

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

No. 2026-P-0649

BENJAMIN EDELMAN,

Plaintiff-Appellant,

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Defendant-Appellee.

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On Appeal from a Judgment of the Suffolk Superior Court

BRIEF OF DEFENDANT-APPELLEE

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

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August 17, 2026

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## **STATEMENT OF THE ISSUES**

- I. Did the Superior Court correctly rule that Harvard was entitled to summary judgment on Benjamin Edelman’s breach of contract claim on three alternative grounds, the failure to prove any one of which would require that the claim be dismissed: (i) the Principles and Procedures for Responding to Matters of Faculty Conduct (the “FRB Principles”) were not contractually binding; (ii) Harvard did not breach the FRB Principles in 2017; and (iii) Edelman was not harmed by any purported breaches of the FRB Principles when Harvard chose not to grant him tenure?
- II. Did the Superior Court correctly rule that Harvard did not violate the covenant of good faith and fair dealing during Edelman’s 2017 FRB Review?

## **STATEMENT OF THE CASE**

In 2017, Harvard Business School (“HBS” or the “School”) chose not to grant tenure to Benjamin Edelman, a former Associate Professor. HBS Dean Nitin Nohria, the sole ultimate decisionmaker at HBS, chose to recommend against tenure because he concluded that Edelman’s actions, including conduct that created conflict of interest, academic integrity, and reputational risks for HBS, raised serious questions about Edelman’s judgment that disqualified him from the “privilege of a lifetime employment” at HBS. [RAI/288](#), 162:15–21. Rather than accept the consequences of his actions,

Edelman chose to sue Harvard for breach of contract (and other claims), focusing on alleged procedural fouls purportedly made by the School in his tenure review. [RAIV/7](#). The Superior Court, in its Order granting summary judgment in Harvard's favor on all claims, correctly identified his misplaced focus on issues that, as the undisputed factual record shows, had no impact on Nohria's discretionary decision to recommend against tenure.

Edelman was first reviewed for tenure in 2015. Because of concerns about Edelman's conduct in two highly publicized events, Nohria called a Faculty Review Board (the "FRB") to assess whether Edelman upheld HBS's Community Values, one of HBS's three criteria for promotion. The FRB determined he had not, but Nohria gave Edelman a second chance to demonstrate improved judgment with a two-year extension. In 2017, following a second FRB review, Nohria recommended against granting Edelman tenure. Edelman left the School in 2018. *See infra*, 6–17.

On February 14, 2023, Edelman filed a complaint in Suffolk Superior Court. [RAI/11](#). Edelman claimed the FRB Principles created rights that were "contractual in nature;" HBS had breached provisions of the FRB Principles; and those breaches resulted in the denial of tenure. [RAIV/7](#). Edelman also claimed that the FRB's behavior in 2017 violated the covenant of good faith

and fair dealing.<sup>1</sup> *Id.* Harvard moved to dismiss Edelman’s complaint on May 22, 2023, which the Superior Court denied on March 18, 2024. RAI/11. Edelman filed an Amended Complaint on April 25, 2025. [RAIV/7](#).

Following discovery, the Parties filed cross motions for summary judgment on December 22, 2025. RAI/14. On January 14, 2026, the Superior Court (Salinger, J.) heard argument on the Parties’ motion. RAI/16. On February 17, 2026, the Superior Court issued a 38-page Memorandum and Order granting Harvard’s summary judgment motion on all three of Edelman’s claims and denying Edelman’s partial motion for summary judgment. RAI/17.

The Superior Court held that Harvard was entitled to summary judgment on Edelman’s breach of contract claim for three distinct and independent reasons:

First, the record establishes that Edelman cannot prove that the FRB [Principles] were contractually binding. Second, Edelman has mustered no evidence that the FRB violated this policy or the implied covenant of good faith and fair dealing. Third, Edelman cannot prove that the FRB’s alleged violation of its procedures caused him to suffer any harm; Edelman presents no evidence that the purported procedural snafus had any effect on the Dean’s decision not to recommend Edelman for tenure.

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<sup>1</sup> Edelman brought a promissory estoppel claim but does not contest the Superior Court’s dismissal of that claim. *See* Mass. R. App. Pro. 16(a)(9)(A).

Add., 70.<sup>2</sup> The Superior Court further held that Harvard was entitled to summary judgment on Edelman’s claim for breach of the implied covenant of good faith and fair dealing because “Edelman has not mustered any evidence that Harvard breached the implied covenant of good faith and fair dealing, or that any alleged breach of this implied covenant caused Edelman to suffer any harm as a result.” Add., 102. Finally, the Superior Court allowed summary judgment in Harvard’s favor on Edelman’s promissory estoppel claim because, again, “Edelman has failed to muster evidence sufficient to prove that claim.” Add., 104. The Superior Court entered final judgment in Harvard’s favor and dismissed all of Edelman’s claims with prejudice. Add., 106. This appeal followed.

## **STATEMENT OF FACTS**

### **A. The HBS Tenure Process**

HBS reserves tenure for “extraordinary individuals who have demonstrated their ability and willingness to make a sustained contribution to the study, teaching, and practice of business.” [RAI/314](#). The School’s Dean has the sole responsibility to decide whether to recommend to Harvard’s President that a faculty member be granted tenure. [RAI/323](#). The

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<sup>2</sup> Although Harvard includes the Superior Court’s Order in its own Addendum as per Mass. R. App. Pro. 16(b), for uniformity of citations, Harvard uses the page numbers assigned by Edelman’s Addendum (hereinafter “Add.”).

HBS tenure process is governed by the Policies and Procedures with Respect to Faculty Appointments and Promotions, commonly called the “Green Book.” [RAI/313](#); [RAI/104](#), 129:1–12.

The Green Book provides that “[t]he primary objective of the appointments process is to provide the Dean with the best possible information, judgment, and advice on various faculty appointments.” [RAI/323](#). The guidance is intended to be flexible. *See id.* Under the Green Book, the Dean always retains the right to vary tenure procedures given the “circumstances of a particular case” or “the best interests of the School.” *Id.*

The Green Book sets forth three criteria for tenure: (i) intellectual contributions; (ii) teaching contributions; and (iii) effective contributions to the HBS community, including upholding certain Community Values such as displaying “honesty, integrity, and respect for others” and, overall, advancing the School’s mission. [RAI/314](#)–18. This last criterion is referred to colloquially as the “colleagueship” standard. [RAI/327](#); [RAI/191](#), 20:16–21:2.

The HBS tenure process generally begins with a three-member Subcommittee that evaluates the candidate based on scholarship, teaching, and contributions to the community (the “Subcommittee”). [RAI/324](#). In cases where the candidate’s conduct raised a question about whether the

candidate meets the criteria for effective contributions to the community, the Dean may ask a separate committee, the FRB, rather than the Subcommittee, to evaluate that criterion. [RAI/422](#)–25. In such cases, the Subcommittee and the FRB each prepare a report, which are submitted to a Standing Committee composed of all the members of that year’s Subcommittees (in a typical year, more than one candidate is considered, so there are multiple Subcommittees). [RAI/325](#), 423. If the Standing Committee advances the case forward, it goes to the Appointments Committee (consisting of all tenured faculty), which provides an advisory vote to the Dean, who decides whether to recommend the faculty member for tenure to Harvard’s President. [RAI/325](#). The Dean is not obligated to adopt the Appointments Committee’s recommendation and has full discretion to decide whether to recommend that a faculty member receive tenure. [RAI/323](#).

## **B. The 2014 Incidents**

In 2014, the year before Edelman’s first tenure review, he became embroiled in two major controversies that, as he testified, were “high water marks. . . of negative publicity” for HBS. [RAI/94](#), 82:3–8.

