**COMMONWEALTH OF MASSACHUSETTS**

**Superior Court** **Suffolk, SS**
**Business Litigation Session**

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| BENJAMIN EDELMAN,<br><br>Plaintiff,<br><br>v.<br><br>PRESIDENT AND FELLOWS OF HARVARD COLLEGE,<br><br>Defendant. | ) | Civil Action 2384CV00395-BLS2 |

**DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

By its attorneys,

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## INTRODUCTION

Defendant President and Fellows of Harvard College ("Harvard") and Plaintiff Benjamin Edelman ("Edelman") agree that Plaintiff's claims in Count One, alleging breach of contract, can be decided on summary judgment. But, as Harvard has argued in its Memorandum in Support of its Motion for Summary Judgment, summary judgment should enter in Harvard's favor, not Plaintiff's. The arguments Plaintiff advances in support of his Cross-Motion for Partial Summary Judgment in fact reinforce Harvard's argument: that Harvard Business School's ("HBS") legitimate concerns about Edelman's judgment—and not any claimed violation of Harvard's Principles and Procedures for Responding to Matters of Faculty Conduct (the "FRB Principles")—resulted in HBS denying tenure.

Plaintiff has failed to establish that the FRB Principles created an implied contract. He has likewise failed to establish that HBS violated the FRB Principles, or that then-Dean Nohria would have recommended Edelman for tenure if only the FRB had followed the process that Plaintiff says it should have followed. Indeed, Plaintiff's arguments—based at heart on the view that he *deserved* tenure and HBS was wrong to deny it—illustrate precisely the "tendency toward absolutism and extreme certainty" that led the FRB and Dean Nohria to conclude that questions about Plaintiff's judgment disqualified him from the "privilege of lifetime employment" at HBS.

## ARGUMENT

"Summary judgment 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.'" *Surabian Realty Co. v. NGM Ins. Co.*, 462 Mass. 715, 718 (2012) (citing *Fuller v. First Fin. Ins. Co.*, 448 Mass. 1, 5 (2006)). In the context of a tenure dispute, "[c]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge on subjective [judgments]," including judgments

about the applicants' "contributions to the university community." *Berkowitz v. President & Fellows of Harvard Coll.*, 58 Mass. App. Ct. 262, 269, *rev. denied*, 440 Mass. 1101 (2003) (citations, quotations omitted). Viewed in the light most favorable to Harvard, the undisputed facts establish that Harvard did not violate a contract with Plaintiff, and summary judgment should be decided in Harvard's favor.

## A. The Undisputed Facts Establish That the FRB Principles Did Not Create an Implied Contract

Plaintiff bears the burden of establishing that the FRB Principles created an implied contract. *See Jackson v. Action for Bos. Cmty. Dev. Inc.*, 403 Mass. 8, 9-10 (1988) (stating that if no implied contract was found to exist, "award of summary judgment for the defendant and denial of summary judgment for the plaintiff were proper"). Rather than attempting to meet this burden, Plaintiff instead effectively asks the Court to assume, without evidence or argument, that the FRB Principles form a contract. The three cases Plaintiff relies on (*see* Plaintiff's Memorandum of Law in Support of Cross-Motion for Partial Summary Judgment, at 10-11)[1] do not establish that the FRB Principles were a contract, as in those cases the courts had no occasion to consider whether the policies at issue created legally binding contracts between the parties. In *Wortis v. Trs. of Tufts Coll.*, 493 Mass. 648 (2024), the parties *agreed* that the plaintiffs' tenure contracts included defendant Tufts University's Faculty Handbook, and that certain other university policies were also part of the tenure agreements between the parties. 493 Mass. at 653. Here, Harvard does *not* agree that the FRB Principles were part of any employment contract with Plaintiff. In *Berkowitz*, "the university *assumed* that the handbook constituted a contract" for the purpose of plaintiff's motion to dismiss. 58 Mass. App. Ct. at 269 n.5 (emphasis added). Here, Harvard does *not* assume that the FRB Principles constitute a contract with Plaintiff. And in *Schaer v. Brandeis Univ.*, 432

[1] Hereinafter referred to as "Mem."

Mass. 474 (2000), the parties did "*not dispute* the fact that a contractual relationship exist[ed] between" the parties, so the court there "assume[d], without deciding, that such a contractual relationship exist[ed]." 432 Mass. at 477 (emphasis added). Here, Harvard *disputes* that the FRB Principles created or were part of any contractual obligations between it and Plaintiff.

