DURIE TANGRI LLP
DARALYN J. DURIE (SBN 169825)
ddurie@durietangri.com
DAVID McGOWAN (SBN 154289)
dmcgowan@durietangri.com
JESSICA E. LANIER (SBN 303395)
jlanier@durietangri.com
CATHERINE Y. KIM (SBN 308442)
ckim@durietangri.com
217 Leidesdorff Street
San Francisco, CA 94111
Telephone: 415-362-6666
Facsimile: 415-236-6300

Attorneys for Defendants
BOARD OF TRUSTEES OF THE
CALIFORNIA STATE UNIVERSITY
and CHANCELLOR TIMOTHY WHITE

(*Additional counsel continued on following page*)

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

AKAYLA MILLER, individually and on behalf of all others similarly situated,

Plaintiff,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY and TIMOTHY WHITE, individually and in his capacity as Chancellor of the California State University

Defendants.

Case No. 2:20-cv-03833-SVW-SK

DEFENDANTS BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY AND CHANCELLOR TIMOTHY WHITE'S NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 24, 2020
Time: 1:30 p.m.
Ctrm: 10A
Judge: Honorable Stephen V. Wilson

DURIE TANGRI LLP
MICHAEL J. PROCTOR (SBN 148235)
mproctor@durietangri.com
ANDREW ESBENSHADE (SBN 202301)
aesbenshade@durietangri.com
953 East 3rd Street
Los Angeles, CA 90013
Telephone: 213-992-4499
Facsimile: 415-236-6300

CALIFORNIA STATE UNIVERSITY
OFFICE OF GENERAL COUNSEL
SUSAN WESTOVER (SBN 151211)
swestover@calstate.edu
WILLIAM HSU (SBN 108922)
whsu@calstate.edu
BRIAN VILLARREAL (SBN 234690)
bvillarreal@calstate.edu
MICHAEL T. TAM (SBN 260056)
mtam@calstate.edu
401 Golden Shore
Long Beach, CA 90802-4210
Telephone: 562-951-4500
Facsimile: 562-951-4956

Attorneys for Defendants
BOARD OF TRUSTEES OF THE
CALIFORNIA STATE UNIVERSITY
and CHANCELLOR TIMOTHY WHITE

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on Monday, August 24, 2020, at 1:30 p.m., or as soon thereafter as the matter may be heard, in Courtroom 10A of the above-entitled court, located at 350 W. 1st Street, Los Angeles, Defendants Board of Trustees of The California State University ("CSU") and Chancellor Timothy White ("Chancellor White"), will and hereby do move pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for an order dismissing Plaintiff Akayla Miller's ("Miller") First Amended Class Action Complaint ("FAC") filed on July 14, 2020.

CSU and Chancellor White move to dismiss the FAC on the grounds that the Court lacks jurisdiction over CSU and that the FAC fails to state a claim for relief against either CSU or Chancellor White.

This Motion is based upon this Notice of Motion and Memorandum of Points and Authorities in support thereof, pleadings on file in this matter, the arguments of counsel, and all other material which may properly come before the Court at or before the hearing on this Motion. This Motion is made following the conference of counsel pursuant to Local Rule. 7-3, which took place on June 23, 2020, as well as on other dates.

Dated: July 27, 2020

DURIE TANGRI LLP

By: 

DARALYN J. DURIE

Attorneys for Defendants
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY and CHANCELLOR TIMOTHY WHITE

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND 3

A. CSU 3

B. Plaintiff's Claims Against CSU 5

C. Plaintiff's Claims Against Chancellor White 7

III. ARGUMENT 7

A. Legal Standards 8

B. CSU Is Immune From Suit In This Court 8

C. Plaintiff's Allegations Plead No Claim Under § 1983 11

1. The FAC Pleads No Property Right 11

a. Plaintiff's fee relationship with CSU is governed by statute, not common law 11

b. The common law does not support Plaintiff's Constitutional claims 12

2. The FAC Pleads No Deprivation of Process 14

3. The FAC Pleads No Seizure of Property 16

4. Plaintiff Pleads No Claim Against Chancellor White 17

5. Plaintiff's Declaratory, Injunctive, and Fee Claims Should Be Dismissed 20

D. Plaintiff's Allegations Plead No Common Law Claims 20

1. Breach of Contract 21

2. Unjust Enrichment 22

3. Conversion 22

IV. CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Angelotti Chiropractic, Inc. v. Baker,
791 F.3d 1075 (9th Cir. 2015) 12

Arizona Students' Ass'n v. Ariz. Bd. of Regents,
824 F.3d 858 (9th Cir. 2016) 10, 17

Arizonans for Official English v. Ariz.,
520 U.S. 43 (1997) 2, 10

Board of Regents of State Colls. v. Roth,
408 U.S. 564 (1972) 11

City & Cty. of San Francisco v. Regents of Univ. of Cal.,
7 Cal. 5th 536, 545 (2019) 8

City & Cty. of San Francisco v. Sheehan,
135 S. Ct. 1765 (2015) 2, 18

Cole v. Oroville Union High Sch. Dist.,
228 F.3d 1092 (9th Cir. 2000) 10

Dalewood Holding LLC v. City of Baldwin Park,
No. 2:19-cv-1212-SVW, 2019 WL 7905901 (C.D. Cal. Oct. 17, 2019) 14, 15

Daniels-Hall v. Nat'l Educ. Ass'n,
629 F.3d 992 (9th Cir. 2010) 1

DeBoer v. Pennington,
287 F.3d 748 (9th Cir. 2002) 15, 16

Doyle v. City of Medford,
606 F.3d 667 (9th Cir. 2010) 11

Fordan v. San Francisco State Univ.,
No. 17-cv-02949-JCS, 2017 WL 5194511 (N.D. Cal. Nov. 9, 2017) 10

Fowler v. Guerin,
899 F.3d 1112 (9th Cir. 2018) 9, 10

Frew ex rel. Frew v. Hawkins,
540 U.S. 431 (2004) 10

Frost v. Trs. of Cal. State Univ. & Colls.,
46 Cal. App. 3d 225 (1975) 14

Gilbert v. Homar,
520 U.S. 924 (1997) 15

Gorlach v. Sports Club Co.,
209 Cal. App. 4th 1497 (2012) 21

Grey Fox, LLC v. Plains All Am. Pipeline, L.P.,
No. CV 1603157 PSG, 2020 WL 1272613 (C.D. Cal. Jan. 28, 2020) 10

Guatay Christian Fellowship v. Cty. of San Diego,
670 F.3d 957, 983 (9th Cir. 2011) 14, 15

Harris v. Rudin, Richman & Appel,
74 Cal. App. 4th 299 (1999) 21

Hartford Casualty Insurance Co. v. J.R. Marketing, L.L.C.
61 Cal. 4th 988 (2015) 13, 22

