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August 8, 2025

Hon. Justice Debra Squires-Lee
Suffolk Superior Court, Business Litigation Session
Suffolk County Courthouse
3 Pemberton Square
13th Floor
Boston, MA 02108

Re: *Edelman v. President and Fellows of Harvard College*, 2384CV00395-BLS-2 – Plaintiff's Submission Concerning Unresolved Discovery Disputes.

Dear Justice Squires-Lee:

This letter sets forth Plaintiff's position concerning the contested discovery Plaintiff seeks.

Discovery Issues in Dispute

Plaintiff's Discovery Requests to Defendant

Interrogatories

Interrogatory 8

Text of Interrogatory and Response:

INTERROGATORY NO. 8:

Identify each FRB investigation or inquiry conducted from 2015 to 2018, and the following information for each:

a. the complainant(s) (if any);

b. the respondent(s);

c. the members of the FRB;

d. any support staff for the FRB;

e. what dates the process began and concluded;

f. whether the investigation or inquiry was related to a tenure review; and

g. whether the respondent was provided with copies of documents and witness statements gathered by the FRB.

RESPONSE TO INTERROGATORY NO. 8:

Harvard objects to this Interrogatory as overbroad and unduly burdensome. Harvard further objects on the basis that it seeks information that is not relevant and not reasonably likely to lead to the discovery of admissible evidence.

Dispute Between the Parties:

Plaintiff requests that the Court order Harvard to answer Interrogatory 8.

Plaintiff's Position:

Should the Court, or a jury, conclude that language in the contractual policy at issue here (the FRB Policy and Procedures) is ambiguous, then information outside of the four corners of the document regarding its past application is likely to be relevant. *See, e.g., Pres. & Fellows of Harvard Coll. v. PECO Energy Co.*, 57 Mass. App. Ct. 888, 896 (2003). Notably, in the argument on Harvard's Motion to Dismiss on December 15, 2023, Judge Kazanjian asked about Harvard's practice in other cases.

Plaintiff is aware, based on discovery already produced in this case, that his 2015 tenure case was the first case to be reviewed by the FRB, which was then newly created. If his case was in fact the only case to be reviewed between 2015 and 2018, then Plaintiff would accept that there is no relevant information about how the FRB procedures were applied in other cases.

On the other hand, if there were another case in the relevant time period, then Plaintiff is entitled to sufficient information to permit him to explore whether the cases were handled similarly or differently, particularly as to the ways in which he alleges that the procedures were breached in his own case. Witness testimony at depositions suggests that there was one other case in that time period, and that information may have been shared differently with the parties in that case. If so, information about that prior case is highly relevant to Plaintiff's claims that the FRB was obliged to provide him with the evidence that it gathered, but that it did not do so. (*See* Amended Compl. ¶¶ 87-90.) Witnesses had different recollections of how the other matter was handled nearly 8 years ago, such that contemporary documentary evidence would be particularly informative. Discovery in this case is governed by a detailed protective order which would protect the confidentiality of information related to other matters.

Defendant's Position:

The Court should not order the production of documents from other FRB proceedings having nothing to do with Edelman or his claims here.

Where, as here, a faculty member claims that a university's policies or procedures creates "rights that are contractual in nature" (Amended Complaint, ¶ 85), Massachusetts courts "are guided by two fundamental principles." [1] *Berkowitz v. President & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269 (2003). First, they rely upon the "standard of 'reasonable expectation—what meaning

[1] Harvard does not concede that the FRB Principles created an implied contract with Edelman. *See generally Warren v. Child.'s Hosp. Corp.*, 652 F. Supp. 3d 135, 143-44 (D. Mass. Jan. 20, 2023) (noting factors mitigating against concluding that policies created implied contracts).

the party making the manifestation, the university, should reasonably expect the other party to give it.'" *Id.* (citation omitted). Second, they "adhere to the principle that 'courts are chary about interfering with academic . . . decisions made by private colleges and universities.'" *Id.* (citation omitted). "[I]n the absence of a violation of a reasonable expectation created by the contract, or arbitrary and capricious conduct by the university, courts are not to intrude into university decision-making." *Id.* (citations omitted).

There are at least three reasons why the Court should not order the production of documents from unrelated FRB proceedings.[2]

First, in the circumstances here, evidence about the procedures followed in *other* FRB proceedings could not have shaped Plaintiff's "reasonable expectations" of how the FRB would conduct his proceeding and, in particular, whether the FRB was required to disclose the identity of witnesses and the notes of their interviews. As Plaintiff's submission acknowledges, Plaintiff's 2015 FRB proceeding was the first FRB conducted at HBS. In 2015, the FRB provided a draft report to Edelman but did not disclose the identity of the witnesses it interviewed or provide the raw notes of those interviews. Edelman Dep. Tr. 160:19–161:15.

Edelman has acknowledged that, between his 2015 FRB proceeding and the FRB's re-convening in 2017, when he was still an HBS faculty member, he had no knowledge of FRB proceedings involving other faculty members. *Id*. at 163:22–25.

Thus, the only "reasonable expectations" that Edelman *could* have had in 2017 were based on the procedures that the FRB followed when it considered *his* case in 2015. As noted, the FRB did not provide either the names of the witnesses it interviewed in 2015 or the notes of those interviews. He did not complain about not receiving this information in 2015. *Id.* at 161:16–17.

Indeed, and contrary to Plaintiff's claims, Justice Kazanjian's questions at the motion to dismiss hearing focused on the procedures the FRB used when it conducted *Edelman's* case in 2015. *See* Motion to Dismiss Hearing Transcript, at 30:9 ("THE COURT: Did [the disclosure of all the evidence gathered] happen the first time, in 2015?").

Second, Plaintiff cites no case supporting the contention that records of other FRB proceedings are relevant here. Plaintiff's citation to *Pres. & Fellows of Harvard Coll. v. PECO Energy Co.*, 57 Mass. App. Ct. 888, 896 (2003) is misplaced. There, the court held that a provision in a written contract between Harvard and an energy supplier was ambiguous and, as a consequence, the parties could introduce evidence of their intentions during the negotiation process. *Peco Energy* certainly does not stand for the proposition that evidence of procedures the FRB followed in other FRB cases is relevant or discoverable here. The FRB Principles did not result from negotiations between Edelman and HBS.

[2] It merits mention that, although HBS sent Edelman the FRB's procedures when the FRB first convened in 2015, Edelman acknowledged that he "did not know" if he "opened" the procedures when they were sent to him and also acknowledged that he did not "think [he] looked at [the FRB Principles] during the 2015 [FRB] proceeding" or during 2017 proceeding up through the period when the FRB issued its final report. B. Edelman Dep. Tr. 174:19-24; 175:20-176:5. Edelman claims to have looked at the draft procedures when they were first circulated to the faculty in March of 2015, but did not "do anything to chart out the steps . . . [the FRB Principles] contemplated." *Id.* at 155:17-20.

In cases involving university disciplinary proceedings, courts in Massachusetts do not generally permit discovery into other, unrelated investigations. In *Leader v. Harvard Univ. Bd. of Overseers*, 2017 WL 8224449, *2 (D. Mass. Dec. 22, 2017), for example, where the plaintiff sought "all documents exchanged between Harvard and the [Department of Education Office of Civil Rights] regarding student complaints of sexual misconduct and Harvard's responses thereto," the court found that plaintiff had "not adequately demonstrated how other students' complaints are relevant to whether Harvard complied with its own policies when responding to her specific complaint."

Cases that permit plaintiffs to obtain discovery about disciplinary proceedings other than their own do so only where a plaintiff claims discrimination or there are other special circumstances. *See, e.g.*, *Doe v. Trustees of Boston Coll*., 2015 WL 9048225, *1 (D. Mass. Dec. 16, 2015) (ordering the defendant to review records of certain other sexual assault investigations and "produce any statements indicative of gender bias . . ."); *Doe v. Emerson Coll*., 2016 WL 11004384, *2 (D. Mass. Dec. 28, 2016) (in response to request for Title IX investigations covering a 16-year period, court permitted discovery into investigations relating to two specific years because "plaintiff alleges she was assaulted by the same assailant in 2012 and 2013.")