Further, and without repeating the arguments advanced in the Memorandum in Support of Harvard's Motion for Summary Judgment, the undisputed facts show that Plaintiff cannot meet his burden to prove the FRB Principles created any contractual rights or obligations. Under the factors set forth in *Jackson v. Action for Bos. Cmty. Dev. Inc.*, 403 Mass. 8 (1988) and its progeny, the circumstances here indisputably demonstrate that the FRB Principles are not a contract, including that they were merely intended to serve as guidance for the faculty tasked with carrying out a faculty review (Ex. 18, JA-367-68); that they were not negotiated with Plaintiff nor did he manifest his assent to them; (Ex. 12); that they were not made readily available for faculty to review or download at will (Ex. 3 at 176:15-177:6); and that Plaintiff's own conduct, wherein he himself paid no special attention to the FRB Principles that were provided to him during the period in which *he was subject to an FRB*, demonstrates he did not think of the FRB Principles as a contract (Exs. 12; 14 at JA-286; 3 at 26:7-11, 151:16-152:21, 155:9-11, 175:210-176:5.). *See Jackson*, 403 Mass. at 15; *Battenfield v. Harvard Univ.*, 1993 WL 818920, at *9-10 (Mass. Sup. Ct. Aug. 31, 1993); *Grant v. Target Corp.*, 2017 WL 2434777, at *4-6 (D. Mass. Jun. 5, 2017). "Because [Plaintiff] has failed to demonstrate any of the elements necessary for the formation of a contract, [his] breach of contract claim must fail," and his motion for partial summary judgment on that claim should be decided in Harvard's favor. *Battenfield*, 1993 WL 818920 at *10.

**B. <u>The Undisputed Facts Establish That the FRB Did Not Violate the FRB Principles</u>**

Plaintiff's summary judgment arguments fare no better even if the Court were to assume that the FRB Principles constituted an implied contract with Plaintiff, as the undisputed evidence

viewed in a light most favorable to Harvard—as it must be viewed for the purpose of *Plaintiff's* Motion for Partial Summary Judgment—shows that HBS did not violate the FRB Principles.[2]

**1. Plaintiff's Claim That the FRB Failed to Provide "the Evidence Gathered" Is Without Merit**

Plaintiff's claim that the FRB failed to disclose the "evidence gathered" runs counter to the standard the Court must use when construing the language of the FRB Principles: that of "reasonable expectation," that is, "whatever meaning that [Harvard] 'should reasonably expect the other party' (i.e., its faculty members) 'to give it.'" *Guarino v. MGH Inst. of Health Pro., Inc.*, 2019 WL 1141308, at *8 (Mass. Super. Jan. 16, 2019) (quoting *Schaer,* 432 Mass. at 478 ). More fundamentally, Plaintiff's supposed concerns about the FRB's decision not to disclose the identity of the witnesses or produce interview notes misapprehends the objective of the FRB process when used in connection with a tenure case. The goal—as with any other process associated with a tenure review—is to provide the Dean (and by extension the Standing and Appointments Committees which give the Dean advice) valuable information to aid his decision whether to recommend a candidate for tenure, granting that candidate (absent extraordinary circumstances) the "privilege of lifetime employment" at HBS. (Ex. 8 at 162:16-24.)

The principle of ensuring candor in important processes like tenure review and the critical role confidentiality plays in ensuring such candor has long been recognized by the courts. *See, e.g.*, *U.S. v. Nixon*, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process"); *Clark v. U.S.*, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors

[2] Indeed, as Harvard argues in its own Motion for Summary Judgment, even when viewed in the light most favorable to Edelman, the undisputed evidence establishes that Harvard did not violate the FRB Principles.

were made to feel their arguments . . . were to be freely published to the world."); *Wakefield Teacher's Ass'n v. School Committee of Wakefield*, 431 Mass. 792, 802 (2000) (it "would not be unreasonable to conclude that disclosure of this sensitive and careful investigation [in public school teacher disciplinary proceeding] and analysis would make the same kind of investigation and analysis difficult, if not impossible, in the future. An assurance of confidentiality to those who voluntarily participate in such investigations likely produces candor."); *see also* Moore's Federal Practice-Civil §26.46 ("The courts have consistently maintained a well-founded concern for the confidentiality of information in tenure review files. Tenure review committee members obtain much of the peer review information contained in those files by virtue of promises of confidentiality, and if breaches of those assurances occurred as a matter of course in denial of tenure lawsuits, the integrity of the tenure process might be severely compromised.").

Here, Plaintiff casts the FRB Principles' clear concern for confidentiality as "tentative" (Mem. at 11), but if HBS could not solicit confidential information from staff and faculty as part of a tenure candidate's FRB review, HBS' ability to gather information to help the Dean's decision making would be compromised. This concern with confidentiality extended to the interviews the FRB conducted in July and August 2017, as the interview guide created by the FRB included a statement to witnesses that: "The FRB will draft a report with its findings. . . The report will include a listing of interviews. We will strive in the report to provide feedback in the aggregate, and to avoid comments or quotes that can be directly ascribed back to an individual." (Ex. 36.) What staff member would speak candidly about a professor without the protection of confidentiality, knowing the professor—if tenured—would interact with the staff member going forward with full awareness of what that staff member had said?

