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[**EXEMPT FROM FEES PURSUANT TO GOV. CODE § 6103**]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

HENRIQUE LAVALLE DA SILVA FARIA, Plaintiff, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant.	Case No. RG20056679 *ASSIGNED FOR ALL PURPOSES TO JUDGE JULIA SPAIN DEPT. 520* **DEFENDANT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFF HENRIQUE LAVALLE DA SILVA FARIA'S FIRST AMENDED COMPLAINT** Date: January 6, 2021 Time: 2:00 p.m. Dept: 520 Reservation No.: R-2218404

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TABLE OF CONTENTS

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

State Cases

State Statutes

Other

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

I. INTRODUCTION

Plaintiff Henrique Lavalle Da Silva Faria, an accomplished lawyer from Brazil, graduated from Berkeley Law's LL.M. program and secured an offer of employment from Ernst & Young. In order to work in the U.S., Mr. Faria was required to obtain an Employment Authorization Document ("EAD") from U.S. Citizenship and Immigration Services ("USCIS"), which would have permitted him to work in the U.S. in his field of study for a period of twelve months through a program known as Optional Practical Training ("OPT"). Mr. Faria alleges that the U.C. Berkeley International Office misrepresented to him the date by which he was obligated to file his EAD application with the USCIS by three days, which caused Mr. Faria's application to be rejected because it was late. As a result, Mr. Faria alleges he lost the position at Ernst & Young and had to leave the U.S.

Mr. Faria previously filed a substantially similar complaint in the United States District Court for the Northern District of California, which The Regents moved to dismiss. Mr. Faria then dismissed that complaint and filed a substantially similar complaint in this action in which he did not address any of the deficiencies identified by The Regents in its motion. A demurrer meet and confer process followed, resulting in Mr. Faria's filing the First Amended Complaint ("FAC"), which is the subject of this demurrer.

Despite The Regents' articulating multiple defenses in both its motion to dismiss and the meet and confer effort related to demurrer, Mr. Faria's FAC still is fatally flawed in that it alleges causes of action for which The Regents is immune, and otherwise fails to state facts sufficient to constitute any cause of action. As this third iteration of Mr. Faria's lawsuit still is deficient, and no amendment can cure the defects, The Regents respectfully requests that the Court sustain this demurrer without leave to amend.

I. FACTUAL BACKGROUND

A. Facts as Alleged in the Complaint

Mr. Faria enrolled in Berkeley Law's LL.M. program in 2017, paid tuition, and ultimately completed his studies with High Honors. *See* FAC, ¶¶ 36, 37, 46. After he completed his degree,

he secured a job offer from Ernst & Young in New York. *See* FAC, ¶ 46. However, in order to remain and work in the United States, Mr. Faria was required to submit an application to the U.S. Citizenship and Immigration Services. *See* FAC, ¶ 52. He sought assistance from the U.C. Berkeley International Office regarding this application, and he alleges that the office provided him with an application that reflected the correct date from which his thirty-day deadline to submit the application was to be calculated on page one (April 6, 2018), but indicated a different, later date on page two (April 9, 2018). *See* FAC, ¶ 67, Exhs. 12, 17. He further alleges that he relied on the date on page two, as well as the date identified in subsequent automated e-mail, when he submitted his application at the very end of the thirty-day period. *See* FAC, ¶ 84, 85, Exh. 17. The application was rejected because it was not timely. *See* FAC, ¶ 7. As a result, Mr. Faria was not able to begin his employment at Ernst & Young, and he returned to Brazil, allegedly forfeiting both the rent he had already paid on a New York apartment prior to securing immigration authorization, and his job at Ernst & Young. *See* FAC, ¶¶ 96, 103, 134.

