Appeal No. 10-16270
PRO BONO

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JASON TECZA,

Plaintiff-Appellant,

v.

UNIVERSITY OF SAN FRANCISCO,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
San Francisco Division
The Honorable Richard Seeborg
Case No. 3:09-cv-03808-RS

PLAINTIFF-APPELLANT JASON TECZA'S REPLY TO DEFENDANT-APPELLEE'S REPLACEMENT RESPONSE BRIEF

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INTRODUCTION

USF argues that all of the claims raised by Tecza on appeal — violation of common law and constitutional privacy rights, breach of contract, negligence, and violation of the UCL — fail for the same reason: the fact disclosed by USF that Tecza received exam accommodations was not, as a matter of law, a "private fact." *See, e.g.*, Dkt. No. 29, Replacement Response Brief of Defendant and Appellee University of San Francisco ("Response Br.") at 1 (Statement of Issue), 9, 12 ("If the fact of receiving exam accommodations was not a legally private fact, all four of the claims Plaintiff pursues must fail."). Specifically, USF alleges that Tecza's exam accommodations could not have been private because his absence from the standard exam room was potentially observable by his classmates. USF's argument fails, however, for two reasons. First, the argument injects a fact question that is inappropriate for a motion to dismiss. Second, even if Tecza's absence were noticed, the *reason* for that absence was not known until USF affirmatively disclosed that Tecza received accommodations. While receiving a disability-based accommodation is a private fact, that disclosure also necessarily revealed that Tecza suffered from a disability that impaired his performance under standard examination conditions. USF admits that medical information is also a protectable private fact.

But even if this Court agrees with USF's "no private fact" argument, Tecza's breach of contract, negligence, and UCL claims survive. The Special Exam Sign-Out Sheet disclosed by USF is an academic record. USF explicitly agreed in its Student Handbook to keep all academic records confidential absent student authorization or legal mandate. Accordingly, in disclosing the Special Exam Sign-Out Sheet without authorization from Tecza or a legal requirement to do so, USF breached its contractual obligation, failed to fulfill its voluntarily assumed duty pursuant to negligence law, and failed to follow its own internal policies in violation of the UCL.

In addition to its failed legal arguments, USF tries to minimize its misconduct by characterizing the disclosure of the Special Exam Sign-Out Sheet as a "clerical error." *See, e.g.*, Response Br. at 6, 13, 51. The record is currently silent as to how Tecza's private information was disclosed, but the facts as alleged show a troubling lack of care for such a sensitive document. In addition, the disclosure of that record in the class materials was not the only improper disclosure of Tecza's private information. As discussed in Tecza's opening brief, USF law professors also discussed Tecza's exam accommodations in front of other students, reflecting both a personal insensitivity and an apparent failure of USF to train its personnel about the importance of preserving the privacy of disability

accommodations. Suffice it to say that the disclosure was not a trivial matter to Jason Tecza.

ARGUMENT

I. THE FACT OF TECZA'S EXAM ACCOMMODATIONS WAS PRIVATE, AND USF'S DISCLOSURE OF THAT FACT ALSO DISCLOSED PRIVATE MEDICAL INFORMATION

USF's "no private fact" theory is based on flawed assumptions of the governing law and the facts pleaded by Tecza. As the California Supreme Court has repeatedly acknowledged, "the claim of a right of privacy is not 'so much one of total secrecy as it is of the right to *define* one's circle of intimacy — to choose who shall see beneath the quotidian mask.'" *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001) (quoting *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 647 (Cal. 1994)); *see also Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 37 (1971). Tecza feared the stigma and professional harm that might result from disclosing to his classmates and future colleagues that he suffered from ADHD (Attention Deficit Hyperactivity Disorder) and received exam accommodations. ER 40, ¶ 21. Accordingly, at no time did Tecza publicly disclose this information to his law school classmates, and remained at liberty to determine with whom he would share this intimate information — until USF's public disclosure of the fact that Tecza received exam accommodations and thus suffered from a medical disability impeding his academic performance.

A. That Tecza Received Exam Accommodations Was Not Public Knowledge Until USF Affirmatively Disclosed this Private Fact

In support of its position, USF asserts that Tecza's exam accommodations cannot be considered private simply because Tecza took his law school exams in a different room and was granted additional time. Response Br. at 16, 17, 32. But this argument assumes facts that cannot be assumed on a motion to dismiss. As USF chose to pursue a facial challenge to Tecza's pleadings, it has placed no evidence in the record that any of Tecza's classmates were aware, prior to USF's disclosure in the Summer of 2007, that Tecza was not present for regularly scheduled exams. Moreover, as this Court is undoubtedly aware, final exams are an extremely stressful time for law students. Focused on their own performance, law students are unlikely to notice that a classmate is missing from the exam room, assuming that the class in question is even small enough to take stock of attendance. In fact, some law schools assign students from the same class to different rooms in order to minimize cheating, whereas other law schools may allow their students to take exams in any location, including off-campus, so long as responses are returned by a designated time.