If there were any doubt about the close connection between candor and confidentiality, the Court need look no further than the process Massachusetts uses to nominate judges. The Executive

Order establishing the Judicial Nominating Commission ("JNC") makes clear how important confidentiality is at each stage of the process. *See* Mass. Ex. Order 610 (2023) § 1.5.4 ("No discussions, motions, opinions, votes or facts revealed during meetings of the Commission may be directly or indirectly disclosed by any Commissioner to any person other than another Commissioner in accordance with this Code of Conduct."). If lawyers whom the JNC interviews could not speak confidentially, would any report reservations about a judicial candidate? A university's favorable tenure decision effectively confers "the privilege of lifetime appointment." (Ex. 8, 162:16-24.) For that reason, ensuring that university administrators can get candid input is vital to that process. As a consequence, permitting them to receive that information confidentially was critical, and Plaintiff's expectation of receiving such confidential information was unreasonable.

Plaintiff argues that because prior drafts of the FRB Principles called for the FRB to provide a "summary of the evidence gathered," the final version, by omitting the word "summary," must have required the FRB to produce the names of the witnesses and the interview notes to him. (Mem. at 11, n. 4.) This is incorrect because Harvard could not have expected that receiving the names and notes of witnesses to the 2017 FRB Report would be part of Plaintiff's "reasonable expectations" of the FRB process. Plaintiff did not receive the witness names or interview notes from the FRB's 2015 Report, did not have knowledge about whether any other FRB between 2015 and 2017 provided that information to respondents[3] (Ex. 3, 163:17-24), and, as a member of HBS's

[3] Plaintiff attempts to wave away this crucial fact by taking the position that "the quotes [from interviews] were so much more central to and maybe pivotal to the 2017 report. They were front and center. And they were supporting contentions that didn't otherwise have any support in the report. Versus in the 2015 report, honestly, the interviews didn't seem to be nearly as important . . . . My expectation in both years were [sic] that if interviews were important, the relevant information necessary to evaluate the interview remarks, including the speaker, the context, those would be the two most important pieces of information would be provided." (Ex. 3, 162:6-163:5).

faculty since 2007, was clearly on notice of the centrality of confidentiality to processes such as tenure review (Ex. 48.) In addition, Plaintiff fails to explain how prior drafts of the FRB Principles, which Plaintiff never saw and which were exchanged only among the small group of faculty charged with drafting them, could possibly have contributed to *Plaintiff's* reasonable expectations about how the FRB would proceed.

Further, Plaintiff's argument about "the summary" of the evidence gathered misses the main point about the drafting history of the FRB Principles. On March 6, 2015, following a meeting with Dean Nohria, Assistant Dean Jean Cunningham circulated a revised draft of the FRB Principles to the small committee tasked with creating them that included, for the first time, a separate section explaining how the FRB Principles should be applied in the context of a tenure case. (Exs. 155; 156.) That draft section, which is nearly identical to the one included in the final version of the FRB Principles, makes clear that the guidelines for the FRB's work in connection with tenure review are intended to be different from the guidelines that apply when the FRB's work is unrelated to a promotion case. In the context of tenure cases, HBS may convene an FRB without the predicate requirement of "*egregious* behavior or actions" or "incidents that indicate a *persistent and pervasive pattern* of problematic conduct." (Ex. 18at JA-366.) Instead, there need only be "previous or current conduct [that] raises a question of whether the candidate meets the School's criteria for 'Effective Contributions to the HBS Community,'" for an FRB to be convened as part of the tenure process. (*Id.* at JA-368).

This distinctiveness of the tenure-specific FRB procedures informs how the tenure section,

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This position is not only nonsensical, it cannot be squared with his other testimony or the position he has taken throughout this litigation that "the evidence gathered" means *all* the evidence, presumably without regard to its weight or prominence in an FRB report. *See, e.g.*, *Id.* at 157:6-10) ("Not every subject of an investigation gets to see all the evidence gathered. Some people might only get to see the evidence relied on or the evidence cited, something like that. But here it says I'm going to get all of it.") Plaintiff cannot have it both ways.

including its drafting history, of the FRB Principles should be read and interpreted. From the time this tenure-specific section was added to the draft FRB Principles, it explicitly contained only one cross-reference to the other sections of the FRB Principles: the cross-reference to "drafting an allegation as outlined above." (*Id.*). It never contained a cross-reference to either a "summary of the evidence gathered" or "the evidence gathered." As such, this aspect of the more general FRB procedures should not be read into the tenure-specific section of the FRB Principles.[4]

