

COMMONWEALTH OF MASSACHUSETTS

Superior Court

Suffolk, SS
Business Litigation Session

_____)
 BENJAMIN EDELMAN,)
)
 Plaintiff,)
)
 v.)
)
 PRESIDENT AND FELLOWS OF)
 HARVARD COLLEGE,)
)
 Defendant.)
 _____)

Civil Action 2384CV00395-BLS2

PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

Plaintiff plausibly alleged multiple ways in which Defendant President and Fellows of Harvard College (“Harvard”) breached its contractually-binding obligations to him, failed to uphold its covenant of good faith and fair dealing, and caused him damages due to his detrimental reliance. Harvard’s motion to dismiss should be denied. Although Harvard repeatedly claims that Plaintiff asks the Court to supplant Harvard’s judgment and award him tenure, all he seeks is fair consideration under the processes that Harvard promised to follow. The Complaint alleges that Harvard convened a Faculty Review Board (“FRB”) without articulating an “allegation” of misconduct it could investigate; that the FRB never disclosed “the evidence gathered” to Plaintiff; that the FRB added new topics to its inquiry near the end of the process, hampering Plaintiff’s ability to respond; that the FRB included administrators with a conflict of interest; and that the FRB’s final report rested on vague implications of impropriety on issues where Harvard had policies in place and Plaintiff complied with them. These acts and omissions violated Harvard’s contractual promises, good faith and fair dealing, and/or Plaintiff’s reasonable expectations. Plaintiff relied on Harvard’s commitment to follow established

procedures and on Harvard’s statement that Plaintiff had a strong likelihood of being awarded tenure if he complied with its requirements. As a result, Plaintiff forewent other opportunities, only for Harvard to undermine his tenure application in bad faith. The Complaint states claims on all three causes of action, and the Court should allow them to proceed.

FACTS

Plaintiff, a lawyer and respected consumer advocate, became a tenure-track professor at Harvard Business School (HBS) in 2007. (¶¶ 14-17.¹) Even before he became a professor, Plaintiff was an expert in online markets, conducting cutting-edge research at the intersection of computer science and economics. (¶¶ 15-18.) From 2007 through at least 2014, Plaintiff was indisputably successful, garnering praise from HBS Dean Nitin Nohria, receiving “best in a decade” awards, and racking up thousands of citations to his numerous academic publications. (¶ 19.) In 2012, HBS promoted Plaintiff to Associate Professor after a thorough review concluded that he could realistically expect to meet the criteria for tenure within four years. (¶ 21.)

In 2014, Plaintiff published a blog post about an adware company called Blinkx, after concluding that Blinkx’s practices, like those of a predecessor that had been sued by the Federal Trade Commission, were problematic. Plaintiff’s research was conducted in part as a consultant for a company that wanted to learn more about what Blinkx was doing. (¶ 22.) Although Plaintiff disclosed this consulting relationship in a way that complied with applicable HBS policies, Blinkx responded to Plaintiff’s blog post by attacking him for an alleged conflict of interest. (*Id.*) HBS requested that Plaintiff make his disclosure even more detailed, and he did so. (*Id.*)

Later in 2014, Plaintiff was criticized in local media for his dispute with a Brookline restaurant which charged customers more than the prices listed on its website. (¶ 23.) Plaintiff

¹ Unless otherwise indicated, paragraph references are to the Complaint and Jury Demand, Paper No. 1.

asked the restaurant to update its online prices and refund customers for past overcharges. Although the request was grounded in governing law and motivated by a desire to protect consumers, the tone of his emails gave rise to negative press coverage. (¶¶ 23-24.)

In response to concerns within the HBS faculty about previous investigations of alleged faculty misconduct, in 2015 HBS issued, and the faculty unanimously approved, a policy containing “Principles & Procedures for Responding to Matters of Faculty Conduct” (“P&P”). (¶ 25; *see* Compl. Ex. A.²) The P&P provides that in the case of “*egregious* behavior or actions” or “*a persistent and pervasive pattern* of problematic conduct” (emphasis in original), the Dean may convene an FRB “to investigate the concern and determine whether misconduct has occurred.” (¶ 26; Compl. Ex. A at 1.) The FRB Chair first summarizes the allegation. Then the FRB “will investigate the allegation” through methods like interviews and reviewing documents. (¶ 26; Compl. Ex. A at 2.) The FRB then prepares a draft report containing the evidence and tentative conclusions, and gives the faculty member “an opportunity to review... the evidence gathered, and the draft report....” (¶ 26; Compl. Ex. A at 2.) Guiding principles are that the faculty member “should be kept informed throughout about the steps of the process” and “[a]llegations should be articulated in writing and evidence presented clearly.” (Compl. Ex. A at 3.) When the FRB process is invoked in a promotion case, the FRB must follow the same procedures, “beginning with drafting an allegation as outlined above.” (¶ 27; Compl. Ex. A at 3.)

In 2015, Plaintiff participated in a review process to determine whether he should be promoted to a tenured faculty position. That review was governed by established HBS Tenure Procedures. (¶¶ 29-30; MTD Ex. 1.) Under the Tenure Procedures, the Appointments Committee

² Because Exhibits 1 and 2 to Harvard’s Motion to Dismiss form part of the contract between Plaintiff and Harvard, and Plaintiff relied upon them in his complaint, they are appropriately considered in deciding the Motion. *See Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004). The P&P are also attached to the Complaint as Exhibit A and therefore are part of the Complaint. *See* Mass. R. Civ. P. 10(c).

(i.e., all tenured HBS faculty) forms a subcommittee to gather materials from the candidate and internal and external reviewers, assess the candidate's record, and make a recommendation. (¶ 31.) Based on that recommendation, the Appointments Committee takes an advisory vote, after which the Dean decides whether to recommend a tenure grant to the University President. (¶ 31.)

In July 2015, HBS convened the FRB to conduct an inquiry into Plaintiff's blog post about Blinkx, his interaction with the restaurant, and four "concerns... about [his] interactions with staff and other colleagues at the School." (¶¶ 32-33.) The 2015 FRB's draft report concluded that Plaintiff had not upheld HBS's "Community Values" in the Blinkx or restaurant incidents, and in two of the four interactions at HBS (omitting mention of the other two interactions entirely). (¶ 36.) In response, Plaintiff successfully rebutted suggestions that he had acted improperly in a dispute about classroom projectors (in fact the Dean of the MBA program expressed gratitude for Plaintiff's efforts) or in travel purchasing (approved by the HBS CFO), but acknowledged errors in the Blinkx and restaurant incidents. (¶ 37.) Although senior faculty in Plaintiff's department supported his promotion, HBS delayed his tenure case for two years. (¶¶ 39-40.) In reliance on Harvard's promise to abide by its procedures, Plaintiff accepted the extension and agreed to teach Leadership and Corporate Accountability (LCA) and take other actions to demonstrate that he learned from the 2014 incidents. (¶¶ 40-41.)

After the 2015 extension of his Associate Professor position, Plaintiff successfully followed through on his commitments and contributed significantly to the HBS community. He taught the LCA course, receiving distinctive student evaluations. He updated LCA teaching plans with recent examples from the tech sector. He built a system to allow sight-impaired faculty to teach in the Socratic method independently, which HBS staff had claimed was infeasible. (¶¶ 42-44.) In March 2017, as requested by his unit head, Plaintiff submitted materials to restart the

tenure review process. (¶ 46.) In July 2017, HBS reconvened the FRB, which said it would examine three questions: whether Plaintiff understood why his past behavior was problematic, whether he demonstrated “changed behavior,” and whether he was likely to sustain changed behavior in the future. (¶ 47.) The letter notifying Plaintiff of the FRB’s inquiry did not contain any allegation of misconduct. (¶¶ 48-49.) In August 2017, Plaintiff met with the FRB and answered questions about his experiences in the past two years, and what he had learned. (¶ 50.)

In September 2017, the FRB suddenly undertook an examination of Plaintiff’s activities outside HBS, which was outside the scope identified by the FRB in July. The FRB demanded information on all of his outside activities for the past two years, with a deadline of just one week that could not be extended. (¶ 51.) The FRB focused particularly on Plaintiff’s role as counsel for a class action lawsuit against American Airlines and a disclosure statement accompanying an article Plaintiff wrote (which had been approved by an HBS Associate Dean). (¶¶ 51-52.) Because of the short timeframe and abrupt shift in the FRB’s focus, Plaintiff was not able to address the FRB’s questions and concerns as thoroughly as he would have liked. (¶ 53.)

The FRB’s September 27, 2017 draft report described the unanimous enthusiasm of Plaintiff’s unit, as well as extremely positive feedback from outside his unit. (¶¶ 54-55.) But the draft report also included 12 anonymous conclusory aspersions and personal attacks against Plaintiff, each entirely devoid of any context. (¶¶ 56-58.) Although the P&P mandated that the FRB give Plaintiff “the evidence gathered” and include it with the draft report, Harvard never provided Plaintiff any information about who allegedly said these things, nor the circumstances or context for their views. (¶¶ 57-59; MTD Ex. 2 at 2.) These statements are included in audio-recorded interviews and/or notes, but none of this evidence was shared with Plaintiff. (¶¶ 59-60.) Plaintiff believes many comments relate to his successful use of technology to support a

colleague with a vision disability, a project that met with resistance from IT staff and others. But without access to the evidence, he had to resort to speculation in attempting to respond. (¶ 61.)

The draft report also included new allegations about Plaintiff's outside activities, which Plaintiff had no opportunity to address previously. (¶¶ 62-63.) The draft report misleadingly characterized Plaintiff's previous consulting work for Microsoft and suggested that he should have disclosed that work when writing about Google. But Plaintiff fully complied with the HBS Conflict of Interest policy, which he helped to develop. (¶¶ 62-65.) The FRB misrepresented the application of the Conflict of Interest policy to Plaintiff's publications to suggest that Plaintiff had made "inconsistent" and deficient disclosures, when in fact Plaintiff went well beyond the policy's requirements. (¶ 66.) The FRB also criticized Plaintiff's work in the airline class-action lawsuit as potentially representing a "reputational risk" for HBS. But there was no evidence indicating such a risk (and in fact the suit quickly recovered sizable refunds for passengers with no negative press at all), no policy precluded Plaintiff's legal work, and senior HBS staff had told Plaintiff he needed no special approval to act as a lawyer. (¶ 67.) Given just days to respond to the draft report, Plaintiff informed the FRB of these errors, but he had no opportunity to meet with the FRB, and the FRB made no material revisions to its draft report. (¶¶ 69-70.) A plausible explanation for the FRB's last-minute hatchet job is conflict of interest by staff: one administrator who was a member of the FRB and another who was its primary staff had been personally involved in disagreements with Plaintiff that the FRB examined, yet HBS assigned them to investigate and adjudicate these same interactions. (¶¶ 78-82.)

Plaintiff had strong internal and external evaluations of his research, and sterling reviews of his teaching. The only factor against his tenure application was the FRB report. (¶ 71.) The Dean arbitrarily set a two-thirds threshold for the faculty vote in order to advance Plaintiff's

tenure application; Plaintiff received a majority but just short of two-thirds support, with a significant part of the opposition based on the FRB report. (¶¶ 72-74.) Because of this vote and the flawed FRB report, Plaintiff was not granted tenure and was forced to leave HBS. (¶¶ 76.)

STANDARD OF REVIEW

On a motion to dismiss for failure to state a claim, the Court must “accept[] as true the facts alleged in the plaintiffs’ . . . complaint . . . and favorable inferences that reasonably can be drawn from them,” and determine if the complaint “plausibly suggest[s] an entitlement to relief.” *Burbank Apartments Tenant Ass’n v. Kargman*, 474 Mass. 107, 116 (2016). A complaint need only set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.” Mass. R. Civ. P. 8. The Court is required to “draw every reasonable inference in favor of the plaintiff.” *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 676 (2011).

ARGUMENT

1. The P&P’s provisions were legally binding upon Harvard.

To establish a breach of contract, Plaintiff must show “an agreement between the parties; the agreement was supported by consideration; the plaintiff was ready, willing, and able to perform his or her part of the contract; the defendant committed a breach of the contract; and the plaintiff suffered harm as a result.” *Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 690 (2016) (citing *Singarella v. City of Boston*, 342 Mass. 385, 387 (1961)). Harvard says it “does not concede” that the P&P is a legally binding contract (Def. Memo. 9 n. 4), yet it makes no argument to the contrary. Nor could it given the P&P’s approval by faculty vote, a salient fact that Harvard selectively overlooks. The P&P is contractual under Massachusetts law.

Personnel manuals and other employer policies may be the basis of a contract between employer and employee. *O’Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 691 (1996)

(citing *Jackson v. Action for Boston Cmty. Dev., Inc.*, 403 Mass. 8, 13 (1988)). The overarching questions are whether the employee believed that the policy “constituted the terms or conditions of employment, equally binding on employee and employer” and whether such belief was “reasonable under the circumstances.” *Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp. 49, 55 (D. Mass. 1996) (describing *O’Brien*, 422 Mass. at 694). There is no “rigid list of prerequisites” for finding that an employment policy is an enforceable contract, *see O’Brien* at 692, but factors in favor of such a finding include the employer calling “special attention” to the policy, and the employee manifesting assent to the policy. *Pearson v. John Hancock Mut. Life Ins. Co.*, 979 F.2d 254, 256 (1st Cir. 1992) (citing *Jackson*, 403 Mass. at 14-15).

Here, the P&P was adopted by unanimous faculty vote to address concerns about fairness of past investigations of alleged faculty misconduct. The subject, accompanying discussions, and vote make the importance of the policy clear. (¶ 25.) Plaintiff manifested assent to the policy repeatedly by his participation in the FRB processes in both 2015 and 2017, and his behavior made it clear that he understood its terms as binding. By contrast, there are no factors that indicate that the policy was not contractual: no language suggesting that Harvard could unilaterally modify the policy, no statement that the policy provides “guidance” rather than a commitment. *See Pearson*, 979 F.2d at 256; *see Compl. Ex. A*. Massachusetts courts frequently treat similar university policies as contractual. *See Harris v. Bd. Of Trustees of State Colls.*, 405 Mass. 515 (1989); *Goldhor v. Hampshire College*, 25 Mass. App. Ct. 716 (1988).

Harvard notes that the P&P was adopted after Plaintiff submitted his 2015 tenure application (Def. Memo. 9 n.4), but it was in effect for the 2015 FRB process and before the 2017 FRB process that is the subject of Plaintiff’s complaint. The P&P governed both processes.

2. Plaintiff stated a claim for breach of contract because HBS violated the plain language of the P&P and his reasonable expectations based on the P&P.

In reviewing a contract between a university and faculty member, the court “employ[s] the standard of reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.” *Berkowitz v. President & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269 (2003) (quoting *Schaer v. Brandeis*, 432 Mass. 474, 478 (2000)); *see also Sonoiki v. Harvard Univ.*, 37 F.4th 691, 709 (1st Cir. 2022). In determining both what Plaintiff may have reasonably expected terms in the contract to mean and whether the school failed to meet those expectations, at the motion to dismiss stage the court must “make any reasonable inferences favorable” to the plaintiff’s position. *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 215 (D. Mass. 2017). As the First Circuit explained in *Sonoiki*,

This standard allows for a [plaintiff’s] reasonable expectations to be different from the interpretation the university places on the same terms. Moreover, a [party’s] expectation can be reasonable even if the precise expectation is not stated explicitly in the contract’s language but, instead, when the [party’s] expectation, viewed objectively alongside the express terms of the contract, is based on the [party’s] fair interpretation of the contract’s provisions.

Sonoiki, 37 F.4th at 709.³ While courts are deferential to educational institutions’ determinations around tenure, *see Berkowitz*, 58 Mass. App. Ct. at 269, those determinations are not unreviewable, and universities are liable under contract law if they fail to comply with their own procedural policies. *See, e.g., Rubinstein v. President and Fellows of Harvard Coll.*, Middlesex Superior Court No. 2020-00609, Paper 22 at 7-13 (Feb. 1, 2023) (attached as Exhibit 1); *Barry v. Trs. Of Emmanuel Coll.*, No. 16-cv-12473-IT, 2019 WL 499744, *6-8 (D. Mass. Feb. 8, 2019)

³ *Sonoiki* involved a student discipline process, but the standard of reasonable expectation is the same whether a faculty member or student is the other party to a contract. *See Berkowitz*, 58 Mass. App. Ct. at 269; *Barry v. Trs. of Emmanuel Coll.*, No. 16-cv-12473-IT, 2019 WL 499744, *6 (D. Mass. Feb. 8, 2019) (attached as Exhibit 2).

(attached as Exhibit 2). Here, HBS’s conduct of the FRB proceedings repeatedly violated the black letter of the P&P, and Plaintiff’s reasonable expectation of fairness. *See Barry, supra* at *7.

a. The FRB failed to share “the evidence gathered.”

The P&P promises in two places that it will share “the evidence gathered” with the faculty member. First, it states that the “faculty member . . . will have an opportunity to review the allegation, the evidence gathered, and the draft report, and to respond in writing.” (Compl. Ex. A at 2.) Then, it provides that the draft report “should include the evidence gathered.” (*Id.*). Furthermore, the P&P states that “evidence [should be] presented clearly.” (*Id.* at 3.) These provisions of the P&P required the FRB to provide Plaintiff access to *the actual evidence* that the FRB gathered, not merely an anonymized, context-free summary of witness comments.

The P&P indicates a clear intent to permit the faculty member to meaningfully respond to the evidence—which he cannot do if a report is decontextualized and anonymous. *See, e.g., Doe v. Stonehill Coll.*, 55 F.4th 302, 320 (1st Cir. 2022) (reversing grant of motion to dismiss on breach of contract claim in student misconduct case where comment’s omission from draft report denied the student the ability to investigate and possibly challenge its accuracy before it was included in final report). Here, the FRB removed both witness names and the contexts they were talking about, preventing Plaintiff from responding in substance.

Sonoiki presented a similar question of contract interpretation. There, the First Circuit found that a motion to dismiss a student respondent’s contract claims should have been denied, in part because Harvard did not share the identities of adverse witnesses with him. The policy in question stated that witness statements would be shared but did not explicitly discuss sharing witness identities. *Sonoiki*, 37 F. 4th at 711-12. Applying the standard of “reasonable expectation,” the First Circuit held that the student had plausibly claimed that Harvard breached his reasonable expectation that he would know the identities of all testifying witnesses. *Id.* at

712. By the same token, Plaintiff's expectation here that "the evidence gathered" would include witness testimony in a form that would permit a meaningful response was reasonable.

Harvard asserts that, contrary to the Complaint, the FRB report *did* include the evidence gathered, citing the Complaint's discussion of some aspects of the FRB report. (Def. Memo. 10.) But the report's brief summary of selected witness remarks stands distinct from "the evidence gathered" which, the Complaint says, included notes, recordings, and/or interview transcripts. (¶60, 88.) Harvard seeks to redefine "the evidence gathered" as whatever information the FRB elects to put into its report, but the plain language of the P&P supports a broader reading of the word "evidence," to Plaintiff's benefit.

Harvard attempts to evade the P&P's obligation to provide "the evidence gathered" by pointing to P&P and Tenure Policy provisions about confidentiality. But this generic language cannot overrule more specific language requiring the FRB to share "the evidence gathered." *See, e.g., Easthampton Congregational Church v. Church Mut. Ins. Co.*, 916 F.3d 86, 92 (1st Cir. 2019) (under Massachusetts law, more specific contract terms ordinarily control over more general contract terms). In any case, Harvard takes the confidentiality language out of context. Harvard quotes language from the P&P's discussion of how to gather input when determining whether a FRB is appropriate in connection with a particular promotion matter. But that stage of proceedings is not at issue. Once the FRB process commenced, the P&P required the FRB to give Plaintiff notice of the allegations and access to evidence. The Tenure Policy provisions about confidentiality offer Harvard even less support: The P&P indicates that it, and not the Tenure Policy, governs the FRB proceedings about which Plaintiff complains.

The P&P confidentiality requirements are aimed at protecting the reputation of the person under investigation. While the P&P remarks that "privacy and confidentiality are important

considerations” and that “information generally should be shared only on a need-to-know basis,” these lines follow a statement that “[e]very reasonable effort should be made to protect the reputations of the individuals involved.” (Compl. Ex. A at 3.) These provisions address the need to prevent private information from flowing to those who do not need it (e.g. students or the general public), but do not limit distribution of “the evidence gathered” to the faculty member and authorized readers of the report, as other provisions of the P&P specifically require.

Harvard says the P&P “do[es] not require the FRB to record or transcribe witness interviews” (Def. Memo. 10), but witness statements are “evidence” that must be shared with the faculty member in some form. Harvard notably does not deny that it did make a record of witness interviews, as the Complaint alleges, and Plaintiff expects that discovery will reveal other evidentiary materials. (¶¶60, 88.) Once it gathers evidence, in whatever form, the FRB is obliged to include it with the draft report and permit the faculty member to review it.

Next Harvard protests that if the P&P “had intended the FRB to attach every item it reviewed... it would have been simple for the [P&P] to say so.” (Def. Memo. 11.) But the P&P *does* say so: “include the evidence gathered,” “opportunity to review ... the evidence gathered.” “[T]he evidence” by its terms means *all* the evidence, as the P&P offers no limitation.⁴ Having provided *no evidence at all*—not one email, not one document, not one interview transcript—Harvard cannot even invoke some notion of substantial compliance with P&P.

Finally, Harvard says Plaintiff could not have expected “civil litigation style discovery.” (Def. Memo. 11.) But Plaintiff seeks no such thing: Plaintiff did not ask to take depositions, propose questions for witnesses, or direct the FRB’s collection of documents or other evidence.

⁴ It would have been simple for Harvard to have promised to share only material evidence, only evidence it relied on, or only exculpatory evidence. Instead, the actual P&P obligation is to simply share all of “the evidence gathered.”

Plaintiff seeks nothing more than what the P&P promises: that the FRB provide to Plaintiff, and attach to its report, the evidence it actually received. He has plausibly alleged facts establishing a breach of this portion of his contract.

b. HBS commenced the 2017 FRB without any allegation of misconduct.

The P&P states that the FRB procedure may be invoked to investigate “instances of *egregious* behavior or actions, or incidents that indicate a *persistent and pervasive pattern* of problematic conduct.” (Compl. Ex. A at 1.) The section of the P&P that authorizes its use in tenure matters states that “[i]f no serious questions about conduct are raised,” the case should proceed without the involvement of an FRB. (*Id.* at 3.) Harvard points to language suggesting the FRB should convene where “previous or current conduct raises a question” about a candidate’s “Effective Contributions to the HBS Community,” but in context it is clear that such a question exists *only* where a “serious question[] about conduct” is raised. A candidate’s contributions to the HBS Community are at issue in *every* tenure case, but the FRB is only to be used where specific, serious questions are raised that can be put in the form of an “allegation” that the FRB can then investigate and resolve. Nothing in the policy suggests that an FRB can be convened more than once to investigate the same conduct, and the 2015 FRB had addressed questions regarding Plaintiff’s 2014 conduct. Absent any new allegation of serious misconduct, there were no grounds to convene an FRB in 2017, and Plaintiff’s contributions to the HBS community were for the Appointments Committee, not FRB, to consider. (Compl. Ex. A at 3.)

To the extent that there is a conflict between terms in the P&P or that there could be a reasonable difference of opinion as to whether an FRB could be convened in 2017, the language is ambiguous, and “ambiguous contract language may not be resolved in a motion to dismiss.” *Sonoiki*, 37 F.4th at 711. If there is ambiguity in the P&P, the question at this stage is simply whether Plaintiff has “plausibly alleged” reasonable expectations that were violated. *Id.*

c. The FRB failed to provide timely notice of the allegations at issue.

The P&P requires the Chair of the FRB to draft a “summary of the allegation, as it is known at the time” at the outset of the FRB process. (Compl. Ex. A at 2.) The faculty member is then to “have an opportunity to review the allegation.” (*Id.*) Among the “principles and considerations” guiding the FRB is the requirement that “Allegations should be articulated in writing.” (*Id.* at 3.) In a promotions case, if the FRB Chair and Executive Dean conclude that “serious questions about conduct” require an FRB, the FRB’s review is to “begin[] with drafting an allegation as outlined above.” (*Id.* at 3.) Thus, in *all* FRB matters, HBS must determine the scope of the FRB’s inquiry *before* it commences and *before* the faculty member is given notice.