Even assuming that some of his classmates noticed Tecza's absence from an exam room — an assumption that is by no means warranted — they could not have known that this absence was the result of exam accommodations without affirmative disclosure or confirmation of this fact from either USF or Tecza

himself. Many possible reasons exist for a student's absence from an exam; examples include illness, a scheduling conflict, an alternative room assignment, even poor performance in the class. Therefore, even if noticed, Tecza's mere absence from a particular exam, or even several exams, could not and did not by itself reveal that he was receiving exam accommodations. USF's arguments further assume that fellow classmates have some way of calculating the time allowed to Tecza and other accommodated students who took the exams in separate rooms. Until USF affirmatively revealed that Tecza received such accommodations, his classmates' suspicions, if any existed, were never definitively confirmed.[1]

Furthermore, the California Court of Appeal explicitly held in *M.G. v. TimeWarner, Inc.* that information need not be completely "secret" or

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[1] USF also complains for the first time on appeal that Tecza did not allege in the Second Amended Complaint that his exam accommodations were not known to his classmates. Response Br. at 17. However, Tecza specifically pleaded that prior to USF's disclosure, this information was only known by "select individuals," i.e., not by his classmates generally. ER 54, ¶ 66. Similarly, as the Second Amended Complaint specifically alleges that student inquiries into Tecza's accommodations began after USF's repeated disclosure of those accommodations during the 2007 Summer Program, it can be reasonably inferred that Tecza's classmates were not aware of his accommodations prior to that time. ER 53–54, ¶ 65; ER 55, ¶ 72; ER 56, ¶ 75. If the Court deems it necessary, however, Tecza can amend his complaint to state this allegation explicitly. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) ("Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.").

"confidential" in order to remain legally private. 107 Cal. Rptr. 2d at 511. USF attempts to differentiate *M.G.* on the sole basis that whereas only family and friends were aware of the *M.G.* plaintiffs' affiliation with a Little League team whose coach was revealed to be a child molester, all of Tecza's classmates must have been aware that he received exam accommodations because these accommodations were publicly observable. But for the reasons explained just above, USF's presumption is incorrect. Tecza disclosed his disability and resulting accommodations only to "select individuals" such as his wife and psychiatrist,[2] ER 54, ¶ 66, and while some of Tecza's classmates might have observed his absence from their exam room, they did not learn of the reason for this absence until USF disclosed the fact that Tecza received accommodations. Similarly in *M.G.*, any passerby might have observed the plaintiffs on the public baseball field, but the fact of the plaintiffs' affiliation with the Little League team in question was not confirmed until an official team photograph was publicly disclosed by the media.

The principle that information need not be "secret" to be a legally private fact is also evident from the case law governing the related tort of invasion of privacy by intrusion. Specifically, in *Sanders v. American Broadcasting*

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[2] At no time has USF suggested that this limited disclosure to "select individuals" was itself sufficient to render Tecza's receipt of exam accommodations public knowledge. *See M.G.*, 107 Cal. Rptr. 2d at 511 ("Information disclosed to a few people may remain private.").

Companies, the plaintiff sued a television network that sent an undercover reporter into his workplace to investigate the telepsychic industry. 978 P.2d 67, 69 (Cal. 1999). The reporter pretended to be employed in the same capacity as plaintiff but wore a hidden camera to record conversations. *Id.* at 70. The plaintiff sued for invasion of privacy by intrusion after the network aired such a recorded conversation. *Id.* Emphasizing that privacy "is not a binary, all-or-nothing characteristic," the Supreme Court of California rejected the network's argument that "a 'complete expectation of privacy' is necessary to recover for intrusion . . . as inconsistent with case law as well as with the common understanding of privacy." *Id.* at 72, 73. The court thus held that the plaintiff's "cause of action [could not be] defeated as a matter of law simply because the events or conversations upon which the defendant allegedly intruded were not completely private from all other eyes and ears." *Id.* at 69.

In sum, the fact that Tecza received exam accommodations from USF was a legally private fact.

