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 MEMORANDUM OF LAW IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Summary judgment should enter for Plaintiff Benjamin Edelman on Count 1 (breach of contract) as to liability, leaving for trial the question of damages and other remedies. The undisputed facts demonstrate that Plaintiff prevails as a matter of law because Defendant President and Fellows of Harvard College (Harvard) failed to comply with its obligations under applicable policies. In particular, the Principles and Procedures for Responding to Matters of Faculty Conduct (the P&P) required Harvard to provide Plaintiff with "the evidence gathered" in the Faculty Review Board (FRB) process, but it did not, hindering Plaintiff's ability to identify and correct errors and misrepresentations. Meanwhile, the P&P required the FRB to begin by articulating a falsifiable allegation of misconduct, to stay true to that allegation, to give adequate notice and opportunity to respond, and to reach conclusions about whether Plaintiff had violated any Harvard Business School (HBS) policy. Instead, the FRB in 2017 convened despite the lack of any allegation of misconduct; considered nebulous questions like "evidence of changed behavior"; expanded the scope of its inquiry beyond the initial notice letter with only a few days for Plaintiff to respond; and created a false impression of wrongdoing without determining

whether or not Plaintiff had violated any policy. These breaches of the P&P, individually and collectively, undermined Plaintiff's standing at HBS and his candidacy for tenure. Because there is no dispute of material fact as to these breaches of Harvard's contractual policies, summary judgment on liability for Plaintiff should enter on Count 1.[1]

I. Facts[2]

Plaintiff Benjamin Edelman was a tenure-track professor at HBS. (SF 1.) In 2014, Plaintiff was involved in two incidents that garnered negative publicity. (SF 6.) In early 2014, Plaintiff published research into an adware company called Blinkx on his website, suggesting that Blinkx was engaged in wrongdoing. (*See id.*) Plaintiff had conducted a portion of that work as paid research for investors. Although he disclosed that fact, he was criticized for the adequacy of his disclosure after Blinkx publicly attacked him. (*See id.*) In late 2014, Plaintiff complained about an overcharge by the Sichuan Garden restaurant, and when his communications were widely publicized, some believed they reflected negatively on HBS. (*See id.*)

In 2015, Plaintiff submitted his application for tenure as a full professor. (SF 1.) The tenure review process was set forth in a document known as the "Green Book," which Plaintiff expected would govern his application. (SF 2-3.) HBS evaluated candidates for tenure on three dimensions: intellectual contributions, teaching contributions, and contributions to the HBS community. (SF 2.) Under HBS's procedure, a tenure application was first reviewed by a subcommittee of three tenured faculty members, who gathered internal and external reference letters concerning the candidate's qualifications, then voted on whether to recommend tenure. (SF 3.) A candidacy was then reviewed by a larger Standing Committee ("SC") composed of

[1] Summary judgment on Count 1 would render Count 3 moot. Plaintiff reserves Count 2 for trial.
[2] Citations of the form "(SF __.)" are to Plaintiff's Statement of Undisputed Material Facts. Certain facts are reserved for later discussion of the specific issues.

members of all subcommittees active for that year, who likewise voted. (*Id.*) Then the Appointments Committee ("AC"), comprised of all tenured and active formerly-tenured professors at HBS, convened to discuss and vote on each case. (*Id.*) At both the SC and AC voting stages, voting members could include written comments explaining their votes, and many did. The HBS Dean had sole responsibility for tenure recommendations to the President of the University. (SF 3.) The Dean considered faculty votes and feedback in making his decision. (*Id.*)

In spring 2015, HBS promulgated the P&P, which established the FRB to review alleged misconduct by HBS faculty, including tenure candidates. (SF 4.) The P&P was created to respond to Plaintiff's situation, in light of the previous year's events. (SF 5.) When the P&P was presented to faculty, Plaintiff understood that it would apply to him. (*Id.*) He reviewed it and was reassured by its procedures, which he thought were fair. (*Id.*) Among those procedures: the FRB would start by drafting an "allegation" of misconduct and provide notice to the respondent faculty member; it would investigate the allegation and prepare a draft report; the respondent would have a right to review the draft report and "the evidence gathered" and respond in writing; and the FRB's final report would include conclusions about whether the respondent had committed misconduct or violated HBS Community Values. (*See* JA-366-369.) Earlier drafts contemplated the faculty member receiving only "a summary" of the evidence gathered, but the final P&P guaranteed the right to review "the evidence gathered" without qualification. (SF 16.)

