

**U.S. District Court**  
**District of Oregon (Portland (3))**  
**CIVIL DOCKET FOR CASE #: 3:19-cv-01342-JR**

Gallagher v. Capella Education Company et al  
Assigned to: Magistrate Judge Jolie A. Russo  
Demand: \$130,000  
Case in other court: 9th Circuit Court of Appeals, 21-35188  
Cause: 28:1332 Diversity-Contract Dispute

Date Filed: 08/23/2019  
Date Terminated: 03/01/2021  
Jury Demand: Plaintiff  
Nature of Suit: 190 Contract: Other Contract Actions  
Jurisdiction: Diversity

**Plaintiff****Alan L. Gallagher**

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V.

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represented by **Erin M. Burris**  
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**P.K. Runkles-Pearson**  
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**ATTORNEY TO BE NOTICED**

Date Filed	#	Docket Text
08/23/2019	<u>1</u>	Application for Leave to Proceed IFP. Filed by Alan L. Gallagher. (joha) (Entered: 08/23/2019)
08/23/2019	<u>2</u>	Complaint. Jury Trial Requested: Yes. Filed by Alan L. Gallagher against Capella Education Company, Capella University, Inc. (Attachments: # <u>1</u> Affidavit, # <u>2</u> Civil Cover Sheet). (joha) (Entered: 08/23/2019)
08/23/2019	<u>3</u>	Individual Party Consent to Jurisdiction by U.S. Magistrate Judge. (joha) (Entered: 08/23/2019)
08/23/2019	<u>4</u>	Application for CM/ECF Registration as a Self-Represented Party. Filed by Alan L. Gallagher. (joha) (Entered: 08/23/2019)
08/23/2019	<u>5</u>	Notice of Case Assignment: This case is assigned to Magistrate Judge Jolie A. Russo. (Mailed to Pro Se party on 8/23/2019.) (joha) (Entered: 08/23/2019)
08/26/2019	<u>6</u>	ORDER: Granting Plaintiff's Application/Motion for Leave to Proceed in Forma Pauperis <u>1</u> . Signed on 8/26/19 by Magistrate Judge Jolie A. Russo. (Mailed to Pro Se party on 8/26/19.) (gm) (Entered: 08/26/2019)

08/26/2019	<u>7</u>	<b>ORDER:</b> Granting Plaintiff's Application for CM/ECF Registration as a Self-Represented Party ( <i>CM/ECF Registered User</i> ) <u>4</u> . Signed on 8/26/19 by Magistrate Judge Jolie A. Russo. ( <i>Mailed to Pro Se party on 8/26/19.</i> ) (gm) (Entered: 08/26/2019)
08/26/2019	<u>8</u>	Notification of CM/ECF Account for Alan L. Gallagher ( <i>Pro Se Filer admission</i> ). Your login is: <b>gallaghera</b> . Go to the CM/ECF login page to set your password. (ecp) (Entered: 08/26/2019)
08/29/2019	<u>9</u>	Notice of Case Assignment to Magistrate Judge Jolie A. Russo and Discovery and Pretrial Scheduling Order. <b>NOTICE: Counsel shall print and serve the summonses and all documents issued by the Clerk at the time of filing upon all named parties in accordance with Local Rule 3-5.</b> Discovery is to be completed by 12/27/2019. Joint Alternate Dispute Resolution Report is due by 1/27/2020. Pretrial Order is due by 1/27/2020. Ordered by Magistrate Judge Jolie A. Russo. (jn) (Entered: 08/29/2019)
09/10/2019	<u>10</u>	Summons Issued as to Capella Education Company, Capella University, Inc.. (Summons, USM 285 form(s), and copies of the Complaint and Order to Proceed <i>in forma pauperis</i> forwarded to the U.S. Marshals Service for service.) (fp) (Entered: 09/10/2019)
10/03/2019	<u>11</u>	Return of Service Unexecuted as to Capella Education Company. (joha) (Entered: 10/09/2019)
10/03/2019	<u>12</u>	Return of Service Unexecuted as to Capella University, Inc.. (joha) (Entered: 10/09/2019)
10/16/2019	<u>13</u>	Summons Issued as to Capella University Inc. and Capella Education Company. (Summons, USM 285 form(s), and copies of the Complaint and Order to Proceed <i>in forma pauperis</i> forwarded to the U.S. Marshals Service for service. (re) (Entered: 10/16/2019)
11/01/2019	<u>14</u>	Return of Service Executed as to Capella Education Company served on 10/28/2019, answer due on 11/18/2019; Capella University, Inc. served on 10/28/2019, answer due on 11/18/2019. (joha) (Entered: 11/04/2019)
11/18/2019	<u>15</u>	Motion to Dismiss for Failure to State a Claim . Oral Argument requested. Filed by All Defendants. (Attachments: # <u>1</u> Appendix Appendix) (Runkles-Pearson, P.K.) (Entered: 11/18/2019)
11/18/2019	<u>16</u>	Corporate Disclosure Statement of <i>Defendants Capella Education Company and Capella University, Inc.</i> Filed by All Defendants. (Runkles-Pearson, P.K.) (Entered: 11/18/2019)
11/19/2019	<u>17</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: Setting Defendants' Motion to Dismiss <u>15</u> on the under advisement calendar of 12/23/2019. Plaintiff's Response due by 12/2/2019. Defendants' Reply due by 12/16/2019. The request for oral argument will be considered in due course. Should the Court deem the motion appropriate for disposition with oral argument upon review of the briefings, the motion will be scheduled accordingly. (gm) (Entered: 11/19/2019)
11/26/2019	<u>18</u>	Response in Opposition to Motion to Dismiss for Failure to State a Claim <u>15</u> Oral ARgument requested. Filed by All Plaintiffs. (Attachments: # <u>1</u> Appendix, # <u>2</u> Exhibit Dissertation) (Gallagher, Alan) (Entered: 11/26/2019)
11/26/2019	<u>19</u>	<b>NOTICE BY THE CLERK:</b> Currently there is partial consent to proceed before a U.S. Magistrate Judge in this case. If the non-consenting party would like to consent to proceed before a U.S. Magistrate Judge, the consent form may be found on the court's website at <a href="http://ord.uscourts.gov/civil-forms">ord.uscourts.gov/civil-forms</a> and may be filed electronically by using the Consent event under Other Filings/Consent in the Civil menu or delivered to the Clerk's Office by mail or in person. For more information regarding the role of magistrate judges and consenting to magistrate judge jurisdiction, see <a href="http://ord.uscourts.gov/consent">ord.uscourts.gov/consent</a> . The parties are free to withhold consent without adverse substantive consequences. (gm) (Entered: 11/26/2019)
11/28/2019	<u>20</u>	Response in Opposition to Motion to Dismiss for Failure to State a Claim <u>15</u> Oral Argument requested. Filed by All Plaintiffs. (Gallagher, Alan) (Entered: 11/28/2019)
11/29/2019	<u>21</u>	Motion for Settlement . Filed by All Plaintiffs. (Gallagher, Alan) (Entered: 11/29/2019)
12/03/2019	<u>22</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: Plaintiff's Motion for a Judicial Settlement Conference <u>21</u> is Denied with leave to renew once defendants' motion to dismiss has been resolved and a dispositive complaint is filed. (gm) (Entered: 12/03/2019)
12/10/2019	<u>24</u>	Reply to Motion to Dismiss for Failure to State a Claim <u>15</u> Oral Argument requested. Filed by All Defendants. (Runkles-Pearson, P.K.) (Entered: 12/10/2019)
12/12/2019	<u>25</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: The Court notes that plaintiff has filed discovery documents (see doc. 23 ). However, pursuant to LR 5-10 and LR 36, discovery related matters are retained by the parties and are not filed with the Court unless you are specifically requested to so by chambers. Accordingly, docket entry 23 is Stricken. (gm) (Entered: 12/12/2019)
12/23/2019	<u>26</u>	<b>Finding &amp; Recommendation:</b> Capella's motion to dismiss <u>15</u> should be granted. Capella's request for oral argument is Denied as unnecessary. Any motion to amend the complaint should be filed within fourteen days of the District Judge's order. Signed on 12/23/19 by Magistrate Judge Jolie A. Russo. (gm) (Entered: 12/23/2019)
12/23/2019	<u>27</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: Findings & Recommendation <u>26</u> is referred to Judge Marco A. Hernandez for review. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. (gm) (Entered: 12/23/2019)
01/06/2020	<u>28</u>	Objections to Magistrate Judge's Order: Findings & Recommendation Referred, <u>27</u> , Findings & Recommendation, <u>26</u> . Filed by Alan L. Gallagher. (Attachments: # <u>1</u> Attachment Dissertation) (Gallagher, Alan) (Entered: 01/06/2020)
01/08/2020	<u>29</u>	<b>Motion to Suspend Response Deadline to Plaintiff's Request for Admissions.</b> Filed by All Defendants. (Runkles-Pearson, P.K.) (Entered: 01/08/2020)
01/09/2020	<u>30</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: Defendants' Motion to Suspend Response Deadline to Plaintiff's Request

		for Admissions <u>29</u> is Granted. Discovery is Stayed in this matter pending resolution of defendants' Motion to Dismiss and the filing of a dispositive complaint. <i>See Covelli v. Avamere Home Health Care LLC, 2019 WL 5858191, *2 (D. Or. July 23), adopted by 2019 WL 5839301 (D. Or. Nov. 7, 2019) ("the dispositive pleading must state a viable claim in order for discovery to proceed").</i> (gm) (Entered: 01/09/2020)
01/13/2020	<u>31</u>	Objection(s) . Filed by All Plaintiffs. (Gallagher, Alan) (Entered: 01/13/2020)
01/21/2020	<u>32</u>	Response to Objections to Findings & Recommendation. Related document(s): <u>28</u> Objections to Magistrate Judges Order, <u>31</u> Objection. Filed by All Defendants. (Runkles-Pearson, P.K.) (Entered: 01/21/2020)
04/01/2020	<u>33</u>	<b>ORDER:</b> Adopting the Magistrate's Findings and Recommendation <u>26</u> . Defendants' Motion to Dismiss for Failure to State a Claim <u>15</u> is Granted. Plaintiff may file a motion to amend his complaint within fourteen days of the date of this Order. Signed on 4/1/20 by Judge Marco A. Hernandez. (gm) (Entered: 04/01/2020)
04/09/2020	<u>34</u>	Amended Complaint . Filed by Alan L. Gallagher against All Defendants. (Gallagher, Alan) (Entered: 04/09/2020)
04/23/2020	<u>35</u>	Motion to Dismiss for Failure to State a Claim . Oral Argument requested. Filed by All Defendants. (Attachments: # <u>1</u> Appendix A) (Runkles-Pearson, P.K.) (Entered: 04/23/2020)
04/24/2020	<u>36</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: Setting Defendants' Motion to Dismiss Amended Complaint <u>35</u> on the under advisement calendar of 5/26/2020. Plaintiff's response to motion to dismiss due by 5/7/2020. Defendants' reply to response to motion to dismiss due by 5/21/2020. The request for oral argument will be considered in due course. Should the Court deem the motion appropriate for disposition with oral argument upon review of the briefings, the motion will be scheduled accordingly. (gm) (Entered: 04/24/2020)
05/04/2020	<u>37</u>	Memorandum in Support of Amended Complaint <u>34</u> . Filed by Alan L. Gallagher against All Defendants. (Gallagher, Alan) Correct docket text on 5/4/2020 (joha). (Entered: 05/04/2020)
05/18/2020	<u>38</u>	Reply to Motion to Dismiss for Failure to State a Claim <u>35</u> Oral Argument requested. Filed by All Defendants. (Runkles-Pearson, P.K.) (Entered: 05/18/2020)
07/01/2020	<u>39</u>	<b>Findings &amp; Recommendation:</b> Capella's Motion to Dismiss <u>35</u> should be granted and judgment should be prepared dismissing this case. Capella's request for oral argument is Denied as unnecessary. Signed on 7/1/20 by Magistrate Judge Jolie A. Russo. (gm) (Entered: 07/01/2020)
07/01/2020	<u>40</u>	<b>ORDER</b> issued by Magistrate Judge Jolie A. Russo: Findings & Recommendation <u>39</u> is referred to Judge Marco A. Hernandez for review. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. (gm) (Entered: 07/01/2020)
07/08/2020	<u>41</u>	Objections to Findings & Recommendation: Capella's Motion to Dismiss <u>35</u> should be granted and judgment should be prepared dismissing this case. Filed by Alan L. Gallagher. (Gallagher, Alan) Modified on 7/8/2020 to correct event (jn). (Entered: 07/08/2020)
07/22/2020	<u>42</u>	Unopposed Motion for Extension of Time to File a Response to Objection to Findings & Recommendation: Motion to Dismiss for Failure to State a Claim <u>35</u> should be granted <u>39</u> . Filed by All Defendants. (Runkles-Pearson, P.K.) (Entered: 07/22/2020)
07/23/2020	<u>43</u>	<b>ORDER:</b> Granting Motion for Extension of Time to File a Response to Objection to F & R <u>42</u> . Defendant's response to Plaintiff's objections to the F&R is due on or before July 29, 2020. Ordered by Judge Marco A. Hernandez. (jp) (Entered: 07/23/2020)
07/29/2020	<u>44</u>	Response to Objections to Findings & Recommendation. Related document(s): <u>39</u> Findings & Recommendation,. Filed by Capella Education Company, Capella University, Inc.. (Runkles-Pearson, P.K.) (Entered: 07/29/2020)
03/01/2021	<u>45</u>	<b>ORDER:</b> Adopting the Magistrate's Findings and Recommendation <u>39</u> . Defendants' Motion to Dismiss <u>35</u> is Granted and this case is Dismissed with prejudice. Signed on 3/1/21 by Judge Marco A. Hernandez. (gm) (Entered: 03/01/2021)
03/01/2021	<u>46</u>	<b>JUDGMENT:</b> It is Ordered and Adjudged that this action is Dismissed with prejudice. Pending motions, if any, are Denied as Moot. Signed on 3/1/21 by Judge Marco A. Hernandez. (gm) (Entered: 03/01/2021)
03/13/2021	<u>47</u>	First Notice of Appeal to the 9th Circuit ( <i>fee waiver status selected (IFP)</i> ) . Filed by Alan L. Gallagher. (Gallagher, Alan) (Entered: 03/13/2021)
03/15/2021		USCA Case Number and Notice confirming Docketing Record on Appeal re Notice of Appeal <u>47</u> . CaseAppealed to 9th Circuit Court of Appeals Case Number 21-35188 assigned. (jt) (Entered: 03/15/2021)