### ***The Blinkx Incident***

In January 2014, Edelman published a blog post, based on research paid for by two investment firms, accusing a UK company called Blinkx of

engaging in deceptive advertising practices. [RAI/362](#); [RAIV/66](#); [RAII/132](#)–[33](#), [135](#)–[37](#). In Edelman’s words, the post led to a public “firestorm.” [RAI/131](#), 276:22–24. Blinkx’s stock price plummeted, which received coverage in the New York Times and elsewhere. [RAII/135](#). Reporters contacted HBS, asking about Edelman’s potential role and conflict of interest as a paid researcher for the suspected short-selling investment firms that stood to benefit from the plummeting stock price his blog post caused. [RAI/328](#).

### ***The Sichuan Garden Incident***

In December 2014, the website Boston.com published an article headlined “Ben Edelman Harvard Business School Professor, Goes to War Over \$4 Worth of Chinese Food.” [RAI/383](#)–90. The article quoted lengthy emails Edelman sent to a restaurant called Sichuan Garden, expressing outrage at having been overcharged \$4 for his takeout order. *Id.* Edelman, who is a lawyer, sent five emails over three days, accusing the restaurant of violating the Massachusetts Consumer Protection Act, demanding that it pay him treble damages (\$12 total) for the alleged overcharge, then requested a 50% discount on his order. [RAI/386](#).

The publication of Edelman’s attack on a local, family-run restaurant drew extremely negative press coverage for Harvard. One prominent legal

commentator tweeted “Here’s why people hate (a) @Harvard and (b) lawyers.” [RAI/394](#); [RAI/130](#), 262:21–263:1. [RAII/91](#). Nohria received what he called a “tsunami” of emails relating to Edelman’s conduct, including the following from an HBS alumnus:

If it isn’t obvious, this type of behavior is truly embarrassing for me, as an alumnus and as someone who is proud of Harvard Business School . . . this type of behavior is damaging nationally. Worse, the faculty member in question is now on the record defending his actions, rather than apologizing. It likely goes without saying, but as a faculty member, Ben Edelman represents both the school, and to an extent, the alumni who attended the school . . . This behavior is bullying, masked in a thin guise of pseudo-legal rhetoric. I shudder to think at his behavior under the secure protection of tenure.

[RAI/393](#).

Edelman testified that he agreed these two incidents gave HBS and its leaders “legitimate reason to be concerned about whether [he] was capable of exercising good judgment” and that they “were right to be thinking about whether it could happen again.” [RAI/87](#), 19:13–20:1; [RAI/94](#), 82:13–16. To Nohria, the Blinkx and Sichuan Garden incidents “led to real question marks about whether [Edelman] was a person who could meet [HBS’s] community standards.” [RAI/288](#), 163:14–19.

### **C. Edelman’s 2015 Tenure Review and FRB Proceeding**

Edelman first went up for tenure in 2015. [RAIV/15](#). In mid-July 2015,

Senior Associate Dean for Faculty Development Paul Healy, the HBS faculty member responsible for administering the faculty promotions process, informed Edelman that “concerns” about his conduct had been raised, causing Healy to “refer[] this aspect of [his] case to the Faculty Review Board.” [RAI/338](#).

Two weeks later, FRB Chair Amy Edmondson informed Edelman that the FRB would be considering the Blinkx and Sichuan Garden incidents because they “raised questions about [his] conduct, including the impact of [his] actions on HBS, the members of its community, and others.” [RAI/339](#). Edmondson also told Edelman that the FRB would be evaluating “his interactions with staff and other colleagues at the School.” *Id.*

The FRB, comprising three senior faculty members and a senior administrator with another senior administrator providing support, gathered documents and interviewed Edelman and others. [RAI/338](#)–39, 327. Edelman sent the FRB a seven-page written statement about his conduct in mid-August. [RAI/340](#)–46. In October 2015, the FRB sent its draft report to Edelman and gave him an opportunity to respond in writing. [RAI/327](#)–37; [RAII/370](#). The report summarized information gathered through interviews of faculty, staff and others; it did not identify who the FRB interviewed or provide copies of interview notes. See [RAI/327](#).

Edelman did not complain that the FRB neither identified interviewees nor provided notes of interviews. [RAI/91](#), 48:18–49:16. He replied to the FRB report in November 2015. [RAII/370](#).

The FRB’s report included findings about the Blinkx and Sichuan Garden incidents and his interactions with HBS staff. [RAI/327](#)–33. The FRB’s report concluded that “Professor Edelman did not uphold the School’s Community Values, and his conduct in each instance [of the areas under review] did not meet the criteria for ‘Effective Contributions to the HBS Community.’” [RAI/336](#). The FRB found that Edelman “did not appear to understand that conflicts of interest, real or perceived, could arise not only when he had been paid directly by a company for his work, but [also] as a result of past work for clients in the same industry or field,” and that Edelman “failed to recognize that as a faculty, integrity in our activities—both real and perceived—is at the core of what we do.” [RAI/334](#), 336.

The Standing Committee, after reviewing the Subcommittee and FRB reports, recommended that the Dean provide Edelman a two-year extension to give Edelman time to show that he had “learned the lessons” from the concerns raised by the FRB report. [RAI/88](#), 24:4–6, 15–22; [RAI/111](#), 171:1–3; [RAI/482](#); [RAI/544](#); [RAII/70](#). Nohria agreed, with the understanding that in 2017 he would ask the FRB to revisit Edelman’s conduct when his tenure

case was taken up again. [RAI/90](#), 30:4–16; [RAII/70](#). Nohria solicited the views of the FRB about this extension and the FRB supported it. [RAI/89](#), 29:1–19; [RAII/70](#).

Healy told Edelman the purpose of the extension was to give him time to demonstrate that he had “learned the lessons” from the FRB report, saying there were “no guarantees” that he would receive a promotion when his case was reviewed once more. [RAI/90](#), 31:15–23, 32:10–16; [RAII/70](#). Edelman testified that he recognized that it was his burden to prove he deserved tenure, acknowledging that “it’s always a burden on the candidate to produce a strong case for . . . promotion[.]” [RAI/90](#), 31:11–14, 32:20–22.

By January 2017, Edelman knew that the FRB would reconvene to evaluate his progress and suggested individuals the FRB should interview. [RAII/114](#)–15; [RAI/107](#), 150:21–151:1; [RAI/121](#), 219:17–22. Edelman expected that the FRB’s 2017 review would be similar to the 2015 review “in terms of the methods used, the kinds of information provided at the outset, and the kinds of information provided” in the FRB’s report. [RAI/109](#), 161:21–162:1.

### **D. The 2017 Tenure Review**

In March 2017, Edelman submitted a document titled “Reflection on Feedback from Faculty Review Board” to the FRB. [RAI/492](#). The FRB met

to discuss the submission and plan its review. [RAI/490](#). In early July, Edmondson informed Edelman that “the Standing Committee then [in 2015] recommended deferring your case for two years to enable you to demonstrate whether you had indeed internalized the lessons learned, anticipating that the FRB would again be activated during summer/fall 2017 to review your conduct.” *Id.* Edmondson explained the scope of the upcoming review, telling Edelman that the “FRB must now assess:

- whether you understand the aspects of your conduct – regardless of your intent – that made them problematic;
- whether there is sufficient evidence of changed behavior; and
- whether there is a reasonable expectation that your changed behavior will be sustained in the future.”

*Id.* Edelman responded on July 31 with an additional written statement addressing, among other things, his choice of outside activities, including his decision to file a class action lawsuit against American Airlines. [RAI/500](#).

In late August, Healy sent the FRB a Wall Street Journal article titled “Paying Professors: Inside Google’s Academic Influence Campaign.” [RAII/117](#); [RAIII/164](#)<sup>3</sup>. The article reported that “Microsoft has paid Harvard business professor Ben Edelman, the author of papers saying Google abuses

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<sup>3</sup> NB: Citations to “RAIII” throughout are to the Record Appendix Volume III, whose footer is incorrectly formatted as “RA/##.”

its market dominance.” [RAII/121](#). (In fact, Microsoft had paid Edelman nearly \$2 million between 2006 and 2015.) [IRA/4–7](#); [RAI/127](#), 251:9–14. Healy asked the FRB to consider whether Edelman’s “papers appropriately acknowledged his relation with Microsoft[.]” [RAIII/164](#).