B. Disclosure of Tecza's Exam Accommodations Also Disclosed Confidential Medical Information, an Undisputed Breach of Tecza's Privacy

USF does not dispute that the disclosure of confidential medical information constitutes a breach of privacy under California law. Nor can it, given that California courts have long recognized that medical information is a confidential

private fact protected from disclosure. *See* Dkt. No. 20, Plaintiff-Appellant Jason Tecza's Replacement Opening Brief ("Opening Br.") at 30.

Rather, USF argues that it did not reveal any confidential medical information because its disclosure contained "only" the information about the exam accommodations that Tecza received, and Tecza's disability — specifically, ADHD[3] — cannot reasonably be inferred from these accommodations. *See generally* Response Br. at 24–28. This argument is inconsistent with the notion of accommodations in general and also with USF's own procedures and requirements for granting them.

Moreover, even if the specific condition from which Tecza suffers could not be inferred from USF's disclosure, that disclosure at a minimum revealed that Tecza suffered from a medical condition that compromised his ability to take examinations under standard conditions. The Special Exam Sign-Out Sheet contained not only Tecza's name and the time and location of the indicated examination, but also the precise nature of the accommodations he received: extended time and isolation. Pursuant to USF's own handbooks, such

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[3] USF complains that ADHD is not a "learning disability." Response Br. at 33 n.5. USF is splitting hairs, for even if true, ADHD is frequently considered together with learning disabilities because of its interference with a student's ability to learn. *See, e.g.*, Scott Weiss, 6 Scholar 219, 223 (2004) (discussing ADHD at length in an article devoted to the treatment of learning disabilities in the study and practice of law). The Second Amended Complaint refers to ADHD as a "psychological impairment." ER 60, ¶ 101.

accommodations were available only to students who provided documentation of a qualifying disability. ER 41, ¶ 23 (quoting SDS Handbook at 8). Accordingly, Tecza's classmates could reasonably infer from the fact that Tecza received exam accommodations that he suffered from some kind of diagnosed and documented medical condition necessitating said accommodations for adequate performance on law school exams. And because Tecza had no obvious physical limitations, ER 40, ¶ 22, the inference is obvious that he had some type of condition that impaired his ability to function effectively under ordinary test conditions. This is itself private medical information even in the absence of a disclosure of Tecza's specific disability, and its disclosure harmed him as much as if a specific diagnosis had been given. That this was confidential and private information is also confirmed by the repeated apologies received by Tecza from members of USF's administration following the disclosure. ER 55, ¶¶ 69–71; ER 56, ¶ 75.

C. USF's Efforts to Rely on Other Disabilities and Accommodations Fail

USF attempts to divert the Court's attention from its disclosure of Tecza's private facts by arguing, first, that some accommodations are inherently public and, second, that recognition of Tecza's claim will harm disabled students by causing universities to deny legitimate accommodations. Neither argument is valid.

Tecza does not dispute that certain disabilities and accommodations are, by their very nature, inherently observable by the public. *See generally* Response Br. at 19–23. This Court, however, is not charged with deciding the scope of privacy rights for *all possible* classroom and exam accommodations; rather, the issue before this Court is whether the *specific* exam accommodations granted by USF to Tecza were publicly known before their affirmative disclosure by USF. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 1999) (en banc) ("[the court's] role is neither to issue advisory opinions nor to declare rights in hypothetical cases"). For the reasons discussed above, they were not.

Indeed, USF's attempt to introduce new facts regarding various disabilities and accommodations is inappropriate and should be rejected. As USF failed to introduce this matter during the district court proceedings, it should not be allowed to do so for the first time on appeal. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal."). And given that USF made a facial challenge to Tecza's pleadings, no allegations beyond those in the Second Amended Complaint may be considered. *Miranda v. Clark Cnty.*, 319 F.3d 465, 470 (9th Cir. 2003) ("These are factual issues, however, that are beyond the purview of our review on a Rule 12(b)(6) dismissal, where only the allegations of the complaint are relevant.").

By mischaracterizing Tecza's position as requiring that *all* academic accommodations be kept hidden from the public, USF presents a "parade of horribles" in which a decision in favor of Tecza would prevent educational institutions from offering any classroom or exam accommodations whatsoever to their disabled students, in violation of federal law. Response Br. at 17–18, 23. Nowhere, however, does Tecza assert or even imply that USF (or any other university) must alter the manner in which it provides accommodations. Rather, Tecza argues merely that USF cannot affirmatively disclose that students are receiving accommodations when that information is not inherently public. For example, the fact that a student is given a sign language translator in a lecture inherently discloses deafness as the basis for the accommodation, and the fact that a student is deaf will be apparent to anyone who meets him or her. In contrast, Tecza's accommodation and associated disability could and should have remained private.

