

To survive a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), a complaint must meet the pleading standards of Federal Rule of Civil Procedure 8, which "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (citation omitted). Federal pleading standards apply to this action even though it was commenced in state court and removed to federal court by the NCAA. *See* Fed. R. Civ. P. 81(c)(1) (declaring that federal rules apply to removed actions); s*ee also Faulkner v. ADT Sec. Servs., Inc.*, 706 F.3d 1017 (9th Cir. 2013); *Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927 (8th Cir. 2012); *Watkins v. Lincoln Cmty. Health Ctr., Inc.*, No. 1:12CV1250, 2013 WL 2285250, at *3 n.3 (M.D.N.C. May 23, 2013).

Accordingly to avoid dismissal, the complaint here must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the

claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *accord Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). A claim is plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged" – a standard that requires more than facts "that are 'merely consistent with' a defendant's liability." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557); *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 455 (4th Cir. 2013). Indeed, the complaint must "permit the court to infer more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679; *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009).

Although all well-pled allegations are presumed to be true and must be viewed in the light most favorable to the plaintiff, *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008), "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555); *see also Brown*, 716 F.3d at 350. Similarly, a court need not accept as true a plaintiff's "unwarranted inferences, unreasonable conclusions, or arguments," *Giarratano*, 521 F.3d at 302 (citation omitted) (internal quotation marks omitted), or "a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555 (citation omitted) (internal quotation marks omitted).

ARGUMENT

Plaintiffs McCants and Ramsay have chosen to bring this lawsuit more than seven years after last taking the courses they now seek to challenge. Although Plaintiffs

acknowledge media coverage of the University's academic issues as early as 2011, they claim that they were unable to discover that the classes they allegedly did not attend, and where they received no faculty instruction or supervision, were academically unsound. Plaintiffs now seek injunctive relief and monetary damages for unspecified "economic losses" they claim to have suffered by bringing time-barred breach of contract claims against the University.

The University is entitled to dismissal of all of Plaintiffs' claims against it. First, Plaintiffs' claims, which are brought under state law, are barred by the Eleventh Amendment. Second, Plaintiffs' claims are time barred. Third, Plaintiffs have failed to allege breach of contract claims cognizable under North Carolina law, as they are based on an "educational malpractice" theory uniformly rejected under applicable precedent. Finally, even if such a theory were viable, Plaintiffs cannot establish a material breach of contract, and they have not sufficiently pled damages.

I. PLAINTIFFS' STATE LAW CLAIMS AGAINST THE UNIVERSITY ARE BARRED BY THE ELEVENTH AMENDMENT.

The Court should dismiss Plaintiffs' breach of implied contract claim because it is barred by the Eleventh Amendment. Plaintiffs' derivative claim for breach of the covenant of good faith and fair dealing is similarly barred and should likewise be dismissed.

The Supreme Court has interpreted the Eleventh Amendment to preclude suits against state governments in federal court, whether brought by their own citizens or

citizens of other states, regardless of whether the suit is in law or equity. *See Edelman v. Jordan*, 415 U.S. 651 662-63 (1974); *accord Martin v. Wood*, 772 F.3d 192, 195 (4th Cir. 2014) (holding that sovereign immunity barred former state employee's action against supervisors at a state-operated hospital and noting that "the Amendment has been construed to withdraw jurisdiction over any suit brought against an unconsenting State in federal court by its own citizens"). Indeed, the law is settled that private parties may not sue a state or state agency in federal court unless Congress validly abrogates state sovereign immunity or the state unequivocally waives its immunity. *See Raygor v. Regents of Univ. of Mich.*, 534 U.S. 533, 540-41 (2002) (holding that the "Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court"); *see also McCray v. Md. Dep't of Transp., Md. Transit Admin.*, 741 F.3d 480, 483 (4th Cir. 2014) (holding that the state was immune from former state employee's age and disability discrimination claims and emphasizing that this immunity applies "absent abrogation of sovereign immunity or consent" by the state). Here, Plaintiffs failed to allege either abrogation or consent; nor has the State waived its immunity.