Plaintiff also wildly claims that the 2017 FRB Report's section that summarized the information gathered from witnesses was misleading, false, sloppy, and even contained "outright fabrication[s]." (Mem. at 12-13.) The undisputed facts however, interpreted most favorably to Harvard, demonstrate that the inclusion of the information gathered from witnesses who had interacted with Plaintiff during the interim two years was a deliberative exercise intended to provide a thorough report of the FRB's overall findings in service of the Dean's ultimate decision-making process. That some comments included in the 2017 Report were not word-for-word quotations is not, as Plaintiff contends, evidence that the FRB intended to mislead or outright fabricate evidence against him. The Report never presented the bullet points as direct quotations and notably did not use quotation marks; rather, the 2017 Report framed the bullet points as "input" and "feedback." (Exs. 1, 183:14-184:3; 62, 112:17-114:3; 66, 212:4-6, 217:10-20.) The FRB, in assessing whether there was sufficient evidence of changed behavior, was not obligated to present Plaintiff in the best possible light, but it did not purposefully set out to paint him entirely negatively either (indeed, the FRB members kept out some of the most inflammatory statements against him, and 27 of the 40 comments summarized were in fact positive). (Exs. 26, 50.)

[4] Without conceding Plaintiff's argument, Harvard notes that Plaintiff also recognizes that not all provisions of the FRB Principles were incorporated into the tenure-specific section of that document. *See* Mem. at 14 (arguing that the language in the tenure section "drafting an allegation as outlined above" "incorporates the earlier procedures" outside of the tenure section).

Plaintiff next claims that having access to the identity of the witnesses and their interview notes would have allowed him to point out supposed flaws in the 2017 Report and effectively rebut the negative *opinions* some colleagues and staff had of him. But this argument simply demonstrates that the concerns the FRB expressed about Plaintiff in 2015—his "tendency toward absolutism and extreme certainty that his view is the right view [and] [h]is apparent certainty that his is the single right perspective, without regard for others' perspectives"—remained in place in 2017 and, indeed, continue today. (Ex. 14 at JA-280.)[5]

Two of his complaints regarding witness notes demonstrate how clearly Plaintiff's arguments miss the forest for the trees: Professor W16 comments about Plaintiff and the FRB's information-gathering from IT staff. As to the first, Plaintiff claims that he only interacted in-person with W16 in two meetings.[6] (Ex. 182 ¶ 11.) But this misses the point. W16 was a member of a committee that Dean Nohria asked Plaintiff to serve on in order to demonstrate that Plaintiff could work well with others and consider other perspectives. *See* (Exs. 31; 58; 112.) Two meetings, coupled with email and other interactions, was enough evidence for W16 to form largely negative views of Plaintiff:

> Bad: Incapable of seeing why his preferred solution can't/won't be implemented, but doesn't come from a bad place, he really believes his way is the right and only way. But he can't see why some things are just not feasible for the IT group, or are not best for other EC instructors. Displays really limited judgment; doesn't understand the consequences of his own actions, unable to be reasonable.
>
> Recent example: There is overwhelming demand by faculty to be videotaped, but

[5] Plaintiff does not, of course, contend that he was harmed by the FRB's decision not to provide the identities of the individuals who provided the 27 positive comments the FRB provided. (Mem. at 11-14.)

[6] Undisputed evidence establishes that, even if that claim is true, Plaintiff also interacted with him over email. (*See, e.g.*, Ex. 125.)

> IT faces capacity constraints. But [Edelman] has a particular view, doesn't understand why all faculty and classes can't be videotaped given technology that's available to support this (could videotape every class continuously, edit later). IT argues ([W16 ] agrees) this is not practical, yet [Edelman] pushes back, not empathetic to other side or point of view, can't relate to others. In conversations, [Edelman] is abrasive, arrogant, stubborn.
>
> [W16 ] has never seen [Edelman] change [h]is mind in any conversation that he's ever witnessed.
>
> The world is [black and white] to [Edelman]
>
> Unable to restrain himself. Comes from a good place, but no sense of what's appropriate. Is unable to see other side's point of view (contrary to HBS, where the case method is based upon finding common ground, trying to understand the perspective of those who disagree with you).
>
> [W16 ] is concerned that [Edelman's] approach harkens back to the "older model" of faculty/staff interactions (I'm smarter than you are, you are inferior), has no sense that [Edelman] can/will change, risk of creating a bad environment, fostering heightened fear of failure. (Ex. 50 at JA-552-53.)