B. Facts of Which the Court May Take Judicial Notice

Mr. Faria originally filed his complaint in the United States District Court for the Northern District of California. *See* Request for Judicial Notice ("RJN"), Exh. A. The Regents moved to dismiss that complaint on many of the same grounds identified in this demurrer [*see* RJN, Exh. B], and the parties stipulated to dismiss that case so Mr. Faria could refile the complaint in state court. Mr. Faria filed that state court complaint on March 2, 2020, and it was essentially identical to the federal court complaint; Mr. Faria did not address the deficiencies identified by The Regents in its motion to dismiss. *See* RJN, Exh. C. Following receipt of the state court complaint, the parties met and conferred about a demurrer, and Mr. Faria filed the instant First Amended Complaint ("FAC"). *See* RJN, Exh. D; *See also* Declaration of Maria M. Lampasona.

II. MEET AND CONFER EFFORTS

The parties engaged in extensive meet and confer efforts, which resulted in the filing the instant FAC. That effort is detailed in the accompanying Declaration of Maria M. Lampasona.

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Oakland, CA 94612

III. LEGAL AUTHORITIES

A. Legal Standard for Demurrer

California Code of Civil Procedure section 430.10 states:

> The party against whom a complaint or cross-complaint has been filed may object, by demurrer or answer as provided in Section 430.30, to the pleading on any one or more of the following grounds:
>
> ***
>
> (e) The pleading does not state facts sufficient to constitute a cause of action.

A demurrer tests the legal sufficiency of the pleadings. *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 994 (citations omitted). For purposes of the demurrer, all material facts in the pleadings are assumed to be true. *Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 947 (citations omitted).

A general demurrer should be sustained when the complaint fails to state facts sufficient to constitute a cause of action. Code Civ. Proc. § 430.10(e). A complaint fails to state facts sufficient to constitute a cause of action when it does not state any valid cause of action. *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38-39.

A demurrer should be sustained without leave to amend when there is no reasonable possibility that the complaint can be cured by amendment. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.

B. Statutory Immunity Bars Mr. Faria's Claims

Defendant The Regents is a "public entity" pursuant to Government Code section 811.2.[1] As such, the Government Claims Act provides for numerous statutory immunities that are applicable to The Regents. Government Code section 818.8 provides: "A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or

[1] Although Mr. Faria alleges that The Regents "privatized education" due to the alleged fee structure related to the LL.M. program at Berkeley Law, he does not cite any authority that supports a finding that The Regents is not a "public entity" subject to the rights and immunities contained in the Government Claims Act, Government Code sections 810, *et seq.*, or that The Regents waived the protections therein. *See* FAC, ¶¶ 15-23, 129.

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

not such misrepresentation be negligent or intentional." Government Code section 822.2 provides: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice." Government Code section 815.2(b) states: "Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

The crux of every cause of action in Mr. Faria's FAC is that an agent of The Regents misrepresented the issue date of his I-20 form in one of two places on that form and in a subsequent automated email, and that misrepresentation caused Mr. Faria to miss a deadline that expired thirty days from the issue date, which caused him harm. Although Mr. Faria characterizes this error as both negligence and a breach of contract, "'[w]hether framed as a negligence or breach of contract theory the harm which [Plaintiff] seeks to redress is the same.'" *Brown v. Compton Unified School Dist.* (1998) 68 Cal.App.4th 114, 117 (citing *Chevlin v. Los Angeles Community College Dist.* (1989) 212 Cal.App.3d 382, 390). "The critical allegation" is that the plaintiff lost a future economic opportunity because of the admitted mistake of a public school representative. *Brown, supra,* 68 Cal.App.4th at 117.