This Court has applied these precise principles to bar breach of contract claims against the State of North Carolina and the University of North Carolina's constituent institutions in federal court. *See, e.g., Housecalls Home Health Care, Inc. v. United States DHHS*, 515 F. Supp. 2d 616 (M.D.N.C. 2007) (holding that the State of North Carolina has not consented to suit on a breach of contract claim in federal court); *Hooper*

v. N.C., 379 F. Supp. 2d 804, 812 (M.D.N.C. 2005) (holding that the Eleventh Amendment barred plaintiff's breach of contract claim against a constituent institution of The University of North Carolina); *Dai v. Univ. of N.C.*, No. 1:02CV224, 2003 WL 22113444, at *5 n.5, 22-23 (M.D.N.C. Sept. 2, 2003) (holding that the University was entitled to Eleventh Amendment immunity in federal court for breach of contract claim).

The Eleventh Amendment bar is applicable even in cases where a non-state defendant removes an action originally filed in state court to federal court under CAFA. *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546-47 (5th Cir. 2006) ("[H]aving taken no affirmative act [to remove, the state] has not waived [sovereign] immunity and can still assert it."). Here, the NCAA, a non-state defendant, timely removed this action on February 27, 2015. As of that date, the University's time to remove had lapsed and its consent was not required under CAFA to effect the NCAA's removal. Moreover, where the state has not consented to waive sovereign immunity for the same action in its state courts,[1] removal of the case does not abrogate the defense. *Stewart v. N.C.*, 393 F.3d 484, 490 (4th Cir. 2005) (North Carolina did not waive sovereign immunity by removing

[1] Although the State has waived immunity for breach of contract claims based on valid contracts, the State retains immunity for claims based on contracts implied in law. *See, e.g., Whitfield v. Gilchrist*, 497 S.E.2d 412, 415 (1998) ("Only when the State has implicitly waived sovereign immunity by expressly entering into a valid contract through an agent of the State expressly authorized by law to enter into such contract may a plaintiff proceed with a claim against the State upon the State's breach.") As discussed further below, Plaintiffs have not alleged a valid contract with the terms they are asserting; thus, the State retains its immunity from suit even in State court.

to federal court where it had not consented to being sued on the same claims in state court.).

There can be no dispute that the University, as a constituent institution of the University of North Carolina—as a State agency- enjoys sovereign immunity under the Eleventh Amendment. *See, e.g., Huang v. Bd. of Governors of Univ. of N.C.,* 902 F.2d 1134, 1139 (4th Cir. 1990) (applying sovereign immunity to a constituent institution of the University of North Carolina); *Googerdy v. N.C. A&T State Univ.*, 386 F. Supp. 2d 618, 625 (M.D.N.C. 2005) (holding that a constituent institution of the university system was the alter ego of the State of North Carolina). The University has retained and not waived its Eleventh Amendment immunity with respect to the claims of breach of implied contract and breach of the implied covenant at issue in this action. Accordingly, those claims must be dismissed.

II. PLAINTIFFS' CLAIMS ARE TIME BARRED.

Plaintiffs' implied contract claims against the University are barred by operation of North Carolina's statute of limitations. Therefore, the University is entitled to the dismissal of Count III and Count IV.

A. Plaintiffs' claims were brought after the relevant statute of limitations period expired.

Under North Carolina law, the statute of limitations for a breach of contract claim is three years from the date the breach occurs. N.C. Gen. Stat. § 1-52(1); *see also Penley v. Penley*, 332 S.E.2d 51, 62 (N.C. 1985); *Bissette v. Harrod*, 738 S.E.2d 792, 799-800

(N.C. Ct. App. 2013). Plaintiffs filed their Complaint on January 22, 2015. Accordingly, their breach of contract claim and breach of implied covenant of good faith and fair dealing must have accrued on or after January 22, 2012. Plaintiffs allege, however, that the latest alleged breach for any member of the proposed class occurred in 2011, well outside the applicable statute of limitations. Compl. ¶ 145 ("From 1989 to 2011 . . . [the University] furnished academically unsound classes . . ."). The named Plaintiffs' alleged breaches occurred much earlier (2007 for Ramsay and 2006 and 2008 for McCants). *Id.*. ¶¶ 10, 13, 222. Therefore, Plaintiffs' claims against the University are time barred and should be dismissed.