Third, the FRB Principles themselves contemplate the importance of confidentiality, as Plaintiff is aware, even though some information is divulged during the FRB process (e.g., the subject is able to read the report about him and respond, something not afforded in the rest of tenure process). Further, Plaintiff's FRB was conducted as part of his tenure review, which is a highly confidential process. Confidentiality is a critical tenet of the HBS tenure process. For example, during the tenure review process, the candidate is not permitted to review the external or internal letters about the candidate's merits for tenure, the sub-committee reports, the names of the sub- or Standing Committee members or their votes, or the vote tally or voting slips of the Appointments Committee. A candidate may not review these materials even if tenure is granted. Confidentiality is the bedrock of the tenure process, as courts routinely recognize. Plaintiff offers no evidence to suggest that he did not understand these principles at the time of his FRB review in 2015 and 2017.

Therefore, the Court should deny Plaintiff's request for sensitive and highly confidential information from third party FRB proceedings.

Plaintiff's Reply:

Application of the standard of reasonable expectation does not make Harvard's proceedings in other FRB matters irrelevant. The question is not what the Plaintiff actually expected or what knowledge he had at the time, but "what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.'" *Berkowitz*, 58 Mass. App. Ct. at 269. If the HBS faculty members who made up the FRB read the requirements of the Faculty Review Board's Principles and Procedures differently in cases other than Plaintiff's, that information is relevant to assessing the reasonableness of Plaintiff's reading of the principles, and to assessing the good faith of Harvard's actions. *See Barry v. Trs. of Emmanuel Coll.*, 2019 WL 499774, *8 (D. Mass. 2019) (considering views of other contemporary faculty members as evidence of reasonable expectations). Plaintiff's interrogatory is also narrowly focused on only those aspects of other FRB matters that would allow him to explore the FRB's understanding and application of the same policy as in his case, in the same time frame, unlike the requests in *Leader* that sought a wide range of documents that were not directly related to Harvard's policies.

Harvard cites extensively to cases involving student disciplinary proceedings, all under Title IX. It is worth noting at the outset that this is not such a case. While courts have used the same standard—reasonable expectation—for contract matters involving faculty as for matters involving students (*see Berkowitz*, *supra; Sonoiki v. Harvard Univ.*, 37 F.4th 691, 709 (1st Cir. 2022)), student matters are nevertheless fundamentally different from faculty cases. For one thing, the privacy of information on students is protected by statute; while this protection does not prevent disclosure in the context of litigation, it does make courts hesitant to lightly reveal such information. *See Doe v. MIT*, 46 F.4th 61, 70 (1st Cir. 2022). (discussing statutory and regulatory scheme under the Family and Educational Rights Privacy Act). Title IX cases also frequently involve deeply intimate information about the students involved. *Doe v. Trustees of Boston Coll.*, 2015 WL 9048225, *2 (D. Mass. Dec. 16, 2015) (noting need for consideration of privacy and confidentiality interests of non-party students to their educational records regarding allegations of sexual assault). These concerns are absent here.[3]

Nor are Harvard's rules about the confidentiality of the tenure process on point here. First, the information Plaintiff seeks concerns other FRB matters, which may take place at any time; his only question related to tenure is simply whether the matter involved or did not involve candidacy for tenure. He does not seek access to anyone else's full tenure file. In any case, confidentiality may be a "critical tenet" of the tenure process, but it applies primarily to the tenure candidate himself. At HBS, the candidate may not review materials such as internal or external letters, subcommittee reports, or standing committee materials—but the tenured members of the HBS faculty are all permitted to review all such materials before voting on the case. Both sides are subject to a very stringent protective order in this case. Under all of these circumstances, production of the requested information would not meaningfully interfere with Harvard's confidentiality interests.

Interrogatory 13

Interrogatory Text:

For each member of the HBS faculty who received tenure between 2010 and the present, provide, for each year from each faculty member's hiring to the present, that faculty member's:

a. Total salary;
b. Additional compensation from HBS;

[3] Harvard also does not fully explicate the holdings of these cases, in some cases in misleading ways. First, in *Doe v. Emerson Coll.*, the plaintiff sought extensive discovery of past sexual assault cases. The Court allowed her discovery about 2012 and 2013, the years in which she alleged that she was assaulted, and *also* granted her discovery for the academic years 2010-2011 and 2011-2012, on the theory that "Emerson's compliance with DOE guidance has some relevance" to her claims. *Doe v. Emerson Coll.*, 2016 WL 11004384, *3 (D. Mass. Dec. 28, 2016). Plaintiff here seeks limited discovery, covering only a narrow time period, about Harvard's history of compliance with its own policies; if anything *Doe v. Emerson Coll.* suggests that it should be granted. Similarly, in *Doe v. Boston Coll.*, in addition to requiring BC to produce statements indicating gender bias, "[f]or complaints of sexual assault or misconduct made by a student in the last three years," the court ordered BC to "identify the gender of each Boston College student against whom the complaint of sexual assault or misconduct was made, the finding on the complaint and the sanction or discipline imposed."

c. HBP Teaching Materials Royalty Payments;
d. HBP Other Payments;
e. Payments for Executive Education Teaching;
f. Income received for the Outside Activities disclosed to HBS in the faculty member's annual disclosure of outside activities;
g. Number of days of outside activities disclosed in the faculty member's annual disclosure of outside activities;
h. Number of trips related to outside activities disclosed in the faculty member's annual disclosure of outside activities;
i. Number of paid speeches outside of HBS.

Harvard's Response to Interrogatory 13:

RESPONSE TO INTERROGATORY NO. 13:

Harvard objects to this Interrogatory as overbroad and unduly burdensome, as it would require Harvard to disclose the confidential financial and other information of dozens of faculty members over a 15-year period. Harvard further objects to this Interrogatory to the extent that it seeks information that is not relevant to the subject matter involved in the pending action. Harvard also objects to this Interrogatory to the extent it seeks information that is not in Harvard's possession or control. Harvard objects to subparts f through i.

Subject to and without waiving the foregoing, Harvard states that it limits its Response to subparts a through e to HBS faculty who were promoted after their tenure applications were reviewed in the years 2015, 2016, or 2017, and further limits the response to compensation received following their receiving tenure. Harvard's response does not include benefit payments contributed by Harvard to faculty medical, retirement, insurance, or other such plans. Harvard further states that its Response contains Confidential information subject to the Protective Order.

Dispute between the parties:

Plaintiff requests that the Court compel Harvard to broaden its answer:

(1) by answering subparts g-i of Interrogatory 13;
(2) by including at least some years prior to tenure for each faculty member;
(3) by including information about faculty who received tenure from 2013 to 2019;
(4) by including the exact numeric value for each person, for each year, for each category.

Plaintiff does not object to Harvard's refusal to answer subpart f of Interrogatory 13.

Plaintiff's Position:

Harvard Business School permits members of its faculty to engage in outside activities, which may include outside teaching engagements, paid speeches, consulting, or expert witness work. Many faculty earn significant income through such work—in many cases, considerably more than they earn directly from HBS. HBS requires its faculty to provide an annual report, through an online tool, about their outside activities. Documents produced in this case regarding the Plaintiff show how HBS stores the data submitted by faculty in tabular form in an organized

information system designed for that purpose. Harvard has already collected the data requested in subparts g-i of Interrogatory 13 and could readily export it from annual faculty reports for the faculty members included in Harvard's answer to subparts a-e of Interrogatory 13.