The FRB reviewed Plaintiff's conduct in 2015, issuing a draft report concluding that Plaintiff had not met HBS's standards for Effective Contributions to the Community and had not upheld HBS's Community Values in the Blinkx and Sichuan Garden incidents and in dealings with HBS staff, including a dispute about a proposed diminution to classroom projectors, which Plaintiff believed would negatively impact teaching. (SF 6.) Prof. Amy Edmondson chaired the

FRB. (SF 7.) In 2015, the other members were Prof. Leonard Schlesinger, Prof. Forest Reinhardt, and Executive Dean for Administration Angela Crispi. (*Id.*) Associate Dean Jean Cunningham provided administrative support. (*Id.*) Instead of voting on Plaintiff's tenure application, the SC recommended extending Plaintiff's appointment at HBS by two years and revisiting his tenure case then. That is what HBS Dean Nitin Nohria decided to do. (SF 8-9.) In conjunction with the extension, HBS leaders asked Plaintiff to teach a new course, join a new teaching group, move his office location away from his unit and close to the new teaching group, and serve on the Academic Technology Steering Committee. (SF 10.) Plaintiff was told that he would have to demonstrate that he had learned from the FRB's 2015 report, and that the assigned activities would help him learn and make that showing. (SF 11.) Plaintiff received positive feedback on each of those steps; FRB members and deans could not articulate other ways that Plaintiff could have demonstrated changed behavior. (SF 12-13.)

In spring 2017, Senior Associate Dean Paul Healy asked Plaintiff to write a statement to the FRB about what he had learned. (SF 18.) HBS convened the FRB again in 2017 to evaluate Plaintiff, with Prof. Stuart Gilson replacing Reinhardt. (SF 14, 20.) Unlike in 2015, the FRB did not formulate or provide notice of an allegation to Plaintiff. (SF 15, 17.) Instead, the FRB informed Plaintiff that it would assess his understanding of his past "problematic" conduct and "whether there is sufficient evidence of changed behavior" that could be expected to continue in the future. (SF 19.) In the FRB's first meeting, before it began investigating or gathering evidence, FRB members had already concluded that Plaintiff had not changed and should not be given tenure. (SF 21.) Gilson said that Plaintiff was "irredeemable" and should have been fired over the Blinkx incident. (SF 21(a).) Edmondson said she believed it was "obvious that we shouldn't have him on the senior faculty." (SF 21(c).)

The FRB's 2017 inquiry included interviews and gathering documents. (SF 22.) The FRB identified witnesses whose perspectives were particularly relevant based on their interactions with Plaintiff, including faculty, HBS Chief Information Officer Steve Gallagher, and IT staff. (SF 18, 27, 28, 31.) Crispi was assigned to interview all the staff witnesses, who ultimately reported to her. (SF 30.) Edmondson assigned her to speak with Gallagher and "2-3 more from IT," but Crispi interviewed only one person from IT and did not interview Gallagher. (SF 31-32.) FRB members took notes of their interviews, but those notes were not shared with Plaintiff. (SF 29.) The FRB obtained documents, including Crispi's memo about past staff interactions with Plaintiff (which criticized Plaintiff for assisting faculty with disabilities), and emails from other faculty, but did not share them with Plaintiff. (SF 23-26, 36, 38.)

After completing interviews of other witnesses, the FRB interviewed Plaintiff on August 14, 2017. (SF 33.) According to the only notes of the interview, FRB members asked him just three questions, all general questions about the prior two years. (*Id.*) FRB members did not recall asking any other questions. (*Id.*) The FRB did not ask Plaintiff about any staff interactions described in Crispi's memo, nor did it ask him about any feedback it received from interviewing faculty or staff. (SF 33-35.) The FRB also did not ask him about topics that would later be central to its report, including his outside activities and disclosures on his written work. (SF 33.)