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Description:	Docket Report	Search Criteria:	3:19-cv-01342-JR Start date: 1/1/1980 End date: 7/12/2021
Billable Pages:	5	Cost:	0.50

*Appended A*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ALAN L. GALLAGHER,

No. 3:19-cv-01342-JR

Plaintiff,

JUDGMENT

v.

CAPELLA EDUCATION COMPANY  
and CAPELLA UNIVERSITY, INC.,

Defendant.

HERNÁNDEZ, District Judge:

Based on the record, IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice. Pending motions, if any, are denied as moot.

DATED: March 1, 2021.

*Marco Hernández*  
MARCO A. HERNÁNDEZ  
United States District Judge

SER-2

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

ALAN L. GALLAGHER,

No. 3:19-cv-01342-JR

Plaintiff,

ORDER

v.

CAPELLA EDUCATION COMPANY  
and CAPELLA UNIVERSITY, INC.,

Defendant.

HERNÁNDEZ, District Judge:

Magistrate Judge Russo issued a Findings and Recommendation on July 1, 2020, in which she recommends that this Court grant Defendants' Motion to Dismiss and dismiss this case with prejudice. F&R, ECF 39. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff filed timely objections to the Magistrate Judge's Findings & Recommendation. Pl. Obj., ECF 41. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

The Court has carefully considered Plaintiff's objections and concludes that there is no basis to modify the Findings & Recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the Magistrate Judge's Findings & Recommendation.

#### **CONCLUSION**

The Court ADOPTS Magistrate Judge Russo's Findings and Recommendation [39]. Therefore, Defendants' Motion to Dismiss [35] is GRANTED and this case is dismissed with prejudice.

IT IS SO ORDERED.

DATED: March 1, 2021

  
MARCO A. HERNANDEZ  
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ALAN L. GALLAGHER,

Case No. 3:19-cv-01342-JR

Plaintiff,

FINDINGS AND  
RECOMMENDATION

v.

CAPELLA EDUCATION COMPANY  
and CAPELLA UNIVERSITY, INC.,

Defendants.

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RUSSO, Magistrate Judge:

Defendants Capella Education Company and Capella University, Inc. (collectively “Capella”) move to dismiss pro se plaintiff<sup>1</sup> Alan Gallagher’s Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons stated below, Capella’s motion should be granted.

<sup>1</sup> Although the Court acknowledges that plaintiff is not currently a licensed attorney, he was a practicing member of the Oregon State Bar from 1978 through 2004. Gallagher v. Capella Educ. Co., 2019 WL 8333532, \*1 n.1 (D. Or. Dec. 23, 2019), adopted by, 2020 WL 1550729 (D. Or. Apr. 1, 2020). Because plaintiff did not numericize his brief or the Amended Complaint, or the attachments thereto, the Court cites to the page numbers assigned in the docket.

## **BACKGROUND**

In 2013, plaintiff enrolled as a graduate student at Capella to pursue his doctorate degree (“Ph.D.”) in Public Safety, with a specialization in Criminal Justice. Am. Compl. ¶ 1 (doc. 34). The University Catalog (“Catalog”), Doctoral Manual (“Manual”), and Dissertation Process Guidebook (“Guidebook”) govern Capella’s doctoral programs and include relevant academic requirements and guidelines. Id.; Manual 4.<sup>2</sup>

In 2016, plaintiff completed his Ph.D. coursework and began his dissertation, at which point his progress was guided by a series of sixteen progressive “Milestones.” Am. Compl. ¶ 2 (doc. 34); Guidebook 18-22; Catalog 57. A published dissertation is the culminating work-product of a Ph.D.; dissertation work is iterative and involves a cycle in which faculty provide ongoing academic feedback on a candidate’s submissions. Manual 6; Guidebook 16. The dissertation is complete when the candidate completes all sixteen milestones in a timely manner. Catalog 57-58.

Doctoral candidates who “receive a Not Satisfactory (‘NS’) grade” for any quarter have failed the dissertation coursework and “will receive an academic standing warning notification.” Id.; Guidebook 23. Candidates “who receive a second consecutive NS grade will be notified that they will be withdrawn due to failure to maintain satisfactory academic standing, and will be given the option to appeal.” Guidebook 23. If the appeal is granted, the candidate “will be allowed to register for one additional quarter.” Id. Those “who receive an ‘NS’ grade in the third consecutive quarter will be administratively withdrawn with no additional options for appeal.” Id.

<sup>2</sup> The Amended Complaint incorporates these materials, as well as Exhibit 1 to plaintiff’s original complaint (which is a 31-page narrative of the events underlying this lawsuit), by reference, such that they are properly before the Court pursuant to Capella’s Rule 12(b)(6) motion. Am. Compl. ¶ 18 (doc. 34); United States v. Ritchie, 342 F.3d 903, 907-08 (9th Cir. 2003).

By Fall 2017, plaintiff had completed Milestone 10, which required mentor and committee approval of his dissertation, and advanced to Milestone 11, which required broader school approval of his dissertation, as well as completion of an academic honesty check. Id. at 21; Am. Compl. ¶¶ 2, 5 (doc. 34). Plaintiff was denied school approval three times – by “Anonymous, Dr. Michael Webb, [and] Dr. Misti Kill” – and was ultimately disenrolled from Capella as a result. Am. Compl. ¶¶ 6, 10-12 (doc. 34).

Specifically, during Fall 2017, an unknown doctoral reviewer denied school approval of plaintiff’s dissertation on the premise that his method was unacceptable, despite the fact that this method “before and after was clearly approved by Capella.” Id. at ¶ 6. Plaintiff nonetheless received a passing grade for this quarter. Compl. Ex. 1, at 8 (doc. 2-1).

In Winter 2018, plaintiff’s second doctoral reviewer, Dr. Webb, “declined to approve the work, with a review which was boilerplate and had sections which did not apply.” Am. Compl. ¶ 6 (doc. 34). Plaintiff made revisions and resubmitted his dissertation, at which point Dr. Webb communicated to plaintiff’s mentor, Dr. Matthew Delisi, “that the dissertation was approvable with minor changes.” Id. at ¶ 9. Plaintiff then made revisions which seemingly satisfied Dr. Webb, who had been removed as plaintiff’s doctoral reviewer and instead placed on his two-person committee. Id. at ¶¶ 9-10. Plaintiff received a passing grade for the Winter 2018 quarter. Compl. Ex. 1, at 8 (doc. 2-1). Thereafter, Dr. Delisi resigned; Dr. Ayn O’Reilly replaced Dr. Delisi as plaintiff’s mentor. Am. Compl. ¶ 10 (doc. 34).

In Spring 2018, Dr. O’Reilly informed plaintiff that he needed to reformat his work before she could review it. Compl. Ex. 1, at 9 (doc. 2-1). Plaintiff paid an editing firm more than \$1500 to complete this task. Id. Dr. O’Reilly subsequently took medical leave and plaintiff was appointed a new temporary mentor, Dr. Michael Brown. Am. Compl. ¶¶ 5, 10 (doc. 34). Dr. Brown indicated

he was pleased with plaintiff's work and ready to recommend it for school approval. Id. at ¶ 10. Dr. O'Reilly returned before the end of the quarter and gave plaintiff a NS grade because he had not completed Milestone 11 over the course of the past year. Id.

According to plaintiff, this was improper because he had made progress on his work. Compl. Ex. 1, at 9 (doc. 2-1). As such, plaintiff appealed the NS grade, but his appeal was denied. Am. Compl. ¶ 10 (doc. 34).

During Summer 2018, plaintiff "made very substantial revisions [to his dissertation] at the direction of Dr. O'Reilly," who then, along with the two other members of plaintiff's dissertation committee, again recommended his work to the school for review. Id. at ¶ 11. Plaintiff's third doctoral reviewer, Dr. Kill, rejected plaintiff's dissertation because it lacked sufficient citations to appropriate sources. Id. at ¶ 6. Because plaintiff still had not completed Milestone 11, Dr. O'Reilly gave him a NS grade, which resulted in automatic dismissal from the doctoral program. Id. at ¶¶ 11-12. Plaintiff successfully appealed that decision and was allowed to remain enrolled at Capella on a probationary basis. Id. at ¶ 12.

Plaintiff "added more recent peer-reviewed journal articles" to his dissertation in light of Dr. Kill's feedback but noted that his work already exceeded the required number of citations. Compl. Ex. 1, at 9-10 (doc. 2-1). Plaintiff also requested referral to any relevant citations that he should have included "but no one at Capella was able/willing to identify" any. Am. Compl. ¶ 6 (doc. 34).

In Fall 2018, plaintiff continued to revise his dissertation and insert additional sources, working with both Dr. O'Reilly and "Dr. Ellen Mink [who] stepped in to provide assistance, in the process imposing still more required changes." Id. at ¶ 12. Immediately prior to the end of the quarter, Dr. O'Reilly communicated to plaintiff that the academic honesty check revealed signs of

“academic dishonesty/plagiarism” in plaintiff’s work. Id. Plaintiff therefore received another NS grade for Fall 2018. Id. at ¶ 13. Plaintiff appealed this grade without success. Id. at ¶ 12. As a result of three consecutive NS grades, plaintiff was unenrolled from Capella. Id. at ¶ 13; Guidebook 23.

Nevertheless, plaintiff continued to work on his dissertation during Winter 2019 and requested Dr. O’Reilly’s review. Compl. Ex. 1, at 10-11 (doc. 2-1). Dr. O’Reilly “declined to assist and rejected [plaintiff’s] next draft submissions with additional formal accusations of academic dishonesty.” Id. at 11. In a further attempt to appeal Dr. O’Reilly’s actions, plaintiff “provided copies of [his] drafts and final product to the Capella President, and his designate and others, and to the appellate panels [but his] appeals were rejected.” Id.