Furthermore, contrary to USF's arguments, protecting USF from liability for affirmatively disclosing or confirming the identities of accommodated students will only hurt students with disabilities by discouraging them from seeking the accommodations to which they are entitled under federal and state laws. For example, if USF's position were accepted, USF would be free to post a list in the law school of all students receiving classroom and exam accommodations, or to

announce at the beginning of an exam the names of the students receiving extra time or taking the exam in seclusion, or to inform potential employers or note on a transcript that a particular student received academic accommodations. Any disabled student wishing to keep a disability and/or receipt of accommodations private from classmates, professors, and potential employers would surely think twice before seeking accommodations under such a regime. For this very reason, while we object to USF's citation to sources outside the record, we note that many of those sources in fact advocate for the confidentiality of academic accommodations. *See, e.g.*, Donald H. Stone, *What Law Schools Are Doing to Accommodate Students with Learning Disabilities*, 42 S. Tex. L. Rev. 19, 35–36, 47, 55 (2000) ("[T]he purpose of providing an exam modification is to place the disabled student on equal footing with one's non-disabled classmates. Therefore, any notation of exam modification on the law school transcript would be misleading, highly prejudicial, and inappropriate."); Ali A. Aalaeri, Note, *The Americans With Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity*, 40 Suffolk U. L. Rev. 419, 434 (2007) (endorsing general anonymity in testing, including not identifying students receiving testing accommodations).

II. TECZA'S CONSTITUTIONAL PRIVACY CLAIM IS ADEQUATELY PLEADED

As the district court failed to address Tecza's constitutional privacy claim, it is unclear on what basis that claim was actually dismissed. *See* ER 3–4. Furthermore, at no time during the district court proceedings did USF argue that Tecza did not adequately plead a violation of his constitutional privacy (ER 30–32, 100–101), and its attempt to do so now in its responsive appellate brief for the first time — nearly four years after this case was filed — not only highlights the inappropriateness of granting a motion to dismiss on this basis, but should not be considered on appeal. *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so.").

In asserting that it did not violate Tecza's constitutional right to privacy, USF now argues: (1) that Tecza has failed to implicate a legally protected privacy interest in exam accommodations, (2) that Tecza could have had no reasonable expectation of privacy in his exam accommodations, (3) that any invasion of Tecza's privacy in these accommodations was not sufficiently serious to warrant constitutional protection, and (4) that the public interest in providing accommodations outweighs any privacy right that Tecza might have. Response Br. at 33–40. Even setting aside their belated assertion, these arguments lack merit.

First, as discussed above, USF's improper disclosure divulged not only the fact that Tecza received exam accommodations, but also Tecza's confidential medical information. *See supra* § I.B. California's constitutional privacy protection "extends to the details of a [person]'s medical and psychiatric history." *Pettus v. Cole*, 57 Cal. Rptr. 2d 46, 72 (Ct. App. 1996). Similarly, USF does not dispute that the Special Exam Sign-Out Sheet that it improperly disclosed constitutes an academic record, and that California's constitutional privacy protection extends to such academic records. *Porten v. Univ. of S.F.*, 134 Cal. Rptr. 839, 843–44 (Ct. App. 1976). Beyond these points, the common thread throughout all of USF's arguments regarding constitutional privacy is, once again, that Tecza's exam accommodations were publicly observable and thus could not constitute private information. That argument fails for the reasons discussed in detail above.

The sole case relied on by USF to support its arguments is not only inapposite, but places in stark relief the gravity of the privacy violation at issue in this case. In *Pioneer Electronics (USA), Inc. v. Superior Court*, a plaintiff seeking class action certification sought to compel the defendant to produce the names and contact information of other customers who had complained about the allegedly defective product at issue in the litigation. 150 P.3d 198, 199–200 (Cal. 2007). After the defendant refused to comply, citing California's constitutional privacy

provision, the trial court ordered each consumer complainant be sent a letter informing him of the litigation and possible disclosure of identifying information. The parties disagreed, however, as to the effect of silence: the plaintiff insisted that identifying information should be produced in the absence of any response from the complainant, whereas the defendant insisted that identifying information should not be produced unless authorization from the complainant was received. *Id.* at 200.