In the *Brown* case, the Court of Appeal reviewed the trial court's granting of a motion for judgment on the pleadings and used the same standard of review as if it were considering a ruling on a demurrer. *Id.* at 116. The plaintiff in that case alleged causes of action for negligence and breach of contract against the public school district after the plaintiff transferred to a high school in the district with the "expressed purpose" of playing basketball and taking the required classes to satisfy the NCAA eligibility requirements because he earned a full basketball scholarship from the University of Southern California ("USC"). *Id.* at 115-116. An advisor at the high school advised him to enroll in a particular science course. The course did not meet the NCAA requirements and, as a result, the plaintiff's failure to complete the correct science class resulted in revocation of the USC scholarship. *Id.* at 116. The plaintiff further alleged that he transferred to the school district because it "'expressly and impliedly provided in pertinent part that his

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2030 Franklin Street, Sixth Floor
Oakland, CA 94612

transfer… would not jeopardize, compromise or threaten his ability to fulfill those high school educational prerequisites mandated by the NCAA,'" and he selected the high school in reliance on those statements. *Id.* The complaint in that case incorporated a letter from the school principal to the NCAA acknowledging that the plaintiff's failure to take the required science class was the result of misadvisement of the school, and that the plaintiff simply followed the mistaken advice given to him by a school authority. *Id.*

The Court of Appeal first analyzed whether the school owed a duty of care to the plaintiff and ultimately held that, even if the existence of a duty was assumed, both the school district and the representative who gave the mistaken advice were immune from liability for misrepresentations pursuant to Government Code sections 822.2 and 818.8. The Court held that immunity bars the entire action (*i.e.* all negligence and breach of contract claims), and the immunity applies even where the "'allegations of the complaint are couched in terms of code violations by the government entity and not misrepresentations per se.'" The Court of Appeal affirmed the trial court's granting of the motion for judgment on the pleadings. *Id.* at 117-118.

The similarities of the *Brown* case to the instant case are striking. Like the *Brown* case, Mr. Faria alleges:

- he enrolled in the LL.M. program in reliance on Berkeley Law's alleged representations that it could provide him with the highest quality education and instruction and guidance on navigating a career path, and because of the availability of OPT. *See* FAC, ¶¶ 34, 56.
- he relied on the date given to him by The Regents when submitting his EAD application, and that The Regents' alleged failure to provide him with the correct issue date on the I-20 caused his application at USCIS to be denied and his employment offer at Ernst & Young to be revoked. *See* FAC, ¶ 7, 71, 96.
- Berkeley Law "admitted making the error" and, like the school district in *Brown*, Berkeley Law sent a letter to USCIS and Ernst & Young acknowledging that Mr. Faria was provided with the incorrect date. *See* FAC, Exhs. 15, 16, 89.
- specific monetary impact of the alleged misrepresentation. *See* FAC, Prayer for

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

Relief.

- causes of action for negligence and breach of contract. *See* FAC.

Like the defendants in *Brown*, here The Regents and its employees are immune from liability for the alleged misrepresentations pursuant to Government Code sections 822.2 and 818.8. Like in *Brown*, this immunity applies even if Mr. Faria alleges breach of code violations, or a violation of other requirement (in *Brown*, the NCAA eligibility requirements, in *Faria*, the SEVIS system user requirements). *Id.* at 118. And like the trial court in *Brown*, the Court here should determine that each cause of action of the FAC, whether framed as a breach of contract or negligence theory, fails to state a cause of action because The Regents and its employees are immune from liability pursuant to the Government Code, and should dismiss the FAC with prejudice because the defect cannot reasonably be cured by amendment. *Id.* at 116-117.

C. Common Law Immunity Bars Mr. Faria's Claims

Public entities and their employees also are protected by common law qualified immunity. This qualified immunity is not merely an immunity from liability, but "an immunity from suit," meaning an immunity from the burdens of trial and pretrial discovery and protects public employees who carry out executive and administrative functions. *Mitchell v. Forsyth* (1985) 472 U.S. 511, 526. A court considering a claim of qualified immunity makes a two-pronged inquiry: (1) whether the plaintiff has alleged the deprivation for an actual constitutional right, and (2) whether such right was clearly established at the time of the defendant's alleged misconduct. See *Pearson v. Callahan* (2009) 555 U.S. 223, 232 (quoting *Saucier v. Katz* (2001) 535 U.S. 194, 201). With respect to the second prong, the Supreme Court has held that "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it, meaning that existing precedent… placed the statutory or constitutional question beyond debate." *City and Cty. of San Francisco, Cal. v. Sheehan* (2015) 135 S. Ct. 1765, 1774.

