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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 – Defendant's Submission Concerning Unresolved Discovery Dispute.

Dear Justice Squires-Lee:

This letter sets forth Harvard's position concerning the contested discovery it seeks; Plaintiff's opposition (beginning at p.10); and Harvard's reply (beginning at p. 16).

Defendant's Position:

The Court Should Order Plaintiff: (1) to Produce Documents Concerning His 2014 Blog Post Relating to Blinkx, Including His Agreements with the Investment Firms Who Paid for His Research; (2) to Respond to Harvard's Interrogatory Asking Him to Identify Those Firms; and (3) to Answer Fully Deposition Questions About Blinkx.

Edelman has repeatedly refused to provide discovery relevant to a central issue in this case: his relationship with two investors who funded his research concerning a company called Blinkx. Edelman has objected to providing discovery because of a confidentiality agreement that he claims prevents him from providing the discovery Harvard has requested. He also contends that the discovery Harvard seeks is not relevant.

The Court should reject both those objections. The information Harvard seeks is relevant. To the extent it is protected by a private confidentiality agreement—and there are serious questions about whether it is—that private agreement cannot defeat Harvard's right to obtain discovery relevant to Edelman's claims and Harvard's defenses.

Background. On January 28, 2014, Edelman published a blog post about a UK company called Blinkx alleging that the company had engaged in deceptive advertising practices. The blog post was based on research that two investment firms paid him $10,000 to conduct. *See* Plaintiff's

Responses to Harvard's First Set of Interrogatories, Response 4. The blog post caused, in Edelman's own words, "a firestorm." Deposition Exhibit (hereinafter "Dep. Ex.") 104; Edelman Deposition Transcript (hereinafter "Dep. Tr.") 277:24–278:2. The Blinkx stock price fell dramatically soon after the blog posting, and media reports raised questions about whether the firms that paid for Edelman to conduct the research had engaged in market manipulation by paying Edelman to write a negative blog post, then profiting from short positions they had taken in Blinkx. *See, e.g.*, Dep. Ex. 106.

Blinkx Played an Important Role in Edelman's Tenure Process at HBS. Edelman's Blinkx post—and the firestorm that resulted—played an important role in the HBS Faculty Review Board's determination in 2015 that Edelman did not uphold the School's Community Values and therefore did not meet the criteria for "Effective Contributions to the HBS Community" required for promotion to tenure. As the FRB's 2015 Report concluded: "In connection with Blinkx, he failed to recognize that as a faculty, integrity in our activities—both real and perceived—is at the core of what we do." Dep. Ex. 6 at HBS0015707.

The Blinkx incident remained relevant in 2017, when Edelman again sought tenure at HBS. At the outset of that process, Edelman submitted a "reflection" to persuade the FRB that he had learned from the FRB's 2015 conclusion, including its findings about Blinkx—which Edelman's reflection mentioned four times. Dep. Ex. 45 at HBS0018892–94, -96. The FRB's 2017 Report also referred to Blinkx and explicitly focused on "whether [Edelman] had internalized the lessons from the 2014 incidents," including Blinkx. *Id*. at HBS0018881.

Edelman's Complaint in this case contains ten references to Blinkx (*see* Amended Complaint, Dkt. 21 at ¶¶ 22, 33, 36, 37, 39, and 81) and alleges that a Harvard employee "incorrectly told a journalist that Plaintiff had violated HBS policy in the Blinkx incident." *Id*. at ¶ 81.

Harvard's Discovery Requests. Given the central importance of the Blinkx incident, Harvard has sought in discovery to learn more about Edelman's work on Blinkx and, in particular, the identity

of the clients who paid for his research and their communications with Edelman about it.[1] Edelman objected. Edelman also refused to identify the clients who paid for the research during his deposition or to describe most aspects of his conversations with them, claiming that a confidentiality agreement prevented him from doing so. *See, e.g.*, Dep. Tr. 300:15–301:7.

[1] The relevant document requests and interrogatories are the following:

Document Request No. 21:
All documents pertaining to the blog post Plaintiff wrote about Blinkx and the concerns commentors raised about it.

RESPONSE 21:
Plaintiff objects to the extent that the request seeks communications protected by the attorney-client privilege, work-product doctrine, or marital privilege. Plaintiff objects to this request on the basis that it calls for production of documents that contain proprietary information of third parties as to which Plaintiff has an obligation to maintain confidentiality.

Subject to and without waiving this request, Plaintiff will produce responsive documents in his possession, custody or control located after a reasonable search.

Interrogatory No. 4:
Please identify the company "that wanted to know Blinkx's current practices" referred to in Paragraph 22 of the Complaint, describe the nature of your consulting arrangement with the company, including when the consulting engagement began, how long it persisted, and the nature of compensation you received.

Response No. 4:
Plaintiff objects to this interrogatory on the basis that it seeks information which Plaintiff is barred from disclosing by a confidentiality agreement with a third party. Plaintiff further objects on the grounds that the interrogatory seeks information that is not relevant or proportionate to the needs of the case.

Subject to and without waiving these objections, Plaintiff states as follows. I prepared my report for my client in December 2013 to January 2014. I was paid $10,000.

The Discovery Harvard Seeks is Relevant

Edelman's conduct relating to Blinkx played a critical role in his tenure case. Moreover, the information about Blinkx that Edelman has provided in discovery shows that, when he addressed the FRB's concern about Blinkx, he provided misleading information about his relationship with the investors who paid for his research.

Edelman's lack of candor is relevant to two important issues: (1) Edelman's credibility and (2) two of Harvard's defenses—specifically, its reliance on the "unclean hands" doctrine in response to Edelman's claim for equitable relief and its invocation of the principle of "after-acquired evidence" to defend against Edelman's legal claims. *See* Answer to Amended Complaint, Dkt. 23 at 18.

Edelman Misled Harvard in 2014 About the Circumstances of His Blinkx Post. Edelman appears to have misled HBS about the circumstances of his Blinkx post in two important ways.

First, in defending his conduct, Edelman falsely told the Faculty Review Board charged with gathering facts about his Blinkx blog post that his clients "couldn't have known what I would find or whether I would choose to write about it publicly." Dep. Ex. 6 at HBS0015717.

