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SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY

HENRIQUE LAVALLE DA SILVA FARIA,

Faria,

vs.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant.

CASE NO. RG20056679

ASSIGNED FOR ALL PURPOSES
TO JUDGE JULIA SPAIN
DEPT. 520

PLAINTIFF HENRIQUE LAVALLE DA SILVA FARIA'S OPPOSITION TO DEMURRER

Date: January 6, 2021
Time: 2:00 p.m.
Dept: 520
Demurrer Reservation No.: R-2218404
Motion to Strike Reservation No.: R-2218415

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I. Introduction

As the First Amended Complaint (FAC) alleges with detailed facts, Defendant and its agents repeatedly bungled and then abandoned their duty to comply with federal regulations so Plaintiff Henrique Faria (Faria), an LL.M. foreign student at Berkeley Law, could lawfully remain in the U.S. FAC ¶¶ 6-102. The consequences for Faria were devastating: Agents of U.S. Immigration and Customs Enforcement ("ICE") arrested him, handcuffed him, shackled him, and escorted him—shackled and handcuffed—to a plane bound for Brazil (FAC ¶¶ 80 and 134).

For Faria, his deportation was a fall from a mountain top, one he had just scaled. Against long odds, Faria's performance at Berkeley Law won him his dream job with Ernst & Young ("E&Y"). FAC ¶¶ 96-97. He had rented and furnished an apartment in Manhattan where he would start work at E&Y's headquarters in July 2018. He is now deep in debt on loans to pay the steep tuition and living costs to attend Berkeley Law and rent an apartment in Manhattan near the job he never started (FAC ¶ 103), with a wound to his psyche that may never heal.

The magnitude of Faria's loss is only matched by the degree of Defendant's neglect. Its agents did not merely commit a single blunder, as Defendant's attorneys would have the Court believe. The blunders began when Defendant gave Faria and U.S. Citizenship and Immigration Service ("CIS") different dates for same deadline to file an application to extend his visa, which are routinely granted in Faria's circumstances. Defendant's agents set May 6, 2018 with CIS as Faria's deadline, but instructed him the date was May 9.

But that was only the start. Since only Defendant's agents knew the correct deadline, only they could correct it. Over the next three months, they violated their duty to monitor Faria's status. Had they looked once, they would have seen CIS blinking a bright red light: it had not received Faria's application to extend his visa, which meant it would be denied. Still, Defendant had two months after CIS blinked red to save Faria's job and even more time—after it discovered its blunders—to salvage his career. FAC ¶ 87. Instead, it did nothing. Defendant's agent told Faria (i) UC could not spare the money to salvage his career (FAC ¶ 101) and (2) he should stop fighting and return to Brazil. That advice got Faria him arrested and deported.

The complaint alleges nine causes of action against Defendant in contract and tort. Each count arises out of the same basic facts: violations by Defendant and its agents of federal regulations that caused ICE to arrest and deport Faria. One case, *Dalgic v. Misericordia Univ.*, 2019 U.S. Dist. LEXIS 111203, at *61 (M.D. Pa. 2019), did a deep-dive into the same regulations in granting the summary judgment of Plaintiff Dalgic, also a foreign student. Dalgic missed the same deadline, because the university gave him the wrong application fee.

In general, Defendant has seized scraps from the FAC while ignoring the detailed factual allegations that are the basis of each cause of action. It ignores binding case law and statutes that undermine its contentions. Other claims rest on unstated and erroneous legal premises. To shoehorn Faria's response into 15 pages, we will not include the boilerplate authorities defining that burden and standard the Court must apply in ruling on a demurrer.

II. The Case's Procedural History: No Court Has Ruled on Any Issue Raised by the FAC

No court has ruled on any issue raised by the FAC or this dispute. Since these claims involve federal regulations, Faria originally filed a complaint with the U.S. District Court for the Northern District of California. Defendant asserted its rights under the Eleventh Amendment to the U.S. Constitution not to be sued in the U.S. courts. On that basis, the District Court granted Faria's voluntary dismissal without prejudice, so the case could be refiled with this Court.

III. The Meet-and-Confer Process Left Open Issues Still Unaddressed by Defendant

The statement by Defendant's counsel regarding the meet-and-confer process is incomplete. The discussions extended through October, as the issues were further defined. For the most part, Defendant's demurrer does not address those sharpened issues. See Declaration of Gary J. Aguirre filed herewith ("Aguirre Dec.").