In 2017, Plaintiff was instructed by his unit head to write to the FRB about his progress since 2015, and did so. (¶ 46.) He then received a letter from the FRB’s chair listing subjects that the FRB would examine, *none* of which contained any allegation of misconduct. The FRB would ultimately examine various claimed concerns about Plaintiff—but gave him notice of none of them at the outset of the process, violating the FRB’s plain, frequently-repeated requirements.

Harvard claims that its three open-ended “concerns”—broad subjects like “evidence of changed behavior”—satisfy the P&P obligation to provide a “summary of the allegation.” This reads all substance out of the word “allegation.”⁵ Harvard’s self-serving interpretation would let the FRB add any subject any time, contrary to the orderly process the P&P lays out and making a nullity of the obligation to provide a summary at the outset.

d. The FRB improperly expanded its scope without required notice.

As discussed above, the P&P requires, without exception, that the process commence with the FRB drafting an allegation and notifying the faculty member under review of that

⁵ Compare the dictionary definition, “a statement saying that someone has done something *wrong or illegal*.” Britannica Dictionary, <https://www.britannica.com/dictionary/allegation> (visited May 3, 2023) (emphasis added).

allegation. Here, Plaintiff was given notice of the FRB's specific concerns only late in the process, after his interview was complete, and in many cases only in the draft report. (¶¶ 51, 63.) This late disclosure was contrary to the P&P's requirements, contrary to Plaintiff's reasonable expectations, and prejudicial to his ability to respond to the concerns ultimately articulated.

The Supreme Judicial Court has held that late disclosure of an allegation or evidence is not a substitute for disclosure at the time when it is contractually required. In *Bulwer*, the hospital's grievance policy required the department chair to provide the plaintiff, a medical resident facing dismissal, with a "written statement of the specific issues" to be discussed at his meeting with the grievance committee—but the statement only generally cited patient safety, and the resident first learned the details of concerns during the meeting. *Bulwer*, 473 Mass. at 691. Like the FRB here, the hospital allowed the resident to submit written rebuttal evidence to address those concerns following the meeting. *Id.* The SJC held that "a reasonable jury could find that this was not equivalent to an opportunity to participate fully in the initial proceedings" and that "the plaintiff's lack of notice and diminished participation in the meetings reduced the effectiveness of his participation in those meetings and, accordingly, affected the outcome of the committee's deliberations." *Id.* The same is true here, where the FRB's vague written statement reduced Plaintiff's effectiveness at his single in-person interview with the FRB. (¶¶ 50-51.)

HBS was free to convene an inquiry into Plaintiff's outside activities if, through the process described in the P&P, serious concerns were raised about those activities. (Compl. Ex. A at 3.) But if such an inquiry were convened, the FRB would be required to begin by drafting a summary of the allegation(s) at issue. (*Id.*) This simply did not happen here.

It is also not the case that, as Harvard asserts, Plaintiff should have anticipated scrutiny of specific aspects of his outside activities because they "were similar to the activities that had been

the focus of the FRB in 2015.” (Def. Memo. 13.) The FRB's 2015 investigation and report did not concern Plaintiff’s work as an attorney, his consulting for Microsoft, or his writings about Google. (¶¶ 33, 36.) Nor is there any real similarity between Plaintiff’s work as a lawyer on a class-action lawsuit seeking to validate consumer rights, for example, and issues that the FRB examined in 2015.

It is particularly problematic for Harvard to argue that Plaintiff should have anticipated such scrutiny because Harvard has rules governing participation in outside activities and disclosure of possible conflicts, and Plaintiff complied with all of those rules. (¶¶ 64-67.)

The P&P required the FRB to give Plaintiff notice of the allegations he faced at the outset of the process, and did not permit the FRB to change its focus mid-stream. Failure to follow these rules violated the P&P and Plaintiff’s reasonable expectations.

e. The FRB did not “investigate” or reach “conclusions.”

The FRB procedure is “a ...structured procedure” for use “to *investigate* the concern and *determine* whether misconduct has occurred.” (Compl. Ex. A at 1, emphasis added.) Harvard points to language stating that in a promotions case, the FRB will undertake a “review” of serious concerns about conduct. (Def. Memo. 13.) But in such a case, the FRB’s “*conclusions* on whether a candidate has upheld the School’s Community Values will be provided to the Appointments Subcommittee or Standing Committee.” (Compl. Ex. A. at 3, emphasis added.) Whether its work is styled a “review” or an “investigation,” the FRB is supposed to accomplish more than simply aggregating complaints about a faculty member’s personality or collating concerns about him; the P&P requires an “investigat[ion]” with “conclusions.” Yet the FRB admitted that its report was “not an investigation” (¶ 6), a quote Harvard fails to acknowledge.

The FRB’s failure to “investigate” and reach conclusions was particularly damaging because of the innuendo it included in its report. In particular, the FRB claimed that it had

“discovered examples of activities and behaviors that cause continued concern,” yet it failed to reach a conclusion about whether Plaintiff’s actions were appropriate. The FRB offered only ambiguity where the P&P required investigation and conclusion. (¶ 101.) As noted above, HBS had detailed policies for both outside activities and conflicts of interest, and Plaintiff’s activities fully complied with both. (¶¶ 64-67.) If the FRB had investigated the concerns as the P&P required, it would have been forced to conclude that Plaintiff had complied with those policies. Instead, its report created the false impression that Plaintiff had engaged in misconduct when he demonstrably had not. Its report violated both the P&P and Plaintiff’s reasonable expectations.

3. Harvard’s conduct violated its duty of good faith and fair dealing.

All contracts in Massachusetts include an implied duty of good faith and fair dealing. *Starr v. Fordham*, 420 Mass. 178, 184 (1995). To show breach of that covenant, Plaintiff need not prove bad faith, only an absence of good faith. *See Rubinstein*, Ex. 1 at 15-16 (citing *Nile v. Nile*, 432 Mass. 390, 398-399 (2000)). Harvard violated that duty here in numerous ways.

Harvard included as FRB members and support staff the very same individuals who had the conflicts with Plaintiff *that the FRB was investigating*. It misrepresented evidence regarding Plaintiff’s airline lawsuit to claim that the suit was subjecting HBS to bad publicity, when the opposite was true. It falsely suggested that he had failed to disclose conflicts of interest, when in fact he had complied with the governing policy. And it took these actions to reach a predetermined outcome. These actions demonstrate a lack of good faith.

In *Barry*, the court concluded that the plaintiff, a professor denied tenure at Emmanuel College, had a reasonable expectation that the tenure review process would be fair, and that this expectation was violated when two professors with whom she had past conflicts participated in her tenure review process. *Barry v. Trs. Of Emmanuel Coll.*, Ex. 2 at *7-8 (denying motion for summary judgment). As the court there held, “considering the detailed and comprehensive

procedure set forth in the Faculty Handbook, a fact-finder may conclude that it was reasonable for Prof. Barry to expect that the individuals formally participating in the review of her tenure application would be unbiased. . . . And a reasonable jury could thus find that allowing [conflicted individuals] to be involved in the formal portions of Prof. Barry’s tenure review process was a violation of her reasonable expectation that she would receive a fair process.” *Id.* at *7. Harvard attempts to distinguish *Barry*, writing that, “the FRB Policy does not preclude the participation of staff members on the FRB that allegedly or actually have a personal conflict with the individual being reviewed.” (Def. Memo. 14-15.) But the same was true of the policy at issue in *Barry*, where the court nonetheless found that the plaintiff reasonably expected a fair process and that a fair process would not have permitted individuals with serious conflicts to participate.

Harvard relies here on *Berkowitz*, which held that academic adversaries need not be excluded from the tenure process. *See Berkowitz*, 358 Mass. App. Ct. at 273. But this case is not about *academic* adversaries or *academic* conflicts. Plaintiff had disagreements with *non-academic* administrative staff who disliked him because he challenged their preferences about how to run HBS, yet HBS put those same administrative staff in charge of running the investigation into those same subjects.⁶ “[C]ontracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars.” *McConnell v. Howard University*, 818 F.2d 58, 66 (D.C. Cir. 1987) (internal citations omitted). Just as in *Barry*, no reasonable faculty member would think that the conflict that occurred here was permissible. *See Barry*, Ex. 2 at *7-8.

⁶ Notably, HBS recognizes the possibility of a conflict of interest impeding a fair tenure review; its tenure policy permits candidates to inform the subcommittee evaluating them of any senior faculty members that they believe could not impartially evaluate their work. Tenure Policy (MTD Memo Ex. 1) ¶ 28.

The FRB’s misrepresentations indicate the overall lack of good faith in Harvard’s approach to the FRB process. Harvard tellingly does not address the Complaint’s allegation that the FRB misrepresented evidence in its report by falsely claiming that Plaintiff’s airline lawsuit was subjecting the school to negative publicity. (¶ 111.) Nor does it address the FRB’s failure to include, in its report, the fact that Plaintiff’s disclosures of his outside activities complied with the applicable HBS policy. (¶ 112.) When a fact-finder ignores multiple clear-cut errors timely brought to its attention, it reveals both its preordained conclusion and its lack of good faith.

Harvard also argues, without citation, that courts “have not expanded the principle of ‘basic fairness’ to any faculty contract.” (Def. Memo. 15.) But *Barry* found that the plaintiff had a reasonable expectation of fairness in her tenure evaluation, despite no explicit language to that effect in the contract itself. *See Barry*, Ex. 2 at *7; *Charest v. Pres. & Fellows of Harv. Coll.*, No. 13-11556, 2016 WL 614368, *16 (D. Mass. Feb. 16, 2016) (attached as Exhibit 3) (holding that plaintiff stated claim for violation of contract without contractual language guaranteeing specific procedural formalities: “[t]his lack of definition . . . does not mean that Harvard is unfettered in structuring its . . . process. . . . Harvard must provide [a] process sufficiently robust to be worthy of that term.”). *Barry* and *Charest* teach that basic fairness *is* required.

Finally, Harvard’s violations of specific contractual guarantees—particularly those requiring notice of the allegation, access to the evidence, and a meaningful opportunity to respond—deprived him of basic fairness in the FRB process and violated Harvard’s duty of good faith and fair dealing. *See Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 88 (1st Cir. 2018) (denying summary judgment on basic fairness claim where the plaintiff stated a breach of contract claim arising from disciplinary proceedings). The Court should deny the motion to dismiss this count.

4. Plaintiff stated a promissory estoppel claim.

“Circumstances that may give rise to an estoppel are (1) a representation intended to induce reliance on the part of a person to whom the representation is made; (2) an act or omission by that person in reasonable reliance on the representation; and (3) detriment as a consequence of the act or omission.” *Sullivan v. Chief Justice*, 448 Mass. 15, 27-28 (2006). Plaintiff extended his employment at HBS, and took a number of specific steps (¶ 40), in response to assurances that he was likely to receive tenure if he did so.

Harvard argues that Plaintiff has failed to establish the first element of a promissory estoppel claim, but in fact HBS promised him at the very minimum that it would give his tenure case meaningful consideration if he took the steps that it asked, and that any FRB process regarding his promotion case would comply with the P&P. (See ¶¶ 118-119.) As he stated explicitly in his Complaint, Plaintiff does not ask this Court to award him tenure; rather, he seeks the fair process that Harvard promised him. (¶ 8.) In reliance on that promise, he spent years doing everything he was asked and forewent other lucrative options. (¶¶ 120-121). Harvard is also liable to him under the explicit terms of his contract. *See supra* § 2. Alternatively, or should this Court conclude that the P&P was not a term of his contract, Harvard is liable to him as a result of his detrimental reliance on its promises. *See, e.g., Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 346 (D. Mass. 2011) (noting that where “the promisor opportunistically has strung along the promisee,” the imposition of liability produces the most equitable result).

CONCLUSION

For the foregoing reasons, Defendant’s Motion to Dismiss should be denied.

Respectfully submitted,
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Dated: May 11, 2023

CERTIFICATE OF SERVICE

I, Ruth O'Meara-Costello, hereby certify that I have caused a true and correct copy of the foregoing document to be served on counsel of record for Defendant by email on May 11, 2023.



Ruth O'Meara-Costello

Exhibit 1

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2020-00609

SHMUEL RUBINSTEIN

vs.PRESIDENT AND FELLOWS OF HARVARD COLLEGE & others¹**MEMORANDUM OF DECISION AND ORDER
ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This case arises from the denial of plaintiff Shmuel Rubinstein's application for tenure with defendant Harvard University. Rubinstein, a former associate professor at Harvard's School of Engineering and Applied Sciences ("SEAS"), commenced this action against Harvard, his employer, Frank Doyle, the Dean of SEAS, and Krzysztof Gajos, a tenured professor in the Computer Science area of SEAS (collectively, the "defendants"), asserting claims for: (1) breach of contract against Harvard (Counts I and II); (2) breach of the covenant of good faith and fair dealing against Harvard (Count III); (3) estoppel against Harvard and Doyle (Count IV); (4) defamation against Harvard and Gajos (Count V); (5) intentional interference with advantageous business relations against Harvard and Gajos (Count VI); and (6) negligent supervision and training against Harvard and Doyle (Count VII). The case is before the court on the defendants' motion for summary judgment. For the reasons that follow, the motion is **ALLOWED** in part and **DENIED** in part.

¹ Frank Doyle and Krzysztof Gajos

BACKGROUND

The following undisputed facts are taken from the Plaintiff's Response to Defendant's Statement of Material Facts (Paper No. 18.4). The court reserves certain facts for discussion below.

Harvard University comprises several schools, including the Faculty of Arts and Sciences ("FAS"). FAS includes, among other academic units, SEAS. Shmuel Rubinstein was an associate professor in the Applied Physics area of SEAS. The criteria for tenure and the process through which tenure candidates in FAS are evaluated are set forth in the FAS Appointment and Promotion Handbook (the "Handbook"). While the Handbook refers to a tenure candidate's "department," SEAS has no departments and is organized by "areas."

Rubinstein first worked at SEAS from 2009-2011 as a postdoctoral researcher. He then worked for two years at the Weizmann Institute of Science in Israel ("Weizmann"), before returning to SEAS as an assistant professor in 2013. Rubinstein was promoted to associate professor in May 2017, with his tenure review scheduled to occur in the academic year 2019-2020. Rubinstein applied for tenure in the 2018-2019 academic year, one year early, at the same time that Weizmann was recruiting him to return. He was encouraged to apply early by his area chair, Professor Eric Mazur, Dean Doyle, and others.

When Rubinstein decided to apply early for tenure, he was aware that conflicts with two graduate students in his lab—referred to in the Complaint as Grad Student #1 and Grad Student #2—had caused them to leave and join the labs of faculty members in the Computer Science area of SEAS. Grad Student #1 alleged that Rubinstein created an abusive environment and threatened his career after Grad Student #1 expressed a desire to leave Rubinstein's lab and work with a different advisor. Grad Student #1 also felt that Rubinstein, in a letter to an editor of a

scientific journal, falsely misrepresented the student's efforts and contributions in connection with research he and Rubinstein hoped to publish in the journal. Grad Student #1 left Rubinstein's lab around March 2017, and in late February 2018 made a formal complaint against Rubinstein to the FAS Committee on Professional Conduct in relation to the journal letter. The Committee dismissed the complaint because it was outside the Committee's jurisdiction. Dean Doyle initiated an investigation with SEAS, which found no impropriety in Rubinstein's letter to the journal.

Grad Student #2 alleged that she felt Rubinstein did not support her research project, demeaned her work, made her feel isolated, told her not to talk to other professors, and made inappropriate comments to her. Grad Student #2 left Rubinstein's lab in May 2017. Like Grad Student #1, one of Grad Student #2's new advisors was in the Computer Science area of SEAS. In addition, a post doctorate researcher—referred to in the Complaint as Post Doc #1—also had left Rubinstein's lab, in January 2017. Post Doc #1 later reported that he had a disagreement with Rubinstein over the authorship of a paper, and when he challenged Rubinstein's position on authorship, Rubinstein yelled at him, demeaned him, and called him a derogatory name.

In March 2018, when Rubinstein met with Dean Doyle to discuss the possibility of early tenure review, Rubinstein expressed concern about the journal issue involving Grad Student #1 and how it could affect his tenure case. He also expressed concern about the involvement of Computer Science faculty in the tenure process, because they had accused him of treating his advisees poorly. According to Rubinstein, Dean Doyle told him that he did nothing wrong in relation to the journal issue, which would not affect his tenure case, and that the Computer Science faculty would not get to vote on his case because they were not in his cluster.

On May 14, 2018, Dean Doyle sent Rubinstein a letter confirming that the FAS Dean had approved early tenure review and listing the materials Rubinstein needed to provide in support of his application, including a “teaching statement.” Rubinstein subsequently met with the SEAS Assistant Dean for Faculty Affairs, Diane Schneeberger, to review the tenure process. Rubinstein submitted materials in support of his candidacy, which included a teaching statement; the teaching statement did not address his philosophy and practices related to student advising and did not address any of the issues with the advisees who had left his lab.

Harvard appointed a review committee of tenured faculty in SEAS to review Rubinstein’s case. Professor Michael Brenner chaired the committee. The committee obtained letters from several reviewers outside Harvard, all of whom strongly recommended tenure. The Area Director for Rubinstein’s area of Applied Physics, Jill Larson, sent emails to Rubinstein’s present and former advisees soliciting their feedback. The committee received letters from sixteen advisees. Most of the advisee letters were positive, but letters from Grad Students #1 and #2 and Post Doc #1 were strongly negative.²

In March 2019, Professor Brenner, as chair of Rubinstein’s review committee, prepared a draft case statement, which included a summary of the advisees’ feedback, both positive and negative.³ The committee noted the seriousness of the negative advisee feedback, but

² Separate from the tenure process, these three advisees had reached out to Seth Avakian, the Program Officer for Title IX and Professional Conduct in FAS, to disclose their experiences with Rubinstein. Ultimately, Avakian formed the opinion that Rubinstein’s advising issues were not driven by malice or abusiveness, but stemmed from different mentoring or cultural expectations and communication styles, and that Rubinstein would benefit from education and training. Avakian prepared a memo for Nina Zipser, the FAS Dean for Faculty Affairs & Planning, which included his opinion.

³ As discussed more fully below, Professor Brenner, at the direction of Dean Zipser, later revised and re-submitted the case statement.

recommended that the case advance to the next stage of the review process. The senior faculty in Rubinstein's cluster met and agreed with the committee's recommendation. Rubinstein's case next was discussed by the SEAS Steering Committee, which comprises all the SEAS area chairs, Dean Doyle, and other senior leaders in SEAS. Ultimately, Dean Doyle advanced the case to the FAS Committee on Appointments and Promotions (the "CAP"). The CAP comprises the then-FAS Dean, Claudine Gay, the FAS Dean for Faculty Affairs & Planning, Nina Zipser, the deans of all the academic units that make up the FAS, and one appointed tenured faculty member from each of those units. The CAP provides its advisory views to Dean Gay, who chairs the CAP.⁴ Dean Gay decides whether to forward the case to the President.

When the case goes to the CAP, all senior faculty in SEAS are invited to write letters which are formally addressed to Dean Gay, but which are reviewed by the entire CAP. Among the letters in Rubinstein's case was one from Professor Gajos, who argued against tenure.⁵ Gajos wrote that disturbing patterns in Rubinstein's behavior emerged from the stories that three of Rubinstein's advisees had shared with him (although not named in his letter, they were Grad Students #1 and #2 and Post Doc #1).

Once Rubinstein's case went before the CAP, it was discussed in two meetings. Dean Gay testified that she found it striking and unusual that Rubinstein did not include any reflections on mentoring and advising in his teaching statement; she wondered how Rubinstein saw his role as a mentor and advisor and what he had learned from his experiences. Dean Gay observed at the end of the first meeting that the CAP felt the case should not move forward, but she reserved her decision until after a second meeting. After a second meeting, the outcome remained the same.

⁴ The CAP does not vote; Dean Gay listens to the CAP's discussion to get the sense of the Committee.

⁵ In addition to his professorship, Gajos co-chaired a committee on Diversity, Inclusion and Belonging at SEAS.

Ultimately, Dean Gay decided not to advance Rubinstein's case to the President. Her decision was based on her concern that Rubinstein was not an effective advisor and mentor, as she would expect of a faculty member who is to receive a lifetime appointment. Rubinstein appealed the tenure denial under the Handbook's grievance procedures, claiming that proper procedures had not been followed. Ultimately, the Docket Committee, the designated review committee, decided that proper procedures were followed in Rubinstein's case and that no further review was warranted.

Around the time Rubinstein was being considered for tenure at Harvard, he was also being considered for a tenured position at Weizmann. In February 2019, Grad Student #1 asked Gajos if he would speak to a faculty member at Weizmann regarding Rubinstein and his candidacy there, and Gajos agreed. A professor at Weizmann then reached out to Gajos by email. The professor explained that he already had a "complete picture of the story" involving Rubinstein's conduct at Harvard, but wanted to be able to mention the names of people at Harvard who were willing to talk to others at Weizmann if they decided to look into what happened at Harvard. Gajos said the professor could use his name and that he had received three firsthand accounts of individuals who had been in Rubinstein's lab and other corroborating information. Gajos offered to "share a properly anonymized synthesis of these stories" with the professor's colleagues at Weizmann.

In May 2019, the head of the appointment and promotion committee that was considering Rubinstein for a position at Weizmann, Professor Ofer Aharony, emailed Gajos and asked to speak to him about Rubinstein. By this time, the Weizmann committee already had learned from other sources that Harvard had denied Rubinstein's tenure. Aharony promised Gajos that the conversation would be confidential. Gajos agreed to speak by Skype with Aharony and a second

member of the committee, Professor Elisha Moses. Gajos answered some preliminary questions and provided the committee with information, including the accounts of Rubinstein's three former advisees. After the call with Gajos, Aharony and Moses had differing recollections about certain aspects of the call, but they eventually agreed on a written summary of it.

STANDARD OF REVIEW

Summary judgment shall be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting affirmative evidence negating an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. See *Flesner v. Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson*, 404 Mass. at 17.

DISCUSSION

I. Breach of Contract Against Harvard (Counts I & II)

Rubinstein asserts in Counts I and II of his Complaint that Harvard breached its contract (i.e., the Faculty Handbook⁶) with him by failing to follow its own procedures in considering his tenure case and in addressing the grievance he filed after tenure was denied. Harvard argues that

⁶ For purposes of summary judgment, Harvard does not dispute that the Faculty Handbook forms a contract with its faculty. Harvard does dispute, however, that it breached that contract.

these claims fail because the undisputed facts demonstrate that Harvard did not violate any of its procedures. Those procedures, it reasons, afford Harvard broad discretion in deciding whether a faculty member is deserving of tenure, and it is well-settled that this subjective, academic judgment is not one for Massachusetts courts to second-guess.

In interpreting the Handbook, the court is guided by two principles. First, the court “employ[s] the ‘standard of reasonable expectation—what meaning the party making the manifestation, the university, should reasonably expect the other party to give it.’” *Berkowitz v. President & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269 (2003), quoting *Schaer v. Brandeis Univ.*, 432 Mass. 474, 478 (2000). At the same time, the court must “adhere to the principle that courts are chary about interfering with academic . . . decisions made by private colleges and universities.” *Schaer*, 432 Mass. at 482. Thus, “in 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” (citations omitted). *Berkowitz*, 58 Mass. App. Ct. at 269-270. This court must therefore examine the summary judgment record to determine whether Rubinstein has asserted facts, which, if true, create a genuine issue of material fact that Harvard breached this contract, i.e., that Harvard failed to meet those expectations which it should reasonably expect professors such as Rubinstein to have under the Handbook.

Rubinstein identifies four main ways Harvard allegedly breached its contract with him by failing to follow the process delineated in the Handbook, each of which the court addresses in turn.⁷

⁷ In his Opposition Memorandum, Rubinstein identifies a fifth way Harvard allegedly breached its contract with him, namely, by tainting the record by considering the views of a “Steering Committee” with no official role in the tenure process. However, this issue has been waived where Rubinstein was aware before filing his internal grievance

i. Count I (Tenure Denial)

Three of the four ways Rubinstein claims Harvard breached its contract with him relate to tenure denial. First, Rubinstein avers that the CAP denied him tenure based in part on his failure to submit a mentorship statement that was never requested nor required under Harvard's tenure policies. Harvard contends that the plain language of the Handbook defeats this claim. In particular, Harvard points out that the Handbook provides, under section "Description: Tenured Professor," that "teaching and advising effectiveness in a variety of settings with both undergraduate and graduate students" is among the "foremost criteria" for tenure. Exhibit 4 at H008708. Harvard further calls attention to Step 2 of section "Steps: Internal Promotion to Tenured Professor from a Tenure-Track Position," which provides that a tenure candidate's materials are to include "[t]eaching and advising materials" as well as a "teaching statement that describes the candidate's philosophy and practices related to both undergraduate and graduate teaching and advising."⁸ *Id.* at H008711. Based on this language, Harvard argues, Rubinstein reasonably should have expected to address his mentoring.