On August 23, 2019, plaintiff commenced this lawsuit, alleging claims for breach of contract and unjust enrichment. On April 1, 2020, the Court granted Capella’s motion to dismiss the original complaint. See generally Gallagher, 2019 WL 8333532. The Court reasoned plaintiff had not alleged facts demonstrating that Capella failed to comply with any specific rule or procedure stipulated in their contract. Id. at \*5. The Court also found that plaintiff failed to state an unjust enrichment claim because he received credits in exchange for the tuition he paid, and had no guarantee of a degree. Id. at \*7.

On April 9, 2020, plaintiff filed his Amended Complaint, reasserting his claims for breach of contract and unjust enrichment. Plaintiff’s claims are premised on the fact that multiple mentors/committee members referred his dissertation to Milestone 11 for school approval, but such approval was never given due to the “arbitrary and capricious” actions of Dr. O’Reilly, each of his three doctoral reviewers, and the appeals board. Am. Compl. ¶¶ 5-6 (doc. 34). As relief, plaintiff requests that the Court order Capella to grant him a Ph.D., as well as unspecified damages and tuition reimbursement. Id. at pg. 11-12.

### STANDARD

Where the plaintiff “fails to state a claim upon which relief can be granted,” the court must dismiss the action. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must allege “enough facts to state a claim to relief that is plausible on its face.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). For the purposes for the motion to dismiss, the complaint is liberally construed in favor of the plaintiff and its allegations are taken as true. Rosen v. Walters, 719 F.2d 1422, 1424 (9th Cir. 1983). Regardless, bare assertions that amount to nothing more than a “formulaic recitation of the elements” of a claim “are conclusory and not entitled to be assumed true.” Ashcroft v. Iqbal, 556 U.S. 662, 680-81 (2009). Rather, to state a plausible claim for relief, the complaint “must contain sufficient allegations of underlying facts” to support its legal conclusions. Starr v. Bacca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Pro se pleadings are held to a less stringent standard than those drafted by lawyers. See, e.g., Haines v. Kerner, 404 U.S. 519, 520 (1972). The court, in many circumstances, instructs the pro se litigant regarding deficiencies in the complaint and grants leave to amend. Eldridge v. Block, 832 F.2d 1132, 1136 (9th Cir. 1987). Nevertheless, a pro se plaintiff’s claims may be dismissed without leave to amend where it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief. Barrett v. Belleque, 544 F.3d 1060, 1061-62 (9th Cir. 2008).

### DISCUSSION

Capella argues that dismissal with prejudice is appropriate because the Amended Complaint is substantively identical to the original complaint and does not cure the defects previously identified by the Court. Specifically, Capella contends that plaintiff neglects to describe any concrete contractual promise that it breached, nor allege any new facts pointing to unjust enrichment. Defs.’ Mot. Dismiss 4-8 (doc. 35). Moreover, Capella asserts that plaintiff fails to

provide a compelling argument for disturbing established precedent related to the educational malpractice doctrine. Id. at 2, 5-6.

Concerning the latter, Capella is correct that courts cannot weigh the relative merits of an academic body's decision-making: "Oregon, as well as the majority of other jurisdictions, prohibit claims of educational malpractice or negligence: in the absence of proof of bad faith, or misconduct or arbitrary action, on the part of the faculty, the decisions of an educational institution in evaluating the satisfactoriness of a student's work cannot be reversed by the court." Gallagher, 2019 WL 8333532 at \*4 (citations, internal quotations, brackets, and ellipses omitted). Nevertheless, "contract-based or alternately-plead equitable claims typically fall outside the educational malpractice doctrine if they do not necessitate a court's scrutiny of the faculty's discretionary decision-making in rendering grades and degrees." Id. (citations omitted).

Therefore, plaintiff's continued attempts to have the Court step into the shoes of his faculty advisors, analyze his dissertation on the merits, and order Capella to grant him a Ph.D. are not cognizable. Am. Compl. ¶ 17 (doc. 34). Plaintiff broadly alleges that Capella's conduct was arbitrary, capricious, and in bad faith; however, as Capella points out, the Amended Complaint fails to introduce new facts to substantiate these vague and conclusory allegations. Defs.' Mot. Dismiss 2, 8 (doc. 35); see also In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1056-57 (9th Cir. 2008) ("the court need not accept as true conclusory allegations, nor make unwarranted deductions or unreasonable inferences" in resolving a motion to dismiss). For this reason, plaintiff's allegations related to the three doctoral reviewers' refusal to approve his dissertation at Milestone 11, as well as Dr. O'Reilly's refusal to grade his work as satisfactory, are simply outside the purview of this Court's review.

## I. Breach of Contract Claim

To state a claim for breach of contract, plaintiff must allege: (1) “the existence of a contract,” including “its relevant terms;” (2) the “plaintiff’s full performance and lack of breach;” and (3) the “defendant’s breach resulting in damage to plaintiff.” Slover v. Or. State Bd. of Clinical Soc. Workers, 144 Or. App. 565, 570, 927 P.2d 1098 (1996) (citation and internal quotations omitted).

In Oregon, the relationship between a student and a college, “which involves the payment of tuition for educational services, is essentially contractual in nature.” Vejo v. Portland Pub. Sch., 204 F.Supp.3d 1149, 1175 (D. Or. 2016), rev’d in part on other grounds, 737 Fed.Appx. 309 (9th Cir. 2018) (citations omitted). Statements in course catalogs, student handbooks, and similar documents can establish the terms of a contractual agreement. Id. (citations omitted). Whether such materials give rise to liability for breach is a fact-intensive inquiry. See Gibson v. Walden Univ., LLC, 66 F.Supp.3d 1322, 1324-26 (D. Or. 2014) (collecting cases).

Thus, to plausibly state a claim in this context, the plaintiff must pinpoint “an identifiable contractual promise that the defendant failed to honor.” Gallagher, 2019 WL 8333532 at \*4. In other words, dismissal is appropriate under Rule 12(b)(6) “when the plaintiff fails to specify the particular rule or procedure that the university allegedly violated.” Id.

Here, plaintiff makes general references to the Catalog, Manual, and Guidebook, and alleges that they constituted promises to award him a Ph.D. if he participated in the milestone process, completed a dissertation, and paid consideration in the form of tuition. See, e.g., Am. Compl. ¶¶ 2, 30 (doc. 34). Plaintiff focuses on his interest in a “completed Ph.D.,” not merely additional courses or credit.” Id. at ¶ 2. He details the tribulations he endured to complete Capella’s doctorate program, a lengthy process full of advisors, reviewers, and steps. Id. at ¶ 1. Regardless,

the premise underlying plaintiff's Amended Complaint continues to be that "his dissertation, on its face and based on the evidence, [is] worthy of doctoral approval such that it merits the Ph.D." Id. at ¶ 17. As addressed above, such review is beyond the scope of this litigation given the dearth of well-plead factual allegations evincing arbitrariness or bad faith.

Additionally, plaintiff again fails to specify which rule or procedure Capella allegedly breached. This continues to be fatal to his claim. See Breyer v. Pac. Univ., 2017 WL 3429395, \*5 (D. Or. Aug. 9, 2017) (dismissing the plaintiff's breach of contract claim under analogous circumstances). In its prior decision, the Court specifically discussed the contents of the Guidebook, Catalog, and Manual, explaining that plaintiff had not identified, and an independent review did not reveal, any concrete promise made by Capella. Gallagher, 2019 WL 8333532 at \*5.

In any event, valid contractual disclaimers exist in this case. Namely, as the Court previously denoted, the Catalog, Manual, and Guidebook each expressly state that they, "nor any of the information and requirements contained [t]herein, constitute a contract or create any contractual commitments between Capella University and any student, any prospective student, or any third party." Id. (quoting Guidebook 6; Manual 4; Catalog 12). The Manual and Guidebook also specify that the "information contained [therein] is subject to change." Id. (quoting Guidebook 6; Manual 4). As such, plaintiff was clearly apprised of Capella's intent not to be bound by these materials and the Amended Complaint does not allege any facts from which the Court could infer that the effectiveness of these disclaimers was in question. Id.; see also Gibson, 66 F.Supp.3d at 1324-26 (requisite intent to form a contract was absent where the university's student handbook contained a virtually identical disclaimer); Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998) (disclaimer in university's graduate school catalog precluded breach of contract claim). Capella's motion should be granted as to plaintiff's breach of contract claim.

## II. Unjust Enrichment Claim

“To state a claim for unjust enrichment, a party must allege (1) a benefit conferred, (2) awareness by the recipient that she has received the benefit, and (3) it would be unjust to allow the recipient to retain the benefit without requiring her to pay for it.” Cordova v. FedEx Ground Package Sys., Inc., 104 F.Supp.3d 1119, 1134 (D. Or. 2015) (citation and internal quotations omitted). Concerning the third element, the plaintiff must assert facts showing that the alleged injustice is “rooted in recognized legal principles and not in abstract notions of morality.” Cumming v. Nipping, 285 Or.App 233, 239, 395 P.3d 928 (2017). In other words, the plaintiff must “show more than abstract unfairness from defendants’ retention of the proceeds” and instead must “identify, with specificity, the source of their right to the proceeds.” Grimstad v. Knudsen, 283 Or.App 28, 47, 386 P.3d 649 (2016), rev. denied, 361 Or. 350, 393 P.3d 1181 (2017).

The Amended Complaint does not include new facts to substantiate plaintiff’s unjust enrichment claim. As before, the only benefit allegedly conferred by plaintiff was the payment of tuition. Am. Compl. ¶ 15 (doc. 34). Yet the Amended Complaint recognizes that plaintiff received academic credit, as well instruction, support, and feedback from Capella’s faculty, in return for his payments. See generally id. Lacking any further facts, plaintiff fails to state a plausible unjust enrichment claim. See Wright v. Capella Univ., Inc., 378 F.Supp.3d 769, 774-75 (D. Minn. 2019) (dismissing unjust enrichment claims where the plaintiffs “received educational services in exchange for each semester for which [they] paid tuition” and there was no indication “Capella guaranteed a degree, or a degree in a certain period of time, in exchange for tuition”). Capella’s motion should be granted in this regard.

The Court previously identified the same deficiencies in regard to plaintiff’s original complaint and granted him leave to amend. However, the Amended Complaint is substantively

identical to the original complaint and plaintiff's briefing makes clear that the main tenet of seeking amendment is simply to encourage the Court to diverge from its past rulings and established precedent. See, e.g., Pl.'s Resp. to Mot. Dismiss 7-8 (doc. 18). Furthermore, plaintiff does not identify any additional facts in his possession that would cure the defects discussed above or in the Court's prior opinion. Accordingly, the Court recommends that dismissal be with prejudice. See Stewart v. Mortg. Elec. Registration Sys., Inc., 2010 WL 1054384, \*11 (D. Or. Feb. 18), adopted by 2010 WL 1054697 (D. Or. Mar. 19, 2010) (granting the defendant's motion to dismiss with prejudice where the pro se plaintiff's amended complaint failed to state a claim).

#### **RECOMMENDATION**

For the foregoing reasons, Capella's Motion to Dismiss (doc. 35) should be granted and judgment should be prepared dismissing this case. Capella's request for oral argument is denied as unnecessary.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right

to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 1<sup>st</sup> day of July, 2020.

/s/ Jolie A. Russo

Jolie A. Russo  
United States Magistrate Judge

**General Docket**  
**United States Court of Appeals for the Ninth Circuit**

**Court of Appeals Docket #:** 21-35188

**Docketed:** 03/15/2021

**Nature of Suit:** 4190 Other Contract Actions

**Termed:** 12/20/2021

Alan Gallagher v. Capella Education Company, et al

**Appeal From:** U.S. District Court for Oregon, Portland

**Fee Status:** IFP

**Case Type Information:**

- 1) civil
- 2) private
- 3) null

**Originating Court Information:**

**District:** 0979-3 : 3:19-cv-01342-JR

**Trial Judge:** Marco A. Hernandez, Chief District Judge

**Date Filed:** 08/23/2019

**Date Order/Judgment:**

03/01/2021

**Date Order/Judgment EOD:**

03/01/2021

**Date NOA Filed:**

03/13/2021

**Date Rec'd COA:**

03/13/2021

**Prior Cases:**

None

**Current Cases:**

None

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v.