All information responsive to this interrogatory could be provided in anonymized form, and subject to the Protective Order already governing discovery in this case.

The information sought is relevant to the question of Plaintiff's damages. This case concerns Plaintiff's allegation that HBS failed to comply with its own written procedures for investigating alleged misconduct by faculty members in the context of candidacy for tenure, with the result that Plaintiff was denied tenure at HBS. When his tenure was denied, Plaintiff lost not only the direct income that he would have earned as a tenured faculty member at HBS—he also lost the opportunity to earn the kind of outside income that HBS tenured faculty routinely earn. A plaintiff in a contract case can be awarded consequential damages if he "proves with sufficient evidence that a breach of contract proximately caused the loss of identifiable professional opportunities." *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 894 (1st Cir. 1988). A jury could award damages to "restore [plaintiff] to the position [he] would have been in if [HBS] had complied with its obligations under the contract." *Hlatky v. Steward Health Care System, LLC*, 484 Mass. 566, 568 (2020); *see also Brown v. Trustees of Boston University*, 891 F.2d 337 (1st Cir. 1989). The foreseeable damage to Plaintiff's earnings as a result of HBS's actions is not limited to the loss of his HBS salary and benefits, and he should therefore be permitted to explore in discovery what other forms of income similarly situated HBS faculty receive. As to the specific aspects in which Plaintiff requests broadening Harvard's response:

(1) Inclusion of subparts g-i of Interrogatory 13 is necessary to provide the information in Harvard's possession about faculty members' quantity of outside activities.
(2) Information about faculty members' outside activities both before and after receiving tenure is relevant to show how faculty members' earnings/earning capacities increase when they receive tenure.
(3) Information about a broader set of faculty will provide more reliable estimates of Plaintiff's damages.
(4) Plaintiff seeks line-item details, for each person in each category in each year, which will provide more reliable estimates of Plaintiff's damages. To date, Harvard has only provided the minimum and maximum in each category in each year.

Defendant's Position:

Harvard has already provided ten years of information describing the compensation Harvard paid faculty members who were awarded tenure 2015 to 2017, encompassing the years when Edelman's tenure case was considered. This information included, for each year from 2016 to 2025, ranges for those professors' (i) total salary; (ii) additional compensation such as Leadership Bonuses for governance positions or developing an HBS Online course; (iii) other forms of compensation such as teaching at Harvard outside of HBS, promotion bonuses, honoraria, etc.; (iv) Harvard Business Publishing royalty and other payments; and (v) payments for Executive Education teaching.

Plaintiff asks the Court to order HBS to produce information relating to the compensation of faculty members tenured before Edelman was considered for tenure (that is, those tenured from 2010 to 2014) and after HBS rejected Edelman's tenure application (that is, those tenured from

2018 to 2024). Plaintiff fails to explain how this information is relevant to his damages calculation. Nor does Plaintiff explain why Harvard should be ordered to produce individualized compensation rather than to produce information describing the ranges of compensation of faculty members for each category of activity, as Harvard has done.

The breadth and burden of this request outweighs Plaintiff's purported need for this information. Likewise, the Court should not order Harvard to compile and produce data showing the number of days faculty reported spending on Outside Activities, the number of trips taken related to Outside Activities, or the number of paid speeches outside of HBS.

To be clear, Harvard does not have data showing *how much* individual faculty members were paid for these Outside Activities. As Plaintiff is aware, *see, e.g.*, HBS0000009 ("Policy on Outside Activities of the Faculty"), HBS limits its professors to 52 days of Outside Activities each year. Within that limit, the number of days that faculty members choose to spend on Outside Activities, the number of trips they take, and the number of paid speeches they make is an individual choice faculty members make, to the extent, of course, that there is demand for their services.

Plaintiff is in possession of his own Outside Activity reports, which include this information, and therefore has a sufficient basis on which to estimate his damages.

Plaintiff's Reply:

As explained in Plaintiff's original statement, the requested information is critically important to Plaintiff's damages calculation. A plaintiff meets the "sufficient evidence" standard for consequential damages by establishing "a basis for inference of fact that the plaintiff has actually been damaged, and the factfinder must be able to compute the compensation by rational methods upon a firm basis of facts." *Redgrave*, 855 F.2d at 896 (citing *John Hetherington & Sons, Ltd v. Wiliam Firth Co.*, 210 Mass. 8, 21 (1911)).

Plaintiff (via a damages expert) seeks to establish that when a faculty member moves from an untenured appointment to a tenured appointment, outside activities typically expand in quantity and change in type. Plaintiff will estimate his likely outside activity earnings by combining this information about quantity and type, in conjunction with other information about typical compensation for each type of activity, with Plaintiff's outside activity earnings during his time as an untenured faculty member.

Harvard says Plaintiff should rely on his own Outside Activity reports (or other information about his own activities and earnings) prior to 2018. But Plaintiff was always an untenured faculty member and never a tenured faculty member. Thus his own data provides no information about how faculty members typically grow in outside activity quantity or type when they transition from untenured to tenured appointments. In reality, tenured faculty have many more opportunities than non-tenured faculty to earn money through outside activities. Tenured HBS faculty are more sought after as experts, speakers, and outside teachers than non-tenured faculty.

Harvard complains of the "burden" of providing the requested information. But Harvard stores the data in tabular form in a database maintained for this purpose. Harvard only needs to pull the data from the database of faculty members' historic outside activities disclosures. Plaintiff is not

pursuing the data in part (f) of this interrogatory because he understands that it is not contained in this database.

Interrogatory 15

Text of Interrogatory:

INTERROGATORY NO. 15:

Who were the members of the Standing Committee considering Plaintiff's tenure case in 2017?

RESPONSE TO INTERROGATORY NO. 15:

Harvard objects to this Interrogatory to the extent that it seeks information that is not relevant to the subject matter involved in the pending action. Harvard further objects that this Interrogatory seeks information that is protected from disclosure to Plaintiff pursuant to the Protective Order between the parties.

Dispute Between the Parties:

Plaintiff requests that the Court order the Defendant to answer Interrogatory 15.

Plaintiff's Position:

Plaintiff's candidacy for tenure was evaluated, first, by a three-person "subcommittee," then by a Standing Committee made up of the members of all of the subcommittees convened to consider candidates for tenure that year. Plaintiff has learned, in the course of discovery, that the Standing Committee received a copy of the FRB's report and met with a member of the FRB to discuss the FRB's findings. Documents produced regarding the Standing Committee's subsequent vote on Plaintiff's candidacy reveal that some of its members were troubled by the FRB's report and that the FRB report and its subject matter were the only reason given by members of the Standing Committee who voted against tenure. The Standing Committee's vote was evenly split on the question of whether Plaintiff should be awarded tenure. Following the Standing Committee vote, the case went to the full Appointments Committee, made up of all of the members of HBS's tenured faculty. Members of the Appointments Committee were informed of the Standing Committee's mixed vote. Ultimately, the Appointments Committee's vote, too, was mixed—too mixed, according to Dean Nitin Nohria, for him to advance Plaintiff's tenure case.

Plaintiff's amended complaint alleges that the FRB's Policy and Procedures requires the Standing Committee and subcommittee to complete their work, including their vote on tenure, without consideration of the topics under FRB review. Exactly what occurred during the Standing Committee's review of Plaintiff's candidacy—including how and when the members of the Standing Committee interacted with the members of the FRB—are valid topics for Plaintiff's inquiry. To fully explore these issues, including but not limited to depositions, Plaintiff needs to know the identities of the Standing Committee members.

Nothing in the Protective Order in this case protects this information from disclosure to the Plaintiff. Paragraph 4 of the Order permits Harvard to redact names and personally identifying information of individuals identified in Plaintiff's tenure dossier, including from the "Summary

of Standing Committee Deliberations." However, it further provides that "If, after receiving redacted documents from Harvard, plaintiff believes that withheld identities are relevant or likely to lead to discovery of relevant information, the parties will confer in good faith about whether those identities should be unredacted. If the parties are unable to resolve this dispute, then plaintiff may seek relief from the court as described in paragraph 8." Paragraph 8 further provides that in the event of a dispute, the burden is on the Disclosing Party to demonstrate that redaction of identities is warranted.