The California Supreme Court sided with the plaintiff. *Id.* at 207. Any reasonable expectation of privacy was reduced given that these individuals had provided the defendant with their names and contact information in the hopes of obtaining relief, and thus might reasonably expect and even hope that this information would be provided to a class action plaintiff. *Id.* at 205. Moreover, any resulting invasion of privacy was not serious given that the disclosure "merely" called for contact information, as contrasted with "particularly sensitive" information such as medical history or finances, and that the complainants would be able to object to even this minimal disclosure if they so chose. *Id.* at 205–06.

The facts alleged by Tecza are very different. He provided USF with documentation of his disability pursuant to USF's assurances that "all information pertaining to his/her disability" would remain strictly confidential. ER 41, ¶ 23 (quoting SDS Handbook at 4). Nonetheless, USF disclosed to its law school

community an academic record detailing that Tecza received exam accommodations as well as the exact nature of the accommodations provided, private information from which Tecza's disability could also be inferred. That academic record (the Special Exam Sign-Out Sheet) was confidential not only pursuant to the obligations imposed by federal law on universities receiving federal funding, but also pursuant to the obligations undertaken by USF in its own handbooks. *See* 20 U.S.C. § 1232g(b), (d); ER 46–47, ¶ 32 (quoting Student Handbook at 26–28). In addition, Tecza's professors referred to his accommodations in front of other students. ER 50, ¶ 50; ER 52–53, ¶ 61. At no time was Tecza given the opportunity to object to the disclosure of this private information, despite the grave ramifications that widespread knowledge of his accommodations and disability could have on his professional reputation and hiring opportunities. In analogizing this case to *Pioneer Electronics*, USF not only effectively compares apples to oranges, but trivializes the gravity of its missteps and their damaging consequences to Tecza and his livelihood.

Finally, in opposing Tecza's constitutional privacy claim, USF again argues that a ruling in favor of Tecza would prevent educational institutions from offering any accommodations to their disabled students. For the reasons explained in section I.C, that argument is without merit.

III. TECZA'S BREACH OF CONTRACT, NEGLIGENCE, AND UCL CLAIMS SURVIVE EVEN IF NO "PRIVATE FACT" IS ESTABLISHED PURSUANT TO PRIVACY LAW

For the reasons explained above, a court can reasonably infer from the Second Amended Complaint that Tecza's exam accommodations and disability were private facts whose disclosure violated Tecza's right of privacy under California law. But even if this Court rules otherwise, the central tenet of USF's over-arching "no private fact" argument is simply incorrect, as Tecza's breach of contract, negligence, and UCL claims survive regardless of whether the Second Amended Complaint sufficiently pleads a private fact.

A. Tecza Adequately Pleaded Breach of Contract

USF never directly disputes Tecza's claim that a contract existed between him and USF upon his matriculation as a law student. *See* Response Br. at 41 ("Even *assuming* that the handbook provisions quoted at length in the 'Factual Allegations' section of the SAC constituted contractual obligations . . . ." (internal citation omitted, emphasis added)). Accordingly, USF has waived any argument that no contract formed between Tecza and USF, or that the provisions of the SDS and Student Handbooks are not part of that contract. *See Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 855 n.5 (9th Cir. 2004) ("Such a conclusory statement does not adequately raise an issue for [this Court's] review."); *see also Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We will not manufacture arguments for [a

party], and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review.").

Rather than denying the existence of a contract, USF claims that the confidentiality provisions in the SDS and Student Handbooks cannot reasonably be interpreted as encompassing an obligation not to disclose the fact that Tecza received exam accommodations, again relying on the flawed argument that Tecza's exam accommodations were publicly observable.[4] Response Br. at 41–42. USF also argues only that these provisions "simply do not contain any promise not to disclose accommodations." *Id.* at 41.

USF's self-serving arguments are nothing short of shocking, not to mention utterly inconsistent with its actual practice. Taken at face value, USF is claiming the right to publicize the names of all disabled students receiving accommodations as well as the nature of the accommodations provided to each. Such a right is at

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[4] The relevance of privacy law to the question of the parties' mutual intent at the time of contracting is far from clear. *See* Cal. Civ. Code § 1636 ("A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."). As for USF's argument that Tecza did not allege that he or anyone else understood the provisions as protecting the confidentiality of accommodations, Response Br. at 42, the objective theory of contract law does not require such an allegation, but it could reasonably be inferred from the pleadings in the Second Amended Complaint. *See, e.g.*, ER 63, ¶ 120; ER 66, ¶ 151; ER 68, ¶ 163. To the extent that such an understanding must be pleaded explicitly, the omission can be remedied easily by amendment. *Manzarek*, 519 F.3d at 1031 ("Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.").

odds with USF's various assurances of confidentiality as any normal person would understand them. It is also difficult to reconcile with the profound and repeated apologies made to Tecza by USF's administration.