IV. Federal Regulations Mandated Defendant to Manage Faria's Visa Status

Berkeley Law's LL.M. program is one of U.C. Berkeley's Self-Supporting Graduate Professional Degree Programs, which means taxpayers pay nothing. These programs are profit centers; students pay what the market will bear. In this way, Berkeley Law operates as a for-profit educational institution. FAC ¶¶ 19-23. It draws applicants from across the globe. Lured by the promise of a law degree from Berkeley Law, these LL.M. students subsidize the law school's

budget beyond the costs of their education. FAC ¶ 21. An LL.M. student pays $60,000 for a nine-month program, while a J.D. candidate pays less than half: $27,000. FAC ¶ 23. In short, Defendant invokes the immunity statutes to shield its for-profit operations.

Bringing foreign students to study in the U.S. is a mixed bag. On the one hand, Congress has long valued (i) the diversity foreign students bring to U.S. universities, (ii) the prestige they bestow on U.S. universities by their choices, (iii) their economic contributions to support U.S. universities, and (iv) the addition of skilled workers to the U.S. economy.[1] On the other hand, bringing foreign students to the U.S. poses security risks. To contain those risks, while still attracting foreign students to U.S. universities, two Department of Homeland Security ("DHS") subagencies—CIS and ICE—monitor and control their arrival, stay, and departure.

To admit foreign students, a U.S. university must first be certified under the Student and Exchange Visitor Program ("SEVP"). This authorizes an academic institution, such U.C. Berkeley, to accept international students with an F-1 visa. FAC ¶ 54. The procedures Defendant ***must*** follow are codified in 8 C.F.R. §§ 214.2, and 214.3 (FAC ¶¶ 59, 61-63, 66, 87-87), *including the deadlines at issue in this case in 8 C.F.R.§ 214.2(f)(11).* FAC ¶ 61.

At the core of SEVP is the Student and Exchange Visitor Information System ("SEVIS"), the secured system U.C. Berkeley uses to communicate with CIS and ICE. FAC ¶¶ 58-59. CIS defines SEVIS as "a web-based system for maintaining information on international nonimmigrant students and exchange visitors in the United States. It is the core technology for the DHS in this critical mission."[2] Defendant's duties to manage its SEVIS records are referenced 158 times in 8 C.F.R. § 214.2. The FAC alleges Defendant breached these mandatory duties, *including those that set the deadlines in 8 C.F.R. § 214.2(f)(11).* FAC 61-67.

All SEVP-certified institutions, including U.C. Berkeley, must employ an authorized Designated School Official ("DSO"). FAC ¶¶ 57-58. The DSO's duties are defined in 8 C.F.R. §§ 214.2 through 214.4. FAC ¶¶ 66 and 87. The 137 references to the DSO in 8 C.F.R. § 214.2

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[1] See CRS Report RL31146, *Foreign Students in the United States: Policies and Legislation*, by Chad C. Haddal, Ex. 1 to Faria's Req. for Judicial Notice ("RJN") filed herewith ("CRS Report").
[2] See "What is SEVIS," available at https://www.ice.gov/sevis. Last visited Dec. 21, 2020.

underscore the DSO's critical role in carrying out DHS regulations. DHS also provides DSOs a step-by-step description how to execute their duties in the DHS User Manual for School Users ("DSO Manual").[3] FAC ¶ 59. U.C.'s DSO violated those regulations and the DSO Manual in setting conflicting deadlines through SEVIS with CIS (May 6, 2018) and on the Form I-20 delivered to Faria.

Under DHS regulations, international students who have completed at least two semesters as fulltime students holding an F-1 visa, such as Faria, are eligible to work in the U.S. in their field of study for a period of twelve months through a program known as Optional Practical Training ("OPT"). OPT must relate directly to the student's major area of study. To participate, eligible students need to apply to CIS for an Employment Authorization Document ("EAD"). FAC ¶ 53. CIS routinely grants an EAD to participate in OPT to students who graduate from an SEVP-certified institution and obtain a job offer in the U.S., provided their applications are timely submitted to CIS. In submitting its application for SEVP certification, Defendant certifies under 8 C.F.R. § 214.3(a)(1)(ii) that UC. Berkeley will comply with all federal regulations in processing EAD applications, such as the one it processed for Faria. FAC ¶ 57.

