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OSAMA EL-HELW,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Appellant,	:	DOCKET NO: A-002550-23T1
v.	:	ON APPEAL FROM SUPERIOR COURT
	:	OF NEW JERSEY-LAW DIVISION:
FAIRLEIGH DICKINSON	:	ESSEX COUNTY
UNIVERSITY,FAIRLEIGH	:	DOCKET NO. ESX-L-2118-19
DICKINSON UNIVERSITY	:	
SCHOOL OF PHARMACY,	:	SAT BELOW:
JOHN DOES 1-10 AND ABC	:	HON. ANNETTE SCOCA, J.S.C.
CORPS. 1-10 (fictitious	:	
Names representing any	:	
unknown	:	
defendants),	:	
	:	
Defendants-Respondents.	:	

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Alan Genitempo, Esq.
Of Counsel

Michael A. Koribanick, Esq.
On the Brief

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PRELIMINARY STATEMENT

Appellant/Cross-Respondent, Osama El-Helw ("Appellant" or "Plaintiff"), appeals the trial court's grant of summary judgment in favor of Appellee/Cross-Appellant Fairleigh Dickinson University ("FDU" or "Defendant"), as Plaintiff's Breach of Contract, Misrepresentation, and Fraudulent Inducement causes of action were improperly dismissed.

This matter arose from FDU's deceitful advertisement of its "dual degree" program offered through its new, not yet fully accredited Pharmacy School. Prior to opening its doors to its inaugural class in the Fall of 2012, FDU falsely advertised its dual degree program to prospective students, misrepresented the program requirements and enrollment period, and induced Plaintiff to apply for, enroll in, and pay seating deposits and tuition to FDU's Pharmacy School.

The dual degree program that FDU advertised to prospective students offered degrees in both the Pharmacy and master's program (the "dual degree program"), wherein a student was able to simultaneously pursue a Doctorate in Pharmacy ("Pharm.D") combined with a choice of one of many master's tracks. Upon completion, the student would graduate with both a doctoral degree and a master's degree. FDU was the only university in New Jersey to offer such a program and utilized the program within its advertisements to entice students to

join its inaugural class as opposed to FDU's only in-state competition, Rutgers University, or out of state alternatives.

The record clearly demonstrates FDU misrepresented the requirements of the dual degree program, including its requirements and selection/opt-in period, and fraudulently induced Plaintiff into enrolling into the FDU School of Pharmacy's inaugural class. Specifically, prior to the opening of the school, the FDU School of Pharmacy's website, advertisement did not include any additional conditions or restrictions for opting into the dual degree program, nor did it explicitly provide that Plaintiff was only able to select or opt-out of the master's pathway at the end of the students' first professional year.

However, after the inaugural class, which included Plaintiff, commenced classes in the Fall of 2012, FDU silently altered the requirements for entry into the dual degree program by adding a 3.0 GPA requirement without notifying its students of the material change.

FDU subsequently misrepresented that Plaintiff would be able to matriculate to the MBA program after the first year, so he did not transfer and/or find seek out additional opportunities, then created and implemented a policy preventing Plaintiff from pursuing the masters track of the dual degree program after his first year. Plaintiff then spoke with FDU employee, Mr. Peter Buechner ("Mr. Buechner"), who advised him that he would be able to matriculate to the

MBA program even after the first year, so that he would finish the dual degree program by 2016. However, at the end of Plaintiff's first year in the program, he was advised he was not able to enroll in course work for the Master of Business Administration master's track program at that time, because he did not meet the newly added minimum 3.0 GPA required for entry in the dual degree program.

On August 1, 2013, Dr. Chris Capuano, University Provost and Senior Vice President for Academic Affairs, Dr. James Almeida, Interim Dean of the College of Business, and Dr. Michael Avaltroni, FDU School of Pharmacy Dean, participated in an email correspondence wherein they created and implemented a policy, on the fly, preventing Plaintiff from self-applying to the dual degree program after his first year. More importantly, the August 1, 2013 emails clearly demonstrate that a student was able to matriculate into the master's pathway at a later date, not only at the end of their first year, and that the Plaintiff was authorized to take master's track courses once he got off academic probation. Despite this, Defendant did not allow Plaintiff to pursue a master's degree.

Ultimately, FDU breached its contract with Plaintiff by not granting Plaintiff the opportunity of enrollment into either of his master's track choices despite him having nearly completed all credits for the program.

Accordingly, the trial court erred in granting Defendant's Motion for Summary Judgment and dismissing Plaintiff's Complaint in its entirety.

STATEMENT OF FACTS

Plaintiff attended Rutgers University - Newark from September of 2008 through May of 2012, where he received a Bachelor of Science ("B.S.") in Biology and a Minor in Chemistry and Minor in Mathematics. (Pa148). As Plaintiff prepared to graduate from Rutgers University, he researched professional degree opportunities and discovered that the FDU Medco School of Pharmacy's was advertising a "dual degree" program in or around early fall 2011. Plaintiff then inquired with FDU as to the requirements for admission into the dual degree program. (Pa152-Pa153).

The dual degree program at FDU was appealing and enticing to Plaintiff because what was being offered was not comparable to anything else in the local area. (Pa153). Plaintiff, a resident of Belleville, New Jersey, wanted to remain in the local area when furthering his education, as he did with his college degree, and FDU was the only university in New Jersey to offer a dual degree program. (Pa153; Pa324).

The FDU School of Pharmacy was a new program, which was not accredited, which advertised to potential students the dual degree program. The dual degree program was one in which a student could pursue a Doctorate in Pharmacy ("Pharm.D") combined with a choice of one of many master's tracks, to be completed in four years. (Pa344; Pa253; Pa398). Dr. Geoffrey Weinman

("Dr. Weinman") and Dr. Michael Alvatroni ("Dr. Alvatroni") had the initial discussions related to the idea of a dual degree program for students to simultaneously earn Pharm.D and MBA degrees. (Pa325). Despite not being accredited yet, FDU advertised to students the ability to earn two degrees within the same time frame as it was taking them to earn the Pharm.D. degree. (Pa369). The dual degree program made it easier to obtain the MBA than the traditional route because some of the classes were required for both degrees. (Pa345). At the time, FDU looked at how to ensure that the students in the Pharm.D program met the requirements for being admitted into the MBA program, and considered undergraduate GPA, standardized test scores, and the PCAT or the GRE as a substitute for the GMAT. (Pa345)

The MBA program, which was 42 credits, was a three-year period of curriculum and coincided with the last three years of the pharmacy degree program. (Pa398). In the MBA program, admission was based upon an undergraduate CGPA and GRE score. (Pa400).

The FDU School of Pharmacy's website advertised the dual degree program, and explicitly provided, "All students who are accepted to the School of Pharmacy with a baccalaureate degree will be provided the opportunity to complete a master's degree in conjunction with the Doctor of Pharmacy." (Pa435). The FDU School of Pharmacy's website initially provided, "Students

will be asked to select or opt-out of a master's pathway at the end of their first professional year," and did not include any additional requirements. (Pa435).

The website was an important part of advertising the program to students to get the word out into the community. (Pa353). Plaintiff understood the plain language of the advertisement meant that all students who were able to qualify to complete the doctorate program would also be able to complete the master's program. (Pa158).

The program was also advertised as a "remediation" program, which effectively ensured students did not fail their courses, to entice prospective students to apply and enroll into the program. (Pa76; Pa184; Pa254; Pa372).

Despite taking a risk and applying to an unaccredited School of Pharmacy, Plaintiff submitted his application for admission to FDU's Doctor of Pharmacy Program on or around November 1, 2011. (Pa439-Pa443). On January 9, 2012, Plaintiff learned he was selected to interview for the FDU School of Pharmacy 2012 Inaugural Class, which was to take place on January 31, 2012. (Pa444 – Pa447). Prior to his admission, Plaintiff was interviewed multiple times by individuals such as Dr. Avaltroni, Dr. Chadwin, Ms. Beth Fisher, Dr. Marisol Diego, Dr. Dong Mi Kim, Dr. Robin Pucci, Dr. Bob Rossi, and Dr. Yong Gwo. (Pa164; Pa167). Plaintiff was admitted to the Pharm.D program on March 1, 2012 and accepted admittance on or around the same day. (Pa97).

Prior to the beginning of the Fall 2012 semester, when the inaugural class was to begin the Pharm.D program, Plaintiff frequently visited Defendant's website for updates related to the school's accreditation/pre-candidate status because FDU's School of Pharmacy had not yet received its accreditation status. (Pa161). Prior to the opening of the school, the FDU School of Pharmacy's website explicitly provided,

> "All students who are accepted to the School of Pharmacy with a baccalaureate degree will be provided the opportunity to complete a master's degree in conjunction with the Doctor of Pharmacy. Students will be asked to select or opt-out of a master's pathway at the end of their first professional year."

(Pa435).

In addition to the February 14, 2011, iteration of the FDU School of Pharmacy's home website page, Plaintiff witnessed at least seven (7) iterations of FDU School of Pharmacy's home website page from dates prior to him starting the Pharm.D program in August of 2012. (Pa448 – Pa454). While the website's layout changed slightly, the verbiage remained the same, and did not include any reference to a minimum GPA or other conditions related to the

period to select or opt out of the dual degree program. (Pa152-Pa153; Pa180; Pa448-Pa454).

Plaintiff contacted the FDU School of Pharmacy to confirm his understanding of their advertisement, and attended open house meetings at FDU wherein his understanding of the plain language was confirmed. (Pa158-Pa159). Plaintiff also reached out to the FDU School of Pharmacy, via an inquiry submission, to clarify eligibility for the dual degree program. (Pa168; Pa239). The FDU School of Pharmacy Dean, Dr. Avaltroni advised Plaintiff, via email, that Plaintiff's minor in chemistry met the requirement for the master's portion, he met all requirements to select the master's track, did not list any other substantive requirements, and the Defendant would begin taking applications for the Pharm.D program later in the spring. (Pa437).

The Pharm. D program commenced classes on or around August 26, 2012. (Pa97). Students did not receive the FDU student manual until orientation, which was approximately the 19th, 20th, or 21st of August 2012. (Pa356). However, shortly after Plaintiff begam the Fall Semester, there was a significant change to the FDU School of Pharmacy's home website page, unbeknownst to Plaintiff at that time. (Pa454). It was not until after Plaintiff commenced classes in the Fall of 2012 Semester that the FDU School of Pharmacy website page included new requirements for the dual degree program, stating, "Students

interested in a dual degree will be required to meet the admissions requirements for the selected second-degree pathway, in addition to maintaining a 3.0 grade point average within the Doctor of Pharmacy curriculum." (Pa454).

Plaintiff applied and was admitted to the program before the website included a 3.0 GPA requirement for matriculating into the Master's program. (P355). Plaintiff did not immediately see the change to the website because at the time of the change in September of 2022, students already began classes, and were "already studying and doing work, so there's no reason for me to review this [webpage] again." (Pa162). Once Plaintiff learned of the changes, he was of the belief the website changed for the following class, as the new requirements were only included within the webpage after the inaugural class had begun. (Pa179-Pa180).

In or around April of 2013, Plaintiff heard a rumor that the students of the inaugural class of the dual degree program would not be going directly into the master's program as they initially believed, and Plaintiff contacted Dr. James Almieda ("Dr. Almeida"), the Interim Dean of the College of Business, to verify whether this rumor was true or not. (Pa179; Pa243).

Subsequently, Plaintiff met with Dr. Almeida to discuss the application process for the dual degree program and other general program requirements. (Pa244). During the Spring Semester of 2013, Plaintiff also spoke with Mr. Peter

Buechner ("Mr. Buechner"), who advised him that he would be able to matriculate to the MBA program later when his GPA was where it needed to be so that he would still finish the dual degree program by 2016. (Pa246; Pa458).

At the end of Plaintiff's first year in the Pharm.D program, which included the Fall, Spring, and Summer semesters, Plaintiff attained a 2.75 GPA. (Pa256). However, during the Summer Semester of 2013, Plaintiff learned he would not be able to enroll in course work for the MBA master's track program, and therefore, could not start the dual degree program. (Pa245).

On June 17, 2013, Plaintiff spoke to Tracy Templin ("Ms. Templin") who advised him that he was not able to matriculate into the master's program at that time because his GPA was not a 3.0 or higher. (Pa245-Pa246).

Accordingly, Plaintiff sought to apply to the MBA Program on his own accord. After doing so, Plaintiff received a letter from the FDU School of Pharmacy advising him that he had been placed on academic probation for "failure to meet the minimum 2.75 grade point ratio as required for progression in the program." (Pa460-Pa461).

At that time, Plaintiff was alleged to have been on "academic probation" even though not all of Plaintiff's final grades from his summer class were accounted for and factored into his GPA. (Pa261). Plaintiff appealed his academic probation, and met with Anastasia Rivkin, Pharm.D., BCPS ("Dr.

Rivkin"), Assistant Dean for Faulty, as well as Chadwin Sandifer, Ed.D., Assistant Dean for Student Affairs & Programmatic Effectiveness ("Dean Sandifer"), who advised him that once the grades were entered, and if Plaintiff was no longer under a 2.75, he would no longer be on academic probation. (Pa262). When Plaintiff started the Fall Semester in 2013, he was no longer on academic probation. (Pa262).

On August 1, 2013, Dr. Almeida emailed Dr. Avaltroni and Dr. Chris Capuano ("Dr. Capuano"), University Provost, and Senior Vice President for Academic Affairs, advising them of Plaintiff's application to the MBA program, and noting he would be eligible for the MBA program as long as his "UG CGPA and the GMAT" score were met. Dr. Almeida noted that Plaintiff would be deemed admissible to the MBA regardless of his status as a Pharm.D student. (Pa461-Pa467). Dr. Almeida further acknowledged, "I do not believe this will be a one-off occurrence, and hence it would behoove us to establish a policy for dealing with these kind of cases." (Pa467). Dr. Capuano responded approximately one hour later, agreeing that a student could apply the "regular admission route (take and submit GMAT or GRE)" if they did not qualify for the dual track degree. (Pa466)

Prior to August 1, 2013, there was no approval requirement and/or rule in place prohibiting Pharm.D students participating in the dual degree program

"indirectly." (Pa461-Pa467). Dr. Alvantroni responded to Dr. Capuano's email, stating, "If this is the student I am thinking (based on his going to Tracy, Anastasia, Chad and myself to try to get us to change our mind) I would be extremely reluctant." (Pa465). More importantly, Dr. Alvantroni stated,

> "We told him (and several others) that they could not take any dual degree classes while dangerously close (or in this case below) academic probation. We assured ACPE during their visit (amidst concern from them about the viability of students not jeopardizing their pharmacy education to complete a dual degree) that we would monitor student progress closely, and hence have chosen to tell students to wait on taking any other course work until they are in academic good standing."

(Pa465). Dr. Alvantroni's email unambiguously demonstrate students were able to enter the dual degree program and take the additional coursework at a later date. (Pa465).

Dr. Alvantroni's email further stated, "This student has been trying for the better part of a month to make a legal case that we have a hole in our policy. I suppose that he has moved on to trying to bypass the policy and go straight to applying directly to the MBA. My major concern is two-fold: first, that we are

now going against what we told him and others just a few weeks ago, and second, that the student will end up failing out of both (he is already getting dangerously close in the Pharm.D track alone)[.]" Id.

In response, Dr. Capuano stated, "…In fact, let's establish a rule now that for any Pharm.D student to participate in the dual degree program (directly or indirectly), they must be approved to do so by the Pharm.D school (School of Pharmacy Dean or designee). (Pa464-Pa465). Dr. Capuano followed up by stating, "Yes, if they are on academic probation in the Pharm.D, then they can be denied simultaneous matriculation in another program at the University, even though they may meet the admission criteria for that program." (Pa463).

Dr. Capuano did not have the authority to establish a rule without process. (Pa486). Despite this, Defendant created and implemented a policy preventing Plaintiff from pursuing the dual degree program after his first year. (Pa298; P461-Pa467). There was no policy prior to August 1, 2013. (Pa419).

Finally, on August 1, 2013, Dr. Almeida stated, "The student could be considered for admission into the MBA program once they are no longer under academic probation within their primary (Pharm D) program." (Pa463-Pa464). Dr. Almeida further stated, "[Plaintiff] scheduled a meeting with me on Monday. I will inform him that he should get himself off the academic probation list, before he will be authorized to take MBA courses." (Pa462).

Dr. Almeida acknowledged that because the dual degree program was new, he was not sure whether a student could apply on the merits of his GRE, PCAT and undergraduate transcript. (Pa411). Dr. Almeida was not aware of any written documentation that existed for the Pharmacy School that advised them of the rules and/or policy if the student failed to get a 3.0 GPA in their first year of Pharm.D classes. (Pa415).