Hines v. Youseff,
914 F.3d 1218 (9th Cir.), *cert. denied sub nom. Smith v. Schwarzenegger*,
140 S. Ct. 159 (2019) 18

Ivey v. Bd. of Regents of Univ. of Alaska,
673 F.2d 266 (9th Cir. 1982) 19

Jachetta v. United States,
653 F.3d 898 (9th Cir. 2011) 10

Jackson v. Hayakawa,
682 F.2d 1344 (9th Cir. 1982) 1, 8

Jacobson v. Commonwealth of Mass.,
197 U.S. 11 (1905) 17

*James v. Global Tel*Link Corp.*,
No. 13-4989, 2020 WL 998858 (D.N.J. Mar. 2, 2020) 16

Klein v. Chevron U.S.A., Inc.,
202 Cal. App. 4th 1342 (2012), *as modified on denial of reh'g* (Feb. 24, 2012) 12, 21, 22

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 16

Lacey v. Maricopa Cty.,
693 F.3d 896 (9th Cir. 2012) 18

Lee v. Bd. of Trs. of the Cal. State Univ., Fullerton,
No. 2:15-cv-01713-CAS(PLAx), 2015 WL 4272752 (C.D. Cal. July 14, 2015) 8

Leen v. Thomas,
No. 2:12-cv-01627-TLN, 2020 WL 1433143 (E.D. Cal. Mar. 23, 2020), *appeal docketed*, No. 20-15768 (9th Cir. Apr. 23, 2020) 19

Lopez v. Washington Mut. Bank, F.A.,
No. 1:09-CV-1838 AWI, 2010 WL 1558938 (E.D. Cal. Apr. 19, 2010) 20

Lujan v. G & G Fire Sprinklers, Inc.,
532 U.S. 189 (2001) 2, 15

McBride v. Boughton,
123 Cal. App. 4th 379 (2004) 13

McGill v. Regents of Univ. of Cal.,
44 Cal. App. 4th 1776 (1996) 14

McKell v. Washington Mut., Inc.,
142 Cal. App. 4th 1457 (2006) 22

Miller v. Schoene,
276 U.S. 272 (1928) 16, 17

Moore v. Regents of Univ. of Cal.,
51 Cal. 3d 120 (1990) 22

Mousa v. Los Angeles Sheriff's Dep't,
No. CV 19-7607-AB, 2019 WL 6917885 (C.D. Cal. Dec. 19, 2019) 19

North E. Med. Servs., Inc. v. Dep't of Health Care Servs.,
712 F.3d 461 (9th Cir. 2013) 9

Papasan v. Allain,
478 U.S. 265 (1986) 17

Paracor Fin., Inc. v. Gen. Elec. Capital Corp.,
96 F.3d 1151 (9th Cir. 1996) 14, 22

Raygor v. Regents of Univ. of Minn.,
534 U.S. 533 (2002) 2, 10

San Bernardino Physicians' Servs. Med. Grp., Inc. v. San Bernardino Cty.,
825 F.2d 1404 (9th Cir. 1987) 7, 12

Sato v. Orange Cty. Dep't of Educ.,
861 F.3d 923 (9th Cir. 2017) 8

Scott v. Harris,
550 U.S. 372 (2007) 18

Suever v. Connell,
439 F.3d 1142 (9th Cir. 2006) 9

Swenson v. File,
3 Cal. 3d 389 (1970) 12

Taylor v. Westly,
402 F.3d 924 (9th Cir. 2005) 8, 9

Tuuamalemalo v. Greene,
946 F.3d 471 (9th Cir. 2019) 18

United States v. Sperry Corp.,
493 U.S. 52 (1989) 16

Voris v. Lampert,
7 Cal. 5th 1141 (2019), *reh'g denied* (Oct. 23, 2019) 2, 8, 13, 23

White v. Pauly,
137 S. Ct. 548 (2017) 18

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989) 2, 10, 17

Wood v. Moss,
572 U.S. 744 (2014) 8

Zumwalt v. Trs. of Cal. State Colls.,
33 Cal. App. 3d 665 (1973) 11

Statutes

42 U.S.C. § 1983 ..... *passim*

Cal. Civ. Code § 1085(a) 14

Cal. Civ. Code § 1621 21

Cal. Code Regs. Title 5, § 41802 ..... *passim*

Cal. Code Regs. Title 5, § 41802(e)(2) 4, 11, 12

Cal. Educ. Code § 66010.4(b) 3

Cal. Educ. Code § 89700(a) 3, 11

Cal. Educ. Code § 89722(a) 3

Cal. Educ. Code § 89724(a)(3) 3, 10

Cal. Educ. Code § 87900 3

Cal. Educ. Code § 89721 3

Cal. Gov't Code § 811.2 3

Other Authorities

5 Witkin, *Summary of Cal. Law* § 815 (11th ed. 2020) 22

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants Board of Trustees of the California State University ("CSU") and Chancellor Timothy White ("Chancellor White") move to dismiss the First Amended Class Action Complaint ("FAC") filed by Plaintiff on the grounds that the Court lacks jurisdiction over CSU and that the FAC fails to state a claim for relief against either CSU or Chancellor White.

I. INTRODUCTION

CSU is part of the State of California. In addition to tuition (which is not at issue in this case), CSU charges certain mandatory fees that vary by campus. CSU's official fee policy states that these mandatory fees are paid to "enroll in or attend the university."[1] Pursuant to statutory authority, CSU issued regulations governing the standards and procedure for issuing fee refunds. Those regulations are codified at section 41802 of Title 5 of the California Code of Regulations. Plaintiff Akayla Miller has not sought a refund under that provision. She filed this lawsuit instead.

Plaintiff's claims arise from CSU's response to the COVID-19 pandemic, a response that was mirrored by every level of government. *E.g.*, FAC ¶¶ 8, 28–32. Plaintiff originally filed only common-law claims against CSU. Recognizing that CSU is immune from suit in this Court, however, *e.g.*, *Jackson v. Hayakawa*, 682 F.2d 1344, 1350–51 (9th Cir. 1982), Plaintiff has now filed the FAC. It attempts to restyle her contract, unjust enrichment, and conversion claims as constitutional claims. Plaintiff now alleges she has a property right in an unspecified amount of her Spring 2020 mandatory fees. FAC ¶¶ 50–52. She alleges due process and takings claims under 42 U.S.C. § 1983, and dependent claims for declaratory judgment and injunctive relief.

Plaintiff's attempt to constitutionalize her common-law claims does not create

[1] https://calstate.policystat.com/policy/7459727/latest/. Information made publicly available on a website maintained by a government entity is judicially noticeable. *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of list of approved vendors on public school district websites where "it was made publicly available by government entities").

jurisdiction over CSU: CSU is immune from suit under the Eleventh Amendment and not a "person" under § 1983. *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64, 71 n.10 (1989). Nor does it create supplemental jurisdiction over CSU with respect to Plaintiff's common-law claims. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541 (2002).