B. There is no basis for tolling the statute of limitations.

Plaintiffs' allegations that they did not discover they had enrolled in academically unsound classes until 2014 and that the University fraudulently concealed information regarding the allegedly irregular classes do not support an argument for a tolling of the statute of limitations. *Contra* Compl. ¶¶ 218, 200. Not only are these positions contradicted by the allegations in the Complaint, but North Carolina law is clear that the discovery rule does not apply to a breach of contract claim. *See* N.C. Gen. Stat. §§ 1-52(9), (16).

Indeed, Plaintiffs seem to recognize they have a major problem pleading around the statute of limitations. They try to do so by positing that they somehow were not aware that they had taken academically unsound classes while students at the University and instead did not learn this alleged fact until 2014, as a result of the information

publicly disclosed in the Wainstein Report. This position is untenable and should be rejected. Plaintiffs' implied contract claims should be dismissed for failure to satisfy North Carolina's statute of limitations governing breach of contract claims.

Plaintiffs allege that McCants, Ramsay, and the potential class members did not know that the courses they were enrolled in were unsound until October 2014. *See* Compl. ¶¶ 11, 14, 218. Plaintiffs offer no explanation for how or why they were unaware of what transpired in the three AFAM courses they took between themselves while students at the University. Nobody is better positioned to know these facts than Plaintiffs, yet their Complaint offers no explanation for their lack of knowledge—within the limitations period—of whether the AFAM classes they took required class attendance and included faculty involvement. Indeed, Plaintiffs unquestionably would have been aware *at the time they took the courses* that they were enrolled "paper classes" that they were not required to attend, required little to no work, were not taught by a faculty member, and involved no interaction with a faculty member. *Id*. ¶ 4.

Moreover, Plaintiffs cite media reports as early as August 2011 that publicly disclosed irregularities in the AFAM department. *Id*. ¶ 184. Plaintiffs fail to explain why the 2011 news stories did not apprise them of potential irregularities at that time.

North Carolina law rarely allows for the tolling of the statute of limitations on breach of contract claims and Plaintiffs are not entitled to tolling here. "It is a well-settled rule . . . that the statute of limitations for a breach of contract action is not tolled pending the injured party's discovery of the breach . . . 'a plaintiff's lack of knowledge concerning

his claim does not postpone or suspend the running of the statute of limitations.'" *Flexible Foam Prods., Inc. v, Vitafoam Inc.*, 980 F. Supp. 2d 690, 701 (W.D.N.C. 2013) (quoting *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 312 S.E.2d 421, 425-26 (N.C. 1984)). Nor does the discovery rule toll the statute of limitations for a breach of contract claim under North Carolina law. *See* N.C. Gen. Stat. §§ 1-52(9), (16) (recognizing discovery-based tolling only for claims based on fraud or mistake and negligence with personal injury or physical damage, respectively); s*ee also First Investors Corp. v. Citizens Bank, Inc.*, 956 F.2d 263, 1992 WL 36812 at *1 (4th Cir. 1992) (unpublished table decision) (explaining that N.C. Gen. Stat. Ann. §§ 1-52(9), (16) govern discovery rule tolling for negligence and fraud claims). Accordingly, Plaintiffs' claims are barred by the statute of limitations and should be dismissed. *See Pearce*, 312 S.E.2d at 425 ("Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action.").

Plaintiffs further attempt to evade the applicable statute of limitations by alleging the University fraudulently concealed the nature of the irregular courses. Compl. ¶ 200. Plaintiffs contend that the University knew about the irregular nature of the paper courses but falsely represented that they were academically sound to Plaintiffs and class members. *See id*. ¶¶ 147, 172, 208, 211. Plaintiffs claim that they reasonably relied on the University's representations and therefore their discovery of the alleged breach of contract was delayed until October 2014. *Id.* ¶ 206.