Subsequently, FDU targeted Plaintiff. For example, FDU entered Plaintiff's grade incorrectly on two separate occasions. (Pa548-Pa552). Dean Chadwin Sandifer testified that he believed Plaintiff was not respectful to him, and he was "threatened" by Plaintiff when Plaintiff re-introduced himself and told Dean Sandifer his name was Osama. (Pa560-Pa561). Dean Sandifer testified he was "threatened" by the following alleged statement from Plaintiff,

> "I don't know if you remember my name, I'm Osama, I'm sure you know lots of Osamas." Dr. Sandifer testified, "I'm not sure if he was trying to **threaten** me at that point or not by alerting me to there's other Osamas in the world, but it made me feel extremely uncomfortable and it was extremely culturally insensitive for him to use his name in that format and so I felt very threatened by his comment."

(Pa560). Dean Sandifer explained,

> "So, yes, I exactly -- I -- did I feel threatened? I wasn't sure, it was my first interaction with him. Did I feel threatened? A bit, yes, I did feel threatened. I also felt he was being very insensitive. Did I fear for my life? I didn't fear for my life because I – I had been in situations where I was much more fearful than having a student use this type of language with me, but did I feel threatened? I wasn't sure because it was one of my first interactions after he had been admitted into the school. So when I say "uncomfortable, threatened," I didn't know him well enough at the time to know which direction to take it. I -- I -- reflecting back, I still don't know how to interpret that comment. I do think it was -- even if it was not a threat, it was extremely culturally insensitive for him to use that word or to use that introduction."

(Pa561). Dean Sandifer was under the belief that Plaintiff using his name, Osama, was "culturally insensitive." Id. Dean Sandifer was also "threatened" by Plaintiff during another meeting wherein he alleges Plaintiff was "talking over"

himself and Dean Rivkin, and Plaintiff stated, "As a student, I am sure you understand." (Pa508).

Dean Sandifer was so threatened by Plaintiff, he recorded two separate conversations involving Plaintiff, one between himself and Plaintiff, and another between Plaintiff, Dr. Avaltroni, and Dean Rossi, and himself. (Pa508-Pa511). Dean Sandifer even improperly recorded Plaintiff in meetings in which he was there to advocate on behalf of Plaintiff. (Pa512-Pa513). Meanwhile, Dean Sandifer attended Plaintiff's suspension hearing, in an advocate rule on behalf of Plaintiff. (Pa512-Pa513).

On August 29, 2016, Plaintiff contacted Dr. Avaltroni, advising Dr. Avaltroni that he only needed to complete only two additional classes to complete his Health Informatics master's track for the dual degree program (Pa553-Pa555; Pa262-Pa263). Dr. Avaltroni responded and advised plaintiff that he "misinterpreted" the guidelines for admission to the MHS program which, allegedly required a "3.00 GPA at the end of your P1 year." (Pa554).

Ultimately, Plaintiff graduated from the FDU School of Pharmacy with a Pharm.D degree in five years. (Pa258). Plaintiff graduated with a 3.20 GPA and 164 credits. (Pa137). Plaintiff did not receive his dual degree, despite completing nearly all required courses for the master's track.

PROCEDURAL HISTORY

Plaintiff-Appellant filed his Complaint and Jury Demand on March 19, 2019, asserting claims against defendant, Fairleigh Dickinson University and Fairleigh Dickinson School of Pharmacy. (Pa1-Pa11). Plaintiff's Complaint alleged three causes of action against FDU: (1) Breach of Contract; (2) Misrepresentation, and (3) Fraudulent Inducement. (Pa1-Pa11). Defendant FDU filed its Answer, Affirmative Defenses, Demand for Statement of Damages and Designation of Trial Counsel on July 2, 2019. (Pa12-Pa33).

On September 25, 2019, FDU filed a Motion to Dismiss the Complaint with Prejudice pursuant to New Jersey Court Rule 4:6-2(e) (the "Motion to Dismiss). (Pa556-Pa557). Appellant filed his Opposition to Defendant's Motion to Dismiss on October 17, 2019, and Defendant filed a Reply Letter Brief on November 4, 2019. Oral argument was held on January 3, 2020.[1] 1T. By Order dated January 3, 2020, Defendant's Motion to Dismiss was denied in its entirety for the reasons stated on the record on January 3, 2020. (Pa558-Pa559). Defendant filed a Motion for Reconsideration, which was subsequently denied

[1] Reference to the Stenographic Transcript of the Motion to Dismiss, dated January 3, 2020, is designated as 1T. Reference to the Stenographic Transcript of the Motion for Reconsideration, dated June 17, 2020, is designated as 2T. Reference to the Stenographic Transcript of Motion Hearing, dated March 12, 2024, is designated as 3T.

during oral argument held on June 17, 2020. 2T. Discovery proceeded in this matter.

The discovery end date was February 10, 2023. On July 7, 2023, Defendant filed a Motion for Summary Judgment pursuant to New Jersey Court Rule 4:46-2 (the "Motion for Summary Judgment"). (Pa48-Pa50). On August 15, 2023, Appellant submitted his Opposition to Defendant's Motion for Summary Judgment, including Responses to Defendant's Statement of Material Facts in Support of the Motion for Summary Judgment, Counterstatement of Material Facts in Opposition to the Motion for Summary Judgment, and Legal Brief in Opposition to the Defendant's Motion for Summary Judgment. (Pa119-Pa137). On September 18, 2023, Defendant submitted its Reply Letter Brief in further support of its Motion for Summary Judgment.

Oral argument was held on March 12, 2024, and the trial court rendered a decision on the record on that same date granting Defendant's Motion for Summary Judgment. (3T, generally).

Appellant filed a Notice of Appeal on April 24, 2024, appealing the dismissal of Plaintiff's Complaint against the Defendant. (Pa36-Pa39). Appellant filed an Amended Notice of Appeal on May 3, 2024. (Pa40-Pa43).

Appellee/Cross-Appellant Fairleigh Dickinson University filed its Notice of Cross Appeal on May 6, 2024. (Pa44-Pa47).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

The Appellate Division reviews a trial court's order granting summary judgment *de novo*, applying the same standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Summary judgment is a stringent remedy. Errickson v. Supermarkets, 246 N.J. Super. 457, 461 (App. Div. 1991). It is to be granted with utmost caution and never as a vehicle for judicial fact-finding by means of a choice between opposing affidavits. On a motion for summary judgment, all doubtful inferences are to be drawn against the movant and in favor of the opponent on the motion. N.J. Mtge. and Inc. Corp. v. Calvetti, 68 N.J. Super. 18, 24-25 (App. Div. 1961). R. 4:46-2(c) mandates that summary judgment be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Summary judgment can only be granted when no genuine issues of material facts are presented.

For the purposes of a summary judgment motion, a trial court must assume the truth of the non-moving party's version of the facts, giving them the benefit

of all favorable inferences that version supports. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995); Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 135 (1986).

Furthermore, in considering the evidential materials presented, it is not the court's role to weigh the evidence and determine the truth of the matter, rather the court is to determine whether there is a genuine issue for trial. Spiotta v. Wm. H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962), certif. denied, 37 N.J. 229 (1962) citing Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249 (1986). If there is the slightest doubt as to the existence of a material issue of fact, the motion for summary judgment should be denied. Errickson, supra, at 462. The opposing papers must be indulgently treated. Lopez v. Swyer, 115 N.J. Super. 237, 241 (App. Div. 1971). It is always the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In light of this standard, the trial court clearly erred by placing itself in the role of factfinder in granting Defendant FDU's Motion for Summary Judgment. As Appellant can establish the elements of breach of contract, misrepresentation and fraudulent inducement, Appellant requests that this Court reverse the trial court's dismissal of Plaintiff's Complaint with prejudice as to Defendant FDU.

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANT FAIRLEIGH DICKINSON UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT AND PLAINTIFF ESTABLISHED A PRIMA FACIE CLAIM OF BREACH OF CONTRACT (3T78 – 3T88)

There can be no dispute that Plaintiff established a *prima facie* breach of contract claim against Defendant FDU, and therefore such claim should have been presented to the jury.

An implied contract "consists of an obligation 'arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words[.]'" Borough of West Caldwell v. Borough of Caldwell, 26 N.J. 9, 29 (1958) (quoting Williston on Contracts, § 3 3d ed. 1957). Implied Contracts are no different than express contracts, "although they exhibit a different way or form of expressing assent than through statements and writings. Courts often find and enforce implied promises by interpretation of a promisor's word or conduct in light of the surrounding circumstances." Wanaque Borough Sewerage Auth. v. Twp. of W. Milford, 144 N.J. 564, 574 (1996).

Courts in other jurisdictions have held that schools may be subject to breach of contract claims when the school broke a contractual promise to provide a specific service or course. See, Till v. Delta Sch. of Com., Inc., 487 So. 2d 180, 182 (La. Ct. App. 1986) (The Court upheld that a reasonable factual

basis existed for the trial court's finding that the Plaintiff was not furnished the educational opportunity which led her to enroll at the defendant school); Jeffers v. Am. Univ. of Antigua, 93 N.Y.S.3d 36, 38 (2019)(Defendant Nursing School was liable for a breach of implied contract after promising its graduates they would be qualified to take a licensing exam for registered nurses and would be eligible to take a national nursing exam and, upon passing the exam, automatically matriculate into a one-year college nursing program, even though the school's program was not properly accredited.)

i. The Trial Court's Oral Opinion to Grant Summary Judgment as to Plaintiff's Breach of Contract Claim (3T1-3T89)

In its oral opinion, the trial court relied on the standard set forth in Beukas v. Bd. of Trustees of Fairleigh Dickinson Univ., 255 N.J. Super. 552, 558, (Law. Div. 1991), aff'd, 255 N.J. Super. 420, 605 A.2d 708 (App. Div. 1992), relative to the Plaintiff's breach of contract claim, and queried, "Did the university act in good faith? And if so, did it deal fairly with its students?" (3T81).

The trial court cited to a "graduate studies bulletin, which stated,

> "The university reserves the right to change, without prior notice, the contents of its bulletins and to modify its academic calendar and programs of instruction. Academic and disciplinary requirements, policies, and procedures, rules and regulations, its tuition fees,

> charges, and the terms of financial aid. Changes shall be effective upon publication or when the university otherwise determines, and any such change may apply to prospective students and to those who already are enrolled in the university."

(3T82:7-22). The trial court reasoned that this "reservation of rights" provided the ability of Defendant to revise its requirements. (3T82:23-25). Furthermore, the trial court asserted Plaintiff understood that "Defendant's advertisement used the word opportunity and not guarantee." (3T83:1-3).

Subsequently, the trial court asserted, "Like all other pharmacy doctoral students, Plaintiff was given the opportunity to earn a master's degree while earning their doctorate degree. But to take advantage of that opportunity, students needed to maintain a 3.0 GPA and succeed in their coursework. Plaintiff's lack of performance resulted in a 2.67 GPA[2] and lost him the opportunity to pursue a masters. But Plaintiff did obtain a PharmD degree, which is accredited and made him eligible for licensure." (3T86:10-19).

The trial court further asserted, "For Plaintiff to assume he was guaranteed admission into a master's degree simply because he was offered an opportunity

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[2] The weighted value of a 2.67 GPA was a B- pursuant to the Graduate Grading System. (Pa3)

to earn two degrees in four years does not equate to an enforceable contract. The Court agrees with this analysis and the Court is granting the motion for summary judgment." (3T88:8-11).

The trial court did not make any finding as to whether the Defendant "acted in good faith." (3T78-3T88). Nor did the trial court acknowledge or consider that Plaintiff testified that the "opportunity" was not conditioned upon any additional requirements, other than acceptance into the FDU School of Pharmacy. Id. Plaintiff testified that he understood this program, based upon its plain language, to mean that all students who were able to qualify to complete the doctorate program would also be able to complete the master's program. (Pa157-Pa158). Most importantly, FDU, at no time, identified the period to select or opt out of the dual degree program for its inaugural class.

ii. The Trial Court Improperly Assumed the Role of the Factfinder When Applying the Standard in Beukas v. Bd. of Trustees of Fairleigh Dickinson University (3T81-3T88)

The trial court and the Defendant improperly relied on Beukas v. Bd. of Trustees of Fairleigh Dickinson Univ., 255 N.J. Super. 552, 558, (Law. Div. 1991), aff'd, 255 N.J. Super. 420, 605 A.2d 708 (App. Div. 1992), in support of its determination that Plaintiff failed to set forth any cause of action. (3T81:3-T:82:1). In Beukas, students brought claims against FDU for closing their college as a result of budget cuts. Beukas, 255 N.J. Super. at 558-559.

While the factual pattern in Beukas is clearly distinguishable, there, "the court fashioned a new standard: When students bring claims against a university for closing a program, it held, courts should ask, 'Did the university act in good faith and, if so, did it deal fairly with its students?'" Dougherty v. Drew Univ., 534 F. Supp. 3d 363, 374 (D.N.J. 2021), reconsideration denied sub nom (citing Beukas, 255 N.J. Super. at 566.) However, that inquiry was, "the most efficient and legally consistent theory to resolve a university-student conflict resulting from an administrative decision to terminate an academic or professional program." Beukas, 255 N.J. Super. at 566.

New Jersey courts have suggested that the breach of contract standard that applies "depends on context." Dougherty v. Drew Univ., 534 F. Supp. 3d 363, 374 (D.N.J. 2021), reconsideration denied sub nom. Dougherty v. Univ., No. CV2100249KMESK, 2021 WL 2310094 (D.N.J. June 7, 2021). For example,

> "In disciplinary contexts, which implicate the need for academic autonomy, the standard requires a showing not just that the university departed from its rules, but that it departed in a "substantial way." *Mittra*, 719 A.2d at 698 (dismissal of a student for academic reasons); *Napolitano*, 453 A.2d at 276 (disciplinary proceeding for plagiarism). Similarly, in other contexts ill-suited

> for judicial decision making, the Appellate Division has applied this deferential substantial-departure standard.

Dougherty, 534 F. Supp. 3d at 374.

Thus, the proper standard to apply within this context is whether FDU substantially deviated from its own rules and regulations. As set forth in great detail above, FDU's late implementation of the GPA requirement, without notice, and creation of two new policies **for its inaugural class,** which prevented Plaintiff from applying to and/or matriculating into the dual degree program, were severe deviations from its own rules and regulations. (Pa262-Pa263; Pa357; Pa454; Pa461-Pa467).

The FDU School of Pharmacy was a new program, unaccredited, which advertised to potential students a dual Pharmacy and master's program where a student could pursue a Pharm.D, combined with a choice of one of many master's tracks, in four years. (Pa255; Pa344; Pa398). FDU was the only university in New Jersey to offer a dual degree program. (Pa324). The dual degree program advertised by FDU was appealing to Plaintiff because the program was not comparable to anything else in the local area. (Pa153). Essentially, FDU advertised to students the ability to earn two degrees within the same time frame as it was taking them to earn the Pharm.D. degree. (Pa406). At the time Plaintiff was deciding where to further his education, the FDU

School of Pharmacy's website advertised the dual degree program, and explicitly provided,

> "All students who are accepted to the School of Pharmacy with a baccalaureate degree will be provided the opportunity to complete a master's degree in conjunction with the Doctor of Pharmacy.
>
> . . .
>
> Students will be asked to select or opt-out of a Master's pathway at the end of their first professional year in the school."

(Pa435). The forgoing advertisement was the extent of the information provided on the Defendant's Website related to the dual degree program.

The "opportunity" to select to enter the program was not conditioned upon any additional requirements, other than acceptance into the FDU School of Pharmacy. Plaintiff testified that he understood this program, based upon its plain language, to mean that all students who were able to qualify to complete the doctorate program would also be able to complete the master's program. (Pa157-Pa158). Plaintiff contacted the FDU School of Pharmacy to confirm his understanding of their advertisement, and attended open house meetings at FDU wherein his understanding of the plain language was confirmed. (Pa157-Pa158).

The FDU School of Pharmacy Dean, Dr. Avaltroni, responded via email, that Plaintiff's minor in Chemistry was a sufficient background for the master's portion of the dual degree program, and did not identify any other program requirements. (Pa437). Thus, Defendant promised Plaintiff the ability and opportunity to enter the dual degree program, as he had the proper prerequisites.

After conducting his due diligence and confirming he would have the ability to select to enter the dual degree program, Plaintiff, despite taking a risk and applying to an unaccredited school, applied to FDU's School of Pharmacy program on November 1, 2011, and was admitted to the Pharm.D program on March 1, 2012 and accepted admittance on or around the same day. (Pa439-Pa443; Pa97).

Plaintiff was induced to enroll into the program and was part of the inaugural Pharm.D class that commenced in August of 2012. (Pa97). After applying, having been admitted, accepting admittance, and commencing classes, the FDU School of Pharmacy revised its home website page, and included new requirements, stating, "Students interested in a dual degree will be required to meet the admissions requirements for the selected second-degree pathway, in addition to maintaining a 3.0 grade point average within the Doctor of Pharmacy curriculum." (Pa355; Pa454). This was a material change to the dual degree

program's requirements, and not one Plaintiff agreed to or accepted when applying and enrolling into the program.

Plaintiff did not see the change to the website because at that point, as students already began classes, and there was no reason for him to review this webpage. (Pa162). Once Plaintiff did become aware of the newly added language, he spoke with several FDU employees, including Ms. Templin, Dr. Almeida and Mr. Buechner. (Pa179; Pa243-246; Pa458).