Substantively, Plaintiff's purported federal claims rest on an alleged property right in "that portion of the mandatory fees for which [Plaintiff] received no benefit." FAC ¶¶ 90, 117. The law recognizes no such property interest. Plaintiff's fee obligations and refund claims are governed by statute, not common law, and the statutes do not create a property interest. Moreover, under the common law there is no property right in an alleged contractual debt. *E.g.*, *Voris v. Lampert*, 7 Cal. 5th 1141, 1151 (2019), *reh'g denied* (Oct. 23, 2019). Rights in intangible property such as money do not vest absent (i) a present possessory interest to (ii) specific, individually identified funds. *Id.* Plaintiff does not, and cannot, allege such an interest.

Plaintiff's § 1983 due-process claim also fails because the governing regulations, codified in section 41802, establish a mandatory procedure to seek refunds; Plaintiff has elected not to use that procedure. Her claims are therefore unripe and, even were that not the case, the common law provides constitutionally adequate process. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001). Plaintiff's takings claim fails for the additional reason that retention of funds voluntarily paid is not a seizure and thus not a taking, and because general governmental action to stop a pandemic is not a taking, either. Plaintiff's claims against Chancellor White in his official capacity should be dismissed for these same reasons. Plaintiff's claims against Chancellor White in his personal capacity should also be dismissed for these reasons and because he enjoys qualified immunity under § 1983. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015).

Finally, the FAC misses the elements of its common-law claims. Most notably, Plaintiff alleges no promise that mandatory fees would be apportioned by use, and Plaintiff ignores the text of the fee policy that states otherwise.

II. BACKGROUND

A. CSU

CSU is a "public entity" under California law. Cal. Gov't Code § 811.2. It is the largest four-year university system in the United States, with 23 campuses stretching from Humboldt to San Diego. FAC ¶ 13. CSU is a legislative creation, subject to legislative control, to achieve a specific legislative purpose. Cal. Educ. Code § 66010.4(b); *cf.* FAC ¶ 13. By statute, CSU is governed by the Board of Trustees, FAC ¶ 16, which has statutory authority to set fee and refund policies. *Id.* California Education Code section 89700(a), referenced in paragraph 50, note 12 of the FAC, provides CSU authority to set fees and rules governing refunds.

The California Education Code governs CSU's custody of revenues it receives. *E.g.*, FAC ¶ 50 n.12. Education Code section 89721 provides that the chief fiscal officer of each CSU campus must deposit revenues received pursuant to Education Code section 89700 in local trust accounts, a state trust account established under the Government Code, or the CSU Trust Fund. *Id.* The CSU Trust Fund is part of the State Treasury, Cal. Educ. Code § 89722(a), and the State Controller may borrow from it. *Id.* § 89722(b). California Education Code section 89724(a)(3) provides that revenues received pursuant to Education Code Section 89700 "shall be appropriated for the support of the California State University . . . ." *Id.* § (a). The State also funds CSU. FAC ¶ 23.

CSU has different categories of fees. *See* FAC ¶ 24 n.4 (linking to fees table). Category I Fees include tuition, which is a system-wide fee that is identical for each campus. Plaintiff does not challenge these fees. *Id.* ¶ 27 n.6. This case concerns Category II fees, which are "mandatory fees that must be paid to enroll in or attend the university."[2] These fees vary by campus, but are mandatory for all students at the applicable campus.[3] They do not vary according to student use of particular facilities or

[2] https://calstate.policystat.com/policy/7459727/latest/.

[3] Category III fees are tied to specific programs; Category IV fees are tied to student consumption of materials or services. Unlike Category II fees, these fees vary by student.

services. The FAC does not allege that a student who failed to pay a campus mandatory fee would be allowed to enroll in or attend CSU, or that a student could pay less than the mandatory fee in return for agreeing not to use a particular service.

Pursuant to its statutory authority under Education Code section 89700, in 1976 CSU established a regulation governing refund of tuition and of the mandatory fees at issue in this case. FAC ¶ 54. Codified at Title 5 of the California Code of Regulations, section 41802, the regulation states in relevant part:

> Tuition and mandatory fees may be refunded if the student or an authorized representative petitions the university for a refund demonstrating exceptional circumstances and the chief financial officer of the university or designee makes a determination that the tuition and mandatory fees have not been earned by the university.[4]

Cal. Code Regs. tit. 5, § 41802(e)(2).

Owing to the COVID-19 crisis, on March 4, 2020, Governor Newsom declared a state of emergency to combat the virus. FAC ¶ 30. A national emergency was declared on March 13, 2020. *Id.* ¶ 31. On March 19, 2020, Governor Newsom issued a statewide shelter-in-place order. *Id.* ¶ 32. CSU began holding classes through remote communication rather than in person. *Id.* ¶ 35. The FAC alleges that most, but not all, students were unable to return to campuses. *Id.*

On March 19, 2020, CSU issued an interim refund policy. FAC ¶ 54 & n.13.[5] This policy sets forth guidelines for refunds. In relevant part it states:

> These guidelines have as principles that refund policies are fair to students, recognize financial obligations including debt service, and should not jeopardize the financial sustainability of essential functions.
>
> The framework below is based on the principle that the CSU will refund fees for materials, services, and facilities for which students have paid but that the

[4] Under section 41802, refunds also may be paid if a student cancels registration, fees were collected in error, a course for which fees were paid is cancelled, a student was ineligible to enroll, or a student was activated for compulsory military service. Full or partial refunds may also be paid when a student withdraws.

[5] Paragraph 54 mistakenly alleges the policy was dated March 25. The policy itself, hyperlinked in FAC footnote 13, is dated March 19.

> CSU is unable to provide. In addition, the CSU will waive cancellation and penalty fees associated with changes resulting from circumstances associated with COVID-19.
>
> * * * *
>
> All campuses plan to continue for the foreseeable future to provide academic credit for courses taken and delivered by alternative means, therefore refunds of tuition and other campus mandatory fees are not warranted.
>
> Tuition and other campus mandatory fees will not be refunded except as provided for by campus refund policies and procedures consistent with Title 5 CCR § 41802.

FAC ¶ 54 & n.13. Plaintiff did not seek a refund pursuant to section 41802.

B. Plaintiff's Claims Against CSU

Plaintiff alleges that anti-COVID measures eventually required, in "most cases," that students take classes remotely and not return to campus. *Id.* ¶ 35. Plaintiff's claims do not extend to tuition or housing, however. *Id.* ¶ 27 n.6. Instead, she alleges that, "campus services, if available at all, were extremely limited and substantially different than what had been paid for with the mandatory fees." *Id.* ¶ 38.