On August 24, 2017, Healy forwarded Edmondson and Cunningham correspondence from an HBS faculty member related to a *Wall Street Journal* article about possible conflicts of interest with Microsoft and Google that mentioned Plaintiff. (SF 36.) Plaintiff had periodically performed paid work for Microsoft for over a decade, which was permitted under HBS's "Outside Activities" policy. (*See* SF 36.) The article described Google paying for influential research, and mentioned Plaintiff without detail. (*Id.*) Cunningham questioned whether this

subject was within the scope of the FRB's review or involved new allegations, and noted that many other HBS faculty worked with outside companies. (SF 36.) The FRB nonetheless began examining Plaintiff's outside activities, including a class action lawsuit that he filed as an attorney against American Airlines (AA). (SF 37.) Members of the FRB found and shared internally articles about Plaintiff's outside activities. (SF 38.) They did not share them with Plaintiff or let him respond to them. (*Id.*) On September 1, 2017, Edmondson asked Plaintiff to submit, within four business days, lists of his outside activities and publications, reflections on certain aspects of those activities, and answers to questions about the AA litigation. (SF 39.) Much of the FRB's report focused on these subjects. (*See* SF 43.)

The FRB wrote a draft report that they provided to Plaintiff. (SF 40-41.) The FRB gave Plaintiff six business days to respond in writing, and he did so. (SF 41.) The FRB made minor changes and wrote an addendum to explain them. (*Id.*) The final report, addendum, and correspondence between Plaintiff and the FRB were provided to SC and AC members. (SF 75.) No other evidence was provided to Plaintiff, the SC, the AC, or the Dean. (SF 42, 75, 80.)

One section of the report, titled "Respect for others inside the institution," consisted largely of bullet-point comments presented as statements from the FRB's interviews with faculty and staff, expressing opinions about Plaintiff and his behavior. (SF 44, 46.) These comments were presented anonymously and without context.[3] (SF 47.) The report overrepresented witnesses' negative comments. During the drafting process, Schlesinger wrote that too many comments were positive to Plaintiff, and as a result, Crispi and Cunningham added more negative statements. (SF 45, 48.) Crispi in particular added two comments, which she said were "quotes" from her "interviews," accusing Plaintiff of creating "unproductive work" for others

[3] The only exception is that the report indicated which came from faculty in Plaintiff's unit.

and of "go[ing]… down rabbit holes" with inadequate knowledge. (SF 49.) Those comments were not actually quotes from any of Crispi's interviews, and Crispi has been unable to identify who, if anyone, said them or in what context. (*Id.*)

The FRB believed it was important to understand how witnesses knew and had interacted with Plaintiff, and flagged specific witnesses and categories of witnesses as particularly significant. (SF 27, 50.) But the FRB's decontextualized presentation of witness comments prevented readers from knowing what weight to give each remark. (SF 51.) For instance, Plaintiff worked closely with the heads of his two teaching groups and with his faculty support specialist. (*See* SF 52, 54, 55.) Each made strongly positive comments about him, but each was quoted only once in the report, and there was no way to tell which comments were theirs. (SF 52-55.) In contrast, the FRB took three negative comments from the interview of a professor with whom Plaintiff interacted in person only twice over two years. (SF 56.)

The comments were also misleadingly excerpted—removing adjacent words or sentences that change meaning; removing witnesses' callout about information not first-hand; repeatedly selecting the rare negative remark from a positive interview; and, in two instances, inserting remarks that the interviewer now says weren't from interviews after all. (SF 57-63.) *See infra* § 2(C). Without the interview notes, Plaintiff could not point out how the FRB skewed the evidence, or place negative statements in context. (SF 63-64.)

The report's other main section, titled "Outside activities and conflicts of interest," identified "potential concerns" about Plaintiff's "work, outside activities and disclosures." (SF 65.) The FRB discussed Plaintiff's past paid work for Microsoft and disclosures of that work in his writings about Google, which it claimed were "inconsistent." (SF 66.) Although the HBS Conflict of Interest Policy governed such disclosures, the FRB did not analyze the disclosures

individually for compliance with that policy, or come to any conclusions about whether Plaintiff had violated it. (SF 67, 72.) The FRB also expressed concern that a lawsuit Plaintiff brought as an attorney against American Airlines could lead to negative publicity for HBS. (SF 68.) The only evidence cited for that possibility was a blog post from 2015 that was not about the 2017 lawsuit. (*Id.*) Plaintiff pointed out this error in his response, but the FRB did not remove or alter the reference. (*Id.*) The FRB did not explain either whether or how the lawsuit violated any HBS Community Values or policies. (SF 68, 73.) Reviewing the FRB report, multiple tenured faculty members argued that it was inappropriate to include Plaintiff's disclosures and the airline lawsuit. (SF 69-71.) The FRB's report stated that it "was not an investigation" and "did not seek to pass judgment." It ended by saying that the FRB was "unable to say, with full conviction, that the issues raised following the 2015 review have been satisfactorily resolved." (SF 73.)