Here, Mr. Faria does not specify how the purported failure to identify the correct date on his documents violated any constitutional right. Instead, the acts alleged occurred in the course and scope of The Regents' employees and entailed administrative functions. Despite the length

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2030 Franklin Street, Sixth Floor
Oakland, CA 94612

of the FAC, there are no facts suggesting that any particular act on the part of any employee of The Regents constituted a violation of a *clearly established constitutional right*. This is the classic case of "shielding officials from harassment, distraction, and liability" when the facts as alleged suggest a mere mistake in the performance of their duties. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson v. Callahan* (2009) 555 U.S. 223, 231. The entire complaint is subject to demurrer based on the doctrine of common law qualified immunity.

D. Mr. Faria's Breach of Contract Claims Fail Because They Do Not State Facts Sufficient to Constitute a Cause of Action

1. Mr. Faria's First Cause of Action for Breach of Implied Agreement Fails Because Mr. Faria Does Not Adequately Plead the Existence or Terms of an Implied Agreement

"An implied contract is one, the existence of and terms of which are manifested by conduct." Civ. Code § 1621. In order to establish contract formation, Mr. Faria must prove that the contract terms were clear, that the parties agreed to give each other something of value, and that the parties agreed to the terms. *See* CACI 302.

Mr. Faria alleges that he paid The Regents "more than $60,000 in tuition and other fees to obtain an LL.M. degree at Berkeley Law and for the assistance of Berkeley Law, ADP and BIO in navigating the career options that would be available to him after he graduated from the LL.M. program." *See* FAC, ¶ 111. He further alleges that, "for this consideration, among other things, pursuant to the terms of the implied-in-fact contract, Defendant agreed to use SEVIS to create the same deadline with USCIS for Faria to file his EAD application as it told Faria with its April 9, 2018, email notice and its Tutorial." *See* FAC, ¶ 112. It seems that Mr. Faria believes the terms of the implied-in-fact contract were that Mr. Faria submitted $100 with his OPT Request Form to BIO, and The Regents agreed, "through the totality of its communications with Faria through all of its sub-entities" that BIO and DSO would correctly set and notify Mr. Faria of the 30-day window of time for Mr. Faria to file his EAD application. *See* FAC, ¶¶ 81, 114. He alleges The Regents breached this "agreement" by setting the 30-day deadline based on April 6, 2018, and

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

informing Mr. Faria that the date had been set on May 9, 2018. *See* FAC, ¶ 115.

Throughout his Complaint, Mr. Faria cites various documents, websites, and verbal information to support his claim that an implied-in-fact contract existed, but he acknowledges that it was the "totality of these communications" that set the terms of the alleged implied-in-fact contract, and he does not identify a single specific promise made by anyone on behalf of The Regents related to his specific claim that Berkeley Law promised to provide him with accurate information (or any information) related to his I-20 Certificate of Eligibility.

Courts have recognized a contractual relationship between students and state universities "by the act of matriculation, together with the payment of required fees." *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 824 (citations omitted). However, although a student's enrollment at a university may result in a contract between the university and him, it is well-settled that contract law is not always rigidly applied. *Ibid.*; see also *Andersen v. The Regents of the University of California* (1972) 22 Cal.App.3d 763, 769. Further, the terms of such contract generally contain only two implied conditions: the student will not be arbitrarily expelled, and the student will submit himself to reasonable rules and regulations. *Andersen, supra,* 22 Cal.App.3d at 769-770 (citing 49 Cal.Jur.2d, Universities and Colleges, § 58, at p. 505). Other terms in an implied-in-fact contract may be enforced *only* if they reflect a "specific promise." *Kashmiri, supra,* 156 Cal.App.4th at 826 (emphasis in original). Contract law is not applied to "general promises or expectations" and statements in materials such as catalogues, bulletins, or websites do not become terms of an implied-in-fact contract unless it would be reasonable to incorporate the language as a term to an implied-in-fact contract. *Id.* at 826, 832. "The reasonableness of the student's expectation is measured by the *definiteness, specificity, or explicit nature* of the representation at issue." *Id.* at 832 (citations omitted, emphasis added). Here, Mr. Faria has cited to a number of documents and websites to support his allegation that Berkeley Law agreed to provide expert assistance in "navigating career options" but he has not identified any *specific promise* in any of those materials by Berkeley Law to provide information related to filing deadlines or otherwise specifically direct any student's interactions with USCIS. *See, e.g.,* Complaint, ¶ 114. Because he has not pleaded the specific terms of the contract (or that

