STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

CRAIG ROBINSON and KELLY ROBINSON

Plaintiffs,

v. Case No. 22-CV-002488

UNIVERSITY SCHOOL OF MILWAUKEE,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS

University School of Milwaukee ("USM") submits this brief in support of its motion to dismiss the Robinsons' Complaint pursuant to Wis. Stat. § 802.06(2)(a)(6) for failure to state a claim upon which relief can be granted.

INTRODUCTION

The Robinsons filed this suit as part of a media campaign intended to tarnish USM's reputation as one of the nation's premier independent, college-preparatory schools. Every cause of action the Robinsons assert is flawed as a matter of law for the reasons explained below. But that does not trouble the Robinsons because they hope to win not in the court of law, but in the court of public opinion—where legal rules, facts, and evidence matter little. That is why the Robinsons appeared first on ABC's Good Morning America to give an interview disparaging USM, and only later got around to filing their Complaint with this Honorable Court.

The Robinsons are determined to secure a large audience to whom they can tell their "story," hoping that less discerning people will simply believe it. Because USM files this brief in support of a motion to dismiss, the Court must do just that—it must believe and accept as true the factual allegations in the Robinsons' Complaint. It is true the Robinson children did attend USM

for years without incident. And USM did exercise its contractual right to deny the Robinson children reenrollment for the 2021-2022 school year because USM officials determined that doing so was in the best interest of the school. Those true factual allegations doom the Robinsons' Complaint.

Other true facts are strategically omitted from the Robinson's Complaint. The Robinsons fail to mention that Mrs. Robinson began regularly attending her older son's virtual classes during the pandemic to observe and critique his teachers. The Robinsons omit that she thereafter sent an incessant series of lengthy, misguided, and often disrespectful emails and text messages asserting unfounded complaints about his teachers, all of whom were working hard to meet the unprecedented challenges of dual-modality, synchronous learning. The Robinsons fail to note that USM faculty and administrators spent hours each week working with them to address their concerns and that USM committed significant resources to help the Robinsons regain a healthy relationship with the school. The Robinsons omit that USM repeatedly advised them that their communications with the school increasingly demonstrated a lack of respect, trust, and kindness, and therefore violated the school's Common Trust and Parent School Partnership—core aspects of the school's educational philosophy. And the Robinsons fail to mention that rather than accept any responsibility for their actions, they responded by threatening to engage in the campaign that has since followed, asserting baseless claims of "racial and socioeconomic insensitivities" to garner national attention and shift to USM the blame for their eventual separation from its community.

The omission of those facts does not save the Robinson's Complaint. Indeed, the Court can ignore them all and grant this motion because the Robinsons' Complaint fails to state a claim upon which relief may be granted. The contract on which the Robinsons purport to base their breach cause of action unambiguously gives USM the right to decline to reenroll the Robinson children if

USM officials determine for "any reason that enrollment is not in the best interests of the school." USM officials undisputedly made that determination. As a result, USM cannot have breached the contract or the implied covenant of good faith and fair dealing by exercising its express right not to reenroll the Robinson children. And because the Robinsons admit having entered an enforceable contract with USM, they cannot maintain their promissory estoppel cause of action. That claim is barred where, as here, there is a valid contract covering the parties' business relationship.

The Robinsons' non-contractual claims fare no better. Their claim for violation of Wis. Stat. § 100.18 accrued in 2016 and has been time-barred for several years under the applicable three-year statute of repose. There is no private right of action for violation of Wis. Stat. § 100.20. And "arbitrary and capricious termination" is not a valid cause of action in Wisconsin, particularly not as to an independent school such as USM, which simply exercised an express right for which it bargained.

The media campaign the Robinsons commenced last month soon will run its course. So too should this lawsuit. The Court should dismiss the Complaint in its entirety, and with prejudice.

STANDARD FOR MOTION TO DISMISS

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the Complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19. The court accepts as true all well-pleaded facts and reasonable inferences to be drawn from them. *Id.* But "legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id*.

ARGUMENT

I. COUNT ONE MUST BE DISMISSED BECAUSE PLAINTIFFS FAIL TO IDENTIFY ANY ACTIONABLE BREACH OF CONTRACT.

As their first cause of action, the Robinsons claim USM breached the 2021-2022 enrollment contract (the "Enrollment Contract") by "terminating" the enrollment of the Robinsons children in June 2021, several months before the 2021-2022 school year began. [Dkt. #2, ¶ 3, 51; see also Dkt. #2, Ex. A]. This claim fails as a matter of law because the Enrollment Contract unambiguously allows USM to do precisely what USM did—to "deny enrollment or reenrollment or dismiss a student if University School officials determine for any reason that enrollment is not in the best interests of the school." [Dkt. #2; Ex. D, p. 3].