Crucially, Mr. Buechner advised Plaintiff that he would be able to matriculate to the MBA program later, when his GPA was where it needed to be so that he would still finish the dual degree program by 2016. (Pa246; Pa458). Due to this statement, Plaintiff remained committed to FDU. Plaintiff could have, and likely would have, sought out a different opportunity by way of a transfer had he known that he was not able to enter the master's track at any point in time.

At the end of Plaintiff's first year in the Pharm.D program, he attained a 2.75 GPA. (Pa255). On June 17, 2013, Plaintiff spoke to Ms. Templin, who advised him that he was not able to matriculate into the master's program at that time because his GPA was not a 3.0 or higher. (Pa245-Pa246). Yet, Plaintiff was made to understand that he would either: (1) be able to apply directly to the FDU

School of Business, as there was no policy against it, or (2) matriculate at a later date. (Pa246; Pa458; Pa460).

Yet, FDU *again* moved the goalpost on Plaintiff, and on August 1, 2013, established a new policy, without process, preventing Plaintiff from pursuing the dual degree program after his first year. (Pa 411; Pa415; Pa461-Pa467; Pa486). The parties to the email were plainly aware that it was Plaintiff who sought the alternative route in gaining admission to the master's degree. (Pa461-Pa467). The August 1, 2013 email string, on several occasions, discussed a student's ability to enter the dual degree program once their GPA raised over the 3.0 threshold. Dr. Alvantroni's email unambiguously demonstrated students were able to enter the dual degree program and take the additional coursework later. (Pa465). Dr. Almeida also stated students were able to select to enter the program at times other than after their first year, once they reached a 3.0 GPA. (Pa462-Pa464). Thus, the University Provost, FDU School of Pharmacy Dean, and Interim Dean of the College of Business were all in agreement that a student was able to matriculate at a later date, and that the Plaintiff was authorized to take MBA courses once he got off academic probation.

Shortly thereafter, Plaintiff's GPA increased, and he took electives for a Master of Health Science ("MHS") degree. (Pa262; Pa554-Pa555). On August 29, 2016, Plaintiff contacted Dr. Avaltroni, advising Dr. Avaltroni that he only

needed to complete only two additional classes to complete his Health Informatics master's track for the dual degree program. (Pa554-Pa555). At that time, Plaintiff was advised that he "misinterpreted the guidelines for admission to the MHS program [,]" which Dr. Avaltroni alleged required a "3.00 GPA at the end of your P1 year." (Pa554).

Ultimately, Plaintiff was not afforded the opportunity to complete the MSH degree, or even enter the masters track of the dual degree program. It is abundantly clear that FDU substantially deviated from its own rules and regulations, as it continued to move the goalposts on Plaintiff, a student of its inaugural class, to prevent him from entering the masters track of the dual degree program. Dougherty, 534 F. Supp. 3d at 374. Thus, the Plaintiff was not furnished with the educational opportunity which led him to enroll at the school, and therefore, the Defendant failed to provide what it promised. Accordingly, Defendant breached its contract with Plaintiff.

iii. Defendant Did Not Act in Good Faith When it Implemental the GPA Requirement After the Inaugural Class Began the Fall Semester and Because it Utterly Failed to Explicitly State the Period to Select or Opt-Out of the Dual Degree Program to its Inaugural Class (3T81-3T88)

FDU did not act in good faith. FDU advertised a dual degree program for its **new, unaccredited** pharmacy school, which did not have any history of rules or regulations, to entice students to apply for its inaugural class. (Pa253; Pa344;

Pa398). The school advertised this unique program to an inaugural class, without accreditation, ostensibly in hopes of swaying local students away from their in-state competition. (Pa324). The website was an important part of advertising the program to students in order to get the word out into the community. (Pa353). FDU induced prospective students to apply to, and accept admittance, to this newly formed dual degree program based on certain criteria in matriculating into the program.

Importantly, there was no precedent related to rules or regulations of the program, and thus, students like Plaintiff were relying on the content available to them, such as the website. Thus, it was not foreseeable that FDU would implement new conditions for the inaugural class to matriculate into the dual degree program, **especially a condition that matriculation would occur only after the first year**. See, e.g., Dworman v. Mayor and Bd. of Alderman, 370 F.Supp. 1056 (D.N.J.1974) (Dworman recognized that under New Jersey law the standard is one of reasonable foreseeability: "only those events that should have been in the contemplation of the contracting parties and thus were reasonably foreseeable as possible contingencies will not excuse performance.")

Defendant further acted in bad faith when it implemented a new policy, on the fly, to plainly prevent Plaintiff from separately applying to the master's program. Prior to August 1, 2013, there was no approval requirement and/or rule

in place prohibiting Pharm.D students participating in the dual degree program "indirectly." (Pa461-Pa467).

Moreover, while Defendant "reserved its right to make changes to its program," there was no defined policy that alerted students the only time they could select or opt-out of the program was at the end of their first year. Plaintiff was given conflicting information regarding the selection requirement to the dual degree program by FDU staff. (Pa244; Pa246; Pa458). Thus, Defendant unambiguously breached its contractual obligations with Plaintiff.

iv. The Trial Court Improperly Relied Upon Mittra v. Univ. of Med. & Dentistry of New Jersey, 316 N.J. Super. 83, (App. Div. 1998) (3T81-3T88)

The trial court echoed the Defendant's argument that the "juris prudence of this state affords institutions of higher education great direction in how they admit, educate, and graduate students." (3T83). The trial court, in its oral opinion, stated, "Relying on Mittra v. University of Medicine and Dentistry of New Jersey, 316 N.J. Super. 83 App. Div. (1998), where the Appellate Division affirmed the trial court's dismissal of the student's breach of contract claim against the university and acknowledged that the rigid application of contractual principles does not apply to university student conflicts." (3T84-3T84).

In Mittra v. Univ. of Med. & Dentistry of New Jersey, 316 N.J. Super. 83, (App. Div. 1998), Mittra's claims were all grounded in the contention that

Defendant UMDNJ improperly dismissed him for academic reasons. Mittra, 316 N.J. Super. at 85 (emphasis added). The court in Mittra rejected "the rigid application of contractual principles to university-student conflicts involving academic performance and limit[ed] [the] scope of review to a determination [of] whether the procedures followed were in accordance with the institution's rules and regulations." Id. at 91. That is not the issue in this matter. Simply, this matter does not relate to student grading or evaluation and thus, this is not a matter related to purely academic decisions. Thus, Mittra is distinguishable.

In fact, the Mittra Court explicitly recognized certain instances where a student may bring a viable breach-of-contract type claim against a university. Id. at 89-90. New Jersey state courts have concluded "that the courts may intervene where the institution violates in some substantial way its rules and regulations pertaining to student dismissals." Id. at 92. (emphasis added) (discussing the holding of Napolitano v. Trustees of Princeton Univ., 186 N.J. Super. 548 (App. Div. 1982), the first reported New Jersey opinion dealing with whether contract principles should be applied in resolving disputes involving student dismissals for academic reasons). Thus, Court's may intervene when universities, like FDU, deviate from its own rules and regulations.

v. Conclusion

The trial court erroneously usurped the role of the factfinder in granting Defendant FDU's Motion for Summary Judgment as to Plaintiff's breach of contract claim. Due to the existence of a material issue of fact, the motion for summary judgment should have been denied. For the reasons set forth above, it is requested that this Court reverse the trial court, and permit Plaintiff to present his case to a jury.

POINT III

THE TRIAL COURT ERRED IN GRANTING DEFENDANT FAIRLEIGH DICKINSON UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT AND PLAINTIFF ESTABLISHED PRIMA FACIE CLAIMS OF MISREPRESENTATION AND FRAUDULENT INDUCEMENT (3T78-3T88)

Plaintiff-Appellant established a *prima facie* cause of action for misrepresentation and fraudulent inducement against Defendant Fairleigh Dickenson University.

i. The Trial Court's Oral Opinion to Grant Summary Judgment as to Plaintiff's Misrepresentation Claim (3T78-3T88)

The trial court stated that misrepresentation and fraud claims require proof of both a misrepresentation or omission and reliance by the Plaintiff on that misrepresentation. (3T84:19-3T85:3). The trial court further asserted that the "elements of fraudulent inducement are the same as those for common law fraud

and require a material misrepresentation of a presently existing or past fact, knowledge or belief by the Defendant of its falsity, and intention that the other party rely on it for reasonable reliance thereupon by the other person. And five, resulting damages." Id.

The trial court contended, "Plaintiff's complaint is based on the omission of the admission standard for the dual degree, but a graduate program has admission standards like maintaining a grade point average." (3T85:10-13).

However, the trial court did not address the Plaintiff's misrepresentation or fraudulent inducement claim in any more depth. (3T78-3T88). Additionally, the trial court did not acknowledge or consider that FDU employee, Mr. Buechner, advised Plaintiff that he would be able to take up to nine credits (not counting pre-requisites) in the master's track and matriculate to the MBA program later when his GPA was where it needed to be so that he would still finish the dual degree program by 2016. (Pa458; 3T78-3T88).

ii. FDU made Material Misrepresentations and Fraudulently Induced Plaintiff

A misrepresentation amounting to a "legal fraud" is a "material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." Jewish Center of Sussex Cty. v. Whale, 86 N.J. 619, 624, (1981), citing Foont–Freedenfeld v. Electro–Protective, 126

N.J. Super. 254, 257, (App.Div.1973), aff'd 64 N.J. 197, 314 A.2d 68 (1974). Non-disclosure of material facts can be a form of misrepresentation where the defendant has concealed a known fact that is material to the transaction, and there is a duty to disclose likely material contingencies. McConkey v. AON Corp., 354 N.J. Super. 25, 47 (App. Div. 2002). "However, a false representation of an existing intention, i.e., a "false state of mind," with respect to a future event or action has been held to constitute actionable misrepresentation." Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1264 (D.N.J. 1982) (citing Samatula v. Piechota, 142 N.J.Eq. 320, 323, (Ch.1948).

Fraud in the inducement does not differ materially from common law fraud, as it provides a cognizable basis for equitable relief in the event a false promise induced reliance. See Lipsit v. Leonard, 64 N.J. 276, 283-84 (1974). Common law legal fraud requires: (1) material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages. Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 535, (App. Div. 1996), aff'd as modified, 148 N.J. 582, 691 A.2d 350 (1997).

Here, FDU made several material misrepresentations that went well beyond "puffery" and directly related to the policy and procedures of the School

of Pharmacy. First and foremost, Defendant FDU misrepresented the requirements related to opting-in to the dual degree program, with the intent to lure incoming students into the unaccredited School of Pharmacy. As previously stated, FDU promised, "Students who are accepted to the School of Pharmacy with a baccalaureate degree will be provided the opportunity to complete a master's degree in conjunction with the Doctor of Pharmacy." (Pa435). This advertisement was made with the intention Plaintiff rely on it to apply to, and accept admission to, the new Pharm.D program.

In fact, by letter dated May 31, 2012, the Medco School of Pharmacy wrote to the Accreditation Counsel for Pharmacy Education ("ACPE"), including a proposed Concurrent Degree Enrollment Program Guidelines and Overview packet, which included language that stated, "A student must have a 3.00 cumulative GPA during their first year within the program to be considered for admission to this concurrent degree pathway." (Pa82). Yet, there is no indication that this document sent by the Medco School of Pharmacy to the ACPE Counsil was, at that time or at any other time, provided to the inaugural class enrolled into the Pharm.D program. This is despite the Defendant's letter to the ACPE counsel which indicated,

> "In addition, the School's webpage has been restructured to ensure that students are fully aware of

> the master's program options and necessary requirements for enrollment and completing of a master's degree in conjunction with the Doctor of Pharmacy Degree."

(Pa69). Thus, Defendant clearly misrepresented to the ACPE, and its inaugural class, that it had provided all requirements of the completing of a master's degree, and fraudulently induced students into applying for, enrolling in, and paying seat deposits and tuition to FDU's Pharmacy School.

The non-disclosure of these key requirements and material facts, such as the period to select whether to enter the dual degree program, is also a significant material misrepresentation. This crucial detail was concealed from Plaintiff despite his significant efforts to gain as much knowledge into the program and its requirements as possible, and despite Defendant's representation to the ACPE that it had provided its prospective students with the requirements for enrollment into the master's track part of the dual degree program.

More importantly, once Plaintiff did become aware of the newly added requirement language for the dual degree program to the FDU website, he spoke with several FDU employees such as Ms. Templin, Dr. Almeida and Mr. Buechner. (Pa179; Pa243-Pa246; Pa458). Crucially, Mr. Buechner advised Plaintiff that he would be able to matriculate to the MBA program later, when

his GPA was where it needed to be so that he would still finish the dual degree program by 2016. (Pa246; Pa458). This was also a materially false statement, as evidenced by Plaintiff having been denied entry into the program. (Pa553–Pa555). Due to this statement, Plaintiff was induced to remain committed to FDU, and did not seek transfer opportunities. Plaintiff also could have withdrawn from the program and/or taken less credits had he been aware that he would never be admitted to the dual degree program to pursue his master's degree. Yet, he was explicitly advised he would be able to enter into the program once his GPA reached 3.0. Plaintiff could have, and likely would have, sought out a different opportunity by way of a transfer had he known that he was not able to enter the master's track at any point in time, **which was the reason he selected FDU in the first place**.

Further, when Plaintiff was a current Pharm.D student, he asked Dr. Avaltroni a very specific question related to admission to the master's degree program. (Pa158). Dr. Avaltroni, responded via email, that Plaintiff's minor in chemistry was a sufficient background for entry into the master's program. Id. However, as previously stated, Plaintiff's undergraduate credentials were not the only factors relevant to admission to the master's program. Thus, Dr. Avaltroni made an "actual" false statement that he undeniably knew to be false. Gennari, supra, 148 N.J. at 607.

These affirmative misrepresentations, which Plaintiff clearly reasonably relied upon, resulted in Plaintiff having been damaged. The recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation. Berman v. Gurwicz, 178 N.J. Super. 611, 621 (Ch. Div. 1981), (citing Restatement, Torts 2d, s 540 (1977)).

The trial court erroneously usurped the role of the factfinder in granting Defendant FDU's Motion for Summary Judgment as to Plaintiff's misrepresentation claim. Due to the existence of a material issue of fact, the motion for summary judgment should have been denied. For the reasons set forth above, it is requested that this Court reverse the trial court, and permit Plaintiff to present his case to a jury.

POINT IV

THE CAUSES OF ACTION SET FORTH IN PLAINTIFF'S COMPLAINT ARE NOT BARRED BY THE STATUTE OF LIMITATIONS (Pa44 – Pa47; 3T78-3T88)

It is undisputed that each of Plaintiff's claims are governed by a six-year statute of limitations. N.J.S.A. 2A:14-1; Holmin v. TRW, 330 N.J. Super. 30, 35-36 (App. Div. 2000), certif. granted, 165 N.J. 531 (2000), aff'd, 167 N.J. 205 (2001). Generally, the date when a cause of action accrues is the date upon which the right to institute and maintain suit first arises. Holmin v. TRW, 330 N.J.

Super. 30, 35 (App. Div. 2000), certif. granted, 165 N.J. 531 (2000), aff'd, 167 N.J. 205 (2001). However, the discovery rule doctrine the doctrine postpones accrual of a cause of action "so long as a party reasonably is unaware either that he has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity." Caravaggio v. D'Agostini, 166 N.J. 237, 245, 765 A.2d 182, 186 (2001), citing Vispisiano v. Ashland Chemical Co., 107 N.J. 416, 527 A.2d 66 (1987).

The question is "whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another." Caravaggio, 166 N.J. at 246. The standard is basically an objective one-whether plaintiff "knew or should have known" of sufficient facts to start the statute of limitations running. Id., quoting Baird v. Am. Med. Optics, 155 N.J. 54, 72 (1998).

i. The Trial Court's Oral Opinion to Regarding Defendant's Statute of Limitations Argument (3T78-3T88)

The trial court did not make any ruling as to the Defendant's statute of limitations argument. However, during its oral opinion, the trial court asserted, "[t]he record shows that Plaintiff's claims that the website changed on or about September 22nd, 2012, four weeks into the program to reflect the 3.0 GPA requirement. Defendant asserts that if this was a time Plaintiff was aware that he had been defrauded then his contract had been breached. To the extend [*sic*]

that he had such a claim, he should have brought his lawsuit within six years, which would mean September 22, 2018." (3T:86:20-3T87:2).

Yet, the trial court goes on to say, "The complaint was filed on March 19th, 2019. However, Plaintiff does not say with certainty that he learned of the change as he claims to have realized it long after. **Thus the date of the onset of Plaintiff's alleged injury is in dispute**." (3T87:3-8) (emphasis added).

Thus, the trial court *explicitly acknowledged* that there was a factual issue as to the statute of limitations argument, and Defendant's motion as to Plaintiff's claims being barred due to the statute of limitations argument should have been denied.

ii. Defendant's Cross-Appeal to Dismiss Plaintiff's Claims on Statute of Limitations Grounds Must be Denied (Pa44-Pa47; 3T87)

Plaintiff anticipates that Defendant will contend each of Plaintiff's claims, and statute of limitations periods, run from the date the Defendant's deceitful website was revised to include the 3.0 GPA requirement in the Fall of 2012.