But documents Edelman has produced in discovery, and his deposition testimony, contradict this assertion. For example, on January 18, 2014, ten days before he published his blog post, he wrote to a former business partner to describe the nature of his work for his clients: "Some investors recently asked me about lousy Blinkx practices. *They convinced me that I'm overdue to write this up.*" Dep. Ex. 102 (emphasis added).

On January 24, 2014, less than a week before he published, Edelman sent a second individual, whom Edelman described as "a security researcher who I worked with at various points" a draft of his blog post and told him: "*After* I finished the research for them, I sought and received their permission to write this up for the web." Dep. Ex. 101 at BGE008178 (emphasis added); *see also* Dep. Tr. 263:2–4.

In addition, Edelman testified that he "think[s]" he provided progress reports to his clients as he was preparing the negative report which served as the basis for his blog post. Dep. Tr. 321:1–14. More importantly, he provided his research report before publishing his blog post and "told them that I viewed the findings as significant. That I was surprised that the problem was much bigger than I had previously understood and that I would be writing it up." Dep. Tr. 318:1–20.

These documents provide important evidence that Edelman sought to mislead the FRB about a significant issue: whether his clients had reason to believe he would publish a negative report about Blinkx. Edelman appears to have tried to mislead the FRB to avoid the FRB drawing the conclusion that he assisted his clients' efforts to manipulate the market by paying Edelman to conduct research about Blinkx—knowing that he would write a negative report—then profiting when that report caused Blinkx's stock price to fall.

Second, shortly after the Blinkx controversy erupted, as HBS was scrambling to respond to media reports about the potential conflicts of interest associated with Edelman acting as a paid researcher for investment firms that stood to benefit from his blog post, HBS Associate Dean Jean Cunningham reported that Edelman had told her that that his clients "didn't stand to benefit from having the results [of his research] published." Dep. Ex. 6 at HBS0015749.

That, Harvard has learned in discovery, is false. On December 12, 2023, Edelman sent an unsolicited email to a Harvard graduate whom Edelman described as "a well-known investor [and] internet personality" seeking "any suggestions" that the investor might "care to share" about Edelman's litigation against Harvard. Edelman's subject line for the email was "with regards from a friend-of-short-sellers (who paid a high price)." Dep. Ex. 111; *see also* Dep. Tr. 327:23–328:1. After introducing himself, Edelman's email continued:

> Back to 2000, I had been criticizing the scourge of adware (Windows apps that clog PCs with extra ads), and in 2014 *some short sellers asked me to update a corner of that work.* I found that the notorious adware company Zango, by then renamed Blinkx and trading on LSE, was still up to no good. I wrote this up for the public, which caused their stock to plummet. Blinkx leaders had no defense for their practices, so they attacked me personally -- and the resulting negative publicity put me in a hole I couldn't dig myself out of. When I was up for tenure a couple years later, HBS accused me of pretextual misconduct -- allegations fortunately provably incorrect, but nonetheless my case failed.

Dep. Ex. 111 (emphasis supplied). In his deposition, Edelman refused to say *when* he learned that his clients were short sellers, citing his confidentiality agreement with his clients. Dep. Tr. 316:6–15.

However, Edelman at least had reason to believe that his clients *had* taken short positions in Blinkx before he published his blog post. In his deposition, he testified that one of the investors who engaged him to prepare a report on Blinkx told him "that his company had been looking at the

practices of Blinkx." Dep. Tr. 301:23–24. Edelman continued: "They had reached a negative view on Blinkx based on . . ." but abruptly terminated his answer mid-sentence, citing his alleged confidentiality agreement. Dep. Tr. 301:24–302:6. He also testified that he knew what his clients wanted him to prove about Blinkx: "The thesis of the work that I was preparing to do *that I understood them to want* was to prove out the hypothesis that the improper aspects of Blinkx's operation were material, maybe were the preponderance of their operation." *Id.* at 314:6–18 (emphasis supplied).

Taken together, these statements show that Edelman's claim, made to Associate Dean Cunningham in 2014, that his clients "didn't stand to benefit from having the results [of his research] published" (Dep. Ex. 6 at HBS0015749) was not only false, but likely knowingly false.

The Discovery Harvard Seeks is Relevant to Three Important Issues. Against this backdrop, the Court should conclude that the evidence Harvard seeks is relevant.

First, the evidence Harvard seeks directly bears on Edelman's credibility. *See* Mass. G. Evid § 611 ("A witness is subject to cross-examination on any matter relevant to any issue in the case, including credibility . . .).

Second, evidence further corroborating what Harvard has learned about Edelman's misleading conduct is relevant to its defense under the principle of "after-acquired evidence." *See* Dkt. No. 23 (Harvard's Tenth Affirmative Defense). As the Supreme Judicial Court has held: "The after-acquired evidence principle permits an employer to show that later-discovered but legitimate reasons for taking adverse employment action against an employee, if they had been known at the time, would have justified or mitigated the employer's otherwise impermissible[e] . . . action (e.g., discharge) relating to that employee, and can serve to limit the employee's recovery." *City of Springfield v. Civ. Serv. Comm'n*, 469 Mass. 370, at 378 n.14 (2014) (citing *Flesner v. Technical Communications Corp*., 410 Mass. 805, 815–16 (1991)).

Here, had HBS known in 2015 that Edelman had misled HBS and the FRB, consideration of his tenure case would have ended in 2015 and his employment would have been terminated. HBS would never have even considered giving him a two-year extension of his appointment or permitted him to re-apply for tenure in 2017.

Third, Harvard has asserted an "unclean hands" defense to Edelman's claim for equitable relief—essentially, his request for a "do-over" of his tenure process. *See* Dkt. No. 23 (Harvard's Ninth Affirmative Defense). But Massachusetts courts consistently hold that equitable relief is

unavailable to a party who has acted inequitably in connection with the subject matter of the litigation. As the Appeals Court explained in *Spinosa v. Tufts*, 98 Mass. App. Ct. 1, 7 (2020): "The doors of equity are . . . closed 'to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the [other party].'" (quoting *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945)).

Edelman's efforts to mislead the FRB are thus plainly relevant and Harvard should be permitted to use the discovery process to obtain a complete record on that point.

Edelman's Private Confidentiality Agreement—to the Extent it Even Exists—Provides No Valid Basis to Resist Discovery.