Rubinstein counters that a professor would reasonably expect that his teaching statement would focus on teaching and not mentorship. He points out, *inter alia*, that Step 2 asks only for a "research statement" and a "teaching statement," and never mentions the words "mentor" or "mentorship." He further indicates that Harvard's faculty have interpreted the policy consistent

of tenure denial that the Steering Committee had reviewed his case, but he failed to raise this issue in his grievance. See *Berkowitz*, 58 Mass. App. Ct. at 275; Exhibits 32, 33.

⁸ Harvard also highlights other "Steps" under the same, noting that "[t]he process (at Step 4) specifically includes solicitation of feedback from the candidate's advisees, a summary of which (at Step 10) is included in the case statement prepared by the review committee chair." Defendant's Memorandum at p. 14. In further support of its position, Harvard notes that Rubinstein's area chair had advised him in writing that his "success in building and acting as a mentor for a group of top-rate graduate students" would be reviewed in considering him for tenure. *Id.*

with his understanding, where in 2020 Dean Gay commissioned a “comprehensive review of the FAS tenure-track system” and the review committee concluded that “advising” as used in the Handbook did not clearly encompass “mentoring.” Plaintiff’s Memorandum at p. 22, citing Exhibit 126. The report recommended (the year after Rubinstein’s tenure denial) “adding a mentoring statement” to the required materials for tenure review. Where Rubinstein has set forth specific facts supporting his position, a genuine issue of material fact exists as to whether he should have reasonably expected that he needed to include a mentoring statement in his tenure application materials. See *Pederson*, 404 Mass. at 17.

Second, Rubinstein alleges that Harvard breached its contract with him by substituting a designated faculty decisionmaker (Professor Mazur, the Area Chair of SEAS) with an administrator (Jill Larson, the Area Director for Rubinstein’s area of applied physics). More specifically, he takes issue with the fact that Larson sent emails to Rubinstein’s advisees soliciting their feedback, when a professor would reasonably expect that his area chair solicits student feedback. Harvard argues that “Rubinstein could not reasonably expect that the area chair had to personally perform this administrative task, nor is there any evidence that the advisees’ feedback would have differed if it had been solicited personally by, rather than on behalf of, the chair.” Defendants’ Memorandum at p. 14.

Step 4 of the tenure promotion policy provides that: “To gather feedback on advising/mentoring, . . . the department chair either speaks with or writes to the candidate’s students (and, as, relevant, postdoctoral fellows).” Exhibit 4 at H0008712. Pursuant to this policy language, and in response to Harvard’s argument, Rubinstein asserts that Harvard specifically designated the department chair (i.e., the area chair) as the decisionmaker on how to solicit student feedback, and “cannot substitute someone else midstream.” Plaintiff’s Memorandum at

p. 23, citing *Barry v. Trustees of Emmanuel Coll.*, 2019 WL 499774 at *7 (D. Mass. Feb. 8, 2019) (denying summary judgment because college could not “unilaterally modify” the decisionmaker; the handbook specified “Vice President” to serve on tenure panel and college allowed former dean to fill in when vice presidency was vacant). Rubinstein further asserts that even if Harvard had a reasonable interpretation of “department chair” that excluded Professor Mazur, that would only give rise to ambiguity. He avers that Harvard’s recent policy changes demonstrate the prior ambiguities, where today the policy states that “the department chair (or their designee)” may solicit feedback, and, as Dean Zipser testified, the Handbook only changes to ensure that what was ambiguous becomes “clear.” Exhibit 53, Zipser Dep. at 30:4-22. In light of the facts presented by Rubinstein and supported by the record, a jury could find that Harvard’s policy created the reasonable expectation that a “department chair” would be the decisionmaker in soliciting feedback or, at the very least, the policy was ambiguous in this respect and it is for the jury to resolve that ambiguity.

Third, Rubinstein alleges that Harvard breached its contract with him by usurping the departmental committee’s role in evaluating and summarizing student feedback. After Professor Brenner, chair of the SEAS review committee, submitted the case statement, Dean Schneeberger, the SEAS Assistant Dean for Faculty Affairs, discussed it with Dean Zipser, the FAS Dean for Faculty Affairs & Planning, who oversees the review of tenure cases that reach the CAP. Dean Zipser advised Dean Schneeberger that the case statement should include more detail. More specifically, Dean Zipser insisted that Professor Brenner “revise [the case statement]” to include specifics from the negative feedback letters” because the statement was “too filtered.” Exhibit 128. In compliance with this direction, Professor Brenner prepared and submitted a revised case

statement that included lengthy quotations from students. Rubinstein's case then went before the CAP.

Harvard argues that while the Handbook says the case statement will include a "summary" of the feedback from advisees, nothing in the Handbook prevents the summary from including direct quotations from the student letters, nor could Rubinstein reasonably have expected such a prohibition to exist where "the entire point of the exercise is for those reviewing the tenure case to be able to review and assess feedback from a candidate's advisees, which of course might be best conveyed in an advisee's own words" Defendant's Memorandum at p. 15. Harvard further argues that it was not improper for the case statement to be revised after the favorable vote at SEAS and before submission of the case to the CAP, where it is common practice for Dean Zipser to call for revisions to case statements and "[t]his is exactly the type of discretion that university administrators must be able to exercise in making important academic decisions such as the award of tenure." *Id.* Rubinstein counters that a professor would reasonably expect that the CAP would see only a summary of student feedback, that the departmental committee chair would determine the content of that summary after the review committee provides input on the strengths and weaknesses of a case, and that the only revisions to the case statement would come at the CAP's recommendation.

As Rubinstein recounts, Step 10 of the tenure promotion policy provides that after a positive vote from the whole department, one specified person, "the chair of the review committee" (here, Professor Brenner), "prepare[s]" and "finalize[s]" the case statement. Exhibit 4 at H0008715. The chair is to include only a "summary of advisee feedback solicited by the department chair." *Id.* at H0008716. The policy specifies one means for revising that finalized case statement: "Step 12 instructs that after reviewing the entire dossier, the CAP may

recommend that it “needs further information or the department needs to modify the case statement.” *Id.* at H0008717. Here, Dean Zipser called for such a modification before the case reached the CAP, which is, as Rubinstein asserts, technically not pursuant to the policy as written. Rubinstein avers that Dean Zipser’s own alleged practices do not trump the specific contractual language that designates the department chair as final arbiter of the case statement and specifies revisions must be requested through the CAP, adding that Dean Zipser, when deposed, could not recall requesting revisions to student feedback in a case statement before. See Exhibit 53 at 176:16-177:19. He urges that Harvard provides no reasonable interpretation of the policy that allows Dean Zipser to intervene in this fashion and amend the process midstream. See *Barry*, 2019 WL 499774 at *7 (“Nor has Defendant pointed to any provision of the Faculty Handbook that puts faculty members on notice that the President may make modifications to the tenure process”).

In light of the facts presented by the parties and the rationale employed by the *Barry* Court in closely analogous circumstances, see 2019 WL 499774 at *7, I find that a genuine issue remains as to whether Harvard violated policy when more than a summary of student feedback reached the CAP.

ii. Count II (Grievance Denial)

Fourth and finally, in a separate count, Rubinstein alleges that Harvard breached its contract with him when the Docket Committee violated the Grievance Procedures. He claims that a reasonable professor would believe that the Docket Committee would deliberate and only conduct a “preliminary screening” of his grievance, and that here a jury could infer that the Committee relied improperly on a member’s personal experience and did not consider all of

Rubinstein's claims. Harvard contends that this claim fails because Rubinstein would have the court read into the Handbook new provisions beyond what it contains.

The Grievance Procedures state, in relevant part: "The Dean will . . . submit [the written grievance] to the elected members of the Docket Committee of the Faculty for preliminary screening. This group is empowered to dismiss the complaint if it is found to be without merit." Exhibit 4 at H008705. The scope of the inquiry contemplated in the preliminary screening is not defined or in any way limited in the Handbook; indeed, there is no restriction on what the Committee may consider or how it must proceed in conducting that screening. Here, the Docket Committee reviewed Rubinstein's grievance and prepared questions about the tenure review process. Dean Zipser responded to some of these questions and sent the Committee a memorandum she drafted, the nature of which the parties dispute. Ultimately, the Committee decided that proper procedures were followed in Rubinstein's case and that no further review was warranted.

Based on the foregoing, the court finds that Rubinstein has not presented evidence at this summary judgment stage to suggest that the Docket Committee violated the Handbook. The Handbook did not limit or prescribe the scope of the Docket Committee's screening, and the court will not read such restrictions into the Handbook that limit the university's discretion in addressing a tenure appeal. See *Berkowitz*, 58 Mass. App. Ct. at 274 ("In the absence of handbook language expressly limiting the docket committee's powers of inquiry, we are reluctant to read in restrictions that limit the university's discretion").

In sum, because, for the reasons discussed above under Count I, Rubenstein may be able to prove that Harvard violated its contract with him by failing to adhere to certain procedures set forth therein, the court finds genuine issues of material fact preclude summary judgment;

accordingly, the motion for summary judgment on Count I is **DENIED**. As to Count II, summary judgment in favor of Harvard is **ALLOWED** for the reasons given.

iii. Contractual Remedies

Whether Harvard breached its contract with Rubinstein in the above-identified instances pertaining to tenure denial is a matter for the jury to decide. I am concerned, nonetheless, why the case should go through trial because it is not for the court to decide tenure. See *Schaer*, 432 Mass. at 482 (the court must “adhere to the principle that courts are chary about interfering with academic . . . decisions made by private colleges and universities”); *Berkowitz*, 58 Mass. App. Ct. at 269-270 (“[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). I am also cognizant, however, that the cases limiting the role of courts in tenure decisions do not eliminate remanding the case to the institution with an order to conduct its tenure consideration in accordance with its established policies and procedures. Given Rubinstein’s position, if Rubenstein were to prevail at trial, that course of action could be appropriate here.

II. Breach of the Implied Covenant of Good Faith and Fair Dealing Against Harvard (Count III)

For the same general reasons discussed with regard to Count I, Rubinstein may be able to prove that Harvard breached the implied covenant of good faith and fair dealing that arose out of his employment contract. Indeed, there are disputed issues of material fact concerning whether Harvard acted with the required lack of good faith, so as to deprive Rubinstein of the benefit of their bargain. See *Nile v. Nile*, 432 Mass. 390, 398-399 (2000) (explaining that plaintiff need not prove bad faith, only lack of good faith, to show breach of the implied covenant); *MacGillivray v. W. Dana Bartlett Ins. Agency of Lexington, Inc.*, 14 Mass. App. Ct. 52, 57 (1982) (noting that

defendant's actions need not be "willful, intentional, or deliberate" to prove breach of the implied covenant). Harvard's motion for summary judgment on Count III is therefore likewise **DENIED**.

III. Estoppel Against Harvard and Doyle (Count IV)

Rubinstein further asserts a claim of estoppel against Harvard and Dean Doyle, claiming that Doyle, the Dean of SEAS, assured him that the advisees' complaints would not affect his tenure application and that Doyle would instruct certain SEAS faculty to "cease their campaign against him." Rubinstein claims he relied on these alleged assurances in applying for tenure one year earlier than usual, which resulted in his application being denied. In support of summary judgment, the defendants contend, inter alia, that this claim fails as a matter of law because a claim for estoppel cannot survive where a written contract (here, relevant provisions of the Handbook) governs the parties' relationship. See *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 612-613 (D. Mass. 2016) (holding that contractual provisions of a university handbook precluded a claim for promissory estoppel); *Malden Police Patrolman's Ass'n v. Malden*, 92 Mass. App. Ct. 53, 60 (2017) (holding that promissory estoppel claim was properly dismissed where written contract governed parties' relationship). I agree.

The Handbook governs the terms of the parties' relationship relative to Rubinstein's tenure review. Although Rubinstein, in responding to the defendants' motion for summary judgment, argues that because he sued Doyle individually for estoppel it does not matter that Harvard had a written contract governing the tenure process, there is no evidence to suggest that Doyle was acting in an individual capacity when he met with Rubinstein to discuss the tenure process. In fact, Rubinstein's complaint specifically alleges that Doyle was "acting on behalf of

Harvard in his capacity as Dean of SEAS.” Complaint at par. 188. Accordingly, the defendants’ motion for summary judgment is **ALLOWED** as to Count IV.⁹

IV. Defamation Against Harvard and Gajos (Count V)

Rubinstein alleges that Gajos, purporting to act within the scope of his employment at Harvard, published false and defamatory statements about him when Gajos spoke with members of the Weizmann hiring committee and falsely informed them that Rubinstein subjected his students to “5 main patterns of abuse,” including verbal abuse, threats, lies, professional abuse, and social isolation. The defendants argue that Rubinstein’s defamation claim fails because Gajos’s communication with Weizmann was conditionally privileged as an “employment reference,” and the undisputed facts demonstrate that Gajos did not abuse the privilege. In response, Rubinstein contends that the defendants’ assertion of conditional privilege is baseless where Gajos—who never met Rubinstein, was in a different field, and had no direct knowledge of Rubinstein’s lab or interactions with students—had no basis to give an “employment reference.” He further contends that Harvard policies strictly bar faculty from providing tenure or student information to third parties, and that faculty witnesses dispute that such a reference would ever be proper. Even if Gajos’ communications were privileged, he maintains, a jury could infer that Gajos abused that privilege because he acted recklessly, excessively, and maliciously when he engaged in a campaign to spread false rumors to destroy Rubinstein’s career.

⁹ Rubinstein additionally brings a claim against Harvard and Doyle for negligent supervision and training (Count VII), however does not meaningfully contest the defendants’ arguments that his claim is barred by the Workers Compensation Act and the economic loss doctrine, which appear to have merit. As such, summary judgment as to Count VII is also **ALLOWED**.

A conditional privilege to publish defamatory material exists where the publisher and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further it. See *Foley v. Polaroid Corp.*, 400 Mass. 82, 95 (1987). “On summary judgment in a defamation action, the burden is on the defendant as the moving party to demonstrate that there is no dispute of material fact as to the existence of a conditional privilege.” *Lawless v. Estrella*, 99 Mass. App. Ct. 16, 22 (2020). Once a defendant has established the existence of a conditional privilege to publish or write the defamatory statement, the plaintiff has the burden of showing that the defendant abused that privilege. *Id.* at 94.

Here, both the alleged existence of a conditional privilege and the alleged abuse of it turn on disputed facts. As to the former, one such disputed fact is whether Gajos volunteered to speak to the hiring committee or whether he made the defamatory statements in response to a request. Similarly in dispute is whether Gajos had the approval of Harvard administrators in making these statements to Weizmann, with Rubinstein pointing to Dean Gay’s testimony that “Gajos’s actions, if true, are a problem,” and the defendants pointing to Dean Zipser’s testimony that she understood Gajos’s discussion with Weizmann to be an employment reference within his authority as a faculty member. Ultimately, the defendants may be able to prove that Gajos was acting in furtherance of a common interest with Weizmann—that is, to ensure that professors who receive lifetime, tenured appointments will appropriately supervise and mentor their advisees. Whether Gajos was actually acting in the common interest is a factual question for the jury to decide.

So too is the question of whether the privilege, if found to exist, has been lost or abused. The conditional privilege may be lost or abused if (1) there is unnecessary, unreasonable or excessive publication, and the defendant recklessly published the defamatory statements; (2) the

defendant published the defamatory statements with knowledge of their falsity or with reckless disregard of the truth; or (3) the defendant acted with actual malice. *Barrows v. Wareham Fire Dist.*, 82 Mass. App. Ct. 623, 631 (2012). “Malice, in this sense, occurs when the defamatory words, although spoken on a privileged occasion, were not spoken pursuant to the right and duty which created the privilege but were spoken out of some base ulterior motive, which may include the intent to injure another, intent to use the privilege as a pretense, or reckless disregard of the rights of another” (quotations and citations omitted). *Lawless*, 99 Mass. App. Ct. at 25.

Here, there is both a “privileged” and an “unprivileged” explanation for Gajos’s conduct. The privileged explanation is that he was trying to ensure universities do not hire professors that treat their students poorly. The unprivileged explanation is that he was not acting out of concern for the university hiring the right people but rather to advocate on behalf of one student and punish Rubinstein for his alleged mistreatment of students. Considering the facts in a light most favorable to Rubinstein, a triable issue of fact remains as to whether Gajos abused his conditional privilege by acting out of malice and/or publishing the defamatory statements with reckless disregard of their truth. As Rubinstein points out, it could be inferred from the fact that Gajos did not personally know Rubinstein, work with him, or have any knowledge of his research or lab that Gajos’s motivation was not primarily to further a common and legitimate interest, but rather to advance some ulterior agenda. See Exhibit 44 at pp. 55-56, 58-60. Moreover, the fact that Gajos did not investigate the underlying complaints before sharing them with Weizmann offers further support for the “unprivileged” explanation. Indeed, per Gajos’s own testimony, he never read the relevant journal articles, reviewed the experimental data at issue, or talked to key

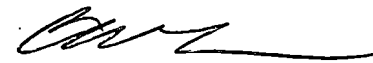
percipient or secondary witnesses to the alleged interactions.¹⁰ Exhibit 44 at pp. 55-56, 58-60, 92, 108-110; Exhibit 45 at p. 69-70.

Accordingly, the conditional privilege is a live issue for the jury and will remain a defense through trial. Summary judgment as to Count V is therefore **DENIED**.¹¹

CONCLUSION AND ORDER

For the foregoing reasons, the defendants' motion for summary judgment is **ALLOWED** as to Counts II, IV, and VII, otherwise it is **DENIED**.

Date: February 1, 2023



Christopher K. Barry-Smith
Associate Justice, Superior Court

¹⁰ Gajos testified that he never personally spoke with Grad Student #2 to verify the truthfulness of her statements. Exhibit 45 at p. 77.

¹¹ The same analysis applies to both the defamation and the intentional interference with contractual relations claims against Harvard and Gajos (Counts V and VI, respectively), both of which rest on Gajos's statements about Rubinstein to the Weizmann hiring committee. As such, summary judgment on Count VI is likewise **DENIED**.

Exhibit 2

2019 WL 499774
United States District Court, D. Massachusetts.

Jacqueline Alfonso BARRY, Plaintiff,
v.
The TRUSTEES OF EMMANUEL
COLLEGE, Defendant.

Civil Action No. 16-cv-12473-IT

Signed 02/08/2019

Attorneys and Law Firms

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Gregory A. Manousos, Morgan, Brown & Joy, LLP, Boston, MA, for Defendant.

MEMORANDUM & ORDER

Indira Talwani, United States District Judge

I. Introduction

*1 Plaintiff Jacqueline Alfonso Barry brought the instant action alleging that Defendant The Trustees of Emmanuel College discriminated against her because of her sex and her pregnancy, in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000-e2(a), and the Pregnancy Act of 1978 (Count 1); and because of her race and national origin discrimination, in violation of Title VII, 42 U.S.C. § 2000e et seq, and Mass. Gen. Laws. ch. 151B (Count 2). Second Am. Compl. ¶¶ 58–94 [#33]. Plaintiff further alleges that Defendant breached the terms of the contract that Defendant had with its faculty during its review of Plaintiff’s application for promotion and tenure (Count 3). *Id.* at ¶¶ 95–104. Before the court is Defendant’s Motion for Summary Judgment [#41]. For the following reasons, Defendant’s motion is ALLOWED

in part and DENIED in part.

II. Factual Background

At summary judgment, the court views the record in the light most favorable to the non-moving party and draws all reasonable inferences in her favor. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990). However, the court does not accept “conclusory allegations, improbable inferences, and unsupported speculation.” Sullivan v. City of Springfield, 561 F.3d 7, 14 (1st Cir. 2009).

A. *The Parties*

Emmanuel College is a Catholic, liberal arts college in Boston, Massachusetts. Def.’s Statement of Material Facts (“Def.’s SOF”) ¶ 1 [#43]. Defendant The Board of Trustees of Emmanuel College is the college’s governing body. *Id.* ¶ 3. The Board of Trustees delegates day-to-day administration of college affairs to the President of the college and her administrators. *Id.* Sister Jane Eisner has served as Emmanuel College’s President since 1979. *Id.* ¶ 5. In 2008, Emmanuel College hired Jacqueline Alfonso Barry as an Assistant Professor of Psychology. Pl.’s Statement of Material Facts (“Pl.’s SOF”) Ex. 1 (“Barry Dep.”) 10:4–21 [#48-2]. That position was a tenure-track position. Pl.’s SOF ¶ 2 [#48].

B. *Emmanuel College’s Alcohol Programming and Prof. Barry’s Alcohol Education Research*

Beginning in the 1980s, Emmanuel College mandated students to complete an alcohol prevention program to receive specific housing privileges. Def.’s SOF Ex. 12 (June 2009, IRB application) 3-5 [#43-12]; Pl.’s SOF Ex. 3 (“Barry’s Aff.” Ex. 3: “Rissmeyer Oct. 2009 letter”) 11 [#48-4]. During at least the last three years prior to the events at issue here, Emmanuel College had also required students to complete a three-month follow-up and analyzed the results to improve student services at Emmanuel College. June 2009 IRB application 3-5 [#43-12].

In 2009, after Prof. Barry gave a research lecture about evidence-based alcohol intervention programs, Emmanuel

College's Dean of Students asked Prof. Barry to consult with the College's administrators on alcohol programming for incoming students. Barry Dep. at 12:2–15 [#48-2]. After being asked to consult with College administrators on the alcohol programming, Prof. Barry submitted a proposal to the College's Institutional Review Board ("IRB"). Id. at 3. Pursuant to federal regulations, the IRB must review all proposed research with human subjects, unless the college determines that the specific research project is exempt from IRB approval. Def.'s SOF ¶ 25 [#43] (citing 45 C.F.R. §§ 46.107, 46.109). At the time of the events at issue here, Professor of Psychology Joyce Benenson was the chair of the IRB, and Professor of Philosophy Raymond Devettere was a member of the IRB. See DSOF ¶ 27 [#43]; PSOF ¶ 18 [#48].

*2 Prof. Barry's proposal explained that Emmanuel College had made the decision to implement (beginning a few months later with the incoming freshman class) personalized feedback as part of the alcohol awareness program, and that she had been asked to assist with the data analysis. See June 2009 IRB application 3 [#43-12]. The proposal explained further that the freshman would be given either of two versions of the alcohol awareness program, one with personalized feedback only and the other with personalized feedback and social norms. Id. The surveys of alcohol use were to be collected without identifying information. Id. In her proposal, Prof. Barry explained that she was not intending to distribute a consent form because the students were required by Emanuel College to complete the alcohol prevention program and 3-month follow-up regardless of the statistical evaluation, and because the College in the past had not required consent despite analyzing those results. Id.

In a closed-door IRB meeting to review Prof. Barry's proposal, Prof. Benenson raised concerns that the proposal did not include sufficient provisions to obtain voluntary informed consent from the incoming students. Pl.'s SOF Ex. 6 ("Fiebig Letter") [#48-7]; Barry Dep. 17:2–18:14 [#48-2]. On June 19, 2009, the IRB rejected Prof. Barry's proposal because it did not specify that Prof. Barry would obtain the voluntary informed consent of students whose data would be used in the research. Def.'s SOF Ex. 13 ("Benenson June 2019 letter") [#43-13]. Prof. Benenson encouraged Prof. Barry to resubmit her proposal with a consent form. Id.

Prof. Barry resubmitted a revised proposal to the IRB with a consent form. See Def.'s SOF ¶ 30 [#43]. On behalf of the IRB, Prof. Benenson wrote to Prof. Barry on July 10, 2009, expressing the IRB's concerns about the

penalty that Prof. Barry proposed for students who chose not to participate in the survey. Def.'s SOF Ex. 14 ("Benenson July 2009 letter") [#43-14]. Prof. Barry did not initially respond to Prof. Benenson's letter, but later told Prof. Benenson that she was modifying the study. See Def.'s SOF Ex. 15 ("Benenson Oct. 2009 email") [#43-15].