However, it was not until 2016 in which Plaintiff learned that he could only matriculate into the dual degree program after his first year of enrollment, which makes Plaintiff's claims timely. Defendant cannot set forth any evidence to reflect that this alleged policy was set forth in any advertisement of the program or explicitly provided to Plaintiff at any other time, and that Plaintiff was aware of that policy.

Defendant will presumably rely upon an exhibit that was attached to a letter sent to "Members of the Council" dated May 31, 2012. (Pa69-Pa80). This May 31, 2012 letter, and its attachments, include a "School of Pharmacy Concurrent Degree Enrollment Program Guidelines and Overview" document, which allegedly sets forth guidelines for placement into the dual degree program. Id. Yet, there is no indication that this document was, at that time or at when Plaintiff was initially denied admission into the dual degree program. Plaintiff filed his complaint on March 19, 2019, less than six years from the accrual date.

Plaintiff selected the FDU School of Pharmacy because it was the *only* local program that offered the ability to obtain a business and doctorate within four years, despite the fact it was unaccredited and was not guaranteed to be accredited when plaintiff and his fellow students expected to graduate. (Pa324). Despite this, and despite there being no explicit policy to the contrary, Plaintiff was not afforded the opportunity to enter the dual degree program. Accordingly, Plaintiff's claims are timely, and his Complaint is not barred by the statute of limitations.

CONCLUSION

Where Plaintiff has established a *prima facie* breach of contract, misrepresentation, and fraudulent inducement case against Defendant FDU,

supported by the evidence and testimony of witnesses, the trial court improperly granted summary judgment to Defendant. The trial court improperly asserted itself as the factfinder in this matter, where the case should have been presented to the jury. Moreover, Defendant's Cross-Appeal to dismiss Plaintiff's claims on Statute of Limitations grounds must be denied, as the trial court explicitly acknowledged that there was a factual issue as to the statute of limitations argument.

For the reasons set forth above, it is requested that this Court reverse the trial court, and permit Plaintiff to present his case to the jury.

Respectfully Submitted,

/s/Alan Genitempo, Esq.
Alan Genitempo, Esq.

Dated: July 19, 2024

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OSAMA EL-HELW Plaintiff-Appellant, v. FAIRLEIGH DICKINSON UNIVERSITY, FAIRLEIGH DICKINSON UNIVERSITY SCHOOL OF PHARMACY, JOHN DOES 1-10 AND ABC CORPS. 1-10 (fictitious names representing any unknown defendants) Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002550-23T1 ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY – LAW DIVISION ESSEX COUNTY DOCKET NO.: ESX-L-002118-19 SAT BELOW: HON. ANNETTE SCOCA, J.S.C.

AMENDED BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT/CROSS-APPELLANT (Da001-Da008)

On the Brief:
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(Da001-Da014)

PRELIMINARY STATEMENT

Ultimately, Fairleigh Dickinson University ("FDU")'s decision not to permit a struggling Pharmacy student to take on the additional academic responsibility of enrolling in a dual degree Master's program was within the judicially-recognized academic discretion of the University. That struggling student, Plaintiff-Appellant Osama El-Helw ("El-Helw"), argues that, because an early website for the (not-yet-accredited) Pharmacy program advertised the "***opportunity***" for admitted students to also pursue a simultaneous Master's degree (in one of eight fields) within four years, he was automatically entitled to admission into the second degree program because the University was divested of the authority to set academic standards for admission. According to El-Helw, FDU's decision to add, to the advertisement, a 3.0 grade point average ("GPA") requirement for admission into the dual degree program constituted: a breach of contract (or implied contract) (Count I of the Complaint), misrepresentation (Count II of the Complaint), and fraudulent inducement (Count III of the Complaint). As the Trial Court recognized, the undisputed record demonstrates that each of El-Helw's claims fails as a matter of law.

FDU's decision not to permit El-Helw to pursue the dual degree while on probation in the Pharmacy program was an exercise of pedagogically sound academic judgment (not arbitrary and not unfair) warranting deference under

New Jersey jurisprudence. Simply put, El-Helw was ineligible for admission into one of FDU's Master's programs because he failed to achieve an academic prerequisite for admission into same: a 3.0 GPA following his first academic year of Pharmacy courses.

El-Helw failed to demonstrate that a website advertisement alone can constitute a legally binding contract. That is particularly so here where the FDU website advertisement of a new academic program (not yet fully accredited), was according to Plaintiff-Appellant still evolving. Nor is there any basis for a legal finding that that advertisement could now give rise to an implied contract. The advertisement, on its face, did nothing more than to alert prospective applicants to the existence of the new program. It contained no contractual terms, nor was it intended to form a contract and no reasonable reader would conclude that it was a contract. Moreover, even if the website could have given rise to a contract, El-Helw cannot self-servingly "pick and choose" which parts of the website constituted the "contract." One such published rule was that the University reserved its right to change requirements for any program in its sole discretion. By accepting admission into FDU's Pharmacy School, El-Helw agreed to abide by the University's rules and regulations – whether existing at the time of his admission or subsequent thereto.

In addition to failing to demonstrate breach of contract, El-Helw was unable to demonstrate at the trial level any misrepresentation or fraudulent inducement on the part of FDU.

Here, the creation of the 3.0 GPA requirement is critical to the Pharmacy School's very existence. The Accreditation Counsel for Pharmacy Education ("ACPE") was initially not in favor of the Pharmacy School offering a dual degree program at all, citing concerns about Pharmacy students being diverted from the rigorous requirements of the healthcare-related degree. When the ACPE eventually agreed to permit the dual degree offering, it did so ***on the condition*** that FDU only admit Pharmacy students who demonstrated strong attainment (which FDU established as a 3.0 GPA) at the end of their first academic year of Pharmacy study. This requirement was ultimately reflected in FDU's Student Handbook, on the website, and in various other publications of which El-Helw should have been aware.

Finally, although the Trial Court chose not to rule on FDU's Statute of Limitations argument, all of El-Helw's claims against FDU are barred under the Statute of Limitations. El-Helw knew – or *should* have known – about the 3.0 GPA requirement by September 22, 2012 at the very latest. Yet he did not file suit until March 19, 2019 – approximately six months after the expiration of the six-year statute of limitations.

QUESTIONS PRESENTED

1. Did FDU's website advertising the "opportunity" to obtain, in four years, a Doctorate of Pharmacy and one of eight Master's degrees create a legally binding contract, or implied contract, between FDU and its admitted pharmacy students, such as El-Helw?

2. Even if the website constituted a contract allowing El-Helw to pursue the "opportunity" of a dual degree, would that "contract" entail guaranteed admission into the second degree program – regardless of El-Helw's academic standing, and where the website also included an explicit reservation of FDU's right to make changes to the dual degree program requirements at any time?

3. As a matter of law, was the change to the FDU website after Plaintiff-Appellant's admission but before the start of classes – where the change in requirements was also reflected in the Student Manual, the mandatory first year course "Beyond the Curriculum," and elsewhere – fraudulent?

4. Does the six-year Statute of Limitations bar Plaintiff-Appellant's action, when he knew or should have known of the 3.0 GPA requirement for the Master's portion of the dual degree, which was publicized at the latest by September 22, 2012 (six and a half years prior to his filing suit against FDU)?

STANDARD OF REVIEW

The Trial Court did not make any factual findings; it decided Defendant-Respondent's motion for summary judgment based on the law. On appeal, the standard of review concerning legal findings is *de novo*. In Re: Ordinance 2354-12 v. Tp. Of West Orange, 223 N.J. 589, 596 (2015); see also Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (providing that a trial court's grant of summary judgment is reviewed *de novo*).

PROCEDURAL HISTORY

The Complaint and Jury Demand was filed on March 19, 2019. The Complaint contained four counts: (1) Breach of Contract; (2) Misrepresentation; (3) Fraudulent Inducement and (4) the above allegations against John Does. (Pa.1- Pa.11). Defendant-Respondent filed its Answer and Affirmative Defenses on July 2, 2019. (Pa.12-Pa.33).

On September 25, 2019, Defendant-Respondent filed a motion to dismiss the Complaint with prejudice, pursuant to R. 4:6-2(c), for failure to state a claim. (Pa.681-Pa.682). Oral argument was held on January 3, 2020. (Pa.116-Pa.143). The Trial Court denied the motion to dismiss with its reasons read into the record on January 3, 2020. (Pa.683-Pa.684). Defendant-Respondent filed a motion for reconsideration on March 11, 2020. Oral argument was heard on June 17, 2020. The Trial Court denied the motion on the same day and read its decision into the

record. (Pa.145-Pa.150). In reading its decision on the motion for reconsideration into the record, the Trial Court remarked "[i]t's a close call. There is not much here." (Pa.149).

Discovery concluded on February 10, 2023. On July 7, 2023, Defendant-Respondent moved for summary judgment to dismiss the Complaint with prejudice, pursuant to R. 4:46-2. (Pa.48-Pa.50). Oral argument was held on March 12, 2024. On the same day, the Trial Court granted Defendant-Respondent's motion for summary judgment and dismissed the Complaint with prejudice. The Trial Court read its opinion into the record on that date.

On April 24, 2024, Plaintiff-Appellant filed a Notice of Appeal of the Trial Court's dismissal of his Complaint. (Pa.36-Pa.39). Plaintiff-Appellant filed an Amended Notice of Appeal on May 3, 2024 (Pa.40-Pa.43). Defendant-Respondent filed a Notice of Cross-Appeal on May 6, 2024. (Pa.44-Pa.47).

Plaintiff-Appellant's Brief and Appendix were accepted by this Court on July 19, 2024. Defendant-Respondent's request for an extension of time, on consent, was granted. Defendant-Respondent's brief in opposition and in support of its Cross-Appeal are due on September 16, 2024.

STATEMENT OF FACTS

The Pharmacy School's Formation

In 2008, FDU, a private higher educational institution of the State of New Jersey, began exploring expansion of its graduate programs to include a Pharmacy School. To open the proposed Pharmacy School, FDU had to go through an accreditation process. In 2010, FDU representatives met with the ACPE, the organization that sets the requirements for pharmacy school accreditation (Avaltroni Dep. T16:6 – T17:4 at Pa.343-44). ACPE accreditation was a *sine qua non* for the Pharmacy School to graduate students eligible for licensure.

The ACPE's accreditation process requires that a proposed pharmacy school meet separate requirements for each of three steps, or "tiers," of the process. The first tier of the accreditation process is "***pre-candidate***" status, which FDU achieved after its curriculum was approved by the ACPE in 2011. Upon being granted pre-candidate status by the ACPE, FDU was permitted to admit students into the Pharmacy School for Fall Semester 2012. (Avaltroni Dep. T22-25-T25:4 at Pa.345-346).

The next tier in the ACPE accreditation process is "***candidate***" status. Prior to granting FDU candidate status, ACPE representatives had to visit FDU's campus for an on-site assessment and an evaluation of the new school's

academic programs. This occurred in May 2012. In order for the Pharmacy School to begin classes, the ACPE had to grant candidate status. If the Pharmacy School were not granted candidate status, admittees such as El-Helw (who was admitted on March 1, 2012), would have been released from the school. The final tier is ***full accreditation***. This is the status the Pharmacy School was required to obtain in order for its graduating students to be eligible to become licensed pharmacists. (Avaltroni Dep. T23:3-T24:4 at Pa.345; Geoffrey Weinman, Dean of Becton College of FDU Dep. ("Weinman Dep"), T23:13-25 at Pa.323-24).

One of FDU's goals – which it communicated to the ACPE – was to offer pharmacy students a new type of program – one that would offer incoming students (among other features) the opportunity to obtain a Master's degree in one of eight disciplines together with the Doctorate of Pharmacy in four years. During its on-campus visit in May 2012, **the ACPE advised FDU that it would only approve this proposed "dual degree" program if FDU restricted admission into the Master's portion of the program to students whose academic performance in the first academic year of pharmacy school demonstrated strong attainment**. The reason for this restriction was to avoid undermining the ability of students to succeed in the pharmacy program. (Avaltroni Dep. T112:7-15 at Pa. 367).

Plaintiff-Appellant's First Observation of the FDU Website, The Inaugural Pharmacy Class, and The Dual Degree Program

Plaintiff-Appellant obtained his undergraduate degree from the Newark College of Arts and Sciences of Rutgers University (Plaintiff Dep. T27:17-T28:13 at Pa. 146) in June 2012. He graduated with a 2.986 GPA. (Plaintiff Dep. T52:5-11 at Pa. 152). At his deposition, Plaintiff-Appellant stated that in February 2011 (his junior year), he was researching graduate degree opportunities when he came across the FDU website,[1] which stated:

> All students who are accepted to the Medco[2] [FDU] School of Pharmacy with a baccalaureate degree will be provided the opportunity to complete a masters degree in conjunction with the Doctor of Pharmacy . . . . Students will be asked to select or opt-out of a masters pathway at the end of their first professional year. [emphasis added]. [3]

(Paragraph 2, to Plaintiff's Cert. in opposition to Defendant's motion to dismiss, dated October 12, 2019 (the "El-Helw Cert.") at Pa.96).

At his deposition, Plaintiff-Appellant admitted that the website did not use the word "guarantee," but rather "opportunity," when referring to the dual

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1 Plaintiff-Appellant also testified that he learned of the FDU pharmacy program from his part-time employer, Walgreens. (Plaintiff Dep. T247:9-20 at Pa.240).
2 The Medco name was eliminated during the early days of the program.

3 Neither Plaintiff nor FDU archived the Website as it existed in 2011 or 2012. Plaintiff, as part of this lawsuit, used the "Wayback Machine" to find the version he recalled seeing originally before he applied. See discussion, infra..

degree. (Plaintiff Dep. T70:8-T71:14 at Pa. 157). At the time Plaintiff-Appellant saw the FDU website, the School of Pharmacy was in pre-candidate status for accreditation. Plaintiff-Appellant was acutely aware of the program's pre-candidate status of accreditation. (Plaintiff Dep. T58:11-23 at Pa.154).

Dean Avaltroni of FDU's Pharmacy School testified that the inaugural class was comprised of 79 students (80 spots were authorized by the ACPE) (Avaltroni Dep. T21:22-T22:7 at Pa.345. Between 20 and 25 of those students applied for the various Master's degree options. (Avaltroni Dep. T33:23-T34:7 at Pa.348). A few students, including El-Helw, were denied admission into the dual degree program. (Plaintiff Dep. T154:22- T155:7 at Pa.178). However, only El-Helw filed suit against FDU, and only El-Helw claimed to be misled by FDU's website prior to his admission into the Pharmacy School. (Plaintiff Dep. T185:4-13 at Pa.185). Of the inaugural class, by the Spring semester of 2014, 22 of the 79 students, including El-Helw, were on academic probation, five of whom had higher GPA's than El-Helw (Plaintiff Dep. T349:3-T350:7 at Pa.265; Plaintiff Dep. Exhibit P32 at Pa.115; Plaintiff Dep. Exhibit P33 at Pa.177). Two or three students in the inaugural class withdrew or were dismissed from the program. (Avaltroni Dep. T69:6-15 at Pa.357). There were two students in addition to Plaintiff-Appellant who had to take an additional year to complete the pharmacy program due to their academic records. (Avaltroni Dep. T69:22-

T70:8 at Pa. 357; Plaintiff Dep. Exhibit P32 at Pa.115; Plaintiff Dep. Exhibit P33 at Pa.177.)

The dual degree program worked as follows: during the first year, the student would take exclusively pharmacy courses. Then, in the remaining three years, the student would take courses in the pharmacy curriculum, some of which could overlap with courses required for various Master's programs, and the student would take electives in the field chosen for the dual degree. (Avaltroni Dep. T39:6-T41:4 at Pa.349-50).

At the direction of the ACPE, by the end of May 2012, the FDU website specifically added that, in order to be permitted to take advantage of the opportunity for the dual degree, a prospective applicant must maintain a 3.0 GPA by the end of their first academic year at the Pharmacy School. In addition, admission to the Master's portion of the program was to be determined by the school granting the Master's degree. (Avaltroni Dep. T24:7-T26:7 at Pa.345-46). The updated website information included:

> Students who are accepted to the School of Pharmacy with a baccalaureate degree may have the opportunity to pursue a Masters degree in conjunction with the Doctor of Pharmacy degree following completion of the first professional year of the Pharmacy curriculum -- providing the opportunity for students to select a focused pathway of study while meeting the Doctor of Pharmacy curricular requirements.

> The integration of required master's courses within the pharmacy program curriculum may allow students to complete both degrees, with overload courses required for some master's programs offered as evening, Saturday or online courses.
>
> Students interested in a dual degree will be required to meet the admissions requirements for the selected second-degree pathway, in addition to maintaining a 3.0 grade point average within the Doctor of Pharmacy curriculum.

(Da. 007).