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Defendant - Appellee,

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(see above)

Ivan Resendiz Gutierrez  
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[COR NTC Retained]  
(see above)

ALAN L. GALLAGHER, Attorney,

Plaintiff - Appellant,

v.

CAPELLA EDUCATION COMPANY; CAPELLA UNIVERSITY,

Defendants - Appellees.

03/15/2021	<input type="checkbox"/> <u>1</u> 61 pg, 1.04 MB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL AND PRO SE APPELLANT. SEND MQ: No. The schedule is set as follows: Appellant Alan L. Gallagher, Attorney opening brief due 05/12/2021. Appellees Capella Education Company and Capella University answering brief due 06/11/2021. Appellant's optional reply brief is due 21 days after service of the answering brief. [12040884] (JBS) [Entered: 03/15/2021 10:52 AM]
04/13/2021	<input type="checkbox"/> <u>2</u> 16 pg, 276.87 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellant Alan L. Gallagher. Date of service: 04/11/2021. [12072579] [21-35188] (Gallagher, Alan) [Entered: 04/13/2021 12:08 PM]
04/14/2021	<input type="checkbox"/> <u>3</u> 2 pg, 94.92 KB	Filed clerk order: The opening brief [2] submitted by Alan L. Gallagher is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: not applicable. The paper copies shall be submitted to the principal office of the Clerk. [12074478] (SML) [Entered: 04/14/2021 03:25 PM]
04/16/2021	<input type="checkbox"/> <u>4</u>	Received 6 paper copies of Opening Brief [2] filed by Alan L. Gallagher. [12077523] (SD) [Entered: 04/16/2021 01:58 PM]
04/20/2021	<input type="checkbox"/> <u>5</u>	Filed (ECF) notice of appearance of Michael Porter (Miller Nash Graham & Dunn LLP, 111 SW 5th Ave., Suite 3400, Portland, OR 97204) for Appellees Capella Education Company and Capella University. Date of service: 04/20/2021. (Party was previously proceeding with counsel.) [12080532] [21-35188] (Porter, J.) [Entered: 04/20/2021 10:52 AM]
04/20/2021	<input type="checkbox"/> <u>6</u>	Added Attorney(s) J. Michael Porter for party(s) Appellee Capella Education Company Appellee Capella University, in case 21-35188. [12080546] (NAC) [Entered: 04/20/2021 10:56 AM]
04/20/2021	<input type="checkbox"/> <u>7</u>	Filed (ECF) notice of appearance of Ivan Resendiz Gutierrez (Miller Nash Graham & Dunn LLP, 111 SW 5th Ave., Suite 3400, Portland, OR 97204) for Appellees Capella Education Company and Capella University. Substitution for Attorney Erin M. Burris for Appellees Capella Education Company and Capella University. Date of service: 04/20/2021. (Party was previously proceeding with counsel.) [12080550] [21-35188] (Resendiz Gutierrez, Ivan) [Entered: 04/20/2021 10:58 AM]
04/20/2021	<input type="checkbox"/> <u>8</u>	Attorneys Erin M. Burris in 21-35188 substituted by Attorney Ivan Resendiz Gutierrez in 21-35188 [12080567] (NAC) [Entered: 04/20/2021 11:05 AM]
05/06/2021	<input type="checkbox"/> <u>9</u> 7 pg, 72.33 KB	Filed order MEDIATION (SL): The Mediation Program of the Ninth Circuit Court of Appeals facilitates settlement while appeals are pending. See Fed. R. App. P. 33 and Ninth Cir. R. 33-1. As part of a pilot project, the Mediation Program is exploring settlement potential in some cases in which one party is proceeding pro se (representing themselves without the assistance of an attorney). This case is being included in the pilot project. By May 20, 2021, the parties are requested to inform the Circuit Mediator in writing whether the issues on appeal or the underlying dispute might be appropriate for settlement discussions... The written response to this order should not be filed with the court; instead, the response should be sent directly to the Circuit Mediator by email (stephen_liacouras@ca9.uscourts.gov) or mail (Stephen Liacouras, Circuit Mediation Office, U.S. Court of Appeals for the Ninth Circuit, James R. Browning United States Courthouse, P.O. Box 193939, San Francisco, CA 94119-3939). (SEE ORDER FOR FULL TEXT). [12104585] (JP) [Entered: 05/06/2021 12:40 PM]
05/19/2021	<input type="checkbox"/> <u>10</u>	Filed (ECF) Streamlined request for extension of time to file Answering Brief by Appellees Capella Education Company and Capella University. New requested due date is 07/12/2021. [12117854] [21-35188] (Resendiz Gutierrez, Ivan) [Entered: 05/19/2021 11:01 AM]
05/20/2021	<input type="checkbox"/> <u>11</u>	<b>Streamlined request [10] by Appellees Capella Education Company and Capella University to extend time to file the brief is approved. Amended briefing schedule: Appellees Capella Education Company and Capella University answering brief due 07/12/2021. The optional reply brief is due 21 days from the date of service of the answering brief.</b> [12118990] (JN) [Entered: 05/20/2021 07:39 AM]
06/01/2021	<input type="checkbox"/> <u>12</u> 8 pg, 95.05 KB	Filed order MEDIATION (VS): The Mediation Program of the Ninth Circuit Court of Appeals facilitates settlement while appeals are pending. See Fed. R. App. P. 33 and Ninth Cir. R. 33-1. As part of a pilot project, the Mediation Program is exploring settlement potential in some cases in which one party is proceeding pro se (representing themselves without the assistance of an attorney). This case is being included in the pilot project. The court has scheduled a dial-in telephone assessment conference at the date and time indicated above to explore settlement potential. Participants with an email address on the attached list will receive an email with dial-in information... All written or spoken communication with the mediator, including the discussions during the scheduled conference, are strictly confidential mediation communications protected by Ninth Circuit Rule 33-1 and cannot be disclosed outside the mediation process. Additional information about confidentiality (including a copy of Ninth Circuit Rule 33-1), the assessment conference, and the Mediation Program are attached and can also be found at the Mediation Program website (www.ca9.uscourts.gov/mediation). The briefing schedule previously set by the court remains in effect. (SEE ORDER FOR FULL TEXT). (Pacific Standard Time) [12129441] (JP) [Entered: 06/01/2021 11:39 AM]
06/16/2021	<input type="checkbox"/> <u>13</u> 1 pg, 105.28 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Conference, 07/07/2021, 3:30 p.m., Pacific Time. See order for details. [12146310] (VS) [Entered: 06/16/2021 03:07 PM]

07/07/2021  14 MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. [12165543] (VS) [Entered: 07/07/2021 03:44 PM]  
1 pg, 88.9 KB

07/12/2021  15 Submitted (ECF) Answering Brief for review. Submitted by Appellees Capella Education Company and Capella University. Date of service: 07/12/2021. [12170421] [21-35188] (Resendiz Gutierrez, Ivan) [Entered: 07/12/2021 10:51 PM]  
263 pg, 5.56 MB

07/12/2021  16 Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Capella Education Company and Capella University. Date of service: 07/12/2021. [12170422] [21-35188] (Resendiz Gutierrez, Ivan) [Entered: 07/12/2021 10:57 PM]  
445 pg, 10.46 MB

07/14/2021  17 Filed clerk order: The answering brief [15] submitted by Capella Education Company and Capella University is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The supplemental excerpts of record [16] submitted by Capella Education Company and Capella University are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [12172072] (SML) [Entered: 07/14/2021 10:06 AM]  
2 pg, 95.79 KB

07/20/2021  18 Received 3 paper copies of supplemental excerpts of record [16] in 3 volume(s) and index volume filed by Appellees Capella Education Company and Capella University. [12177735] (KWG) [Entered: 07/20/2021 11:46 AM]

07/20/2021  19 Received 6 paper copies of Answering Brief [15] filed by Capella Education Company and Capella University. [12178079] (SD) [Entered: 07/20/2021 03:14 PM]

08/10/2021  20 This case is being considered for an upcoming oral argument calendar in Seattle  
  
Please review the Seattle sitting dates for December 2021 and the 2 subsequent sitting months in that location at [http://www.ca9.uscourts.gov/court\\_sessions](http://www.ca9.uscourts.gov/court_sessions). If you have an unavoidable conflict on any of the dates, please file **Form 32** within 3 business days of this notice using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully.  
  
When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date.  
  
If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter within 3 business days of this notice, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation). [12197153]. [21-35188] (KS) [Entered: 08/10/2021 01:21 PM]

09/26/2021  21 Notice of Oral Argument on Thursday, December 9, 2021 - 09:00 A.M. - SE 7th Flr Courtroom 2 -  
Scheduled Location: Seattle WA.  
The hearing time is the local time zone at the scheduled hearing location.  
  
View the Oral Argument Calendar for your case [here](#).  
  
NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. See Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Check [here](#) for updates on the status of reopening as the hearing date approaches. At this time, even when in person hearings resume, an election to appear remotely by video will not require a motion. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance.  
  
Please note however that if you do elect to appear remotely, the court **strongly prefers** video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so.  
  
Be sure to review the **GUIDELINES** for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible).  
  
If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 21 days before Thursday, December 9, 2021. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice. [12239221]. [21-35188] (KS) [Entered: 09/26/2021 06:21 AM]

09/26/2021  22 Filed (ECF) Acknowledgment of hearing notice by Party Alan L. Gallagher. Hearing in Seattle on

		12/09/2021 at 09:00 A.M. (Courtroom: 2). Filer sharing argument time: No. (Argument minutes: 10.) Special accommodations: NO. Filer admission status: I certify that I am appearing only on behalf of myself. Date of service: 09/26/2021. [12239240] [21-35188] (Gallagher, Alan) [Entered: 09/26/2021 02:52 PM]
10/27/2021	<input type="checkbox"/> 23	Filed (ECF) Acknowledgment of hearing notice by Attorney Ivan Resendiz Gutierrez for Appellees Capella Education Company and Capella University. Hearing in Seattle on 12/09/2021 at 09:00 A.M. (Courtroom: Courtroom 2 (William K. Nakamura Courthouse, 7th Floor)). Filer sharing argument time: No. (Argument minutes: 10.) Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 10/27/2021. [12270684] [21-35188] (Resendiz Gutierrez, Ivan) [Entered: 10/27/2021 02:23 PM]
11/02/2021	<input type="checkbox"/> 24	Notice of Oral Argument on Thursday, December 9, 2021 - 1:00 P.M. - SE 7th Flr Courtroom 2 - Scheduled Location: Seattle WA. The hearing time is the local time zone at the scheduled hearing location.  View the Oral Argument Calendar for your case <a href="#">here</a> .
<p>NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. See Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, you may have the option to appear in person at the Courthouse or remotely by video. Check <a href="#">here</a> for updates on the status of reopening as the hearing date approaches. At this time, even when in person hearings resume, an election to appear remotely by video will not require a motion, and any attorney wishing to appear in person must provide proof of vaccination. The court expects and supports the fact that some attorneys and some judges will continue to appear remotely. If the panel determines that it will hold oral argument in your case, the Clerk's Office will contact you directly at least two weeks before the set argument date to review any requirements for in person appearance or to make any necessary arrangements for remote appearance.</p> <p>Please note however that if you do elect to appear remotely, the court <b>strongly prefers</b> video over telephone appearance. Therefore, if you wish to appear remotely by telephone you will need to file a motion requesting permission to do so.</p> <p>Be sure to review the <a href="#">GUIDELINES</a> for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible).</p> <p>If you are the specific attorney or self-represented party who will be arguing, use the <a href="#">ACKNOWLEDGMENT OF HEARING NOTICE</a> filing type in CM/ECF no later than 28 days before Thursday, December 9, 2021. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice. [12275502]. [21-35188] (KS) [Entered: 11/02/2021 10:41 AM]</p>		
11/10/2021	<input type="checkbox"/> 25 1 pg, 98.3 KB	Filed clerk order (Deputy Clerk: OC): The court finds this case suitable for decision without oral argument. This case shall be submitted on the briefs and record, without oral argument, on Thursday, December 9, 2021, in Seattle, Washington. Fed. R. App. P. 34(a). [12284170] (OC) [Entered: 11/10/2021 12:08 PM]
12/08/2021	<input type="checkbox"/> 26 7 pg, 115.94 KB	Filed (ECF) Party Alan L. Gallagher Correspondence: Notice of oral argument. Date of service: 12/08/2021. [12309831] [21-35188]--[COURT UPDATE: Updated docket text to reflect correct ECF filing type. 12/20/2021 by SLM] (Gallagher, Alan) [Entered: 12/08/2021 11:27 AM]
12/09/2021	<input type="checkbox"/> 27	SUBMITTED ON THE BRIEFS TO M. MARGARET MCKEOWN, BRIDGET S. BADE and SIDNEY A. FITZWATER. [12311492] (SB) [Entered: 12/09/2021 01:06 PM]
12/20/2021	<input type="checkbox"/> 28 10 pg, 332.53 KB	FILED MEMORANDUM DISPOSITION (M. MARGARET MCKEOWN, BRIDGET S. BADE and SIDNEY A. FITZWATER) AFFIRMED. FILED AND ENTERED JUDGMENT. [12320021] (MM) [Entered: 12/20/2021 08:33 AM]
01/03/2022	<input type="checkbox"/> 29	COURT DELETED INCORRECT ENTRY. Notice about deletion sent to case participants registered for electronic filing. Correct Entry: [30]. Original Text: Filed (ECF) Appellant Alan L. Gallagher motion for reconsideration of dispositive Judge Order of 12/20/2020. Date of service: 01/03/2022. [12328464] [21-35188] (Gallagher, Alan) [Entered: 01/03/2022 05:20 AM]
01/03/2022	<input type="checkbox"/> 30 11 pg, 262.88 KB	Filed (ECF) Appellant Alan L. Gallagher petition for panel rehearing (from 12/20/2021 memorandum). Date of service: 01/03/2022. [12328665]--[COURT ENTERED FILING to correct entry [29].] (SLM) [Entered: 01/03/2022 09:08 AM]
01/06/2022	<input type="checkbox"/> 31 1 pg, 835.12 KB	Filed (ECF) Appellees Capella Education Company and Capella University bill of costs (Form 10) in the amount of \$362.10 USD. Date of service: 01/06/2022 [12332835] [21-35188] (Resendiz Gutierrez, Ivan) [Entered: 01/06/2022 09:05 AM]
01/06/2022	<input type="checkbox"/> 32 1 pg, 95.59 KB	Filed clerk order (Deputy Clerk: NAC): Denying Bill of Costs (ECF Filing). Appellees' late request for bill of costs received on January 6, 2022 is denied as untimely. Bill of cost must be received within 14 days from the date of entry of judgment. Ninth Circuit Rule 39-1.4 and Mollura v. Miller, 621 F.2d 334 (9th Cir. 1980). [12332938] (NAC) [Entered: 01/06/2022 09:45 AM]