When a U.C. DSO recommends a student for OPT, U.C. assumes the responsibility to accurately maintain the student's SEVIS record for the entire period of the authorized OPT. 8 C.F.R. § 214.2 (f)(11)(ii). DHS requires U.C. Berkeley to immediately report any error regarding the student's status to ICE upon its discovery. FAC ¶ 58. For U.C. Berkeley to provide OPT to a student, its DSO must follow the procedures specified by 8 C.F.R. § 214.2(f)(10) through (13), *including the timelines in 8 C.F.R. § 214.2(f)(11)*. The DSO Manual also specifies how a DSO must comply with these regulations in Chapter 21.5. FAC ¶ 61. *See* RJN, Ex. 4.

Subsection 214.2 (f)(11) defines the responsibilities of both the DSO and the student. It requires the student to "initiate the OPT application process by requesting a recommendation for OPT from his or her DSO." It specifies the time window: "90 days prior to his or her program

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[3] Last visited on De. 21, 2020, the DSO Manual is available at https://www.ice.gov/sites/default/files/documents/Document/2016/School_UM_Vol2_0.pdf.

end date" and "no later than 60 days after his or her program end date." Faria timely submitted his OPT application to BIO on April 4, 2018. FAC ¶ 82.

After the student initiates the OPT process, § 214.2 (f)(11) directs the DSO to take the next two steps: "*Upon making the recommendation*, the DSO will provide the student a signed Form I-20 *indicating that recommendation* (emphasis added)." Simply put: (1) the DSO first enters the recommendation on SEVIS, thereby triggering the running of the 30-day period for the student to deliver the I-20 to CIS and (2) the DSO then delivers the completed Form I-20 to the student "indicating that recommendation." 8 C.F.R. § 214.2(f)(11)(i). The DSO Manual specifies the same process. The DSO must: (i) review the student's submittal, (ii) save the OPT request, *which submits it to USCIS*, (iii) print the OPT request; (iv) sign the Form I-20; and (v) give the printed Form I-20 to the student. FAC ¶ 81. Again, *Dalgic*, *supra*, explains this process.

Only the DSO and CIS know when the DSO entered the recommendation on SEVIS. Hence, only they know when the 30 days begin to run and end. Students have no access to SEVIS. The Form I-20 does explicitly set a deadline. Faria's Form I-20 (FAC Ex. 12) shows the DSO began processing it on Friday, April 6, 2018, but did not complete it until Monday, April 9. For that reason, Faria's Form I-20 had two different dates. Even if § 214.2(f)(11) was silent on whether the DSO had a duty to inform the student of the deadline, rules of statutory construction would require the DSO to inform the student of the deadline. Otherwise, the section would be absurd, since the student would have no knowledge of the deadline. See: *Quintano v. Mercury Cas. Co.*, 11 Cal. 4th 1049, 1060 (1995)("Our canons of statutory construction guide us to reject an interpretation that would produce such an absurd result.")

But § 214.2(f)(11) is not silent. Rather, it states what the DSO must do before making any recommendation on SEVIS that triggers the running of the 30 days. Subsection 214.2(f)(11) expressly states the DSO—in this case U.C. Berkeley's DSO—"***must ensure*** … ***the student is aware of the student's responsibilities for maintaining status while on OPT."*** Obviously, the first and most critical factor Faria must know is the deadline for him to deliver his Form I-20 to CIS. So, what did U.C.'s DSO do to comply with the mandate in § 214.2(f)(11) that the DSO "must ensure" Faria was "aware" of the deadline to submit his Form I-20 to CIS? Defendant set

the deadline for Faria to file his Form I-20 with CIS for May 6, but gave Faria the date of May 9. That error is not merely alleged. The FAC quotes the letter of BIO Director Ivor Emanuel, who supervised Faria's DSO, that BIO and the DSO gave Faria the wrong date.

In particular, FAC ¶ 89 alleges, Director Emmanuel admitted in his August 30, 2018, letter to E&Y (FAC Ex. 15):

> As an F-1 nonimmigrant international student, Henrique recently sought Optional Practical Training (OPT) employment authorization through the USCIS that would permit him to join your organization. Unfortunately, an erroneous slide on a powerpoint [*sic*] presentation provide instructions to students on how to complete the application contributed to the denial of Henrique's application for OPT. We deeply regret this error and are taking several steps to assist Henrique in this very unfortunate situation.