On October 1, 2009, Prof. Barry submitted a revised proposal. Def.'s SOF Ex. 16 (Oct. 2009 IRB Proposal) [#43-16]; Def.'s SOF ¶ 31 [#43]. The proposal explained that, as of August 2009, incoming freshman students had completed two versions of alcohol-use surveys through the Student Affairs Office, but that Prof. Barry had not yet analyzed the data. Oct. 2009 IRB Proposal [#43-16]. Prof. Barry proposed that she proceed to analyze and compare the data obtained from these surveys. Id. Vice President for Student Affairs Patricia Rissmeyer was a co-applicant of the revised proposal. Rissmeyer Oct. 2009 letter 11 [#48-4].

After reading Prof. Barry's revised proposal, Prof. Benenson accused Prof. Barry of conducting the study that the IRB had rejected in July 2009, and informed other IRB members that Prof. Barry may have put Emmanuel College at legal risk by breaching ethical standards and contravening federal research regulations. Def.'s SOF Ex. 6 ("Benenson Dep.") 23:3–19 [#43-6]; Benenson Oct. 2009 email [#43-15]; Def.'s SOF Ex. 17 ("Oct. 2009 IRB email chain") [#43-17]. Vice President Rissmeyer wrote to Prof. Benenson to assure her that Student Affairs had not yet conducted any research, and that Prof. Barry's consultation with the Student Affairs office was separate from the research proposed in the October 2009 IRB submission. Rissmeyer Oct. 2009 letter 11 [#48-4]. Despite Vice President Rissmeyer's letter, Prof. Benenson reached out to the federal Office for Human Research Protections for guidance. Benenson Dep. 37:19-21 [#43-6].

The IRB called Prof. Barry into a meeting on October 22, 2009. See Barry Dep. 29:7–30:1 [#48-2]. At the meeting, Prof. Devettere accused Prof. Barry of violating federal regulations and disobeying the IRB's denials of her proposals, and told Prof. Barry that he was going to report her to the federal regulators. Id. 31:13-32:16; Def.'s SOF Ex. 5 ("Devettere Dep.") 8:8–14 [#43-5].¹

¹ Professor Barry was never informed if Prof. Devettere, Prof. Benenson, or anyone else made any such report. Barry Dep. 33:1-23 [#48-2].

*3 In 2010, Prof. Barry submitted a revised proposal, again co-sponsored by Vice President Rissmeyer,

elaborating that she would only use data that was collected after she received IRB approval and would ensure the participants' voluntary informed consent. Def.'s SOF Ex. 18 ("June 2010 IRB Proposal") 3-4 [#43-18]. The IRB accepted this revised proposal. Def.'s SOF ¶ 35.

C. The Timing of Prof. Barry's Maternity Leave and Tenure Application

Emmanuel College gives faculty members eight weeks of paid parental leave following a birth or adoption, and thereafter the faculty member can take an unpaid leave of absence for the rest of the academic semester, or exercise other options. *See* Def.'s SOF Ex. 10 (Emmanuel College Faculty Handbook ("Faculty Handbook")) 22-23 [#43-10]. In September 2012, Prof. Barry informed Emmanuel College that she was pregnant and planned to take maternity leave. Barry Dep. 34:8-23 [#48-2]. She subsequently took maternity leave from February 18, 2013, until the end of May 2013. Barry Aff. ¶ 2 [#48-4].

At Emmanuel College, obtaining tenure assures academic appointment until retirement unless the tenured faculty member is terminated for cause. Faculty Handbook 13 [#43-10]. To be qualified for tenure, an associate professor must have completed a minimum of six academic years of full-time teaching. *Id.* at 15. Tenure track professors are generally required to apply for tenure during the first day of the fall semester of their sixth year of tenure-track teaching. *Id.* at 17-18. The six-year pre-tenure period is suspended during an approved maternity leave of absence, unless the faculty member requested in writing otherwise. *Id.* at 23. In accordance with the Handbook, Prof. Barry's pre-tenure probationary period clock was suspended during Prof. Barry's leave. Barry Dep. 36:4-8 [#48-2]. She therefore was not required to apply for promotion and tenure until September 2014, instead of September 2013. *Id.*

D. Tenure Application Process

The Faculty Handbook outlines the steps of the tenure process. Tenure applications are due by the first day of the fall semester. Faculty Handbook 18 [#43-10]. At the first step, the Faculty Promotion and Tenure Committee ("Faculty Tenure Committee"), consisting of seven faculty members, evaluates the candidate's: (1) teaching effectiveness; (2) scholarship and professional

achievement; and (3) engagement with the College and its mission. *Id.* at 16. To do so, the Faculty Tenure Committee evaluates reference letters from the applicant's department chair and colleagues and solicits feedback from three outside evaluators. *Id.* at 18-19. The Faculty Tenure Committee makes an initial recommendation whether to grant the applicant tenure. *Id.* at 11-12. To recommend tenure, the Faculty Tenure Committee must find that the candidate is "strong in all three standards." *Id.* at 17-18. The Faculty Tenure Committee's recommendation, and reasons, therefore, must be provided to the candidate and to the Vice President of Academic Affairs by the first of February. *Id.* at 18-19. If the Faculty Tenure Committee recommends not to grant tenure, the written reasons must help the candidate to prepare for an appeal, if an appeal is desired. *Id.* at 19.

At the second step, by March 7 of the applicant's sixth year, after meeting with three members of the Faculty Tenure Committee to review all recommendations, the Vice President of Academic Affairs and "the appropriate dean(s)" (referred to herein as the "Administrative Review Committee"²) make a recommendation to the President of the College regarding the application. *Id.* at 19. When this recommendation differs from that of the Faculty Tenure Committee, the Administrative Review Committee shall meet with the Faculty Tenure Committee to discuss the reasons. *Id.* at 20.

² The handbook does not use this term, but the term is used here by counsel and by Dean of Arts and Sciences William Leonard. Def.'s SOF Ex. 15 ("Leonard Administrative Review Committee Recommendation") [#48-16].

*4 Both the Faculty Tenure Committee and the Administrative Review Committee must send the President of the College all materials from the candidate, and the references, evaluations, and the letter from the Faculty Tenure Committee explaining the basis for their decision. *Id.* If the Faculty Tenure Committee's decision is positive and the Administrative Review Committee's decision is negative, then the Administrative Review Committee shall provide the general reasons in a written letter to the candidate to help the candidate prepare for an appeal, should he or she wish to appeal. *See id.* at 20.

At the next step, the President makes her decision before the spring Board of Trustees meeting. *Id.* at 20. If the President makes a decision that differs from the recommendation of the Faculty Tenure Committee or the Administrative Review Committee, the President will meet with the Faculty Tenure Committee and the Administrative Review Committee to discuss the reasons

for the reversal of the recommendation. *Id.* at 20. If the President’s decision is negative, then she shall give the general reasons in a written letter to the candidate to help the candidate prepare an appeal. *See id.* at 20.

If there is a negative recommendation by the Faculty Tenure Committee or the Administrative Review Committee, or a negative decision by the President, then the faculty member may file an appeal. *Id.*

The President’s final negative decision is dispositive, whereas the President’s positive recommendation is sent to the Board of Trustees to make the final decision. *Id.* at 18, 20.

E. Prof. Barry’s Tenure Application

In September 2014, Prof. Barry submitted her application for promotion and tenure. Barry Dep. 36:9–19 [#48-2]. Prof. Benenson, the former IRB chair, was a member of the Faculty Tenure Committee in September 2014 but recused herself from reviewing Prof. Barry’s application. Benenson Dep. 62:23–63:9 [#43-6]; Barry Dep. 185:10-24, 186:1-2 [#48-2]. In accordance with the Handbook, a substitute faculty member replaced Prof. Benenson on the Faculty Tenure Committee. Def.’s SOF ¶ 40 [#43].

The Faculty Tenure Committee reviewed Prof. Barry’s application, course evaluations, and references, and, on January 29, 2015, recommended to President Eisner that Prof. Barry be awarded tenure. Pl.’s SOF Ex. 11 (“Faculty Tenure Committee Recommendation”) [#48-12]. The Faculty Tenure Committee recommendation letter noted that Prof. Barry received positive teaching evaluations, had a consistent record of research and publication, and had a strong record of service to the college. *See id.* The letter pointed out that all three outside reviewers gave Prof. Barry favorable recommendations, but that one reviewer criticized Prof. Barry’s research portfolio for the “relative lack of prestige of the journals in which she was published and the lack of externally funded research.” *Id.*

By the time that the Faculty Tenure Committee had concluded its review, William Leonard was serving as the Dean of Arts and Sciences (and interim chief academic officer) and was a member of the Administrative Review Committee. *See* Def.’s SOF Ex. 4 (“Leonard Dep.”) 7:2-24 [#43-4]; Eisner Dep. 29:1–9 [#43-8]; Pl.’s SOF Ex. 15 (Leonard Administrative Review Committee Recommendation Letter) [#48-16]. Emmanuel College’s Vice President for Academic Affairs had left the college,

however, and that position was vacant. Leonard Dep. 7:12-17 [#43-4]; Eisner Dep. 21:20–22:14 [#43-8]. President Eisner appointed Prof. Devettere—who had threatened to report Prof. Barry to federal regulators in 2009—as the second (and only other) person involved in the second step of the tenure review process. Eisner Dep. 31:13-32:8 [#43-8]. Prof. Devettere was not a dean at the time, although he had served as a dean previously. *Id.* at 42:7–12. President Eisner did not consult Prof. Barry or seek Prof. Barry’s approval before making these appointments. *Id.* at 42:23–43:4. Upon hearing of Prof. Devettere’s involvement in the tenure process, Prof. Barry expressed concern to a colleague that she and Prof. Devettere “have clearly had some IRB run-ins.” Def.’s SOF Ex. 21 (“Pl.’s Feb. 2015 email”) [#43-21].

*5 On March 6, 2015, Dean Leonard sent a letter to President Eisner noting that the Administrative Review Committee was divided, but that he agreed with the Faculty Tenure Committee and recommended that Prof. Barry be awarded tenure. Leonard Administrative Review Recommendation Letter [#48-16]. Prof. Devettere drafted a separate undated document, stating that Prof. Barry had shown strong teaching and service to the College, but that he was uncertain as to whether her research and scholarship were sufficiently strong to warrant tenure. Pl.’s SOF Ex. 12 (“Devettere Administrative Review Recommendation Letter”) [#48-13]. Prof. Devettere outlined several reasons, including that Prof. Barry had published only two studies that were published in “lower-ranked journals,” that Prof. Barry’s remaining publications were based on her previous graduate school research, and that Prof. Devettere had questions regarding whether Prof. Barry obtained IRB approval for her studies. *Id.* Prof. Devettere commented that a “serious compliance issue” occurred in 2009 where Prof. Barry failed to obtain consent from students, and that Prof. Barry “had an extra year before seeking promotion and tenure due to a leave that stopped the tenure clock.” *Id.* Prof. Devettere did not recommend Barry for promotion and tenure. *Id.*

On May 7, 2015, President Eisner met with the Faculty Tenure Committee, Dean Leonard, and Prof. Devettere to discuss Prof. Barry’s application. Eisner Dep. 66:7–17 [#43-8]. President Eisner also invited Prof. Benenson to speak at the meeting. *Id.* at 65:12-66:17. At the meeting, the 2009 IRB incident was described to several members of the Faculty Tenure Committee for the first time. *See id.* 69:1–70:8. President Eisner then asked the members of the Faculty Tenure Committee whether, considering what they had just heard, they would change their votes. Benenson Dep. 37:2-9 [#43-6]. The majority of the Faculty Tenure Committee then agreed that denial of

tenure was appropriate. Eisner Dep. 69:9–15 [#43–8].

On May 14, 2015, President Eisner sent Prof. Barry a list of questions. Pl.’s SOF Ex. 17 (“Eisner May 2015 letter”) [#48-18]. Many of the questions addressed the issues that Prof. Devettere raised in his recommendation to President Eisner, including whether Prof. Barry had obtained IRB approval for several of her studies. *Id.* Two weeks later, Prof. Barry sent President Eisner a letter answering the questions. Pl.’s SOF Ex. 18 (“May 2015 Resp. Letter”) [#48-19]. President Eisner provided a copy of Prof. Barry’s responses to Prof. Devettere, who subsequently sent President Eisner a letter responding to Prof. Barry’s answers and maintaining that Prof. Barry was not sufficiently qualified for tenure. Pl.’s SOF Ex. 13 (“Devettere June 2015, Letter”) [#48-14].

On June 25, 2015, President Eisner notified Prof. Barry that her application for tenure had been denied because she had not shown sufficiently strong scholarship. Pl.’s SOF Ex. 19 (“June 2015 Tenure Rejection letter”) [#48-20]. Prof. Barry filed an appeal with President Eisner on July 13, 2015, in which Prof. Barry compared her scholarship to two other recently promoted and tenured professors. Pl.’s SOF Ex. 20 (“Pl.’s Appeal letter”) [#48-21]. President Eisner provided Prof. Barry’s appeal letter to Prof. Devettere, and, in response, Prof. Devettere sent President Eisner comments critical of Prof. Barry’s appeal. *See* Pl.’s SOF Ex. 14 (“Devettere July 2015 letter”) [#48-15]. Prof. Devettere noted that Prof. Barry’s appeal did not mention that “her time frame for submitting material relevant to her scholarship and research in preparation for tenure has been significantly longer than the time frames [for her colleagues].” *Id.*

President Eisner denied Prof. Barry’s appeal on August 3, 2015, noting the President’s “concerns about [Prof. Barry’s] research methods and compliance with human research protocols and standards, and [Prof. Barry’s] characterization of them.” Pl.’s SOF Ex. 21 (“Appeal Denial”) [#48-22]. Prof. Barry separated from Emmanuel College in January 2016. Def.’s SOF Ex. 2 (“Noonan Decl.”) ¶ 5 [#43-2].

III. Discussion

A. Standard of Review

Summary judgment is appropriate when “the movant shows that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law.” *Fed. R. Civ. P. 56(a)*. “A dispute is ‘genuine’ if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is ‘material’ if it has the potential of determining the outcome of the litigation.” *Baker v. St. Paul Travelers Ins. Co.*, 670 F.3d 119, 125 (1st Cir. 2012) (quoting *Scottsdale Ins. Co. v. Torres*, 561 F.3d 74, 77 (1st Cir. 2009)). All reasonable inferences must be drawn in favor of the non-movant, but the non-moving party “cannot rely on speculation to avoid summary judgment.” *Medina-Rivera v. MVM, Inc.*, 713 F.3d 132, 136 (1st Cir. 2013). Thus, “[e]ven in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.” *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

B. Breach of Contract (Count 3)

*6 Prof. Barry claims that Defendant breached its contract with her by failing to follow the tenure process delineated in the Handbook in fifteen instances when reviewing her application. *See* Second Am. Compl. ¶ 105(a)–(o) [#33]. Because the court finds that genuine disputes of material fact exist as to whether Defendant breached its contractual arrangement by allowing Prof. Devettere to sit on the Administrative Review Committee as part of Prof. Barry’s tenure application process, judgment as a matter of law is not warranted. *Cf. Doe v. Trs. of Bos. Coll.*, 892 F.3d 67, 80 (1st Cir. 2018) (“Because we find that genuine disputes of material fact exist as to two of the [six preserved] alleged breaches, we hold the district court’s grant of summary judgment ... was improper.”).

1. Applicable Law and Legal Framework

Under Massachusetts law, a breach of contract claims requires a plaintiff to prove that she had a binding contract with the defendant, that the plaintiff was willing and able to perform under that contract, that defendant’s breach prevented the plaintiff from performing, and that the plaintiff suffered damages. *See Doyle v. Hasbro, Inc.*, 103 F.3d 186, 194 (1st Cir. 1996).

Massachusetts state courts have found that a college’s faculty handbook may constitute a binding contract between that college and its faculty. *See, e.g., Berkowitz*

v. Pres. & Fellows of Harvard Coll., 58 Mass. App. Ct. 262, 269–70 (2003); Tuttle v. Brandeis Univ., 2002 WL 202470, at *9 (Mass. Super. Ct. Feb. 4, 2002) (“Under appropriate circumstances, promises contained in a personnel manual, like the Faculty Handbook, can be binding on an employer and effectively become terms of an employment contract.” (citing O’Brien v. New Eng. Tel. and Tel. Co., 422 Mass. 686, 691 (1996))); cf. Schaer v. Brandeis Univ., 432 Mass. 474, 476 (2000) (student handbook may be a contract between the institution and its students). For purposes of summary judgment, Defendant does not dispute that the Faculty Handbook was a binding contract. Def.’s Mem. in Support of Mot. for Summ. J. (“Def.’s Mem.”) 14 [#42]. Defendant does dispute, however, that it breached that contract or that any such breach was material. Id.

2. Breach of Contract

In interpreting the Handbook, the court is guided by two principles. First, the court “employ[s] the ‘standard of reasonable expectation—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 (quoting Schaer, 432 Mass. at 478). At the same time, the court must “adhere to the principle that ‘[c]ourts are chary about interfering with academic ... decisions made by private colleges and universities.’ ” Id. (quoting Schaer, 432 Mass. at 482). Thus, “in 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. at 269-70 (citing Schaer, 432 Mass. at 478, and Coveney v. Pres. & Trs. of the Coll. of the Holy Cross, 388 Mass. 16, 19–20 (1983)).

According to the Faculty Handbook, following the Faculty Tenure Committee’s consideration of an application for promotion and tenure, the Vice President of Academic Affairs and the “appropriate dean(s)” review the Faculty Tenure Committee’s recommendation and then makes their own recommendation to the President. Faculty Handbook 19 [#43-10]. The Vice President of Academic Affairs position was vacant at the time the Faculty Tenure Committee had completed its review of Prof. Barry’s tenure application, and President Eisner appointed Prof. Devettere to serve on the committee instead. Def.’s SOF ¶ 43–48 [#43].

*7 Defendant contends that because the Vice President of Academic Affairs position was vacant, it was impossible to comply with the “technical” requirements of the

Faculty Handbook. It “therefore fell to the College to devise a mechanism to most closely approximate the Faculty Handbook’s conception of an administrative review committee consisting of the [Vice President of Academic Affairs] and appropriate deans.” Def.’s Mem. 16 [#42]. But Defendant does not explain why it could not have complied with its contractual obligations by appointing an interim Vice President of Academic Affairs, and offers no legal authority to support its position that the President may unilaterally modify the terms of the tenure process. Nor has Defendant pointed to any provision of the Faculty Handbook that puts faculty members on notice that the President may make modifications to the tenure process. In fact, the Faculty Handbook provides that “all proposed changes [concerning faculty employment conditions] will be submitted to the Faculty Senate... Final authority to change this Handbook rests with the Board of Trustees.” Faculty Handbook 3 [#43-10]. There is no evidence that any changes were submitted to the Faculty Senate, or that the Board of Trustees changed the tenure process in light of the vacant position or gave the President the unilateral authority to do so. Thus, it remains a genuine issue whether President Eisner breached Prof. Barry’s contract by unilaterally modifying its terms and appointing Prof. Devettere to the Administrative Review Committee.

Moreover, there is a genuine dispute of material fact as to whether allowing Prof. Devettere and Prof. Benenson’s participation in Prof. Barry’s tenure review process violated Prof. Barry’s reasonable expectation of fairness. Early on in her pre-tenure period, Prof. Devettere and Prof. Benenson accused Prof. Barry of violating federal regulations and Prof. Devettere threatened to report Prof. Barry to federal regulators. See Benenson Dep. 23:3–19 [#43-6]; Benenson Oct. 2009 email [#43-15]; Oct. 2009 IRB email chain [#43-17]; Barry Dep. 31:13-32:16 [#48-2]; Devettere Dep. 8:8–14 [#43-5]. At least one other IRB member described Prof. Devettere and Prof. Benenson as having “subjected [Prof. Barry’s research proposals] to an unprecedented degree of scrutiny and criticism ... distinct from any other proposals submitted to the IRB[,] which could be interpreted as a focus pursuit against [Prof. Barry].” Fiebig letter [#48-7]. In fact, that IRB member went as far as to describe Prof. Benenson and Prof. Devettere’s actions as a “de facto ‘witch hunt.’ ” Id.

It is not for the court to determine whether these IRB members’ criticisms of Prof. Barry’s research were substantively correct. The court notes, however, that Emmanuel College was free to terminate Prof. Barry’s “probationary” pre-tenure employment at the time. It did not, and instead, at the time of the events at issue, at least

some college administrators (who had sought Prof. Barry's participation in the project presented to the IRB in the first place) sided with Prof. Barry. The court notes further that, at least as described here, the criticisms of Prof. Barry's research proposal could well have been similarly directed to Emmanuel College's long-standing mandate (unrelated to Prof. Barry) for students to complete an alcohol prevention program to receive specific housing privileges, and Emmanuel College's apparent use of students' responses without their consent. In any event, despite Prof. Benenson and Prof. Devettere's criticisms, Emmanuel College did not terminate Prof. Barry at the time, and Prof. Barry was permitted to continue her research and her pursuit of tenure over the next five years without any notice of the outsized role (not contemplated in the Faculty Handbook) that these two faculty members would be given in the consideration of her tenure application.

"Academic adversaries ... are not meant to be excluded from the [tenure] process," [Berkowitz](#), 58 Mass. App. Ct. at 273, and a fact-finder may find that no breach of contract occurred. But, considering the detailed and comprehensive procedure set forth in the Faculty Handbook, a fact-finder may conclude that it was reasonable for Prof. Barry to expect that the individuals formally participating in the review of her tenure application would be unbiased. Indeed, it is hard to imagine why Prof. Barry would have stayed at Emmanuel College following the IRB interactions if she had been alerted to the role these faculty adversaries would be afforded in the tenure review process, despite the Administration's encouragement of the project throughout the dispute and the IRB's eventual approval of that project. And a reasonable jury could thus find that allowing Prof. Devettere and Prof. Benenson to be involved in the formal portions of Prof. Barry's tenure review process was a violation of her reasonable expectation that she would receive a fair process.

*8 Notably, this expectation of fairness may have been shared by other faculty members at Emmanuel College, including two other IRB members and the former Vice President of Academic Affairs, Joyce DeLeo, all of whom advised Prof. Benenson to recuse herself from the Faculty Tenure Committee during its review of Prof. Barry's application. Barry Dep. at 186:1-2 [#48-2]; Benenson Dep. 62:23-63:9 [#43-6]. Professor Benenson presumably agreed that her involvement would at least present an improper appearance given that she agreed to recuse herself from the Faculty Tenure Committee on which she would otherwise have been serving.

Prof. Devettere, however, did not recuse himself from

reviewing Prof. Barry's application for tenure, despite the same concerns with his participation, and even though he held no administrative position giving him a formal role in the tenure review process according to the Faculty Handbook. And once Prof. Devettere recommended denial of tenure, President Eisner included him in forming further questions and reviewing Prof. Barry's responses, and invited Prof. Benenson (despite her prior recusal) to present the 2009 IRB issue to the Faculty Tenure Committee and the Administrative Review Committee at a meeting entirely outside of the tenure process identified in the Faculty Handbook. This outsized involvement by Prof. Devettere and Prof. Benenson in the tenure process gives rise to a genuine dispute as to whether Defendant breached the terms of its contract with Prof. Barry. Therefore, Defendant's Motion for Summary Judgment [#41] as to Prof. Barry's breach of contract claim (Count 3) is DENIED.

C. Sex and Pregnancy Discrimination (Count 1)

1. Applicable Law and Legal Framework

Prof. Barry further alleges that Defendant denied her application for promotion and tenure because of her sex and pregnancy. Second Am. Compl. ¶ 68 [#33].³ She argues that there is both direct and circumstantial evidence of this discrimination. Pl.'s Opp'n 9-11 [#47].

³ Prof. Barry has briefed her pregnancy discrimination claim under state and federal law, see Pl.'s Opp'n 9 [#47], but her Second Amended Complaint [#33] only alleges violations of federal law, see Pl.'s Second Am. Compl. ¶¶ 58-72 [#33]. Because the Second Amended Complaint [#33] defines the claim, the court considers only federal law here.

The analysis used to prove discrimination depends on whether there is direct or circumstantial evidence of discrimination. See Smith v. F.W. Morse & Co., 76 F.3d 413, 420-21 (1st Cir. 1996). If a plaintiff presents direct evidence that a discriminatory animus was "a motivating factor in the employment action," "the burden of persuasion [shifts] from the employee to the employers ... [to] affirmatively prove that it would have made the same decision even if it had not taken the protected characteristic into account." Id. at 421. If a plaintiff has only circumstantial evidence of discrimination, she may still attempt to prove her case by resort to the burden-shifting framework set forth in McDonnell

Douglas Corp. v. Green, 411 U.S. 792 (1973). Id.