01/06/2022	<input type="checkbox"/> <u>33</u> 1 pg, 97.43 KB	Filed order (M. MARGARET MCKEOWN, BRIDGET S. BADE and SIDNEY A. FITZWATER) The panel has voted to deny the petition for panel rehearing. [12333077] (OC) [Entered: 01/06/2022 11:07 AM]
01/13/2022	<input type="checkbox"/> <u>34</u> 7 pg, 74.54 KB	Filed (ECF) Appellant Alan L. Gallagher Motion to file late petition for rehearing and/or petition for rehearing en banc of 7 pages. Date of service: 01/13/2022. [12339519] [21-35188] (Gallagher, Alan) [Entered: 01/13/2022 06:22 AM]
01/14/2022	<input type="checkbox"/> <u>35</u> 1 pg, 124.39 KB	Filed order (M. MARGARET MCKEOWN, BRIDGET S. BADE and SIDNEY A. FITZWATER) Appellant's petition for rehearing en banc, Dkt. [34], is DENIED as untimely. See Fed. R. App. P. 35(c), 40(a)(1). The seven-day period to issue the mandate started to run on January 6, 2022, when the court denied Appellant's petition for panel rehearing, Dkt. 33. See Fed. R. App. P. 41(b). The court will not extend that period based on Appellant's untimely petition for rehearing en banc. See id. [12341664] (OC) [Entered: 01/14/2022 02:48 PM]
01/14/2022	<input type="checkbox"/> <u>36</u> 1 pg, 93.88 KB	MANDATE ISSUED.(MMM, BSB and SAF) [12341671] (NAC) [Entered: 01/14/2022 02:51 PM]
01/27/2022	<input type="checkbox"/> <u>37</u> 8 pg, 50.69 KB	Filed Appellant Alan L. Gallagher letter dated 01/15/2022 re: Request for En Banc Review. Paper filing deficiency: None. [12353618] (NAC) [Entered: 01/27/2022 02:46 PM]

*Appendix B*

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

DEC 20 2021

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ALAN L. GALLAGHER, Attorney,

No. 21-35188

Plaintiff-Appellant,

D.C. No. 3:19-cv-01342-JR

v.

MEMORANDUM\*

CAPELLA EDUCATION COMPANY;  
CAPELLA UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court  
for the District of Oregon  
Marco A. Hernandez, Chief District Judge, Presiding

Submitted December 9, 2021\*\*  
Seattle, Washington

Before: McKEOWN and BADE, Circuit Judges, and FITZWATER,\*\*\* District Judge.

Plaintiff Alan L. Gallagher (“Gallagher”), proceeding *pro se*, appeals the district

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See Fed. R. App. P. 34(a)(2).*

\*\*\* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

court's judgment dismissing his action against defendants Capella Education Company and Capella University, Inc. (collectively, "Capella") under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief can be granted. We have jurisdiction, 28 U.S.C. § 1291, and affirm.

We review the district court's dismissal for failure to state a claim de novo. *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). To survive Capella's motion to dismiss under Rule 12(b)(6), Gallagher needed to plead "enough facts to state a claim to relief that [was] plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . ."). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (alteration omitted) (quoting

Fed. R. Civ. P. 8(a)(2)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678.

Gallagher’s breach of contract claim in part requires the court to review academic decisions made by Capella, including the decision not to approve Gallagher’s dissertation due to lack of citations and plagiarism. Under Oregon law, a court can review a university’s academic decision only if it was made arbitrarily or in bad faith. *Tate v. N. Pac. Coll.*, 140 P. 743, 746 (Or. 1914) (“The faculties of colleges . . . exercise quasi judicial functions, and their decisions are conclusive, if they act within their jurisdiction, and in good faith, and not arbitrarily.”).<sup>1</sup>

Gallagher’s amended complaint does not plausibly plead that Capella made arbitrary or bad-faith decisions. Gallagher makes the conclusory assertion that Capella’s conduct involved “bad faith, misconduct, and arbitrary action.” Am. Compl. at 8. But the allegedly “arbitrary” decisions he challenges—Capella’s requiring more citations for his dissertation, rejecting his dissertation for plagiarism, and requiring a specific method in his dissertation—are valid academic decisions, not

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<sup>1</sup> Oregon has not termed this rule the “educational malpractice” doctrine, but courts that apply similar deference to universities refer to it as such. *See, e.g., Gillis v. Principia Corp.*, 832 F.3d 865, 872 (8th Cir. 2016) (holding that a “breach-of-contract claim that raises questions concerning the reasonableness of the educator’s conduct in providing educational services . . . is one of educational malpractice” and is not cognizable under Missouri law (alteration in original) (internal quotation marks omitted)).

arbitrary ones. *See Tate*, 140 P. at 744 (“[College faculties have] power to make rules and regulations for the government of [their] students, in the manner and *methods* of study . . .” (emphasis added)). Dismissal of Gallagher’s breach of contract claim predicated on academic decisions made by Capella was therefore warranted.

To the extent Gallagher alleges a breach of contract claim that is not based on an unreviewable academic decision, he has failed to plausibly plead that Capella breached a specific promise. *See Iqbal*, 556 U.S. at 678; *Slover v. Or. State Bd. of Clinical Soc. Workers*, 927 P.2d 1098, 1101 (Or. App. 1996) (reciting the elements of a breach of contract claim under Oregon law). We find from our reading of the amended complaint few specific promises that Gallagher alleges Capella broke. The promise on which the amended complaint and opening brief primarily focus—“to provide the academic degree of Ph.D. when [Gallagher] completed the requirements set forth in the Capella catalog and other materials,” Am. Compl. at 2—fails because Gallagher plainly had not completed those requirements. *See Slover*, 927 P.2d at 1101 (explaining that a plaintiff asserting a breach of contract claim must allege that it fully performed the contract); Am Compl. at 5 (“This approval, Milestone 11, was not granted.”). And Capella’s rejection of his dissertation (the decision that led to his failure to complete the requirements) is an academic decision that is unreviewable unless made arbitrarily or in bad faith, which Gallagher has not plausibly pleaded.

Other “personal and explicit promises” that Gallagher mentions appear to refer to Capella’s promises that it “could and would uniquely provide services and a method to assure he would obtain the degree.” Am. Compl. at 2. But Gallagher does not plausibly plead how Capella broke this promise. In fact, the amended complaint acknowledges that Capella provided its unique mentor program and milestone program to help Gallagher obtain a degree.<sup>2</sup> *See Slover*, 927 P.2d at 1101 (explaining that a plaintiff must allege, among other things, a defendant’s breach to state a plausible breach of contract claim).

We do not consider the district court’s dismissal of Gallagher’s unjust enrichment claim because he makes no argument pertaining to this cause of action on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[O]n appeal, arguments not raised by a party in its opening brief are deemed waived.”).

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<sup>2</sup> And even assuming *arguendo* that Capella’s promises in the catalog, manual, and handbook apply, Gallagher has not plausibly pleaded an explicit promise that Capella made and broke.

We therefore affirm the judgment of the district court.<sup>3</sup>

**AFFIRMED.**

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<sup>3</sup> On December 8, 2021, without leave of this court, Gallagher filed a document captioned “Plaintiff’s Oral Argument.” [Dkt. No. 26] Because we have concluded that this appeal can be decided on the briefs and record on appeal, without oral argument, we decline to consider this document.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 6 2022

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ALAN L. GALLAGHER, Attorney,

No. 21-35188

Plaintiff-Appellant,

D.C. No. 3:19-cv-01342-JR

v.

District of Oregon,  
Portland

CAPELLA EDUCATION COMPANY;  
CAPELLA UNIVERSITY,

ORDER

Defendants-Appellees.

Before: McKEOWN and BADE, Circuit Judges, and FITZWATER,\* District Judge.

The panel has voted to deny the petition for panel rehearing.

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\* The Honorable Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

*Appendix D*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALAN L. GALLAGHER, Attorney,

Plaintiff-Appellant,

No. 21- 35188 D.C. No. 3:19-cv-01342-JR

v.

CAPELLA EDUCATION COMPANY; CAPELLA UNIVERSITY,

Defendants-Appellees.

Request for Panel Re-Hearing

This case is of importance because the Contract Disclaimer of University Catalogues allows them to deny the existence of contract and hide behind immunity in cases involving millions of students and dollars. Universities enforce contracts against students, but students are not allowed to enforce contracts against them. This is inequitable and wrong. In this case, Capella denies there is a contract, but seeks through a collection company over \$600 in tuition and fees. At the very least, if the Panel rules there is no contract, Capella should be precluded from its collection action.

The Court Panel was wrong to state that the Complaint lacked a factual basis, as the complaint supported its conclusory allegations with a sworn affidavit incorporated by reference, and other documents, which set out the supporting facts in detail. Those facts are summarized in Appellant's Brief and Oral Argument. What Capella advertises, and what Appellant entered, was a Ph.D. Program with a ratchet-like series of approvals (Milestones): one gained, not to be lost. There was a contract (based upon the Milestone/Mentor Program, which Capella advertises as its

unique feature, to assure the completion of the Ph.D. program). There was consideration and performance: over four years of work, and over \$150,000 of costs. Capella breached the contract by unreasonably (and not for academic reasons) failing to grant Milestone 11 (doctoral department approval, normally pro forma), in spite of the approval and recommendations of its own experts, Mentors and Dissertation Committee Members.. Appellant was harmed by this breach. The Panel was wrong to consider failure to obtain Milestone 11 approval a failure of Appellant. Rather, this was precisely the breach of contract by Capella. In the repeated judgment of all three Mentors and all seven Committee Members (one of whom had been the second Reviewer), and others at Capella, Appellant should have been granted the graduate department approval which they recommended. The denial was arbitrary, capricious, irrational, arbitrary, and retaliatory, falling within the exceptions to "academic immunity."