Mass. R. Civ. P. 26(c) permits parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" Edelman has not claimed that he provided legal advice to his clients or objected to testifying based on any other legally recognized privilege. Instead, he contends only that he entered into an agreement with the client, or clients, that requires that he maintain confidentiality. The Court has already issued a Protective Order in this case. *See* Dkt. No. 17. The Court may address any claims of confidentiality Edelman may make under that order or fashion another order. Harvard should not be precluded from obtaining relevant information simply because Edelman claims it is confidential.

Moreover, there is a serious question about whether a valid confidentiality agreement even exists. Edelman's work for the two clients who paid him to provide a report on Blinkx was governed by a written agreement. *See* Dep. Ex. 110. Edelman provided what he described as a copy of that agreement to HBS in 2014 but redacted the names of his clients. *Id*. That agreement contains no confidentiality provision.

Edelman told HBS, however, that a *prior* agreement concerning a *different* engagement with *one of the two clients* contained a confidentiality agreement. He did not provide that agreement itself, even in redacted form, but purportedly did a "cut and paste" of the language purportedly creating a confidentiality obligation into an email he sent to Associate Dean Cunningham. The language he provided was as follows: "He [Edelman] will treat as confidential any information received from [client] and will not disseminate same with or without attribution without the express written consent of [client]." Dep. Ex. 109 at BGE005654 (all bracketed text in original).

Edelman has acknowledged that he had no written confidentiality agreement with the second investment firm who paid for his research in 2014. Dep. Tr. 312:11–15.

Edelman testified that he did not specifically recall agreeing, even orally, about a confidentiality agreement governing his Blinkx project. He said that his communications "would have been much shorter, would have been a little more informal and wouldn't have entailed reciting the language. It would have been more like, Should we do confidentiality the same way we did it last year? Yeah, that works for me." Dep. Tr. 311:12–312:5. Edelman testified that he based his testimony on his "ordinary practice" rather than a specific recollection. Dep. Tr. 312: 6–10.

Two other considerations strongly suggest the Court should not permit Edelman's claimed confidentiality agreement to prevent Harvard from obtaining the discovery it needs. First, Edelman has acknowledged that his own "compliance" with the confidentiality order has been selective and inconsistent: "I may have been too flip . . . in not honoring the confidentiality . . . . I think probably sometimes I haven't quite done what I was supposed to do with respect to the full contours of the confidentiality agreement." Dep. Tr. 316:16–317:4.

Second, counsel for one of Edelman's clients has written Harvard's counsel, putting Harvard on notice of a claimed confidentiality agreement with Edelman. But that letter (attached as Ex. AA) only provides further reason to doubt Edelman's candor.

The lawyers' letter describes two distinct provisions purporting to impose confidentiality obligations on Edelman. *See* Ex. AA. But those provisions are both *different than the language Edelman identified as creating his obligation not to disclose his clients' identity. See* Dep. Ex. 109 at BGE005655.

The first provision cited by the lawyers' letter states:

> We mutually agree that we will maintain confidentiality of any information shared with each other. [Client] will never knowingly solicit any trade secret, proprietary information, or any material, non public information related to [Edelman's] present employer or any other publicly traded enterprise, and [Edelman] should always exclude such information from any information that [Edelman] may provide to [Client]. [Edelman] confirm[s] that [he is] aware of [his] obligations under the code

> of ethics of GLG.[2] In [Edelman's] consultation with [Client], [Edelman] will not discuss any information for which [Edelman] is under a confidentiality or other non disclosure obligation, or which was obtained from someone who is under such obligation.

Ex. AA (all bracketed language in original). That language focuses on Edelman's obligation not to disclose *Harvard's* confidential information to his client or clients. The second provision identified in the lawyers' letter described Edelman's confidentiality obligation as follows: "I understand that [Client] will not object to [Edelman] posting [Edelman's] findings to [Edelman's] web site thereafter, so long as [Edelman] post[s] only material derived from public sources and of course no confidential material from [Client]." *Id.* (all bracketed language in original).

The lawyers' letter did not refer to or even cite the language that *Edelman* told Harvard was the "entire section that spoke to confidentiality." Dep. Ex. 109 at BGE005654.[3] This raises a serious question about whether Edelman may well have simply given HBS language he made up, after-the-fact, to justify keeping information from HBS.

Moreover, to the extent the language cited in the lawyers' letter to Harvard's counsel imposed any confidentiality obligation on Edelman—something Edelman himself did not claim in 2014—it merely limited his ability to "post . . . confidential material" from the client on his website. It did not prevent him from disclosing the identity of his client to Harvard in 2015 or 2017, or in this litigation.

In sum, there are substantial reasons to doubt the veracity of what Edelman told HBS about his obligation of confidentiality, including significant evidence already brought to light in discovery that Edelman sought to mislead HBS and the FRB in 2015.

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[2] GLG appears to refer to an expert network that connects potential clients and experts. *See* https://glginsights.com/.

[3] The language that Edelman described as creating his confidentiality obligation is different and broader than the language cited in the lawyers' letter. "He [Edelman] will treat as confidential any information received from [client] and will not disseminate same with or without attribution without the express written consent of [client]." Dep. Ex. 109 at BGE005654.

Because the information Harvard seeks is relevant and not privileged, the Court should order Edelman to respond fully to the Interrogatories and Document Requests outlined above and to answer fully and completely deposition questions posed by Harvard about his Blinkx clients.

Plaintiff's Position:

The Court Should Sustain Plaintiff's Objections Concerning Blinkx and the Identity of the Clients Who Retained Him to Research Blinkx Because the Requested Discovery Is Not Relevant and Would Violate Confidentiality Expectations of Third Parties.

Introduction

Harvard's requested discovery concerning Blinkx is not relevant, nor reasonably calculated to seek evidence relevant to any relevant claim or defense in this matter. This case is not about what Plaintiff did or did not do for clients in 2014. It is also not about what Plaintiff did or did not say to HBS administrators or the FRB, particularly in 2015 when Blinkx was discussed. Instead, this case is about whether Harvard breached its contractual obligations related to the FRB process in 2017. Harvard's attempt to engage in a fishing expedition in order to uncover Plaintiff's confidential communications with his clients should be rejected.

The Amended Complaint discusses Plaintiff's research concerning Blinkx only as background context. The FRB in 2015 examined Plaintiff's actions relating to Blinkx, but he has not raised any claim in this Court concerning how the 2015 FRB investigation was conducted, and any such claim would have been time-barred when this action was filed. The FRB's 2017 report does not mention the word Blinkx. Instead, the FRB review in 2017 focused on Plaintiff's conduct between 2015 and 2017, and the extent to which Plaintiff had learned from past controversies.