The first prong of the McDonnell Douglas analysis requires that “the complainant ... carry the initial burden ... of establishing a prima facie case of ... discrimination.” 411 U.S. at 802. To establish a prima facie case of discrimination in connection with tenure, a plaintiff must show that: 1) she is a member of a protected class; 2) she was qualified for tenure; 3) she suffered an adverse employment action; and 4) there is evidence of a “causal connection between her membership in a protected class and the adverse employment action.” Bhatti v. Tr. of Bos. Univ., 659 F.3d 64, 70 (1st Cir. 2011) (citing St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993)). To show that she was qualified for tenure, a plaintiff tenure applicant must show “that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion.” Kumar v. Bd. of Tr., Univ. of Mass., 774 F.2d 1, 14 (1st Cir. 1985) (quoting Banerjee v. Bd. of Tr. of Smith Coll., 648 F.2d 61, 63 (1st Cir. 1981)).

*9 If a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a “legitimate, nondiscriminatory reason for the [adverse employment action].” McDonnell Douglas, 411 U.S. at 802. If the defendant can so articulate, “the burden shifts back to [the plaintiff] to show that the reason was a coverup for a discriminatory decision.” Benoit v. Tech. Mfg. Corp., 331 F.3d 166, 174 (1st Cir. 2003) (quoting Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 34 (1st Cir. 2001)). Specifically, a plaintiff must “produce sufficient evidence to create a genuine issue of fact as to two points: 1) the employer’s articulated reasons for its adverse actions were pretextual, and 2) the real reason for the employer’s actions was discriminatory animus.” Ray v. Ropes & Gray LLP, 799 F.3d 99, 113 (1st Cir. 2015) (quoting Mariani-Colón v. Dep’t of Homeland Sec., 511 F.3d 216, 223 (1st Cir. 2007)).

The First Circuit has emphasized the inherent subjectivity of decisions to grant or deny tenure and has advised district courts to refrain from “substitut[ing] [their] own views concerning the [plaintiff tenure applicant’s] qualifications for those of the properly instituted authorities.” Brown v. Tr. of Bos. Univ., 891 F.2d 337, 346 (1st Cir. 1989). However, as with other forms of discrimination, the court may infer discrimination if a defendant’s reasons for denying tenure are “ ‘obviously weak or implausible,’ or that the tenure standards for prevailing at the tenure decisions were ‘manifestly unequally applied.’ ” Id. (quoting Kumar, 774 F.2d at 12).

An inference of discrimination, therefore, should only be made if “the denial of tenure was ‘obviously’ or ‘manifestly’ unsupported.” Id.

2. Claim of Direct Evidence of Gender Discrimination

Here, Prof. Barry points to Prof. Devettere’s two comments that she had extra time to submit relevant materials for her application for tenure, and President Eisner’s admission that she relied in part on Prof. Devettere’s review of Prof. Barry’s responses to President Eisner’s May 2015 letter, as direct evidence of discrimination since the additional time afforded to her was related to her maternity leave. Pl.’s Opp’n 9–11 [#47] (citing to Eisner Dep. 62:20–24 [#48-5]; Devettere March 2015 letter [#48-13]; Devettere July 2015 letter [#48-15]). Prof. Devettere’s statements that Prof. Barry had a full additional year for meeting tenure criteria, as compared to other faculty members, suggest that he may indeed have considered her time on maternity leave as time during which she should have been publishing. But he combined that criticism with comments regarding additional time she had available while not on leave (the balance of the additional year before tenure review and during the appeal), making his comparisons with other faculty members less clear. See Devettere July 2015 letter 1-2 [#48-15]. In any event, President Eisner, not Prof. Devettere, was the final decision maker, and while President Eisner admittedly relied in part on Prof. Devettere’s review, the part she relied on appears to be his much more strongly articulated view of Prof. Barry’s alleged failings during the IRB process rather than her comparative publication rate. The evidence is thus ambiguous, and “inherently ambiguous statements do not qualify as direct evidence.” Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 65 (1st Cir. 2002). Therefore, the McDonnell Douglas burden-shifting framework guides the court’s analysis.

3. Indirect Claim - Prima Facie Case of Gender/Pregnancy Discrimination

The parties do not dispute that Prof. Barry is a member of a protected class, that she was denied tenure, and that other faculty members who were not members of that protected class were granted tenure during the relevant time period. Pl.’s SOF ¶¶ 3, 25, 62 [#48]; Def.’s SOF ¶¶ 37, 63, 68–72 [#43]. Thus, the only disputed issue at the prima facie stage is whether Prof. Barry was qualified for

tenure.

*10 Defendant argues that since President Eisner and some faculty members determined that Prof. Barry's research and scholarship were not sufficiently strong, no reasonable factfinder could conclude that Prof. Barry was qualified for tenure. See Def.'s Mem. 6-7 [#42]. But the Faculty Tenure Committee recommended that Prof. Barry be granted tenure, which required those faculty members to have found that she was sufficiently strong in all three required fields, including research and scholarship. Def.'s SOF ¶ 42 [#43]. Further, all three outside reviewers during the Faculty Tenure Committee's review agreed that Prof. Barry should have been granted tenure. See *id.* Dean Leonard also agreed and found Prof. Barry's research and scholarship sufficient to warrant a positive recommendation for tenure in his role on the Administrative Review Committee. *Id.* ¶ 57.

To meet her burden at the prima facie stage, Prof. Barry need only show that she was "sufficiently qualified to be among those persons from whom a selection ... would be made." *Banerjee*, 648 F.2d at 63. Given these differences in opinion, a reasonable jury could conclude that Prof. Barry was qualified for promotion and tenure under the school's standards. Accordingly, she has satisfied her burden at the first stage of the *McDonnell Douglas* framework. See, e.g., *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991).

4. Indirect Claim - Defendant's Legitimate, Non-discriminatory Reason

The burden shifts back to the Defendant to articulate a "legitimate, nondiscriminatory reason" for denying Prof. Barry's application for tenure. *McDonnell Douglas*, 411 U.S. at 802. Defendant's burden is one of production, not one of persuasion. See *Fields v. Clark Univ.*, 966 F.2d 49, 51 (1st Cir. 1992) ("The defendant must meet a burden of production by articulating a legitimate, nondiscriminatory reason for its challenged actions.").

Defendant has met its burden. According to President Eisner's letter notifying Prof. Barry that her application had been denied, Prof. Barry was denied tenure because she had not demonstrated that her scholarship and professional achievement were strong enough. June 2015 Tenure Rejection letter [#48-20]. In response to Prof. Barry's appeal, President Eisner wrote that Prof. Barry's was denied tenure because of President Eisner's "concerns about [Prof. Barry's] research methods and compliance with human research protocols and standards,

and [Prof. Barry's] characterization of them." Appeal Denial [#48-22]. Although President Eisner's May 2015 meeting with the Faculty Tenure Committee, Dean Leonard, and Professor Devettere may have violated the Handbook's procedural guarantees, the members of the Faculty Tenure Committee agreed with President Eisner's decision to deny Prof. Barry's tenure application after learning about Prof. Barry's prior run-ins with the IRB.⁴ See Eisner Dep. 69:9-15 [#43-8].

⁴ Although the IRB's conclusions about Prof. Barry's proposals may (or may not) have been valid, what matters for purposes of this analysis is whether the final decision maker, President Eisner, has provided a non-discriminatory reason for denying Prof. Barry's tenure application in light of the information that President Eisner was given.

Accordingly, Defendant has provided a legitimate, non-discriminatory reason for denying Prof. Barry promotion and tenure, and the burden shifts back to her.

5. Indirect Claim – Pretext

At the final stage, Prof. Barry bears the burden of persuasion, where she must show that Defendant's reason was pretextual and, "by process of eliminating legitimate reasons, that the decision was governed by an illegitimate one." *Banerjee*, 648 F.2d at 63 (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)). Prof. Barry "must convince a trier of fact, by a preponderance of the evidence, that the defendant's articulated reasons ... were *obviously* weak or implausible, or that the tenure standards for prevailing at the tenure decisions were *manifestly* unequally applied." *Villanueva*, 930 F.2d at 129. (internal quotation marks omitted) (emphasis added). "Introducing evidence that [Prof. Barry] was as qualified as other tenure candidates does not suffice." *Id.* at 131.

*11 Prof. Barry argues that President Eisner presented two different reasons for denying Prof. Barry's application for tenure. In President Eisner's first letter notifying Prof. Barry that her application for tenure had been denied, President Eisner wrote that Prof. Barry had "not demonstrated the level of scholarship that would justify promotion and tenure." June 2015 Tenure Rejection letter [#48-20]. After Prof. Barry appealed, President Eisner wrote that:

Because of my concerns about your research methods and compliance with human research protocols and standards and your characterization of them, I remain

of the view that it is not in the best interests of the college to grant you tenure. Appeal Denial [#48-22]. Prof. Barry contends that President Eisner's "inconsistent and changing rationale demonstrates that a genuine issue of material fact exists regarding whether Defendants' reasoning is a mere pretext for discrimination." Pl.'s Opp'n 17 [#47].

Had President Eisner's denial of Prof. Barry's application solely been based on Prof. Barry's level of scholarship generally, the court would be likely to agree that the true motivation behind the denial of Prof. Barry's application may be suspect considering the initial recommendation by the Faculty Tenure Committee and Dean Leonard that Prof. Barry's professional achievements were sufficiently strong to justify granting her tenure. But President Eisner did not rest her decision upon Prof. Barry's scholarship generally, but rather made clear through the questions she asked Prof. Barry after receiving Prof. Devettere's letter, and in her Appeal Denial, that she had "concerns about [Prof. Barry's] research methods and compliance with human research protocols and standards, and [Prof. Barry's] characterization of them." Appeal Denial [#48-22]. That President Eisner used general language in the Tenure Rejection Letter and revealed her focused reason in the Appeal Denial does not, by itself, support the claim that her reason was pretextual, and that the true reason behind the denial of Prof. Barry's application was because she took maternity leave.

The court notes that it was not until Prof. Devettere's involvement in Prof. Barry's application review process that anyone recommended that Prof. Barry not be granted tenure. And although Prof. Devettere did mention in his letters the additional time Prof. Barry had in an apparent effort to diminish her scholarship generally, his primary focus appears to have been IRB related issues. For example, he asserted that: Prof. Barry did not have IRB approval for one study that she included in her application materials; Prof. Barry's application materials purportedly "misrepresented" that she had IRB approval for one study; Prof. Barry had not indicated whether she obtained IRB approval—nor was their documentation to indicating IRB approval—for two manuscripts that she listed as "under review," and another that she listed as "in preparation"; in 2013, Prof. Barry declined to take the IRB's suggestion that she make changes to a research protocol, which Prof. Devettere stated was "extremely rare"; and that there was a "serious compliance issue" in 2009 in which the IRB believed that Prof. Barry failed to obtain consent from student subjects of research. Devettere March 2015 letter [#48-13].

Moreover, after Prof. Benenson spoke to the Faculty and

Tenure Committee and Dean Leonard about the 2009 IRB incident, most of the Faculty and Tenure Committee members concluded that denying tenure was appropriate. See Benenson Dep. 37:1–4 [#43-6]; see also Eisner Dep. 69:1–17 [#43-8]. Although Prof. Barry points out that President Eisner requested that the Faculty Tenure Committee re-vote after hearing about the incident, see Pl.'s SOF ¶ 58 [#43], the fact that the majority of the members changed their recommendation when told of the 2009 IRB incident is strong evidence that President Eisner's stated basis for denying Prof. Barry tenure—her concerns with Prof. Barry's "research methods and compliance with human research protocols and standards, and [Prof. Barry's] characterization of them"—was not obviously weak or implausible. Appeal Denial [#48-22].

*12 Nor has Prof. Barry shown that Defendant's tenure process was "manifestly unequally applied." To show that the tenure process was manifestly unequally applied, Prof. Barry may show that Defendant treated a similarly situated employee differently than it treated her. See [Benoit](#), 331 F.3d at 174; cf. [Villanueva](#), 930 F.2d at 131 (tenure applicant plaintiff may offer evidence of similarly situated candidates who received a promotion as evidence of pretext); [Perkins v. Brigham & Women's Hosp.](#), 78 F.3d 747, 751 (1st Cir. 1996) (individuals with whom a plaintiff seeks to be compared must have engaged in the same conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them for it).

In her appeal, Prof. Barry compared herself to Profs. Lin and Jarvinen, two psychology professors that had been recently awarded tenure. Pl.'s Appeal Letter [#48-21]. Prof. Barry's comparison focused on the fact that she had published at least as many articles as those two professors but was cited in other articles more often than the other two professors. *Id.* Prof. Barry also points out that Dr. Clare Mehta, who co-authored three different publications with Prof. Barry but did not take maternity leave, was awarded tenure. Pl.'s Opp'n 11 [#47]; Pl.'s SOF Ex. 8 ("Dr. Mehta Dep.") 31:8–11 [#48-9].

Prof. Barry does not, however, make a true comparison between herself and other promoted professors who had issues like those that President Eisner found concerning. Notably, Prof. Barry's comparison makes no mention of whether Prof. Lin, Prof. Jarvinen, or Dr. Mehta had any prior compliance issues with IRB protocols before being promoted. Similarly situated defendants must have engaged in the same conduct, yet there is no evidence that any of the comparators had a problematic track record with respect to obtaining or properly representing whether they obtained IRB approval.⁵ It is not enough for Prof.

Barry to compare her qualifications to those of Profs. Jarvinen and Lin solely on the basis of her publication output; she must in fact show that they were similarly situated. See [Perkins](#), 78 F.3d at 751.

⁵ The court, again, does not opine as to the validity of the IRB issues.

Nor does Prof. Barry provide the court with any evidence that other women qualified for tenure who took maternity leave were denied promotions. Rather, the record evidence shows that between 2009 and 2016, five tenure candidates had their tenure clocks paused due to parental leave, and Prof. Barry was the only one denied tenure. Noonan Decl. ¶ 6 [#43-2]. In the same year that Prof. Barry submitted her application, Prof. Devettere recommended another candidate who had “stopped the clock” due to maternity leave. [Id.](#) ¶ 8; Def.’s SOF Ex. 33 (“Devettere March 9, 2015, email”) [#43-33]; Def.’s SOF Ex. 34 (“Johnston ARC recommendation”) [#43-34]. Prof. Barry has therefore failed to show that Defendant’s tenure process was *manifestly* unequally applied. See, e.g., [Benoit](#), 331 F.3d at 174.

Prof. Barry contends that Prof. Devettere’s “disdain” for Prof. Barry’s maternity leave is circumstantial evidence of pretext. Pl.’s Opp’n 17 [#47]. However, even presuming *arguendo* that Prof. Devettere’s comments displayed a clearly discriminatory animus, Prof. Barry has presented no evidence that President Eisner—the decision maker—based her decision to deny Prof. Barry tenure solely on Prof. Devettere’s, or anyone else’s, recommendation. Rather, after reviewing all the materials and recommendations, including asking Prof. Barry a “long series of questions,” see Eisner May 2015 letter [#48-18], President Eisner explicitly stated her reason for denying Prof. Barry tenure: her concern over Prof. Barry’s compliance with research protocols, Appeal Letter [#48-22].

*13 Prof. Barry says that the school’s failure to follow the precise tenure procedures outlined in the Faculty Handbook also constitutes evidence of pretext. Pl.’s Opp’n at 14 [#47]. For support, Prof. Barry cites an unpublished Sixth Circuit case, [DeBoer v. Musashi Auto Parts, Inc.](#), 124 F. App’x. 387, 392–93 (6th Cir. 2005) (unpublished). While the [DeBoer](#) court acknowledged that an employer’s failure to follow protocol *may* constitute relevant evidence of pretext, it did not find a deviation from protocol to constitute *per se* evidence of pretext. Compare [id.](#) at 394 (failure to follow detailed tenure procedures was one fact that, taken in combination with two other salient facts, got the plaintiff past the summary judgment hurdle) with [Skalka v. Fernald Envtl.](#)

[Restoration Mgmt. Corp.](#), 178 F.3d 414, 422 (6th Cir. 1999) (where employer previously relied solely upon its own procedures to justify other layoffs, the jury was entitled to disbelieve employer’s “conveniently identified flaws in the process” argument as to the plaintiff). The [DeBoer](#) court itself found the employer’s failure to follow protocol in that case was of “small probative value.” [DeBoer](#), 124 F. App’x at 394.

Unlike in [Skalka](#), Defendant does not argue that the tenure review process used to evaluate all other applicants during the relevant time period was insufficient to evaluate Prof. Barry’s application. In fact, Prof. Barry does not dispute that all tenure applications for the 2014-2015 academic year, regardless of whether the applicant took maternity leave, were reviewed by Prof. Devettere and Dean Leonard. Def.’s SOF ¶ 45. Like in [DeBoer](#), Defendant’s failure to strictly follow the tenure process here is of “small probative value,” but, without more, does little to demonstrate that President Eisner’s stated reason was pretextual.

Prof. Barry is unable to show that Defendant’s justification for denying her tenure, because of the concerns with Prof. Barry’s history with the IRB, was pretextual, and that the true reason was because of Defendant’s discriminatory animus towards her pregnancy. Defendant’s [Motion for Summary Judgment](#) [#41] is therefore ALLOWED as to Prof. Barry’s sex and pregnancy discrimination claim (Count 1).

D. Race and National Origin Discrimination (Count 2)
Prof. Barry does not claim any direct evidence of discrimination, and therefore once again finds herself in the world of [McDonnell Douglas](#).

Again, to establish her prima-facie case of race and national origin discrimination, Prof. Barry must show that she was a member of a protected class; that she was qualified for tenure; that her tenure application was rejected; and that others were granted tenure in the same relative time period as Prof. Barry’s rejection. See [Banerjee](#), 648 F.2d at 62. It is undisputed that Prof. Barry is Latino and is therefore a member of a protected class. Pl.’s SOF ¶ 5 [#48]. Defendant does not dispute that Prof. Barry’s tenure application was rejected, or that others were granted tenure during the school year. And, as previously stated, a reasonable jury could find that Prof. Barry was qualified for tenure. [Supra](#) Section III(C)(3). Therefore, Prof. Barry has established a prima facie case of race and national origin discrimination. And, because

Defendant offered a legitimate, non-discriminatory reason, see supra Section III(C)(4), the burden falls on Prof. Barry to provide evidence of pretext. She has failed to do so.

Prof. Barry presents two facts to support of her claim of race and national origin discrimination. First, Prof. Barry states that she was the only person of Hispanic origin at Emmanuel College who pursued tenure for a subject area other than Spanish language or Latin history. Pl.'s Opp'n. 20 [#47]; Pl.'s SOF ¶ 7 [#48]. Second, Prof. Barry says that President Eisner's "attitude towards [her] soured significantly after [President] Eisner met [Prof.] Barry's Latino mother." Pl.'s Opp'n 20 [#47]; Pl.'s SOF ¶ 6 [#48]. Prof. Barry's asserts that, in the years after she introduced her mother to President Eisner, President Eisner became "distant and cold" towards her. Pl.'s Aff. ¶¶ 4-8 [#48-3].

*14 But Prof. Barry fails to provide any evidence whatsoever, other than speculation, that this shift in President Eisner's demeanor had anything to do with Prof. Barry's race or national origin. Prof. Barry also fails to show why her being the only professor of Hispanic heritage to pursue tenure in an area other than Spanish language or Latin history supports her claim of race discrimination. Defendant points out that three Hispanic candidates applied for tenure at Emmanuel College between 2009 and 2016, and Prof. Barry was the only one amongst them to whom President Eisner denied tenure. Noonan Decl. ¶ 6-7 [#43-2]. Furthermore, none of the other five faculty members denied tenure during the 2009-2016 period were Hispanic. Id. ¶ 6. Accordingly, Prof. Barry has failed to show that President Eisner's legitimate, non-discriminatory reason for denying her application for tenure was pretextual.

Finally, Prof. Barry acknowledges that her original application to Emmanuel College made "repeated references to [her] being a bicultural and bilingual Latina." Pl.'s Aff. ¶ 9 [#48-4]. While not itself dispositive, that Prof. Barry was hired as a tenured-track professor after making repeated references to her national and cultural heritage cuts against her claim of race and national origin discrimination.

As Prof. Barry's claim of race or national origin discrimination amounts to mere speculation, it cannot survive summary judgment. See Medina-Rivera, 713 F.3d at 136 (claims of discrimination based solely on speculation cannot survive summary judgment). Defendant's Motion for Summary Judgment [#41] as to Prof. Barry's race and national origin discrimination claim (Count 2) is ALLOWED.

IV. Conclusion

For the aforementioned reasons, Defendant's Motion for Summary Judgment [#41] is ALLOWED as to Count 1 (gender/pregnancy discrimination) and Count 2 (race/national origin discrimination), and DENIED as to Count 3 (breach of contract).

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 499774, 2019 Fair Empl.Prac.Cas. (BNA) 42,359

Exhibit 3

2016 WL 614368

Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

Mark G. CHAREST, Plaintiff,
v.
PRESIDENT AND FELLOWS OF
HARVARD COLLEGE and Andrew G.
Myers, Defendants.

CIVIL ACTION NO. 13-11556-DPW

|
Signed 02/16/2016

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MEMORANDUM & ORDER

DOUGLAS P. WOODLOCK, UNITED STATES DISTRICT JUDGE

I. BACKGROUND

*1 While a chemistry graduate student at Harvard University, Dr. Mark Charest worked in a laboratory supervised by Dr. Andrew Myers. There, he, along with Dr. Myers and other scientists, discovered a novel and valuable method for creating synthetic tetracyclines, which have applications in the development of commercial antibiotics. Dr. Charest assigned his rights in the patents for this invention to Harvard, as he was required to do pursuant to the participation agreement that he signed with the University. Harvard, in turn, licensed these patents to Tetrphase, a company founded for the purpose of commercializing the patented invention. Dr. Charest claims that Harvard has now deprived him of the

share of the royalty stream to which he is entitled from this license.

He alleges, first, that Harvard and Dr. Myers coerced him under threats and duress to enter an agreement which reduced his share of the royalties from the patents and increased Dr. Myers' share. Second, he contends that Harvard amended the Tetrphase License to include additional patented technology, and then improperly allocated an outsize share of the Tetrphase License royalties to this new patent on which Dr. Myers was, but Dr. Charest was not, a listed inventor.

Dr. Charest contends that this conduct breached contractual obligations to him assumed by Harvard and embodied in Harvard's intellectual property policy, and also constitutes a violation of various common law and statutory prohibitions. The Defendants move to dismiss.

A. Factual Background

The facts drawn from the Amended Complaint are as follows:

1. Dr. Charest's Enrollment at Harvard

Dr. Charest enrolled at Harvard University as a doctoral student in the organic chemistry department in 1999. Am. Compl. ¶ 10. While a student, Dr. Charest was advised and mentored by Dr. Myers, and focused his research on investigating the synthetic creation of tetracycline antibiotics, a project suggested by Dr. Myers. Am. Compl. ¶¶ 15-16. Prior to Dr. Charest's enrollment, Dr. Myers had been unable to create a route for creating new synthetic tetracyclines and told Dr. Charest that if he successfully worked out the problem "they could make a [] billion dollars." Am. Compl. ¶¶ 8-9.

2. The Discovery of a Synthetic Route for the Production of Tetracycline Antibiotics

In 2004, in collaboration with others, Dr. Charest discovered a method to synthetically create a new class of tetracycline antibiotics. Am. Compl. ¶ 11. More specifically, Dr. Charest discovered a method for taking

an intermediary and using that intermediary to make a new class of tetracycline antibiotics in as little as three steps. *Id.* This invention was particularly valuable because of its potential to treat otherwise antibiotic-resistant bacteria. Am. Compl. ¶ 12. Prior to the publication of Dr. Charest's doctoral thesis, Harvard began work on patenting the discovery and Dr. Charest worked with Harvard's patent counsel, Dr. C. Hunter Baker, on patent applications covering his research (the "Pioneering Patents"). Am. Compl. ¶¶ 13, 28.

*2 After the patent applications were filed, Dr. Charest and his collaborators published the results of their research in the April 2005 issue of *Science* under the title "A Convergent Enantioselective Route to Structurally Diverse 6-Deoxytetracycline Antibiotics." Am. Compl. ¶ 14. Because his contributions to the research were greatest, Dr. Charest was the first-listed author of the article. Am. Compl. ¶ 15. Based upon the results of his research on routes for the creation of synthetic tetracycline, Dr. Charest received his Ph.D. in organic chemistry in 2004. Am. Compl. ¶ 10.