Defendant's Position:

The Court should not order HBS to disclose the names of the 2015 and 2017 Standing Committee Members.

Harvard has already disclosed the *results* of the Standing Committee's deliberations in each of those years. As Edelman knows, the Standing Committee's deliberations in those years did not end his tenure candidacy. To the contrary, as documents Harvard has produced reveal, in 2015 the Standing Committee voted to recommend a two-year extension of Edelman's appointment at HBS—an extension Edelman accepted. *See, e.g.*, HBS0019880. In 2017, the Standing Committee voted 6-4 to recommend Edelman's candidacy and Edelman's tenure application went on to be considered by the Appointments Committee (a larger group consisting of nearly all tenured faculty) and the Dean. *See* HBS0024273 (Appointments Committee Voting Sheets Transcription).

The Standing Committee is part of the highly confidential tenure process. The identity of members of the committee are not revealed to even successful candidates after tenure is granted. Here, Plaintiff has failed to demonstrate how knowing the names of the Standing Committee members would produce information relevant to his claims or defenses.

As to Plaintiff's contention that it is necessary for him to know the identity of Standing Committee members so that he can determine "how and when the members of the Standing Committee interacted with the members of the FRB," Harvard has already searched, in response to Plaintiff's Request for Production of Documents No. 41, the custodial files of the FRB members for communications with the members of the Standing Committee so that it could produce such communications.

Plaintiff's Reply:

It is indisputable that it was highly damaging to Plaintiff's tenure candidacy that the 2017 Standing Committee's vote was mixed going into the full Appointments Committee vote. The Standing Committee did not have to "end" Plaintiff's tenure candidacy to significantly affect the outcome of his case. Plaintiff is entitled to explore the communications between the FRB and the Standing Committee.

Discovery in this case revealed that a member of the FRB spent nearly an hour with the Standing Committee before its vote, in person. But document production and depositions have revealed remarkably little about what was actually said in that time. There were no written accounts of the FRB member's statements or of the questions that the Committee asked. Plaintiff took depositions of three people present for the Standing Committee meeting, but none could recall the Committee's deliberations or interactions with the FRB in any detail. Plaintiff seeks the full list of everyone

present – all members of the Standing Committee – in order to evaluate taking additional depositions to try to learn what occurred during the Standing Committee's meetings. In addition, the Standing Committee members, having already explored Plaintiff's candidacy in depth, are more likely to recall what happened at the full Appointments Committee meeting. Because Plaintiff was unable to determine who among many dozens of tenured HBS faculty members were on the Standing Committee in the face of Harvard's refusal to answer this interrogatory, he had no opportunity to identify and depose these witnesses.

Requests for Production of Documents

Scope of Search for Documents

Dispute Between the Parties:

Plaintiff requests that the Court order Harvard to search for responsive documents in the emails and files of two additional custodians, Professors A and B. (The identities of these individuals are known to the Parties but are subject to the restrictions in the Protective Order on public disclosure.)

Plaintiff's Position:

In late summer of 2024, the parties agreed to a list of custodians and search terms that each party would use to search for responsive documents, with the understanding that either party could request further searches based upon information received in discovery. After receiving and reviewing discovery from Harvard, the Plaintiff asked that Harvard include Professor A, and a faculty member referred to in Harvard's production as F050 (revealed in subsequent discovery to be Professor B), as custodians and search their communications with the same terms previously agreed upon.

As described in paragraphs 22, 33, 36 and 37 of the Complaint, one of the questions under review by the Faculty Review Board in 2015 was Plaintiff's writing about a company called Blinkx, and questions about the adequacy of the disclosure accompanying that writing. Professor A was closely involved in advising HBS administrators about that issue. He was subsequently interviewed by the 2015 FRB about that issue; to the FRB, he described himself as HBS's "de facto chief compliance officer." In August 2017, he wrote to a member of the FRB multiple times; once to raise a concern about Plaintiff's choice to file a consumer protection lawsuit against American Airlines, once seemingly to follow up on an ongoing discussion about a different post on Plaintiff's website. In September 2017, he wrote to HBS's Senior Associate Dean for Faculty Development, Paul Healy, offering his opinion that Plaintiff's tenure case presented "very serious [Conflict of Interest/Outside Activities] concerns." In short, existing discovery has revealed that Professor A was significantly involved with the FRB and with Plaintiff's tenure process both in 2015 and 2017. Professor A also raised issues about other faculty members' compliance with the Conflict of Interest Policy that Harvard handled quite differently.

Similarly, in August 2017, Professor B contacted Senior Associate Dean Paul Healy to express concerns about Plaintiff's work for Microsoft. Dean Healy shared his email with the FRB. Ultimately, the issues that Professors A and B raised were added to the FRB's investigation mid-

stream, after Plaintiff had already been interviewed, and were central to the FRB's negative conclusion about Plaintiff. Their communications about Plaintiff and his tenure case are essential to understanding events that are the subject of Plaintiff's breach of contract claims. (*See* Compl. ¶¶ 96-99.)

Documents produced in discovery so far indicate that top administrators followed up with Professors A and B, but there are gaps as to what the administrators said. Adding Professors A and B as custodians would not be overly burdensome, particularly because standard e-discovery tools can exclude documents duplicative of those already reviewed for production.

Defendant's Position:

The Court should not order Harvard to collect and produce documents from two new custodians at this late stage of discovery.

Defendant has already produced over 5,000 documents totaling nearly 24,500 pages from eleven custodians, after applying agreed-upon search terms crafted to capture documents relevant to Plaintiff's tenure case and FRB review in both 2015 and 2017. Included in Defendant's productions is extensive information about the issues the FRB examined in 2015 and 2017 (including communications involving Prof. A about the Blinkx incident and Prof. B's email about Plaintiff's writings on Google), and FRB meeting and interview notes (including its meeting with Prof. A in 2015; neither Prof. A nor Prof. B were interviewed by the FRB in 2017).

Adding two new custodians will require Defendant to collect and review potentially thousands of additional documents, resulting in further delay with very little likelihood of producing new relevant documents, in light of the extensive information already produced.

Plaintiff's Reply:

Plaintiff's counsel first asked Defense counsel to add Professors A and B as custodians on February 21, 2025. Had Harvard agreed to do so at that time, the discovery would have been completed long ago. Harvard cannot rely on its own intransigence to avoid producing relevant discovery.

In any case, there is no reason to think that these proposed custodians have extensive documents that would be captured by the agreed-upon search terms. Each interacted with the HBS administration and the FRB regarding Plaintiff and his tenure candidacy, but they were not close colleagues of Plaintiff. In any case, the agreed terms require more than simply mentioning Plaintiff's name; emails would only be captured if they also included other words or terms relevant to this case. It is vanishingly unlikely that their email inboxes contain "thousands" of emails that would be captured by the requested searches.

Requests for non-redaction of Documents:

HBS21257—Email Transmitting FRB Report

Dispute:

Plaintiff respectfully requests that the Court order production of an unredacted version of this email.

Plaintiff's Position:

HBS21257 (attached as Ex. A) is an October 26, 2017 email from Jean Cunningham, the Associate Dean for Faculty and Academic Affairs and support staff for the FRB, to Paul Healy, Senior Associate Dean for Faculty Development, with the subject line, "FRB Report." The full text of the email is redacted. The email contains an attachment; the name of the attachment is also redacted. It is difficult to understand how this email could be non-responsive or irrelevant when on its face it appears to be transmitting the FRB's 2017 report to Dean Healy, the person responsible for the tenure process.