Plaintiff alleges that mandatory fees are "paid solely to cover the cost of certain on-campus services, facilities, and materials which are no longer available to students," *id.* ¶ 41, but she alleges no good faith basis for this conclusion. The text of CSU's fee policy states that mandatory fees are paid "to enroll in or attend the university." *See supra* note 3. The FAC does not allege that mandatory fees were based on individual uses by individual students. Nor does Plaintiff allege that all students used all services equally. The FAC instead alleges that such fees were flat for the semester and thus were invariant to use. FAC ¶ 24 & n.4. A student who visited the health center every day and a student who never used it at all paid the same mandatory fees.

The FAC alleges that mandatory fees are "earmarked" for certain purposes, *id.* ¶ 23, but it alleges no facts explaining this allegation nor any facts pertaining to any specific set

of students or any specific fee. For example, one fee listed is "Health Facilities," *id.* ¶ 24(a), yet the FAC does not allege that any health facility on any campus closed or that any student tried to go to a health facility but was turned away. Similarly, the FAC lists "Student Association" fees, *id.* ¶ 24(f), separate from "Student Center" fees, *id.* ¶ 24(g), but the FAC does not allege that student associations dissolved or ceased providing services. As a final example, the FAC lists "Instructionally Related Activities" and "Student Success" fees, *id.* ¶¶ 24(c) & (e), but does not allege for what these fees are supposedly "earmarked" and does not allege that any student was denied any such "earmarked" benefit. The FAC does not allege that, by following COVID-19 related government orders, CSU avoided any costs associated with such services.

Critically, the FAC pleads no statutory basis of Plaintiff's alleged entitlement to fees. It instead alleges that the common law recognizes a property right "that an *owner* of funds" holds "in an account managed by another," FAC ¶ 50 (emphasis added), and that the common law has a rule against unjust enrichment. *Id.* ¶ 51. It alleges that these two rules combine to create "a protected property right in all sums that [Plaintiff] paid to the CSU system for which [she] received nothing in return." *Id.* ¶ 52; *see also id.* ¶¶ 90, 106, Req. for Relief (b).

The FAC does not allege that any student had an individual account holding their fees. It does not allege that students had a present possessory interest in any funds paid as fees, nor does it allege that students had individually identified interests of any kind in such fees. To the contrary, as noted above, the FAC alleges that fees were deposited in either local (campus-specific) or general CSU accounts. FAC ¶ 50 n.12. The FAC does not allege that these accounts contained only revenue from the challenged fees.

Plaintiff asks that the Court order CSU to pay students "that portion of the mandatory fees for which they received no benefit," but does not allege any specific amount of fees she claims is owed. *Id.* ¶¶ 90, 106, 117. Plaintiff seeks only retrospective payment, pertaining to the "Spring 2020" semester. *Id.* ¶ 111. Plaintiff does not, and could not, allege that each of CSU's 23 campuses operates on semesters. Plaintiff does

not, and could not, allege that the shift to remote instruction occurred after the deadlines provided to seek refunds at all campuses.

C. Plaintiff's Claims Against Chancellor White

The FAC alleges that Chancellor White has statutory power to oversee the CSU system. FAC ¶ 16. It alleges that he was among the CSU officials who issued orders to combat COVID-19, and that he had "exclusive authority" over the amount and timing of payments to CSU campuses. *Id.* ¶ 96. Yet the FAC cites California Education Code section 89700, FAC ¶ 50 n.12, which provides that the *Board of Trustees* has authority to set, by rule, the amount, timing, and manner of paying fees. As noted above, section 41802 of Title 5 of the California Code of Regulations governs refund requests. Plaintiff does not allege that she presented such a request or that the Chancellor denied it.

III. ARGUMENT

CSU is immune from suit under the Eleventh Amendment. Its immunity extends to Plaintiff's dependent declaratory relief and injunctive claims and to her common-law claims. CSU is not a "person" for purposes of 42 U.S.C. § 1983. Each of these rules bars Plaintiff's claims against Chancellor White in his official capacity as well, in part because Plaintiff seeks no prospective injunctive relief but only retrospective damages. Plaintiff alleges no facts against Chancellor White on her common-law claims.

Apart from these immunity doctrines, the law creates no property right relevant to Plaintiff's claims. Refunds at CSU are governed by statute, not common law; the relevant statutes create no such right. Even if the common law governed, California does not recognize a property right in an alleged contractual debt. If allowed, Plaintiff's new claims would convert every contract dispute with a government entity into a due process or takings case. That is not the law. "It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *San Bernardino Physicians' Servs. Med. Grp., Inc. v. San Bernardino Cty.*, 825 F.2d 1404, 1408 (9th Cir. 1987).

Finally, Plaintiff's claims against Chancellor White in his personal capacity are

meritless. Plaintiff alleges no facts against him on her common-law claims, no facts showing that he denied her any refund—in part because Plaintiff never sought a refund—and he in any event enjoys qualified immunity from liability.

A. Legal Standards

"A sovereign immunity defense is 'quasi-jurisdictional' in nature and may be raised in either a Rule 12(b)(1) or 12(b)(6) motion." *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 927 n.2 (9th Cir. 2017). Under each rule, well-pleaded factual allegations are assumed to be true; legal assertions are not. *E.g.*, *Wood v. Moss*, 572 U.S. 744, 755 n.5 (2014).

B. CSU Is Immune From Suit In This Court

CSU and its campuses are part of the State of California; under the Eleventh Amendment they are immune from suit in this Court. *Jackson*, 682 F.2d at 1350 ("The district court was correct in characterizing the California State College and the university system of which California State University at San Francisco is a part as dependent instrumentalities of the state."); *Lee v. Bd. of Trs. of the Cal. State Univ., Fullerton*, No. 2:15-cv-01713-CAS(PLAx), 2015 WL 4272752, at *8 (C.D. Cal. July 14, 2015) ("CSUF is part of the California State University system. Therefore, a suit against CSUF—whether for damages or injunctive or declaratory relief—is categorically barred."); *City & Cty. of San Francisco v. Regents of Univ. of Cal.*, 7 Cal. 5th 536, 545 (2019) (observing CSU system is an agency of the state government).