FAC ¶ 90 further alleges, "In a second letter dated August 31, 2018 [FAC Ex. 16], to CIS, Director Emmanuel explained BIO's error more precisely:

> Henrique was following the guidelines provided by the Berkeley International Office. On page 16 of the instructional materials (OPT Tutorial Powerpoint [*sic*]presentation - attached) a box with instructions erroneously pointed to the date page two of the I 20 as the deadline date by which students needed to have their completed application at USCIS.

Finally, FAC ¶ 91 alleges: "Director Emmanuel was referring to the following instruction and illustration at page 16 of the Tutorial, which identifies the page and line number of the I-20 Certificate of Eligibility that sets the last day of the 30-day window during which Faria could timely file his EAD application with USCIS:"

OPT applications must be received by USCIS no later than 30 days after this date. Please see an advisor at BIO if there are concerns that the application will not arrive on time.

At this point in Faria's Form I-20, the date was "4/9/2018," which started the running of the 30-day window that ended on May 9, 2018.

But this was just the first of multiple failures by U.C. Berkeley's DSO to follow the mandates in 8 C.F.R. § 214.2 (f)(10)-(13) and Chapter 21.5 of the DSO Manual. Subsection

214.2(f)(11)(ii) imposes another mandatory duty on U.C. Berkeley's DSO: "When a DSO recommends a student for OPT, the school assumes the added responsibility for maintaining the SEVIS record of that student for the entire period of authorized OPT." "A DSO who recommends a student for OPT is responsible for updating the student's record to reflect these reported changes for the duration of the time that training is authorized." 8 C.F.R. § 214.2(f)(12)(i).

Had the DSO checked Faria's SEVIS record just once during the two-month period from May 7 to July 9, 2018, she would have discovered Faria's SEVIS had not changed to "pending." This meant CIS had not received his EAD application (I-765) or Form I-20. On this point, the DSO Manual states at 268: "Upon receipt of the I-765, USCIS issues a Receipt Notice (Form I-797), which contains the receipt number assigned to the case. ***Through an interface with USCIS, the status of the OPT request in SEVIS changes to Pending*** (emphasis added)." RJN Ex. 4.

If Faria's EAD application had timely arrived with CIS on May 6, its status would have been updated to "pending" on SEVIS. Had U.C.'s DSO checked the status on SEVIS at any time between May 7 and July 9, the DSO would have known Faria's Form I-20 had not timely arrived. The DSO still had another 62 days to submit a correction to CIS within the 60-day window specified by § 214.2(f)(11), which did not begin to run until May 9, 2018. In short, Defendant could easily have saved Faria's job with Ernst & Young and his career. FAC ¶ 87.

Defendant did not notify Faria of any issue regarding his EAD or the status of his EAD application on SEVIS until July 24, 2018, when BIO notified Faria:

> We are contacting you because your SEVIS record shows that your OPT Application has been in **requested** status for over 90 days. This can mean that you did not submit your OPT application, that there has been some delay in processing your OPT request, or that USCIS has not accurately updated your status in SEVIS.

That notice came 15 days too late. Defendant *again* failed to inform Faria that SEVIS indicated his Form I-20 had not timely arrived and thus his EAD application would be denied. FAC ¶ 88.

Still, as alleged in the FAC, there were multiple options available, even at this late date, to salvage Faria's career, though not his job at E&Y, and avoid his arrest and deportation in shackles and handcuffs. For example, Berkeley Law could have readmitted him for the fall semester, which would have allowed him to re-apply later for OPT. In *Dalgic, supra*, the

university made this option available to its student as an interim solution after the university's negligence (wrong fee amount) caused his EAD application to arrive late, and CIS to deny it. (2019 U.S. Dist. LEXIS 111203, at *14). Instead, U.C. Berkeley notified Faria it would provide no further assistance because of the cost. FAC ¶¶ 99-102, 116, 125-126, 131-132, 148-149.

V. Defendant's Groundless Claim It Is Immune under Common Law

Defendant makes sweeping and erroneous contentions that the FAC is subject to demurrer because Faria "does not specify how the purported failure to identify the correct date on his documents violated any constitutional right." Even the cases Defendant cites refute its contention: *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600 (2015) recognizes this defense does not exist if the government agency violated a *statutory* or constitutional right that was clearly established at the time of the challenged conduct. Each of Faria's claims is based on statutes well established at the time of the conduct.