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

Berkeley Law agreed to such specific terms), Mr. Faria has not and cannot state a cause of action for breach of implied-in-fact contract.

2. Mr. Faria's Second Cause of Action for Breach of Express Agreement Fails Because Mr. Faria Does Not Identify an Express Agreement

Mr. Faria's allegations in support of his claim for Breach of Express Agreement are identical to his claims for Breach of Implied Agreement. Importantly, he does not allege the existence of any written contract identifying the terms he alleges give rise to a cause of action for Breach of an Express Agreement.

"An express contract is one, the terms of which are stated in words." Civ. Code § 1620. Although Mr. Faria alleges breach of an "express" contract, he does not attach any such contract, nor does he set forth the terms of any such contract in sufficient detail to overcome a pleadings challenge. "To state a cause of action for breach of contract… 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." *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307; see also *McKell v. Washington Mutual, Inc.*, (2006) 142 Cal.App.4th 1457, 1489. There is no formal agreement between The Regents and Mr. Faria and therefore, if anything, any agreement would be an implied-in-fact contract, *not* an express contract. See *Kashmiri, supra,* 156 Cal.App.4th at 827. Because Mr. Faria has not (and likely cannot) allege the express written terms of an agreement by which Berkeley Law agreed to provide accurate information regarding the USCIS process in exchange for Mr. Faria's $60,000 tuition payment or $100 fee (or any other consideration), Mr. Faria's second cause of action for Breach of Express Agreement fails.

3. Mr. Faria's First and Second Causes of Action for Breach of Contract Fail Because Mr. Faria Has Not Adequately Pleaded Breach

Mr. Faria also alleges that Berkeley Law breached the contract when it provided the incorrect date for his I-20 Certificate of Eligibility. To establish breach, a plaintiff must show (1) the existence of a contract, (2) plaintiff's performance, (3) defendant's non-performance, (4) damages, and (5) that defendant's breach was a substantial factor in causing the harm. However,

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

Mr. Faria admits, and the exhibits to his complaint confirm, that Berkeley Law *did* provide the accurate date (the "April 6, 2018 issue date") on page one of the I-20, but identified a different (inaccurate) date (April 9, 2018) on page two. *See* FAC, Exh. 12. "Implicit in the element of damage is that the defendant's breach caused the plaintiff's damage." *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352. Mr. Faria should have inquired about the discrepancy, especially as a seasoned lawyer whose future employment depended on the accuracy of the document, and he should not have waited until the very last day to submit his application. His actions were a substantial cause of his alleged damages. See *Guido v. Koopman* (1991) 1 Cal.App.4th 837, 844 (attorney's failure to review written instrument not justifiable). Mr. Faria's first and second causes of action also fail because he has not adequately alleged breach.

4. Mr. Faria's First and Second Causes of Action for Breach of Contract Fail Because The Regents is not Bound by any Agreement

Finally, The Regents is a statewide agency with constitutionally derived powers (Cal. Const., art. IX, § 9) and the legal authority to bind the University resides exclusively with Board of Regents and the Officers of The Regents in accordance with The Regents' Bylaws and Standing Orders.[2] Specific responsibility and authority may be delegated only if the Board determines such delegation to be in the best interest of the University. Accordingly, only those individuals who have been delegated this authority to negotiate and execute agreements may enter into contracts on behalf of the University.