Schlesinger presented the FRB's final report to the SC. (SF 74.) Faculty members asked who the FRB had talked to, but Schlesinger provided no information beyond what was in the report. (SF 74.) The SC concluded that Plaintiff exceeded HBS's academic standards, as had the subcommittee, based on internal and external letters that praised his academic work. (SF 88-89.) Ultimately, the SC vote was split. (*Id.*) Those who voted against Plaintiff cited the FRB report as the reasons for their opposition. (*Id.*) Plaintiff's tenure case proceeded to the AC, where tenured faculty had access to the FRB report. (SF 75.) At the AC meeting, Edmondson was invited to talk about the FRB review, and spoke more than anyone. (SF 76.) Ultimately, 59% of the AC voted in favor of granting Plaintiff tenure (41-29 with 2 abstentions). (SF 78.) Many who opposed tenure stated that the FRB report swayed them against Plaintiff's candidacy. (SF 77.)

After the AC vote, Dean Nohria considered faculty input in deciding whether to recommend Plaintiff for tenure. (SF 79, 81.) Nohria asked Healy for information on past AC

votes, which revealed that all candidates with a 75% vote had been promoted, as had all but one candidate with 65%. (SF 82.) Nohria believed that it was "very difficult… to move forward" on the basis of the 59% vote, and did not recommend that Plaintiff be granted tenure. (SF 83-84.) The FRB was an important factor in his decision. (SF 86.) In contemporaneous notes before he announced his decision to the faculty, he described a "zone of discretion for the dean" where a vote fell between 65% and 80% in favor, and stated that the vote in favor of Plaintiff was outside that zone. (SF 85.) Nohria testified that Plaintiff's scholarship was "well above the bar" for a tenured professor, and his teaching also met HBS standards, but that he was turned down for not meeting community standards – the issues addressed by the FRB. (SF 86.) Because Nohria did not recommend Plaintiff for tenure, his application was denied and his employment at HBS ended. (SF 87.)

II. Discussion

A. Standard of Review

Summary judgment under Mass. R. Civ. P. 56 is appropriate when, "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). "In order to defeat summary judgment, the [non-moving party is] required to 'set forth specific facts showing that there is a genuine issue for trial.'" *Athanasiou v. Selectmen of Westhampton*, 92 Mass. App. Ct. 94, 98 (2017), quoting Mass. R. Civ. P. 56(e). Summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." Mass. R. Civ. P. 56(c).

To prove his claim for breach of contract, Plaintiff must show that he had a valid contract with Defendant, that Defendant breached the contract, and that Plaintiff suffered harm as a result.

See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 690 (2016). Plaintiff may establish liability even without proving specific damages, because a breach of contract implies at least nominal damages. *See Davidson Pipe Supply Co., Inc. v. Johnson*, 14 Mass. App. Ct. 518, 520 (1982); *St. Charles v. Kender*, 38 Mass. App. Ct. 155, 161 (1995). In interpreting contracts with university faculty, the Court employes the "standard of reasonable expectation – what meaning the party making the manifestation, the university, should reasonably expect the other party to give it." *Wortis v. Trs. of Tufts College*, 493 Mass. 648, 662 (2024), quoting *Berkowitz v. Pres. & Fellows of Harvard College*, 58 Mass. App. Ct. 262, 269 (2003). If the wording of a contract is clear, it must be enforced as written. *See Wortis* at 663.

B. The P&P Were Contractual in Nature.

By adopting and implementing the P&P, Harvard promised its faculty members that it would follow the FRB process it established in addressing alleged breaches of HBS's Community Values by faculty. Courts have had little difficulty applying faculty handbooks and similar policies as contracts. *See Wortis*, 493 Mass. at 662-64 (noting that contracts with faculty often "comprise[] a collection of documents, such as an offer letter, a faculty handbook, and other rules or policies of the college"); *Berkowitz*, 58 Mass. App. Ct. at 267-69; *cf. Schaer v. Brandeis Univ.*, 432 Mass. 474, 478 (2000) (assessing whether university failed to meet student's reasonable expectations based on student handbook, "thereby violating its contract"). The P&P gives faculty members rights, including the right to receive evidence gathered. *See Wortis* at 665-66 (substantive provisions of university policy were enforceable as contracts). Harvard purported to apply the P&P to Plaintiff's situation in 2015 and in 2017, and made no attempt to withdraw or alter it; accordingly, Plaintiff reasonably expected that Defendant would abide by the P&P as written. *Cf. O'Brien v. New England Tel. & Tel. Co.*, 422 Mass. 686, 694 (1996) ("employees

may have a reasonable expectancy that management will adhere to a manual's provisions"). The P&P represented contractual commitments by Harvard.