Defendant's Position:

The Court should not order Harvard to produce an unredacted version of this document. The email in question does not, in fact, transmit Plaintiff's 2017 FRB Report. The redacted portions of the attachment do not refer to Edelman.

Plaintiff's Reply:

The Court should review the unredacted HBS21257 in camera to determine whether it refers to Plaintiff. Harvard has indicated that it will be submitting an unredacted copy for in camera review.

HBS21410**, Email Correspondence Regarding Appointments Committee Meeting**

Dispute:

Plaintiff requests that this Court order production of an unredacted version of this email exchange.

Plaintiff's Position:

HBS0021410 (attached as Ex. B) is a set of emails between Professor Robert Simons (the Chair of the Subcommittee in Professor Edelman's case), Jean Cunningham, Paul Healy, and Dean Nitin Nohria, all dated November 4, 2017 (days before the Appointments Committee met to consider Plaintiff's tenure case). Harvard redacted, as "not responsive," the text of all of the emails except for the final email, between Dean Nohria, Dean Healy, and Dean Cunningham. In that email, Dean Nohria wrote, "You should make sure that he [Simons] understands that raising this in any way in the AC meeting would be inconsistent with our norms and grossly unfair to the candidate." It appears that the "candidate" referenced is the Plaintiff, and that there was a dispute between the HBS leadership and the Chair of the Subcommittee about whether a particular subject could be discussed with the full voting membership of the Appointments Committee. The discussion at the Appointments Committee meeting is important to Plaintiff's case, particularly insofar as Plaintiff alleges that the meeting and its outcome were deeply affected by the flawed

FRB process. What subject Dean Nohria was concerned that Professor Simons might raise at that meeting, and whether it was in fact raised, are legitimate subjects for discovery in this case.

Defendant's Position:

The Court should not order the production of an unredacted version of this email chain. The redacted portions of this email do not refer to Edelman.

Plaintiff's Reply:

The Court should review the unredacted HBS21410 in camera to determine whether it refers to Plaintiff. Harvard has indicated that it will be submitting an unredacted copy for in camera review.

Requests for Production of Documents

Request for Production of Documents 48

REQUEST FOR PRODUCTION NO. 48:

All communications to, from, or including Angela Crispi concerning Plaintiff between January 1, 2013, and January 1, 2018.

RESPONSE TO REQUEST FOR PRODUCTION NO. 48:

Harvard objects to this Request on the basis that it is vague, overbroad, unduly burdensome, and seeks information that is not relevant or proportional to the needs of the case. Harvard also objects to this Request to the extent it is duplicative of other Requests and therefore calls for documents already produced in this case or that are otherwise already in Plaintiff's possession, custody, or control. Harvard further objects to this Request to the extent it seeks documents protected by the attorney-client privilege, attorney work-product doctrine, or any other privilege or immunity recognized by statute or applicable rule or case law.

Harvard further responds that, in response to the Plaintiff's First and Second Requests for Production of Documents, Harvard conducted a search Ms. Crispi's email account using the terms listed in Harvard's Response to Request no. 47 above, which it disclosed to Plaintiff's counsel. Thus, to the extent that Ms. Crispi communicated with or about Plaintiff on matters relevant to this case, Harvard believes that the searches Harvard previously conducted were sufficient to satisfy its discovery obligations.

Dispute:

Plaintiff requests that the Court order Harvard to produce responsive documents.

Plaintiff's Position:

There are three reasons why Plaintiff seeks additional production from Dean Angela Crispi's records.

First, Angela Crispi is the HBS Executive Dean for Administration. *All* HBS staff report to her, directly or indirectly. In her deposition on June 18, 2025, she described numerous occasions when staff frustrations with Plaintiff were brought to her attention both prior to the FRB review of Plaintiff's conduct in 2015, and during the two-year extension of his appointment before the

FRB review in 2017. She acknowledged that she sought staff feedback on Plaintiff in the extension period, in her role as Executive Dean for Administration. The 2017 FRB interviewed numerous faculty members, but by agreement, Dean Crispi was the only FRB member to conduct staff interviews. Plaintiff's interactions with staff were a subject of criticism in the 2017 FRB report and among the stated reasons of some HBS faculty for voting against Plaintiff for tenure. All of the FRB's information about these interactions ran through Dean Crispi. In addition, documents produced after the close of discovery showed that Dean Crispi had relevant communications about Plaintiff with staff that did not include the previously-agreed search terms. Therefore, all of Dean Crispi's communications with staff about Plaintiff are relevant or reasonably calculated to lead to relevant evidence.

Second, in his Amended Complaint, Plaintiff alleges that Dean Crispi (S1 in the complaint) was directly involved in matters that the FRB investigated and had an "incurable conflict of interest" that "gave [her] strong motives to oppose Plaintiff's tenure and to ensure that the FRB reached a negative assessment of Plaintiff." (Amended Compl. ¶ 78.) Dean Crispi's communications about Plaintiff are relevant to whether that conflict existed as claimed.

Third, discovery has revealed questions about Dean Crispi's conduct and transparency, particularly during the FRB process. For one, contrary to the expectations of other FRB members, and contrary to written instructions from FRB Chair Amy Edmondson, Dean Crispi interviewed far fewer staff than agreed. Furthermore, although she told other FRB members that she was inserting "quotes from my interviews" into the FRB 2017 report, her insertions do not appear in her interview notes. Instead, in her deposition, she admitted that she actually inserted paraphrased feedback (not quotes), that the origin of this feedback was not interviews but prior emails or discussions, and that she could not recall the origin (format, time, and source) of these negative statements about Plaintiff. Searching Dean Crispi's communications pertaining to Plaintiff is appropriate to determine whether her other factual representations were accurate and whether her statements to the FRB about Plaintiff were based in fact.

Dean Crispi's communications with HBS staff are central to understanding her actions on the FRB. Plaintiff has received some such communications in discovery, but because Dean Crispi was interacting with staff about Plaintiff in contexts outside of her role on the FRB and unrelated to Plaintiff's tenure case, it is likely that there are many additional relevant communications that are not captured by Harvard's current search terms. An additional search for Plaintiff's name in Dean Crispi's communications could exclude all documents previously produced, and would not be burdensome to conduct.

Defendant's Position:

Harvard has already conducted searches of Dean Crispi's documents, including by applying agreed-upon search terms that aimed to discover documents relevant to the issues discussed in the 2015 and 2017 FRB reports and conducting additional searches in response to further requests from Plaintiff throughout the course of discovery.

The Court should deny this request, as allowing additional discovery would lead to further delay and Plaintiff has not shown sufficient justification for this delay.

Plaintiff's Reply:

Dean Crispi's deposition testimony made clear that she discussed Plaintiff with a variety of staff members who, directly or indirectly, reported to her, and that she then included her understanding of issues and interactions that staff reported to her in FRB deliberations. Discovery also indicates that her recollection or understanding of many of those issues was incorrect. The search terms initially agreed upon by the Parties were geared towards the FRB process itself and the witnesses who were interviewed, on the assumption that the FRB only considered the evidence it gathered during its inquiry. However, Dean Crispi inserted statements into the FRB report that, unbeknownst to the other FRB members and contrary to her statement that the insertions were "from my interviews" (HBS20611), she now claims were made outside the FRB interview process (though from sources she could not identify). In order to explore these statements and the staff interactions that allegedly led to them, a broader search of Dean Crispi's documents is appropriate.

In addition, after the close of discovery, Harvard produced 14 email threads that did not match the agreed search terms because they did not refer to Plaintiff by his last name (instead calling him by his initials or first name). These threads addressed several issues about which Plaintiff questioned FRB witnesses at their depositions and about which they had limited memories, such as how it was decided which FRB member would interview which witnesses, how the list of witnesses was narrowed down to the ones who were actually interviewed, whether there was an established interview script, and how that script was communicated to FRB members. The existence of these emails, which Plaintiff would have wanted to ask at least five deponents about, suggests that the agreed search terms were inadequate to capture all responsive documents. Harvard only identified and produced this thread as a result of repeated follow-up requests by Plaintiff after Dean Crispi's deposition.