For the purposes of the FRB's work in 2017, the details of Plaintiff's research on Blinkx were not important, and were not even discussed in its report. There was a shared understanding that Plaintiff had published an article regarding Blinkx with a disclosure statement about his prior paid research on behalf of clients, but less disclosure than some would have preferred; that he was publicly criticized for this; and that he consulted with HBS and revised his disclosure after receiving negative media attention. The FRB did not know, and did not ask, the identities of Plaintiff's clients. It did not and could not have impacted their decision-making in the least.

Plaintiff has retained all documents relating to his Blinkx engagement and research, and produced over 5000 pages of documents related to Blinkx. He withheld only those documents, and declined to answer only those deposition and interrogatory questions, that implicate the identities or

sensitive communications which he agreed to keep confidential. The further discovery that Harvard seeks would be irrelevant, disproportionate, and would serve no purpose other than frustrating the legitimate confidentiality expectations of Plaintiff's clients.

Harvard Has No Evidence That Plaintiff Misled Harvard Or the FRB

By conflating communications at different points in time, Harvard has tried to manufacture factual conflicts or credibility issues where none exist. The statement by Plaintiff that Harvard highlights, "The clients here couldn't have known what I would find or whether I would choose to write about it publicly," referred to what Plaintiff's clients would have expected at the beginning of the engagement. It was not an assertion that the clients *never* knew what Plaintiff found or that he decided to publish his research. That is clear from the preceding context: "[T]he article I posted to my web site simply was not required by any contract with investors or anyone else. My agreement with clients obliged me to conduct certain research and to provide them with my findings, but I was *not* obliged to write about this on my web site. Indeed, thinking back to the various companies that have retained me over the years, in only a minority of cases did I consider the findings important enough to merit online posting or other publication." (Dep. Ex. 6 at HBS0015717.) In other words, the clients agreed to pay Plaintiff to conduct research without knowing whether the results would be noteworthy or whether Plaintiff would publicize them on his own initiative.

Nothing about the other statements identified by Harvard contradicts Plaintiff's 2015 statement to the FRB. After Plaintiff completed his research, and while he was preparing his report, he provided updates to his clients. Having uncovered "lousy Blinkx practices" through his research, he became convinced that he should publish new material about Blinkx and told the clients that he would be doing so.

Harvard's inflammatory language – supposed "efforts to manipulate the market" – shows only their misunderstanding of the regulation of market research. Capital markets are designed to encourage investors to obtain new and better information about companies. To that end, investors are allowed to commission research, trade on that research, and publicize information that they believe will be positive or negative towards specific companies or industries. Plaintiff's mistake was not in performing the research or in publishing his results. It was, at most, in not providing greater detail when disclosing his paid relationship with his clients. That is what the FRB found in 2015: "Professor Edelman failed to recognize the possible intersection between his publication activities and the ability of a client to engage in market timing, and his initial disclosure did nothing to inform readers of the possibility that his client, which hired him to conduct the research, could benefit from his findings because it had a stake in the subject of his research." (Dep. Ex. 6 at

HBS0015705.) Tellingly, Harvard's overstated claim of "market manipulation" is not backed by any allegation that Plaintiff did anything unlawful.

Harvard also claims that Plaintiff told HBS Associate Dean Jean Cunningham in 2014 that his clients "didn't stand to benefit from having the results [of his research] published" (HBS0015749). Harvard's support for this claim comes from a passing comment Dean Cunningham made to two Harvard communications staff members in an email Plaintiff did not see until over a year later, as one message in a lengthy chain that the FRB only cited generally for the fact that a Bloomberg reporter reached out to HBS Communications staff. Dean Cunningham's extensive correspondence with Plaintiff about the Blinkx article in 2014 does not include this statement. Plaintiff, in his submissions to the FRB in 2015, did not address the question whether his clients stood to benefit. The FRB did not ask him about it. Discovery does not reveal any indication that anyone in the FRB remarked on or even noticed it. And the FRB's report did not touch upon that question. (If the FRB's investigation had focused on that question, Plaintiff would have realized that the document incorrectly captured his point and would have corrected it.) It was not material in 2015, and certainly was not material in 2017. Dean Cunningham specifically denied ever providing any first-hand information to the FRB about Blinkx. (Cunningham Dep. 86:23-87:15.) If Dean Cunningham did not provide the FRB with this supposed statement or any other information from her personal experience working with Plaintiff on the Blinkx matter, no aspect of that supposed statement could possibly "mislead" the FRB.

Plaintiff believes he actually conveyed a much more nuanced point in discussions with Dean Cunningham. Plaintiff's view is that the clients *did* stand to benefit, but also that they had ample other ways to achieve that benefit had Plaintiff not published his findings on his web site. (For example, the clients could have redistributed Plaintiff's report on their own web site or in other formats, and they could have replicated his findings via other experts or their own staff.) Plaintiff did not know at the time whether his clients had a position in Blinkx, and Harvard has no evidence to suggest otherwise.

Harvard later cites a 2023 email for the proposition that, in 2014, Plaintiff knew his clients were short sellers. But the nine-year gap reveals the obvious error in this logic: Plaintiff learned more in this period. In particular, Plaintiff explained in his deposition that a news article, published later in 2014, revealed the names of companies that had short positions in Blinkx. (Dep. Tr. 321:17-322:4.) Plaintiff indicated that from that article he learned that his clients had a short position in Blinkx. (Dep. Tr. 329:7-15.) Plaintiff also testified that he learned from that article that "no firm in the world" had made a material change in its short position on Blinkx in the time period when

he was researching Blinkx. (Dep. Tr. 322:11-16.) The 2023 email is no surprise and does not suggest Plaintiff knew his clients' strategy as of February 2014.

Harvard makes much of the supposed consequences of whether Plaintiff's clients stood to benefit. But in fact, the FRB in 2015 concluded that Plaintiff's clients "could benefit from his findings because [they] had a stake in the subject of his research" (HBS0015705). The FRB already concluded, and Plaintiff agrees, that the clients stood to benefit from Plaintiff's work. No one was misled. Harvard identifies no false statements by Plaintiff at all, and certainly no false statements that Plaintiff made to the FRB. There are no issues of credibility that Harvard can legitimately explore through the discovery it now seeks – it is a pure fishing expedition.