Plaintiff-Appellant claims that the website did not change until September 22, 2012, some four weeks after he started his course work on August 26, 2012[4]. (Plaintiff Dep. T93:2-7; T94:2-7 at Pa.93-94). Although FDU presented evidence in discovery that the website was, in fact, updated in May 2012, for purposes of this motion, FDU accepts Plaintiff's date of September 22, 2012 because it is not a material to the dispute. Moreover, in addition to the website, the Graduate Student Handbook, open houses, and the mandatory first-year course "Beyond the Curriculum" all informed pharmacy students of the 3.0 GPA requirement (Alvatroni Dep. T108:19-T109:2 at Pa. 366-67). El-Helw failed to even enroll in the first semester of the required "Beyond the Curriculum" course

[4] Plaintiff-Appellant's contention that the website changed on September 22, 2012 is not based on his own knowledge, but on screenshots taken from the web crawler "the Wayback Machine." (Plaintiff Dep. T122:9-16 at Pa.170). However, the Wayback Machine's algorithm does not capture the exact date on which a website was changed or modified. (See Certification of Christopher Butler, dated October 24, 2022 at Pa.111.)

– which covered the 3.0 GPA requirement. (Sandifer Dep. T202:1-T203:13 at Pa. 524).

The ACPE's May 2012 Visit and Beyond

During the course of evaluating FDU's pharmacy school for accreditation, the ACPE expressed concern that the Master's portion of the FDU dual degree program not compromise pharmacy education and recommended a high standard of performance in the pharmacy courses before a student be permitted to take on the added burden of dual degree requirements. (Avaltroni Dep. T99:19-T103:4 at Pa.364-65). To assuage ACPE concerns, FDU had set a 3.0 GPA at the conclusion of the first year of study in pharmacy as the requirement for entry into the dual degree program. The ACPE recommended that, although available elsewhere (such as in the Student Manual), that FDU should also include it on the FDU website. (Alvatroni Dep. T99:19-T103:4 at Pa.364-65).

Dr. Alvatroni testified that the 3.0 GPA requirement was publicized on FDU's website, as well as in various other University resources, such as student bulletins and manuals. Had Plaintiff been concerned that he could not meet a GPA of a 3.0 in graduate education, he could have rescinded his acceptance three months before classes began with a full refund. (Avaltroni Dep. T62:20-T63:13 at Pa.355). Plaintiff-Appellant testified that he was aware that the FDU School of Pharmacy was not yet accredited and that things were constantly

changing, so he looked at its website daily, at least until his admission. (Plaintiff Dep. T89:2-14; Sponzilli Cert., Exhibit C). Plaintiff-Appellant testified that, even before he saw the 3.0 GPA requirement reflected on FDU's website, he had heard rumors of changes in the dual degree requirements. (Plaintiff Dep. T159:17 – T160:5 at Pa.179).

On July 23, 2013, Plaintiff-Appellant was placed on academic probation due to his GPA falling to 2.67 (where probation is a GPA under 2.75). As a result, he could not enroll in the Master's program (El-Helw Cert., paras. 10-11 at Pa.99). It should be noted that in every example of the FDU Website, produced by Plaintiff-Appellant, utilizing the Wayback Machine, including that of February 15, 2011, the decision to admit a student into the dual degree was to be made at the conclusion of the student's first year, contrary to Plaintiff-Appellant's contention to the contrary. (Da.007-14).

The University's Reserved Right to Make Changes to Academic Programs

In all versions of FDU's website, the website explicitly set forth the right of the University – consistent with New Jersey caselaw – to make changes, in its sound academic judgment, regarding academic requirements, courses, and programs. There was no time limitation on when these changes could be made. As noted above, even the February 15, 2011 FDU website contained a provision which stated:

> The University reserves the right in its sole judgment to make changes of any nature in the University's academic programs, courses, schedule or calendar whenever in its sole judgment it deemed desirable to do so. The University also reserves the right to shift colleges, schools, institutes, programs, departments or courses from one to another of its campuses. The foregoing changes may include, without limitation, the elimination of colleges, schools, institutes, programs, departments or courses; the modification of the content of any of the foregoing, the rescheduling of classes with or without extending the announced academic term; and the cancellation of scheduled classes or other academic activities.

(FDU's document production, Bates stamp D02132-D02134 at Pa. 65-67.)

In addition, El-Helw admitted that when he was admitted into the Pharmacy Program that he signed the University admission form that said:

> It is agreed and understood that the signing of this application constitutes an agreement on the part of the student to abide by all rules and regulations of the University.

(Plaintiff Dep. T63:21-24 at Pa.155). The University admission form continued:

> Students who accept enrollment at the University agree to abide by all the rules and regulations <u>now or hereinafter promulgated</u> by the University. Any student failing to comply with such rules and regulations may be dismissed by the University.

(Plaintiff Dep. T64:12-24 at Pa.155; FDU's document production, Bates stamps D02393, D02394, D02485 at Pa.66) (emphasis added).

The original FDU Website contained only the barest of information regarding the dual degree program. There was no intention that the website go

beyond simply promoting the program. It clearly did not list (or purport to list) all requirements for admission, let alone degree *completion*. For example, Plaintiff-Appellant admitted that the Website did not address academic dishonesty (Plaintiff Dep. T146:18 – T148:4 at Pa.176), nor did it explain how many credits were needed to graduate with a dual degree. (Plaintiff Dep. T148:5 – T149:4 at Pa.176). Nor did the website state how many credits were required for each degree. (Plaintiff Dep. T149:13-18 at Pa.176). The Website did not tell students about housing and on-campus services, (Plaintiff Dep. T149:19 – T150:3 at Pa.176-77), nor did it address student fees, required texts, dining offerings, library assets, laboratory resources, or the existence of a student center. It did not explain what happened if a student failed a course. (Plaintiff Dep. T150:4 – T151:16 at Pa.177). It did not explain whether being on probation (which El-Helw was) would be a factor in admission consideration into the dual degree program. (Plaintiff Dep. T152:7-13 at Pa.177). The website did not tell the student what courses or credits were required to graduate. (Plaintiff Dep. T152:14-16 at Pa.177). It did not tell an applicant how a criminal record would impact one's ability to be admitted into the dual degree program. (Plaintiff Dep. T153:19- T154:2 at Pa.177-78). It did not address discipline, course failures, the Pharmacy Code of Conduct, the course calendar, Dean's List, etc. (Plaintiff Dep. T152-19–T154:21 at Pa.177-78).

When asked at his deposition about his claim of misrepresentation, Plaintiff-Appellant said that he was supposed to get a dual degree and his PharmD in four years; instead, he spent five years and received only the PharmD degree[5]. (Plaintiff Dep. T321:5-11 at Pa.258). He admitted that he received 7 grades of C, along with several "T's" (temporary grades). (Plaintiff Dep. T313:25–T314:4 at Pa.256). He also had several failures. He claims the misrepresentation and the fraud claims were based on the original website. (Plaintiff Dep. T324:5, T325:12; Id.) However, he admits the "Right, language can't always be exact, so." (Plaintiff Dep. T325:20-21 at Pa.259).

After being denied admission into the dual degree program, Plaintiff-Appellant attempted to end-run the 3.0 GPA requirement by applying *directly*

5 Throughout El-Helw's brief, he attempts to manufacture instances in which he was "misled" by FDU regarding the requirements of the dual degree. None of the examples are legally material. For example, El-Helw alleges that when researching the dual degree option, he inquired – via FDU's web portal – about whether he (having minored in Chemistry in College) would be eligible to pursue a Master's degree in Chemistry. The answer was that he could. (Plaintiff Dep., T106:8-107:3 at Pa. 166). El-Helw now claims that FDU misled him in this instance because FDU's response should have included complete details of the requirements for the dual degree. That, of course, was not the question he posed via the web portal, and in any case, it is not legally material. Moreover, El-Helw posed this question prior to the ACPE's site visit in May 2012. Id. His similar manufactured examples of FDU misleading him are dispelled by the website changing in May 2012, as well as FDU's other publications and announcements regarding the dual degree requirements.

to the Business School's MBA program[6]. This attempt at an end-run was brought to the attention of the Dean of Pharmacy and the Provost, and El-Helw was ultimately denied admission into the MBA program. Plaintiff-Appellant argues that, by denying him admission into the MBA program (***while he was on academic probation in another program***), FDU improperly made a new rule just for him. Plaintiff-Appellant also makes the point that, over his tenure in the Pharmacy program, his GPA – eventually – rose above a 3.0. However, as set forth above, the 3.0 GPA requirement, which was clearly stated in various University sources, related to the minimal GPA necessary after the first academic year (through May 2012). Moreover, that requirement was pedagogically sound in that there would not have been enough time to take the courses necessary to fulfill course requirements for two degrees if entry into the dual degree occurred in later years.

When asked why he did not sue FDU in the Spring of 2013, Plaintiff-Appellant alleged that was because he was a full-time student then. (Plaintiff Dep. T340:18 - T341:4 at Pa.263). However, he hired an attorney to assist him in arguing about his grades well before the Statute of Limitations had run.

6 El-Helw first was interested in a Master's degree in Chemistry, then he turned his focus to pursuing an MBA, and eventually, expressed an interest in pursuing a Master's degree in Health Sciences.

(Sandifer Dep. T153-:16-20, at Pa511; T187:14-23 at Pa.520; 219:3-12 at Pa528; T219:3-T221:2 at Pa.528)

LEGAL ARGUMENT

Count I of El-Helw's Complaint sounds in implied contract. Count II sounds in misrepresentation, which Plaintiff-Appellant alleges he relied upon to enter into what he considered to be an implied contract (his acceptance of admission into the Pharmacy School on March 1, 2012). Count III alleges fraudulent inducement into what Plaintiff-Appellant says was an implied contract with FDU. Count IV contains no substantive legal theory for relief, but rather adds John Does who were never identified. Consequently, N.J.S.A. 2A:14-1 governs this suit.[7]

As set forth below, all of Plaintiff-Appellant's claims against FDU should have been dismissed at the trial level as time-barred. Moreover, the Trial Court's decision to dismiss all of Plaintiff-Appellant's claims on their merits should be affirmed.

[7] Even were his misrepresentation claim deemed tort-based, El-Helw still would be held to a six-year statute of limitations. N.J.S.A. 2A:14-2.

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT RULING THAT PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-RESPONDENT WERE BARRED BY THE SIX-YEAR STATUTE OF LIMITATIONS (Trial Transcript pages 86:20-88:15)

Although the Trial Court correctly dismissed El-Helw's claims on their merits (see Point II, infra), it incorrectly declined to decide FDU's motion for summary judgment based on the separate ground that Plaintiff-Appellant failed to file this lawsuit within the applicable six-year Statute of Limitations. All Counts of Plaintiff-Appellant's Complaint are based on the premise that, when FDU changed its website to include the requirement that pharmacy students attain a 3.0 GPA at the end of their first year of pharmacy study as a condition for admission into the dual degree program, it breached a contract (or implied contract) based on the website's initial advertisement and also defrauded El-Helw.

Plaintiff-Appellant concedes that as of September 22, 2012 **at the latest**, the FDU website which advertised the dual degree "opportunity" had been changed to make explicit reference to the 3.0 GPA requirement. Moreover, El-Helw hired an attorney well within the Statute of Limitations period. The revision of the website is the event which El-Helw claims constituted the breach of his contract with FDU. El-Helw's argument is that the prior iterations of FDU's website (which did not state the 3.0 GPA requirement) gave rise to a

contract between FDU and El-Helw once El-Helw "accepted" his admission into FDU' pharmacy school on March 1, 2012.

Even utilizing the September 22, 2012 date Plaintiff-Appellant alleges as the date the website changed to add the 3.0 GPA, Plaintiff-Appellant did not file suit in this matter until March 19, 2019, some six and a half years after September 22, 2012. Moreover, there was uncontradicted testimony that not only did the website change, but the 3.0 GPA requirement was published in the Graduate Student Manual, provided to all incoming students on or about August 26, 2012. (Alvatroni Dep. T108:19-T109:2 at Pa. 366-67.) The 3.0 GPA was also announced in other publications as well and in the introductory course "Beyond the Curriculum." Id. El-Helw's testimony at his deposition was that he looked at the FDU website every single day until admission, because he was aware that it was a new, unaccredited program and he wanted to be aware of changes. (Plaintiff Dep., T89:2-14 at Pa.161). He testified that after admission, he no longer had to monitor it every day and cannot recall when he saw it again. (Plaintiff Dep., T92:21-93:7 at Pa.162).

The law is clear: it is not when a plaintiff actually learns of his claim that determines when the six-year Statute of Limitations begins to run. Rather, the six-year Statute of Limitations begins to run when the plaintiff either knew ***or should have known*** of the claim:

> The question in a discovery rule case is whether the facts presented would alert a reasonable person, exercising ordinary diligence, that he or she was injured due to the fault of another. The standard is basically an objective one-whether plaintiff "knew or should have known" of sufficient facts to start the statute of limitations running.
>
> That does not mean that the statute of limitations is tolled until a plaintiff has knowledge of a specific basis for legal liability or a probable cause of action. It does, however, require knowledge not only of the injury but also that another is at fault.

Caravaggio v. D'Agostini, 166 N.J. 237, 246 (2001).

In this case, El-Helw *should have known* of the 3.0 GPA requirement no later than September 22, 2012, when he acknowledges the website was updated; and in addition, through the information provided to him by way of the Graduate Student Manual and in the Beyond the Curriculum course. (Alvatroni Dep. T108:19-T109:2 at Pa. 366-67.) However, even accepting that the FDU website was not revised to reflect the 3.0 GPA requirement until September 22, 2012 – *and* that it was somehow reasonable for Plaintiff-Appellant to not have known about the requirement before that date – Plaintiff-Appellant's Complaint is nevertheless barred by the applicable six-year Statute of Limitations. N.J.S.A. 2A:14-1 ("Every action at law…for recovery upon a contractual claim or liability, express or implied,…shall be commenced within 6 years next after the

cause of any such action shall have accrued"). G&L Assocs., Inc. v. 434 Lincoln Ave. Assocs., 318 N.J. Super. 355, 359-60 (App. Div. 1999).

Plaintiff-Appellant admitted that he knew that the pharmacy program was constantly evolving. He also testified that he heard rumors of changes in requirements for the dual degree, all occurring more than six years prior to his filing this lawsuit. FDU's Dean Avaltroni further testified that a student such as El-Helw would have known of the 3.0 GPA requirement through the FDU website, student manuals, presentations and open houses, the Beyond the Curriculum course (which all pharmacy students, including El-Helw, were required to take), orientation, and in documents circulated to all students highlighting the curriculum for the eight masters' programs. (Avaltroni Dep. 108:19-109:16 at Pa.366-67.) As such, El-Helw knew, or should have known about, the 3.0 GPA requirement for admission into the dual degree program for nearly four months prior to attending class at FDU and ***six and-a-half years before he filed suit***.

Since Plaintiff did not file suit until March 19, 2019, approximately six and one-half years after the applicable limitations period accrued, Plaintiff's claims are barred by the Statute of Limitations. This, in and of itself, constitutes an independent basis upon which to dismiss all of El-Helw's claims against FDU. The Trial Court should have ruled accordingly.

POINT II

THE TRIAL COURT'S ORDER GRANTING DEFENDANT-RESPONDENT'S SUMMARY JUDGMENT MOTION AND DISMISSING PLAINTIFF-APPELLANT'S CLAIMS ON THE MERITS SHOULD BE AFFIRMED

The Trial Court correctly dismissed El-Helw's claims against FDU on their merits. In that respect, the Trial Court's decision should be affirmed.

As noted above, on appeal, this Court reviews a summary judgment decision *de novo*. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018). Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits … show that there is no genuine issues as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

"[A] court should deny a summary judgment motion *only* where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" [emphasis added] Brill, 142 N.J. at 529. **A "nonmoving party cannot defeat a motion for summary judgment merely by pointing to *any* facts in dispute."** Id. (emphasis added). Rather, an alleged dispute must be both genuine and material to defeat summary judgment.

To show that a genuine issue of material fact exists, the nonmoving party may not rest upon bare conclusions, without factual support. Sullivan v. Port

Auth. of NY and NJ, 449 N.J. Super. 276, 279-80 (App. Div. 2017). Self-serving assertions are insufficient to create a genuine issue of material fact and cannot defeat the moving party's entitlement to summary judgment as a matter of law. Garruto v. Cannici, 397 N.J. Super. 231, 233 (App. Div. 2007). "[W]here the party opposing summary judgment points only to disputed issues of fact that are 'of an insubstantial nature,' the proper disposition is summary judgment." Brill, 142 N.J. at 529. Indeed, the party opposing summary judgment "'must do more than simply show that there is some metaphysical doubt as to the material facts[,]'" Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (quoting Big Apple BMW Inc. v. BMW of North Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993), as "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments.'" Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009). An inference can only be drawn from proven facts—it cannot be based on mere conjecture, speculation, or a surmise. Long v. Landi, 35 N.J. 44 (1961). Contrary to El-Helw's argument on appeal, the Trial Court did not decide fact issues, rather it viewed the myriad of facts alleged by El-Helw irrelevant to the material issues to be decided. A comparison of the Material Statements of Fact submitted below will evidence a lack of any material fact in dispute.