Although North Carolina recognizes that a defendant's fraudulent concealment of a material fact can toll the running of the statute of limitations, in order to avail themselves of this relief, plaintiffs must show (1) the defendant fraudulently concealed facts, and (2) the plaintiffs failed to uncover these facts during the statutory period despite (3) the exercise of due diligence. *See Yancey v. Remington Arms Co.*, LLC, 2013 WL 5462205 at *6 (M.D.N.C. Sept. 30, 2013). Here, Plaintiffs failed to allege facts demonstrating that they exercised due diligence but were nonetheless precluded from uncovering the alleged breach of contract during the statutory period. Accordingly, there is no basis for tolling the statute of limitations.

Plaintiffs base their lawsuit on the alleged unsoundness of classes they claim began as early as 1989. Compl. ¶ 145. McCants and Ramsay give no explanation for why they, could not, through the exercise of due diligence, discover that these courses involved no formal instruction, offered no faculty interaction, and required no class attendance at the time they were enrolled in the class. *See id.* ¶¶ 149, 152, 201. Indeed, that the courses were "paper classes" with no classroom instruction or faculty involvement would have been readily apparent to Plaintiffs during their enrollment in the class. Plaintiffs also note that the grades awarded to student-athletes in the paper classes were "significantly higher than the average grades they received" in other classes, *id.* ¶ 162; this, coupled with Plaintiffs' lack of interaction with a faculty member, *id.* ¶ 149, would have reasonably sufficed to prompt further inquiry by Plaintiffs.

Plaintiffs' fraudulent concealment theory is especially meritless given that Plaintiffs note that irregularities in the AFAM department were made public in news stories as early as August 2011. Compl. ¶ 184. These public stories should have apprised Plaintiffs of the alleged irregularities well before October 2014. Plaintiffs offer no explanation why an exercise of due diligence would not have uncovered the course irregularities within the statutory period. Thus, Plaintiffs' argument that the statute of limitations is tolled by the University's fraudulent concealment is unavailing and Counts III and IV of the Complaint should be dismissed.

III. PLAINTIFFS' BREACH OF IMPLIED CONTRACT CLAIM SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Even if the statute of limitations did not bar Plaintiffs' breach of implied contract claim against the University, the claim nonetheless must be dismissed because Plaintiffs failed to adequately plead the required elements for a breach of contract. Moreover, Plaintiffs' breach of contract claim is based on a theory of educational malpractice which has been firmly rejected under North Carolina law.

A. Plaintiffs failed to adequately plead the required elements for a breach of contract claim.

Plaintiffs allege that the University breached an implied contract to provide Plaintiffs and class members with an academically sound education in exchange for their enrollment and participation in athletics programs at the University. Compl. ¶¶ 250, 252. However, Plaintiffs failed to allege the necessary elements of a breach of contract claim

under North Carolina law—a valid contract, a material breach of a specific term of that contract, and damages as a result of the breach. *See Stony Point Hardware & Gen. Store, Inc. v. Peoples Bank*, 714 S.E.2d 866, 2011 WL 3569967 at * 7 (N.C. Ct. App. 2011) (unpublished table decision) (stating the necessary elements that must be pled to support a breach of contract claim); *see also Long v. Long*, 588 S.E.2d 1, 4 (N.C. Ct. App. 2003) (noting that a breach of contract claim is only actionable if the breach is material).