C. Defendant Breached the P&P By Failing to Provide Plaintiff With the Evidence Gathered.

The P&P explicitly promises to provide the faculty member under review with "the evidence gathered" by the FRB. It first states that the draft report "should include the evidence gathered," but then provides that "[t]he faculty member… *will* have an opportunity to review the allegation, *the evidence gathered*, and the draft report, and to respond in writing." (JA-367 (emphasis added).) The policy makes no exceptions. The distinction between "should" and "will" suggests that certain evidence might be omitted from the FRB's report (which would ultimately go to a broad audience of faculty), but that the faculty member involved will receive all evidence gathered, without exception.[4] The P&P's separate discussion of confidentiality is much more tentative, nowhere suggesting it overrides the firm requirement to provide the evidence gathered. Nor does the P&P's promise of flexibility authorize Harvard to bend the procedure past the breaking point by omitting protections the P&P makes mandatory.

It is beyond dispute that Harvard did not provide Plaintiff with the evidence gathered. The FRB members and staff acknowledged that the FRB's notes of witness interviews were part of the evidence gathered. (SF 22.) Not only did Harvard withhold the interview notes, it did not even give Plaintiff the names of any of the witnesses the FRB interviewed. (SF 23.) The FRB also received a variety of documents, such as Dean Angela Crispi's compendium of remarks from certain faculty and staff, that likewise were not shared with Plaintiff. (SF 24.)

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[4] Although the text of the final P&P is unambiguous, its history is also notable. In earlier drafts, Harvard considered having the draft report include only "a summary of the evidence gathered" and giving the faculty member a less specific "opportunity to review materials." (SF 16.) Rejecting that "summary" approach, the final version instead gave the faculty member the right to see "the evidence gathered" without qualification. (*Id.*)

Withholding evidence prejudiced Plaintiff in responding. The FRB's report presented a series of statements as quotes from its interviews, purportedly accurately recounting what speakers said. But the FRB selectively excerpted several quotes, artfully omitting context to change meaning. Three examples: (1) The FRB suggested that Plaintiff mistreated staff but was deferential to faculty, relying on a quote, "With his superiors, he has more of a filter." But the full statement in the notes was, "With his superiors, he has more of a filter (as we all probably do)." Far from the sharp criticism presented in the report, the witness actually reported a normal tendency to speak differently in different contexts. Furthermore, the interview notes make clear that the interviewee specifically flagged this as "2nd/3rd hand" information (although the FRB sought only personal knowledge), and this witness confirmed in his deposition that the comment was not based on anything he witnessed firsthand, as all his interactions with Plaintiff were favorable. (SF 59.) (2) The report included another professor's remarks: "He's abrupt. He lacks grace. He's more apt to pressure others—he asks questions the way you might in a seminar," but left out the further statement: "But he's intellectually sharp. Asks great questions. He agrees to disagree." The excerpt suggests closed-mindedness, but the full statement indicates the opposite. (Tellingly, Edmondson's contemporaneous summary of this interview was strongly positive. (SF 58.)) (3) An IT staff member was quoted as: "He can have a tendency to threaten to take something to the next level." But the full quote continues: "… the next level, *but he has taken a step back*." (SF 60.) Far from indicating that Plaintiff was harsh as of 2017, this witness actually indicated improvement. Since the FRB was allegedly examining evidence of changed behavior, it misled readers when it omitted information about timing and change.[5]

[5] Plaintiff would have used the interview notes to contest or contextualize these and other negative statements attributed to witnesses, in a variety of ways. (SF 57, 63.)

Even worse, in two cases, the FRB presented as quotes certain statements that were nothing of the kind. Specifically, the FRB report states "He leaves a lot of unproductive work for people since he jumps to solutioning without thinking through implications or engaging others" and "He goes off on tangents or down rabbit holes, and he doesn't know as much as he thinks he knows." Crispi, who added these purported "quotes" from her "interviews" to the report, admitted in deposition that they are neither quotes nor from her interviews; their source is unknown. Yet the FRB report indicated that the remarks were quotes from interviews: it explains that "members of the FRB met with 21 individuals" to solicit input on Plaintiff, and introduces witness statements with words like "comments such as", "using phrases such as", and "expressed as," each indicating that the words were taken directly from interviews. If Plaintiff had had the interview notes, he would have called out the false quotations as indicating bias or sloppiness at best, and arguably outright fabrication.