Faria's contractual rights are codified in five titles of the Civil Code, including Title 2 (§§ 1619-1633), which codifies the law for "Manner of Creating Contracts." Nor can this contention be reconciled with the holding in *Kashmiri v. Regents of University of California*, 156 Cal.App.4th 809 (2007) or *Moen v. Regents of Univ. of Cal.*, 25 Cal.App.5th 845 (2018). Neither even mentioned this theory, despite holding Defendant could be liable for implied-in-fact contracts with employees (*Moen*) and students (*Kashmiri*). Nor is there any appellate decision among thousands involving Defendant where any Court has even addressed this contention.

Likewise, Faria's tort claims are clearly anchored in statute. Each tort cause of action is either based on (i) Civil Code § 815.2(a), which imposes liability on "a public entity for an injury proximately caused by an act or omission of an employee," or (ii) Civil Code § 815.6, which imposes liability on a public entity for breach of a mandatory duty based on an enactment.

VI. The FAC's Negligence Causes of Action Are Not Subject to Demurrer

A. Defendant's Violation of a Mandatory Duty Is Not Subject to Immunity

At two points in its Memorandum of Points and Authorities (MPA), Defendant argues it has no liability under the mandatory duty exception created by Gov. Code § 815.6. First, it argues the Court "should dismiss the FAC with prejudice," citing *Brown v. Compton Unified School*

Dist., 68 Cal.App.4th 114 (1998). MPA at 6, ll. 9-11. In a four-page decision, *Brown* upheld a trial court judgment in favor of the agency based on Gov. Code § 818.8. *Brown* never mentions Gov. Code § 815.6. Defendant therefore assumes Gov. Code § 818.8 somehow trumps the separate exception to immunity under § 815.6. Neither *Brown* nor Defendant offers a clue why Gov. Code §§ 818.8 and 815.6 should be read this way. Nor do we have a clue. If Defendant reserved this argument for its reply, Plaintiff will seek leave to file a surrebuttal.

Defendant also argues (1) Faria has not identified an enactment containing a mandatory duty and, if he did so, (2) the enactment is permissive, not mandatory, and (3) it was not designed to protect Faria. MPA at 11-14. These contentions ignore FAC allegations.

On the first point, FAC ¶ 61 alleges Defendant "must follow the mandatory procedures established by 8 C.F.R. §214.2(f)(10) through (13), ***including the timelines set forth in 8 C.F.R.§ 214.2(f)(11)***. The step-by-step process the DSO must follow, as contemplated by these mandatory procedures, ***is set forth in Chapter 21.5 of the SEVIS User Manual*** (emphasis added)." See: *Alanniz v. Barr*, 924 F.3d 1061, 1065 (2019)(Courts "defer to an agency's interpretation of its own regulation when that interpretation is neither clearly erroneous nor inconsistent with the regulation.") Faria was relying on § 214.2(f)(11) as the basis for the mandatory duty exception. Aguirre Decl. ¶ 9. As stated above, § 214.2(f)(11) and the DSO Manual are the bases for Defendant's mandatory duty.

Second, there is nothing "permissive" in the regulations or the DSO Manual on the issue before the Court. Both § 214.2(f)(11) and the DSO Manual mandate Defendant to deliver a Form I-20 with an accurate deadline to the student for obvious reasons. When Defendant's DSO gave Faria the wrong deadline, Faria was arrested, handcuffed and deported, leaving his job, career, and life in shambles. Neither § 214.2(f)(11) nor the DSO Manual gave U.C. Berkeley that discretion. As discussed above, both mandated U.C. Berkeley to *accurately* (i) maintain SEVIS and (ii) deliver a Form I-20 to Faria and, to that end, guided it step by step through the process.

Third, and finally, Defendant argues § 214.2 does not impose a mandatory duty, because it was not "'designed to protect against the risk of a particular kind of injury' Faria alleges" and the benefits to him were merely "incidental." This contention raises a simple question: who benefits

by a regulation requiring a university to give a student the correct date to file his Form I-20? On its face, § 214.2(f)(11) protects legitimate foreign students in the U.S. This regulation implements federal statutes that balance the public interest (i) in bringing foreign students to the U.S. against (ii) the risk that some of them turn out to be terrorists. *See* CRS Report, RJN, Ex. 1. This dual policy is also reflected by the DHS mission statement insuring "its regulatory initiatives are aligned with its guiding principles to develop human resources." *See* Defendant's RJN, Ex. F. In any case, the right to be free from arrest and deportation is hardly "incidental," at least as Websters' defines it: "occurring merely by chance or without intention or calculation."