For the following reasons, the Trial Court's decision to grant FDU's summary judgment motion, and to dismiss all of El-Helw's claims against FDU on the merits, should be affirmed.

A. The University Website Did Not Give Rise to a Contract Between FDU and El-Helw Such That FDU Was Required to Admit El-Helw Into the Dual Degree Program.

i. FDU's Website Lacked the Essential Terms to Constitute a Contract – or Even an Offer to Form a Contract.

The essential elements of a contract are (1) offer, (2) acceptance, and (3) consideration. See, e.g., Weichert Co. Realtors v. Ryan, 128 N.J. 427 (1982). El-Helw has failed to establish these elements of a contract. Indeed, under New Jersey law, an advertisement generally does not even constitute an *offer* to enter into a contract. See Jackson v. Manasquan Sav. Bank, 271 N.J. Super. 136, 143 (Law. Div. 1993) ("the advertisement … contains no specific terms that would form the basis of an offer … Rather, the advertisement in question can be viewed only as an invitation to the public…").

The Restatement (First) of Contracts further provides that, in order for an advertisement to constitute an offer, the terms must be defined on the face of the advertisement. "If from a promise, or manifestation of intention, or from the circumstances existing at the time, the person to whom the promise or manifestation is addressed knows or has reason to know that the person making it does not intend it as an expression of his fixed purpose until he has given a

further expression of assent, he has not made an offer." Restatement (First) of Contracts § 25 (1932). To illustrate the necessity of agreement on a contract's essential terms, the Restatement provides the following example, "A writes to B, 'I am eager to sell my house. I wish to get $20,000 for it.' B promptly answers saying, 'I will buy your house at the price you name in your letter.' There is no contract. A's letter is a mere request or suggestion that an offer be made to him." Id. This Court has held that "[t]here is no question that there is no enforceable agreement unless the parties agree on its essential terms." Foulke v. Staval, Inc., 2011 WL 831707, at *2 (N.J. Super. Ct. App. Div. Mar. 11, 2011); see also Gamble v. Connolly, 399 N.J. Super. 130, 141, 943 A.2d 202, 208 (2007) (finding that there is no enforceable agreement "if the parties do not agree to one or more essential terms"). Clearly, in the case at bar, the website advertisement cannot have given rise to a contract between FDU and El-Helw because – simply put – it lacked the essential terms of a contract (or even an offer to enter into one).

Moreover, El-Helw's reading of what little information the barebones advertisement *did* contain is patently unreasonable. FDU's website advertised the four-year dual degree as merely an "opportunity." By its literal terms, the advertisement did not claim that the "opportunity" was automatic – nor did it purport to define when, how, or in what fashion the opportunity would be manifested.

According to The American Heritage Dictionary of the English Language, "opportunity" is defined as follows:

> A favorable or advantageous combination of circumstances; suitable occasion of time . . .
>
> **usage**: Opportunity is often followed by *for*, *of*, or *to* as in *opportunity* for (or of) writing, opportunity to write.

The American Heritage Dictionary of the English Language. (Houghton Mifflin Co., copyright 1980).

This argument of school advertisement-as-contract came up – and was subsequently struck down – during the COVID-19 pandemic, in which schools across the country had to eliminate (or make virtual) ***entire programs*** after admitting students into those programs. For example, in Doe v. Emory Univ., 2021 WL 358391, at *5 (N.D. Ga. Jan. 22, 2021), the plaintiff sued his college for breach of contract when the College switched to virtual classes during the COVID-19 pandemic. He pointed to a number of promotional items, including the school's website, that explicitly discussed in-person class offerings. However, the Court dismissed the breach of contract claims by applying Georgia law – which, like New Jersey law, provides that advertisements do not constitute offers to form contracts. Specifically, the Court held:

> …[T]hese promotional statements merely describe these features and ***opportunities***, and there is no language identified that indicates a promise to provide in-person education. While these statements might

> conjure images of the typical academic, residential, and social opportunities enjoyed by college students, these statements cannot be deemed a legal offer.
>
> Instead, these promotional statements are essentially advertising materials, which do not constitute offers to form express contracts under longstanding Georgia law.

Doe v. Emory Univ, 2021 WL 358391, at *5 (N.D. Ga. Jan. 22, 2021) (emphasis added).

El-Helw's argument in this matter is strikingly similar to the (unsuccessful) arguments made by the Doe plaintiff. At deposition, Plaintiff-Appellant testified that he was interested when he saw the website, which advertised that FDU was creating a new pharmacy school (not yet accredited), and further advertised the innovative "opportunity" to obtain both a Doctor of Pharmacy degree and a Master's degree in four years. Plaintiff-Appellant further admitted that, when he originally saw the advertisement, he understood that it used the word "opportunity," and not "guarantee." (Plaintiff Dep. T71:11-19 at Pa.157). Plaintiff-Appellant checked the FDU website "daily," at least up until his eventual admission into the pharmacy school. (Plaintiff Dep. T89:2-14 at Pa.161; Id.) After his admission, Plaintiff-Appellant did look at the website, but he could not recall when or how often. (Plaintiff Dep. T28:4-25 at Pa.146.)

When using the word "opportunity," the website did not explain how that "opportunity" would be realized. Nor did it contain terms or conditions. (Pa.13;

Plaintiff Dep. T20:5-T21:14 at Pa.20-21.) It did not address (or purport to address) *any* requirements, such as GPAs, test scores or other regularly-encountered admission pre-requisites[8]. It did not explain what courses may be required for admission into any of the given Master's programs. Thus, no reasonable juror could conclude that the website, when initially seen by Plaintiff-Appellant, gave rise to a contractual relationship between FDU and Plaintiff-Appellant – or even an offer to enter into one.

Indeed, Plaintiff-Appellant admitted that FDU's website contained only the barest of information regarding the dual degree program. Specifically, El-Helw testified that the website did not address academic dishonesty (Plaintiff Dep. T146:18 – T148:4 at Pa.176); nor did it explain how many credits were needed to graduate with dual degrees (Plaintiff Dep. T148:5 – T149:4; Id.); nor did the website relate how many credits were required for each degree. (Plaintiff Dep. T149:13-18; Id.) The website did not explain what happened if a student failed a course. (Plaintiff Dep. T150:4 – T151:16; Id.). Nor did it explain what courses or credits were required to graduate. (Plaintiff Dep. T152:14-16; Id.). It did not address discipline, course failures, the Pharmacy Code of Conduct, the

8 El-Helw testified that the website did not make clear whether his minor in chemistry made him eligible for the Master's in Chemistry option. (Plaintiff Dep., T106:8-107:3 at Pa. 166). Clearly, even El-Helw recognized that back in 2011 not all conditions of the dual degree program were included in the website.

course calendar, or Dean's List eligibility (Plaintiff Dep. T152-19–T154:21; Id.). Plaintiff admits that "language can't always be exact . . . ." (Plaintiff Dep. T325:20-2 at Pa.259).

In essence, Plaintiff-Appellant apparently wants the Court to believe that there were simply ***no academic requirements*** associated with the dual degree program once FDU advertised the program without listing requirements on its website. Under Plaintiff's theory, he could have failed out of pharmacy in his first year and FDU would *still* be compelled to admit him into a Master's degree program. That is not consistent with the law of the State of New Jersey. The advertisement did not contain the essential terms of an enforceable contract. Therefore, no contract existed between the parties.

ii. The Relationship Between a Student and a University Should Not Be Viewed in Purely Contractual Terms, and New Jersey Courts Defer to a University's Judgment With Respect to Academic Standards.

In determining that no contract existed between El-Helw and FDU, the Trial Court also correctly rejected Plaintiff-Appellant's myopic view of FDU's ability to promulgate and enforce basic academic standards. The jurisprudence of this State affords institutions of higher education great discretion in how they admit, educate and graduate students. As such, higher education institutions are not constricted to the same degree as commercial entities as to what should constitute a binding contractual agreement. Our courts have found that the

relationship between a student and his college (or university) **is not to be analyzed in strict contractual terms.** Mittra v. University of Medicine & Dentistry of New Jersey, 316 N.J. Super. 83 (App. Div. 1998). Under New Jersey law, courts must give substantial deference to the principles of institutional integrity and independence, especially where the institution is a private institution, such as FDU. State v. Schmid, 84 N.J. 535 (1980); Napolitano v. Princeton Univ. Trustees, 186 N.J. Super. 548, 567 (App. Div. 1982); Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413 (D.N.J. 1985). This deferential standard permits an educational institution to "exercise properly educational responsibility." Napolitano, 186 N.J. Super. at 566. As such, "to resolve a university-student conflict resulting from an administrative decision to terminate an academic or professional program," New Jersey courts apply the following inquiry: "**did the university act in good faith and, if so, did it deal fairly with its students?**" Beukas v. Bd. of Trustees of Fairleigh Dickinson Univ., 255 N.J. Super. 552, 566 (Law. Div. 1991), aff'd, 255 N.J. Super. 420 (App. Div. 1992). The Beukas court continued: "in the absence of a showing of bad faith, arbitrariness or lack of prompt notice by defendants of their intention to close the dental college there is no purpose in forcing a contract analysis upon the relationship only to have the court reject whatever classic contract principle

the court, in its discretion, thinks should not apply." Beukas, 255 N.J. Super. at 564.

As the New Jersey Supreme Court further explained in Schmid:

> Private educational institutions perform an essential social function and have a fundamental responsibility to assure the academic and general well-being of their communities of students, teachers and related personnel. At a minimum, these needs, implicating academic freedom and development, justify an educational institution in controlling those who seek to enter its domain. The singular need to achieve essential educational goals and regulate activities that impact upon these efforts has been acknowledged even with respect to public educational institutions. Hence, private colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment. [emphasis added]

84 N.J. at 566-67 (internal citations omitted). "Courts have also recognized the necessity for independence of a university in dealing with the academic failures, transgressions or problems of a student." Napolitano, 186 N.J. Super. At 567, 571.

There are many cases of New Jersey courts applying this deferential standard in relation to conflicts between students and their universities. For example, in Mittra v. University of Medicine and Dentistry of New Jersey, 316 N.J. Super. 83 (App. Div. 1998), the plaintiff student brought a breach of contract and tort claims action against a public University (where protections

afforded public higher educational institutions in contractual settings are less fulsome than those afforded private institutions) after he was dismissed for poor academic performance. The Appellate Division affirmed the trial court's dismissal of the student's breach of contract claim against the University, acknowledging that the rigid application of contractual principles does not apply to university-student conflicts. Id. at 90. The court held that academic decisions concerning student issues bear little resemblance to the type of inquiry traditionally performed by the courts. Id.; see also Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 226 (1985) ("If a federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies, far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making"); Board of Curators of Univ. of Mo. V. Horowitz, 435 U.S. 78, 90 (1978). The Appellate Division, in Mittra, 316 N.J. Super. at 91, further recognized that "[e]valuation of student academic performance is a murk[y] subject … A graduate or professional school is surely the best judge of its student's academic performance and his ability to master the required curriculum." Id. (quoting Horowitz, 435 U.S. at 85).

This judicial deference extends to a college or university's admissions, modification of course and degree offerings, course selections and student grading as well as evaluations of student performance. See e.g., State v. Schmid, 84 N.J. 535, 543 (1980); Napolitano v. Trustees of Princeton University, 186 N.J. Super. 548, 567 (App. Div. 1980); Swidryk v. St. Michaels Med. Ctr., 201 N.J. Super. 601, 606 (Law Div. 1985) (finding that "[a]s a general rule courts will not interfere with purely academic decisions of a university"); Dougherty v. Drew Univ., 534 F. Supp. 3d 363, 375–76 (D.N.J. 2021) (dismissing a breach of contract claim by a student against a University where the University decided to cancel its in-person class offerings during the COVID-19 pandemic in favor of virtual classes); Gourdine v. Felician Coll., 2006 WL 2346278, at *4 (N.J. Super. Ct. App. Div. Aug. 15, 2006) (dismissing breach of contract, implied contract and negligent misrepresentation claims against a university where the university **entirely eliminated a nursing program into which students had already enrolled**); Gaviria v. Lincoln Educ. Servs. Corp., 547 F. Supp. 3d 450, 453 (D.N.J. 2021) (dismissing a breach of contract claim by a student against a University); Mitelberg v. Stevens Inst. of Tech., 2021 WL 2103265, at *3 (D.N.J. May 25, 2021) (dismissing a student's causes of action for breach of contract and unjust enrichment against a University).

Following its decision in Mittra, the Appellate Division, in Romeo v. Seton Hall Univ., 378 N.J. Super. 384, 395 (App. Div. 2005), further held that "[a] contractual relationship cannot be based on isolated provisions in a student manual." Thus, it follows that Plaintiff-Appellant cannot claim a contractual relationship with FDU based on one isolated iteration of one page of FDU's website – divorced from all of the other written materials that simultaneously (1) gave Plaintiff-Appellant advance notice of the 3.0 GPA requirement, and (2) explicitly reserved FDU's right to create and/or modify its academic curricula at any time. The Romeo Court went on to say: "[j]ust as in Mittra, where the evaluation of a student's academic performance is left to the judgment of the university, a private religious university's values and mission must be left to the discretion of the university."

In Gourdine, the defendant university faced a lawsuit following its decision to entirely eliminate its existing nursing program. In dismissing the plaintiffs' breach of contract claim against the university, the Court reiterated the well-established principle that the relationship between university and student is not analyzed in strict contractual terms, and further noted: "[t]o the extent that plaintiffs seek to enforce a contractual right against defendant, **that contract includes the college catalog's reservation of rights to alter or to eliminate the program in which they were enrolled**." Gourdine v. Felician

Coll., A-5248-04T3, 2006 WL 2346278, at *4 (N.J. Super. Ct. App. Div. Aug. 15, 2006) (emphasis added).

In Dougherty v. Drew Univ., 534 F. Supp. 3d 363 (D.N.J. 2021), an undergraduate student and her parent brought a putative class action against Drew University (originally in New Jersey state court), asserting contract and tort claims arising from the university's transition to virtual instruction and suspension of campus operations in response to the COVID-19 pandemic. Following removal from state court, the university moved to dismiss. The District of New Jersey, applying the Beukas standard described above, determined that the university acted in "good faith" and dealt fairly with its students by transitioning to virtual classes in response to COVID-19 pandemic. Thus, the university did not breach any purported contract. Dougherty, 534 F. Supp. 3d at 374.

In the instant case, Plaintiff-Appellant seeks to have the Court recognize an "implied" contract between himself and FDU. Plaintiff-Appellant further seeks to have this Court determine that FDU *breached* that purported implied contract. New Jersey's Model Jury Charges provide the following explanation of a "implied" contract:

> An implied contract is one in which the parties show their agreement by conduct. For example, if someone provides services to another under circumstances that do not support the idea that they were donated or free,

> the law implies an obligation to pay the reasonable value of services.
>
> Thus, an implied contract is an agreement inferred from the parties' conduct or from the circumstances surrounding their relationship. In other words, a defendant may be obligated to pay for services rendered for defendant by plaintiff if the circumstances are such that plaintiff reasonably expected defendant to compensate plaintiff and if a reasonable person in defendant's position would know that plaintiff was performing the services expecting that defendant would pay for them.

Model Jury Charges (Civil), 4:10 E, "Bilateral Contracts Express or Implied" (approved 5/98). See also, Wanaque Borough Sewerage Auth. v. West Milford, 281 N.J. Super. 22, 30 (App. Div. 1995).

Because precedential New Jersey case law establishes that the relationship between student and university should not be viewed in strictly contractual terms, a Court should be very cautious in imposing an "implied" contract between a student and a university. Under the present facts, it is plainly the case that no contractual relationship exists between Plaintiff-Appellant and FDU. Contrary to Plaintiff-Appellant's myopic view, the decision on whether to admit a student is an *academic* one that is within the expertise – and the discretion – of the institution.

Mittra and its progeny stand for the proposition that an academic institution in exercising its discretion should nonetheless treat its students fairly

and that it not act arbitrarily or capriciously. Here the decision to require a strong academic performance at the conclusion of the first year of pharmacy courses (FDU selected 3.0 GPA as the indicia of strong academic attainment), in order to be able to take advantage of the opportunity for participation in the dual degree program, was necessary to gain ACPE acceptance of the program, and was pedagogically sound. Therefore, there were academic reasons, not an arbitrary or capricious determination. Moreover, the 3.0 GPA requirements was fair to students as it protected underperforming students from failure and jeopardization of their academic careers. Therefore, even if the Court *were* to recognize some quasi- or implied contractual relationship between the parties, under the standards set forth in Beukas and Dougherty, FDU has thoroughly demonstrated that the supplementation of its website to include the 3.0 GPA requirement was neither "***arbitrary***" nor "***capricious***." Rather, it was to comply with the ACPE's requests. The Trial Court's dismissal of Plaintiff-Appellant's contractual claim against FDU should be affirmed.