Clearly, there was a contract, and its terms are easily determined, certainly to include the Milestone/Mentor Program, and its cumulative (ratchet-like) approvals. If the university is to claim academic immunity, it must use academic standardsa.

The Court Panel was clearly wrong, misreading the facts of the case.

(1) All three Mentors, and all (seven) Dissertation Committee Members, approved and recommended the dissertation many times for doctoral department approval (Milestone 11). Two are national experts in criminal justice, and the others Capella's own experts. The three doctoral department reviewers, and the last Mentor, imposed incorrect and different standards, different each time (irrational, inconsistent).

(2) Reviewer #1 (Anonymous) was clearly wrong when he declared the method unacceptable. This was not academic discretion. He was wrong—plain error. He was also antagonistic, even venomous, not academic. The method (qualitative

interviews, which Capella labels “phenomenology,” but Appellant labels Boasian anthropology or Weberian verstehen)) is standard in the social sciences, was and is approved by Capella, and was approved by the subsequent reviewers.

(3) Reviewer #2 was wrong and right. Part of his review dealt with another product altogether and appeared to be boilerplate—unprofessional plain error. He later told Dr. DeLisi (the first Mentor/Dissertation Committee Chair) that the dissertation was approvable with minor changes, which were promptly made. He was then shifted to be a Dissertation Committee Member, in which capacity he approved and recommended the dissertation several times, showing that his concerns had been met.

(4) Reviewer #3 (Kill) wanted more citations. However, Capella has a formula for minimum citations, which Petitioner exceeded, but still added more. Petitioner noted this was a new research field, that he had all relevant citations, was considered an expert on the topic, and invited more direction, which was not given. This was an arbitrary and additional standard, never defined, and not academic.

(5) Second Mentor (O'Reilly) said she would not impose different standards, but did so, in an ever-changing process, at times plainly incorrect (according to other parts and experts of Capella), including the use of certain terms and sources, and the later charge of plagiarism. She recommended the dissertation for approval, but then irrationally failed Appellant when he failed to get that approval. Appellant's dissertation had been scrutinized for over three years by multiple faculty and *TurnItIn* (a plagiarism program) and been accepted over and over again. Any “plagiarism” was unintentional and/or immaterial, and had been so considered by other Capella Mentors, Committee, and reviewers. When Appellant sought the Mentor's help to correct any problems, submitting

to her a revised draft which addressed her every expressed concern, she declined, violating her contract role.

(6) All these show inconsistent, irrational, arbitrary, capricious, and retaliatory behavior, ever-changing standards or lack of standards, and not academic discretion.

The Court Panel was wrong, in that the question of whether exceptions (for arbitrary, capricious, irrational, or retaliatory behavior) exist is a fact question for a jury. Petitioner provided multiple detailed examples of such behavior, and had formally in person and in writing complained to Capella's President about these concerns.

The Court Panel was wrong, in that Appellant fully completed his contract obligations. Milestone 11 and subsequent Milestones are intended to be pro forma. All of Capella's experts, Mentors and Dissertation Committee Members recommended the dissertation for Department approval (Milestone 11), normally a brief (two week) pro forma step. Others at Capella praised the dissertation as not merely meeting minimum standards, but as being of "importance" and "a contribution." Appellant contracted with Capella precisely because of its Ph.D. Milestone Program of step -by -step progress, ratchet approval, and Mentor support (Capella's promise). He performed his part (including consideration of over \$150,000 and performance over four years), but Capella breached the contract when it failed or refused to grant Milestone 11. The last Mentor (O'Reilly) not only failed to perform her role, but turned into an irrational antagonist. As such, she could no longer fulfill the promised role of Mentor. But even she had approved the dissertation over and over again, from topic approval to final product, until she alleged plagiarism.

Appellant never intended to abandon the alternate claim of unjust enrichment. Capella gained over \$140,000 from Appellant, based upon its representations of a unique

Milestone/Mentor Program, cost him additional sums, and failed/refused to deliver the promised benefit, the Ph.D., in spite of Appellant's sufficient dissertation and other performance.

For all of these reasons, the decision of the Court Panel should be revisited and decision rendered in favor of Appellant.

Alan L. Gallagher

Gallagheralan2000@yahoo.com

Gallagher v Capella University;

Appendix E

9<sup>th</sup> Circuit Oral Argument

I get ten minutes: not much time. My thought, and observation, is that if the Court wants to rule in my favor, it will find a way. If it does not, it will find a way not to do so. My goal must be to get the Court to want to rule for me, to be interested in my case.

It is somewhat awkward, but I want to present myself as the ideal student. This may seem arrogant, but I should be a “poster boy” for Capella. If I cannot succeed, if someone like me cannot succeed, “Something is rotten in the state of Denmark.” There must be something irrational, capricious, arbitrary, retaliatory, that, I hope, the Court will want to fix.

I studied online at Capella University from 2014-2019, literally traveling half way around the world, from teaching on board ship and on naval bases for the US Navy in Asia, to attend Residential Colloquia and Programs in Jacksonville (FL), Atlanta (GA), Albuquerque (NM), and Anaheim (2x CA).

During this time, I suffered several heart attacks, and was emergency hospitalized four times (a fifth time recently in 2021): stent installment (New Orleans), stent replacement (New Orleans), and pneumonia twice (Los Angeles & Portland, Oregon). I have been since diagnosed with congestive heart failure (leaky “regurgitating” valve), severe breathing disorder, severe sleep apnea, severe arthritis, polymyalgia rheumatica, diabetes, atrial fibrillation, and cellulitis. The effect is not getting enough oxygen, severe breathing problems on even slight exertion, and problems walking. Even though I completed the Camino de Santiago in 2015, now I can hardly walk to the mailbox.

**My dissertation is of quality**, as testified to by Capella's own people. All of my (seven) Dissertation Mentors/Committee members (Drs. DeLisi, Beaver, O'Reilly, Mink, Brown, Webb, and Conis), and others at Capella, praised and recommended my work for doctoral department approval, many times. Two (Drs. Matt DeLisi and Kevin Beaver) are nationally recognized experts in criminal justice; the others are Capella's own experts in criminal justice and social science research, who supervised and approved my work over many terms. I have published my dissertation on Amazon (Kindle & paperback).

Dr. DeLisi, my original Capella Mentor/Dissertation Committee Chair, who is tenured, department chair, and journal editor, at Iowa State University, left Capella because it was mistreating graduate students such as myself. Unfortunately, that left me subject to the very people and irrational treatment he was concerned about.

All Capella evaluators of my work have in writing found it of value and deeply interesting. At Capella University, Dr. Michael Brown, as acting Mentor, stated that it was: "riveting and it will no doubt make a positive mark in criminal justice academia." Dr. Michael Webb, as doctoral reviewer, called it: "a very interesting dissertation that provides needed information to the criminal justice community," Dr. Misti Kill, the most recent Doctoral Reviewer, called the work "very interesting," and Dr. Lisa Blackman-Siddall of CU's IRB called it "important."

**I am of quality**: over half a century of criminal justice experience (Prosecutor, State/Federal Defender, Municipal Judge, Legal Aid/Civil Liberties Attorney), university/college teaching in criminal justice and legal history (e.g.: Washington State University, Arkansas State University, University of Maryland, US Navy/NC-PACE on the USS Blue Ridge, 7<sup>th</sup> Fleet

Command Ship, Pacific Far East, elite AP programs, Korean Department of Education Scholarship Program), honors at all levels, and published versions of my theses/writings:

- Diploma: Computer Programming/Operation; AIA/Control Data.
- AS. 3.26 GPA. Accounting & Computers. Point Park University.
- BA. 3.56 GPA. Cum laude. Departmental Honors. University of Pittsburgh.
- JD. Top quartile. University of Pittsburgh Law School.
- MA. 4.0 GPA. National History Honor Society. Portland State University.
- MAIS. 4.0 GPA. Texas A&M University.
- CM (Permanent Certified Manager). ICPM @ James Madison University.
- Ph.D. (abd). 3.98 GPA. Honors field exams. University of Washington.
- Ph.D. (abd-Capella University). 3.833 GPA. Capella Ambassador. National Criminal Justice Honor Society. Dissertation presented, on invitation, at 2018 Annual Meeting in New Orleans of Academy of Criminal Justice Sciences.
- Diploma. University of Salamanca (Spain). Advanced Spanish Language & Literature. "Sobresaliente" (Outstanding). DELE C-2: Spanish.
- MENSA. IQ: 140+.
- 15 books published on Amazon (Kindle & paperback). Versions of theses published in various publications.
  - “Already an accomplished historian.” Robert E. Burke, U of Washington.
  - “The most learned graduate student.” Gordon Dodds. Portland State U.
  - “Knows more than most criminal justice professors.” Matthew DeLisi, Capella U., Iowa State U.

My argument is that, even if one grants the university immunity because of its Denial of Contract and the Educational Malpractice Doctrine, these have exceptions where arbitrary, capricious, irrational, or retaliatory behavior is alleged. This should be for a jury to decide.

In spite of its catalogue denial of any contract, Capella sells itself as having a special program/method to assist students to the Ph.D., including its Milestone Program, with each step of the way carefully monitored and approved before one moves, ratchet-like, to the next step. I entered Capella because of this Program, and relied upon it. I achieved each of those Milestones (Approval of topic, approval of method, comprehensive exam, approval of human research, multiple residential colloquia with experts to approve the dissertation in progress, work with Mentor/Dissertation Committee (headed by experts), individual chapter approval, approval of entire product including research and conclusions), until the almost-final pro forma departmental approval. Normally, the graduate department approval is scheduled to take about two weeks, to be pro forma, and mostly for correction of minor errors.

I had three (3) doctoral department reviewers. The first reviewer (anonymous) condemned the research method (qualitative interviews). In doing so, he was wrong: it was and is a common social science method, and approved by Capella. The second reviewer (Dr. Webb) was ready to approve the dissertation, with minor changes which were promptly made. When Dr. DeLisi left Capella, Dr. Webb was then moved to become a member of my Committee, where he did approve the dissertation several times (indicating that his minor concerns were met). The third reviewer (Dr. Kill) wanted more citations (although I exceeded Capella's minimum formula, was deemed an expert in my topic, and was not informed of any article or expert I missed, although I specifically asked. I did add more current peer-reviewed journal citations). Finally, I was rejected from the University because, even though my Mentor recommended me

many times, I failed to obtain doctoral department approval. This was irrational on her part. Likewise, my work had passed multiple reviews, including being put by me (as required) through the plagiarism review program (TurnItIn) many times, without problems. There were no material problems, and none which could not have been and were not corrected/revised. At the request of my Mentors, and other Capella supervisors, I made many changes, even though the demands were incorrect, inconsistent, and contradictory: I was docile in performance, making endless “required” changes, if sometimes questioning.

The locus of irrationality was new Mentor (former Dissertation Committee member and Residential Colloquia expert) O'Reilly who, on becoming Mentor, promised no new standards, but then put me through expensive months of “required” revisions, including demands contrary to Capella’s own rules, and contradictory to other advisers. I spent over \$1000 for professional external review of my citations, meta-text, and coordination before she would deign even to review my work. (She did the same in a course in which she failed me, regardless of the excellent quality of my work, because I did not acquire from her an approved dissertation topic—not required by the syllabus). Capella also failed me for one Residential Program, because, although all my work was successfully completed, I left 20 minutes early. I had sought permission, which was not granted, for I had a flight back to Asia). However, she did approve my dissertation finally, again, and recommend me for doctoral department approval (again), only to fail me—irrationally-- when I did not obtain that approval. Two such failures at Capella is automatic dismissal.

It is clear that O'Reilly objected to my politics and independence. She claimed anything she demanded was “required” by the school. She objected to my use of “illegal alien” (and falsely claimed it was not allowed by the IRB—on my application, the IRB said it was ok and

denied having told her this) and to my assertion that, measured by prison populations, illegal aliens committed more crime. She objected to my use of John Lott and the Federation of Americans for Immigration Reform (which she called a hate group, relying upon the Southern Poverty Law Center, a too-me discredited entity). She praised peer-reviewed journals (which is an invalid argument from authority. Cf. introduction to dissertation).