The SDS Handbook obligates USF to "[m]aintain appropriate confidentiality of records and communication concerning students with disabilities or disabling conditions (except where disclosure is authorized by the student or required by law)." ER 41, ¶ 23 (quoting SDS Handbook at 5–6). The plain meaning of this provision requires that USF not disclose any record or communication concerning a disabled student without that student's permission, unless such disclosure is legally mandated. *See* Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."). Yet that is exactly what USF did. As explained in the Opening Brief, the Special Exam Sign-Out Sheet disclosed by USF during the 2007 Study Abroad Program was a record or communication concerning Tecza and his disability, recognized by USF when it agreed to provide exam accommodations. Its disclosure was neither authorized by Tecza nor legally required. Opening Br. at 24. Not surprisingly, USF has not argued that its inclusion of Tecza's Special Exam Sign-Out Sheet in the materials for a Comparative Criminal Justice course was somehow "appropriate."

Moreover, that the governing confidentiality provisions do not explicitly refer to accommodations does not preclude accommodations from being encompassed by these provisions. For example, one of the confidentiality provisions extends to "all information pertaining to [a student's] disability." ER 41, ¶ 23 (quoting SDS Handbook at 4). Nowhere does USF dispute that a student's receipt of exam accommodations, and the nature of those accommodations, is information "pertaining to" that student's disability. Nor can it — USF only provides accommodations upon proof that a student suffers from a disability, and the nature of the accommodations provided depends directly on the nature of the disability. ER 41–42, ¶ 23 (quoting SDS Handbook at 8, 17, Appendix E).

To the extent that there is any ambiguity, the contract should be interpreted in Tecza's favor given that USF had complete control over the language used in its handbooks. *Kashmiri v. Regents of the Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 654 (Ct. App. 2007) ("It is well established that '[i]n cases of uncertainty not removed by [other] rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist.'" (quoting Cal. Civ. Code § 1654)).

Even if Tecza's accommodations were not private, the Special Exam Sign-Out Sheet was itself independently confidential as part of Tecza's academic record — a point that USF nowhere disputes. Opening Br. at 25. As such, the

unauthorized disclosure of Tecza's Special Exam Sign-Out Sheet to his classmates breached USF's obligation pursuant to the Student Handbook to disclose academic records only to law school administrators and faculty "for the purpose of administering the academic record in performance of their official duties" or upon written request by Tecza himself. *Id.* at 21, 25. Accordingly, regardless of whether his accommodations were a private fact, USF breached its contract with Tecza.

Finally, USF explicitly admits that pursuant to the SDS Handbook provisions, it was obligated to maintain the confidentiality of Tecza's medical information. Response Br. at 42–43. For the reasons explained above in section I.B, USF breached this contract by disclosing, at a minimum, that Tecza suffered from a disability for which he required additional time and isolation for examinations. The district court erred by concluding otherwise.

B. The District Court Erred in Dismissing Tecza's Negligence Claim

1. The District Court Erred in Not Giving Tecza Notice and an Opportunity To Be Heard as to Whether USF Breached a Duty Owed to Him

In the district court, USF argued that the "educational negligence bar" precluded Tecza's negligence claim, and that was the negligence issue briefed by the parties. As USF acknowledges, the district court dismissed Tecza's negligence claim on the entirely different ground that it failed to allege breach of a duty of

care. Response Br. at 44, 47. Nonetheless, USF attempts to sweep this significant procedural error under the rug, arguing that the requirements of notice and opportunity to be heard are satisfied so long as dismissal is made pursuant to the same Federal Rule of Civil Procedure — here Rule 12(b)(6) — raised by the moving party. Given the range of issues encompassed by Rule 12(b)(6), USF's argument is startling in its scope and would eviscerate any notion of due process.

At no time during the district court proceedings was Tecza given *any* indication by either USF or the district court that the sufficiency of his pleadings as to USF's breach of a duty of care was being considered as a possible basis for dismissal. Nor was that issue briefed or argued in the context of some other motion. *See, e.g., Omar v. Sea-Land Serv., Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (affirming *sua sponte* dismissal of fraud and breach of contract counterclaims without notice where defendant's own summary judgment motion raised as affirmative defenses the same legal theories and associated facts). As a result, the dismissal of the negligence claim was clear error.