The FAC attempts to plead an exception to Eleventh Amendment immunity, citing Ninth Circuit cases involving escheat or its functional equivalent. FAC ¶ 64. For example, *Taylor v. Westly*, 402 F.3d 924, 931 (9th Cir. 2005), involved escheat pursuant to a statute under which escheated property was held in a custodial trust for the owners. The property was "like a car that is towed and held in an impound lot. The car is in the

custody of the impounding government, but it is held for its owner, if one turns up." *Id.*[6] The "extremely narrow Eleventh Amendment 'exception'" adopted in *Taylor* was limited to a state's custodial possession of property with a specifically identifiable owner. *North E. Med. Servs., Inc. v. Dep't of Health Care Servs.*, 712 F.3d 461, 467 (9th Cir. 2013); *id.* at 469 ("In certain cases, the Eleventh Amendment does not bar a suit to recover property in a state's possession, or funds held by the state arising from the sale of seized property."). The court in *North East Medical Services* affirmed immunity against a claim that California had "seized" a portion of fees paid to the state because no law required the funds to be held "in a custodial trust." *Id.*

Fowler v. Guerin, 899 F.3d 1112 (9th Cir. 2018), which Plaintiff also cites, FAC ¶ 64, applied the same rule. The state in that case acted as custodian for individual schoolteacher retirement accounts. The teachers had control over the funds in the accounts; the plaintiffs in *Fowler* had shifted their funds from one retirement plan to another. 899 F.3d at 1115. Though the funds in each account earned interest, when the teachers changed plans the state kept the interest earned prior to the transfer. *Id.* The *Fowler* court specifically addressed state appropriation of "interest income earned on an interest-bearing account . . . ." *Id.* at 1118. The court followed *Taylor*, held that the state acted as custodian for those accounts, and affirmed that "[m]oney that the state holds in custody for the benefit of private individuals is not the state's money, any more than towed cars are the state's cars." *Id.* at 1120. *Fowler* did not involve or address a claim for a refund of fees of any kind, much less the fees at issue here, which were paid to enroll by a student who did enroll.

Plaintiff does not—and could not—allege that CSU acts as a custodian for funds held for the benefit of students when it collects mandatory fees. Plaintiff does not—and could not—allege that students have individual possessory interests in "unused" fees or

[6] *Suever v. Connell*, 439 F.3d 1142 (9th Cir. 2006), similarly involved escheat under an unclaimed property law that provided the state provisional title to property subject to the right of owners to appear and claim it. *Id.* at 1144.

that interest on such funds belongs to students. Instead, funds collected pursuant to Education Code section 89700, cited in FAC ¶ 50 n.12, are "appropriated for the support of the California State University." Cal. Educ. Code § 89724(a)(3). The Ninth Circuit's custodial exception therefore does not apply.

CSU's immunity extends to Plaintiff's § 1983 claim. *Arizonans for Official English*, 520 U.S. at 69 ("§ 1983 actions do not lie against a State."); *Will*, 491 U.S. at 64, 71 n.10; *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1100 n.4 (9th Cir. 2000) (state not subject to § 1983 damages claim); *Jachetta v. United States*, 653 F.3d 898, 909–10 (9th Cir. 2011) (§ 1983 takings claim barred); *Fordan v. San Francisco State Univ.*, No. 17-cv-02949-JCS, 2017 WL 5194511, at *15 (N.D. Cal. Nov. 9, 2017) ("the California State University system, of which SFSU is a part, is a 'dependent instrumentalit[y] of the state' and therefore not a 'person' within the meaning of § 1983") (alteration in original) (citation omitted).

CSU's immunity extends to all claims seeking monetary relief, however captioned. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("Federal courts may not award retrospective relief, for instance, money damages or its equivalent, if the State invokes its immunity."); *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 865 (9th Cir. 2016) ("sovereign immunity bars money damages and other retrospective relief against a state or instrumentality of a state"); *Grey Fox, LLC v. Plains All Am. Pipeline, L.P.*, No. CV 1603157 PSG, 2020 WL 1272613, at *6 (C.D. Cal. Jan. 28, 2020) (distinguishing *Fowler* and explaining: "A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money." (citations omitted)). Plaintiff seeks retrospective monetary relief for Spring 2020. FAC ¶ 40. CSU's immunity therefore extends to Plaintiff's claims for declaratory judgment and for injunctive relief, which seek a declaration and injunction to pay money for past conduct and thus are mislabeled damages claims.

Lastly, CSU's immunity extends to all claims resting on supplemental jurisdiction as well. *Raygor*, 534 U.S. at 541 ("[W]e cannot read § 1367(a) to authorize district courts

to exercise jurisdiction over claims against nonconsenting States . . . ."). CSU therefore should be dismissed from the case entirely.

C. Plaintiff's Allegations Plead No Claim Under § 1983

Even if CSU were not immune to suit, the FAC fails to plead facts sufficient to state a claim under § 1983.

1. The FAC Pleads No Property Right

The Fifth Amendment creates no property interests. It protects interests defined by independent sources such as state law. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577–78 (1972). Plaintiff's theory is that the common law recognizes a property right "that an *owner* of funds" holds "in an account managed by another," FAC ¶ 50 (emphasis added), and thus a property right in "that portion of the mandatory fees for which they received no benefit." FAC ¶¶ 90, 117. Plaintiff is not an owner of fees she paid and, accordingly, she has no property right in them.

a. Plaintiff's fee relationship with CSU is governed by statute, not common law

California Education Code section 89700(a) authorizes CSU to charge fees and to enact rules governing payment. CSU exercised that statutory authority to enact the refund regulation codified at California Code of Regulations, Title 5, section 41802(e)(2), which is legally binding on Plaintiff. *Zumwalt v. Trs. of Cal. State Colls.*, 33 Cal. App. 3d 665, 675 (1973) ("Rules of an administrative agency implementing a statutory delegation of authority have the force of law.").[7] Plaintiff does not allege that section 41802 creates a property right, nor could she. "A regulation granting broad discretion to a decision-maker does not create a property interest." *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010). Instead, to count for Constitutional purposes, "[t]he property interest must be vested. In other words, if the property interest is contingent and uncertain or the receipt of

[7] Plaintiff includes a conclusory assertion that CSU's actions were *ultra vires*, FAC ¶ 65, but pleads no facts to support it. Plaintiff does not allege that she sought refunds under section 41802. She instead alleges that CSU stated it would apply that policy to refund claims. *Id.* ¶ 54.

the interest is speculative or discretionary, then the government's modification or removal of the interest will not constitute a . . . taking." *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015) (internal quotation marks omitted) (second alteration in original) (citations omitted).

Section 41802 does not meet this standard. It provides that "fees ***may*** be refunded ***if*** the student or an authorized representative petitions the university for a refund," demonstrates "exceptional circumstances," ***and*** CSU determines that the fees were not earned. Cal. Code Regs. tit. 5, § 41802(e)(2) (emphases added). Because section 41802 confers discretion rather than a vested interest it creates no property right. Plaintiff's claims for declaratory and injunctive relief should be dismissed, as should her § 1983 claim.

b. The common law does not support Plaintiff's Constitutional claims

Plaintiff also fails to plead facts establishing a property interest under the common law. With respect to contract law, as noted above, the mandatory fees at issue were paid to enroll and attend CSU and Plaintiff did in fact enroll and attend. FAC ¶ 12. Plaintiff points to no contractual basis for asserting a balance of "unused" fees.

Moreover, an alleged contractual debt is not a property interest cognizable under § 1983. If that were the case then every alleged breach of contract with a state entity would create a property interest cognizable under § 1983. The law is otherwise. *San Bernardino Physicians' Servs. Med. Grp., Inc.*, 825 F.2d at 1408.