Capella denies there is a contract, but is meanwhile trying to collect from me, through a collection company, about \$600 in unpaid tuition and fees (which the University President's representative personally promised I would not have to pay), that is, based upon a contract. Capella should not be able to deny and assert a contract at the same time. I relied upon Capella's representations, its special Milestone Program and Mentor Support, on entering the Program, but Capella failed to perform its promises. That Program is sufficiently detailed to form a contract. Capella itself states in its catalogue that the student is entitled to operate under the rules of the catalogue at the time of matriculation.

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IN THE 9<sup>TH</sup> CIRCUIT COURT OF APPEALS

ALAN L. GALLAGHER,

Plaintiff, Pro se.

In forma Pauperis

Case No. 21-35188

Vs

D.C. 3:19-cv-01-01342-JR

US District Court for Oregon (Ptld)

Capella University Inc., and

Plaintiff's Brief

Capella Education Company,

Defendants

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- 12. Argument: Error #2: Educational Malpractice: Exceptions require trial
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- 16. Certificate of Compliance

### **Introduction: Issues presented**

Cases like this, once labeled “Contract Disclaimer” or “Educational Malpractice,” are usually dismissed, without real thought or consideration of the merits (Where “I am persuaded” takes the place of the syllogism). That is wrong, and a shame. Both doctrines are wrong. But in this case, regardless, Defendants should be estopped from contract disclaimer (as they themselves seek to enforce their contract through collections); the contract has specific enough terms to be enforced, and the recognized exceptions to educational malpractice—arbitrary, capricious, irrational, and retaliatory behavior—should require a trial. On a Motion to Dismiss, Plaintiff’s allegations must be taken as true.

### **Jurisdiction**

Diversity. Amount in controversy is \$140,000+.

### **Case History**

This is an appeal from the final judgment of the District Court of Oregon, Portland, dismissing Plaintiff’s Amended Complaint for failure to state as cause of action.

### **Statement of Facts**

[This Statement of Facts is supported by the Affidavit and Exhibits filed in the District Court, and by the presumption, on Motion to Dismiss, that alleged facts are true and correct].

In 2013, Plaintiff enrolled in Ph.D. Program (Public Service Leadership, Criminal Justice) at Capella University, with first classes in Winter Term 2014 (Capella has four terms, Winter commencing in January, Spring, Summer, and Fall). From 2014-2019, he completed

course and residential requirements (Four “Residential Colloquia,” in Jacksonville, Atlanta, and twice in Anaheim), and was approved for dissertation. Plaintiff was an exemplary student, with 3.833 GPA, National Criminal Justice Honor Society, and chosen by Capella as “Capella Ambassador.” Capella advertises a unique program to assist students to complete the Ph.D., including a series of “Milestones” and assignment of a Dissertation Mentor and Committee. Prior to these Milestones, Plaintiff obtained topic approval and, in his comprehensive exams, also discussed the topic. Plaintiff completed these Milestones step by step, including: Topic and method approval, Scientific Merit Approval, Human Research Approval, approval of Chapters 1, 2, Chapters 3, 4, and 5, and then of the entire 5 chapter dissertation by his Mentor/Committee who, in late 2017, recommended his dissertation for graduate department approval. In February 2018, on invitation and sponsored by his then-Mentor Matthew DeLisi, a nationally recognized scholar, Plaintiff presented his dissertation at the Annual Conference of the Academy of Criminal Justice Sciences in New Orleans. At this point, Plaintiff was invited to and did apply for graduation. The next milestones, based upon Capella’s estimated time for their completion, are normally and essentially pro forma, including doctoral department approval.

Plaintiff has long been an exemplary student. Diploma in Computers: Control Data. AS Point Park University. 3.26 GPA. BA University of Pittsburgh. 3.56 GPA. Departmental Honors. JD University of Pittsburgh Law School. Top Quartile. MA Portland State University. 4.0 GPA. National History Honor Society. MAIS Texas A&M University. 4.0 GPA. Ph.D. (abd). University of Washington. 3.98 GPA. Honors Field Exams. Diploma. University of Salamanca (Spain). Advanced Spanish (“Outstanding”). His theses and dissertation research have been published. He has also taught at university/college level: Washington State University, Arkansas State University, for the US Navy at the University of Maryland University College-Asia and

Central Texas College/NC-PACE (*USS BLUE RIDGE, Command Ship, 7<sup>th</sup> Fleet, Pacific Far East*), Pioneer Pacific College, Del Mar College, Purdue/Kaplan University, Mohave Community College, and for AP programs for elite US and Asian secondary schools. He practiced law from 1974-2005, including civil liberties, prosecutor, municipal judge, city/county attorney, and state and federal criminal defense (trials and appeals).

Plaintiff's dissertation is part of the record of this case, and is published on Amazon: *Subjects' experiences of collateral consequences of criminal convictions.*

All readers of the work have in writing found it of value and deeply interesting. At Capella University, Dr. Michael Brown, as acting Mentor, stated that it was: "riveting and it will no doubt make a positive mark in criminal justice academia." Dr. Michael Webb, as doctoral reviewer, called it: "a very interesting dissertation that provides needed information to the criminal justice community," Dr. Misti Kill, the most recent Doctoral Reviewer, called the work "very interesting," and Dr. Lisa Blackman-Siddall of CU's IRB called it "important." All Mentors/Committee Members have recommended it for doctoral approval, many times: Drs. (1) Mathew DeLisi, (2) Kevin Beaver, (3) Ayn O'Reilly, (4) Michael Brown, (5) Michael Webb, and (6) Peter Conis. Both Drs. DeLisi and Beaver are nationally recognized scholars in the field. Dr. Matthew DeLisi, a nationally recognized criminology scholar and journal editor, was faculty sponsor for an invited presentation on the dissertation at the 2018 Annual Meeting of the Academy of Criminal Justice Sciences in New Orleans, where it met a favorable reception. Dr. Beaver is also a criminology scholar of national reputation. Capella's Dr. Ellen Mink worked with Plaintiff, and found it "almost" ready for doctoral approval. Dr. O'Reilly has stated that even parts removed were worthy of publication. *The Capital Press*, the Pacific Northwest Newspaper for OR, WA, ID, and N. CA, devoted 1/3 of its editorial page to an essay, "The myth

of the otherwise innocent illegal alien," based upon a portion of the dissertation. Its recommendations are under review at and have been presented to the Oregon Legislature and Legislative Counsel.

Fall 2017, the dissertation was approved and recommended for doctoral department approval by the then-Mentor (**Dr. Matthew DeLisi**) and Committee (**Dr. Ayn O'Reilly, Dr. Kevin Beaver**). Both Drs. DeLisi and Beaver are nationally recognized scholars in criminal justice, and Dr. O'Reilly was Capella's own expert in dissertation preparation and in qualitative research, and director of Residential Colloquia, where students worked on their dissertations. The dissertation was rejected by the first graduate reviewer (anonymous), who mistakenly said that the method (qualitative interviews) was not allowed at Capella. The method was allowed, had already been approved, continued to be approved by Capella, and has long been recognized and approved in Social Sciences. It is THE primary method in social anthropology, and used by many of the greatest sociologists (e.g. Oscar Lewis). In Winter Term, the dissertation was resubmitted to a second reviewer (**Dr. Michael Webb**), who indicated it was approvable with minor changes, which were promptly made. At this point, Spring Term 2017, Dr. DeLisi (concerned about poor treatment of graduate students by Capella) left Capella, and a new Mentor/Committee was formed, with Dr. O'Reilly as Mentor/Chair, and new Committee Members. Dr. Michael Webb (who had been the second reviewer) and **Dr. Peter Conis**. Dr. O'Reilly went on medical leave until the last week of the term, and until the very last week of term was replaced by **Dr. Michael Brown**. After changes in the dissertation, Dr. Brown stated that the dissertation was approvable and was ready to recommend it for graduate department approval. Note that Dr. Webb's approval, now as Committee member, meant that his concerns, as second reviewer, had been met. **Had he remained as Doctoral Reviewer, the dissertation**

would have been approved. But Dr. O'Reilly returned in the last week, and did not submit it. Next term, Summer 2017, after more changes, Dr. O'Reilly/Committee did recommend the dissertation for graduate department approval, which was denied by a third reviewer (Dr. Misti Kill), who wanted more citations. Because Dr. Kill had not approved it, Dr. O'Reilly graded Plaintiff at NS (Not satisfactory) for the term. Next term, Fall 2018, after more changes, Dr. O'Reilly and Committee again recommended the dissertation, which Dr. Kill again declined. Plaintiff was again graded NS. At Capella, two successive failures result in suspension. Plaintiff appealed, and was allowed to continue, making more changes, including more current citations from peer-reviewed journals, at the direction of Dr. O'Reilly and Dr. Ellen Mink (another Capella dissertation expert, co-director of Residential Colloquia, and Capella's expert in quantitative research). Capella has a formula, for minimum number of citations, which Plaintiff exceeded in all of his drafts. Capella's experts conceded that Plaintiff was expert in his topic and, in spite of his express request, were not able to identify any authority or citation he had missed. Dr. O'Reilly, on the last day of term Fall 2018, then failed Plaintiff because of alleged plagiarism, which Plaintiff denied. Plaintiff's work had been subject to continual review by Capella since original topic approval, put multiple times by Plaintiff through plagiarism checking programs (using the program: TurnItIn), was accepted and recommended many times by Mentors/Committees, and its content was well known and copied multiple times to Mentors/Committee Members, to the Graduate Department, to Capella's experts in topic, method, and research, and to Capella's President and Special Assistant to the President. Plaintiff sought additional direction from the Mentor, Dr. O'Reilly, to correct any alleged defects, but such direction was not provided. The role of the Mentor is specifically, per the Catalog, to assist the student, but this assistance was refused by a now adverse Mentor, against whom Plaintiff had

lodged written complaints. Plaintiff's next revision was again denied for alleged plagiarism. The resultant grades caused Plaintiff's dismissal from Capella. Plaintiff exhausted remedies within Capella without success.

Plaintiff was therefore not only denied the Ph.D., but left with a stain on his record. Additionally, Capella claims, and through a collection company is attempting to collect from Plaintiff, \$698 in alleged unpaid tuition and fees, which has adversely affected Plaintiff's credit rating (in spite of an express promise of Capella's Special Assistant to President Senesee that Plaintiff would not be left owing such a sum).

In June 2017, Plaintiff complained, about the incorrect and irrational behavior of the Reviewers and of Dr. O'Reilly, by letter to Capella's President Dick Senesee (after a personal meeting and invitation from Dr. Senesee in Anaheim, CA), who assigned his personal representative Dr. Jonathan Gehrtz to monitor Plaintiff's concerns. Likewise, Dr. Ellen Mink was assigned in the last two terms to assist, and was working with Plaintiff (she, Dr. O'Reilly, and Dr. Gehrtz telling Plaintiff that he was "almost" there, with only very minor changes needed for approval), when Dr. O'Reilly's grading terminated Plaintiff. Plaintiff expressed his concern about arbitrary, capricious, irrational, and retaliatory behavior on the part of Capella's doctoral reviewers and Dr. O'Reilly. Because of the lack of approval from the first reviewer, Plaintiff was required to take four or five additional terms, ultimately without success, at great cost. Instead of graduating in January 2018, Plaintiff was obliged to take and pay for additional courses until Winter Term 2019. Dr. Gehrtz personally assured Plaintiff that he would not, because of this, be left owing money to Capella (which now Capella is trying to collect through a collection company, and has adversely affected Plaintiff's otherwise excellent credit rating (815 dropped to 715). Plaintiff has paid over \$140,000 in tuition, fees, and other costs.

Plaintiff's dissertation, *Subjects' experience of collateral consequences of criminal convictions*, is part of the record, and is published on Amazon (paperback and Kindle). It has been highly praised by Capella's own experts, as noted herein. The Abstract is here reprinted to advise the Court of its content. The dissertation is intelligent, interesting, literate, based upon theoretical and practical knowledge, and worthwhile.