In fact, the district court's failure to give Tecza any notice of its intention to dismiss his negligence claim on an entirely different basis than that raised by USF is arguably more egregious than the similar procedural error for which this Court reversed dismissal in *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001). In that case, plaintiffs filed an action under 42 U.S.C. § 1983 against the City of Los

Angeles and four individual officers of the Los Angeles Police Department alleging various constitutional violations based on the wrongful arrest and incarceration of one of the plaintiffs. *Id.* at 676–77. Although only the City filed a motion to dismiss the § 1983 claims, the district court, without notice, dismissed these claims *sua sponte* as to the individual officers also. Given the lack of adequate notice, this Court found dismissal to be in error — despite the fact that the City's motion to dismiss directly implicated the acts of the individual officers. *See id.* at 683 n.7. Here, by contrast, nothing in USF's briefing even remotely implicated the sufficiency of Tecza's pleadings as to USF's breach of a duty of care. *See* ER 103; ER 34–35.

The district court could easily have requested supplemental briefing from the parties before ruling on the sufficiency of Tecza's negligence pleadings, but did not. *See, e.g.*, *R.K. v. Hayward Unified Sch. Dist.*, No. C 06-07836, 2007 WL 2778730, at *7 (N.D. Cal. Sept. 21, 2007) (denying Rule 12(b)(6) motion to dismiss Unruh Act claim on basis raised by defendant, but reserving ruling on second basis for dismissal raised *sua sponte* by the court to afford plaintiff opportunity to file supplemental briefing). Its failure to do so impermissibly denied Tecza any opportunity to address the sufficiency of his pleadings as to USF's breach of a duty of care. Accordingly, unless Tecza cannot possibly win relief on his negligence claim — and, as explained below, he can — dismissal of

this claim was in error. *See Wong v. Bell*, 642 F.2d 359, 361–62 (9th Cir. 1981) (holding that dismissal pursuant to Rule 12(b)(6) without notice and an opportunity to at least submit a written memorandum is erroneous except where "[p]laintiffs cannot possibly win relief").

2. The District Court Erred in Holding that Tecza Did Not Sufficiently Plead the Duty and Breach Elements of Negligence

The district court dismissed Tecza's negligence claim on the ground that he alleged that USF acted inadvertently rather than intentionally. As inadvertent conduct is the essence of negligence, the district court erred as a matter of law. *See* Opening Br. at 35–37. USF does not dispute that inadvertence is actionable as negligence. Rather, it argues that Tecza "misreads" the district court's order as requiring intentionality. Response Br. at 44–45. But the district court explicitly characterized as a *concession* Tecza's pleading that USF acted inadvertently in disclosing that he received exam accommodations. ER 9. The district court then *again* referred to the inadvertent nature of USF's disclosure in concluding that USF did not breach a duty owed to Tecza. *Id.* It is thus difficult to understand the district court's order in any way other than meaning that Tecza's claim failed at least in part because USF's conduct was inadvertent.

USF again reverts to its "no private fact" arguments in claiming that it had no duty to Tecza to keep his exam accommodations confidential. Response Br. at

45. As discussed above, however, these arguments lack merit even if they apply to negligence analysis. Moreover, as discussed in section III.A above, these privacy law arguments are inapplicable at least because USF voluntarily assumed a duty in the SDS and Student Handbooks to keep Tecza's academic forms confidential. *See also* Opening Br. at 25, 41–43.

Finally, USF appears to admit that it had a legal duty pursuant to negligence law not to disclose Tecza's medical information. Response Br. at 45. For the reasons stated above, USF breached this duty by disclosing that Tecza received exam accommodations.

3. Tecza's Negligence Claim Is Not Subject to the Educational Negligence Bar

In an effort to rescue the district court's dismissal of Tecza's negligence claims, USF raises the "educational negligence"[5] bar as an alternative basis for affirming the district court's dismissal of Tecza's negligence claim. Response Br. at 48. It is true that California courts have held that "[f]or policy reasons . . . the law refuses to hold a public school system liable to a student who claims he was inadequately educated." *Chevlin v. L.A. Cmty. Coll. Dist.*, 260 Cal. Rptr. 628, 631 (Ct. App. 1989). But by its own terms, this educational negligence bar is here inapplicable for two reasons.

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[5] Educational negligence may also be referred to as educational malfeasance. *See, e.g.*, *Wells v. One2One Learning Found.*, 141 P.3d 225, 250 (Cal. 2006).