Harvard's Affirmative Defenses Are Legally Insufficient and Provide No Grounds for the Discovery It Seeks

Harvard asserts that discovery related to Blinkx can support an affirmative defense related to after-acquired evidence, but it misleads the Court by suggesting that such a defense has been accepted in a holding of the Supreme Judicial Court. Harvard cites the 2014 *City of Springfield* case, but rather than accepting the doctrine, this case mentions it only in passing, in dicta in a footnote. *See also Flesner v. Tech. Comms. Corp.*, 410 Mass. 805, 815-16 (1991) (discussing holdings of federal cases without accepting them as correct). As the SJC later clarified, in a decision Harvard fails to acknowledge: "In the rare opportunities that this court and the Appeals Court have had to consider the issue of after-acquired evidence in the context of a termination from employment, neither of the courts has adopted, or declined to adopt, this doctrine." *EventMonitor v. Leness*, 473 Mass. 540, 543 (2016). There thus is no established defense of after-acquired evidence as a matter of law.

Even assuming that the after-acquired evidence doctrine were valid in Massachusetts, in evaluating requests for discovery in search of after-acquired evidence, courts applying that defense are appropriately skeptical of the risk of "extensive, otherwise-irrelevant discovery." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 363 (1995). *McKennon* specifically counsels against "routine" discovery of after-acquired evidence. As a result, the after-acquired evidence defense is not an independent basis for discovery in the absence of some evidence that wrongdoing occurred. *See Smith v. Turbocombustor Tech., Inc.*, 338 F.R.D. 174, 177 n.4 (D. Mass. 2021), citing *Liles v. Stuart Weitzman, LLC*, No. 09-61448-CIV-COHN, 2010 WL 1839229 *4-5 (S.D. Fla. May 6, 2010); *Chamberlain v. Farmington Sav. Bank*, No. 3:06CV01437 CFD, 2007 WL 2786421 at *2 (D. Conn. Sept. 25, 2007). As discussed above, Harvard's claims of wrongdoing mischaracterize the evidence; there is no evidence that Plaintiff misled HBS or the FRB. And especially given that

the FRB did not focus on the issues Harvard asserts (with hindsight during litigation) were critical, it falls far short of identifying any "wrongdoing [] of such severity that the employee in fact would have been terminated on those grounds alone…." *McKennon*, 513 U.S. at 362-63. Harvard is not entitled to delve into irrelevant issues in the bare hope that it will uncover an incorrect statement somewhere, particularly when third parties have a substantial interest in that information remaining confidential.

Harvard's conclusory reference to unclean hands fails for similar reasons. There is no evidence of bad faith or inequitableness, and Harvard does not even claim that Plaintiff engaged in any misconduct or made any false or misleading statements in the 2017 FRB process that is the subject of this lawsuit. In order to establish a defense of unclean hands, "the [inequitable] conduct at issue must *directly* affect the claim being brought" *Amerada Hess Corp. v. Garabedian*, 416 Mass. 149, 156 (1993) (emphasis added). In *Amerada Hess*, whether or not the plaintiff had violated environmental laws had no bearing on its right to specific performance of an option to purchase land. *See id.* "Even a party guilty of intentional violation of law does not lose the right to relief, where his cause of action arises independently of his unlawful conduct." *Braga v. Braga*, 314 Mass. 666, 672 (1943). Here, Plaintiff did nothing unlawful and is not alleged to have done anything unlawful, but his claim of the 2017 FRB violating its P&P commitments is absolutely independent of the statements he made in 2014 concerning Blinkx.

Any Tenuous Claim of Relevance Is Disproportionate to the Harm to Plaintiff and Third Parties If He Is Required to Disclose Third-Party Confidential Information

Plaintiff contemporaneously agreed to maintain confidentiality of his clients' identities, communications, and information. Providing that to Harvard in discovery would cause harm to those clients; to at least one third party whose data and analysis (and associated restrictions on use and redistribution) were discussed in Plaintiff's correspondence with those clients; as well as to Plaintiff, whose ability to honor his confidentiality commitments would be called into question.[4] While that does not, by itself, preclude discovery of the documents and information Harvard now seeks, the confidentiality agreement does indicate that the Court should consider carefully whether

[4] While Harvard criticizes Plaintiff's supposedly "selective" compliance with the confidentiality agreement, Plaintiff's hesitation in his deposition reflected only his desire to be as forthcoming as he can, consistent with his confidentiality obligations. To the extent that he had concern about how he had approached his obligations under the confidentiality agreement with these clients, it was at least in part due to uncertainty about how to handle unusual situations like conflicts between confidentiality agreements and HBS annual reporting requirements.

the requested discovery is relevant and whether Plaintiff or the clients would be subjected to "annoyance, embarrassment, oppression, or undue burden or expense." Mass. R. Civ. P. 26(c).

Harvard incorrectly suggests that Plaintiff has been less than candid about the confidentiality agreement. Rick Anigian, counsel for a client who retained Plaintiff to research Blinkx, has provided a supplemental letter to clarify the situation. Attorney Anigian's supplemental letter explains that the client engaged Plaintiff several times dating back to 2005, that the client engaged Plaintiff with regard to a related topic (browser hijacking) in 2012, and that it entered into an Agreement for Services with Plaintiff that contained exactly the language Plaintiff provided to Dean Cunningham in 2014 as the operative confidentiality agreement. (7/31/25 Anigian Letter at 1 & Ex. B.) Counsel also clarified that the description of the confidentiality arrangements between Plaintiff and the client in his 2024 letter was incomplete, insofar as he quoted only one of the operative confidentiality agreements.[5]

Attorney Anigian's supplemental letter explains the importance of confidentiality to the client and its standard practices with respect to confidentiality of expert engagements. The client understood, expected, and agreed that "its and its representatives' names and communications" would be kept confidential as part of the "mutual[] agree[ment] to maintain the confidentiality of any information shared with each other." (*Id.* at 1-2.) The client would not engage experts without a confidentiality agreement, has never had its identity or that of its representatives disclosed, and has an interest in confidentiality so that others are not aware of what it is researching. (*Id.* at 2.) The 2012 Agreement for Services provided that Plaintiff "will treat as confidential any information received from [client] and will not disseminate same with or without attribution without the express written consent of [client]." (*Id.* Ex. B.)