On September 1, 2017, with its review still ongoing, Edmondson emailed Edelman asking him to submit a “complete listing of your outside activities, including client names and litigation” and “a complete listing of all work products in the public domain” for the prior two years. [RAI/508](#). Edmondson asked Edelman to explain “when and where [he decided] to seek advice or approvals on your outside activities, and when and how to include disclosures on your output.” *Id.* Edmondson referred specifically to Edelman’s decision to bring a class action lawsuit against American Airlines. *Id.* Edelman responded on September 8, 2017. [RAI/509](#).

### **E. The FRB’s 2017 Report**

The FRB provided its 2017 draft report to Edelman on September 27, 2017. [RAIII/98](#). Edelman replied on October 5. [RAI/515–26](#). On October 12, the FRB issued its final report and addendum ([RAI/480–531](#)) which included a list of changes made to the draft report ([RAI/526–531](#)) following its review of Edelman’s reply. The final 2017 report focused on two issues: (i) respect for others within the institution and (ii) outside activities and

conflict of interest. [RAI/480](#)–91. Like the 2015 report, the 2017 report summarized information gathered through interviews without identifying the interviewees or providing interview notes. [RAI/109](#), 161:10–17; [RAI/280](#), 126:7–11.

The report’s discussion of Edelman’s outside activities focused on two issues. First, the FRB addressed Edelman’s decision to file a class action lawsuit against American Airlines without notifying or seeking advice from the Dean despite the likely connection to Harvard given that both Edelman and the plaintiff were HBS professors. [RAI/486](#)–89. The FRB expressed concern that, “given his prior history with situations that had complicated consequences for him and for the School,” Edelman “did not engage” the Dean, the Dean’s Office, or HBS’s Director of Communications before filing suit. [RAI/489](#).

The FRB also addressed Edelman’s disclosures during 2016 and 2017 about his financial relationship with Microsoft in four publications, one presentation, and one blog post about Google. [RAI/485](#)–86. The FRB concluded that Edelman’s “reporting of disclosures is, at best, inconsistent . . . [and] that rather than providing information so that a reader might determine potential conflict, Professor Edelman instead omits many of the required elements, and himself seeks to make that determination.”

[RAI/486](#). The FRB observed: “one might expect the need for appropriate disclosures to be top of mind for Professor Edelman during this time period, given the express concern raised by the FRB [in its 2015 report] about ‘the public’s trust in the independent and objective nature of [his] scholarship.’” *Id.* The FRB’s 2017 report concluded that the FRB was “unable to say, with full conviction, that the issues raised following the 2015 review had been satisfactorily resolved” or that Edelman met the “School’s standards for collegueship.” [RAI/529](#).

#### **F. Dean Nohria’s Decision Not to Recommend Edelman for Tenure**

In October 2017, the Standing Committee reviewed and voted on Edelman’s tenure materials. [RAII/203](#). Its vote was evenly divided among those who supported and opposed his promotion. *Id.* The Appointments Committee met and voted on Edelman’s tenure case in November, with 56% supporting tenure and 41% opposing it (3% abstained). *See* IRA/8–18. Edelman received a lower percentage of pro-tenure votes from the Appointments Committee than any successful tenure candidate had in at least the previous ten years. [RAII/355](#). In fact, from 2006 to 2017, no candidate with less than a 64% supporting vote from their colleagues had been granted tenure. *Id.* Given the tepid faculty support, Nohria viewed Edelman’s case as one where there was “not a clear mandate in either

direction . . .” and “one where [he had] to exercise [his] best judgment.”

[RAII/364](#); [RAI/284](#), 149:16–18.

Nohria recommended against Edelman’s promotion. [RAIV/221](#); [RAI/272](#), 78:19–21; [RAI/281](#), 136:6–18. He “concluded that [Edelman] had not met our standards for being a member of our community that we could have faith would meet collegiality standards and community standards over the long run.” [RAI/281](#), 136:14–18. Nohria was most concerned by Edelman’s repeated poor judgment in his choice and manner of engaging in outside activities. In Nohria’s judgment, Edelman:

continued to have blind spots in relationship to how others might see situations that he would see differently; that on issues where ***it would have been very easy to check in with someone else***, he would personally make determinations for when it was correct for him to check in and when it was not; and that he continued to be ***excessively self-confident about his opinion relative to consulting others*** and paying careful attention to what their views might be, which is the heart of what our community encourages in our classrooms and encourages of each other.

[RAI/281](#), 136:19–137:10 (emphasis added). As Nohria further explained:

[s]everal things that go all the way back to the Chinese restaurant situation, where it was very clear that other people thought he was bullying someone . . . he couldn’t imagine why anybody would believe [] that some people may have thought that if he had any economic relationship with someone who had done a

study . . . that if he just published the study because he thought it represented his academic integrity that someone else might imagine that it didn't[;] that if he took on a lawsuit that he didn't think [it]. . . would be worth just talking to someone to see if that was an okay thing, whether that might end up dragging him into a situation in which the amount of work involved or effort involved would create challenges or . . . reputation issues [for the School]. These are just things where you don't have to say whether you should do it or not but just having **the ability to talk** to someone to get a second opinion, **to listen** to that opinion carefully, **to weigh those matters** would allow you to make better decisions **and he repeatedly seemed to not want to do that.**

[RAI/281](#)–82, 137:14–138:14 (emphasis added).

Once Nohria called Edelman to tell him that he would not be recommending him for tenure, Edelman's tenure bid ended. See [RAII/75](#); [RAI/92](#), 50:15–24.

### **STANDARD OF REVIEW**

An appellate court's "review of a decision on a motion for summary judgment is de novo." *Metcalf v. BSC Grp., Inc.*, 492 Mass. 676, 680 (2023). "An appellate court may affirm a correct result based on reasons that are different from those articulated by the judge below" (*id.*, 681) as long as they are "supported by the record" (*Roman v. Trs. of Tufts Coll.*, 461 Mass. 707, 711 (2012)). "Summary judgment is appropriate where there is no material issue of fact in dispute and the moving party is entitled to judgment as a

matter of law.” *Metcalfe*, 492 Mass. at 681. “A nonmoving party’s failure to establish an essential element of [his] claim ‘renders all other facts immaterial’ and mandates summary judgment in favor of the moving party.” *Roman*, 461 Mass. at 711.

### **SUMMARY OF ARGUMENT**

This case is a straightforward breach of contract case relating to whether a document issued by HBS—the FRB Principles—can be properly viewed as a contract; whether Harvard breached the FRB Principles; and whether Edelman consequently was harmed. The Superior Court correctly determined that, based on the undisputed facts, the answer to all three questions is “No.” It also held that the undisputed facts established that Edelman could not demonstrate breach of the implied covenant of good faith and fair dealing.

The Superior Court correctly rejected Edelman’s contention that the FRB Principles were contractually binding. *See infra*, 21. The Superior Court found no material evidence to support the reading of the FRB Principles as either an express or implied contract between Harvard and Edelman. First, the FRB Principles must be read together with the Green Book, and the Green Book gives the Dean broad discretion to determine procedures in tenure cases, instructing against interpreting the FRB

Principles as contractually binding. Second, the Superior Court correctly determined that the procedural provisions Edelman relied on to demonstrate a purported contract do not apply to tenure cases before the FRB but instead apply to misconduct cases. Third, Edelman's own conduct belies any claim that he had a reasonable belief that certain provisions of the FRB Principles formed a contract—he knew that provisions he now claims were contractual were not followed in the 2015 FRB process; yet, he made no complaint about the 2015 process. Finally, the special deference courts provide to a private university's tenure process strongly counsels against reading the FRB Principles as strict procedural rules in the absence of language to that effect, which would constrain Harvard's academic decision-making.