The Court may consider the Enrollment Contract in deciding this motion to dismiss because the Robinsons attach a copy of it to their Complaint. *See Peterson v. Volkswagen of Am., Inc.*, 2005 WI 61, ¶ 15 (holding that an attachment to the complaint is "considered a part of the pleading"). And the construction of the Enrollment Contract is a matter of law for the Court, not a question of fact for the jury. *See Levy v. Levy*, 130 Wis. 2d 523, 528, 388 N.W.2d 170, 172 (1986).

The Court must construe the Enrollment Contract as it is written. *See id.* The terms must be given their plain or ordinary meaning. *Goldstein v. Lindner,* 2002 WI App 122, ¶ 12. The Court may not "insert what has been omitted or rewrite a contract made by the parties." *Levy*, 130 Wis. 2d at 528. Nor may the Court construe the Enrollment Contract in a way that renders meaningless any of the words the parties used to express their intention and bargain. *See Dykstra v. Arthur G. McKee & Co.*, 100 Wis. 2d 120, 127, 301 N.W.2d 201, 205 (1981).

The Robinsons admit that the Enrollment Contract is a valid and enforceable contract, supported by ample consideration. [Dkt. #2, ¶ 49]. As to its terms, the Enrollment Contract expressly states, in relevant part:

> You agree that we have the right to discipline a student at any time during the school year for violating University School rules, regulations, policies or procedures, and to deny enrollment or reenrollment or dismiss a student if University School officials determine for any reason that enrollment is not in the best interests of the school . . . .

[Dkt. # 2; Ex. D, p. 3]. This provision is unambiguous. The Robinsons agreed that USM retained the right to deny reenrollment of their children if USM officials, in their sole discretion, determined "for any reason" that reenrollment was not in the best interest of the school. Because the Robinsons agreed to this language, they are bound by it. They cannot maintain any claim for breach of the Enrollment Contract based on USM's determination that reenrollment of their children was not in the best interest of the school. Yet that is exactly what the Robinsons attempt to do in Count One of their Complaint. [Dkt. #2, ¶ 51].

Importantly, the Robinsons do *not* allege USM officials failed to make the required determination that declining to reenroll their children was in the school's best interest. They instead dispute whether the determination USM officials made was "reasonable"—*i.e.*, whether USM officials should have reached some other conclusion. [Dkt. #2, ¶ 51 ("USM failed to fulfill and breached its obligation to make a 'reasonable' determination with regard to the termination of the enrollment contracts for the Robinson Children.")]. But the terms to which the Robinsons agreed impose no "reasonableness" limitation and in fact, confirm the opposite: USM may deny enrollment whenever its officials determine "for any reason" that enrollment is not in the best interest of the school. [Dkt. #2; Ex. D, p. 3]. The determination is not subject to second-guessing, as USM officials can rely on "any reason" at all in reaching their conclusion. [*Id.*]

The Court may not rewrite the contract to impose an omitted "reasonableness" requirement. *Levy*, 130 Wis. 2d at 528. Nor may the Court render meaningless the unambiguous language to which the Robinsons agreed, which language authorizes USM officials to make this determination for *any* reason. *Dykstra*, 100 Wis. 2d at 127. The Court also may not substitute its judgment for that of "USM officials," the authorities that the Robinsons expressly agreed had sole discretion to make the determination. [Dkt. #2; Ex. D, p. 3]. The Robinsons did not bargain for any of these omitted terms. USM in contrast bargained for the express terms included in the contract, a binding agreement that the Robinsons freely admit is valid and enforceable. [Dkt. #2, ¶ 49]. As a result, Count One must be dismissed.

II. COUNT TWO MUST BE DISMISSED BECAUSE IT IS TIME-BARRED UNDER THE APPLICABLE STATUTE OF REPOSE.

For their second cause of action, the Robinsons allege that USM violated Wisconsin's Deceptive Trade Practices Act, Wis. Stat. § 100.18. [Dkt. # 2, p. 15]. This claim is time-barred and must be dismissed.

Section 100.18 prohibits "intentionally inducing the public to purchase merchandise either directly or indirectly, by an announcement, statement, or representation containing any assertion, representation or statement of fact which is untrue, deceptive or misleading." *Staudt v. Artifex Ltd.*, 16 F. Supp. 2d 1023, 1031 (E.D. Wis. 1998) (emphasis added) (internal quotations omitted). By its express terms, the statute applies only to statements made to "the public." Wis. Stat. § 100.18. And as a matter of law, statements made by one party to another after they have entered a contract are not statements made "to the public." *Kailin v. Armstrong*, 2002 WI App 70, ¶ 44 (finding "no indication in the language of § 100.18(1) that the legislature intended to address untrue, deceptive, or misleading assertions, representations, or statements of fact made

by one party to another after they have entered into a contract"). Such statements therefore are not actionable under § 100.18. *Id.*

The Robinsons admit having first enrolled their children at USM in August 2016 and having continuously done so since that date. [Dkt. #2, ¶ 23]. They therefore ceased being members of "the public" as far as § 100.18 is concerned more than five years ago. So the only statements on which they can base any § 100.18 claim must have occurred in 2016 or earlier.