The 2012 Agreement for Services stated that it could be extended "as needed" or renewed, and was renewed when the work transitioned from hourly to a flat fee in November 2012 and when the work expanded to include Blinkx in December 2013.[6] (*Id.* at 1-2 & Ex. B.) Plaintiff and the

[5] Attorney Anigian's supplemental letter also addressed the mention of GLG, which Harvard remarked on. He explained that the reference to GLG was a mistake by the client's representative, a mistake which Plaintiff noticed in 2012 and which the representative then addressed and corrected. (*Id.* at 1 & Ex. A.)

[6] At his deposition, Plaintiff did not have a specific recollection about the discussions he had with his clients about the confidentiality of the Blinkx research. He did not recall at that time that, as reflected in the Anigian supplemental letter, the clients regarded the Blinkx research as a

clients understood that its confidentiality provisions applied to the Blinkx work, and that, as Plaintiff testified, the other client (joining the project only in December 2013) would receive the benefit of the confidentiality terms previously agreed.

The Anigian supplemental letter makes plain that there was a written confidentiality agreement with Attorney Anigian's client, and that Plaintiff accurately provided the operative language from that agreement to Dean Cunningham in 2014. Because Harvard has not demonstrated any relevance or need for the requested discovery, the Court should respect the clients' reasonable and contractual expectations of confidentiality, and should not compel further production related to Blinkx.

Defendant's Reply:

Plaintiff's reply only underscores Harvard's need for its requested discovery regarding the Blinkx matter. The Court should therefore order Plaintiff to respond to Harvard's discovery requests on this issue.

First, Plaintiff's assertion that "discovery concerning Blinkx is not relevant" to this litigation is without merit. Indeed, Edelman himself has written that his published report about Blinkx played a major role in his failure to obtain tenure. Shortly after filing this litigation, Edelman wrote an email to a well-known investor suggesting that his work on Blinkx as a "friend-of-short-sellers" had cost him tenure at HBS:

> I'm proud of . . . multiple instances calling out big tech years before it became cool to do so. **But my skepticism came at a cost** . . . [I]n 2014 some short sellers asked me to update a corner of that work. I found that the notorious adware company Zango, by then renamed Blinkx and trading on LSE, was still up to no good. I wrote this up for the public, which caused their stock to plummet. Blinkx leaders had no defense for their practices, so they attacked me personally – **and the resulting negative publicity put me in a hole I couldn't dig myself out of** . . . [T]here aren't many friends of short sellers on the HBS faculty, and [] even fewer who **have paid this level of personal price for, ultimately, reporting the truth**.

continuation of the browser hijacking work reflected in the 2012 Agreement for Services, which was then extended to cover the Blinkx engagement. (7/31/25 Anigian Letter at 1-2 & Ex. B.)

Dep. Ex. 111 (emphasis added). Recognizing the importance Blinkx played in HBS's rejection of his tenure application, Plaintiff's counsel has asked deposition witnesses questions about Blinkx no fewer than 66 times.[7]

Plaintiff attempts to minimize the contradictions between what he told HBS and what he has said to others about Blinkx. But the clear objective of Edelman's 2015 statement to the FRB (that his clients "couldn't have known what I would find or whether I would choose to write about it publicly") was to suggest that he made his decision to publish *independent* of any self-interested motives his clients may have had. He certainly did not tell HBS or the FRB that the investors "convinced me that I'm overdue to write this up."

Plaintiff's credibility is plainly an issue here. Given the importance Blinkx played in the rejection of his tenure application, the Court should not permit Edelman to prevent Harvard from discovering important information about the true nature of his relationship with the clients who paid him to do research on Blinkx.

Second, the information that Harvard seeks is also relevant to Harvard's affirmative defenses. The cases Edelman cites do not hold that a defendant is foreclosed, in circumstances like these, from developing evidence to support an after-acquired evidence or unclean hands defense.

Plaintiffs rely on *McKennon v. Nashville Banner Pub. Co*., 513 U.S. 352, 363 (1995). But as the SJC noted in *EventMonitor v. Leness*, 473 Mass. 540, 543 n.6 (2016), "[t]he United States Supreme Court has prohibited application of the after-acquired evidence doctrine when a termination without cause has been found to have occurred for impermissible reasons, such as discrimination or retaliation." Edelman has advanced no such theory here.

[7] *See, e.g.*, M. Bazerman Dep. Tr. at 33:8-12, 34:20-22, 48:13-14, 180:24, 181:8-17, 182:1-4, 204:8-10, 205:4-6, 205:14-17; A. Edmondson Dep. Tr. at 66:15-17, 81:22-23, 82:4-6, 82:11-12, 84:11-14, 144:3-6; S. Gilson Dep. Tr. at 38:12-14, 117:19-20, 118:22-24, 130:18-21, 132:19-24, 136:3-5, 136:11-12, 136:23-137:1, 137:5-6, 162:25-163:2, 164:19-22, 165:2-3, 165:9-11, 165:15-16; L. Schlesinger Dep. Tr. at 22:23-23:2, 24:15-16, 24:24-25, 25:5-6, 28:25-29:1, 29:3-4, 32:21-22, 33:8-9; P. Healy Dep. Tr. 58:8-12, 132:18-20; J Cunningham Dep. Tr. at 79:19-21, 83:17-20, 85:10-11, 85:23-24, 86:23-87:1, 87:10-11, 87:13-14, 190:4-5, 191:8-11, 196:7-8, 196:20-21, 197:12-13, 197:17-19; N. Nohria Dep. Tr. at 49:10, 49:12, 49:14, 49:19-20, 49:22-50:3, 50:8, 50:10, 50:12, 50:17-18, 50:24-51:1, 51:3-4, 51:12-14, 87:2-7, 161:23-162:1.

In the other cases Plaintiff cites, courts merely prevented parties from engaging in discovery fishing expeditions far removed from key case issues. *See, e.g.*, *Smith v. Turbocombustor Tech., Inc.*, 338 F.R.D. 174, 176 (D. Mass. 2021) (Court denied motion for an employer/defendant to subpoena former and current employers about plaintiffs' job performance at those jobs); *Liles v. Stuart Weitzman, LLC*, No. 09-61448-CIV-COHN, 2010 WL 1839229 *4-5 (S.D. Fla. May 6, 2010)(same); *Chamberlain v. Farmington Sav. Bank*, No. 3:06CV01437 CFD, 2007 WL 2786421 at *2 (D. Conn. Sept. 25, 2007) (same).