Withholding information about who was interviewed also allowed the FRB to hide the limitations of the evidence it gathered. Plaintiff's interactions with staff were a substantial topic of review, particularly his dealings with IT staff. Accordingly, Edmondson instructed Crispi to interview HBS's Chief Information Officer (CIO), two other staff, and "2-3 more from IT." (JA-956.) But Crispi did not interview the CIO, and interviewed only one person from IT. She did not interview anyone from Media Services, which is notable because Plaintiff had had extensive dealings with Media Services, including the classroom projector dispute that the FRB addressed in 2015. Neither Plaintiff nor anyone reading the report understood that its section on interactions with staff was based on such limited information, nor that 6 of 13 quotes that the FRB categorized as negative came from just 2 of 21 witnesses. Faculty voting on Plaintiff's

tenure case wanted to understand "the population that [the FRB] had talked to," but that information was, improperly, withheld from them and from Plaintiff.

D. Defendant Breached the P&P Because the FRB Failed to Articulate an Allegation, Expanded Its Scope Late In the Process, and Did Not Reach Conclusions.

It is also beyond dispute that Harvard committed additional breaches of the P&P that deprived Plaintiff of adequate and timely notice of the allegations against him, limited his ability to respond to the most critical issues in the FRB's report, and allowed the FRB to hide behind vague innuendo without actually determining whether Plaintiff had engaged in wrongdoing.

a. The FRB Did Not Issue an Allegation of Misconduct.

The obligation to articulate a falsifiable allegation of misconduct is central to the FRB process. The P&P states that if there are "instances of *egregious* behavior or actions, or incidents that indicate a *persistent and pervasive pattern* of problematic conduct," the Dean may refer an "allegation" to the FRB. (JA-366 (emphasis in original).) (Indeed, an "allegation" is the *only* thing a Dean may refer to the FRB.) When the Dean makes such a referral, the FRB Chair must write a "summary of the allegation, as it is known at the time" at the outset of the process, and then the FRB must "investigate the allegation." (*Id.* at 2.) In the section on promotion cases, the P&P states: "For cases where previous or current conduct raises a question of whether the candidate meets the School's criteria for 'Effective Contributions to the HBS Community,' the FRB will be asked to undertake a review, *beginning with drafting an allegation as outlined above*." (*Id.* at 3 (emphasis added).) Thus, in situations like Plaintiff's where questions are raised about colleagueship, the P&P incorporates the earlier procedures related to an "allegation." And a core principle in the P&P was "Allegations should be articulated in writing and evidence presented clearly." (*Id.*)

The FRB in 2017 considered Plaintiff's behavior after 2015, but did not identify any allegation of misconduct (let alone egregious behavior or a pattern of problematic conduct) since then. (SF 15, 17.) With no allegation to investigate, the FRB should have stopped its work there. Instead, according to its initial 2017 letter, the FRB resolved to "assess" three points: "whether you understand the aspects of your conduct—regardless of your intent—that made them problematic"; "whether there is sufficient evidence of changed behavior"; and "whether there is a reasonable expectation that your changed behavior will be sustained in the future." (SF 19.) Each of these was a matter of opinion, not amenable to a conclusion as to the questions the P&P required the FRB to answer: "whether misconduct has occurred" and "whether [the] candidate has upheld the School's Community Values." Collecting such opinions was not an "allegation" under the P&P. (SF 19.) In the absence of an allegation, Plaintiff was left to guess how he might prove a negative (that there would be no future Blinkx or restaurant incidents). The FRB ended up soliciting and giving voice to free-ranging opinions on Plaintiff's personality, divorced from any connection to HBS policies. The P&P authorizes no such thing.

b. The FRB Added New Matters Near the End of Its Inquiry.