Perhaps ironically, negative perceptions of Plaintiff only *increased* when Plaintiff met with other members of the Committee when W16 was not present. W10 (whose observations did not make it into the final report (*compare* Ex. 26 *with* Ex. 50)) noted that "When Linda and W16 ] in room [Edelman] more in control. Comes across as arrogant. Long emails, inappropriate. Absorbs meeting[s]." (Ex. 50 at JA-547). W07 observed that "W16 and Linda not at meeting so like the cover not there. Started to go off the rails." (*Id.*). These observations are consistent with the concerns the FRB expressed about Plaintiff acting differently when his superiors were present.[7] Crucially, these views represent *subjective*

[7] During his deposition, Plaintiff continued to discount negative opinions held by staff members and made clear that he still believes that these differences in *opinion* could be "reconciled" or even "discredited" merely because one or more higher-ranking faculty members held a different view. For example, in commenting on the remarks staff member W11 made to the FRB about Plaintiff, he stated:

assessments of Plaintiff, and Plaintiff cannot demonstrate that if he had known the identity of the witnesses or had access to the FRB's interview notes, Dean Nohria would have reached a different decision. *See Guarino*, 2019 WL 1141308, at *8 (noting that decisions about who may join a university's faculty "necessarily hinge on *subjective judgments* regarding the professor's academic excellence, teaching ability, creativity, contributions to the university community, report with students and colleagues, and *other factors that are not susceptible of quantitative measurement*."), citing *Berkowitz*, 58 Mass. App. Ct. at 269 (emphasis added).

As to Plaintiff's complaints about the FRB's collection of information from IT staff, he mischaracterizes what FRB member Associate Dean Angela Crispi did to gather this information. Plaintiff claims that the FRB did not interview W07 , HBS's Chief Information Officer at the time.[8] (Mem. at 5.) Yet Associate Dean Crispi testified that during the two-year period

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> But in response to the [W11 quotes, I would have pointed out that my sole interactions with W11 [were] in the field 3 teaching group. And Jeff Polzer and Cynthia Montgomery were both present in all of those discussions. And so to the extent that W17 , senior faculty member and course head, and W13 W13 senior faculty member and the only female faculty member in the room or the only senior female faculty member in the room, perceived me one way and [W11 perceived me a different way. I want the reader to reflect on *whose evaluations they are prepared to credit*. These three people disagree. And whether we do it as *two against one or the faculty votes get credited over a disagreeing staff vote* or the course head gets credited over disagreeing with anyone; *by any of those standards,* W11 *would not be credited and the favorable assessments would be credited* . . . . Q: Do you have any reason why her view should be credited less than a faculty member's view just because she is a staff member? A: Oh, not at all. I think everyone's view should count. *But to the extent that there is a disagreement and you are trying to figure out how you'd address or in any event reconcile different people saying different things,* we are all in the same room and all have the same discussion. (Ex. 3, 191:14-193:15 (emphasis added).)

[8] Plaintiff also incorrectly states that FRB Chair Amy Edmondson "assigned" Associate Dean Crispi to speak with "2-3 more [people] from IT." As communicated to Associate Dean Crispi,

between 2015 and 2017 she was "gathering feedback from staff about" Plaintiff, including from W07 (Ex. 6, 132:23-133:25; *see also id.*, 144:20-145:1), which she summarized in typewritten notes for when the FRB reconvened in 2017. (*Compare* Exs. 27; 94 *with* Exs.89; 90; 91; 92; 93; 161.) W07 comments to Associate Dean Crispi during those two years were the result of interactions with Plaintiff, including serving on the same Committee as Plaintiff and W16 ] (Ex. 27 at JA-470-71) and email exchanges about campus technology (Ex. 91.) For example, W07 noted that Plaintiff "[l]eaves a lot of work for people doing things;" "[t]akes them in an unproductive path and then people tune you out;" "No matter how well intentioned, he jumps into situations and introduces much chaos;" "Doesn't know as much as he thinks he knows;" "Goes off on tangents – course evaluation as examples;" "I have several other examples where Ben [Edelman] is jumping down rabbit holes and leaving a large wake of expended energy in IT and beyond." (Exs. 27 at JA-469; 161.) This feedback is directly reflected in two comments in the 2017 FRB Report: "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." (Ex. 26 at JA-420.)

Finally, Plaintiff's argument about the evidence gathered simply ignores his own deposition testimony acknowledging that the FRB's 2017 Report provided the evidence gathered relating to his outside activities and conflicts of interest.[9] Dean Nohria emphasized that, in making his

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however, she was to "focus on W06 W11 W15 and W07 plus 1-2 other IT representatives." (Exs. 163, 164.) Associate Dean Crispi did exactly that by summarizing and sharing feedback from W07 gathered over the interim 2 years, conducting interviews in July and August 2017 with W06 , W15 , and W11 , and selecting one other person from IT W19 to interview in July 2017. *See* (Ex. 50 at JA-546-51.)