First, the bar against claims for educational negligence is limited to allegations of failure to provide an adequate education. *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 860–61 (Ct. App. 1976) (applying bar where former student, who graduated from high school with only a fifth-grade reading level, alleged in part that his public school district "negligently and carelessly failed to provide [him] with adequate instruction, guidance, counseling and/or supervision in basic academic skills such as reading and writing"); *see also Chevlin*, 260 Cal. Rptr. at 631 (applying bar where a community college student terminated from its nuclear medicine program alleged that the college failed to provide adequate supervision, training, and evaluation). Such claims are not actionable because "classroom methodology affords no readily acceptable standards of care, or cause, or injury," thus leaving courts with no workable standard against which to assess the alleged misconduct. *Peter W.*, 131 Cal. Rptr. at 860–61 ("The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught . . . .").

As a more recent opinion of the Supreme Court of California makes clear, the educational negligence bar in no way precludes claims that "do not challenge the *educational quality or results* of the school's programs."[6] *Wells v. One2One*

[6] USF dismisses *Wells v. One2One Learning Foundation* as holding merely that the educational negligence bar does not apply to allegations of fraud. Response Br.

Learning Found., 141 P.3d 225, 251 (Cal. 2006) (holding that claim brought pursuant to the California False Claims Act for fraudulent receipt of state public education funds was not subject to the educational negligence bar "insofar as it asserts, not simply that [the defendant] charter schools provided a *substandard* education, but that they submitted false claims for school funds while failing to furnish *any* significant educational services, materials, and supplies"). As Tecza in no way alleges that USF provided him with an inadequate legal education, his negligence claim — based solely on USF's improper disclosure of his confidential information — does not implicate the quality of the educational instruction with which he was provided and thus is not subject to the educational negligence bar.

Second, the decisions establishing the bar on claims of educational negligence relate to allegations brought against *public* educational institutions. These decisions are in fact grounded upon "consideration of the role imposed upon the *public* schools by law and the limitations imposed upon them by their *publicly* supported budgets." *Peter W.*, 131 Cal. Rptr. at 861 (emphases added). As the first California Court of Appeal to apply the educational negligence bar explained:

> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation

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at 48. But the California Supreme Court in fact applied the educational negligence bar to plaintiffs' fraud claim insofar as it sought "to raise issues of the *quality* of education offered by the charter school defendants, or of the academic *results* produced." 141 P.3d at 252.

> of the public schools during the last few decades. . . . To hold them to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims — real or imagined — of disaffected students and parents in countless numbers. . . . The ultimate consequences, in terms of public time and money, would burden them — and society — beyond calculation.

Id. USF, however, is a *private* — not a public — university, and thus the educational negligence bar is inapplicable for this reason also.

C. Tecza Adequately Pleaded a Violation of the UCL

The UCL prohibits business acts or practices that are either unlawful, unfair, or fraudulent. Cal. Bus. & Prof. Code § 17200 *et seq.* Tecza alleges that USF violated the "unfair" prong of the UCL by violating its own internal policies as stated in the SDS and Student Handbooks. Opening Br. at 45–49. USF does not directly dispute that an "unfair" business act or practice may be predicated on a violation of a defendant's own internal policies, nor does it dispute that the SDS and Student Handbooks constitute the internal policies of USF. Response Br. at 49 ("even *assuming* the correctness of that theory, and even *assuming* that the handbooks quoted in the SAC are the University's internal policies" (emphases added)). USF has thus waived any argument as to those issues. *See Kuba*, 387 F.3d at 855 n.5; *see also Greenwood*, 28 F.3d at 977. Instead, USF argues that Tecza's "unfair" allegation is derivative of his breach of contract claim, and fails for the same reasons. But as explained above in section III.A, USF's arguments with respect to breach of contract are unavailing.

The "unlawful" prong in turn allows the UCL to treat violations of other laws as proscribed unfair competition. While Tecza's "unlawful" allegation is admittedly derivative of his constitutional privacy claim, that claim is adequately pleaded as explained in section II, and thus the district court erred in dismissing Tecza's UCL claim for this reason also.

CONCLUSION

For the foregoing reasons and those stated in Tecza's Replacement Opening Brief, Tecza respectfully requests that the Court vacate the district court's order dismissing the Second Amended Complaint without leave to amend; direct the district court to enter an order denying USF's motion to dismiss as to Tecza's privacy, breach of contract, negligence, and UCL claims; and remand for further proceedings.

Dated: January 18, 2013

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C), the attached Plaintiff-Appellant Jason Tecza's Reply to Defendant-Appellee's Replacement Response Brief is proportionately spaced, has a type-face of 14 points or more, and contains 6,929 words (based on the word processing system used to prepare the brief).

Dated: January 18, 2013

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 18, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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