The Superior Court also correctly rejected Edelman's contention that HBS breached the FRB Principles. *See infra*, 30. Undisputed facts show that HBS adhered to the FRB Principles: the FRB properly drafted an allegation against Edelman; the scope of the FRB's 2017 review was not improperly expanded; Edelman was provided with the evidence he was entitled to; and the 2017 FRB report properly went before the Standing Committee with the Dean's knowledge and approval. Therefore, no breaches occurred.

The Superior Court further correctly rejected Edelman's contention

that he was harmed by any alleged breaches of the FRB Principles. *See infra*, 38. The undisputed facts show that Nohria had the ultimate discretion to recommend against Edelman's promotion to tenure. Nohria's decision was based on his views about Edelman's conduct in his outside activities and the serious questions it raised about his judgment. No material dispute exists that even if the FRB had departed from the FRB Principles, the Dean's decision would have changed. Thus, the Superior Court's rejection of Edelman's breach of contract claim should stand.

Separately, the Superior Court correctly rejected Edelman's contention that there was a breach of good faith and fair dealing. *See infra*, 44. First, there was no impropriety in the way Angela Crispi (the senior administrator on the FRB) and Jean Cunningham (the senior administrator supporting the FRB) executed their roles on the FRB, and they were not required to recuse themselves just because they had previous interactions with Edelman. Second, there is no evidence the FRB manipulated evidence against Edelman, rather than merely exercising its judgment in how to present and weigh the evidence it reviewed. Finally, even if there was any impropriety, Edelman cannot demonstrate that had it not occurred, Nohria's decision would have been different. Thus, the Superior Court's rejection of Edelman's claim for breach of good faith and fair dealing should also stand.

Accordingly, summary judgment was properly entered in Harvard's favor.

### **ARGUMENT**

As an initial matter, Edelman claims that the Superior Court made several “inferences in Harvard’s favor,” supposedly violating the summary judgment standard. Edelman Principal Brief (hereinafter “Brief”), 29. But these supposed favorable “inferences” for Harvard are nothing more than the Superior Court applying the correct legal standard regarding reasonability in a breach of contract claim. *Compare* Brief, 29 (citing Superior Court’s Order) *with O’Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 692–693 (1996) (implied contract exists if employee “reasonably believed” employer offered policy as term of employment); *Wortis v. Trs. of Tufts Coll.*, 493 Mass. 648, 662 (2024) (at summary judgment, courts apply “standard of reasonable expectation” for what meaning a university “should reasonably expect” an employee to give policy) *and* Add., 87, 93. Rather than inferences in Harvard’s “favor,” the cited portions of the Order represent the Superior Court’s application of the proper standards to the undisputed facts. The Superior Court properly adhered to the summary judgment standard.

#### **I. The Superior Court Correctly Rejected Edelman’s Contention That the FRB Principles Were Contractually Binding**

Edelman claims that the FRB Principles created contract-based rights. The Superior Court correctly held that the FRB Principles did not provide a basis for Edelman's contract claims.

**A. The Superior Court Correctly Ruled that the FRB Principles Did Not Create an Express or Implied Contract in Edelman's Tenure Case**

The Superior Court determined that the FRB Principles were not an express part of Edelman's employment contract with Harvard. An organization's internal document, like a "personnel manual may form the basis for an express contract . . . if the parties agree in advance of employment" or "if, during the course of at-will employment" there is an express oral or written agreement "that the provisions of an employee manual" are part of the parties' "rights and obligations." *O'Brien*, 422 Mass. at 691. The Superior Court correctly found that the evidentiary record is devoid of any evidence of an express agreement, and Edelman has offered none to dispute it. *See Add.*, 86–87.

Nor are the FRB Principles an implied contract. In the absence of an express contract the test is whether "an employee *reasonably believed*" that an "employer was presenting the manual as a statement of the conditions under which employment would continue." *O'Brien*, 422 Mass. at 692–93 (emphasis added). Courts look for indicators that a manual forms an implied

contract such as the fact that it “states that it provides only guidance as to the employer’s policies” (*id.*, 693) or “the conduct and relations of the parties” (*Jackson v. Action for Boston Cmty. Dev., Inc.*, 403 Mass. 8, 9 (1998)), which would cut against finding a contract. *See Decker v. Worcester Jr. Coll.*, 369 Mass. 960, 960 (1975) (holding that a college could not be bound by a general policy that did “not contain a commitment to the” faculty that the college would follow it).

Here, the Superior Court correctly concluded that the undisputed material facts established that Edelman could not demonstrate a reasonable belief that the FRB Principles formed an implied contract in his tenure case. The Superior Court carefully analyzed the language of the FRB Principles and explained that Edelman’s claim that it created contractual rights in his tenure case failed because the FRB Principles (1) explicitly cross-reference the Green Book, which gives the Dean broad discretion to initiate and approve variances from procedures in tenure cases; (2) signal clearly that the procedural provisions that Edelman claims the FRB violated, including his claim that the FRB should have provided the “evidence gathered,” apply to misconduct cases, not tenure cases; and (3) contain language about confidentiality that makes clear that no reasonable faculty member could believe that the FRB Principles would require the FRB to provide all the

“evidence gathered” in tenure cases. Further, the Superior Court correctly held that Edelman’s own conduct made clear that he did not believe that the FRB Principles required the FRB to provide all the “evidence gathered.” The Superior Court also carefully distinguished other cases permitting implied contract cases to go forward.

**1. Because the FRB Principles Must Be Read Together with the Green Book—Which Gives the Dean Broad Discretion to Determine Procedures in Tenure Cases—They Do Not Form an Implied Contract**

The Superior Court noted that the FRB Principles contain a separate section on page 3 “that addresses ‘promotions, reviews, and reappointments,’ and thus applies to a tenure review case.” Add., 88. This section specifically refers to the Green Book’s standards and procedures. *See* [RAI/424](#). Consequently, the Green Book and FRB Principles were “interlocking documents” that are “interrelated in purpose,” and that “any reasonable faculty member would realize that they must be read together to understand how they should be applied.” Add., 88 (citing *Matthews v. Planning Bd. of Gloucester*, 72 Mass.App.Ct. 456, 463 (2008) (documents that were part of single transaction and contained identical language were “interlocking” and should be read together)). Consequently, the FRB Principles effectively incorporate the Green Book principle that “the Dean may initiate or approve variances” from the promotions process “whenever

circumstances or the School’s best interest warranted it.” Add., 88. “This weighs heavily against finding that the FRB [Principles] were intended to be contractually binding.” *Id.* (citing *Jackson*, 403 Mass. at 14–15 (where employer “retained the right to modify unilaterally the personnel manual’s terms,” distribution of the manual was not an offer that could be accepted to form implied contract and employer was entitled to summary judgment)).

This Court should reject Edelman’s contention that the Superior Court’s finding that these two documents must be read together is incorrect. *See* Brief, 34–35. *Both* documents address procedures carried out as part of the formal tenure promotions process; accordingly, neither document can be understood independently of the other. Edelman’s preferred reading—based on nothing more than his conjecture—strains credulity because it asks this Court to accept that the Dean may approve variances to every other part of the tenure promotions process, *except* when an FRB review is part of it. This is an impermissible constraint on Harvard’s academic decision-making and is not supported by the factual record.

**2. The Superior Court Correctly Held that the Procedural Provisions Edelman Relies On Apply Only in Misconduct Cases, Not Tenure Cases.**

The FRB Principles are intended to address two distinct circumstances. First, they address circumstances where any HBS faculty member faces

accusations of misconduct and sanctions for that misconduct. [RAI/422](#). Second, a separate section of the FRB Principles gives the Dean the option of authorizing the FRB to conduct a review to help their decision making in tenure cases. [RAI/424](#). Given the clear distinction the FRB Principles make between these two circumstances, no reasonable HBS employee could conclude that the FRB was required to follow the FRB provisions directed to evaluating faculty misconduct and imposing sanctions where the FRB's role was to aid the Dean's decision in a tenure case. *See McMillan v. Massachusetts Soc. for Prevention of Cruelty To Animals*, 140 F.3d 288, 310 (1998) (no implied contract where employee could not have "reasonably expected" employer to follow particular procedures in an internal document). The Superior Court correctly concluded that the provisions Edelman claims HBS breached—in particular, the provision requiring the FRB to disclose the "evidence gathered"—apply to misconduct cases where HBS may impose sanctions, not to tenure cases. Add., 89.