The Regents does not have the power to enter into a contract in disregard of established rules, related both to the process by which The Regents contracts, as well as the specific I-20 Certificate of Eligibility completion policies reference by Mr. Faria in this case. It is well-established that "contracts wholly beyond the powers of a municipality are void." *Miller v. McKinnon* (1942) 20 Cal.2d 83, 88. "It is settled that the mode of contracting vested in a state agency is the measure of its power to contract and a contract made in disregard of the established

[2] *See* RJN, at page 3, lines 12-16 (*citing* The Regents' Governance and Bylaws), available online at https://regents.universityofcalifornia.edu/governance/index.html.

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

mode is invalid." *Seymour v. State of California* (1984) 156 Cal.App.3d 200, 202. Accordingly, in addition to failing to allege either the existence of a binding contract or its terms, Mr. Faria has not explained how The Regents could be bound by any such agreement, and his causes of action fails on these grounds, as well.

E. Mr. Faria's Negligence Claims Fail

In addition to the immunities identified above, additional defenses exist that bar Mr. Faria's third, fourth, fifth, sixth, seventh, and eighth causes of action for negligence.

1. The Third, Fourth, and Fifth Causes of Action Fail Because Plaintiff Does Not Adequately Plead the Vicarious Liability

"Except as otherwise provided by statute," a public entity is not liable for any injury arising from the act or omission of the public entity or public employee. Gov. Code § 815. Government Code section 815 "abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation." *See* Gov. Code § 815 Legislative Committee Comments. In other words, all government liability must be based on statute. *Duarte v. San Jose* (1980) 100 Cal.App.3d 648. Although the headings in each of Mr. Faria's third, fourth, and fifth causes of action identify Government Code section 815.2, his allegations within those causes of action do not sound in vicarious liability. For example, he references "Defendant's negligence" instead of "Defendant's employees' negligence" in various places, and he does not allege that The Regents is vicariously liable for its employees' alleged negligence. *See, e.g.* FAC, ¶¶ 131, 132, 133, 134, 138, 139, 140, 144. Because The Regents cannot be directly liable for negligence under California law, these allegations related to The Regents' negligence (as opposed to its employees' negligence, for which The Regents may be liable pursuant to Government Code section 815.2) are inadequate to state a cause of action for negligence against The Regents.

2. The Sixth, Seventh, and Eighth Causes of Action Fail Because Plaintiff Has Not Identified an "Enactment" That Could Form the Basis for a Mandatory Duty

Mr. Faria identifies Government Code section 815.6 as the statutory basis for his sixth, seventh, and eighth causes of action. This section provides:

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

An "enactment" is defined as "a constitutional provision, statute, charter provision, ordinance or regulation." Gov. Code § 810.6.

In order to establish liability of a public entity under this provision, a plaintiff must establish "(1) the statute which was violated imposes a mandatory duty, (2) the statute was intended to protect against the type of harm suffered, and (3) breach of the statute's mandatory duty was a proximate cause of the injury suffered." *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 980 (citations omitted).

a. Mr. Faria Has Not Identified a Specific "Enactment" Related to His Claims

In the general allegations of his FAC, Mr. Faria identifies provisions in the Federal Code of Regulations related to Immigration Regulations (8 C.F.R. § 214.2(f)(10) through (13)) as the basis for his mandatory duty cause of action, and he also cites to the User Manual for School Users of the Student and Exchange Visitor Information System ("SEVIS User Manual"), and in particular, Chapter 21.5 of that manual. *See* FAC, ¶¶ 57, 58, 59, 61, 63, 66, 86, 87. Within the sixth, seventh, and eighth causes of action specifically, Mr. Faria makes reference to "federal statutes, as implemented in regulations," but does not otherwise identify the statutes or regulations, and he identifies the following mandatory duties allegedly imposed thereby:

- To correctly set the deadline for Mr. Faria to submit his application, and to correctly and accurately state all information in its Tutorial and Mr. Faria's I-20 Certificate of Eligibility. *See* FAC, ¶¶ 147, 149, 154, 160.
- To monitor Mr. Faria's status on SEVIS in order to detect that Mr. Faria's application had not been converted to "pending" on May 7, 2018. *See* FAC, ¶¶ 148, 149.