Request for Production of Documents 50

REQUEST FOR PRODUCTION NO. 50:

All documents and communications concerning the "outreach across the faculty to identify ways [to] enhance the promotions process and the experience of those who participate in it" or the subsequent meeting of the senior faculty described in Paul Healy's May 14, 2015 message with subject line "Appointment Process Update" (HBS0023012).

RESPONSE TO REQUEST FOR PRODUCTION NO. 50:

Harvard objects to this Request because it is overly burdensome, seeks information that is not relevant to the subject matter involved in the pending action or the claims and defenses of the parties, and is not proportional to the needs of the case. Harvard further objects to this Request to the extent it seeks documents protected by the attorney-client privilege, attorney work-product doctrine, or any other privilege or immunity recognized by statute or applicable rule or case law.

Dispute:

Plaintiff respectfully requests that this Court order Harvard to produce non-privileged documents responsive to this request.

Plaintiff's Position:

Plaintiff filed an Amended Complaint on April 22, 2025, alleging that Harvard violated its contract with him by failing to follow the FRB's Principles and Procedures ("P&P") because the Standing Committee considering his case considered the conduct questions under review by the FRB, including in its vote. (*See* Amended Compl. ¶¶ 103-111.) In responding to discovery, Harvard claimed that the Standing Committee referenced in the P&P is not the Standing Committee that evaluates tenure-track faculty such as Plaintiff, but a separate Standing Committee that evaluates non-ladder faculty.

In its interrogatory response on this subject, Harvard argued that the tenure-track Standing Committee had not been created when the P&P was finalized on April 29, 2015. But on May 14, 2015, Senior Associate Dean for Faculty Development Paul Healy sent a letter to faculty whose promotions cases were upcoming, informing them that after "extensive outreach across the faculty," the appointments process would be altered to include a Standing Committee. Plaintiff believes, and seeks to show through discovery, that by April 29, 2015, some set of faculty were aware of the proposed creation of a Standing Committee for tenure-track faculty. Plaintiff seeks the requested discovery to understand who was involved in or aware of the creation of the Standing Committee. The discovery is relevant to understanding the intent of the drafters of the P&P and what a reasonable HBS faculty member presented with the P&P in spring or summer 2015 would understand the term "Standing Committee" to mean.

Defendant's Position:

The Court should not order Harvard to produce additional discovery about the creation of the Standing Committee. Such discovery would provide no evidence bearing on Plaintiff's claims.

As discovery has revealed, HBS created the FRB process as a way to provide a more consistent and fair application of HBS's Community Values to situations where a concern had been raised regarding a faculty member's potential violation of those values. This was especially important when concerns had been raised during the promotions process, as "colleagueship"—which encompasses adherence to HBS's Community Values—is one of three areas of assessment for a tenure candidate's promotion. Prior to the FRB's creation, such concerns had been addressed by either a senior faculty member of the Dean's choosing or the subcommittee tasked with drafting a report and making a recommendation on the tenure candidate. *See* P. Healy Dep. Tr. 35:4–36:2; N. Nohria Dep. Tr. 52:4–53:12. Around 2014 there was a growing consensus among HBS leadership that a more formalized process should be created to evaluate colleagueship and Community Values violations, which led to the creation and implementation of the FRB Principles in April 2015. *Id.*

After the FRB Principles were implemented, in May 2015, Senior Associate Dean Paul Healy announced a change in the tenure appointments process, namely the implementation of a Standing Committee that would be comprised of all tenure appointments subcommittees. Dep. Ex. 116. Prior to the creation of the tenure Standing Committee, a subcommittee—comprised of three Appointments Committee members who were not from a candidate's unit—would review the entire tenure application package for a tenure candidate and generate a report and a recommendation on whether the candidate should be promoted to tenure, which became part of the full tenure packet reviewed by the Appointments Committee. The implementation of a

Standing Committee in 2015 created an intermediate step in the tenure appointments process: the Standing Committee, comprised of all members of the various subcommittees for that tenure cycle, would review the report and recommendation of each of the subcommittees and take a vote on whether to recommend a candidate for promotion. N. Nohria Dep. Tr. 130:7–23. That vote would be included in the materials reviewed by the Appointments Committee. *Id.*; HBS0023012. As with the creation of an FRB, the establishment of a tenure Standing Committee was prompted by a desire to strengthen the consistency and fairness of the tenure process. P. Healy Dep. Tr. 20:7–21; N. Nohria Dep. Tr. 130:7–12.

In both 2015 and 2017, the tenure Standing Committee for those years received the respective FRB reports for Plaintiff's case as part of its evaluation of his tenure candidacy in each year.[4] The Court should not grant additional discovery on the creation of this Standing Committee. The implementation of a tenure Standing Committee occurred after the FRB Principles were drafted and presented to the HBS faculty.

Further, a different Standing Committee—the Standing Committee for Professors of Management Practice and Term Faculty, which considers appointment and reappointment of non-tenure-track faculty with term appointments, was already in existence at the time the FRB Principles were implemented. As discovery had made clear, the reference to the Standing Committee in the FRB Principles is a reference to that Standing Committee. Before the creation of the FRB, in connection with the re-appointment of those faculty members, the Standing Committee for Professors of Management Practice and Term Faculty was required to address whether those faculty members adhered to Community Values. After the FRB Principles were adopted, if serious questions about Community Values arise during the re-appointments process, the FRB would consider those questions.

Granting additional discovery on the creation of the tenure Standing Committee will only result in further delay, and Plaintiff has not shown what relevance doing so would have to his claims sufficient to justify this delay. The Court should deny Plaintiff's request.

Plaintiff's Reply:

One of the claims in the Amended Complaint is that the P&P expressly prohibited the Standing Committee from considering the FRB report or from addressing matters of colleagueship or Community Values, but it nonetheless did so. (Plaintiff learned of this violation during discovery, which is why it was added in the Amended Complaint.) Harvard is essentially seeking summary judgment on that claim in the guise of resisting discovery, based on its factual contention that the Standing Committee that was involved in Plaintiff's tenure process did not exist on the day that the P&P document was presented to the faculty, but only came into being a few weeks later. Plaintiff is entitled to discovery so that, in due course, he can brief the question properly.

Harvard further asks the Court to draw the inference that because the P&P is dated in April 2015 and the Standing Committee was formally announced in May 2015, it was outside the realm of reasonable expectations for a tenure-track faculty member in 2017 – the time period relevant for the FRB review at issue in this case – to understand that "Standing Committee" meant the Standing

[4] Plaintiff knew in 2015 that the Standing Committee would receive the FRB report and his reply. B. Edelman Dep. Tr. 23:11–16.

Committee considering their tenure application. But the question is not how Harvard administrators understood the P&P. Rather, it is "what meaning… the university[] should reasonably expect the other party to give it." *Berkowitz v. Pres. & Fellows of Harv. Coll.*, 58 Mass. App. Ct. 262, 269 (2003), quoting *Schaer v. Brandeis Univ.*, 432 Mass. 474, 478 (2000)). Harvard cannot bar inquiry into the establishment and original understanding of the Standing Committee by assuming the conclusion that only its interpretation is reasonable. Discovery on this issue is reasonable and necessary to resolve Plaintiff's claim.

Document Retention and Spoliation

Dispute: Plaintiff requests that the Court find that Harvard failed to preserve relevant documents after being on notice that litigation was reasonably anticipated, and that as a sanction, an adverse inference should be applied against Harvard at the summary judgment and trial stages.