Here, in contrast, Edelman's statements about Blinkx are central to this case. If HBS knew in 2015 that Edelman had misled HBS and the FRB, HBS would have ended his tenure case and terminated his employment rather than granting him a two-year extension. The Court should reject Edelman's efforts to prevent Harvard from gathering further evidence about his misleading conduct.

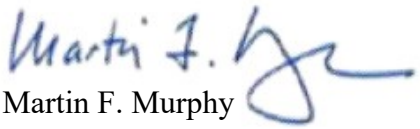
The unclean hands cases Plaintiff cites do not support Plaintiff's opposition to discovery. Those cases address the merits of the defense, not whether a party should be able to obtain relevant pre-trial discovery to pursue that defense. And here, unlike *Amerada Hess Corp. v. Garabedian*, 416 Mass. 149, 156 (1993), or *Braga v. Braga*, 314 Mass. 666, 672 (1943), Edelman's statements about Blinkx bear on a central issue. If HBS had known that Edelman had misled HBS or the FRB about Blinkx, HBS would never have given Edelman a second chance at tenure.

Third, Plaintiff's arguments about confidentiality do nothing to undermine Harvard's need for the discovery it seeks. Indeed:

- Plaintiff does not challenge Harvard's position that a private confidentiality agreement cannot supersede the Court's right to order appropriate discovery.
- Plaintiff fails to address why the information Harvard seeks could not be protected by the existing Protective Order in the case.
- Plaintiff has failed to offer any evidence suggesting that one of his two Blinkx clients ever had a confidentiality agreement with him.
- The information plaintiff has offered about his confidentiality agreement with his first client raises more questions than answers. Why did counsel for this client initially cite a provision in a confidentiality agreement that it now claims was never applicable?

Production of the documents that Harvard seeks is necessary to permit Harvard fully to challenge Edelman's credibility and to develop the defenses it seeks to pursue. Harvard respectfully requests that the Court order it.

Sincerely,



Martin F. Murphy

MFM

HAYNES BOONE

July 31, 2025

Via Email

David A. Russcol
Zalkind Duncan & Bernstein LLP
65A Atlantic Avenue
Boston, MA 02110
drusscol@zalkindlaw.com

Re: *Benjamin Edelman v. President and Fellows of Harvard College*;
Civil Action No. 2384CV00395-F

Dear Mr. Russcol:

We represent one client who retained Mr. Benjamin Edelman to conduct independent research related to a company known as Blinkx. Our client requests that its and its representatives' names and communications with Mr. Edelman remain confidential in accordance with the terms of its retention of Mr. Edelman. It also requests that Mr. Edelman take whatever steps are necessary to oppose the President and Fellows of Harvard College's efforts to compel the disclosure of such confidential information.

Our client is a private investment firm that has engaged Mr. Edelman on several occasions starting in 2005. These engagements included the retention of Mr. Edelman in September 2012 to conduct an independent research project related to browser hijacking and other unscrupulous online advertising practices. The initial project was not related to Blinkx, but these research projects often lead to the discovery of other companies outside of the initial target. The initial project is the one that I referred to in my letter to you dated August 26, 2024.

The initial 2012 engagement related to browser hijacking was confirmed in a series of email exchanges between our client and Mr. Edelman on September 12 and 13, 2012. A redacted image of the email string is attached hereto as Exhibit A. Note that our client acknowledged one error in the September 2012 email communications which pertained to a reference to the expert network GLG. Our client's representative mistakenly believed Mr. Edelman was affiliated with GLG when the September 12, 2012 (4:32 PM) email was sent. The September 2012 engagement began on an hourly fee basis and was converted to a flat fee in November 2012. Both the hourly and flat fee engagements are reflected in written Agreements for Services, each of which required that Mr. Edelman maintain the confidentiality of all information he received from our client. The Agreements for Services provides in part, "The undersigned provider [Edelman] understands and agrees that . . . he will treat as confidential any information received from [client] and will not disseminate same with or without attribution without the express written consent of [client]." A true and correct copy of one of the 2012 Agreements for Services is attached hereto as Exhibit B.

Our client continued to research browser hijacking in 2013. It believed Blinkx was a potential offender. Our client and another private entity engaged Mr. Edelman in late 2013 to provide

similar research related to Blinkx that he provided on the research project that began in September 2012. Mr. Edelman was paid a flat $10,000 consulting fee to provide additional forensic research that was focused on Blinkx.

Due to changes in computer systems and the difficulty in accessing legacy data, to the extent it can be recovered, our client has not located communications with Mr. Edelman specifically related to the engagement for the Blinkx project.

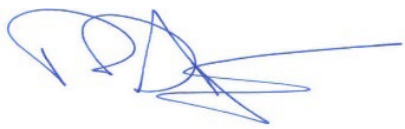
Prior to all of our client's various retentions of Mr. Edelman, both parties mutually agreed to maintain the confidentiality of any information shared with each other. Our client understood and continues to believe that the "confidential information" protected in such agreements included its identity as well as the identities of its representatives who would interact with Mr. Edelman. At the time of the Blinkx engagement, our client agreed that Mr. Edelman could post the result of his findings, provided that such findings were based on information derived from publicly available sources and not from our client's confidential information.

Mr. Edelman was one of hundreds of consultants our client had retained for hundreds of research projects involving hundreds of securities across the globe. It was a standard business practice that our client would not engage any expert for any such research project prior to obtaining a confidentiality agreement from the independent expert or expert network it was retaining. Our client is not aware of any instance over these hundreds of projects where any expert ever disclosed its or its representatives' names or their communications in connection with a project. It relied on such confidentiality agreements and did not want third parties to be aware of what it was researching.

Mr. Edelman's fee was not contingent on the result of his research, and he was not requested to deliver a specific result. Our client retained Mr. Edelman based on his expertise in conducting independent research, including reviewing source code, running virtual machines to identify and interact with malicious ads and other independent research.

Should you have any questions, please let me know.