Lastly, the terms of section 41802 are part of any contract Plaintiff could plead. "As a general rule, all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have had in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated." *Klein v. Chevron U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1386 (2012), *as modified on denial of reh'g* (Feb. 24, 2012) (citing *Swenson v. File*, 3 Cal. 3d 389, 393 (1970) (internal quotation marks omitted) (internal citation omitted)).

As shown above, section 41802 creates no property right and, in fact, establishes that Plaintiff had no vested right to fees once they have been paid.

Plaintiff's pleading failures not only distinguish the Ninth Circuit's custodial trust cases, FAC ¶ 64, they also confirm that Plaintiff has no property interest. The rules of conversion prove the point. Under California law, a "plaintiff has no claim for conversion merely because the defendant has a bank account and owes the plaintiff money." *Voris*, 7 Cal. 5th at 1152 (citation omitted). Instead:

> [M]oney cannot be the subject of an action for conversion unless a specific sum capable of identification is involved . . . . A cause of action for conversion of money can be stated only where a defendant interferes with the plaintiff's *possessory interest* in a specific, identifiable sum; the simple failure to pay money owed does not constitute conversion.

Id. at 1151 (internal quotation marks omitted) (citations omitted). *Voris* holds that unpaid wages are not property that may be converted. Plaintiff's claims to "that portion of the mandatory fees for which [she] received no benefit," FAC ¶ 11, assert no possessory interest and no specific, identifiable sum. Her claims are weaker than the claim for conversion of unpaid wages rejected in *Voris.*

Nor can Plaintiff create a cognizable property interest by claiming unjust enrichment. Properly speaking, unjust enrichment is not a right at all. *McBride v. Boughton*, 123 Cal. App. 4th 379, 387 (2004) ("Unjust enrichment is not a cause of action, however, or even a remedy, but rather 'a general principle, underlying various legal doctrines and remedies. It is synonymous with restitution.'") (citations omitted). *Hartford Casualty Insurance Co. v. J.R. Marketing, L.L.C.* holds that a claim for restitution "is not mandated merely because one person has realized a gain at another's expense. Rather, the obligation arises *when the enrichment obtained lacks any adequate legal basis* and thus 'cannot conscientiously be retained.'" 61 Cal. 4th 988, 998 (2015) (emphasis added) (citation omitted). Plaintiff does not allege that CSU "obtained" her fees wrongly, and section 41802 is the "legal basis" governing CSU's retention of fees.

Moreover, Plaintiff explicitly pleads her unjust enrichment claim as based on

contract: She alleges she "did not receive the full benefit of [her] bargain, while Defendants continue to retain those fees." FAC ¶ 103. Plaintiff's unjust enrichment claim is thus subordinate to her contract claim and creates no property interests for the same reasons her contract claims create no such interest. *See, e.g.*, *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) ("Under both California and New York law, unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties.").

Plaintiff's first, second, fifth, and sixth claims—for declaratory relief, violation of § 1983, conversion, and injunctive relief—should be dismissed because they all presume a property right that does not exist.

2. The FAC Pleads No Deprivation of Process

"To obtain relief on § 1983 claims based upon procedural due process, the plaintiff must establish the existence of (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Dalewood Holding LLC v. City of Baldwin Park*, No. 2:19-cv-1212-SVW, 2019 WL 7905901, at *4 (C.D. Cal. Oct. 17, 2019) (quoting *Guatay Christian Fellowship v. Cty. of San Diego*, 670 F.3d 957, 983 (9th Cir. 2011) (internal quotation marks omitted)). The preceding section showed that Plaintiff cannot meet the first element. This section shows that Plaintiff cannot meet the second or third.

The FAC pleads no deprivation of process. Section 41802 of Title 5 of the California Code of Regulations, discussed above, provides for an administrative process, and California law provides for writ review of that process to determine whether a decision was arbitrary or capricious. Cal. Civ. Proc. Code § 1085(a); *Frost v. Trs. of Cal. State Univ. & Colls.*, 46 Cal. App. 3d 225, 229 (1975); *McGill v. Regents of Univ. of Cal.*, 44 Cal. App. 4th 1776, 1786 (1996) ("[W]hen review is sought by means of ordinary mandate the inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support").

Plaintiff alleges that a March 2020 notice from CSU was vague and devoid of

process. FAC ¶ 59. But the FAC alleges that this notice explicitly referenced Title 5 of the California Code of Regulations, section 41802. *Id.* ¶ 54. Plaintiff does not challenge section 41802 as lacking process, nor could she. Plaintiff does not allege she attempted to withdraw. Nor does she allege she filed a petition, either during or after the Spring 2020 term, that identified the exceptional circumstances she believed warranted a refund. Plaintiff has elected to ignore the refund process established by regulation, but that does not mean she has been denied process. *Cf. Gilbert v. Homar*, 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). Plaintiff's refusal to use the established regulatory process does mean, however, that her claim is unripe. As this Court held in *Dalewood Holding LLC*, "[w]e cannot offer the Plaintiffs relief until 'the administrative body issues its final definitive position regarding how it will apply the regulations at issue to the particular land in question.'" 2019 WL 7905901, at *4, (citation omitted).[8]

Even if Plaintiff's claims are treated as contractual rather than statutory, contract law provides adequate process for alleged injuries to contractual interests. *Lujan*, 532 at 195 ("Because we believe that California law affords respondent sufficient opportunity to pursue that claim in state court, we conclude that the California statutory scheme does not deprive [plaintiff] of its claim for payment without due process of law."). Under *Lujan*, "the common law breach of contract claim provides adequate process for the deprivation of a property right derived from a contract, unless the deprivation constitutes a denial of a present entitlement." *DeBoer v. Pennington*, 287 F.3d 748, 750 (9th Cir. 2002). A

[8] Plaintiff's attempt to dodge their ripeness problem by alleging that it would be "futile" to use the process CSU provided. FAC ¶ 60. But "futility" in this context is limited to "conditions that make the process itself impossible or highly unlikely to yield governmental approval of the [outcome] that claimants seek—such as government obstinacy or where the only governmental body to which claimants can appeal is unable to authorize claimants' desired [outcome]." *Dalewood Holding LLC*, 2019 WL 7905901 at *4 (quoting *Guatay Christian Fellowship*, 670 F.3d at 981). Plaintiff alleges no such facts. She appears to complain that section 41802 is not expansive enough to satisfy her claims, but that is a substantive rather than a procedural argument.

"present entitlement" means "a right by virtue of which [one is] presently entitled either to *exercise ownership dominion* over real or personal property, or to pursue a gainful occupation." *Id*. (emphasis added) (citation omitted). As noted above, Plaintiff does not, and could not, allege such facts.