B. Even if There Were a Contract Between FDU and El-Helw, FDU Would Not Be in Breach Because the University Website Explicitly States that FDU Reserves its Rights to Make Changes to Courses, Requirements, and Programs at Any Time.

In Beukas v. Bd. Of Trustees of Fairleigh Dickinson Univ., FDU (also the defendant here) sought to terminate its entire dental program. 255 N.J. Super. 552, 554-57 (Law. Div. 1991), aff'd, 255 N.J. Super. 420 (App. Div. 1992). The

students already enrolled in the dental program brought suit against FDU. Of critical importance in the Beukas case was the existence of FDU's "Graduate Studies Bulletin," which provided, in relevant part:

> The University reserves the right in its sole judgment to make changes of any nature in the University's academic program, courses, schedule, or calendar whenever in its sole judgment it is deemed desirable to do so. The University also reserves the right to shift colleges, schools, institutes, programs, departments, or courses from one to another of its campuses. *The foregoing changes may include, without limitation, the elimination of colleges, schools,* institutes, programs, departments, or courses, the modification of the content of any of the foregoing, the rescheduling of classes, with or without extending the announced academic term, the cancellation of scheduled classes, or other academic activities. If such changes are deemed desirable, the University may require or afford alternatives for scheduled classes or other academic notification of any such change as is reasonably practical under the circumstances....

Id. (emphasis in original).

In reaching its conclusion dismissing the plaintiff's claims against FDU, the Beukas Court relied on Trustees of Columbia Univ. v. Jacobsen, 53 N.J. Super. 574 (App. Div. 1959), where "the court refused to recognize a cause of action for fraud in favor of a student and against Columbia University based on the alleged failure of the University to meet the quality of academic courses as was represented in the college catalog. In that regard, the court stated: "they [the courses in the catalog] add up to nothing more than a fairly complete exposition

of Columbia's objectives, desires and hopes..." Beukas, 255 N.J. Super. at 563 (citing Jacobsen, 54 N.J. Super at 579). The Beukas Court analogized that:

> The same argument could be made in construing the contents of defendants' bulletins with regard to the award of a D.M.D. degree following the successful completion by plaintiffs of the four-year required course of study: that is, by offering a four-year course of study culminating in the degree, defendants were merely expressing their 'objectives, desires and hopes' and were not making an enforceable promise to plaintiffs to provide the degree no matter what the financial condition of the university.

Beukas, 255 N.J. Super. At 563. The Beukas court further explained that, were it to apply contractual principles, the result (dismissal of the complaint) would be the same. "But even if I were to apply a contract analysis to this case based on the terms of the university bulletins, there is no doubt that defendants reserved the right in their bulletins to eliminate any college within the university subject only to giving adequate notification to its students." Id. at 564.

In the case at bar, as in Beukas, the University explicitly reserved its right to make changes to its program even before its first website advertisement for the dual degree program in February 2011. It did so in its bulletins and on its website. FDU had the right to add a requirement anytime it determined it should do so (here, it did so to meet the requirement of accreditation imposed by the ACPE).

In all versions of FDU's website, there was language explicitly setting forth the right of the University to make changes, in its sole judgment, about requirements, courses, programs, etc. Per the reservation-of-rights language, such changes could be made at any time. As noted above, even the February 15, 2011 version of the FDU website contained a provision stating:

> The University reserves the right in its sole judgment to make changes of any nature in the University's academic programs, courses, schedule or calendar whenever in its sole judgment it deemed desirable to do so. The University also reserves the right to shift colleges, schools, institutes, programs, departments or courses from one to another of its campuses. The foregoing changes may include, without limitation, the elimination of colleges, schools, institutes, programs, departments or courses; the modification of the content of any of the foregoing, the rescheduling of classes with or without extending the announced academic term; and the cancellation of scheduled classes or other academic activities.

(FDU's document production, Bates stamp D02394 at Pa. 67.)

Consequently, even if the February 15, 2011 version of the website *did* give rise to a contract between FDU and El-Helw (it did not), then the above provision would be one of the terms of that "contract," and the University would have the right to develop and revise the requirements for the dual degree, on the same basis as the Court in Beukas endorsed. El-Helw cannot self-servingly "pick and choose" which contents of the website to discard and which to include as part of the alleged "contract." See Hardy ex rel. Dowdell v. Abdul-Matin,

198 N.J. 95, 103 (2009) (providing that a court must interpret a written agreement "as a whole"); C.L. v. Div. of Med. Assistance & Health Servs., 473 N.J. Super. 591, 599 (App. Div. 2022) ("Importantly, a contract should not be interpreted to render one of its terms meaningless").

Moreover, Plaintiff-Appellant also affirmatively agreed to the University's right to change programs and requirements on a separate occasion. The following language was included in the written form that Plaintiff-Appellant signed upon accepting admission into the pharmacy school on March 1, 2012:

> Students who accept enrollment at the University agree to abide by all the rules or regulations now or hereinafter promulgated by the University. Any student failing to comply with such rule and regulation may be dismissed by the University.

(Plaintiff Dep. T64:12-24 at Pa. 155; FDU's document production, Bates stamps D02393-20394, D02485 at Pa. 66-67, 82.)

In addition, the University's policies and procedures include its right, "in its sole judgment, to change academic programs." It also "reserves its right to shift colleges, schools, institutes, programs, departments or courses," including, "without limitation, the elimination of colleges, schools . . . departments or courses." (FDU's document production, Bates stamps D2393-94 at Pa. 66-67.)

FDU, as it had at the time of the Beukas case referred to above, continues to maintain a graduate student bulletin, which provides:

> **The University reserves the right to change, without prior notice, the contents of its Bulletins and to modify its academic calendar and programs of instruction; academic and disciplinary requirements**, policies and procedures, rules and regulations; its tuition, fees and charges, and the terms of financial aid. Changes shall be effective upon publication or when the University otherwise determines, **and any such change may apply to prospective students and to those already enrolled**.

(FDU's document production, Bates stamp D2132 at Pa. 65) (emphasis added).

Thus, if a contract did exist between FDU and El-Helw (which it did not), FDU clearly reserved for itself the ability to change any program, and this ability applied with equal force to both current and prospective students. If the law under Beukas permits a University to eliminate an entire degree program, then surely narrowing the eligibility for participation in a program by current students is cognizable under the law. Plaintiff-Appellant, like all students enrolled into FDU's pharmacy program, received exactly what the advertisement stated he would receive: the opportunity to earn a Master's degree while earning his pharmacy doctorate. Plaintiff-Appellant did not capitalize on that opportunity as a result of his own inadequate academic performance.

Because FDU would not be in breach of any "contract" with El-Helw, even *if* one did exist, Plaintiff-Appellant's contractual claim was properly dismissed, on the merits, by the Trial Court. This Court should affirm the Trial Court's decision.

C. The Record Clearly Demonstrates that FDU Made No Misrepresentation to El-Helw, and Therefore El-Helw's Claims of Misrepresentation and Fraudulent Inducement Fail as a Matter of Law.

It is well-settled in New Jersey that both fraud and misrepresentation claims require proof of both (1) a misrepresentation or omission, and (2) reliance by the plaintiff on that misrepresentation. The elements of fraudulent inducement are the same as those for common-law fraud, and require "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Microbilt Corp. v. L2C, Inc., No. A-3141-09T3, 2011 WL 3667645, at *3 (N.J. Super. Ct. App. Div. Aug. 23, 2011) (emphasis added) (quoting Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610 (1997)).

"Misrepresentation and reliance are the hallmarks of any fraud claim, and a fraud cause of action fails without them." Banco Popular N. Am. V. Gandi, 184 N.J. 161, 174 (2005); see also Barrows v. Chase Manhattan Mortgage Corp., 465 F. Supp. 2d 347,366-67 (D.N.J. 2006) (quoting Banco Popular, 184 N.J. at 175) (applying New Jersey law and stating "fraud" is "a term of art with a clear definition" and "an amorphous [ ] fraud claim that requires plaintiffs to prove neither reliance nor misrepresentation does not exist in New Jersey").

With regard to affirmative misrepresentations, the alleged misrepresentation must be an actual false representation of fact. See Gennari v. Weichert Co. Realtors, 148 N.J. 582, 607 (1997) (holding that a material misrepresentation must actually be false); Trustees of Columbia University v. Jacobsen, 53 N.J. Super. 574, 577 (App. Div. 1959) (refusing to recognize fraud action predicated upon alleged failure of university to provide courses as represented in college catalog). Further, New Jersey courts have long recognized the clear distinction between true misrepresentations of fact and mere "puffery" set forth in an advertisement. See Rodio v. Smith, 123 NJ 345, 352 (1991) ("You're in good hands with Allstate is nothing more than puffery"); New Jersey Citizen Action v. Schering-Plough Corp., 367 NJ. Super. 8, 13 (App Div.), certif. denied, 178 N.J. 249 (2003) (pharmaceutical companies' advertisement claiming that consumers can lead "a normal nearly symptom-free life again" after using the product was not a guarantee of effectiveness of the product and was in the nature of "puffery").

For example, in Jacobsen, supra, 53 N.J. Super. 574 the counterclaimant sought to defend the enforcement of two (2) promissory notes by the university on the grounds that the university engaged in common law fraud by making material misrepresentations of fact in various university advertisements, which included brochures and catalogs. Id. at 576-77. In particular, the university's

brochures and catalogs contained the university's general objectives, hopes, and desires together with "factual statements as to the nature of some of the courses included in its curricula." Id. at 579. The Trial Court dismissed the claim of fraud against the university. The Appellate Division affirmed the dismissal, holding that the university's advertisements were "nothing more than a fairly complete exposition of Columbia's [the Defendant in that matter] objectives, desires and hopes," and that, "[o]nly by reading into them the imagined meanings" can one conclude that the advertisements constituted material misrepresentations of fact. Id. The Appellate Division also held that "defendant is seeking to…assign to the quoted excerpts a construction and interpretation peculiarly subjective to him and completely unwarranted by the plain sense and meaning of the language used." Id. at 579.

As noted above, the Beukas Court relied on Jacobsen. The Beukas Court noted that the defendant was "merely expressing [its] . . . 'objectives, desires and hopes' and were not making an enforceable promise to plaintiffs to provide the degree no matter what". Beukas, 255 N.J. Super. at 563.

In this matter, as in both Beukas and Jacobsen, Plaintiff-Appellant fails to set forth ***any*** misrepresentation to support the cause of action. Instead, Plaintiff-Appellant simply alleges that "Defendant School of Pharmacy represented to the public that incoming students have an opportunity to pursue a Doctor of

Pharmacy degree dueled with a choice of various Master's track's" and "Defendant School of Pharmacy omitted any mention of the minimum secondary requirements with the intent to lure incoming students to the unaccredited School of Pharmacy." Although the cause of action is pled as a "misrepresentation," it actually complains about an omission, not an affirmative representation. Specifically, Plaintiff-Appellant claims he relied on what was essentially an advertisement on the University's website (as it existed on February 15, 2011).

Indeed, Plaintiff-Appellant's entire Complaint is based on the – entirely reasonable – omission of the admission requirements for the dual degree from that advertisement. Contrary to Plaintiff-Appellant's arguments, this simply does not constitute a misrepresentation. Like any rigorous graduate program into which one is enrolled, there are basic admission standards to be met, including (among many other things) maintaining a certain grade point average. Surely it is not misrepresentation or fraudulent inducement to not list, in every advertisement, all of the academic requirements for admission and graduation in any particular graduate program. It is much more reasonable to conclude that, in presenting the advertisement for the dual Master's Program, the University was merely expressing its "objectives, desires and hopes," and was not making

any enforceable promise to El-Helw or any prospective student. See Jacobsen, 53 N.J. Super. 574.

Moreover, the law has been well-settled for over a century that a "fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." PH Chaleyer, Inc v. Simon, 91 F. Supp. 5, 7 (D.N.J. 1950) (citing Norfolk & Nosiery Co. v. Arnold, 49 N.J. Eq. 390, 390 (Ch. 1892)). Here, Plaintiff-Appellant claims that "Defendant School of Pharmacy offered incoming students of its first graduating class automatic eligibility into its Master's Programs in conjunction with its Doctor of Pharmacy Degree." (Complaint, ¶ 31 at Pa. 7.) This is the quintessential set of facts upon which a fraud claim simply ***cannot*** be based. Even assuming Plaintiff-Appellant's allegations of misrepresentations to be true (which the University does not concede), an alleged failure to perform a future event such as automatic enrollment in a dual graduate program does not permit Plaintiff-Appellant to assert a cognizable fraud claim against FDU.

Furthermore, as Dean Avaltroni testified, the University informed students through almost every mode of communication that the dual degree program required a 3.0 GPA. Specifically, he testified that a student would know of the 3.0 GPA requirement through the website, student manuals and documents, presentations and open houses, a Beyond the Curriculum course

(which all pharmacy students, including Plaintiff, were required to take), orientation, and in a document circulated to all students highlighting the curriculum for the eight Master's programs. Plaintiff is the only student who failed to comprehend through the multiple oral and written communications to him that he needed to maintain a 3.0 GPA to participate in the dual degree program. Consequently, even if an omission could constitute a fraud (which it cannot), here, the correction before Plaintiff started classes negates any actionable claim.

Accordingly, Plaintiff's claims for fraud and misrepresentation were properly dismissed, on their merits, by the Trial Court. This Court should affirm the Trial Court's decision.

CONCLUSION

For the reasons stated herein, FDU's motion for summary judgment was properly granted. The Trial Court's dismissal of El-Helw's claims, on their merits, should be affirmed.

Moreover, FDU's motion for summary judgment should further have been granted on the basis that El-Helw's claims against FDU were barred by the six-year statute of limitations.

NORRIS McLAUGHLIN, P.A.
Attorneys for Defendant, Fairleigh Dickinson University (mispled as Fairleigh Dickinson University and Fairleigh Dickinson University School of Pharmacy)

By: */s/ Edward G. Sponzilli*
EDWARD G. SPONZILLI

Dated: September 19, 2024

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OSAMA EL-HELW,	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Appellant,	:	DOCKET NO: A-002550-23T1
v.	:	ON APPEAL FROM SUPERIOR COURT
	:	OF NEW JERSEY-LAW DIVISION:
FAIRLEIGH DICKINSON	:	ESSEX COUNTY
UNIVERSITY,FAIRLEIGH	:	DOCKET NO. ESX-L-2118-19
DICKINSON UNIVERSITY	:	
SCHOOL OF PHARMACY,	:	SAT BELOW:
JOHN DOES 1-10 AND ABC	:	HON. ANNETTE SCOCA, J.S.C.
CORPS. 1-10 (fictitious	:	
Names representing any	:	
unknown	:	
defendants),	:	
	:	
Defendants-Respondents.	:	

REPLY BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Alan Genitempo, Esq.
Of Counsel

Michael A. Koribanick, Esq.
On the Brief

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PRELIMINARY STATEMENT

> "The student could be considered for admission into the MBA program once they are no longer under academic probation within their primary (Pharm D) program." (Pa463-Pa464)
>
> "[Plaintiff] scheduled a meeting with me on Monday. I will inform him that he should get himself off the academic probation list, before he will be authorized to take MBA courses." (Pa462)

Dr. James Almieda ("Dr. Almeida"), Interim Dean of the College of Business, on August 1, 2013, days prior to Plaintiff commencing his second year of classes. Yet, once Plaintiff was off academic probation and attained a GPA above 3.0, he was denied entry into the master's track. Ultimately, Plaintiff graduated with a 3.2 GPA.

Throughout Fairleigh Dickinson University's ("FDU" or "Defendant") Amended Brief in Opposition and Cross-Appeal, Defendant failed to address the clear misrepresentations and omissions of fact alleged by Appellant/Cross-Respondent, Osama El-Helw ("Appellant" or "Plaintiff"). Notably, Defendant failed to address the numerous misrepresentations by FDU staff that Plaintiff was able to select and/or opt-in to the dual degree program at a time *after* the end of Plaintiff's first year. Defendant also failed to address the August 1, 2024 internal emails between Dr. Almeida, Dr. Michael Avaltroni, FDU School of Pharmacy Dean, and Dr. Chris Capuano ("Dr. Capuano"), University Provost and Senior Vice President for Academic Affairs, which demonstrate a student was able to matriculate into the

master's pathway at times other than after the end of their first year, and that Plaintiff was authorized to take master's track courses once he got off academic probation.

More importantly, Defendant failed to demonstrate that Plaintiff was provided with any program or course related material indicating that he was *only* able to select or opt-out of the master's pathway at the end of his first academic year, and could not select the pathway when his GPA rose above a 3.0, whenever that occurred. Plaintiff was not afforded the "opportunity" to pursue degrees in both the Pharmacy and master's program (the "dual degree program", a unique program which initially led him to enroll at the school, and therefore, the Defendant failed to provide what it promised in line with what was advertised and set forth in FDU's course materials provided to the inaugural class. Before and after Plaintiff's enrollment at FDU, Defendant misrepresented the requirements of the dual degree program, including its GPA requirements and the selection/opt-out period for the dual degree program.