Applying the standard in *O'Brien* and *McMillan* to the facts here, the Superior Court correctly concluded that those provisions apply "where a more structured procedure may be needed to investigate a concern and determine whether misconduct has occurred." *Id.* This section specifies that the Dean is "responsible for finalizing any sanctions" recommended as a

result of the misconduct investigated by the FRB. *Id.* The Superior Court held that the procedural provisions that Edelman relies on—particularly his claim that the FRB should have provided all “the evidence gathered”—could not reasonably be interpreted as applicable in tenure cases. *Id.*, 90.

A tenure review is not for the purpose of determining whether misconduct or an offense has occurred, as the promotions section of the FRB Principles explicitly refers to “concerns about conduct” and whether there is a question that the tenure candidate has not met the collegueship criterion. *Id.*; [RAI/424](#). There is no contractual right to receive tenure, so denial of tenure was not a “sanction.” *Add.*, 89. Therefore, the Superior Court determined, “any reasonable faculty member would conclude that [the misconduct] section of the FRB [Principles] has nothing to do with a tenure review case or other decisions about whether to promote or reappoint a faculty member.” *Id.*

The FRB Principles also repeatedly refer to the importance of confidentiality and privacy ([RAI/423–24](#)), which courts have long recognized as critical to ensuring candor in important processes like tenure review. *See, e.g., U.S. v. Nixon*, 418 U.S. 683, 705 (1974) (“Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for

their own interests to the detriment of the decisionmaking process”); *Clark v. U.S.*, 289 U.S. 1, 13 (1933) (confidentiality of jury deliberations); *Wakefield Teacher’s Ass’n v. School Committee of Wakefield*, 431 Mass. 792, 802 (2000) (public school teacher disciplinary proceedings); *see also* Moore’s Federal Practice-Civil §26.46[7][c] (“The courts have consistently maintained a well-founded concern for the confidentiality of information in tenure review files.”) Recognizing these important principles, the Superior Court correctly determined that Edelman’s reading of this section of the FRB Principles (*see* Brief, 47) discounts a key aspect of any university’s decision-making process. Add., 90 (citing cases regarding the “critical importance” of confidentiality in tenure cases); [RAI/424](#).

### **3. Edelman Did Not Object When the FRB Principles Were Not Followed in 2015, Further Demonstrating His Belief Was Not Reasonable**

When determining whether an implied contract exists, “[t]here is no surer way to find out what parties meant, than to see what they have done.” *T.F. v. B.L.*, 442 Mass. 522, 525 (2004) (quoting *Martino v. First Nat’l Bank*, 361 Mass. 325, 332 (1972)). Here, Edelman’s own conduct shows that he had no reasonable expectation that the FRB would identify by name the witnesses it interviewed or provide interview notes, nor that the FRB report should not have gone to the Standing Committee.

It is undisputed that the FRB did not provide “all” the evidence gathered to Edelman in 2015 when it withheld interview notes from its draft report while providing a summary of that information. Edelman did not complain about this. Such acquiescence shows that his reasonable expectations about the FRB Principles did not include access to all the sources of evidence. Edelman’s knowledge and actions in 2015 also rebut his claims that the Standing Committee should not have reviewed the FRB’s report in 2017. Edelman knew the Standing Committee had seen the FRB’s report in 2015 but did not complain—indeed, since the Standing Committee first proposed a two-year extension, he received the benefit of the Standing Committee’s review of the 2015 report. The Superior Court correctly held Edelman’s behavior was “compelling evidence that this section of the FRB [Principles] did not become part of Edelman’s contract.” Add., 92.<sup>4</sup>

#### **4. The Special Deference Courts Provide to the Tenure Process Also Counsels Against Reading the FRB Principles as Strict Procedural Rules**

The Superior Court correctly found that Edelman’s breach of contract claim here “is different [from other breach of contract cases] because a

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<sup>4</sup> Edelman points to conduct from FRB members purportedly indicating they believed the FRB Principles were contractual. Brief, 59–61. But without more, these examples merely indicate a commitment to a fair process. Edelman points to no other evidence indicating Harvard intended the FRB Principles to be binding. See *O’Brien*, 422 Mass. at 693.

discretionary decision whether to grant a university professor tenure is different.” Add., 90–91. This discretion in the face of the enormous privilege bestowed by tenure (an “unusually secure position[] tantamount to [a] life contract,[]” (*Beitzell v. Jeffrey*, 643 F.2d 870, 875 (1st Cir. 1981)), “suggests a need for wide discretion in making an initial tenure award.” *Berkowitz v. President & Fellows of Harvard College*, 58 Mass.App.Ct. 262, 269 (2003). And nothing in the FRB Principles suggests that Harvard intended to narrow its discretion in considering tenure promotion cases.

In sum, the Superior Court correctly held based on the undisputed facts that the FRB Principles were not contractually binding in Edelman’s tenure review.

## **II. The Superior Court Correctly Rejected Edelman’s Contention That the FRB Principles Were Breached**

The Superior Court also correctly held that Edelman did not offer material facts to establish that HBS breached the FRB Principles. When reviewing a university handbook or other policy document, courts should apply “the standard of reasonable expectation” and give the document the meaning the university “should reasonably expect the other party to give it.” *Wortis*, 493 Mass. at 662–63; *see also* Add., 93. The academic decisions of private universities—including tenure decisions—are given special deference by Massachusetts courts. *See Berkowitz*, 58 Mass.App.Ct. at 272; *see also*

Add., 93. The Superior Court correctly applied this standard. *See* Add., 92–99.

At summary judgment, Edelman alleged six different ways Harvard breached the FRB Principles but challenges the Superior Court’s ruling on only four of those issues, thereby waiving the other two.<sup>5</sup> *See* Mass. R. App. Pro. 16(a)(9)(A). As to these four alleged violations, the Superior Court correctly granted summary judgment in Harvard’s favor because its conduct did not constitute breach as a matter of law.

**A. The Superior Court Correctly Rejected Edelman’s Claims That the 2017 FRB Failed to Properly Specify an Allegation and Improperly Expanded Its Scope**

Edelman claims Harvard violated the FRB Principles because the FRB did not draft an allegation against him in 2017 and improperly expanded the scope of its review. This Court should reject those claims. “In the absence of [policy] language expressly limiting the . . . committee’s powers of inquiry,” courts must be “reluctant to read in restrictions that limit the university’s discretion.” *Berkowitz*, 58 Mass.App.Ct. at 274.

The Superior Court correctly determined that the factual record

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<sup>5</sup> On appeal, Edelman does not challenge the Superior Court’s holding that there was no breach as to whether (i) the FRB was properly reconvened in 2017 (Add., 93–94) or (ii) the FRB’s 2017 Report properly reached conclusions (Add., 98–99). *See also* Brief, 44–56.

showed that the 2017 tenure review was a continuation of the tenure review that began in 2015; so, too, was the 2017 FRB. Add., 94–95. As such, no new allegation was required. *Id.*, 94. However, if a new allegation was required, the FRB provided one. [RAI/490](#). The FRB’s letter to Edelman in July 2017 reminded him that he was given an extension to demonstrate he had learned from the Blinkx and Sichuan Garden incidents, and that it would be assessing three distinct questions: “whether [he] underst[oo]d the aspects of [his] past conduct. . .that made them problematic, whether there [was] sufficient evidence of changed behavior, and whether there [was] a reasonable expectation that [his] changed behavior will be sustained in the future.” *Id.*

The Superior Court also correctly rejected Edelman’s claims that the FRB improperly expanded its review by examining his outside activities and conflict of interest disclosures. Add., 95–97. Edelman understood that his outside activities and disclosures would be relevant; indeed, he discussed these topics in his letter to the FRB in March 2017. [RAI/493](#)–94. Edelman raised involvement in the American Airlines lawsuit in his July 2017 FRB submission. [RAI/502](#). Edelman fails to explain why the FRB could not investigate something he raised himself. As the Superior Court held, it was not reasonable to expect that the FRB could not consider “new information about disclosure issues in Edelman’s publications that the FRB learned of

during its review.” Add., 96.