3. The Harvard Participation Agreement and the Harvard Intellectual Property Policy

In 2003, while a student at Harvard, Dr. Charest signed the Harvard University Participation Agreement. Am. Compl. ¶ 19, Ex. A. That agreement confirms that Dr. Charest "ha[s] read and [] understand[s] and agree[s] to be bound by the terms of the 'Statement of Policy in Regard to Inventions, Patents and Copyrights' " and "understand[s] and accept[s] the provision of the University's royalty income sharing policy ... as amended from time to time." Am. Compl. Ex. A.

The Harvard University Royalty Sharing Policy for Intellectual Property (the "IP Policy") in effect from 2001 until 2008 provided that patent inventors share 35% of the first \$50,000 of royalties and 25% of any amounts above \$50,000. MD Ex. D at 1.¹ The policy provided that, in the case of a single invention, "[e]ach inventor receives equal shares of the inventor(s)' portion, unless all inventors agree otherwise. A deviation from the policy of equal sharing requires a written agreement of all inventors." *Id.* at 3; Am. Compl. ¶¶ 23-24.

¹ Although an evaluation of a motion to dismiss is typically limited to those facts alleged in the operative complaint, a court may consider "documents the authenticity of which are not disputed by the parties ... documents central to plaintiffs' claim [and] documents sufficiently referred to in the complaint." *Watterson v.*

Page, 987 F.2d 1, 3 (1st Cir. 1993). The documents attached as Exhibits A-G to the Defendants' Motion to Dismiss, consisting of the patent covering Dr. Charest's invention and his assignment of that patent to Harvard, Harvard's intellectual property policies, and the National Institute of Health's Grants Policy Statement fit within these categories. Accordingly, the Defendant's request for judicial notice of these documents, Dkt. No. 13, which has not been opposed by Plaintiff, will be GRANTED. I will also grant Defendant's request for judicial notice of documents identified as Exhibits E, and H-0 to the Defendant's supplemental motion to dismiss. Supplemental Exhibit D consists of the January 31, 2007 amendment to the license agreement between Harvard and Tetraphase. This document is sufficiently referred to in the complaint—and indeed central to Dr. Charest's claims—to warrant judicial notice, recognizing, however, that it does not constitute the entirety of or the final amendment to the license agreement between Harvard and Tetraphase. Plaintiff opposes judicial notice of Supplemental Exhibits F, G, and P to Defendant's supplemental motion to dismiss, contending that these documents are incomplete, misleading, incorrect, or unverified. Supplemental Exhibits F and G are Dr. Myers' conflict of interest disclosures to Harvard and his consulting agreement with Tetraphase. These documents are not sufficiently referenced in the complaint, not public documents, nor central to Plaintiffs' claim. Accordingly, I will not take judicial notice of them. Similarly, I will not take judicial notice of Supplemental Exhibit P, which consists of excerpts of Harvard's 30(b)(6) deposition witness addressing facts disputed by the parties. *See Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013) (refusing to consider documents which did not fit into the categories of documents enumerated in *Watterson* when considering motion to dismiss).

*3 The IP Policy in effect from 2001 until February 2008 provided that, when more than one invention is included in a license agreement:

1. Ordinarily each invention/case included in a license shall be considered of equal value. Absent any objection from the inventors prior to distribution of income, license income not specifically linked to an invention/case will be equally divided among all inventions/cases included in the license.
2. If [Harvard's Office of Technology Transfer and Licensing] determines ... that the inventions/cases should have unequal value, they will notify those individuals identified as inventors at that point in time. Absent any objection from the inventors prior to the distribution of income, license income not specifically linked to an invention case will be

divided among the inventions/cases according to that determination.

3. If all the inventors of all the inventions/cases included in the license agree upon the relative value of those inventions/cases, income from that license will be allocated according to that valuation.

4. At such time as income is clearly attributable to individual inventions/cases (e.g., when the product actually being sold only uses one invention), income shall be allocated to the inventions/cases actually generating the income.

5. If any of the inventors disagrees with the above, he/she may appeal to the Committee on Patents and Copyrights. Any such appeal shall only apply to allocation of income received after the appeal unless the appeal is made within thirty days of the inventors being notified of the license agreement and the planned valuation of the inventions/cases.

MD Ex. D at 4.

This policy was amended in February of 2008. The post-2008 version provides that for a single invention, “Personal ... shares ... will be allocated among Inventors ... according to a written agreement among them or, if there is no agreement, in equal shares.” MD Ex. E, § 5(E)(1). For multiple patents licensed as a package, the post-2008 policy provides that royalties will be shared:

[a]s agreed in writing among all Inventors or, if no agreement, in equal shares among Inventors. In the alternative, upon request of any of the Inventors, OTD will determine the relative value of each patent to the package with the Inventor(s) of each patent sharing equally in the value assigned by OTD. The foregoing notwithstanding, where an executed license agreement assigns different values to different patents licensed as a package, that value shall be the value assigned for purposes of royalty sharing among Inventors.

MD Ex. E, § 5(E)(3). The post-2008 agreement provides that OTD’s determination of the relative value of the patents licensed as a package “may be appealed by the persons affected to the Committee on Intellectual Property for final determination.” MD Ex. E, § 5(F). Section 6 of the post-2008 agreement provides that:

The University Committee on Intellectual Property, appointed by the President, shall be responsible for interpreting this policy and resolving questions and disputes concerning it. From time to time the Committee may suggest changes to this policy on its own initiative or at the request of the President and Fellows of Harvard College or its designee.

*4 Other responsibilities of the Committee include the hearing of appeals as provided under this policy and other such duties as may be assigned from time to time by the President and Fellows of Harvard College or its designee.

In addition to the right to make changes specifically provided elsewhere in this policy, the University reserves the right to amend or modify any of the terms of this policy as it may determine from time to time. Any such modification or amendment shall become effective upon adoption by the President and Fellows of Harvard College or as of such other time as the President and Fellows of Harvard College shall specify. MD Ex. E, § 6.

The policy was modified again effective October 4, 2010. The post-2010 policy, like the 2008 version, provides that, for a single patented invention, “Personal ... shares ... will be allocated among Inventors ... according to a written agreement among them or, if there is no agreement, in equal shares.” MD Ex. F, § 5(E)(1). The 2010 amendments altered the language governing distribution of royalties from multiple inventions licensed as a package, providing that:

First, Net Royalties will be allocated among the licensed Creations as agreed in writing among all Creators or, if no agreement, in equal shares among such Creations. In the alternative, upon request of any of the Creators, OTD will determine the relative value to the package of each of the Creations. The foregoing notwithstanding, where an executed license agreement assigns different values to different Creations licensed as a package, that value shall be the value assigned for purposes of allocating Net Royalties among such Creations. Second, the Creator personal share ... of Net Royalties so allocated to each of the Creations in the package will be allocated in accordance with Paragraph E.1.

MD Ex. F, § E(3). As with the 2008 policy, the 2010 amendment provides that determinations of relative value “may be appealed by the persons affected to the Committee on Intellectual Property for final determination.” MD Ex. F, § V(F).

The 2010 Amendments alter the third paragraph of Section 6, so that paragraph reads:

In addition to the right to make changes specifically provided elsewhere in this policy, the University reserves the right to amend or modify any of the terms of this policy as it may determine from time to time. The President and the Fellows of Harvard College (the “Corporation”), the President of the University, and the

Provost of the University each severally shall have the power to make such amendments and modifications. Any such modification or amendment shall become effective upon adoption by the Corporation, President or Provost, as the case may be, or as of such other time as the Corporation, President or Provost, as the case may be, shall specify.

MD Ex. F, § 6(C).

The Statement of Policy in Regard to Inventions, Patents and Copyrights in effect prior to 2001 states that “a standing University Committee on Patents and Copyrights was created in 1975. This committee has representation from the principal faculties potentially affected by policies in this area and from the administration, and its chairman is a senior administrative officer of the University reporting directly to the President. It is charged with responsibility for interpreting and applying University policy in individual cases, and for recommending such changes in University policy as from time to time may be required.” MD Ex. C at 1. No subsequent versions of the IP Policy refer to the Committee on Intellectual Property and/or Patents and Copyrights as a “standing” committee.

*5 Harvard’s “Concise Guide” to its IP Policy, which makes reference to the 2008 amendments to that policy, describes the “University Committee on Intellectual Property” as a “standing committee appointed by the President.” Am. Compl. Ex. C, § VI.

5. Dr. Charest Assigns the Patents to Harvard and Harvard Licenses the Patents to Tetrachase

In a document signed on August 17, 2005, Dr. Charest assigned his rights in the Pioneering Patents covering his work on the synthetic creation of tetracycline antibiotics to the President and Fellows of Harvard College. Am. Compl. ¶ 29; MD Ex. B. That document recites that the assignment was given “[i]n consideration of One Dollar (\$1.00) and other good and valuable consideration.” MD Ex. B at 1.

At the time that he made the assignment, Dr. Charest expected that Harvard would abide by the IP Policy. Am. Compl. ¶ 30.

Harvard, through OTD, licensed the Pioneering Patents to Tetrachase, a company created by OTD and Dr. Myers for the purpose of commercializing the Pioneering Patents.² Original Compl. ¶ 41. Dr. Myers served and serves as a founder and consultant for Tetrachase.

Original Compl. ¶ 42. On the basis of the value provided by the Pioneering Patents, Tetrachase raised more than \$25 million in funding from investors. Original Compl. ¶ 44. In the license agreement, Tetrachase agreed to pay Harvard milestone payments and royalties on future sales of tetracycline drugs, as well as an upfront payment of \$250,000. Original Compl. ¶¶ 44, 130.

² In amending his complaint, Dr. Charest appears inadvertently to have omitted those factual allegations, included in the original complaint, regarding the founding of Tetrachase and the licensing of the Pioneering Patents to it. I refer to those here from the original complaint to provide full context. To the extent that Plaintiff’s case survives motion to dismiss practice, I will direct Plaintiffs to file another amended complaint correcting this error, along with a redline for the court’s review. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 350 F. Supp. 2d 160, 169 (D. Me. 2004) (accepting correction of “typographical error” in complaint after filing of motion to dismiss).

The Tetrachase license is OTD’s most successful license to date. Over the life of the license, OTD could claim credit for bringing in over \$1 billion in revenue. Am. Compl. ¶ 34. As a result of the success of this license, Dr. Myers is held in high regard and given significant latitude by the OTD. *Id.*

6. The Allocation of Royalty Shares from the Licensing of the Pioneering Patents

On August 8, 2006, Dr. Erik Halvorsen, then director of business development for OTD, emailed Dr. Charest and the other non-faculty inventors on the Pioneering Patents. Am. Compl. ¶ 35. Dr. Halvorsen’s email informed the non-faculty inventors of the creation of Tetrachase and explained that, instead of an equal distribution of royalties, Dr. Myers would receive 50%, Dr. Charest, Dr. Seigel and Dr. Lerner would each receive 15%, and Dr. Brubaker would receive 5%. Am. Compl. ¶¶ 35-36. This allocation was made without consultation with the non-faculty inventors. Am. Compl. ¶ 40. Dr. Halvorsen’s email included an agreement for them to sign. That agreement stated that “[w]e acknowledge that the Harvard University Royalty Sharing Policy for Intellectual Property specifies that, for inventions, the creators’ share normally will be divided equally among all creators unless they agree otherwise.” Am. Compl. ¶ 37.

*6 After receiving the email from Dr. Halvorsen, Dr.

Charest discussed the allocation with the other inventors. The other inventors agreed to adjust the shares so that Dr. Charest received 18.75%, Dr. Siegel received 11.25%, and Dr. Lerner and Dr. Brubaker received 10% each. Am. Compl. ¶ 38. When approached by Dr. Charest, Dr. Halvorsen stated that Dr. Myers' share was not open to discussion. Am. Compl. ¶ 39.

7. Dr. Myers and Dr. Halvorsen Threaten Dr. Charest in Order to Induce him to Accept the Proposed Allocation

When Dr. Charest spoke with Dr. Myers expressing his opposition to the allocation, Dr. Myers told Dr. Charest to "tread lightly" and "be careful," which Dr. Charest understood to be threats. Am. Compl. ¶ 39. Dr. Myers followed through on these threats by refusing to act as a reference, a rarity in the field of academic chemistry, when Dr. Charest was applying for a venture capital job. Am. Compl. ¶ 42. This refusal was a contrast to the strong recommendations given by Dr. Myers to Dr. Charest prior to the royalty dispute arising. Am. Compl. ¶ 43.

During discussions about the royalty allocation, Dr. Halvorsen told Dr. Charest that, if he did not accept the proposed allocation, he would reduce Dr. Charest's royalty share by allocating 50% of the license royalties to another, undisclosed patent on which Dr. Charest was not an inventor. Am. Compl. ¶ 46. Dr. Halvorsen refused to show Dr. Charest the patent application even when Dr. Charest offered to sign a nondisclosure agreement, but represented that it warranted half of the license royalties. Am. Compl. ¶¶ 48-49.

The undisclosed patent application has never been issued as a patent and has been effectively abandoned, indicating that it was of little value. Am. Compl. ¶¶ 49-50. Dr. Charest contends that this patent application was added to the Tetrphase License only as leverage to compel him to accept the allocation proposal, a belief which is supported by the fact that the patent application was filed and included in the license agreement only after the financial terms of the license had been agreed upon. Am. Compl. ¶ 51. If Dr. Charest had known that the undisclosed patent application had no or little value, he would not have agreed to accept less than the default equal allocation of royalties provided for in the Royalty Sharing Policy. Am. Compl. ¶ 53.

8. The Reallocation of License Income to the Intermediary Patent

On November 24, 2009, Dr. Laura Brass, who replaced Dr. Halvorsen as the director of business development for OTD, wrote to Dr. Charest informing him that Harvard and Tetrphase had amended their license to include a new patent application (the "Intermediary Patent") and explaining that OTD was retroactively assigning 33% of the license income to the new patent application. Am. Compl. ¶ 55. The Intermediary Patent was licensed on January 31, 2007 to Tetrphase in exchange for a one-time payment of \$25,000. Am. Compl. ¶ 57. *See also* Supp. MD Ex. D.

The scope of the Intermediary Patent was narrower than the Pioneering Patent: The latter described new tetracycline compounds, methods of use and making those compounds, intermediaries used to make the compounds, and methods for making those intermediaries; the former described only an alternative method for making the intermediary. Am. Compl. ¶ 56.

Dr. Charest contends that the \$25,000 fee represents the true commercial value of the Intermediary Patent. *See* Am. Compl. ¶¶ 59-64. During conversations with the OTD, Dr. Charest said that the value assigned by the license agreement should control the allocation of royalties, as required by the Royalty Sharing Policy. OTD refused to make an allocation in line with the \$25,000 paid for the addition of the Intermediary Patent to the license. Am. Compl. ¶ 66.

*7 Dr. Charest spoke with Dr. Brass on December 12, 2009 regarding the allocation of royalties to the Intermediary Patent. During that call, she told Dr. Charest that if he did not agree to the proposed re-allocation to the Intermediary Patent, his royalty share would be reduced even further than the proposed 33%. Am. Compl. ¶ 67. Dr. Brass also told Dr. Charest that the 33% was not an OTD determination, but a proposal for agreement and made clear that if he did not sign on OTD would make an official determination that was less favorable. Am. Compl. ¶ 69. Ultimately, Dr. Charest would not agree to the proposed 33% allocation to the Intermediary Patent. Am. Compl. ¶ 71.

9. Harvard's Committee on Intellectual Property and the Hearing Regarding the Royalty Allocation

Harvard's IP Policy (as effective after both the 2008 and 2010 amendments) provided that the Committee on Intellectual Property (the "IP Committee") would be a

committee appointed by Harvard's President. The IP Committee's responsibilities include interpreting the IP Policy, and resolving questions and disputes concerning it, as well as hearing appeals as provided for under the IP Policy. Am. Compl. ¶¶ 72-74; MD Exs. E, F, § VI. Dr. Charest alleges that the IP Committee is a standing committee at Harvard which includes professors from Harvard's business and law schools, a senior administrator, and members of numerous other departments. Am. Compl. ¶¶ 73, 75.

After Dr. Charest inquired about making an appeal of the allocation of royalties to the Intermediary Patent, Dr. Maryanne Fenerjian, the director of the Office of Technology Transfer, responded on April 13, 2010, writing that:

The committee designated in the IP Policy as having responsibility for such appeals is not a standing committee, but instead must be convened on an *ad hoc* basis. If and when we receive your notice, I will request that Provost Hyman appoint and seat the committee. Once he has done so, a committee representative will contact you to schedule your appeal and to answer any procedural questions that you might have. As the committee will set its own procedures, I am afraid that I cannot offer you any guidance with respect to the timing or mechanics of the appeal process, should you elect to move forward with it.

Am. Compl. ¶ 77, Ex. G.

Instead of sending the appeal of the OTD administrative decision to a standing Committee on Intellectual Property, OTD sent the appeal to this "*ad hoc* committee," appointed at the request of OTD, which included four science professors, who, rather than being independent and unbiased, relied upon OTD for funding. Am. Compl. ¶ 79.³

³ Dr. Charest has also alleged, contrary to OTD's representations, that the committee was selected by OTD. Am. Compl. ¶ 80. During the hearing on the Defendants' Motion to Dismiss, it became clear that this specific allegation was speculation cobbled together from inadequate circumstances and raw conjecture, raising serious Rule 11 issues. Recognizing that Plaintiff lacks an adequate foundation for this allegation, I will not consider this allegation when determining whether to dismiss the complaint.

On December 15, 2010, Dr. Fenerjian wrote an email to Dr. Charest telling him that "[t]he committee likely will meet for the first time in mid-to-late January. In preparation for that meeting, I will provide the committee members with background materials about the licensed

technologies and efforts on the part of Tetrphase toward their eventual commercialization." Am. Compl. ¶ 82. In response to this letter, Dr. Charest submitted a letter and a short PowerPoint presentation to the *ad hoc* committee on December 22, 2010. Up to that date, Dr. Charest had not been provided with an articulation of OTD's reasoning for its allocation, and the materials that Dr. Charest sent to the committee provided only background information on the patents, rather than Dr. Charest's substantive arguments regarding the relative value of the Pioneering and Intermediary Patents. Am. Compl. ¶¶ 84-85. Dr. Charest closed his letter by expressing his interest in communicating with the *ad hoc* committee regarding the appeal and his willingness to travel to Harvard to participate in the process. Am. Compl. ¶ 85.

*8 On January 11, 2011, OTD submitted a memorandum to the *ad hoc* committee detailing their position on the valuation of the patents. Dr. Charest was not provided a copy of the materials. Am. Compl. ¶ 86. Shortly after, the committee met and two members of OTD attended, Isaac Kohlberg and Dr. Fenerjian. Dr. Charest was not told about this meeting or given the opportunity to attend or present his views. Am. Compl. ¶¶ 87-88. Dr. Charest found out about this meeting only when he was informed that his royalty share was being reduced as the royalties would be split 55% to the Pioneering Patents and 45% to the Intermediary Patent. Am. Compl. ¶ 87. Dr. Charest was never given an opportunity to present his views regarding the appropriate allocation of royalties between the Pioneering and the Intermediary Patents to the committee. Am. Compl. ¶ 88.

Dr. Charest contends that OTD presented material and information to the *ad hoc* committee that was misleading and materially incorrect, and which overstated the value of the Intermediary Patent. Am. Compl. ¶¶ 89-95. In fact, Dr. Charest contends that if OTD's representations to the committee regarding the value of the Intermediary Patent were correct, they would have been negligent, unethical, or grossly incompetent in licensing that technology to Tetrphase, a company affiliated with Dr. Myers, for only \$25,000. Am. Compl. ¶ 96. Dr. Charest contends that Dr. Myers controlled the OTD appeals process and engineered an outcome favorable to himself. Among the information provided to the committee were opinions by Dr. Hunter Baker and Dr. Louis Plamondon. Dr. Myers and Dr. Baker knew each other well, having received their Ph.D.'s after working at the same laboratory at Harvard. Am. Compl. ¶ 131. Dr. Baker had worked with Dr. Myers on a number of patenting issues, as well as issues related to the establishment of Tetrphase. *Id.* Dr. Plamondon is Tetrphase's Vice President for Chemistry and has worked at Tetrphase since its founding, while Dr. Myers

has acted as a consultant, per the licensing agreement. *See* Am. Compl. ¶ 132, Ex. E.

At the same time that Dr. Charest was informed of the outcome of the appeal of OTD's allocation decision, Harvard requested that he sign a form acknowledging and accepting this decision as final as a condition of receiving the royalties owed to him. Am. Compl. ¶ 100, Ex. B. Subsequently, when contacted by Dr. Charest's counsel, Harvard requested a release of all claims against Harvard as a condition of the disbursement of royalties. Am. Compl. ¶ 101.

10. Dr. Myers' Motive to Allocate Royalties to the Intermediary Patent

In his original complaint, Dr. Charest alleged, upon information and belief, that Dr. Myers was motivated to reallocate royalties from the Pioneering Patents to the Intermediary Patent because he was entitled to a larger share of royalties from the latter than the former. Limited discovery has shown that OTD in fact paid 100% of the royalties on that patent to another inventor, Dr. Brubaker. Dr. Myers contends this was in error, and that OTD corrected the error by directing a payment of the correct (50%) share to himself (without requiring a clawback of the incorrect payment to Dr. Brubaker). Am. Compl. ¶ 107, Ex. F (Deposition of Dr. Andrew Myers) at 14:7-17:23. Thus Dr. Myers' share of the royalties was not increased by the re-allocation of royalty income to the Intermediary Patent.

Dr. Charest now contends that the payment was made to Dr. Brubaker as compensation for Dr. Brubaker performing research which Dr. Myers was obligated to perform for Tetrphase and which benefitted Dr. Myers and Tetrphase. Am. Compl. ¶¶ 109-114. Dr. Charest contends that Dr. Myers directed Dr. Brubaker to perform this research for his own and Tetrphase's benefit and that this represents a violation of Harvard's ethical rules and poses a conflict of interest for Dr. Myers in his dual roles as a company scientist employed by Tetrphase and an academic supervisor. Am. Compl. ¶¶ 115-121. By allocating royalties from the Pioneering Patent to the Intermediary Patent, Dr. Myers was able to compensate Dr. Brubaker for performing this work at no cost to himself or Tetrphase, while, in effect, buying Dr. Brubaker's silence and loyalty. Am. Compl. ¶¶ 122-123.

11. Demand under Massachusetts General Law Chapter 93A

*9 On May 28, 2013, Dr. Charest sent a Chapter 93A demand letter to Harvard and Dr. Myers describing his allegations and the relief sought. Am. Compl. ¶¶ 136, 138. In their response letter, Defendants did not offer any settlement to Dr. Charest, but instead asked Dr. Charest to sign a release of all claims against them in exchange for the disbursement of the royalties accrued and payable to Dr. Charest under Harvard's allocation. Am. Compl. ¶¶ 140-141. Harvard had withheld any payment to Dr. Charest since Dr. Charest refused to accept the legitimacy of the 55%/45% allocation. Am. Compl. ¶ 142.

In response to my request, Harvard filed additional briefing regarding its alleged refusal to make payments of royalty amounts owed to Dr. Charest according to Harvard's own determination of a 55%/45% allocation between the Pioneering and Intermediary Patents. Harvard represented that "OTD requested that each inventor return a signed acknowledgment—not a release of claims—upon receipt of which OTD would distribute each inventor's respective share of the royalties" (emphasis by Harvard) and attached the letter dated March 1, 2011 in which Dr. Kohlberg, Harvard's Senior Associate Provost, wrote: "To acknowledge your acceptance of the Committee's determination, thereby enabling OTD to distribute to you your inventor share of such Net Royalties, please sign and date a copy of this letter in the space provided below, and return it to my attention at the above address."

In response, Dr. Charest filed an additional brief in which he contests Harvard's representation that it did not condition payment of Dr. Charest's share on his release. Attached to that filing is a letter from Harvard's counsel to Dr. Charest's counsel. The penultimate paragraph of that letter reads:

As it has in the past, Harvard stands willing to distribute to Dr. Charest his percentage share of all royalty payments that have been received to date in connection with the tetracycline patents. Harvard is holding these sums in escrow for Dr. Charest, which currently total \$50,261.72, and is agreeable to releasing them upon his execution of the March 1, 2011 acceptance and acknowledgment letter regarding the allocation of royalties between the various patents released to Tetrphase. In addition, given Dr. Charest's threat of litigation, an appropriate release of claims would also be required.