### **Abstract**

"Collateral Consequences of Criminal Convictions (CCCCs) are civil limitations automatically imposed by legislation or rule upon persons arrested, convicted, or of certain statuses, such as illegal aliens. CCCCCs number over 50,000 in the United States, and 1100 in Oregon. They are said to affect over 85 million nationally (25% of the US 315 million population), and perhaps 15% of Oregon's 3.8 million. Illegal immigrants (11-12 million nationally, 170,000 in Oregon) add to this number. CCCCCs are considered "invisible" by legal and social science literature, because they are not addressed by the criminal justice system during trials and sentencing. The courts have no direct power over them. The legal literature deals with legal issues. The limited social science literature deals mostly with voting rights or in very limited ways with judges, social workers, and quantitative issues, not with subjects of CCCCCs. The literature calls for qualitative research into subjects' perceptions and experiences. The instant qualitative research interviewed a purposive sample of 19 adult Oregonians, convicts or illegal aliens, subjected to CCCCCs, but not subject to direct state control by courts or corrections, to explore their perceptions and experiences, a viewpoint missing in the legal and social science literature. Three leading court cases involving CCCCCs subjects were compared with the interviews. Using phenomenological methods (Weber's *verstehen*), subjects were asked to recount their criminal or alien history, and the effects of CCCCCs in their lives. Their accounts were analyzed for

commonalities. From the interviews and from a closer reading of the literature suggested by them, it appeared that: CCCCs are not, in fact, "hidden" or "unknown." Statements saying so are no longer true. The invocation of such terms as "hidden," "secret," and "invisible," is ritual and legal fiction. The vast number potentially subject to CCCCs becomes substantially less when better calculated and when actual particular cases are reviewed. Many CCCCs are never imposed because of a lack of knowledge or will to explore and impose them or because of poor resources or recordkeeping. Many state and private entities positively avoid or even prohibit inquiring into arrests and convictions, immigration status, and CCCCs (to protect criminals and illegal aliens or to avoid racial discrimination). Those potentially subject to CCCCs have (not surprisingly given that they are ex-convicts and/or illegal aliens) in many cases developed effective strategies to avoid or minimize their effects. All subjects knew, in general and often in particular, of CCCCs, and had developed successful strategies to avoid them, often with the aid of governmental laws, practices, and private parties."

Plaintiff filed this lawsuit, based upon diversity and amount, which was dismissed for failure to state a claim. The Magistrate, approved by the District Judge, asserted that Capella's Contract Disclaimer in its catalog was sufficient to deny any contract, and that the doctrine of Educational Malpractice precluded a claim. Plaintiff alleged there was sufficient contract, and that Capella, by attempting to collect (assigning a bill of \$698 to a collections agency and adversely reporting this to the credit rating agencies), itself declared there was a contract. No contract: no bill. Plaintiff suggested that, if Educational Malpractice was the law, still there were exceptions for arbitrary, capricious, irrational, and retaliatory behavior by Capella, which he alleged in detail, and asserted that the exception question was a fact question for a jury.

**Argument: ERROR #1:**

There is an enforceable contract between Plaintiff and Capella. In Oregon and the 9<sup>th</sup> Circuit, the relationship between student and university is contractual in nature, and that contract is evidenced mostly by the university catalog. Even if the Contract Disclaimer should be accepted, Capella should be estopped from asserting it, because of its efforts to collect under a claim of contract, and its harm to Plaintiff's credit rating.

The terms of the contract are sufficiently specific to enforce. Plaintiff did not enter Capella to complete individual courses, but to gain the Ph.D., which is necessary for employment. Capella recognizes this, and distinguishes itself by offering a special method to assist students to complete the Ph.D. Capella offered special assurances, with its Milestone program, with Mentor/Committee, to assure success. Plaintiff relied upon these assurances. Plaintiff gained these cumulative step= by=step approvals, such that his final product, having

won approval at each step by Capella's own experts, should have been approved. The specific promise is that, as the student completes each step, and that step is approved, that his approval is real and will last, not to be revoked and overturned by caprice at a future step. The Milestones are to be like rachets, which cannot turn backwards. It is one thing to make minor adjustments, but quite another to have product approved over and over again by Capella's own experts, then overturned by new people for unintelligible and/or mistaken reasons. The first and second Reviewers were plainly wrong, but even the second Reviewer came to approve Plaintiff's work. Then a third Reviewer has unarticulated reasons, in a comedy of changing and unreal, undisclosed, standards, apparently unknown to all prior faculty, Mentors, and Committee. Plaintiff, over and over during over a year of forced revisions, presented an approvable dissertation, in fact approved by all his Mentors/Committee and praised by them. Capella's graduate department never offered a valid reason for denial of approval, and showed plain error and lack of standards in its denials. Exercise of discretion is distinguished from lack of standards and arbitrary behavior.

Dr. DeLisi, the original Mentor, was truly such: learned in both theory and practice of criminal justice. Dr. O'Reilly, the second Mentor, was an academic bureaucrat, with no real knowledge or experience of the field, and more concerned with subservience of the student than acting the real role of a Mentor. Her behavior was irrational enough that Plaintiff complained personally to the Capella President, and then filed a formal complaint in mid-2018, Dr. DeLisi left Capella because of the irrational manner in which it was treating graduate students. Included in bias by Dr. O'Reilly were her complaints about the use of the term "illegal alien," her disputing that illegal aliens proportionately commit more crime than others in the US, her reliance upon the Southern Poverty Law Center as an identifier of "hate groups," her

consideration of FAIR (Federation for American Immigration Reform) as a “hate group,” and her rejection of the research of John Lott on immigrants and crime in Arizona based only upon his “reputation” and not his work or correct facts. She falsely told Plaintiff that the Institutional Review Board prohibited the use of “illegal alien,” but Plaintiff checked personally with the IRB and it had not done so and allowed the term.

**Argument: ERROR #2:**

The doctrine of Educational Malpractice should not apply. While this doctrine is generally favored by the courts (while disfavored by law journal commentators, Stander, R. (2013). *Educational malpractice law in the U.S.*, [www.rbs2.com/edumal3.pdf](http://www.rbs2.com/edumal3.pdf)) who routinely dismiss such cases with hardly a second thought, it provides for exceptions where arbitrary, capricious, irrational, and/or retaliatory behavior is alleged, which takes a case out of the realm of “academic discretion” in which courts say they are reluctant to interfere.

“When judges are asked to review the substance of a genuinely academic decision, they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment.” Regents of the University of Michigan v Ewing, 474 U.S. 214, 225 (1985).

Educational malpractice was adopted in the Oregon District Court based upon a questionable case (accommodating a sex offender with a “pedophilic sexual orientation” was not a real option for Judge Panner in Gibson v Walden Univ., LLC., 66 F. Supp. 1322 (D. OR 2014). In this case, instead, we have an exemplary student). Bad cases make bad law. Universities should not be able to disclaim responsibility for their promises, and it is shameful

that courts have allowed them. Given the incredible extent of intrusions into universities by federal, state, and local governments today, e.g., based upon race, sex, due process, First Amendment, and pandemic/safety intrusions, the idea of courts' aloofness or deference no longer has value.

Exceptions to the doctrine of Educational Malpractice exist, where there are allegations of arbitrary, capricious, irrational, and/or retaliatory behavior, which require fact finding by a jury.

These issues were raised below, including in objections to the Magistrate's proposed findings and conclusions, but not addressed by the Magistrate or Judge.

"Oregon, as well as the majority of other jurisdictions, prohibit claims of educational malpractice or negligence in the absence of proof of bad faith, or misconduct or arbitrary action, on the part of the faculty, the decisions of an educational institution in evaluating the satisfactoriness of a student's work cannot be reversed by the court" (quoted from Magistrate's recommendation, p. 7, emphasis added). Herein, Plaintiff has alleged such arbitrary action, and spelt out in detail when and where it occurred (e.g., in his Objections to the Magistrate's proposed findings and recommendations), e.g., with Dr. O'Reilly approving his dissertation, but grading him NS when the dissertation failed to gain graduate department approval. Likewise, the dissertation, from topic approval onward, had been checked over and over again, course by course, for academic honesty (not only at the end of the program, as the Magistrate incorrectly asserted, Plaintiff ran his draft through the program TurnItIn many times, and posted the findings in the course room online), and only faulted after Plaintiff's complaints.

Plaintiff's dissertation is self-evidently of doctoral quality, such that its rejection is on its face arbitrary, capricious, irrational, and retaliatory. It is suggested that the Court, to fairly

evaluate this claim, must actually read the dissertation. Further, the praise and approvals accorded it by Capella's own Mentors/Committees/Experts attest to its quality, and that it more than met the standards of recognized experts and Capella's own experts. The dissertation is part of the record of this case (Docket 18, Exhibit 2), and is available published on Amazon. Further, Plaintiff has over half a century of professional criminal justice experience, working with convicts and aliens, and training in the methods of law (JD), history (2 MAs and Ph.D. abd), and anthropology (BA, JD), as well as criminal justice (JD, legal history study, Capella study), all applied in this study, using methods developed and approved by generations of social science researchers (many named in the text), that is, qualitative interviews and the negative instance. The Anonymous Reviewer was simply and egregiously wrong, and acting contrary to Capella's own prior approvals, thus, in an arbitrary and irrational manner. One would expect Plaintiff's work to be informed by this training and experience and to be of value. The second Reviewer, Dr. Webb, came to approve the dissertation, in his role as Committee Member. Had he been retained as Reviewer, Plaintiff would have received doctoral department approval. This shows, on the part of the graduate department, lack of standards and arbitrary procedure. The last Reviewer, Dr. Kill, wanted "more" citations, but Plaintiff always exceeded the minimum required, and demonstrated his mastery of his subject, acknowledged by Capella's faculty, such that the demand for "more" became irrational. Plaintiff specifically requested identification of any expert or issue missed, but no response was given: that was irrational. The Mentor Dr. O'Reilly became irrational when she over and over again approved and recommended Plaintiff's dissertation for doctoral approval, but failed him when he failed to obtain such approval. She became retaliatory after Plaintiff complained and defended his product and actions. The confusing and contradictory approvals and lack of approvals showed that Capella had no

standards, and that its judgments were arbitrary, capricious, irrational, and at times retaliatory.

This was not academic discretion.

Plaintiff has independently published his dissertation on Amazon (paperback and Kindle), and widely distributed drafts and final copies, including to all of the relevant Capella people, and to criminal justice people in Oregon. In the Acknowledgements section, Plaintiff has identified his major sources and influences, such that no reader will be misled about where he stands on criminal justice issues. His “conservative” views, experience as a practitioner, and deep theoretical and practical knowledge of American Criminal Justice, distinguish him from the apparent Left-leaning views of the second Mentor, and appear to have contributed to his problems with her. Such bias is not within the bounds of academic discretion, but constitutes arbitrary, capricious, irrational, and retaliatory behavior, which is all too common in today’s academia. Cf. Shields, J. and Dunn, J. (2016). *Passing on the Right: Conservative Professors in the Progressive University*. Oxford University Press. Wright, J.P. and DeLisi, M. (2016). *Conservative Criminology: A call to restore balance to the social sciences*. New York: Rutledge.

### **Conclusion**

For all of the above reasons, the judgment below should be reversed, and the case remanded for trial. Plaintiff invites the Court, win or lose, if it has a sense of humor and justice, to print the dissertation as a footnote or appendix to its decision, and let 9<sup>th</sup> Circuit readers decide for themselves its value.

At the very least, Plaintiff, since Capella denies/disclaims there is a contract, should receive a judgment that Plaintiff does not owe to Capella the \$698 it seeks through collection.

Respectfully submitted:

/s/ \_\_\_\_\_

Alan L. Gallagher, Pro se, In forma pauperis.

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**Certificate of Service**

I hereby certify that true copies of this document were served upon Defendants, by e-mail, directed to their attorneys, on the 11th day of April 2021.:

Erin Burris. Erin.burris@millernash.com

P.K. Runkles-Pearson, P.K.Runkles-Pearson@millernash.com

**Certificate of Compliance.**

This document is in 12- point New Roman type, and contains c. 4162 words.

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Alan L. Gallagher

Certificate of Likeness

The Court has ordered that Appellant mail six copies of his opening brief to the Court, with certification that they are alike to original filed electronically. Four duplicate copies were mailed to the Court on Monday April 12, 2021. Two more copies were mailed April 15. It is so certified.

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Alan L. Gallagher