Though the P&P offers no process for expansion during an inquiry and never authorizes inquiry divorced from a clear written allegation, the FRB dramatically expanded its scope on September 1, 2017, 22 days after completing witness interviews, 18 days after interviewing Plaintiff, and with the deadline for its report looming. The FRB then began investigating Plaintiff's service as an attorney in a consumer class action and his outside activities generally, and gave Plaintiff only four business days to provide extensive information. After discussions with Edmondson, Cunningham objected to adding these matters so late because the new material was "in effect an allegation" and "outside the mandate of the current FRB review." (SF 36.) HBS witnesses could not explain why the matters were added or who decided to include them. (SF

37.) Yet they took up approximately 40% of the FRB's final report. (JA-416-425 .) A reasonable faculty member would not understand the P&P to indicate that the FRB could undertake an inquiry in the absence of an allegation of wrongdoing, expand its inquiry when the process was nearly complete, and make those additions the center of its report.

This shift in the FRB's scope hindered Plaintiff's ability to address the FRB's concerns. Earlier in the process, Plaintiff had multiple chances to gather information over a period of weeks, to express his position with care, and to respond and clarify orally. When the FRB expanded its scope, it granted Plaintiff only four business days to respond, and no chance to be heard in an interview. (SF 39.) The compressed time frame provided inadequate opportunity to address the late-added subjects. This rush created not just potential for error, but actual error. The FRB criticized Plaintiff for "inconsistent" disclosures regarding his work for Microsoft in six instances where he allegedly wrote or spoke about Google, but the FRB did not analyze each of those disclosures under the HBS Conflict of Interest Policy. In one instance, the FRB quoted a disclosure on a web page linking to an article, but the article itself contained a more detailed disclosure. In another, the disclosure the FRB criticized was drafted not by Plaintiff but by an editor of a journal owned by HBS—after Plaintiff provided all relevant information. A third article mentioned Google at most peripherally, discussing early practices of a company that Google acquired years later. (SF 66-67; JA-1152.) The FRB's moving target denied Plaintiff the opportunity to uncover all the reasons why the FRB's concerns were misplaced, as he could have if these issues had been stated at the outset as the P&P required. (*See* JA-1145-1146, 1148-1155, ¶¶ 6-7, 14-25.) Although Plaintiff had a limited opportunity to respond to these issues in the draft report, the FRB refused to revise its analysis even when Plaintiff identified blatant errors (such as the FRB citing a 2015 blog as evidence of response to a 2017 lawsuit). By that point, the FRB's

direction was set. Opportunity to reply is not the same as opportunity to be heard in the first place. *See Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 691 (2016) (written rebuttal not equivalent to advance notice required by policy).

c. The FRB Did Not Reach Conclusions.

The P&P required the FRB's report to include "the FRB's conclusions on whether misconduct has occurred" and, in a tenure case, "[t]he FRB's conclusions on whether a candidate has upheld the School's Community Values." But rather than reach such conclusions, the FRB offered only slurred intimations that Plaintiff had, in some unspecified way, fallen short. The FRB was designed to evaluate compliance with HBS's Community Values. (SF 4.) However, the FRB did not conclude that Plaintiff had violated any Community Values. (SF 73.) Nor did the FRB decide whether Plaintiff had committed misconduct or violated any policy. (*Id.*) Instead, the FRB's summary was that it was "unable to say, with full conviction, that the issues raised following the 2015 review have been satisfactorily resolved."

If the FRB had tried to reach conclusions as required by the P&P, it would have had to do the work of examining specific incidents in light of applicable policies—work that it just refused to do. Disclosures on academic work were governed by the HBS Conflict of Interest Policy. The FRB should have applied that policy to Plaintiff's disclosures to evaluate whether each disclosure did or did not comply. Then faculty members reading the report could have evaluated the soundness of the FRB's analysis. Instead, the FRB misleadingly summarized the disclosures and vaguely described them as "at best, inconsistent" and "omit[ting] many of the required elements" without explaining why even one disclosure supposedly fell short of what the policy required. (JA- 422.) The FRB would also have had to explain what policy was implicated by the class action and its supposed "PR risk to Harvard" (JA-424). Or if the FRB argued that the class action violated HBS Community Standards, it would have had to reconcile that contention with

its insistence that another HBS Professor, Max Bazerman, did nothing wrong in serving as named plaintiff in the same case. (SF 69.) Attempting to defend the lack of a conclusion, the FRB report stated on page 1 "this process was not an investigation, and we did not seek to pass judgment." (JA-416.) But the P&P allows no such disclaimer, requiring both "investigation" and "conclusions." Instead of investigating allegations defined at the outset, and instead of applying HBS policies to reach clear conclusions, the FRB report focused on matters not included in the scope of its inquiry, and ultimately rested on implication and innuendo. This was not what the P&P promised, and not what Plaintiff expected.