This letter fully belies Harvard's claim that it did not request a release from Dr. Charest in exchange for disbursement of funds that it admits owing to him.

Harvard has now represented that, as of February 3, 2014, it made payment to Dr. Charest of the amount owed according to the 55%/45% royalty allocation determination of the IP Committee and that it will make all applicable royalty payments to Dr. Charest going forward in a timely manner and without condition.

B. Procedural Background

Dr. Charest filed his first complaint in this matter on July 28, 2013. Harvard and Dr. Myers moved to dismiss the case for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and for lack of standing under Rule 12(b)(1).

At a hearing on December 19, 2013, recognizing that there were certain factual disputes regarding the allocation of royalties to Dr. Myers which could be easily resolved, I entered an order permitting Dr. Charest to conduct limited discovery and amend or supplement his complaint, and allowing the Defendants to respond to any such amendments.

On January 17, 2014, Dr. Charest filed his amended complaint. Harvard and Dr. Myers subsequently filed additional briefing in support of their previously-filed motion to dismiss.

*10 I held a hearing regarding the motion to dismiss filed by Harvard University and Dr. Myers on January 29, 2014. During that hearing, as discussed above, I requested additional briefing from Harvard regarding the allegation that Harvard has conditioned payment of amounts owed to Dr. Charest on his execution of a release of claims against Harvard and whether such conduct constitutes a violation of Massachusetts General Law Chapter 93A.

Harvard filed additional briefing on February 3, 2014. In addition to discussing the refusal to make payments to Dr. Charest, Harvard also offered evidence which it contends contradicts Dr. Charest's allegation that he was not given adequate notice and an opportunity to present his substantive arguments to the IP Committee. In response, Dr. Charest contends that the evidence offered by Harvard is one-sided and incomplete. He represents that he repeatedly requested information from Harvard University regarding the appeals process, but did not receive the requested information until after the completion of the appeals process.

The seriatim offers of evidence in this case by both parties demonstrates the wisdom of the phased decision-making

process established by the Federal Rules of Civil Procedure. Those rules provide that, at this phase of the proceeding, before the parties have had the opportunity for discovery, my review is limited to testing the sufficiency of the allegations set forth in Dr. Charest's complaint, subject only to "narrow exceptions" for the consideration of certain extrinsic evidence. *See Freeman v. Town of Hudson*, 714 F.3d 29, 36 (1st Cir. 2013); *see generally supra* note 4. The sufficiency of the evidence of a party is tested only "after adequate time for discovery," *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If genuine issues of material fact remain after such discovery, precluding the entry of summary judgment, those factual disputes are to be resolved by a trial.

I will not short-circuit this process by indulging in an attempt to resolve factual disputes based upon the tit-for-tat offers of evidence and representations of the parties. While I will consider, along with the well-pled allegations in the complaint, those documents which are central to Dr. Charest's claim, I will not extend my review to include the weighing of evidence that the Defendants have submitted to contradict the allegations Dr. Charest has made regarding the opportunity (or lack thereof) afforded to him to participate in the IP appeal.

II. STANDARD OF REVIEW

In order to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). I "must accept all well-pleaded facts alleged in the Complaint as true and draw all reasonable inferences in favor of the plaintiff." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993). While I am "generally limited to considering facts and documents that are part of or incorporated into the complaint," I "may also consider documents incorporated by reference in the [complaint], matters of public record, and other matters susceptible to judicial notice." *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008) (citation and internal quotation marks omitted) (alteration in original).

Dismissal for failure to state a claim is appropriate when the pleadings fail to set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory." *Berner v. Delahanty*, 129 F.3d 20, 25 (1st Cir. 1997) (quoting *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988) (internal quotation marks omitted)).

“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’ ” *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679).

III. ANALYSIS

*11 Based upon the factual allegations detailed above, the Plaintiff has asserted seven separate causes of action against Harvard and/or Dr. Myers: (1) breach of contract; (2) fraud in relation to the original allocation of royalties from the Pioneering Patents; (3) tortious interference with contract; (4) breach of fiduciary duty; (5) promissory estoppel; (6) violation of Mass. Gen. Laws c. 93A, § 9; and (7) violation of Mass. Gen. Laws c. 93A, § 11.

A. Has Plaintiff Adequately Alleged That Harvard’s IP Policy is a Contract?

While brought under several different theories, Dr. Charest’s claims largely begin with a single common threshold issue: Whether the IP Policy imposes binding contractual obligations upon Harvard.⁴

⁴ On more than one occasion, Massachusetts courts have found that an institution’s intellectual property policies are binding on individual employees as signatories. *See, e.g., Greene v. Ablon*, 2012 WL 4104792 (D. Mass. Sept. 17, 2012); *Grocela v. General Hosp. Corp.*, No. 11-991-BLS1, 30 Mass. L. Rptr. 176 (Mass. Sup. Ct. July 18, 2012) (unreported decision). In those cases, as here, the individual expressly agreed to be bound by the policy.

In support of its contention that the IP Policy is not a contract, Harvard relies primarily on *Jackson v. Action for Boston Community Dev. Inc.*, 525 N.E.2d 411 (Mass. 1988), in which the Massachusetts Supreme Judicial Court held that an employer’s personnel manual did not form the basis for an implied contract of employment for a defined term. In reaching that conclusion, the Supreme Judicial Court identified several factors relevant to that decision, including that: (1) the employer retained the unilateral right to modify the manual’s terms; (2) the manual provided that it was for “guidance” as to the employer’s policies; (3) there was no negotiation between the employer and the employee regarding the terms of the

manual; (4) the manual stated no term of employment; (5) the employer called no special attention to the manual; and (6) the employee did not sign or manifest his assent to the manual or acknowledge that he understood its terms. *Id.* at 415-16.

Here, as in *Jackson*, Harvard retained the right unilaterally to modify the IP Policy. It also appears that no negotiations occurred between the parties regarding the terms of the policy, again supporting Harvard’s claim that it is not a contract. Other factors, however, weigh in favor of Dr. Charest. Harvard did call special attention to the IP Policy. In 2003, Dr. Charest signed a “Participation Agreement” in which he agreed to be bound by the IP Policy and in which he acknowledged that he understood and accepted the terms of Harvard’s royalty sharing policy. *See* Am. Compl. Ex. A. In addition, while the manual at issue in *Jackson* spoke in terms of providing “Guidance,” the IP Policy speaks in mandatory terms: “Except as otherwise provided in this policy, the following formula *will apply* to the distribution of Net Royalties among Creators ...”; “Personal shares *will be* allocated among Inventors ... according to a written agreement among them or, if there is no agreement, in equal shares.” MD Ex. F, § 5(B), (E) (emphasis added).

Looking at the factors identified in *Jackson* alone (upon which the defendant relies), I cannot conclude dispositively that the terms of the IP Policy are not a part of the contract between Harvard and Dr. Charest.

Furthermore, the factors in *Jackson* do not stand alone. Since *Jackson*, the Massachusetts Supreme Judicial Court has substantially clarified its teaching on the issue of when an employer manual becomes a part of an employment agreement. In *O’Brien v. New England Tel. & Tel. Co.*, 664 N.E.2d 843 (Mass. 1996), the Supreme Judicial Court explained that the circumstances identified in *Jackson* “are not a rigid list of prerequisites, but rather explain factors that would make a difference or might make a difference in deciding whether the terms of a personnel manual were at least impliedly part of an employment contract.” *Id.* at 847. The central question (upon which those factors shed light) is whether an employee “would reasonably conclude that the employer was presenting the manual as a statement of the conditions under which employment would continue.” *Id.* at 848. *See also Ferguson v. Host Intern. Inc.*, 757 N.E.2d 267, 271 (Mass. App. 2001) (“[S]uch manuals [are] to be enforced to the extent that they instill a reasonable belief in the employees that management will adhere to the policies therein expressed.”).

*12 As noted, the Participation Agreement signed by Dr.

Charest makes explicit reference to Harvard's royalty sharing policy-supporting Dr. Charest's reasonable belief that Harvard would adhere to the policies therein. In addition, the policy itself states that it is intended to be a "more definitive statement[] of policy that [is] applicable to the entire Harvard community" and that "[w]here royalties are generated by Harvard as a consequence of commercializing a Supported Invention, royalties will be shared with the Inventor(s) as described in Section V of this policy." MD Ex. F at 1, § I(F). Finally, Harvard's own conduct leads to the same conclusion. According to Dr. Charest's allegations, in August of 2006, Dr. Halvorsen emailed Dr. Charest and the other non-faculty inventors of the Pioneering Patents. In the email, Dr. Halvorsen specifically referenced the IP Policy and acknowledged that, absent agreement among the inventors, royalties from the commercialization of the invention would be divided equally among all the named inventors on the patent. Am. Compl. ¶ 37. Similarly, in its letter dated March 1, 2011, in which Harvard informed the inventors of the Pioneering Patents of the outcome of Dr. Charest's challenge to the allocation of royalties between the Pioneering and Intermediary Patents, Harvard specifically referenced the IP Policy as the basis for both the process and the outcome. *See* Am. Compl. Ex. B. By following the IP Policy, Harvard's conduct demonstrates that it does view the policy as imposing binding obligations upon the university. *See Jackson*, 525 N.E.2d at 415 ("[T]he defendant's adherence to the grievance procedures is some evidence of the existence of a contract.").

Dr. Charest contends that he expected Harvard to honor its contractual obligations to pay him royalties as defined by the IP Policy. The Amended Complaint alleges a reasonable basis for concluding, in light of the circumstances, that a contract existed between Dr. Charest and Harvard, evidenced by the terms of the Participation Agreement which Dr. Charest signed, by the terms of the IP Policy, and by Harvard's conduct. "It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises." *Ferguson*, 757 N.E.2d at 272 (quoting *Woolley v. Hoffmann-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985)).⁵

⁵ In addition, although they are not binding upon me, I note that this conclusion is in accord with a number of out-of-state cases cited by the plaintiff in which courts have found that university intellectual property policies are a part of the employment contract. *See, e.g., St. John's Univ., New York v. Bolton*, 757 F. Supp. 2d 144, 161 (E.D.N.Y. 2010) ("Federal courts have consistently upheld the validity of patent-assignment obligations imposed on university students, faculty and staff");

Regents of the Univ. of New Mexico v. Knight, 321 F.3d 1111, 1118 (Fed. Cir. 2003) (finding that the university patent policy formed an "implied contract"); *Fenn v. Yale Univ.*, 283 F. Supp. 2d 615, 628-29 (D. Conn. 2003) ("University patent policies such as Yale's have long been recognized as a valid and enforceable part of the contract of employment.") (citing *Chou v. Univ. of Chicago*, 254 F.3d 1347, 1356-57 (Fed. Cir. 2001) and *Univ. of West Virginia Bd. of Trustees v. VanVoorhies*, 84 F.Supp.2d 759, 769-71 (N.D.W.Va. 2000)). In *Molinelli-Freytes v. Univ. of Puerto Rico*, 2012 WL 4665638 (D.P.R. Feb. 15, 2012), the court held that ownership of intellectual property was not determined by the university's intellectual property policy. In reaching that conclusion, however, the court specifically relied on 17 U.S.C. § 201(b), which provides that initial ownership of copyright in a work performed for hire may be altered only upon an express written agreement signed by both parties, *id.* at *13, making that specific holding inapposite here.

Dr. Charest alleges two separate time periods of misconduct on the part of Harvard and Dr. Myers with respect to the alleged contract. The first occurred in 2006, when the university and Dr. Myers sought to obtain Dr. Charest's agreement to a royalty allocation that would grant Dr. Myers 50% of the royalty income from the licensing of the Pioneering Patents to Tetrphase.

The second instance of alleged misconduct began when Harvard informed Dr. Charest of OTD's decision to add the Intermediary Patent to the license agreement with Tetrphase and allocate a 33% share of the Tetrphase royalties to that patent. After Dr. Charest protested this decision, the committee hearing his appeal determined that the proper allocation was 55% to the Pioneering Patents and 45% to the Intermediary Patent. I turn to a consideration of those two time periods in Sections III.B and III.C below.

B. Claims Based Upon the 2006 Allocation of the Pioneering Patents Royalties Are Barred by the Statute of Limitations.

*13 According to Dr. Charest, in order to induce his agreement to the 2006 allocation, Harvard, through Dr. Halvorsen, misrepresented the existence of valuable technology that was part of the Tetrphase license agreement and threatened to divert royalties to that patent—reducing Dr. Charest's royalty share—if Dr. Charest would not agree. Dr. Myers, for his part, is said to have used his position of authority to level threats against

Dr. Charest regarding his future employment prospects-threats which were eventually carried out.

This conduct would arguably be actionable under one or more of the theories asserted by Dr. Charest. A party may not misrepresent facts and then use those misrepresentations as leverage to deprive another party of its contractual rights. See *Massachusetts Employers Ins. Exch. v. Propac-Mass, Inc.*, 648 N.E.2d 435, 438 (Mass. 1995) (holding that “conduct undertaken as leverage to destroy the rights of another party to [an] agreement while the agreement is still in effect” constituted not only a breach of contract, but “warranted a finding of unfair acts or practices” under Mass. Gen. Laws c. 93A); *Anthony’s Pier Four, Inc. v. HBC Assocs.*, 583 N.E.2d 806, 822 (1991) (“[K]nowing use of a pretext to coerce” a party into paying more than the amount owed under a contract constituted a breach of the contractual duty of good faith and fair dealing, and violated Mass. Gen. Laws c. 93A “as a matter of law.”).

The statute of limitations, however, poses a hurdle to the claims arising from events occurring in 2006. Claims for breach of contract and promissory estoppel are subject to a six year statute of limitations. Mass. Gen. Laws c. 260, § 2. A claim for violation of Mass. Gen. Laws c. 93A is subject to a four year statute of limitations. Mass. Gen. Laws c. 260, § 5A. Claims for breach of fiduciary duty, tortious interference with contract, and fraud must be brought within three years. Mass. Gen. Laws c. 260, § 2A. Because claims arising from the initial allocation of royalties among the inventors of the Pioneering Patents relate to conduct that occurred more than six years before this action was filed, such claims presumptively are barred by the applicable statutes of limitation.

Seeking to avoid this result, Dr. Charest asserts that the running of the limitations period should be extended by the discovery rule which “tolls the commencement of the statute of limitations until the plaintiff knew or reasonably should have known of the alleged harm.” *Abdallah v. Bain Capital*, 880 F. Supp. 2d 190, 197 (D. Mass. 2012). The rule operates in three circumstances: “[W]here a misrepresentation concerns a fact that was ‘inherently unknowable’ to the injured party, where a wrongdoer breached some duty of disclosure, or where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive.” *Patsos v. Albany Corp.*, 741 N.E.2d 841, 846 (Mass. 2001).

1. Was the Statute of Limitations Tolloed Because These

Claims were “Inherently Unknowable”?

“The discovery rule provides that a cause of action for the redress of an ‘inherently unknowable’ wrong does not accrue until the plaintiff knew, or in the exercise of reasonable diligence should have known, of the factual basis for a cause of action.” *Patsos*, 741 N.E.2d at 846-47. Tolling lasts until “events occur or facts surface which would cause a reasonably prudent person to become aware that she or he had been harmed.” *Felton v. Labor Relations Com’n*, 598 N.E.2d 687, 689 (Mass. App. 1992). A plaintiff is placed on “inquiry notice” of his claims “when the first event occurs that would prompt a reasonable person to inquire into a possible injury at the hands of the defendant.” *Epstein v. C.R. Bard, Inc.*, 460 F.3d 183, 188 (1st Cir. 2006) (citing *Szymanski v. Boston Mut. Life Ins. Co.*, 778 N.E.2d 16, 20-21 (Mass. 2002)). “[K]nowledge of ‘every fact necessary to prevail on the claim’ is not required to put the plaintiff on inquiry notice and trigger the accrual period.” *Id.* (citing *Int’l Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc.*, 560 N.E.2d 122, 124 (Mass. App. 1990)).

*14 Here, Dr. Charest alleges that he discussed the allocation of royalties from the Pioneering Patents with Dr. Myers and Dr. Myers told him to “tread lightly” and “be careful.” As Dr. Charest explicitly alleges, he “understood these statements to be threats.” Am. Compl. ¶ 41. When Dr. Halvorsen threatened to reduce Dr. Charest’s share by allocating royalties to an undisclosed patent, Dr. Charest asked Dr. Halvorsen to show him the undisclosed patent application because he “wanted ... to determine the veracity of Dr. Halvorsen’s threat.” Am. Compl. ¶ 49. These facts demonstrate that Dr. Charest had sufficient information to know that he had been harmed (by the reduction in his royalties) and that this harm resulted from improper conduct on behalf of both defendants.

2. Did the Defendants Breach a Fiduciary Duty of Disclosure?

Where a fiduciary relationship exists, a party’s “failure to affirmatively and adequately disclose facts that would give rise to knowledge of the cause of action” tolls the limitation period “until the plaintiff actually becomes aware of the operative facts underlying the cause of action.” *OrbusNeich Medical Co., Ltd., BVI v. Boston Scientific Corp.*, 694 F. Supp. 2d 106, 115 (D. Mass. 2010) (citing *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159 (Mass. 1997) and *Mass. Eye and Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 242 (1st Cir. 2005)).

Tolling on this basis necessarily relies on the existence of a fiduciary relationship. Dr. Charest claims that Dr. Myers assumed the role of a fiduciary by virtue of his role as Dr. Charest's supervisor and academic advisor, and as head of Dr. Charest's laboratory, Am. Compl. ¶¶ 166-69, and that Dr. Myers breached his fiduciary obligations by using his position to obtain a more favorable share of the royalties from the tetracycline research at Dr. Charest's expense. Am. Compl. ¶ 262.

Dr. Charest's attempt to allege a fiduciary relationship fails for two reasons. First, I conclude that under Massachusetts law, a student-advisor relationship is not fiduciary in nature. Justice Fremont-Smith of the Massachusetts Superior Court addressed precisely this issue in *Battenfield v. Harvard Univ.*, No. 915089F, 1 Mass. L. Rptr. 75 (Mass. Sup. Ct. Aug. 31, 1993), and held that the relationship of an academic advisor to a student does not constitute a fiduciary relationship, explaining that "[o]ne party cannot unilaterally transform a business or academic relationship into a fiduciary relationship by reposing trust and confidence in another." *Id.* at *9. (Citing *Comstock v. Livingston*, 97 N.E. 106, 108 (Mass. 1912)).⁶

⁶ Dr. Charest contends that the relationship at issue in *Battenfield v. Harvard Univ.*, 1 Mass. L. Rptr. 75 (Mass. Sup. Ct. Aug. 31, 1993) was an employee-employer relationship, making that case inapplicable. It is clear that, as to at least one defendant in *Battenfield*, Sue Weaver Schopf, the relationship was purely that of an academic advisor, which the court determined was not fiduciary in nature. *Id.* at *9. Dr. Charest also relies upon *Chou*, 254 F.3d 1347, for the proposition that a student-advisor relationship is fiduciary in nature. In addition to being decided under Illinois law, there were specific facts existing in *Chou* that are absent in the present case. These include the fact that Chou's advisor "specifically represented to her that he would protect and give her proper credit for her research and inventions" and had "responsibility to make patenting decisions regarding Chou's inventions." *Chou*, 254 F.3d at 1362. There is no allegation that Dr. Myers made any such promises or assumed such responsibilities with respect to Dr. Charest.

Second, as Dr. Charest explicitly states in his opposition to the motion to dismiss "[t]his dispute involves Defendants' actions that span over a period of five years, all after Dr. Charest had left Harvard." Even if a fiduciary relationship arising from the academic mentorship existed at some point between Dr. Charest and Dr. Myers, that relationship would have ended when Dr. Charest left Harvard and was no longer Dr. Myers' supervisee.

*15 Because Dr. Charest has not alleged the existence of a legally cognizable fiduciary relationship—and certainly not one which existed at the time of the challenged conduct—the statute of limitations cannot be tolled on this basis.

3. Was the Statute of Limitations Tolled by the Doctrine of Fraudulent Concealment?

Where a defendant fraudulently conceals a cause of action from the plaintiff, the statute of limitation is tolled until the plaintiff has "actual knowledge" of his cause of action. *Demoulas*, 677 N.E.2d at 174; Mass. Gen. Laws c. 260, § 12. The doctrine of fraudulent concealment "concerns plaintiffs' ability to know of the 'cause of action' itself, not the particular identity of the tortfeasor." *Gauthier v. United States*, No. 10-40116, 2011 WL 3902770, *5 (D. Mass. Sept. 2, 2011) (citing *White v. Peabody Const. Co., Inc.*, 434 N.E.2d 1015 (Mass. 1982)).

When asked to sign an agreement which would have allocated him only 15% of the royalties from the Pioneering Patents, Dr. Charest refused and protested the decision. Am. Compl. ¶ 37-38. Dr. Charest was informed by OTD that Dr. Myers' share was not open for discussion. When Dr. Charest spoke to Dr. Myers about his outsize allocation, Dr. Charest's overtures were met with threats. Am. Compl. ¶ 41. Similarly, Dr. Halvorsen threatened to allocate royalties to another patent on which Dr. Charest was not an inventor and "Dr. Charest understood Dr. Halvorsen to be using the undisclosed patent as leverage over him." Am. Compl. ¶ 46. Dr. Charest in fact wrote to Dr. Halvorsen that he (Dr. Halvorsen) "issued the written warning that my portion of the inventor allocation would be reduced if I proceed forward." *Id.* These facts are the gravamen of Dr. Charest's claims and they were known to him as they occurred. The allegation of fraud and deceit—that "[i]f Dr. Charest had known the truth about the undisclosed patent application [i.e., that it was without any value], he would never have agreed to a reduction in his share of the Inventor Royalties"—suggests only that Dr. Halvorsen's leverage was weaker than Dr. Charest recognized and that Dr. Charest has come to regret acceding to the demands.

4. Conclusion

At bottom, any claim of tolling fails because the complaint demonstrates that Dr. Charest recognized the harm and wrongfulness of the conduct as it occurred. He was presented with an agreement that would reduce his share of the royalties, and threatened by Dr. Myers and Dr. Halvorsen if he did not accede to their demands. Rather than promptly bringing his claims, he chose not to do so for more than six years, after which time the statute of limitations had run.

I will consequently dismiss Counts I and III-VII to the extent that they depend upon the initial allocation of royalties from the Pioneering Patents, and Count II in its entirety, on statute of limitations grounds.⁷

⁷ In addition, because I have determined that no fiduciary relationship is properly alleged between Dr. Myers and Dr. Charest, I will dismiss Count IV in its entirety on that ground as well.

C. Breach of Contract Claims Based Upon Re-Allocation of Royalties to the Intermediary Patent Turn on the Propriety of the Process Employed in Effecting that Re-Allocation

*16 Dr. Charest contends that OTD violated the IP Policy in three distinct ways when re-allocating royalties from the Pioneering Patents to the Intermediary Patents.

First, the IP Policy provides a right of appeal of OTD's allocation decisions, allowing an affected individual to appeal "to the Committee on Intellectual Property for final determination." MD Ex. F, § V(F). Dr. Charest contends that Harvard breached this requirement by sending his appeal of OTD's re-allocation decision to an *ad hoc* committee rather than to the Harvard IP Policy Committee and by refusing him the opportunity to participate in a meaningful way in the appeals process. Am. Compl. ¶ 148.

Second, he claims that the IP Policy requires that royalties from the Tetrphase License be allocated between the Pioneering and Intermediary Patents according to the values assigned to those patents by the terms of the license and that Harvard's allocation breached this requirement. Am. Compl. ¶¶ 145-46.

Third, Dr. Charest claims that, if the license agreement does not place a value upon individual patents, royalties must be allocated according to their commercial value—which Harvard has failed to do. Am. Compl. ¶

147.

1. Did Harvard Breach the IP Policy in the Handling of Dr. Charest's Appeal?

After being informed of OTD's initial determination that 33% of the royalties from the Tetrphase License should be allocated to the Intermediary Patent, Dr. Charest sought to exercise his right to appeal this determination to the IP Committee—a right provided by Harvard's IP Policy. MD Ex. F, § V(F).