B. Defendant Is Vicariously Liable under Gov. Code § 815.2

Defendant argues Faria did not adequately allege Defendant is vicariously liable, citing FAC ¶¶ 131 through 144. These paragraphs are in the summary sections of the Third and Fourth Causes of Actions. In ¶¶ 128 and 135, both causes of action incorporate the detailed and specific allegations of ¶¶ 1 through 108, which repeatedly identify the agents and specific offices whose acts constituted the negligence. For example, those allegations refer 31 times to the DSO and 49 times to the BIO office as the actors. The FAC also alleges 11 times the employees and agents were acting within the scope of their employment or agency with Defendant. Notably, Defendant's counsel never raised this issue at any time during the meet-and-confer sessions.

Defendant also contends (i) it is immune under Gov. Code § 818.8 for misrepresentations by any of its employees and (ii) its employees are immune under Gov. Code § 822.2 for the same, citing the four-page decision in *Brown*, *supra*, 68 Cal.App.4th 114. As alleged in the FAC, there is a threshold issue whether there is any ground to involve § 818.8. The DSO began to process the Form I-20 on April 6 and delivered it to Faria on April 9. It is equally plausible she prematurely set the deadline through SEVIS on April 6, before she completed processing it, then correctly gave the Form I-20 to Faria when it was completed, as the FAC alleges in ¶ 149. Faria respectfully submits this issue of fact cannot be determined on the pleadings.

As before, Defendant also overlooked controlling authority, *Johnson v. State of Cal.*, 69 Cal. 2d 782, 800 (1968). In reasoning equally applicable here, the Supreme Court narrowed the meaning of "misrepresentation" in the context of § 818.8 to an "invasion of interests of a

financial or commercial character, in the course of business dealings." The Supreme Court found the Senate Committee on Judiciary Comment to § 818.8 confirmed its "interpretation" by giving the following example: "This section will provide . . . a public entity with protection against possible tort liability where it is claimed that an employee negligently misrepresented that the public entity would waive the terms of a construction contract requiring approval before changes were made." 69 Cal.2d at 800 (1968).

Assuming the DSO did not err by prematurely setting the deadline over SEVIS for May 6, the issue under *Johnson* is whether the "invasion of interests" was to "the interest of a financial or commercial character, in the course of business dealings." It was not. The "misrepresentation" to Faria invaded his right to be in the U.S. lawfully. When he lost that right, ICE could and did arrest, handcuff, shackle, and deport him. The deportation and humiliation at the hands of ICE was the invasion. It resulted in other damages: lost job, damage to his career and emotional scars.

This is similar to the harm to plaintiff in *Johnson*, where the agency employee misrepresented the background of a minor to his foster parents. The minor assaulted his foster mother; she sued the agency for her damages. *Johnson* distinguished this personal invasion from the Senate example where the "invasion" was to a "financial interest," i.e., money due under a contract. The same distinction exists here: the invasion was to a personal interest that caused other damages.

VII. Plaintiff May Recover Damages Under His Breach of Contract Claims

A. Defendant's Meritless Contentions of Immunity from Contract

Defendant makes two groundless claims of contractual immunity. First, Defendant argues it is "immune from liability pursuant to the Government Code." MPA at 6, ll. 8-11. This contention cannot be reconciled with Gov. Code § 814, which states: "Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee."

Second, Defendant makes the vague contention that its agreements with others do not bind it unless it follows its bylaws and regulations. MPA at 10-11. Despite the hundreds of cases filed

against Defendant asserting contract claims,[4] it cites no case that upheld its theory. On the other hand, *Kashmiri v. Regents of Univ. of Cal.*, 156 Cal.App.4th 809, 830 (2007) addressed and rejected a similar theory, "As already emphasized, the rights and duties of the parties in the present case arose out of an implied contract—*not out of the University's policies* or from a statute (emphasis added)." Further, *Kashmiri*, 156 Cal.App.4th at 831, cited and relied on Civil Code § 1635: "All contracts, whether public or private, are to be interpreted by the same rules."