8 C.F.R. Part 214 contains regulations adopted by the Department of Homeland Security

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS
2030 Franklin Street, Sixth Floor
Oakland, CA 94612

related to Immigration and Naturalization that regulate "nonimmigrant classes." The sections cited by Mr. Faria, 8 C.F.R. § 214.2(f)(10) through (13), describe the requirements for an F-1 student to apply for practical training (OPT) (the same program through which Mr. Faria sought employment with Ernst & Young), but do not include any provisions related to the University's obligation to correctly set the deadline, or monitor a student's status. Instead, the regulations require that the University perform general administrative actions related to the *student's* obligations to apply for OPT status.

For an enactment to impose a "mandatory duty" it must "*require*, rather than merely authorize or permit, *that a particular action be taken or not taken*." *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 980 (citations omitted, emphasis in original). An enactment that "does not require a public agency to take any *particular action*" is inadequate to impose a mandatory duty. *Id.* (emphasis in original). In addition, a "statute is deemed to impose a mandatory duty on a public official only if the statute affirmatively imposes the duty *and* provides implementing guidelines… If a statute does not require that a 'particular action' be taken, … section 815.6 does not create the right to sue a public entity." *O'Toole v. Superior Court* (2006) 140 Cal.App.4th 488, 509 (citing *Shamsian v. Department of Corrections* (2006) 136 Cal.App.4th 621, 632) (emphasis added).

Here, there are no provisions in the regulations cited by Mr. Faria that speak to a university's specific obligation either to identify the correct deadline by which a student must file an application, or to monitor the student's ongoing status on SEVIS, and the regulations do not provide implementing guidelines related to any such specific duties. Accordingly, these regulations do not impose mandatory duties on The Regents.

Mr. Faria also relies on the provisions of the SEVIS User Manual as a source of mandatory duty. However, Government Code section 815.6 on its face only applies to "enactments," and a user manual is not an "enactment" contemplated by that statute because it is not "a constitutional provision, statute, charter provision, ordinance or regulation." Gov. Code § 810.6. Mr. Faria does not allege, nor could he, that the SEVIS User Manual constitutes an "enactment" and therefore "the manual impose[s] no mandatory duties" on The Regents. *Wilson,*

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supra, 91 Cal.App.4th at 982.

Because Mr. Faria has not identified any "enactment" imposing a mandatory duty on The Regents to correctly set the deadline and to monitor his status for the purpose of identifying when his status would covert to "pending," Mr. Faria's sixth, seventh, and eighth causes of action fail.

b. The Enactments Identified by Mr. Faria Were Not Intended to Protect Against the Type of Harm Suffered

In order for an enactment to create a mandatory duty, the mandatory duty also must be "designed to protect against the risk of a particular kind of injury" allegedly suffered by the plaintiff. Gov. Code § 815.6. In this regard,

> The plaintiff must show the injury is 'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.' Our inquiry in this regard goes to the legislative purpose of imposing the duty. That the enactment "confers some benefit" on the class to which plaintiff belongs is not enough; if the benefit is "incidental" to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under section 815.6.

Bologna v. City and County of San Francisco (2011) 192 Cal.App.4th 429, 437 (citations omitted).

Here, the regulations on which Mr. Faria relies were enacted by the Department of Homeland Security ("DHS"), whose self-stated mission is to "ensure a homeland that is safe, secure, and resilient against terrorism and other potential threats." *See* RJN, Exh. F. The DHS carries out this mission through the promulgation of regulatory actions, including Title 8 of the Code of Federal Regulations, which includes 8 C.F.R. § 214.2. Even a cursory review of Title 8 reveals that the intended purpose of these regulations was not to protect international student's rights, but to provide a specific framework for the administration of immigration policy with the goal of keeping the country secure. While Mr. Faria may have benefited from the provisions related to the OPT program, through which he may have been permitted to lawfully reside and work in the United States, this benefit is incidental to the purpose for the implementation of these immigration policies. Accordingly, 8 C.F.R. § 214.2 does not impose a mandatory duty on these facts because it was not "designed to protect against the risk of a particular kind of injury" that Mr. Faria alleges.