Dr. Charest alleges a series of irregularities and improprieties in the handling of his appeal to the OTD. First, Dr. Charest challenges the procedures of his appeal. Specifically, Dr. Charest alleges that, despite representations from Harvard that he would have notice of the appeal hearing and an opportunity to present materials to the IP Committee, he was not informed of the hearing of his appeal until after it had been completed, he was given no opportunity to respond to materials submitted to the committee by OTD, he was not informed of the substantive positions of adverse parties, and he never was able to present his substantive arguments to the IP Committee. Dr. Myers and OTD, in contrast, were afforded an opportunity to submit their substantive arguments to the committee, and two representatives from OTD, Mr. Kohlberg and Dr. Fenerjian, actually appeared before the committee during the hearing on Dr. Charest's appeal.

Second, Dr. Charest challenges the constitution of the committee which heard his appeal. He claims that OTD directed his appeal to an *ad hoc* committee convened for the specific purpose of hearing his appeal, rather than sending the appeal to the IP Committee, a standing committee appointed by Harvard's President.

While the IP Policy provides the opportunity for an appeal of an OTD determination, it does not dictate any specific procedural formalities that must be followed during such an appeal. It does not specify that an appellant will be given notice of the committee hearing, an opportunity to present substantive evidence to the committee, an opportunity to appear before the panel and present arguments, or an opportunity to be apprised of the arguments of adverse parties. And Harvard has not promulgated any rules or regulations governing the appeals provided under its IP Policy. This lack of definition, however, does not mean that Harvard is unfettered in structuring its appeals process. To have fulfilled its contractual promise, Harvard must provide an

appeal process sufficiently robust to be worthy of that term.

*17 In *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), the Fourth Circuit addressed a circumstance in which the restaurant chain Hooters and its employees agreed to arbitrate disputes “pursuant to the company’s rules and procedures ... as promulgated by the company from time to time.” *Hooters*, 173 F.3d at 936. Pursuant to this provision, Hooters promulgated rules that “when taken as a whole ... were so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.” *Id.* at 938. The Fourth Circuit held that doing so was a contractual violation, *id.* at 940 (“By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.”), and violated the implied covenant of good faith and fair dealing:

Hooters had a duty to perform its obligations in good faith ... Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck. Thus we conclude that the Hooters rules also violate the contractual obligation of good faith.

As the Fourth Circuit explained, Hooters and its employees agreed to a contract under which Hooters was obligated to establish an arbitration system and had discretion in fulfilling this obligation. Hooters’ discretion was not unbounded, however. Hooters could not establish such unfair rules as to make the arbitration process a sham and was required to exercise its discretion in accordance with the covenant of good faith and fair dealing inherent in all contracts. Here, Harvard was entrusted with contractual discretion to establish the procedures for hearing appeals from the royalty allocation decisions of OTD. Harvard, like Hooters, is obligated to exercise its contractual discretion in good faith when setting the rules for an appeal to the IP Committee.

Good faith execution of the contractual terms does not require that Harvard meet some Platonic ideal in designing its appellate procedures.⁸ Nor would it be appropriate for this court to determine the appropriate procedures to govern an appeal to the IP Committee and then attempt to measure Harvard’s conduct against that standard.⁹

⁸ Although not precisely applicable here, the Supreme Court’s statement that “(d)ue process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances” but instead “is flexible and calls for such procedural protections as the particular situation demands,” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citations omitted),

underscores the difficulty of trying to devise in the abstract the procedural requirements Harvard was obligated to provide to fulfil its promise of an appeal under Section V(F) of the IP Policy.

⁹ In the somewhat analogous circumstance in which a student has attacked the fairness of a University’s disciplinary proceedings, the First Circuit, applying Massachusetts law, has explained that “[w]here, as here, the university specifically provides for a disciplinary hearing before expulsion, we review the procedures followed to ensure that they fall within the range of reasonable expectations of one reading the relevant rules We also examine the hearing to ensure that it was conducted with basic fairness.” *Cloud v. Trustees of Boston University*, 720 F. 2d 721, 724-25 (1st Cir. 1983). In performing this review of a University’s internal decision-making, however, “courts are chary about interfering with academic ... decisions made by private colleges and universities.” *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) (citations omitted).

*18 However, I need not measure Harvard’s conduct only against such abstract ideals. According to Dr. Charest, Harvard made specific procedural promises to him. Although the communications were made subsequent to the formation of the contract, they are reflective of the parties’ understanding of what constitutes a proper appeals process under the IP Policy. *See Lanier Prof. Servs., Inc. v. Ricci*, 192 F.3d 1, 4 (1st Cir. 1999) (describing use of extrinsic evidence to interpret contractual terms under Massachusetts law). He alleges that Harvard represented that he would be given notice of the date of the hearing of his appeal, that he would be an opportunity to present his substantive arguments, that he would be given notice of the substantive positions of adverse parties, and that he would be given the chance to appear before the tribunal that would decide his appeal. Dr. Charest alleges that rather than making good on these promises, Harvard reneged and instead presented the outcome of the appeals process to him as a *fait accompli*.¹⁰ Arguably, such a proceeding would not constitute an appeal even without this extrinsic evidence — these are allegations of serious procedural shortcomings — but with that evidence, it is clear that Dr. Charest has alleged a breach of contract.

¹⁰ One of Dr. Charest’s complaints—though perhaps only a minor one—is that the committee that heard his appeal was convened by the Provost of Harvard, rather than the President. During oral argument, counsel for Harvard suggested that this deviation was excused because the Provost was empowered under the IP

Policy to make “amendments and modifications” to it. The authority to amend or modify a policy does not entail the authority to violate the rules. While the University may have the power to modify the rules, those rules are generally applicable and must be enforced as they stand—until they are actually modified. What Harvard may not do is alter the rules on the fly and on an *ad hoc* basis to suit its immediate purposes.

In the somewhat analogous context of a University disciplinary proceeding, Justice Ireland of the Massachusetts Supreme Judicial Court explained (in dissent, but on this point in it basic agreement with the majority) that: “if the university puts forth rules of procedure to be followed in disciplinary hearings, the university should be legally obligated to follow those rules ... the university cannot tell its students that certain procedures will be followed and then fail to follow them.” *Schaer v. Brandeis University*, 735 N.E.2d 373, 383 (Mass. 2000) (Ireland, J., dissenting). That approach is applicable here. Dr. Charest has alleged that Harvard promised him an appeals process worthy of the name, and revealed what specific procedures it understood to be owed under the contract, but did not follow through on this promise. If these allegations are true, Harvard has deprived him of the meaningful and fair hearing it was obligated to provide under Section V(F) of its IP Policy.

2. Did OTD Improperly Value the Intermediary Patent?

In addition to claiming that Harvard failed to abide by the promises it made regarding the procedural handling of his appeal, Dr. Charest also claims that the substantive outcome of that process violated Harvard’s IP Policy.

The IP Policy provides that “when an executed license agreement assigns different values to different Creations licensed as a package, that value shall be the value assigned for purposes of allocating Net Royalties among such Creations.” MD Ex. F, § V(E)(3).

Nowhere in the License Agreement is there an explicit statement regarding the relative value of the Intermediary and Pioneering Patents or an assessment of their relative value to Tetrachase. Instead, Dr. Charest relies on valuations implicit in the Tetrachase License royalty structure. As discussed above, as consideration for the initial grant of a license to the Pioneering Patents, Tetrachase made an upfront payment of \$250,000 to Harvard, along with commitments to make future

milestone payments (based upon the progress of commercializing the technology) and royalty payments (based upon sales). *See* Am. Compl. Ex. E, § 6. Although Dr. Charest alleges that the only consideration for the addition of the Intermediary Patent is \$25,000, Compl. ¶ 58, a review of the actual amendment, Compl. Ex. D, First Amendment, shows that it says the initial upfront payment is “partial consideration” for the license to the additional patent. This is a meaningful distinction because when a new patent is added to a royalty paying license, the licensor’s consideration may come in forms other than an upfront payment; if that patent increases the licensee’s sales, percentage-based royalties accruing will correspondingly increase as well. This would constitute additional consideration, not necessarily explicit, that rises or falls with the value of the additional patent. The \$25,000 upfront payment for the addition of the Intermediary Patents to the Tetrachase License cannot appropriately be viewed as an assignation of the relative value of that patent to the license.

*19 For purposes of evaluating Dr. Charest’s first alleged species of breach of contract, the relevant question is whether the “license agreement assigns different values to different Creations licensed as a package.” The Tetrachase license agreement does not. The most Dr. Charest has alleged (and the license itself shows) is that Harvard has received consideration in different forms for the different patents. This falls short of the explicit assignation of value necessary to trigger the provision of the IP Policy, which requires that the license actually “assign[] ... values” to different patents.

Alternatively, Dr. Charest contends that, if the license does not assign values to the different patents, OTD was required to do so in accordance with the commercial value of the patents—and that the allocation determination made by OTD was inconsistent with the commercial value.

The relevant language in the IP Policy provides that: “upon request of any of the Creators, OTD will determine the relative value to the package of each of the Creations.” MD Ex. F, § V(E)(3). This provision reveals the central failing of Dr. Charest’s second species of contract claim. In the absence of a specification of relative value in the license agreement, the contract does not entitle Dr. Charest to a specific royalty amount or an assessment against a specified benchmark. Rather, it provides him the right to have OTD make a determination of the relative value of his patent. And he has undoubtedly received such a determination from OTD in the form of a 33%/66% split which he subsequently appealed.

In his complaint, Dr. Charest sets forth various allegations of facts which would support his view that the value of the Intermediary Patent was relatively minimal and therefore OTD's determination was incorrect. *See, e.g.*, Compl. ¶¶ 58-63, 89-96. But Dr. Charest points to nothing that suggests that OTD was obligated to consider the various facts he enumerates in his complaint nor even that he was entitled to some objectively correct allocation of royalties.¹¹ The contractual promise was procedural, not substantive: that OTD would make a determination of relative value.¹² Harvard provided such a determination to Dr. Charest.

¹¹ This procedural obligation retains a substantive flavor because OTD must make a determination for "relative value" (emphasis supplied). The procedure must serve that ultimate end. If, for example, OTD held a hearing that allocated royalties 66%/33% because Dr. Myers was twice as old as Dr. Charest, or on the roll of a dice, it would have breached its contractual obligation to determine "value," no matter how many procedural safeguards were employed. However, Dr. Charest does not allege that OTD's hearing ignored value in this way. Indeed, the Amended Complaint alleges that OTD told Dr. Charest that its determinations would be based on "value." Am. Compl. ¶ 66, 84. As alleged, OTD made a determination of value and therefore kept its obligation under the IP Policy.

¹² Dr. Charest specifically alleges that "relative value" in the IP Policy must equate to "commercial value"—picking up on a phrase used in the letter from OTD informing inventors of the outcome of Dr. Charest's appeal of OTD's determination. Am. Compl. Ex. B. That may be so, as Massachusetts allows course of dealings evidence to be used to resolve ambiguous contract terms. *See Keating v. Stadium Mgmt. Corp.*, 508 N.E.2d 246, 251-52 (Mass. App. Ct. 1987). But since the Amended Complaint does not allege that OTD ignored value, commercial or otherwise, this is immaterial.

D. Tortious Interference with Contractual Relations

*20 In support of his claim for tortious interference with contractual relations, Dr. Charest asserts that Dr. Myers worked with OTD, Dr. Baker, and Dr. Plamondon to misrepresent the relative value of the two patents to the "ad hoc committee" hearing the allocation appeal. Am. Compl. ¶¶ 162-165. In order to make out a claim for tortious interference with contractual relations, a plaintiff

must allege "(1) he had a contract with a third party; (2) the defendant knowingly induced the third party to break that contract; (3) the defendant's interference, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *G.S. Enterprises, Inc. v. Falmouth Marine, Inc.*, 571 N.E.2d 1363, 1369 (Mass. 1991).

Dr. Charest's allegations fail to state a claim for tortious interference with contractual relations for several reasons. First, while he alleges that Dr. Myers worked with OTD, Dr. Baker, and Dr. Plamondon to present false information to the *ad hoc* committee, he fails to link these allegedly false statements to any breach of a contractual provision. Nothing in the IP Policy bars the IP Committee from hearing the views of Dr. Myers, Dr. Plamondon, and OTD. As discussed above, even if their false submissions led the IP Committee to reach an outcome unfavorable to Dr. Charest, that does not constitute a breach of contract; the IP Policy does not guarantee to Dr. Charest any substantive outcome.¹³

¹³ To be clear, a lower allocation to the Pioneering Patent may be the harm resulting from some alleged breach of contract. But the substantive fact of a lower allocation does not constitute a breach of any contractual provision.

Second, to state a claim, the alleged interference must be "improper in motive or means." The Massachusetts Supreme Judicial Court has explained that "for example ... a party is justified in interfering with a third-party's contract with another by filing a lawsuit in a good faith effort to assert legally protected rights" but that this conduct would be malicious if the initiator "does not have probable cause to believe the suit will succeed, and is acting primarily for a purpose other than that of properly adjudicating his claims." *G.S. Enterprises*, 571 N.E.2d at 1370. Here, Dr. Charest has initiated a proceeding—the appeal to the IP Committee—that is in some ways akin to a lawsuit. Dr. Myers, as an individual with a stake in the process, undoubtedly has the right to participate in the appeal. In doing so, Dr. Myers' conduct is protected by something akin to the "litigation privilege." *Cf. Lottek-Jick v. O'Toole*, 29 Mass. L. Rptr. 269 (Mass. Super. Ct. 2011) (applying privilege to arbitration as well as litigation). That privilege provides that statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged so long as such statements relate to that proceeding. *Sriberg v. Raymond*, 345 N.E.2d 882, 883 (Mass. 1976). This privilege applies not only to claims of defamation and slander, but also to other torts, including claims of intentional interference with contractual

relations. *See, e.g., Blanchette v. Cataldo*, 734 F.2d 869, 877 (1st Cir. 1984). Dr. Charest alleges that Dr. Myers and other participants made false statements regarding the relative value of the Pioneering and Intermediary Patents to the IP Committee during the hearing of Dr. Charest's appeal. It is imperative for the functioning of such a process that participants be free to express their opinions and advocate for their viewpoint without fear of legal liability. The allegations set forth by Dr. Charest do not show that Dr. Myers' participation in the appeal was "improper in motive or means." To the contrary, this participation was the exercise of a protected right—the right to participate freely in litigation affecting one's interests.¹⁴

¹⁴ If Dr. Charest alleged that Dr. Myers had interfered with the contract by causing the appeal to be unfair in its very constitution, for example by convening a prejudiced tribunal in the first place, this privilege might not apply. But Dr. Charest only alleges that Dr. Myers interfered through his communications with the committee.

*21 Third, resolving Dr. Charest's claim of tortious interference would require a finder of fact to determine whether Dr. Myers falsely represented the value of the Intermediary Patent, as Dr. Charest has alleged. That determination, however, is vested in the IP Committee and it is for that committee, not for this court, to determine the appropriate relative values of the patents. For the court to make that determination would be an unwarranted interference in a decision that the contractual arrangements among the parties has reserved to the IP Committee.

E. Promissory Estoppel

In his promissory estoppel claim, Dr. Charest simply seeks to enforce the terms of the IP Policy as a promise made by Harvard to induce Dr. Charest to assign the Pioneering Patents to Harvard. Under Massachusetts law, the doctrine of promissory estoppel is implicated only in "the absence of an express contract." *Northrup v. Brigham*, 826 N.E.2d 239, 244 (Mass. App. Ct. 2005). Because I have already determined that the IP Policy is a contract binding upon Harvard, promissory estoppel is inapplicable here.

F. Violation of Chapter 93A

Although Dr. Charest alleges a litany of conduct which he contends constitutes a claim under Massachusetts General Law Chapter 93A, *see* Compl. ¶¶ 180-191, the allegations boil down to essentially three instances of conduct.

The first, discussed above, is that surrounding the initial allocation of royalties among the inventors of the Pioneering Patents. And, as discussed above, claims relating to those events are untimely and barred by the statute of limitations and will be dismissed.

The second instance of conduct is OTD's decision to reallocate royalties to the Intermediary Patent and then, when Dr. Charest challenged this determination, engineering the appeal process to favor Harvard's faculty member and punish Dr. Charest for exercising his contractual right of appeal. According to Dr. Charest, OTD threatened that his allocation would be further reduced if he challenged its allocation decision, and followed through on this threat by diverting the appeal from the IP Committee to a committee selected to be favorable to Dr. Myers and OTD and by preventing Dr. Charest from having meaningful involvement in the appeal.

These allegations concern the internal governance procedures of Harvard University for allocating royalties arising from patented inventions developed jointly by multiple researchers working at Harvard University and the relationship between Dr. Charest and Harvard from which these allegations arise is akin to that of an employee and an employer. Chapter 93A is inapplicable to disputes that are private and concern the internal governance of an entity. *See, e.g., Zimmerman v. Bogoff*, 524 N.E.2d 849, 856 (Mass. 1988) ("The transactions at issue here were principally private in nature and thus do not fall within the purview of G.L. c. 93A."); *Riseman v. Orion Research, Inc.*, 475 N.E.2d 398, 400 (1985) (Chapter 93A is inapplicable in a case involving "the internal governance of a corporation."); *Manning v. Zuckerman*, 444 N.E.2d 1262, 1265 (Mass. 1983) ("[E]mployment agreements between an employee and the organization of which he is a member do not constitute 'trade' or 'commerce.'").

The third alleged instance of conduct arose after the IP Committee rendered its decision regarding Dr. Charest's appeal of OTD's initial allocation. Since that decision, until the onset of this lawsuit, Harvard refused to pay to Dr. Charest any of the royalties owed to him according to the IP Committee's decision unless and until Dr. Charest signed a release accepting the committee's decision and releasing Harvard from any liability for its conduct.

***22** In its February 3, 2014 brief regarding these events, Harvard explained that the OTD made payments to all inventors until they became aware that Dr. Charest sought to appeal the royalty allocation decision. At that time, they suspended all payments to all inventors. After the IP Committee rendered its decision, OTD informed the inventors of the decision and requested “a signed acknowledgment—*not* a release of claims-upon receipt of which OTD would distribute each inventor’s respective share of the royalties.” According to Harvard, this release is important because once Harvard makes royalty payments to an inventor, it is their long-standing practice not to seek recoupment of overpayments. Rather, in the case of a misallocation, Harvard makes the underpayee whole out of its own funds. The acknowledgment of the IP Committee’s decision mitigates Harvard’s risk of making such overpayments which it will later be required to cover. With the exception of Dr. Charest, all of the inventors returned the requested acknowledgment and received their royalty payments.

I find several problems with Harvard’s explanation of its conduct. First, while Harvard claims that it requested only an “acknowledgment” as a condition of releasing funds, the subsequent letter provided by the plaintiff appears to show that Harvard was holding Dr. Charest’s funds in escrow and that “an appropriate release of claims would ... be required” as a condition of the release of those funds to Dr. Charest—directly contradicting Harvard’s representations to this court. Second, while Harvard represented in its latest brief that it suspended payment of all royalties to all inventors upon receiving notice of Dr. Charest’s appeal, in an earlier brief submitted to this court, the defendants stated: “Dr. Myers received his 50% share of the first royalty payment in January 2008 and 50% of every other royalty payment to the Intermediate Method Patent since that time”—a statement which seems to suggest that Dr. Myers received his payments without interruption from 2008 until the present. It would appear strikingly unfair if Harvard continued to make payments to its own faculty members while suspending payments to unaffiliated (or only formerly affiliated) scientists when the relevant contract provided no greater priority to Dr. Myers than to Dr. Charest. Third, at the core, Harvard’s representations simply reaffirm Dr. Charest’s allegations, albeit with some context provided. Dr. Charest stood on contractually equal footing with his co-inventors on the Pioneering Patents—each had the same contractual rights to payments from the royalty streams (although in different percentages). Those who signed and return the requested forms from Harvard (whether termed an acknowledgment or release), received disbursements of funds. Dr. Charest did not sign and return the forms

requested by Harvard and Harvard, in turn, refused to release funds held in escrow to him. Yet nothing in the contractual arrangements between Harvard and Dr. Charest—or Harvard and the co-inventors—made signing these forms a valid precondition to the disbursement of funds or otherwise justified this differential treatment. This was a unilateral decision by Harvard that it was able to effect because it controlled the monies flowing from the Tetraphase License.

Unlike the allegations regarding OTD’s conduct and the IP Committee’s allocation decisions, the Chapter 93A claim relating to Harvard’s withholding of monies may not be dismissed as arising purely from a private matter of Harvard’s internal governance. At the time that the funds were withheld, Dr. Charest was no longer associated with Harvard in a business venture and the internal governance procedures necessary for the disbursement of funds had concluded. As Harvard explained in its March 1, 2011 letter, “[a]ll appeal rights under the IP Policy have now been finally and completely exhausted.” At that point, the only then-existing relationship between Harvard and Dr. Charest was that Harvard had contractual obligations to pay-over money received from the Tetraphase License.¹⁵ Dr. Charest had no relationship with Harvard nor with Tetraphase after the completion of the IP appeal. At least at the stage of a motion to dismiss, I cannot conclude that this is anything other than a commercial relationship—little more than that of creditor and debtor—and not a joint enterprise.

¹⁵ Harvard’s argument that Dr. Charest’s statement that he and the IP Committee are both a part of the “Harvard community” makes them all members of a joint enterprise is hardly compelling; it is tantamount to a contention that no Harvard alum may sue another under Chapter 93A because every alum is a member of the “Harvard community.”

***23** The remaining question is whether the conduct alleged by Dr. Charest is of the sort outlawed by Chapter 93A. Chapter 93A makes unlawful “unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” Mass. Gen. Laws. c. 93A, § 2. While the standard for a violation of Chapter 93A has sometimes been described in uninformative terms, such as whether the conduct has “attain[ed] a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce,” *Levings v. Forbes & Wallace, Inc.*, 396 N.E.2d 149, 153 (Mass. 1979), Massachusetts courts have specifically identified certain conduct that violates Chapter 93A. In particular, the Supreme Judicial Court has said that conduct “in disregard of known contractual arrangements

and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes,” *Anthony’s Pier Four*, 583 N.E.2d at 475 (citing *Wang Labs., Inc. v. Business Incentives, Inc.*, 444 N.E.2d 1262 (Mass. 1986)), and the First Circuit has explained Chapter 93A makes it unlawful for a party to withhold “monies which they legally owed as a form of extortion — to force [the plaintiff] to do what otherwise it could not be legally required to do.” *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc.*, 754 F.2d 10, 17-19 (1st Cir. 1985). Dr. Charest has alleged that Harvard and OTD has done precisely this. While knowing that royalties are owed to Dr. Charest and while paying royalties to other similarly situated inventors, Harvard has withheld royalties from Dr. Charest until and unless he signs various forms acknowledging acceptance of Harvard’s decision and executes releases of liability—acts which he has no contractual or other legal obligation to perform.

Adding to the unfair quality of the alleged is the obvious inequality between the parties, not only in terms of institutional size and authority, but also in terms of the contractual structure. With the Participation Agreement and IP Policy, Harvard has created a mechanism for the licensing and commercialization of the inventions developed by its faculty and students. While presenting significant benefits to inventors, this mechanism vests authority and discretion in OTD in terms of structuring licensing agreements, valuing inventions, and, as relevant here, collecting and distributing royalties. Dr. Charest’s allegations suggest that OTD abused this authority-engaging in what the defendants aptly, if disapprovingly, describe as an allegation of a “grand conspiracy”—which hindered and punished Dr. Charest for the exercise of his contractual rights by refusing to pay amounts owed to him. While it may be that evidence developed during discovery will show that Harvard and

OTD’s conduct has been proper and forthright, Dr. Charest’s allegations suggest otherwise.

IV. CONCLUSION

For the reasons set forth more fully above, I will grant Defendants’ Motion to Dismiss (Dkt. No. 11) as to Claims II-VI. I will also GRANT Defendants’ Motion to Dismiss Claim I to the extent that those claims relate to the initial allocation of royalties among the inventors of the Pioneering Patents. I will also GRANT Defendants’ Motion to Dismiss Claim VII to the extent that those claims relate to the initial allocation of royalties among the inventors of the Pioneering Patents. The Defendants’ Motion to Dismiss is DENIED as to Claim I, as it relates to Defendants’ failure to provide, procedurally, the appeals process promised. The Motion to Dismiss is DENIED as to Claim VII, as it relates to Defendants’ withholding of monies owed.

In addition, because I have dismissed all of the claims against Dr. Myers, he is dismissed from the case as a defendant.

It is FURTHER ORDERED that the parties shall file on or before March 4, 2016 a joint scheduling submission outlining a proposal for bringing this case to final judgment.

All Citations

Not Reported in Fed. Supp., 2016 WL 614368