B. Defendant's Liability under Its Implied-in-Fact Contract with Faria

Following well-established law, *Kashmiri*, 156 Cal.App.4th at 810 held "an implied contract was created by the students' conduct when they accepted the University's offer of enrollment." Likewise, an implied-in-fact contract was created when Faria accepted U.C.'s offer of enrollment. Significantly, Kashmiri observed: "Implied contractual terms 'ordinarily stand on equal footing with express terms.'" *Id.*, at 810. Likewise, "Courts have consistently applied contractual analysis when analyzing implied-in-fact agreements between students and colleges, even when the institution of higher education is a public college or university." *Id*. Hence, we have alleged those rules in FAC ¶ 37 and incorporated their principles in drafting the FAC. In language equally applicable here, *Kashmiri*, observed: "the contractual obligations imposed by the language in catalogues center around what is reasonable." *Id*., at 811. And that is precisely what Faria has alleged in his FAC, e.g., ¶¶ 26, 27, 28, 33, 37, 70, 72, and 74.

Defendant's analysis places undue focus on a unique fact in *Kashmiri*, the exact words of an implied-in-fact term in that case, rather than the principles the court articulated. *Kashmiri* presents a set of rules that the trier of fact must apply in deciding whether a university's catalogs, handbooks and websites constitute enforceable terms of an implied-in-fact contract.

In ascertaining the parties' intent, *Kashmiri* focused on the rule of interpretation codified in Civil Code § 1649: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." *Kashmiri*, 156 Cal.App.4th at 831. Those facts are crystal clear. Faria

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[4] Our search on Lexis found more than 1,000 hits involving contract claims and Defendant.

alleges in FAC ¶¶ 52 through 83 why both he and Defendant's agents (BIO and its DSO) expected the DSO would communicate the same deadline to CIS over SEVIS as it communicated to him. That deadline began to run the moment the DSO set it on SEVIS. FAC ¶¶ 65 and 66. And only the DSO knew it. Faria had no access to SEVIS and no way of knowing the deadline, except the erroneous date Defendant admits giving him, *supra* at 6. FAC ¶¶ 89-94.

Kashmiri also set another standard for determining the terms of an implied-in-fact-contract. Citing Civ. Code § 1636, *Kashmiri*, 156 Cal.App.4th at 831, explained: "The reasonableness of the student's expectation is measured by the definiteness, specificity, or explicit nature of the representation at issue." The date of deadline is quite specific. The FAC alleges that both Faria and Defendant understood Faria expected Defendant to set the correct deadline for Faria to deliver the I-20 to CIS. FAC ¶¶ 52-83. Defendant's Tutorial, relied upon by Faria, tracked § 214.2(f)(11). The procedure was explicit and clear. Faria would apply for an EAD. Defendant would set the deadline over SEVIS and give Faria the Form I-20 with a clear statement of same deadline. FAC ¶ 79- 81. This specificity more than satisfies *Kashmiri.* The *Kashmiri* holding is easily tweaked to fit the facts the FAC alleges. *Kashmiri* held: "[W]e conclude that it was reasonable for students to believe that the general statement that fees could be changed did not apply to the [professional degree fee]." Tweaked to the Faria facts, the holding would read: "We conclude it was reasonable for Faria to believe Defendant had agreed to provide him with the correct deadline for the submission of his EAD application to CIS."

Further, Faria had the right to expect Defendant would comply with its mandatory duty under 8 C.F.R. § 242.2(f)(11) and the DSO Manual (Section 21.5). The DSO Manual states at page 265: "Any OPT requests entered into SEVIS must comply with federal regulations. DSOs must understand the following regulations and policy guidance." RJN, Ex. 4. Those regulations and the DSO Manual required Defendant to enter the same deadline on SEVIS and the Form I-20

Significantly, Defendant has amended its agreement with foreign students to exclude the implied-in-fact term it breached with Faria. It has rewritten its Berkeley Law and BIO websites to delete the representations that created its contractual liability to future U.C. foreign students if it bungled their EAD application. FAC ¶¶ 104-108. In this way, Defendant has impliedly

admitted its agreement with Faria contains the implied-in-fact term that it would provide Faria with the correct deadline for submitting Form I-20 and EAD application to CIS.

But this was only one of the implied terms of Defendant's implied-in-fact agreement with Faria. In view of BIO's representations of its expertise (FAC ¶ 68), its explicit statements in the Tutorial (FAC Ex. 11), and its mandatory duties under 8 C.F.R. § 214.2(f)(11) and the DSO Manual, Faria had the reasonable expectation the DSO would monitor SEVIS to track his EAD application. FAC ¶ 87. Had the DSO done so, she would have discovered Faria's EAD application had not been converted to "pending" on May 7 and thus would be denied.