Similarly, the Superior Court correctly rejected Edelman’s complaint that he did not have enough time to adequately respond to the “new” allegations in 2017. Brief, 53–54. Edelman did not complain or ask for more time; and “[s]ince no provision of the FRB [Principles] gave Edelman any contractual right to a longer response period, HBS could not have committed a breach of contract by not giving Edelman more time that he never requested.” Add., 97 (citing *Vakil v. Anesthesiology Assocs. of Taunton, Inc.*, 51 Mass.App.Ct. 114, 123 (2001))<sup>6</sup>.

The undisputed facts make clear that Harvard would have reasonably expected Edelman to understand that the 2017 FRB was a continuation of the 2015 FRB; that the allegation in 2017 was a clear reference to the conduct issues that gave rise to the 2015 FRB and Edelman’s extension; and that the 2017 FRB would review topics that were relevant in 2015, namely his conflicts of interest and outside activities—all of which Edelman in fact did understand. *See Wortis*, 493 Mass. at 662–63 (courts should apply “the

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<sup>6</sup> Edelman points to an email from Cunningham asking whether a review of his disclosures was within the FRB’s remit. *See* Brief, 53 (citing [RAIV/276](#) ¶36). But the FRB eventually resolved the question and requested additional information from him about those disclosures in September 2017. *See* [RAII/167](#); [RAI/508](#); *see also* [RAI/509](#) (Edelman’s September 2017 submission regarding his outside activities).

standard of reasonable expectation” to university policy documents to give the document the meaning the university “should reasonably expect the other party to give it”).

**B. The Superior Court Correctly Rejected Edelman’s Claim That the 2017 FRB Failed to Provide Edelman With the Evidence Gathered**

Edelman also claims that Harvard violated the FRB Principles because its report, while providing a detailed summary of the information it gathered, did not identify the people the FRB interviewed in 2017 or provide interview notes. Pointing to the FRB Principles’ emphasis on the importance of confidentiality, the Superior Court held that Harvard could not have reasonably anticipated Edelman to give the FRB Principles any other reading than that the FRB would maintain the confidentiality of interviewees and that as a result he would not receive this information as part of the evidence gathered. *See Add.*, 98. Edelman attempts to dispute this by claiming “policy rationales” cannot override the text of the FRB Principles which “offer[] no exception;” presenting a strained reading of the FRB Principles; and claiming that evidence in other investigations is shared with the subject of the investigation. *Brief*, 45–48. These contentions do not create a material factual dispute and should fail.

*First*, Edelman reduces the Superior Court’s discussion of the core

function of confidentiality in tenure review proceedings to mere “policy rationales.” Brief, 47. The Superior Court’s decision, rather, pointed to specific language in the FRB Principles to find that “[a]ny reasonable faculty member would understand that *this means what it says*, and that in a tenure case the FRB [Principles] may and indeed must maintain the confidentiality of information provided to it in confidence.” Add., 98 (emphasis added). Edelman contends that construing the FRB Principles’ instruction to provide “the evidence gathered” to exclude confidential information would somehow make this instruction “meaningless.” Brief, 47. In fact, it is *Edelman’s* reading that would make the confidentiality provisions of the FRB Principles meaningless, because providing *all* evidence (including that obtained under the premise of confidentiality) would essentially eliminate those provisions. “The words of a contract must be considered in the context of the entire contract rather than in isolation.” *Matthews*, 72 Mass.App.Ct. at 462. Further, the Superior Court did not ignore Edelman’s interest in responding to evidence as he claims. Brief, 48. It recognized that Edelman reviewed the evidence that was shared in the 2017 report, including a *summary* of witness interviews, and had a chance to respond. See Add., 97; see also [RAI/483–85, 515](#).

*Second*, Edelman’s bare claim that he should have seen the confidential

information the FRB collected because “many otherwise-confidential investigations” share such evidence is misplaced, as he offers neither evidence nor authority to support this. In fact, the evidentiary record here cuts against this unsupported claim, as it is undisputed that Edelman’s *own prior FRB* in 2015 did not provide him with such evidence, which he neither complained about in 2015 nor raised in 2017.<sup>7</sup>

*Third*, the FRB Principles clearly state that “the FRB and Executive Dean may seek *and report on* confidential input—from faculty colleagues, staff, student, alumni, or others—about concerns about the candidate[] that were not previously reported.” [RAI/424](#) (emphasis added). The FRB did so in 2015 and in 2017. Edelman claims this language was quoted out of context by the Superior Court, citing the sentence before it to imply that this seeking and reporting on confidential input is limited to the initial meeting between the FRB Chair and Executive Dean. Brief, 46. But this is not what the words say. The first sentence refers to a meeting held between just “the FRB Chair and Executive Dean” where any earlier complaints would be discussed.

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<sup>7</sup> Edelman argues that the evidence provided from witness interviews in 2015 was not significant. Brief, 50. He does not explain (because he cannot) how the insignificance (to him) of those interview notes meant that HBS complied with the FRB Principles despite not providing notes in 2015 but then violated the Principles by not providing them in 2017.

[RAI/424](#). The next sentence says that “the FRB”—*not just the FRB Chair*—and the Executive Dean “may seek and report on confidential input . . . about concerns about the candidates that were not previously reported.” *Id.* Since there is no indication that the entire FRB must be present at the initial meeting with the FRB Chair and Executive Dean, it is improper for Edelman to read into the Principles a restriction as to when the full FRB may collect and report on confidential information.

*Finally*, Edelman contends that the “Superior Court mistakenly claimed that Edelman only objected in ‘a single sentence at the end of a footnote’ to withholding evidence other than interview notes.” Brief, 47 (quoting Add., 97 n.6). He points to another sentence from his summary judgment briefing referring to “a variety of documents . . . that likewise were not shared with” him. *Id.* Yet the supporting evidence he cites only directly mentions one other piece of evidence not provided—Crispi’s “record of staff and faculty reflections on and interactions with Associate Professor Ben Edelman.” [RAIV/273](#)¶24; *see also* [RAIV/321](#); [RAIV/316-319](#); [RAIV/308](#), n.10. He does not point to any other specific pieces of evidence that were improperly withheld; nor does he explain why this additional information gathered from individuals at HBS about Edelman—the equivalent of interviews—would not be covered by the confidentiality provisions of the

FRB Principles. *See supra*, 27–28.

**C. The Superior Court Correctly Rejected Edelman’s Claim That the 2017 Standing Committee Should Not Have Reviewed the FRB’s Report**

Edelman claims that providing the FRB’s 2017 report to the Standing Committee was a breach of the FRB Principles. The evidentiary record demonstrates that Harvard could not have reasonably expected Edelman to believe that the FRB Principles precluded the Standing Committee from reviewing the FRB report, and Edelman does not raise any material facts to contradict this.

The Superior Court concluded that Nohria “knew that the Standing Committee had been briefed on and discussed the FRB’s 2015 and 2017 reports and assessed whether Edelman met the Community Standards criterion for promotion[.]” Add., 99. Edelman also does not address the undisputed fact that he knew the Standing Committee referenced the FRB report in 2015, giving rise to a reasonable expectation that he knew the Standing Committee would review the FRB’s 2017 report as well.