3. The FAC Pleads No Seizure of Property

To "take" property within the meaning of the Fifth and Fourteenth Amendments means to deprive an owner of that property against her will. No case holds that a voluntary payment in exchange for a benefit (here enrollment at a CSU campus) is a "taking" by the government. Thus, by way of analogy, "[i]t is beyond dispute that . . . user fees . . . are not 'takings'. . . ." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013) (third alteration in original). Instead, "taken" within the meaning of the Fifth Amendment, "implies legal compulsion, not a lack of reasonably priced options . . . ." *James v. Global Tel*Link Corp.*, No. 13-4989, 2020 WL 998858, at *3 (D.N.J. Mar. 2, 2020).

Plaintiff does not allege that CSU "took" mandatory fees in the first instance. Her theory is that the failure to *refund* "sums that [students] paid to the CSU system for which they received nothing in return," FAC ¶ 52, is a taking. No case so holds, and *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989), forecloses that theory. There the Court held that, even when the government does simply deduct a fee regardless of a party's desire, the "Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *Id.* at 60. Plaintiff's proportionality claim therefore fails as a matter of law.

In addition, general public health measures do not constitute takings. For example, in *Miller v. Schoene*, 276 U.S. 272 (1928), the Court denied a constitutional challenge to a Virginia statute requiring the destruction of trees infected with a contagious disease, even though the statute did not provide compensation for the value of the trees cut down. The Court agreed that the state had to choose between allowing the contagion to spread or destroying infected trees. It held "the state does not exceed its constitutional powers by

deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.* at 279. *Accord Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 27 (1905) ("Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.") (upholding mandatory vaccination order).

Plaintiff alleges a general closure of public spaces to deal with the public health crisis of COVID-19. That closure was not limited to CSU nor did it target CSU. Plaintiff—and everyone else—was similarly barred from going to a gym for which she might have paid in advance, or from going to an office for which she might have paid rent in advance. To accept Plaintiff's contention that a statewide public health order is a taking of allegedly unused fees is to imply that all retail tenants may sue the government for pro-rata refunds of their rent, that all health club members may sue for pro-rata refunds of their fees, and that the clubs themselves (and every Starbucks, movie theater, airline, and bar) may sue the government for harm to their businesses. That is not the law.

4. Plaintiff Pleads No Claim Against Chancellor White

The FAC names CSU's Chancellor, Timothy White, in both his official and personal capacity. In his official capacity, Chancellor White is not susceptible to suit under § 1983. A "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . . As such, it is no different from a suit against the State itself." *Will*, 491 U.S. at 71. Though in principle a state official may be sued in his official capacity for prospective injunctive relief, that principle does not apply to the retrospective monetary relief Plaintiffs seek here. *E.g.*, *Papasan v. Allain*, 478 U.S. 265, 278 (1986) ("Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."); *Ariz. Students' Ass'n*, 824 F.3d at 865. The Court therefore should dismiss all claims against Chancellor White on the same grounds as pertain to CSU.

As to claims against Chancellor White in his personal capacity, "[p]ublic officials are immune from suit under 42 U.S.C. § 1983 unless they have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *Sheehan*, 135 S. Ct. at 1774 (citation omitted). "Qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . .'" *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (citation omitted), and it "'represents the norm' for government officials exercising discretionary authority . . . ." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 915 (9th Cir. 2012) (citation omitted).

Plaintiff's personal claims against Chancellor White therefore must allege facts showing: (i) the existence of the claimed right; (ii) that it was clearly established; and (iii) that he violated that right. These three elements are typically combined into a two-part test. The Court asks whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendant's] conduct violated a constitutional right," and "whether the right was clearly established." *Lacey*, 693 F.3d at 915 (citations omitted) (first alteration in original). The Court has discretion over which element to consider first. Plaintiff's claims against Chancellor White should be dismissed for each of three independent reasons.

First, as shown above, Plaintiff had no property right in fees paid to CSU.

Second, even if such a right might potentially exist, it was not (and to this day is not) clearly established. "A right is clearly established if it was 'sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right.' That is, the issue must have been 'beyond debate.' In determining what is clearly established, we must look at the law 'in light of the specific context of the case, not as a broad general proposition.'" *Hines v. Youseff*, 914 F.3d 1218, 1229 (9th Cir.), *cert. denied sub nom. Smith v. Schwarzenegger*, 140 S. Ct. 159 (2019) (citations omitted) (internal footnotes omitted); *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) ("Existing precedent must have placed the constitutional question beyond debate.") (citations omitted); *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) ("The

right must be settled law, meaning that it must be clearly established by controlling authority or a robust consensus of cases of persuasive authority.").

The specific context pleaded in the complaint is comprised of: (i) voluntary payments to CSU; (ii) pursuant to statutory authority given to CSU to set both fees and refund policies; (iii) of a mandatory fee to enroll and attend CSU, not tied to use of any service or facility; (iv) with no student right to present possession or control of fees once paid; (v) the absence of individualized accounts holding individualized balances of "unused" fees; (vi) the exercise of national and statewide powers to combat a pandemic, which Plaintiff alleges rendered her unable to avail herself of some unspecified number of CSU services; and (vii) the failure to return an unspecified amount of fees where Plaintiff failed to allege she utilized the refund process CSU put in place pursuant to its statutory authority. No case finds a property right on such facts. Plaintiff therefore fails to allege the existence of a clear right, and the FAC's claims against Chancellor White should be dismissed on that ground. *Cf. Leen v. Thomas*, No. 2:12-cv-01627-TLN, 2020 WL 1433143, at **7–8 (E.D. Cal. Mar. 23, 2020), *appeal docketed*, No. 20-15768 (9th Cir. Apr. 23, 2020) (dismissing on qualified immunity grounds a complaint alleging interference with an amendment to a water license).

Third, Plaintiff's allegations against the Chancellor are too conclusory to withstand dismissal. Plaintiff "must instead set forth specific facts as to each individual defendant's deprivation of protected rights:" "[s]weeping conclusory allegations will not suffice . . . ." *Mousa v. Los Angeles Sheriff's Dep't*, No. CV 19-7607-AB, 2019 WL 6917885, at *2 (C.D. Cal. Dec. 19, 2019) (internal quotation marks omitted) (citation omitted); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.").

Plaintiff alleges that Chancellor White had overall responsibility for oversight of systemwide fees, FAC ¶ 17, but by law the authority to set fees and refund regulation was vested in the Board under Education Code section 89700, not in Chancellor White. And

the specific refund regulation at issue here, section 41802 of Title 5 of the California Code of Regulations, was adopted in 1976; the FAC does not and could not allege that Chancellor White adopted it. Finally, as noted above, Plaintiff has not sought a refund and thus has not been denied, and certainly not by Chancellor White.