This is fatal to their claim. A claim for violation of § 100.18 is subject to a three-year statute of repose. *See* Wis. Stat. § 100.18(11)(b)(3) ("No action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of this action."); *Kain v. Bluemound East Indus. Park, Inc.*, 2001 WI App 230, ¶¶ 14-18 (concluding that § 100.18(11)(b)(3) is a statute of repose, not a statute of limitation). Unlike a statute of limitation, a statute of repose "begins to run when a defendant acts in some way," and "may 'bar an action before the injury is discovered or before the injury even occurs.'" *Hocking v. City of Dodgeville*, 2010 WI 59, ¶ 19 (quoting *Kohn v. Darlington Cmty. Schs.*, 2005 WI 99, ¶ 38). As a statute of repose, § 100.18(11)(b)(3) is *not* subject to a discovery rule, as a matter of law. *Id.* ("In a statute of repose, the legislature has already determined when the claim 'accrues'—at the time of the *defendant's* action." (emphasis added)).

Whatever claim the Robinsons might have had for statements made while they remained members of "the public" in and before 2016 expired in 2019, nearly three years *before* the Robinsons filed suit. No dispute as to the facts can change this outcome. Count Two must be dismissed.

III. COUNT THREE MUST BE DISMISSED BECAUSE NO PRIVATE RIGHT OF ACTION EXISTS UNDER WIS. STAT. § 100.20(1T).

Count Three of the Robinsons' Complaint alleges a violation of Wisconsin's Unfair Trade Practices Act, Wis. Stat. § 100.20(1t). But no private cause of action exists under this statute. *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F. Supp. 2d 959 (E.D. Wis. 1998). Only the Department of Agriculture, Trade, and Consumer Protection (the "Department") has authority to investigate and enjoin conduct under § 100.20(6). And it must do so through a procedure involving a public hearing, which has not occurred. *See* Wis. Stat. § 100.20(3). A private litigant such as the Robinsons may only sue for a violation of an order issued by the Department following such public hearing. *See* Wis. Stat. § 100.20(5).

The Robinsons fail to allege or even reference any Department order prohibiting any trade practice by USM (and no such order exists). The Robinsons fail to allege USM has violated such an order (and no such violation exists). As such, the Robinsons have failed to state a claim and Count Three must be dismissed.

IV. COUNT FOUR MUST BE DISMISSED BECAUSE THE ENROLLMENT CONTRACT COMPLETELY BARS PROMISSORY ESTOPPEL.

As their fourth cause of action, the Robinsons assert promissory estoppel. They contend they relied on the promise of enrollment memorialized in the Enrollment Contract to their detriment. [Dkt. #2, ¶73]. This quasi-contract claim is just as fatally flawed as each of the Robinsons' contract claims, and for a related reason.

A contract that addresses the business relationship between the parties serves as an "absolute bar" to a claim for promissory estoppel. *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶ 53. Stated differently, "a claim for promissory estoppel only arises when there is no contract." *Scott v. Savers Prop. & Cas. Ins. Co.*, 2003 WI 60, ¶ 53.

Here, the Enrollment Contract addresses the relationship between USM and the Robinsons. The Robinsons do not allege that the Enrollment Contract omits any essential elements. Nor can they, as they expressly allege the contract itself is the basis for their promissory estoppel claim. [Dkt. #2, ¶73]. The contract is the promise on which their claim is premised. [*Id.*]

It follows that Count Four should be dismissed. *Teff*, 2003 WI App 115, ¶ 53; *Scott*, 2003 WI 60, ¶ 53; *Goff v. Massachusetts Protective Ass'n, Inc.,* 46 Wis.2d 712, 717 (1970) (holding that existence of contract "is a complete defense to the cause of action based on promissory estoppel"); *Townsend v. Neenah Joint School Dist.*, No. 2015AP2240, 2016 WL 4097785 (Ct. App. 2016) ("[T]he fatal flaw to Plaintiffs' promissory estoppel claim is that a claim for promissory estoppel arises only when there is no contract.").

V. COUNT FIVE MUST BE DISMISSED BECAUSE THE ENROLLMENT CONTRACT GIVES USM THE RIGHT TO DECLINE TO REENROLL THE ROBINSON CHILDREN "FOR ANY REASON."

In Count Five of their Complaint, the Robinsons allege USM breached its duty of good faith and fair dealing by declining to reenroll the Robinson children for the 2021-2022 school year. [Dkt. #2, ¶¶ 80-81]. This claim too fails as a matter of law.