E. Plaintiff Suffered Harm From These Breaches.

Both the Subcommittee and Standing Committee confidently concluded that Plaintiff had more than met HBS's standards for academic work. (SF 88.) Letters in support of Plaintiff's candidacy were effusive. (SF 89.) Internal letters praised "an amazingly intellectual resource" and "knowledge and brilliance" in "an unusual combination of talents" and an "extraordinary" publication record with "exceptional impact" including "economic theory at its best" and "risk-taking [in] confronting public issues." (*See* SF 89.) External letters praised "the careful forensic work that academics are capable of but rarely spend the time to carry out … break[ing] the ivory tower mold," "as rigorous as … impactful", a "force of nature [and] amazing role model," finding "no one like him" in "quality of the top papers, quantity of papers, quantity in top journals, diversity of outlets, influence in the academy and, perhaps most importantly, influence beyond the academy." (*See id.*) One letter-writer said a recent talk by Plaintiff was the "best discussion I've ever seen of any paper in any context … everyone in the room learned something … [a perspective] no other economist (or lawyer) could provide." (*See id.*) The Subcommittee concluded Plaintiff was not just "clearly over the bar in terms of [academic research], he is also over the bar on both managerial and educator audiences"—meaning Plaintiff satisfied all three

paths to HBS tenure, an achievement the Subcommittee called "most unusual" because *only one* is required. (*See* SF 88.) Notes from the 2017 Standing Committee discussion stated "Everyone in attendance believed that [Plaintiff] passed our standards for scholarship, course development, and teaching." (*See id.*) Healy remembered that Plaintiff's work was "really excellent and more than met our standards for promotion to full professor." (SF 90.) Dean Nohria believed that Plaintiff's scholarly contributions were "well over the bar" of expectations for a tenured professor and that Plaintiff's teaching met HBS's standards. (SF 86.)

Nonetheless, the FRB report—tainted by the breaches described above—led to the denial of Plaintiff's application for tenure and the loss of his job at HBS. The Standing Committee vote was split because of the FRB report. The discussion of the Appointments Committee meeting centered on the FRB report, with Edmondson speaking more than anyone else. Many faculty who voted against him stated at the time that the FRB report swayed their vote. Dean Nohria reviewed the FRB report (but not the underlying evidence), and considered the faculty vote and comments in light of prior history, in which he and his predecessor had promoted nearly every candidate with at least a 65% vote. He did not approve Plaintiff's tenure application because of the issues addressed by the FRB. Dean Nohria testified that the FRB report was an important factor in deciding not to recommend Plaintiff for tenure. And because Dean Nohria did not recommend Plaintiff for tenure, Plaintiff's employment at HBS ended.

As explained above, the FRB report would not have taken the same form, or had the same impact, if not for the repeated violations of the P&P. If Plaintiff had received "the evidence gathered" as the P&P promised, he would have identified errors and responded to misleading excerpts (and even fabrications) attributed to witnesses. If the FRB had begun with an allegation as the P&P required, it would have had to conclude that there was no allegation of misconduct to

investigate, and there would have been no report. If the FRB had not expanded its inquiry at the last minute, much of the material that swayed faculty votes would not have been included, or Plaintiff would have had an adequate opportunity to rebut it. And if the FRB had reached actual conclusions about Plaintiff's conduct, it would have had to conclude that he had not violated HBS policies or Community Standards. Many of the faculty members who voted against Plaintiff found the choice difficult; if only five changed their votes, the faculty vote would have placed Plaintiff's case into a zone where past practice indicates Dean Nohria would have recommended him for tenure. And because Nohria considered the report itself as an important factor, a different report without the breaches of the P&P would probably have led him to a different choice apart from the specific faculty vote. The evidence clearly shows that Plaintiff suffered damages because of Harvard's breaches; a factfinder at trial must determine the extent of his damages.

III. Conclusion

For the foregoing reasons, the Court should enter partial summary judgment in Plaintiff's favor as to liability on Count 1 as requested herein; and such other and further relief as may be just and proper.

Respectfully submitted,
BENJAMIN EDELMAN,
By his attorneys,

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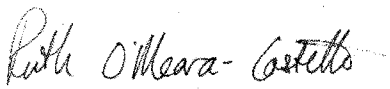
Dated: October 24, 2025

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 October 24, 2025.



Ruth O'Meara-Costello