Plaintiffs' fundamental contract theory is flawed at the outset—allegations that the University promised to provide scholarship athletes with an academically sound education, alone, cannot form the basis of an enforceable contract. *See Ryan v. Univ. of N.C. Hosps.*, 494 S.E.2d 789, 791 (N.C. Ct. App. 1998) (citing *Ross v. Creighton Univ.*, 957 F.2d 410, 417 (7th Cir. 1992) (limiting breach of contract claims against universities to those that "point to an identifiable contractual promise that the [school] failed to honor")).[2] Plaintiffs make several allegations regarding the quality and structure of courses offered by the University, but they do not point to an identifiable contractual promise that the University failed to honor. *See, e.g.* Compl. ¶¶ 149-151, 252. Where students alleging a breach of contract claim against a school cannot point to an agreement with definite terms, the claim must fail. *See id.*

[2] In the *Ross* case, the Seventh Circuit rejected an educational malpractice claim under Illinois law by a student-athlete but allowed a narrow breach of contract claim related to educational services. In that case, unlike here, the plaintiff's claim was grounded in a specific, identifiable promise of tutoring and other educational services that the university allegedly promised to provide in order to address Plaintiff's academic deficiencies and allow his academic participation but then failed to provide. Unlike in *Ross*, Plaintiffs here do not identify any specific, identifiable promise that the University failed to meet.

For example, in *Ryan*, the plaintiff sued the University of North Carolina for breach of contract complaining of the quality of the residency program he received. 494 S.E.2d at 790. The North Carolina Court of Appeals noted that other than allegations specific to an employment contract promising a one-month rotation in gynecology, the plaintiff's allegations involved an inquiry into the "nuances of educational processes and theories." The Court allowed his claim to proceed solely on that specifically pled employment ground. *Id.* at 791.

Unlike the *Ryan* plaintiff, Plaintiffs here simply allege that the University failed to provide "academically sound" educations without identifying a definite term or promise that the University breached. Accordingly, Plaintiffs have not identified a definite term or promise that would support a breach of contract claim against the University, and the court should not do so for them. *See, e.g. McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 981-82 (M.D.N.C. 2011) (dismissing breach of contract claim against school where plaintiffs were unable to establish a specific, enforceable contractual obligation and allowing separate breach of contract claim where plaintiffs identified specific, enforceable provisions), *rev'd and dismissed in part on other grounds*, *Evan v. Chalmers*, 703 F.3d 636 (4th Cir. 2012).

To the extent Plaintiffs base their claims on course listings in university bulletins and directories, this approach is unavailing. Compl. ¶¶ 201-205. This Court has repeatedly refused to allow a school's general policies, even when expressly stated in the school's bulletins and other materials, to form the basis of an enforceable contract with

students. *See e.g. Rouse v. Duke Univ.*, 869 F. Supp. 2d 674, 683 (M.D.N.C. 2012) (holding that school's anti-discrimination and anti-harassment policies were too general to form the basis of a contract); *Giuliani v. Duke Univ.*, No. 1:08CV502, 2010 WL 1292321 at *6-*9 (M.D.N.C. March 30, 2010) (concluding that benefit promises during recruitment, athletic scholarship agreements, and policy manuals were insufficient to create a binding contract between student and university); *Love v. Duke Univ.*, 776 F. Supp. 1070, 1075 (M.D.N.C. 1991) (holding that examination requirement in academic bulletin did not create a binding contract between student and university).

Even if the University's alleged promise to provide an academically sound education with legitimate educational instruction constitutes a specifically identifiable contractual promise, Plaintiffs have failed to allege that the offering of "paper courses" (however regrettable) was a material breach of a broader contract with the University. *See* Compl. ¶ 250. Under North Carolina law, a breach is material only if it defeats the purpose of the contract. *Long*, 588 S.E.2d at 4. Where a student-athlete earned a degree and only took one or two "paper classes" during his or her multiple years at the University, there is no showing that this is a material breach of contract, particularly where many students often graduate having taken more classes than required for graduation.

Setting aside Plaintiffs' conclusory statements, Plaintiffs have not asserted any factual allegations that could plausibly show that they and the potential class members did not receive academically sound educations. Nowhere is this more evident than in

McCants and Ramsay's own allegations regarding their educational experiences at the University. The Complaint reveals McCants was enrolled in just two allegedly irregular classes. *See* Compl. ¶ 10. McCants graduated from the University with a degree in Communications and Media Productions. *Id.* ¶ 9. Similarly, Ramsay was enrolled in just one allegedly irregular class and earned a degree in Public Policy. *Id.* ¶¶ 12, 13.