[9] Plaintiff complains that, if he had more time, he would have been able to address these issues more persuasively. Harvard addresses this claim further below.

decision *not* to recommend tenure, these were the issues he focused on and led him to that result:

> [T]he conclusion that I arrived at was that the advice that we had given to Ben [Edelman] at the end of 2014 is that relying on his own views of situations was not something that he should count upon because, repeatedly, his own interpretation of those situations had gotten him and the school into places that we would not wish for. He acknowledged that himself. He said, "I've learned from the situation. In the future, I will reach out to people. I will try and learn what someone else's point of view would be. I will consult with people.' I remember distinctly him making those promises to me, and by the end of this period, I was -- by 2017, couldn't feel confident that he had fully internalized what he said he was going to internalize . . . . [T]he American Airlines case was clearly an example where he could have easily checked in with people. Having been advised about inconsistent disclosures on the Blinkx circumstance, the disclosures that were brought to Microsoft and Google are, again, places where he could have easily erred on the side of caution and on the side of being more disclosing rather than not. So . . . while there were places where he showed signs of improvement, there still remained many places where it would have been easy for him to continue to consult, benefit from others' point of view, that he just for whatever certain reasons continued to not think it was appropriate to do. And those situations would create, to my mind, risk for the institution that as a tenured faculty member where you get permanent employment, and it's very difficult at that point to check or monitor your behavior, those would create undue risk for the institution, which it was my job as dean to protect as much as my job was to promote faculty members who we would celebrate. (Ex. 8, 139:10-141:7.)

As such, even if this Court assumes the FRB breached the FRB Principles by not providing witness names and interview notes to either Plaintiff or Dean Nohria, Plaintiff has no claim because such a deprivation caused no harm to his tenure review.

**2. Plaintiff's Claims That the FRB Improperly Failed to Articulate an Allegation, Improperly Expanded Its Scope Late in the Process, and Did Not Reach Conclusions Are All Without Merit**

Plaintiff's other claims regarding how the FRB allegedly breached the FRB Principles each lack merit and, taken together, again betray Plaintiff's fundamental misunderstanding of the FRB's purpose in connection with tenure proceedings: to gather information to help the Dean decide whether to recommend a candidate for tenure.

**a. The FRB Did Not Improperly Fail to Articulate an Allegation**

The FRB and Dean Nohria always understood that the FRB would reconvene in 2017 to evaluate Plaintiff's progress. (Exs. 58; 8, 70:20-71:3.) Plaintiff also knew that HBS would need to evaluate his progress and, at least as early as January 2017, knew that the FRB would convene again to do that work. (Exs. 51; 3, 30:13-16, 218:15-219:22.) When it did reconvene in 2017, the FRB outlined for Plaintiff the specific issues it intended to address. (Ex. 26 at JA-426). Plaintiff has not alleged that the FRB failed to articulate an allegation in 2015. (Ex. 3, 158:6-8, 159:4-6.) At the end of the 2015 process, the FRB reached a negative conclusion about Plaintiff:

> In examining all three areas—Blinkx, Sichuan Garden, staff interactions—the FRB finds that Professor Edelman did not uphold the School's Community Values, and his conduct in each instance did not meet the criteria for "Effective Contributions to the HBS Community." In his dealings with Sichuan Garden and with staff at HBS, he did not demonstrate respect for others or for their commitment to the School. His tone was overly harsh, his approach was dogged, and he demonstrated a lack of appreciation for a difference of views. In connection with Blinkx, he failed to recognize that as a faculty, integrity in our activities—both real and perceived—is at the core of what we do. Across all three areas, his actions reflected a repeated inability to understand and adopt not just the technical requirements of the School's policies, values, and standards, but the underlying principles they convey . . . . For the reasons described above, the FRB finds that Professor Edelman's conduct in connection with Blinkx and Sichuan Garden as well as his interactions with staff, as exhibited by the projector and travel examples, was inconsistent with the School's Community Values and did not constitute effective contributions to the HBS community. (Ex. 14 at JA-281, -284.)

Rather than simply reject Plaintiff's tenure candidacy based on the conclusion that he had failed to meet one of the three core requirements for tenure, the Standing Committee recommended and Dean Nohria gave Plaintiff a second chance by offering a two-year extension. (Exs. 3, 24:15-25:24; 45.) Thus, when the FRB reconvened in 2017, there was no need for a new allegation—the FRB was continuing the work it began in 2015.