Had the Regents, U.C. Berkeley, BIO, and its DSO tracked the EAD application, as they were obligated to do, they could have easily discovered their first blunder and saved Faria's job and career. Since the 60-day period had not expired, and indeed had not even begun to run, the DSO could have withdrawn the application (DSO Manual at 276, RJN, Ex. 4) and then initiated a new recommendation with a new deadline. That option was open for the DSO until July 9, 2018. Unfortunately, the DSO failed to monitor SEVIS before the 60-day period had expired.

Finally, even after Defendant's agents discovered they had given Faria the wrong deadline, they had three more chances to salvage Faria's career: (1) on July 24, 2018, when they checked SEVIS and discovered the status as "requested" (FAC ¶ 87), (2) on August 20, 2018, when Faria informed BIO his EAD application had been denied (FAC ¶¶ 98-99) and (3) on September 7, 2018, when Faria was pleading for help. FAC ¶¶ 99-102. In response to his plea, Defendant told Faria it would provide him with no more assistance, even though it had multiple options to cure its prior breaches and salvage Faria's career. Instead, through BIO, Defendant gave Faria the erroneous legal advice to return home to Brazil. FAC ¶¶ 101-102.

C. Defendant's Liability under Its Express Contract with Faria

California courts have typically found the agreement between a university and its students to be an implied-in-fact contract rather than an express contract. *Kashmiri, supra*, at 11-12. Assuming the Court overrules the demurrer to the implied-in-fact cause of action (Count 1), Faria urges the Court to defer the decision whether the contract is implied or express until trial. Further, Defendant has not stated a valid ground for sustaining the demurrer to the express

contract cause of action (Count 2). Defendant's contention that Faria must either quote the agreement or attach it ignores the third option. *Constr. Protective Servs., Inc. v. TIG Specialty Ins. Co*., 29 Cal.4th 189, 198-99 (2002) held, "In an action based on a written contract, a plaintiff may plead the legal effect of the contract rather than its precise language." The facts constituting the agreement are alleged in ¶¶ 83-103 and ¶¶ 104-108. The breaches are alleged in ¶¶ 84-103. Each count concisely states the theory of the claim.

D. Defendant's Breach of Contract Is Concrete, Clear, and Undisputed

Defendant claims it did not breach its contract, because it gave Faria both the correct and incorrect dates on the Form I-20. This is Defendant's invention: it conflicts with FAC allegations and its express admission stated in the FAC. The April 6 date is on the first page, in the School Attestation box, and the April 9 date is on the last page, in the Travel Endorsement box. Nothing in the text of the Form I-20 (FAC Ex. 15) gives a clue that either date (April 6 or 9) triggers the 30-day period, much less sets a deadline. The Tutorial instructs the student to use the date in the Travel Endorsement box. FAC ¶¶ 67-77, 82-84. Defendant has admitted the error. *See* FAC ¶¶ 89-96, Ex. 13 and *supra*, at 6. Aside from this, Defendant does not dispute the adequacy of Faria's allegations that Defendant, through its agents, breached its contract with him. FAC ¶¶ 84-103.

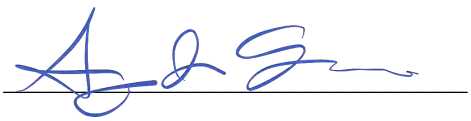
VIII. Faria Has Alleged Negligent Interference with Prospective Economic Relations

The only flaw in this claim are the words "interference with contractual relationships." Defendant correctly agues the tort of negligent interference with *contractual relationship* does not exist in California. However, *J'Aire Corp. v. Gregory*, 24 Cal. 3d 799, 807 (1979) recognized a cause of action for negligent interference with *prospective economic relations*, the subject of CACI No. 2204 (2020). RJN, Ex. 5. Faria has alleged each CACI 2204 element: (1) his relationship with E&Y would result in future economic benefit; (2) Defendant's agents knew this, (3) it would be disrupted if they failed to act with reasonable care; (4) they failed to act with reasonable care; (5) they engaged in unlawful conduct that (6) disrupted Faria's relationship; (7) Faria was harmed, and (8) their wrongful conduct was a substantial factor in causing his harm. "[I]t is error for a court to sustain a demurrer where the allegations adequately state a cause of action under any legal theory." *Cellular Plus, Inc. v. Superior Court*, 14 Cal.App.4th 1224, 1231 (1993).

Respectfully submitted,

Aguirre Law, APC

Dated: December 22, 2020

By: 

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