Conspicuously absent from the Complaint are any allegations that McCants or Ramsay would not have successfully earned their degrees absent these three allegedly irregular classes, and it is unlikely they could make such an allegation given the number of classes they took. *Id.* ¶¶ 10, 13. The Complaint is also silent as to how the University breached its alleged promise to McCants and Ramsay to provide them a legitimate education. Plaintiffs do not claim they were forced into paper classes, told not to attend class, did no coursework, or were somehow prevented from taking classes of their choosing. McCants and Ramsay have alleged nothing to suggest they failed to receive the full benefit of an academically sound education. Plaintiffs' claim should be dismissed because they have failed to allege material breach, or indeed any breach at all.

Finally, Plaintiffs failed to plead damages necessary to support a breach of contract claim. Plaintiffs' only reference to damages is a cursory statement that they "suffered and continue to suffer economic losses and other general and specific damages." Compl. ¶ 253. There are no allegations, for example, of out-of-pocket losses, diminished earnings, or other financial losses attributable to the alleged breach of contract. Plaintiffs' theory of financial harm, and thus money damages, in short, is

merely asserted. This is insufficient under North Carolina law and federal pleading standards.

Under North Carolina law, plaintiffs alleging a breach of contract claim are required to plead damages. *Peoples Bank*, 2011 WL 3569967 at * 7; *see Cobra Capital, LLC v. RF Nitro Commc'ns, Inc.*, 266 F. Supp. 2d 432, 437 (M.D.N.C. 2003); *Claggett v. Wake Forest Univ.*, 486 S.E.2d 443 (N.C. Ct. App. 1997). Furthermore, the Supreme Court is clear that sufficient pleadings require plaintiffs to state more than "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. at 664 (2009). Here, Plaintiffs' mere statement that they suffered damages, without more, is vague, speculative, and in no way establishes a connection between the alleged breach and *any* resulting injury. McCants and Ramsay did not, and cannot, show any losses suffered due to their combined enrollment in three allegedly irregular classes. Such an unfounded pronouncement is exactly the type of conclusory statement disfavored by the United States Supreme Court. As a result, Plaintiffs failed to plead damages, an essential element of any breach of contract claim.

Because Plaintiffs' allegations failed to establish any and all of the elements required for a breach of contract claim, they have not stated a claim upon which relief can be granted. Thus Plaintiffs' breach of implied contract claim should be dismissed.

B. Plaintiffs' breach of contract claim is an attempt to bring an impermissible educational malpractice claim against the University.

Plaintiffs attempt to support their breach of contract claim with allegations regarding the rigor of the academic courses offered by the University. *See, e.g.* Compl. ¶¶ 4, 11, 14, 145-50. This is nothing more than a thinly-veiled attempt to bring a claim for educational malpractice, a claim that has been soundly rejected by North Carolina courts. The University is entitled to a dismissal of Count III. .

North Carolina does not recognize a claim for educational malpractice. *Thomas v. Olshausen*, No. 3:07CV130-MU, 2008 WL 2468738 at *2 (W.D.N.C. June 16, 2008) ("Insofar as the claims seek to allege that Defendants denied [Plaintiff] or his son access to more challenging educational programs, the claims should be dismissed as there is no cognizable claim for educational malpractice under North Carolina law."). Instead, a breach of contract claim against a school requires more than an allegation that "the education was not good enough." *Ryan*, 494 S.E.2d at 791 (citation omitted). Consistent with this requirement, courts applying North Carolina law have repeatedly disavowed inquiries "'into the nuances of the educational processes and theories,'" s*ee Supplee v. Miller-Motte Bus. College, Inc.*, 768 S.E.2d 582, 592 (N.C. Ct. App. 2015) (citation omitted); *Ryan*, 494 S.E.2d at 791 (citing *Ross*, 957 F.2d at 417), recognizing that "not all aspects of the student/university relationship are subject to a contract remedy." *McFadyen*, 786 F. Supp. 2d at 982; *see also Giuliani v. Duke Univ.*, No. 1:08CV502, 2009 WL 1408869 at *3 (M.D.N.C. May 19. 2009). Courts in North Carolina and elsewhere have rejected this type of claim for good reason, including that a student's

educational deficiency can be caused by complex and myriad factors other than the school and/or teacher, the sheer number of claims that could arise if the cause of action were recognized, and the courts' reluctance to oversee the day-to-day operations of schools. *See, e.g., Ross*, 957 F.2d at 414.