It is well-established a party may not "employ the good faith and fair dealing covenant to undo express terms of an agreement." *Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶ 29. Nor may a party "violate the duty of good faith and fair dealing by taking an act that is specifically authorized by the parties' agreement." *Aug. Res. Funding, Inc. v. Procorp, LLC*, 482 F. Supp. 3d 808, 814 (W.D. Wis. 2020) (citing *Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.*, 146 Wis. 2d 568, 431 N.W.2d 721, 726 (Ct. App. 1988) ("But where, as here, a contracting party complains of acts of the other party which are specifically authorized in their agreement, we do not see how there can be any breach of the covenant of good faith.").

Count Five ignores these rules entirely. The Robinsons allege USM breached its duty of good faith and fair dealing by "declining to enroll the Robinson Children without cause, warning, or notice." [Dkt. #2, ¶ 80]. They further complain that USM breached the implied covenant by "terminating" the enrollment of the Robinsons' children purportedly because the Robinsons raised concerns about USM's supposed "inequitable treatment of its students of color and underrepresented students." [Dkt. #2, ¶ 81]. Even if these allegations were true (they are not), the Robinsons fail to state a claim because the Enrollment Contract to which the Robinsons admit having agreed expressly gives USM the right to decline to reenroll their children if USM officials determine "for any reason" that doing so is in the best interest of the school. [Dkt. #2; Ex. D, p. 3].

Again, the Robinsons do not allege USM officials failed to make the required determination. They instead allege USM officials made the determination "in bad faith." [Dkt. #2, ¶ 82]. The contract, however, expressly authorizes USM officials to make the determination "for any reason," even one with which the Robinsons (or the Court) might disagree. And the Robinsons cannot use the covenant of good faith and fair dealing to undo and override USM's express contractual right. *Beidel*, 2013 WI 56, ¶ 29. Count Five should be dismissed.

VI. COUNT SIX MUST BE DISMISSED BECAUSE "ARBITRATRY AND CAPRICIOUS TERMINATION" IS NOT A VALID CAUSE OF ACTION.

For their sixth cause of action, the Robinsons allege "arbitrary and capricious termination." No such cause of action exists under Wisconsin law. And the Robinsons identify no law or statute establishing the contrary. They instead cite a single case decided nearly 100 years ago as purported support for their claim, *Frank v. Marquette*, 209 Wis. 372 (1932).

Frank involved a former medical student who was expelled from graduate school for disciplinary reasons. The student attempted to obtain specific performance compelling

Marquette University to confer on him the degree of Doctor of Medicine. *Id.* The decision on which the Robinsons appear to rely addressed a discovery dispute, not the merits of the student's claim. *Id.* Specifically, the Wisconsin Supreme Court affirmed a trial court decision denying the student discovery as to disciplinary measures concerning ten of his classmates. *Id.* Only in passing did the Court note that it appeared "well settled that a university, college, or school may not arbitrarily or capriciously dismiss a student or deny to him the right to continue his course of study therein." *Id.* But the Court went on to confirm "[a] broad discretion is given to schools, colleges, and universities in such matters." *Id.*

If any portion of the *Frank* decision somehow applies here it is the statement regarding the discretion given to schools when it comes to dismissals. *Id*. Here, such discretion not only is given as a matter of law, but it is an express term of the contract between the parties. The Robinsons agreed to give USM the right to "deny enrollment or reenrollment or dismiss a student if University School officials determine *for any reason* that enrollment is not in the best interests of the school." [Dkt. #2; Ex. D, p. 3 (emphasis added)]. Nothing in *Frank* overrides the strong policy supporting freedom of contract and USM's right to enforce the express rights for which it has bargained. Nor does any part of the *Frank* decision allow this court to ignore much more recent and repeatedly affirmed well-established principles noted above, including that the court "cannot insert what has been omitted or rewrite a contract made by the parties." *Levy*, 130 Wis. 2d at 528.

If USM and the Robinsons intended that USM could only decline to reenroll the Robinsons' children for specific reasons, they would have said so in the Enrollment Contract. They in fact agreed and said something else entirely—that USM has the right to "deny enrollment or reenrollment or dismiss a student if University School officials determine *for any*

reason that enrollment is not in the best interests of the school." [Dkt. #2; Ex. D, p. 3 (emphasis added)]. Because those are the terms to which the Robinsons agreed, no alternative or contrary standard applies. Count Six should be dismissed.

CONCLUSION

For the reasons set forth herein, USM respectfully requests the Court dismiss Plaintiffs' Complaint in its entirety.

Dated: May 19, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2022, a true and correct copy of the foregoing **NOTICE OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** was filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing (upon counsel's entry of appearance) to counsel of record for Petitioner:

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