Plaintiff fails to explain how an allegation conforming to his narrow specifications in 2017 could have *retroactively* informed him of how he might prevent "future Blinkx or restaurant incidents" during the two years *prior to* 2017. (Mem. at 15.) The facts show, instead, that the FRB process began with a proper allegation that alerted Plaintiff to what it would review in 2015;

the 2015 Report concluded that Plaintiff did not meet HBS's requirements for tenure, as he had failed to demonstrate "Effective Contributions to the HBS Community;" Plaintiff (in spite of his claim that he was "left to guess" (Mem. at 15)) was given several tasks by Dean Nohria and the FRB in 2015 to help him demonstrate he could meet this requirement (Ex. 31); Plaintiff *knew exactly* what the FRB would evaluate in 2017 as shown in his March 2017 Reflection document to the FRB that elaborated on his behavior in the areas the 2015 Report reviewed; and the FRB's letter to him at the beginning of the 2017 process confirmed the expectations that it would be continuing the process begun in 2015. (Ex. 26 at JA-426, -428). Plaintiff's failure to again demonstrate he met HBS's standards for tenure cannot be blamed on any imagined lack of an allegation.

**b. The FRB Did Not Improperly Expand its Scope**

Plaintiff's outside activities and conflict of interest disclosures were a core part of the FRB's work in 2015 and featured prominently in the 2015 Report. *See* (Ex. 14 at JA-276-79). Plaintiff evidenced an understanding of the importance of his approach to his outside activities to the 2017 FRB process, as he included a section on his "[c]hoice of outside projects" in his March 2017 Reflection letter to the FRB. (Ex. 26 at JA-429-30.) He discussed the American Airlines lawsuit in his July 31, 2017, response to the FRB's question about "*how* [he] thought about [his] activities" (*Id.* at JA-426, -436)—although he chose not to tell the FRB at that time that the lead plaintiff he ultimately was able to secure was a tenured HBS faculty member who would vote on his tenure case. And the FRB asked Plaintiff directly about his American Airlines lawsuit in its August 14, 2017, interview. (*Id.* at -424). It was also appropriate for the FRB in 2017 to ask Plaintiff about his work for Microsoft and whether his financial relationship with the company had been properly disclosed in his writings about Google. A faculty member had raised the concern to Senior Associate Dean Paul Healy (who passed those concerns to the FRB) in the form of a *Wall Street Journal* article about potentially improper disclosures by Plaintiff and other professors (Ex. 77) and the FRB determined that Plaintiff's disclosures were properly within the scope of the 2017

FRB review (Ex. 168).[10]

With respect to his Microsoft disclosures, there is no doubt that the 2015 FRB Report put Plaintiff squarely on notice that the FRB had concerns about the disclosures he made in his written work. As the 2015 Report stated, across each of the areas the FRB reviewed:

> [Professor Edelman] failed to recognize that as a faculty, integrity in our activities—both real and perceived—is at the core of what we do . . . his actions reflected a repeated inability to understand and adopt not just the technical requirements of the School's policies, values, and standards, but the underlying principles they convey.
>
> * * *
>
> In terms of managing his outside activities, the FRB found that Professor Edelman did not appear to understand that his own zeal for righting a wrong could call into question the integrity of his writings, as well as the integrity of faculty work more broadly and the reputation of the School—that a single-minded focus on redressing one wrong could, nonetheless, enable other wrongs to occur. In addition, *Professor Edelman did not seem to understand that conflicts of interest, real or perceived, could arise not only when he had been paid directly by a company for his work,* ***but as a result of past work for clients in the same industry or field***. (Ex. 14 at JA-280, -282 (emphasis added).)

Because the FRB informed Plaintiff that it would assess "whether [he] underst[ood] the aspects of [his] conduct – regardless of [his] intent – that made them problematic," (Ex. 26 at JA-426) it defies logic for Plaintiff to now suggest that his disclosures about written work were out of bounds for the FRB's 2017 review.

Moreover, Plaintiff's myopic focus on whether his written work about Google complied with HBS's Conflict of Interest policy misses the point and, indeed, demonstrates that even today, he has failed to understand the aspects of his conduct that made it problematic in the first place. HBS's Conflict of Interest policy, absent certain very clear prohibitions, requires a faculty member

[10] Plaintiff misleadingly cites an email from Assistant Dean Cunningham questioning whether the issues raised were within the scope of the FRB's review that year (Mem. at 5-6), omitting her follow up communication indicating that this was, in fact, within the FRB's purview. (Ex. 168.) If the FRB had known, as Harvard now knows, that Microsoft had paid Plaintiff over $[redacted] during the time he was on the HBS faculty (Ex. 53), the FRB would surely not have been *less* concerned about the article and Plaintiff's disclosures.

to exercise *judgment* about what a reasonable reader would want to know about his relationship with companies that had in the past financed his work. (Ex. 131 at JA-846 n.3; *see also* Ex. 26 at JA-464.) As stated in the July 12, 2017, *Wall Street Journal* article supplied to the FRB, "Microsoft has paid Harvard business professor Ben Edelman, the author of papers saying Google abuses its market dominance." (Ex. 26 at JA-421.)