Plaintiff's Position:

At least as far back as 2017, Defendant was aware of the likelihood that Plaintiff would bring a lawsuit if he did not receive tenure as a result of errors in the FRB process. A partial list of communications relevant to this point is below.

- On October 25, 2017, Senior Associate Dean Paul Healy discussed in an email with HBS Dean Nitin Nohria "fears that there will [be] a legal follow up if Ben [Edelman] does not get promoted and we do not have tight policies to defend ourselves."
- In spring 2018, Plaintiff met with Dean Nohria and explained ways in which he believed the FRB had not followed the Principles and Procedures to his detriment, and left Dean Nohria with a color-coded copy of the Principles and Procedures.
- In early May 2018, Plaintiff met with Dean Healy to express his concerns about the FRB process and stated that he believed it could have impacted his tenure case. As of that time, Dean Healy testified that he "assumed [Edelman] might consider litigation" and "didn't know whether he would go so far as that stage of bringing a lawsuit" but thought it was a possibility.
- On May 16, 2018, Plaintiff emailed Dean Healy to reiterate his belief that the Principles and Procedures had been violated; Dean Healy wrote to Dean Nohria, "Sounds like Ben is preparing to go to the next level."
- On May 31 and June 11, 2018, Plaintiff wrote to then-Provost Alan Garber expressing that "rules" had been "violated," asking for a meeting in order to avoid an "overly lawyerly" written submission, stating that "procedural commitments… weren't followed," and indicating that further discussion could "get[] legalistic and frankly argumentative pretty quickly."
- On June 30, 2021, Plaintiff emailed the new HBS Dean, Srikant Datar, attached a letter from an attorney, and flagged "the need to preserve documents pertaining to my FRB and subsequent evaluation."
- Between October 19, 2021, and November 4, 2021, Plaintiff communicated with Attorney Jennifer Kirby in the Harvard Office of General Counsel, raising Harvard's document retention obligations and suggesting that pertinent custodians included "the FRB faculty and staff."

- On October 4, 2022, Plaintiff's current counsel wrote to Attorney Kirby with a description of Plaintiff's legal claims and a request to preserve documents including "Documents, notes, communications, letters, emails, reports or records created by any Harvard employee related to Professor Edelman's candidacy for tenure or the 2015 and/or 2017 FRB processes" and "Communications from or to any Harvard employee… concerning Edelman's candidacy for tenure or the FRB process."

Notwithstanding these repeated references to litigation and document retention, Harvard did not implement a litigation hold until August 24, 2021 (with respect to only Deans Nohria and Healy, one FRB member, and one staff member supporting the FRB). It then did not institute a litigation hold with regard to the three other members of the 2017 FRB until February 24, 2023, after this case was filed in court. As a result, there was no litigation hold for Dean Crispi, Prof. Gilson, or Prof. Schlesinger for over 15 months after Harvard counsel was directly put on notice that they were relevant custodians and their documents should be retained, even assuming that none of the earlier communications listed above placed Harvard on notice that litigation was contemplated. Litigation holds for other custodians were implemented months or even over a year later.

Testimony has shown that many relevant documents were deleted. Dean Healy "completely wiped" an iPad that had his notes and relevant documents from the promotion process, including notes related to Standing Committee meetings, in July 2018. Prof. Gilson, an FRB member, testified that he regularly and intentionally deleted his emails, and did not keep them until he was instructed to preserve them in 2023. Many emails Harvard has produced relating to the FRB process are available only because Dean Cunningham retained them, whereas the members of the FRB did not; emails on which she was not copied have likely been lost. Prof. Edmondson, the Chair of the FRB, was unable to describe her practices for deleting emails and testified that she was "very disorganized" in email retention. It appears from metadata that Prof. Edmondson or someone with access to her email account tried to delete relevant messages, and purge them so they would be unrecoverable, after the litigation hold had been implemented; to date, Harvard has not been able to identify who did so or when.

Plaintiff has been prejudiced by his inability to confront witnesses with missing documents, or to use them to refresh recollections of events that may have occurred 7-10 years ago. It is highly unusual that demands for document preservation were made directly to counsel but litigation holds were not implemented in a timely fashion, sometimes not for years. Only an adverse inference related to the deleted documents will be a sufficient sanction to cure the prejudice.

Defendant's Position:

The Court should neither "find" that "Harvard failed to preserve relevant documents" nor impose a sanction against Harvard based on Plaintiff's claim that Harvard improperly failed to do so.

As the Appeals Court has held:

> [t]he premise underlying the doctrine [of spoliation] is that a party who culpably destroys evidence 'should be held accountable for any unfair prejudice that results.' The doctrine does not extend to "a fault-free destruction or loss of physical

> evidence." Thus . . . the party seeking sanctions has the burden to "produce[ ] evidence sufficient to establish certain preliminary facts" including "that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute."

Santiago v. Rich Products Corporation, 92 Mass. App. Ct. 577, 581 (2017) (citations omitted).

Here, Harvard first received a communication revealing that Plaintiff had retained counsel on July 30, 2021,[5] when Edelman sent an email to HBS's new dean, attaching a memorandum—*dated February 14, 2020, more than 15 months earlier*—from a lawyer, Morris J. Baller of Oakland, California, identifying potential legal claims Edelman could bring against Harvard. BGE003554–3561.[6]

Harvard acted promptly when it received the letter attaching Baller's Memorandum. Harvard took steps in August 2021 to preserve evidence by issuing litigation holds on the key decision-makers in Plaintiff's tenure case and his FRB review—including Dean Nitin Nohria, Senior Associate Dean Paul Healy, and FRB Chair Prof. Amy Edmondson. At the same time, HBS also placed a litigation hold on Associate Dean Jean Cunningham, who provided staff support for the FRB. These litigation holds did more than simply instruct potential witnesses to retain documents; HBS's IT department put holds on the email accounts of these individuals to ensure that all of their emails would be preserved on the "back end."[7]

Two years later, when Edelman actually filed suit, Harvard expanded its litigation hold to include, among others, the other faculty members and staff who had served on the FRB in 2015 and 2017.

These steps satisfied Harvard's duty to retain evidence. *See Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 550 (2002) ("once a litigant or its expert knows or reasonably should know that the evidence might be relevant to a possible action, we have imposed a duty to preserve such evidence in the interests of fairness") (citation omitted); *see also Kippenhan v. Chaulk Servs., Inc*., 428 Mass 124, 127 (1998) ("The threat of a lawsuit must be sufficiently apparent . . . that a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute").

Harvard's productions in discovery demonstrate that Harvard did not engage in the spoliation of evidence. Harvard is in possession of and has produced to Plaintiff over 24,000 pages of documents. These include:

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[5] Plaintiff erroneously cites the date of this email as June 30, 2021. *See* BGE003554.

[6] Mr. Baller has not appeared for plaintiff in this action. Notably, Edelman's email attaching Baller's memorandum stopped short of suggesting that Edelman actually intended to file suit and instead asked the new Dean, Srikant Datar, to "think through what should be done . . . you uniquely have the authority to find a solution") and expressed his desire to *avoid* a lawsuit ("The obvious instinct is to call in the lawyers, as to be sure I have already. *But this needn't come to that*"). BGE003554 (emphasis added).

[7] For this reason, Plaintiff's focus on the emails Harvard produced that he claims indicate an attempted "deletion" or "purging" from Prof. Edmondson's custodial file is a red herring. To put the matter as simply as possible: *Harvard's actions preserved these items and Harvard produced them in this litigation.*

- Notes from the 2015 and 2017 FRB witness interviews;
- The multiple drafts, comments, and edits of the 2015 and 2017 FRB reports shared among the FRB members;
- Notes of FRB meetings and deliberations;
- Notes of the personal impressions of FRB members regarding Plaintiff's written and oral statements, including those of Prof. Gilson and Associate Dean Crispi;
- Vote sheets from the Appointments Committee; and
- Emails between and among FRB members in 2015 and 2017.