**III. The Superior Court Correctly Rejected Edelman’s Contention That He Was Harmed by Any Alleged Breaches of the FRB Principles**

Edelman’s claims that he was harmed by alleged breaches do not rise above the level of “pure speculation.” *Hasseltine House, LLC v. Jewish Fam.*

*& Children’s Servs., Inc.*, 106 Mass.App.Ct. 30, 36–37 (2025). As the Superior Court correctly determined, Edelman cannot show that the Dean would have made a different tenure recommendation if the FRB had followed different procedures. Add., 99–100. Edelman needs to “present definite, competent evidence” “showing that the breach [allegedly] committed by Harvard would have changed the outcome of his [tenure] case.” *Sonoiki v. Harvard Univ.*, No. CV 19-12172-LTS, 2024 WL 760844, \*11 (D. Mass. Feb. 6, 2024), *appeal filed* Feb. 23, 2024 (internal quotations omitted). He has not done so.

The Superior Court properly relied on Nohria’s un rebutted testimony that he decided against recommending Edelman for tenure because he “concluded that [Edelman] had not met our standards for being a member of our community that we could have faith would meet collegiality standards and community standards over the long run.” Add. 100–101; [RAI/281](#), 136:14–18. The Superior Court correctly observed that:

Dean Nohria’s testimony that he reached his conclusion because of his concerns about the Blinkx, Sichuan Gardens, American Airlines, and Microsoft/Google disclosure incidents—and that he would have come out the same way even if the FRB’s 2017 report had not addressed any other issues about Edelman’s respect for others within HBS—is un rebutted on this record.

Add., 101. Since the only undisclosed evidence related to opinions and

input from faculty and staff about Edelman’s interactions, and not Edelman’s outside activities, “[i]t therefore would have made no difference if the FRB had disclosed evidence that it gathered from witnesses about how Edelman treated HBS faculty and staff,” since that “was not part of the FRB’s report that influenced Dean Nohria.” *Id.*

Edelman attempts to create a dispute of fact by claiming that “Nohria’s reasoning was a significantly disputed factual question” because his affidavit “contradicted his deposition testimony and contemporaneous statements regarding the reasons for his negative recommendation.” Brief, 62. This is not true. Edelman first claims that Nohria’s deposition testimony states “he relied on ‘all the information that I had available,’ and considered a ‘holistic picture’ based on ‘all of the evidence in its totality.’” *Id.* (quoting [RAI/260](#), [285](#)–86). But Edelman misleadingly characterizes Nohria’s testimony. The Dean testified that he “*reviewed* all of the information” he had available—including the subcommittee report, the Standing Committee vote, the Appointments Committee discussion and votes, and the FRB Reports—“*before* making the recommendation.” [RAI/260](#), 23:4–24:15 (emphasis added). Similarly, Nohria’s full comments about the “evidence in its totality” (Brief, 62) reads: “I am required, and I looked at all of the evidence in its totality.” [RAI/286](#)–87, 157:9–158:6. This testimony does not demonstrate

a material dispute about the reason for Nohria's decision; it merely confirms that Nohria did exactly what any reasonable faculty member would expect him to do: review all the materials pertinent to Edelman's tenure case before making his decision. It says nothing about what information Nohria "relied on," as Edelman puts it, in deciding against recommending tenure.

Similarly, Nohria's comments about considering a "holistic picture" was in the context of being asked *a hypothetical* question about whether an Appointments Committee vote above 80% in Edelman's favor would have "significantly impacted [his] thinking." [RAI/285](#), 150:5–20. (Of course, Edelman's vote was nowhere near 80% and fell well below the favorable vote level for every tenure candidate considered over the previous 10 years.) Nohria explained that if the vote had been 80%, the *evidence likely would have been very different* because the Appointments Committee vote "reflects a combination of all things . . . so you weigh all of these things as a holistic picture to try and make a determination. So if the votes were 80%, *I imagine* the data would have been different." *Id.* (emphasis added).

This testimony also does not present "a conflict with his later affidavit." Brief, 63 (citing [RAIV/221](#)). In fact, this testimony explains why Nohria declined to answer a hypothetical question about the Appointments Committee voting percentages (*see* Brief, 63 (citing [RAI/285](#))): as he quite

logically noted, had the vote been different, the evidence likely would have been different. See [RAIV/221](#). Nohria was not asked in his deposition about what he would have recommended if the FRB had not addressed issues related to respect for others and therefore there is no conflict in his testimony. As he explained in his affidavit, the concerns about Edelman's outside activities and disclosures addressed by the FRB, "independent of the concerns about his respect for others inside the institution . . . were sufficient on their own for me to conclude to recommend against tenure and I would have decided not to recommend Prof. Edelman for tenure even if the FRB's 2017 report had not addressed any issues related to respect for others." *Id.*

That Nohria's contemporaneous comments about his decision referred to the Appointments Committee vote does not present a material factual dispute either. Compare Brief, 63–64 with [RAIV/286](#), 155:20–157:1 (explaining how the Appointments Committee vote percentages factor into the Dean's decision-making). The Superior Court correctly responded to Edelman's claims that Nohria's contemporaneous statements, deposition testimony, and sworn affidavit contradict each other: "the evidence . . . is not inconsistent with and does not refute Nohria['s] affidavit." Add., 85, n.5. "[M]ere assertions of the existence of disputed facts without evidentiary support cannot defeat the summary judgment motion." *Bergendahl v. Mass.*

*Elec. Co.*, 45 Mass.App.Ct. 715, 718–19 (1998).

Edelman claims Nohria’s “perception of those incidents was based” on a flawed report “tainted by” the alleged breaches. Brief, 64. But Edelman himself brought up his outside activities and disclosures to the FRB. Further, Edelman’s deposition testimony affirmatively acknowledged that the FRB disclosed the evidence it relied on with respect to outside activities and disclosures. See [RAI/95](#), 89:10–24.

Finally, Edelman posits a speculative chain of events: Nohria’s decision was affected by the Appointments Committee members who may have been influenced by the FRB Report’s purportedly flawed section on Edelman’s treatment of staff, and that, absent those flaws the vote would have been higher in Edelman’s favor, thereby influencing Nohria to recommend tenure. Brief, 65. The evidence does not support this. The Superior Court’s conclusion that “the summary judgment record makes clear that the Dean would not have reached a different conclusion and decided that Edelman had shown he met the School’s Community Standards and should be promoted to a tenured position, if only the FRB had gone about its work differently” should stand. Add., 102.<sup>8</sup>

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<sup>8</sup> Similarly, Edelman’s claims that the Appointments Committee relied solely on the FRB report ignores the fact that Edelman and the controversies his

#### **IV. The Superior Court Correctly Rejected Edelman's Contention That There Was a Breach of Good Faith and Fair Dealing**

The Superior Court correctly found that Harvard did not violate the implied covenant of good faith and fair dealing. Edelman claims that Crispi and Cunningham improperly served as both witnesses and adjudicators, and that the FRB's presentation of the information gleaned from its witness interviews was manipulated to purposefully paint Edelman in a bad light.

*First*, the Superior Court correctly observed that “[t]he FRB’s involvement in a tenure review is not an adjudicatory proceeding akin to a jury trial” and that the FRB Principles do not bar “tenured faculty members who know a tenure candidate, and may have relevant information or prior opinions about the candidate, from serving on the FRB.” Add., 103. It held that because the purported contract’s language and purpose did not exclude any of the FRB members from participating, “the choice of FRB members did not violate the implied covenant.” *Id.* (citing *Berkowitz*, 58 Mass.App.Ct. at 272 (no reasonable expectation to support plaintiff’s interpretation of handbook absent express requirement regarding the complained-of makeup

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conduct created were well known to his faculty colleagues, and they had a right to their own views about his behavior. *See e.g.*, IRA/16, comment F063. As Edelman readily acknowledged, two of those controversies (Blinkx and Sichuan Gardens) were “high water marks . . . of negative publicity” for HBS. [RAI/94](#), 82:3–6.

of his tenure committee).