Subsequently, Defendant fraudulently induced Plaintiff to remain at FDU, based upon the *multiple* misrepresentations that he would be able to opt-in the dual degree program at any time after his first year in the Pharm.D program. It was not until August 29, 2016 that Plaintiff learned he was not able to opt-in to the dual degree program, when Dr. Avaltroni advised Plaintiff that he was allegedly required to have achieved a 3.00 GPA *at the end of his first academic year* of Pharmacy courses to have opted in to the dual degree program and could not opt-in at any time

thereafter. This was contrary to the representations from FDU staff that Plaintiff was able to opt-in to the program upon achieving a 3.0 GPA, **whenever that occurred**. Thus, this was a severe deviation from Defendant's own rules and regulations.

Defendant relies on the Accreditation Counsel for Pharmacy Education's ("ACPE") condition that the 3.0 GPA requirement be added to permit the dual degree offering by FDU, yet fails to explain why the guideline requirements, set forth in an *internal* proposed Concurrent Degree Enrollment Program Guidelines and Overview packet, were not provided to its inaugural class There is no evidence that this admission requirement was set forth in any course materials provided to students. This was a *significant* omission of material fact by FDU. Nor does Defendant explain why the GPA requirement, which was added to the FDU website after Plaintiff commenced classes, was not immediately made known to the inaugural class. It was not until Plaintiff utilized the "Wayback" machine years later that he first saw the FDU website was changed. Plaintiff did not see the change at the time it occurred.

Plaintiff was not afforded the opportunity to achieve a master's degree upon reaching the requisite GPA requirements, and therefore breached its contract with Plaintiff. Defendant misrepresented that Plaintiff was able to opt-in to the program after his first year upon achieving a 3.0 GPA, and thereby fraudulently induced Plaintiff into remaining at FDU.

STATEMENT OF FACTS

Appellant restates and incorporates the comprehensive Statement of Facts as set forth in his original brief.

PROCEDURAL HISTORY

Appellant restates and incorporates the Procedural History as set forth in his original brief.

POINT I

THE TRIAL COURT APPROPRIATELY ACKNOWLEDGED THERE WAS FACTUAL ISSUE AS TO DEFENDANT'S STATUTE OF LIMITATIONS ARGUMENT AND PLAINTIFF-APPELLANT'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS (Pa44 – Pa47; 3T78-3T88)

The six-year Statute of Limitations applicable to Plaintiff's claims begins to run when the plaintiff either knew or should have known of the claim. Caravaggio v. D'Agostini, 166 N.J. 237, 245 (2001) (quoting Baird v. Am. Med. Optics, 155 N.J. 54, 72 (1998)). Defendant alleges that El-Helw, "should have known of the 3.0 GPA requirement no later than September 22, 2012, when he acknowledges the website was updated; and in addition, through the information provided to him by way of the Graduate Student Manual and in the Beyond the Curriculum course." (Db22). Yet, contradicts itself by asserting that Plaintiff "failed to even enroll in the first semester of the required "Beyond the Curriculum course – which covered the 3.0 GPA requirement. (Db12-Db13).

Moreover, the inaugural class received the FDU student manual approximately the 19th, 20th, or 21st of August 2012, after the inaugural students

began classes, which indicated that a 3.0 GPA was required to opt-into the master's track. (Pa356). However, Graduate Student Manual (the "Manual") did not explicitly provide that Plaintiff was **only** able to select or opt-out of the master's pathway at the end of the students' first professional year. No such limiting language exists.

The Defendant entirely disregards the material fact that Plaintiff constantly inquired with FDU as to whether he would be able to opt-in to the Pharm.D program at a time after his first professional year and was consistently advised he would be able to. For example, Plaintiff testified that during the Spring Semester of 2013, he spoke with Mr. Peter Buechner ("Mr. Buechner"), who advised him that he would be able to matriculate to the MBA program when his GPA was where it needed to be so that he would still finish the dual degree program by 2016. (Pa246; Pa458).

Defendant also disregards FDU School of Pharmacy Dean, Dr. Michael Avaltroni, Ph.D's, email which unmistakably demonstrates students were able to enter the dual degree program and take the additional coursework at a later date. (Pa465). Dr. Almeida stated, "**The student could be considered for admission into the MBA program once they are no longer under academic probation within their primary (Pharm D) program**." (Pa463-Pa464). This statement was made *after* Plaintiff's first year of enrollment ended.

Therefore, it was not until 2016 that Plaintiff learned that he could have only matriculated into the dual degree program after his first year of enrollment, which

makes Plaintiff's claims timely. At the very least, as the trial court stated, the date of the onset of Plaintiff's alleged injury is in dispute." (3T87:3-8).

Furthermore, Defendant misrepresents to the Court that Plaintiff, "also testified that he heard rumors of changes in requirements for the dual degree, all occurring more than six years prior to his filing this lawsuit." (Db23). That is categorically false. In or around April of 2013, Plaintiff heard a rumor that the students of the inaugural class of the dual degree program would not be going directly into the master's program as they initially believed. (Pa179; Pa243). That was *less* than six years after Plaintiff filed this matter on March 19, 2019, and within the six-year statute of limitations.

Accordingly, Plaintiff's claims are timely, and the claims in his Complaint are not barred by the statute of limitations.

POINT II

THE TRIAL COURT ERRED IN GRANTING FDU'S MOTION FOR SUMMARY JUDGMENT WHERE THERE WERE GENUINE ISSUES OF MATERIAL FACT AND PLAINTIFF ESTABLISHED A PRIMA FACIE CLAIM OF BREACH OF CONTRACT (3T78 – 3T88)

Again, there can be no dispute that Plaintiff established a prima facie breach of contract claim against Defendant FDU, and therefore such claim should have been presented to the jury. The uncontroverted facts demonstrate that Plaintiff was not provided the opportunity to enter and complete the master's degree in conjunction with the Doctor of Pharmacy, despite him reaching the requisite 3.0 Grade Point

Average ("GPA"). (Pa99). Prior to Plaintiff commencing his first academic year at FDU, Defendant's website read, "Students will be asked to select or opt-out of a Master's pathway at the end of their first professional year in the school." (Pa435). After Plaintiff commenced classes at FDU, the FDU School of Pharmacy website page included new requirements for the dual degree program, stating, "Students interested in a dual degree will be required to meet the admissions requirements for the selected second-degree pathway, in addition to maintaining a 3.0 grade point average within the Doctor of Pharmacy curriculum." (Pa454).

Noticeably, the website, nor any other materials provided to the Plaintiff, included any explicit language that students would not be able to opt-in to the program at a later date, or that a student must maintain a 3.00 GPA during their first professional year of study to opt-in to the program. There was no language limiting the selection or opt-out period to the end of the first professional year.

Defendant, within its Amended Brief, attempts to analogize Doe v. Emory Univ, 2021 WL 358391, (N.D. Ga. Jan. 22, 2021), a matter from the United States District Court, Northern District of Georgia, Atlanta Division, which it alleges supports the proposition that a promotional statement does not constitute offers to form an express contract. (Db29-Db30). However, Doe is distinguishable from the within matter. In Doe, the Plaintiffs pursued a breach of an express contract claim due to the college switching to virtual classes during the COVID-19 pandemic. Id.

at *1. The Doe court reasoned that the advertisement did not expressly promise in-person education, whereas here, Defendant expressly promised the ability to opt-in to the master's program, and later, upon reaching a 3.0 GPA. Id. at *5. Significantly, the Doe court did not dismiss the Plaintiff's breach of implied contract claim, but instead found,

> "that the Defendant's customary practice and the Plaintiffs' payment of tuition represent sufficient factual allegations of mutual assent to an implied contract. The Plaintiffs have also sufficiently alleged a breach of that contract and damages. (Am. Compl. ¶¶ 122–23.) The Plaintiffs' breach of implied contract claim can proceed at this stage."

Id. at *6. Accordingly, Doe supports *Plaintiff's* position, not Defendant's.

Further, Plaintiff has demonstrated that the trial court did not make any findings as to whether the Defendant "acted in good faith", that the Defendant did not act in good faith, nor did it deal fairly with its students. (Pb31-Pb32). The record is clear that Defendant substantially deviated from its own rules and regulations, in violation of the standard set forth in Dougherty v. Drew Univ., 534 F. Supp. 3d 363, 374 (D.N.J. 2021). Defendant's late implementation of the GPA requirement, without notice, and creation of two new policies for its inaugural class**, including the inability to select/opt-in to the dual degree program at any time after the first professional year,** which prevented Plaintiff from applying to and/or matriculating into the dual degree program, were severe deviations from its own rules and regulations. (Pa262- Pa263; Pa357; Pa454; Pa461-Pa467).

The string of cases cited by Defendant within its Opposition (Db35-Db37) miss the mark, as this is simply not a matter related to student grading, student evaluation, disciplinary actions, the elimination of a program, or the like, as **this is not a matter related to purely academic decisions**. Romeo v. Seton Hall Univ., 378 N.J. Super. 384, 395 (App. Div. 2005), is distinguishable from this matter for the same reasons as Mittra v. University of Medicine & Dentistry of New Jersey, 316 N.J. Super. 83 (App. Div. 1998). In Romeo, an openly gay student brought action for violations of the Law Against Discrimination (LAD) and breach of contract against private religious university, which denied student's application for provisional recognition of a gay and lesbian student organization. Romeo, 378 N.J. Super. at 387. The Romeo court held, "[a] contractual relationship cannot be based on isolated provisions in a student manual." Id. at 395. First and foremost, this matter is distinguishable because it does not relate to Plaintiff's academic performance, or a private religious university's values and mission. Id. at 395. Here, none of the materials supplied to Plaintiff *prior* to his application, acceptance, and enrolling into FDU contained any notice that Plaintiff was required to maintain a 3.0 GPA within the curriculum to opt-in to the dual degree program. Nor did any material provided to Plaintiff before his enrollment, or after, contain any term or condition that Plaintiff was only able to opt-in to the program at the end of his first professional year. These

were material changes to the dual degree program's requirements, and not ones Plaintiff agreed to or accepted when applying and enrolling into the program.

Nor is this matter analogous to the unpublished Appellate Division decision in Gourdine v. Felician Coll., A-5248-04T3, 2006 WL 2346278, (N.J. Super. Ct. App. Div. Aug. 15, 2006), wherein low enrollment caused the college to cancel a program entirely based upon "financial conditions in the institution, and the necessity of looking at all programs that were not fiscally viable or pedagogically sound." Gourdine, 2006 WL 2346278 at 2. The Gourdine court stated, to the extent the plaintiffs sought to enforce a contractual right against the defendants which included a "reservation of rights", "[t]he question of their rights to recover damages, then, as in Beukas, rests on defendants' reasons for the decision to alter or close the program and the manner in which it was accomplished." Id. at *4. There, the court reviewed opposing certifications to determine whether the proffered financial reasons for the closing of the program were valid, and determined the reasons provided were valid, and determined the facts were "one-sided." Id. Here, the court **made no such evaluation** of the reason related to the decision to alter the GPA requirement or the opt-in period. (3T7-3T88). Therefore, Gourdine is distinguishable.

Nor is this a matter involving a monetary dispute over the transition to virtual higher education during the COVID-19 pandemic, such as Mitelberg v. Stevens Inst.

of Tech., No. CV211043SDWMAH, 2021 WL 2103265, at *1 (D.N.J. May 25, 2021). Unambiguously, the Court failed to determine whether Defendant "acted in good faith" or whether it substantially deviated from its own rules and regulations. Dougherty, 534 F. Supp. 3d at 374.

Merely because Defendant reserved the ability to change a program does not allow for free reign to do so, nor does it provide that the rationale to do so is being appropriate or outside of judicial intervention. The Mittra Court explicitly recognized that Court's may intervene when universities like Defendant deviate from its own rules and regulations. Mittra, supra, 316 N.J. Super. at 92.

The Plaintiff was not furnished with the educational opportunity which led him to apply to FDU, pay a seating deposit, enroll at the school, and pay tuition, and therefore, the Defendant failed to provide what it promised. Accordingly, Defendant breached its contract with Plaintiff.

POINT III

DEFENDANT MADE MATERIAL MISREPRESENTATIONS TO PLAINTIFF AND FRAUDULENTLY INDUCED PLAINTIFF TO ENROLL AT FAIRLEIGH DICKINSON UNIVERSITY (3T78-3T88)

Plaintiff-Appellant established a prima facie cause of action for misrepresentation and fraudulent inducement against Defendant Fairleigh Dickenson University, and the trial court erred in granting Defendant's Motion for Summary Judgment where there were genuine issues of material fact.

Even though Plaintiff alleges a host of misrepresentations of material fact and/or omissions were made by Defendant, Defendant merely cherry picks and responds to two allegations. The two misrepresentations addressed by Defendant in the Opposition include the Defendant's misrepresentation that incoming students would have the opportunity to pursue the dual degree, and that Defendant omitted mention of the secondary requirements with the intent to lure incoming students to the unaccredited School of Pharmacy. (Db47-Db48). While the foregoing was addressed and explained in detail in Plaintiff's initial brief (Pb36-Pb40), Defendant neglects the remaining allegations of misrepresentations, such as the statements of Ms. Templin, Dr. Almeida (the Interim Dean of the College of Business) and Mr. Buechner, in particular. (Pa179; Pa243-Pa246; Pa458). Defendant persistently misrepresented that Plaintiff would be able to matriculate into the MBA program once his GPA reached 3.0, yet when it did, he was advised by Dr. Michael Avaltroni, the Dean of the FDU School of Pharmacy, that he "misinterpreted" the guidelines for admission to the MHS program, and he was not able to matriculate into the program. (Pa554).

Defendant further omitted to advise its inaugural students, in any of the omission requirements or course requirements once Plaintiff enrolled at FDU, that a student was only able to opt-in to the dual degree program after their first year. As

Defendant does not offer a rebuttal to this alleged misrepresentation, it should be deemed conceded.

Defendant asserts Plaintiff's allegations of fraud are related to "unfulfilled promises" and "future events," and therefore, a fraud claim cannot be based upon these allegations. (Db49). However, a false representation of an existing intention, i.e., a "false state of mind," with respect to a future event or action has been held to constitute actionable misrepresentation." Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1264 (D.N.J. 1982) (citing Samatula v. Piechota, 142 N.J.Eq. 320, 323, (Ch.1948). Regardless, Defendant's statements related to matriculation were related to a present fact, which was that Plaintiff could not matriculate in the program at a later date, despite Ms. Templin, Dr. Almeida, and Mr. Buechner's statements that he could. As a result of the FDU faculty's statements, Plaintiff was induced to remain committed to FDU, and did not seek transfer opportunities.

Furthermore, Defendant does not address the May 31, 2012 letter sent to the Accreditation Counsel for Pharmacy Education ("ACPE"), which included a proposed Concurrent Degree Enrollment Program Guidelines and Overview packet that comprised of language that stated, "A student must have a 3.00 cumulative GPA during their first year within the program to be considered for admission to this concurrent degree pathway." (Pa82). This pertinent language was not presented to Plaintiff, or any other student, and therefore, it was a material omission. Again,

Defendant offers no rebuttal to those allegations and therefore should be deemed conceded.

Defendant attempts to analogize Trustees of Columbia University v. Jacobsen, 53 N.J. Super. 574, (App. Div. 1959) to establish that Plaintiff has not set forth any misrepresentation claim. (Db46-Db47). However, the representations made in Jacobsen are substantially different than the misrepresentations made by FDU in the present matter. For example, in Jacobsen, Columbia University represented it could teach, "wisdom, truth, justice, beauty, spirituality" among other qualities. Jacobsen, 53 N.J. Super at 578. The Appellate Division in Jacobsen found that the pro-se Plaintiff's counterclaim failed to establish a false representation, because, "[o]nly by reading into them the imagined meanings he attributes to them can one conclude—and the conclusion would be a most tenuous, insubstantial one—that Columbia University represented it could teach wisdom, truth, justice, beauty, spirituality and all the other qualities set out in the 50 counts of the counterclaim." Here, Plaintiff was not reading "imagined meanings" of the dual degree program requirements. Rather, Plaintiff read the plain language of the text, which misrepresented and omitted material requirements for entry to the dual degree program.

Due to the existence of a material issue of fact with regard to Plaintiff's misrepresentation and fraudulent inducement claim, Defendant's motion for summary judgment should have been denied. For the reasons set forth above, it is

requested that this Court reverse the trial court, and permit Plaintiff to present his case to a jury.

CONCLUSION

Where Plaintiff has established a *prima facie* breach of contract, misrepresentation, and fraudulent inducement case against Defendant FDU, supported by the evidence and testimony of witnesses, the trial court improperly granted summary judgment to Defendant. The trial court improperly asserted itself as the factfinder in this matter, where the case should have been presented to the jury.

Moreover, Defendant's Cross-Appeal to dismiss Plaintiff's claims on Statute of Limitations grounds must be denied, as the trial court explicitly acknowledged that there was a factual issue as to the statute of limitations argument.

For the reasons set forth above, it is requested that this Court reverse the trial court, and permit Plaintiff to present his case to the jury.

Respectfully Submitted,

/s/Alan Genitempo, Esq.
Alan Genitempo, Esq.

Dated: November 11, 2024