The Court should reject Plaintiff's claim that his efforts before July 2021 to get HBS leaders or Harvard's then-provost to voluntarily reconsider HBS's decision to reject his tenure application required Harvard to take steps to preserve documents. Indeed, some of Plaintiff's efforts to get HBS leaders, like former Dean Nitin Nohria, to reconsider his case coincided with Dean Nohria's and other faculty members' efforts to find him another job in academia.[8]

Against this background, Plaintiff's claims that the Court should make a spoliation finding and impose an adverse inference as to deleted documents are wholly unwarranted. Plaintiff makes the following specific claims about spoliation.

First, Plaintiff points to testimony that Dean Healy wiped his iPad when he left his position as Associate Dean in July 2018. But that was long before Edelman's July 31, 2021 email attaching a lawyer's memorandum describing Edelman's purported legal claims. Further, Plaintiff offers no evidence of prejudice, as the case law requires. *See Santiago*, 92 Mass. App. Ct. at 581 ("a party who culpably destroys evidence 'should be held accountable for any unfair prejudice that results.'") (citations omitted).

Second, Plaintiff complains about the document management practices of Prof. Edmondson, the FRB Chair. But, as noted, Prof. Edmondson was subject to a "back-end" legal hold instituted by HBS in August 2021. Indeed, Plaintiff's alleged "evidence" that someone intentionally deleted and purged emails from Prof. Edmondson's account is based on the production of emails that were *retained* from Prof. Edmondson's account. Plaintiff has advanced no legitimate reason to believe that Edmondson selectively sought to delete or purge emails specifically related to his tenure case. Plaintiff has offered no basis to claim that Harvard failed to preserve any documents, including electronic documents Prof. Edmondson created, or that he has suffered any prejudice, as the documents have been produced.

Third, Plaintiff complains about 2017 FRB member Prof. Stuart Gilson, who acknowledged that he continued his routine practice of periodically deleting emails until he learned of Edelman's suit. But here, too, Plaintiff cannot demonstrate prejudice. As Plaintiff notes, the emails of Jean Cunningham, who served as the staff person for the FRB, were preserved beginning in August 2021. To the extent Prof. Gilson communicated by email to Cunningham or Edmondson about

[8] In his deposition, Edelman testified that faculty at Boston University informed him "there was a job available for [him] if [he] wanted it," and that individuals at the University of Toronto and UCLA led him to believe he "could get a tenured position there if [he] applied." Edelman Dep. Tr. 345:4–348:2.

Edelman's FRB case, Harvard has collected and produced documents responsive to agreed-upon search terms. There is no basis for the Court to find spoliation or impose a sanction. *See Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55, 75 (2020) (finding that the trial court judge did not abuse discretion by denying plaintiffs' motion for sanctions regarding spoliation where notes were unavailable prior to the commencement of litigation due to defendant's witness's "custom and practice to destroy" handwritten notes, and since, even assuming spoliation had occurred, "plaintiffs did not demonstrate how the spoliation allegedly prejudiced them," as the witness was deposed and could testify about a meeting memorialized in her destroyed notes) (citations omitted). Here, Edelman has had a full opportunity to depose Prof. Gilson.

Finally, and certainly, on this record and at this stage of the proceeding, where there is no reason to believe that Harvard either engaged in spoliation or that Plaintiff has been prejudiced, there is no basis for the Court to adopt the drastic sanction of imposing an adverse inference. "As a general rule, a judge should impose the least severe sanction necessary to remedy the prejudice to the nonspoliating party"). *Id.* (citation omitted).

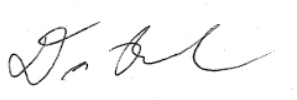
Plaintiff's Reply:

The dates on which Harvard imposed litigation holds, by themselves, show that months and years went by between when it was on notice of litigation and when custodians known to be relevant actually started keeping their data. Dean Healy and Dean Nohria discussed as far back as 2017 and 2018 the likelihood that Plaintiff would litigate if he did not receive tenure, and had conversations with Plaintiff in 2018 with specific reference to some of the P&P provisions at issue in this case. Shortly before Dean Healy wiped his iPad containing notes of the Standing Committee meeting, not only did Healy know litigation was a real possibility, but he emailed Dean Nohria to say so. No litigation hold was put into place for anyone until over three years later. And even in 2021, when Harvard acknowledges being on notice that Plaintiff had retained counsel and was contemplating litigation, it did not implement a litigation hold for three of the four members of the FRB. No matter how polite Plaintiff's letter to Dean Datar was in 2021, it was plainly a threat of litigation – identifying claims, citing authority, and indicating the retention of counsel. In each of these periods, Harvard was on notice of the likelihood of litigation.

Plaintiff is hampered in trying to show exactly what data was deleted over those years because, Plaintiff has recently learned, Harvard does not retain metadata about who deletes emails or when. Microsoft software automatically generates a "mailbox audit log" when emails are deleted, cleared, or purged. The audit log contains information about the message, who deleted it (for instance, the user themselves; a delegate like an administrative assistant; or an IT administrator), and when. Harvard apparently has configured its systems not to retain email audit logs longer than 90 days, *even when a litigation hold is in place*. Therefore, Harvard has failed to preserve data that would show who tried to delete, clear, and purge Prof. Edmondson's responsive emails (possibly during the pendency of this case), and it has failed to preserve logs that would reveal what emails were deleted in the time period from 2018 to 2023. The possibility of prejudice is obvious, and Harvard should not benefit from its lax approach to data retention in the face of a known risk of litigation. Plaintiff cannot know what would have been shown in emails that were deleted years ago.

Plaintiff brings this issue to the Court's attention now for discussion of the concerns involved and the appropriate process for addressing them, recognizing that motion practice on a fuller record may be needed.

Sincerely,



David. A Russcol

Exhibit A

* Not Responsive

From: Cunningham, Jean
Sent: Thursday, October 26, 2017 10:58 AM EDT
To: Healy, Paul
Subject: FRB report
Attachments: *

Not Responsive

Exhibit B

From: Nohria, Nitin
Sent: Saturday, November 4, 2017 11:52 AM EDT
To: Cunningham, Jean; Healy, Paul
Subject: Re: Not Responsive

I am glad this has been cleared up. Paul, please let me know if it would be helpful in any way for me to talk to Bob. You should make sure that he understand that raising this in any way in the AC meeting would be inconsistent with our norms and grossly unfair to the candidate. This is why we have various processes (administrative review or FRB) to ensure there is an opportunity for careful fact gathering around any such incident and an opportunity for the faculty member to also feel there was due process in which they can respond to any charges against them. If he is not fully satisfied with your response, he should talk to us.

From: Jean Cunningham <jcunningham@hbs.edu>
Date: Saturday, November 4, 2017 at 11:01 AM
To: "Healy, Paul" <phealy@hbs.edu>
Cc: "Nohria, Nitin" <nnohria@hbs.edu>
Subject: Re: Not Responsive

Not Responsive

Sent from my iPhone

On Nov 4, 2017, at 10:57 AM, Healy, Paul <phealy@hbs.edu> wrote:

> Jean.
>
> Not Responsive
>
> P
>
> Sent from my iPhone
>
> On Nov 4, 2017, at 8:54 AM, Cunningham, Jean <jcunningham@hbs.edu> wrote:
>
> Not Responsive

Sent from my iPhone

On Nov 4, 2017, at 9:41 AM, Healy, Paul <phealy@hbs.edu> wrote:

Nitin and Jean.

Not Responsive

P
Sent from my iPad

Begin forwarded message:

From: "Simons, Robert" <rsimons@hbs.edu>
Date: November 4, 2017 at 7:27:04 AM MDT
To: "Healy, Paul" <phealy@hbs.edu>
Subject: Not Responsive

Hi Paul,

Not Responsive

Bob