Very truly yours,



Direct Phone Number: (214) 651-5633
Direct Fax Number: (214) 200-0354
rick.anigian@haynesboone.com

EXHIBIT A

From: [redacted]
To: Ben Edelman <ben@benedelman.org>
Cc: [redacted]
Subject: RE: [redacted] Consultant Ben Edleman-[redacted] Call on [redacted]-Consultant Request-1
Date: Thu, 13 Sep 2012 16:27:27 +0000
Importance: Normal

Hi Ben,

Thank you for your response and I apologize for the mention of GLG. You are not held under their code of ethics as you are not affiliated with them and you have signed a separate contract with [redacted]. I will send a calendar invite holding the time below shortly, but please note we are confirmed and will call you at the agreed time.

Best Regards,

[redacted]

From: Ben Edelman [mailto:ben@benedelman.org]
Sent: Wednesday, September 12, 2012 4:56 PM
To: [redacted]
Cc: [redacted]
Subject: RE: [redacted] Consultant Ben Edleman-[redacted] Call on [redacted]-Consultant Request-1

That's fine, except that I'm not affiliated with GLG and have not reviewed their current code of ethics or other current policies.

The proposed time is fine. I'll be at 617 496 2055.

From: [redacted]
Sent: Wednesday, September 12, 2012 4:32 PM
To: Ben Edelman (ben@benedelman.org)
Cc: [redacted]
Subject: [redacted] Consultant Ben Edleman-[redacted] Call on [redacted]-Consultant Request-1

Hi Ben,

I am writing on behalf of [redacted] of [redacted]. I believe you have recently signed a contract with us to set up a consult call over [redacted]. I have reviewed your calendar and it looks like 10am ET/9am CT is convenient for you on Monday, September 17th. I would like to go ahead and schedule the call for that time. Please let me know if this time is still convenient and also please confirm you agree to the statement below. **I will not be able to schedule the call officially until the below statement is confirmed.**

"By conducting the consultation referenced above, we mutually agree that we will maintain confidentiality of any information shared with each other. [redacted] will never knowingly solicit any trade secret, proprietary information, or any material, non public information related to your present employer or any other publicly traded enterprise, and you should always exclude such information from any information that you may provide to us. You confirm that you are aware of your obligations under the code of ethics of GLG In your consultation with us, you will not discuss any

information for which you are under a confidentiality or other non disclosure obligation, or which was obtained from someone who is under such obligation.

Consultants who are to perform Services for [redacted] may not relate to a public company of which Consultant is a director, officer or other employee or have been such within six months prior to agreeing to perform Services for [redacted] hereunder."

Thank you,

[redacted]

EXHIBIT B

[redacted]

AGREEMENT FOR SERVICES

Ben Edelman ("Provider") agrees to provide [redacted] the following consulting/research services (attach additional detail as needed):
Consultation with [redacted] regarding the browser reset / browser hijack business

These services shall be provided:

- by email
- by telephone

The undersigned provider understands and agrees that:

- in no instance will it / he provide to [redacted] material, non-public information about any public company,
- he will not utilize proprietary information of a current employer to provide consulting services nor consult during employer's working hours, and
- it / he will treat as confidential any information received from [redacted] and will not disseminate same with or without attribution without the express written consent of [redacted]

The services shall be provided for the following period:
START DATE: September 4, 2012 END DATE: January 4, 2013, as needed

The Agreement may be cancelled on 30 days written notice or renewed for additional periods of time by written notice signed by both parties, otherwise it shall terminate at the end of the period indicated in the preceding sentence.

The services shall be provided in exchange for $800 per hour with a minimum of 30 minutes, payable upon receipt of invoice by [redacted]

Date: 9/11/12

Signature: _____

Name: Ben Edelman

Address: 169 Walnut St, Brookline, MA 02445

E-mail: ben@benedelman.org

Phone: 617 496 2055 or 617 359 3360

[redacted]

EXHIBIT AA

HAYNES BOONE

August 26, 2024

Ruth O'Meara-Costello ***Via email***
Law Offices of Ruth O'Meara-Costello
875 Massachusetts Avenue
Suite 31
Cambridge, MA 02139
ruth@ruthcostellolaw.com

Harvey A. Silvergate ***Via email***
David A. Russcol
Zalkind Duncan & Bernstein LLP
65A Atlantic Avenue
Boston, MA 02110
has@harveysilvergate.com
drusscol@zalkindlaw.com

RE: *Benjamin Edelman v. President and Fellows of Harvard College*;
Civil Action No. 2384CV00395-F (the "Lawsuit")

Dear Counsel:

We represent a client of Benjamin Edelman who retained Mr. Edelman's services on several occasions related to internet-based companies, including with respect to a project known as Blinkx. Each of our respective clients' engagements, including the Blinkx project, was subject to the following confidentiality agreement:

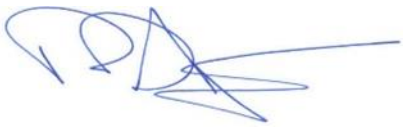
> We mutually agree that we will maintain confidentiality of any information shared with each other. [Client] will never knowingly solicit any trade secret, proprietary information, or any material, non public information related to [Edelman's] present employer or any other publicly traded enterprise, and [Edelman] should always exclude such information from any information that [Edelman] may provide to [Client]. [Edelman] confirm[s] that [he is] aware of [his] obligations under the code of ethics of GLG. In [Edelman's] consultation with [Client], [Edelman] will not discuss any information for which [Edelman] is under a confidentiality or other non disclosure obligation, or which was obtained from someone who is under such obligation.

My client's agreement with Mr. Edelman regarding the Blinkx project further provided, "I understand that [Client] will not object to [Edelman] posting [Edelman's] findings to [Edelman's] web site thereafter, so long as [Edelman] post[s] only material derived from public sources and of course no confidential material from [Client]."

My client now understands that the defendant in the Lawsuit is seeking information about the Blinkx project and more specifically, information about my client, including its identity. My client objects to it being identified in the Lawsuit and expects Mr. Edelman to take every available step to comply with the terms of their confidentiality agreements, including protecting its identity. My client does not object to the production of discoverable information related to the Blinkx project provided its name and identifying information is redacted from all documents, discovery responses, and answers to questions in any deposition.

Should you have any questions or wish to discuss this matter further, please feel free to contact me.

Very truly yours,



Richard D. Anigian
(214) 651-5633
rick.anigian@haynesboone.com

4856-3311-8173