Here, Plaintiffs contend that the University's allegedly irregular classes deprived named plaintiffs and potential class members of the academically sound education they were promised. Compl. ¶ 252. This is precisely the type of educational malpractice claim, based on the adequacy of education, that North Carolina law prohibits. Moreover, assessing this claim would unequivocally require this Court to evaluate the general quality of the University's educational program, an inquiry courts have repeatedly and prudently declined to undertake.

Plaintiffs cannot circumvent North Carolina law and bring an unrecognized educational malpractice claim under the guise of a contract claim.

IV. PLAINTIFFS' CLAIM FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiffs' breach of implied covenant of good faith and fair dealing claim must be dismissed because Plaintiffs failed to establish the necessary predicate for this claim—the existence of a contract. Moreover, even if Plaintiffs alleged the existence of a valid contract, they failed to set forth facts to state a claim that the University breached the covenant of good faith and fair dealing.

A. Plaintiffs' failed to establish the existence of a contract, a prerequisite for a breach of implied covenant of good faith and fair dealing claim.

Plaintiffs allege that the University's failure to provide them with a "meaningful education" breached the implied covenant of good faith and fair dealing. Compl. ¶¶ 257-259. While the covenant of good faith and fair dealing is generally implied in every contract under North Carolina Law, *Gordon v. Gordon*, 768 S.E.2d 202, 2014 WL 7472951 at *5 (N.C. Ct. App. 2014) (unpublished table decision), the covenant does not exist in the absence of an enforceable contract. *Giuliani*, 2010 WL 1292321 at *9; *see also Bethel v. Fed. Express Corp.*, No. 1:09CV613, 2010 WL 3242651 at *11 (M.D.N.C. Aug. 16, 2010) ("'[i]n the absence of an enforceable contract, the parties cannot have an implied covenant of good faith and fair dealing.'") (citation omitted).

As explained above, Plaintiffs' Complaint failed to sufficiently allege the existence of an enforceable contract. Since there can be no covenant of good faith and fair dealing without an enforceable contract, Count IV of Plaintiffs' Complaint must be dismissed.

B. Plaintiffs failed to show the University's alleged actions breached the covenant of good faith and fair dealing.

Even if the covenant of good faith and fair dealing was applicable in this case, Plaintiffs' factual allegations fail to state a claim that the University breached it. Plaintiffs offer nothing more than vague and conclusory allegations that the irregular classes offered by the University deprived them of the academically sound education they were promised. Compl. ¶¶ 257-58. In fact, McCants and Ramsay fail to plead facts explaining

how what *they experienced* as students in the AFAM classes breached any covenant of good faith and fair dealing. McCants and Ramsay do not allege they submitted "sham" papers or otherwise did no work in the AFAM classes they took. Nor do they allege they were forced to enroll in irregular paper classes, or were prevented from pursuing their chosen majors or coursework. Instead, both earned degrees outside the AFAM department and do not allege that the small number of AFAM courses taken between them deprived them of an academically sound educational experience. *See id.* ¶¶ 9-13.

Plaintiffs' allegations do not support their claim for breach of the covenant of good faith and fair dealing. Accordingly, Plaintiffs failed to state a claim upon which relief can be granted and the University is entitled to dismissal of Count IV.

CONCLUSION

For the foregoing reasons, the University respectfully requests that all of Plaintiffs' claims against it, Count III and Count IV of the Complaint, be dismissed.

Respectfully submitted this 30th day of March, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2015, I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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This 30th day of March, 2015.

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