Crispi and Cunningham were not “witnesses” to the FRB just because they were personally familiar with some of the conduct issues the FRB reviewed in 2017. Indeed, given the highly public nature of the Blinkx and Sichuan Garden incidents in 2014, Nohria would have been hard pressed to find anyone from HBS who could have served on the FRB if personal knowledge of Edelman’s conduct issues was disqualifying. Nohria knew well both Crispi’s role as head of staff at HBS and Cunningham’s role in the Dean’s Office—roles that allowed them to interact directly with or receive concerns about Edelman—and was not concerned about their ability to fairly perform their FRB duties. [RAI/267](#)–68, 57:24–58:9; [RAI/269](#) 62:2–14. Edelman does not rebut this with material facts; his claims regarding Crispi and Cunningham do not relate to their supposed dual role but merely rehash unsupported claims that they “manipulated” evidence. *See* Brief, 59–61. *See also Schaer v. Brandeis Univ.*, 432 Mass. 474, 481 (2000) (“nothing in the contract suggests that disciplinary proceedings will be conducted as though they were judicial proceedings”).

*Barry v. Trs. of Emmanuel Coll.*, 2019 WL 499774, \*7–\*8 (D. Mass. Feb. 8, 2019) does not support Edelman’s claim that Crispi and Cunningham should not have served on or supported the FRB. *See* Brief, 60–61. In *Barry*

two professors on plaintiff's tenure committee had accused her of violating the law, threatened to report her to federal regulators, and played an "outsized role (not contemplated in the Faculty Handbook)" in her tenure case. 2019 WL 499774,\*7. That is far from the situation here. The FRB Principles do not prohibit someone in Crispi's or Cunningham's role from participating in an FRB. *Cf. Schaer*, 432 Mass. at 480 (board members' use of their "own experience" in place of admitting testimony did not violate procedures). Further, Edelman well knew of his own past interactions with Crispi and Cunningham and that they were serving on and supporting the FRB; yet, once again, he made no complaint.

*Second*, the Superior Court considered Edelman's claims that the FRB "manipulated" evidence and determined the summary judgment record did not support this reading: "nothing in the FRB [Principles] barred the FRB members 'from using their own common sense and expertise' in evaluating the evidence that they considered." *Add.*, 103 (quoting *Schaer*, 432 Mass. at 480). "It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject" in evaluating a tenure candidate. *Berkowitz*, 58 Mass.App.Ct. at 274 (citing *Schaer*, 432 Mass. at 481).

Edelman's disagreement over how the FRB presented evidence

amounts to no more than his subjective opinion that he was treated unfairly and that his own view was correct. He points to no facts to dispute that the 2017 report represented anything more than the work of a committee “using their own common sense and expertise” to evaluate and distill the evidence they considered. *Schaer*, 432 Mass. at 480. Edelman points to no persuasive evidence that FRB members purposefully set out to paint him more negatively than the evidence warranted. Indeed, the FRB members chose to exclude some of the most inflammatory statements his colleagues and HBS staff members made about him.<sup>9</sup> In the FRB’s final report, 27 of the 40 summarized interviewee comments were, in fact, positive. See [RAI/483](#)–84.

*Third*, Edelman claims he was singled out by the FRB’s treatment of him, but the evidence he points to does not support this. See Brief, 61. For example, he cites Cunningham’s comment that HBS had not “audited any faculty member for compliance with the [Conflict of Interest] policy,” but the FRB Report supplied the reason for the FRB’s approach: “Although it is not our intent that [Edelman] be held to a higher standard than his colleagues,

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<sup>9</sup> For example, interviewees described Edelman as “arrogant,” “unable to restrain himself,” having “no sense of what’s appropriate,” and “unable to see [the] other side’s point of view.” [RAII/18](#). Another interviewee wondered whether Edelman was “a Ted Kaczynski or a John Nash?” [RAII/23](#). Still another person expressed “doubts about his ability to resolve his behavioral issues.” [RAII/106](#).

here, again, one might expect the need for appropriate disclosures to be top of mind for Professor Edelman *during this time period, given the express concern raised* by the FRB [in 2015] about ‘the public’s trust in the independent and objective nature of [his] scholarship.’” [RAI/486](#) (emphasis added). As to Cunningham’s purported objection that “the FRB’s concerns about outside activities and disclosures ‘could be raised about’ other HBS faculty,” (Brief, 61) the full context demonstrates she was reacting to an HBS faculty member making a specific “allegation of wrongdoing” against Edelman. *See* [RAI/549](#); [RAIII/167](#).

The selective quote Edelman points to from faculty member Ben Esty is immaterial. *See* Brief, 61. Esty was not a member of the FRB, and he admitted that he *did not know* whether the other tenure candidates that year also “had formal reviews culminating in written reports.” [RAII/250](#). Regardless, Esty made those remarks to Healy who, when asked during his depositions whether he shared Esty’s concerns, replied: “No, I don’t. The reason I don’t is that there were *external allegations raised* about Ben Edelman’s outside work . . . and his previous conflict of interest disclosures that made it *a question worth investigating*.” [RAI/178](#), 122:5-123:16 (emphasis added).

*Fourth*, the Superior Court separately and independently determined

that even if there were breaches of good faith and fair dealing, Edelman still could not prove there was any harm to him *as a result of* those breaches: “Dean Nohria made up his own mind about whether to recommend that Edelman receive tenure. No reasonable jury could find that the Dean would have supported Edelman’s tenure bid if only different faculty members had served on the FRB or they had reacted differently to arguments that Edelman made in his reply to the draft 2017 report.” Add., 104.

In its final analysis, Edelman’s complaints about the FRB process are, as the Superior Court held, little more than “persnickety” grievances about the outcome of a process he wishes had turned out differently. Add., 92. The undisputed evidence shows that the process was, in fact, extraordinarily fair to him. Cf. Brief, 12–14, 30, 34, 35 n.3, 37, 44 (commenting that the FRB Principles were meant to promote fairness). In 2015 and 2017, the FRB wrote detailed reports that described their conclusions and, in each instance, gave him multiple opportunities to respond in writing to their concerns. See [RAI/327](#)–414, [RAI/480](#)–530. The Standing Committee (in 2015) and Standing and Appointments Committees (in 2017) had the opportunity to review all of Edelman’s responses to the FRB’s questions and his efforts to rebut the FRB’s conclusions. In 2015, HBS gave him a second chance in 2017, but he continued to engage in outside activities in a manner that caused

Nohria to question his judgment.

Rather than demonstrate a dispute as to whether Edelman was treated fairly, the evidentiary record shows that Nohria recommended against Edelman's promotion because he believed Edelman had not sufficiently demonstrated changed behavior in the two years following the Blinkx and Sichuan Garden controversies. Edelman points to no factual evidence that, had Crispi and Cunningham been excluded from the FRB or had Edelman received full access to the interview notes and therefore been able to "rebut" the witnesses' statements about him, Nohria would have reached a different conclusion about the propriety of Edelman's conduct as it related to his outside activities and conflict of interest disclosures. Harvard was therefore entitled to summary judgment on Edelman's claim on good faith and fair dealing.

### **CONCLUSION**

The Superior Court correctly ruled that (i) Harvard did not breach any contract with Edelman during the 2017 FRB review and (ii) Harvard did not violate the covenant of good faith and fair dealing during Edelman's 2017 FRB Review. Edelman has presented no material facts sufficient to dispute these conclusions, and the Superior Court properly granted summary judgment on these claims in Harvard's favor. This Court should affirm the

Superior Court's Order.

Respectfully submitted,

**PRESIDENT AND FELLOWS OF  
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Dated: August 17, 2026

### **CERTIFICATE OF COMPLIANCE**

I, Martin F. Murphy, hereby certify that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Rule 16(b); Rule 16(e) (references to the record); Rule 20 (form and length of briefs, appendices, and other documents). I further certify that this brief complies with the length limitation in Rule 20—it was prepared in 14-point Georgia font using Microsoft Word and, according to Microsoft’s wordcount tool, contains 10,994 words.

/s/ Martin F. Murphy  
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### **CERTIFICATE OF SERVICE**

I, Martin F. Murphy, hereby certify that this document was served by email and via the Court’s electronic filing system on the following counsel pursuant to Mass. R. App. Pro. 13(d) on August 17, 2026:

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## ADDENDUM

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