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3. The Fifth and Eighth Causes of Action for Negligent Interference with Prospective Contractual Relationships Fails Because No Such Tort Exists

In support of his fifth cause of action, Mr. Faria alleges that The Regents' conduct "interfered with the prospective *contractual* relationship between Faria and Ernst & Young," "with knowledge of Faria's prospective contractual employment relationship with Ernst & Young, negligently mishandled Faria's I-20… application, thus interfering with Faria's *contractual* relationship with Ernst & Young." *See* FAC, ¶¶ 142, 143 (emphasis added). In support of his eighth cause of action, Mr. Faria alleges that The Regents' conduct "interfered with the prospective *contractual* relationship between Faria and Ernst & Young," and The Regents, "with knowledge of Faria's prospective contractual employment relationship with Ernst & Young, negligently mishandled Faria's I-20… application, thus interfering with Faria's *contractual* relationship with Ernst & Young." *See* FAC, ¶¶ 161, 162.

The California Supreme Court has held that there is no cause of action for "negligent interference with contractual relations." *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636-637 (Affirming dismissal following a demurrer on the grounds that "courts have quite consistently refused to recognize a cause of action based on negligent, as opposed to intentional, conduct which interferes with the performance of a contract between third parties.") The instant Court should sustain this demurrer on the same grounds.

IV. LEAVE TO AMEND WOULD BE FUTILE

Although this is the first demurrer that the Court has considered, it follows a Motion to Dismiss and an extensive meet and confer effort following the filing of Plaintiff's original state court complaint. This is the third iteration of Plaintiff's claims; The Regents presented its defenses in detail in the Motion to Dismiss and during the meet and confer process, and the resulting pleading still is deficient. As Plaintiff has had multiple opportunities to cure the defects in the Complaint and yet has not pleaded facts sufficient to overcome The Regents' defenses, The Regents respectfully requests that the demurrer be sustained without leave to amend.

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Dated: November 13, 2020

RANKIN, SHUEY, RANUCCI, MINTZ, LAMPASONA & REYNOLDS

By: _____
MARIA M. LAMPASONA
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PROOF OF SERVICE
Faria, Henrique Lavalle Da Silva v. The Regents of the University of California
Alameda County Superior Court Case No. RG20056679

I am a resident of the State of California, over 18 years of age and not a party to the within action. I am employed in the County of Alameda; my business address is: 2030 Franklin Street, Sixth Floor, Oakland, CA 94612. On November 13, 2020, I served the within:

DEFENDANT THE REGENTS OF THE UNIVERSITY OF CALIFORNIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PLAINTIFF HENRIQUE LAVALLE DA SILVA FARIA'S FIRST AMENDED COMPLAINT

on all parties in this action, as addressed below, by causing a true copy thereof to be distributed as follows:

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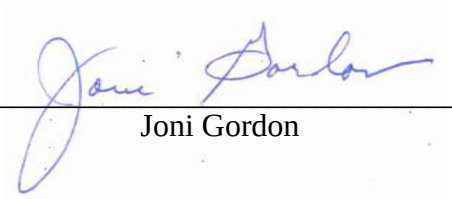
☒ ONLY BY ELECTRONIC TRANSMISSION. Pursuant to Emergency Rule 12 of the California Rules of Court, Appendix I, regarding emergency rules related to COVID-19, I served the document(s) to the persons at the e-mail address(es) listed above. The email addresses listed above have been confirmed to be correct prior to transmission. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

☒ **(*STATE*)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 13, 2020, at Oakland, California.



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