5. Plaintiff's Declaratory, Injunctive, and Fee Claims Should Be Dismissed

The legal deficiencies set forth above compel dismissal of Plaintiff's first cause of action, which seeks a declaration based on the premise that she has property rights that were taken without due process. FAC ¶ 79. They compel dismissal of Plaintiff's § 1983 claim, which rests on the same premises, *id.* ¶ ¶ 85–90, and of Plaintiff's claim for an injunction, which seeks retrospective monetary relief based on the same premises. *Id.* ¶ 117. Injunction is a remedy, not a claim. *Lopez v. Washington Mut. Bank, F.A.*, No. 1:09-CV-1838 AWI, 2010 WL 1558938, at *9 (E.D. Cal. Apr. 19, 2010) ("Under Federal law, an injunction is a remedy to another claim or cause of action and not a claim or cause of action in and of itself. Similarly, under California law, a claim or cause of action for an injunction is improper because an injunction is a remedy, not a cause of action.") (internal citations omitted).

Plaintiff's seventh claim for relief is no claim at all; it is a request for fees resting on the "common fund" doctrine. FAC ¶¶ 119–20. The claim should be dismissed on that ground alone, but the allegation is telling: The escheat exception to immunity applies only to specific, individualized property owned by specific persons in custodial accounts where it is held for their benefit. Return of such property would not create a common fund, and Plaintiff's concession that she seeks a common fund is an admission both that she has no property interest to allege and that her claims are disguised damages claims that do not lie against either CSU or its Chancellor.

D. Plaintiff's Allegations Plead No Common Law Claims

Because Plaintiff's federal claims presume a property right in an alleged contractual debt, there is an overlap between those claims and the elements of Plaintiff's common law

claims. Those claims suffer from additional and independent deficiencies, however, which we demonstrate briefly in this section.[9]

1. Breach of Contract

As noted above, Plaintiff's fee relationship with CSU is governed by statute, not common law. At a minimum, California Code of Regulations, Title 5, section 41802 is part of any contract that might be deemed to exist, *Klein*, 202 Cal. App. 4th at 1386, and its terms therefore govern Plaintiff's refund claim. Plaintiff pleads no violation of that section.

To plead a breach of contract, Plaintiff must specify the term breached. That is true for agreements reflected in writings, *Harris v. Rudin, Richman & Appel*, 74 Cal. App. 4th 299, 307 (1999) ("If the action is based on alleged breach of a written contract, the terms must be set out verbatim in the body of the complaint or a copy of the written agreement must be attached and incorporated by reference."), and contracts implied in fact are no different. Their terms may be manifested by conduct, Cal. Civ. Code § 1621, but they still must be specified to allege breach. "An implied contract . . . in no less degree than an express contract, must be founded upon an ascertained agreement of the parties to perform it, the substantial difference between the two being the mere mode of proof by which they are to be respectively established." *Gorlach v. Sports Club Co.*, 209 Cal. App. 4th 1497, 1507 (2012) (internal quotation marks omitted) (citation omitted).

Plaintiff alleges that CSU "stopped providing services for which the fees were intended to pay." FAC ¶ 98. But Plaintiff alleges no writing or conduct by which CSU promised that mandatory fees would be tied to student use. Plaintiff alleges that fees were "earmarked," *id.* ¶ 1, but it does not follow that they were use fees. Nothing in the terms "success fee," or "instructional activities fee" or "student association fee" promises some

[9] Plaintiff does not specify that her common-law claims are against only CSU, but she alleges a contract with CSU, not Chancellor White, FAC ¶ 95, and she does not allege that Chancellor White personally was unjustly enriched or took possession of unearned fees. Plaintiff appears not to intend to assert these claims against him, and in any event fails to do so.

sort of *pro rata* fee, and the facts that the fees are (i) summed into (ii) a single flat rate that (iii) must be paid by students regardless of use, negates any such promise. Instead, CSU's fee policies state that mandatory fees "must be paid to enroll or attend the university." Plaintiff does not allege that she was unable to do either.[10] She therefore fails to allege breach.

2. Unjust Enrichment

As noted above, Plaintiff's fee relationship with CSU is governed by statute, not by the common law, and the statutes provide the "legal basis" for CSU's retention of fees, *cf. Hartford Cas. Ins. Co.*, 61 Cal. 4th at 998, and Plaintiff's unjust enrichment claim is merely a rewording of her contract claim. FAC ¶ 103 (alleging unjust enrichment based on denial of full benefit of a bargain). Moreover, because section 41802 is by law part of any contract Plaintiff could allege, *Klein*, 202 Cal. App. 4th at 1386, even assuming *arguendo* that she states a contract claim, that claim undercuts her unjust enrichment claim. Inchoate concepts such as unjust enrichment do not displace either statutes or contractual terms. *E.g.*, *Paracor Fin., Inc.*, 96 F.3d at 1167.

3. Conversion

"To establish a conversion, plaintiff must establish an actual interference with his *ownership* or *right of possession* . . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 136 (1990) (citation omitted). "Money cannot be the subject of conversion unless a specific, identifiable sum is involved." 5 Witkin, *Summary of Cal. Law* § 815 (11th ed. 2020); *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1492 (2006) ("Plaintiffs cite no authority for the proposition that a cause of action for conversion may be based on an overcharge. Consequently, they have failed to demonstrate that they have stated a cause of action for

[10] Plaintiff complains that classes were moved online, FAC ¶ 98, but the FAC does not challenge any fees that contributed to instruction: it seeks return of fees only that are "tangential to and distinct from instructional services . . . ." *Id.* ¶ 23; *see also id.* ¶ 27 n.6.

conversion.").

As noted above, a contractual debt—even one as individualized and specific as unpaid wages—does not satisfy these criteria. Plaintiff's allegations that an unspecified portion of mandatory fees should be returned are less specific than those found wanting in *Voris*, 7 Cal. 5th at 1151, and Plaintiff's conversion claim therefore should be dismissed.

IV. CONCLUSION

This case does not belong in this Court. At this point, the only apparent reason this case remains here is that re-filing in State court would force Plaintiff to move to the end of the line of filed cases. But Plaintiff's attempt to constitutionalize her common law claims to avoid that result is not a productive use of the Court's time. This is not an escheat case, CSU did not seize Plaintiff's fees, and she steadfastly refuses to seek a refund under the CCR provision governing refunds. Presumably that is because she cannot meet the legal requirements set forth in section 41802, but that failure does not turn fees she willingly paid to CSU into the equivalent of a car held in a county tow lot. That inapt analogy is the only thread from which Plaintiff seeks to dangle this case, and it is too thin and too weak to hold the weight.

For the foregoing reasons, this case should be dismissed, with prejudice.

Dated: July 27, 2020

DURIE TANGRI LLP

By: _____

DARALYN J. DURIE

Attorneys for Defendant
BOARD OF TRUSTEES OF THE
CALIFORNIA STATE UNIVERSITY

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2020 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

DARALYN J. DURIE