Plaintiff himself has acknowledged that his conduct in 2014 gave HBS legitimate grounds to question his judgment. (Ex. 3, 19:22-20:1.) He has also acknowledged that it was appropriate for HBS to consider the quality of the judgments he made about his disclosures regarding payments he received from Microsoft. (*Id.*, 258:16-21.) But, in deciding what to say about his past work for Microsoft in his written work about Google, Plaintiff acknowledged that he did not even consider what the FRB had said in 2015: that he "did not seem to understand that conflicts of interest, real or perceived, could arise not only when he had been paid directly by a company for his work, but as a result of past work for clients in the same industry or field" (Ex. 14 at JA-282), and instead focused solely on the "school's conflict of interest policy, which [he] took to be a comprehensive and authoritative complete statement of the school's policies and expectations with respect to disclosures" (Ex. 3, 256:19-22.)

Aside from being factually inaccurate or irrelevant, Plaintiff's argument makes no logical sense, as it has no limiting principle and would lead to absurd results. Any review process like the one conducted by the FRB inevitably entails a process of gathering facts and following up. Indeed, the FRB informed Plaintiff of this reality in 2015. (Ex. 14 at JA-287) ("Over the coming weeks we will review documents and conduct interviews to evaluate these incidents and interactions, *and others that may come to our attention over the course of the review*." (emphasis added)). However, if Plaintiff's argument were accepted, the FRB would need to issue a new, specific allegation *each time* its work generated a new line of inquiry, no matter how closely related to the subject matter of the FRB's work already underway. Plaintiff cannot therefore claim that the 2017 FRB process was a "moving target" (Mem. at 16), as the *subject* of the FRB's inquiry (i.e., Plaintiff's judgment as demonstrated by his outside activities, disclosures, and interactions with HBS personnel) was

the same in 2015 and 2017. Since Plaintiff's task during the two-year extension was to demonstrate changed behavior, it was proper that the FRB looked for evidence as to whether any such change had taken place, and doing so did not violate the FRB Principles. (Ex. 18; 58.)

Plaintiff's claim that the FRB did not give him enough time to respond to its inquiries ignores the facts and attempts to deflect his own responsibility in the process. The FRB offered him the opportunity to ask for more time to respond to its questions about outside activities if he needed it. (Ex. 3, 95:16-20.) He did not ask.[11] (*Id.*, 95:21-22.) Plaintiff had eight days to respond to the FRB's report, to which he provided a Reply that was over four pages single-spaced and included two single-spaced Appendices over five pages in length. (Exs. 149; 26 at JA-451.) Regardless, his claim that, if he had been given more time, he would have been able to make more arguments (*see* Mem. 16) once again misses the fundamental point: that the FRB and, ultimately, the Dean, had continuing questions about his judgment. Given his admission that he did not even consider the FRB's statement about his approach to conflicts of interest, Plaintiff cannot establish that, if he had more time to respond, the Dean would have reached a different result than to deny Plaintiff tenure.

**c. The FRB Did Not Improperly Fail to Reach Conclusions**

Plaintiff's claim that the 2017 FRB Report "did not reach conclusions" (Mem. at 17) is plainly false; this is unsurprising given Plaintiff's insistence on reading narrow, convoluted requirements into the FRB Principles that do not exist. The FRB's work in 2017 was not limited, as Plaintiff claims, to looking only at violations of Community Values (Mem. at 17); rather, an FRB done in the context of a tenure review evaluates "whether the candidate meets the School's criteria for 'Effective Contributions to the HBS Community,'" one of the three core requirements for tenure (often referred to in shorthand as "colleagueship"). (Ex. 18 at JA-368.) Plaintiff also

[11] Plaintiff's framing of the timeframe he had to respond to the FRB's requests in terms of "business days" (Mem. at 6, 15-16) belies not only the seriousness he should have devoted to an endeavor as important as his tenure promotion by working nights and weekends, but also his own statements to the FRB about the time he devoted to his outside activities, framing it "as outside work, as research, as a hobby, and something he does instead of sleeping." (Ex. 14 at JA-282.) If Plaintiff needed help with allocating his time to respond to the FRB, he could have asked.

fails to point to any facts to sustain his claim that assessing a Community Values violation requires an examination "in light of applicable policies." (Mem. 17.)

In any event, the 2015 Report reached the conclusion that Plaintiff had neither upheld the School's Community Values nor met the criteria for colleagueship (Ex. 14 at JA-280), and he was given a two-year extension to demonstrate that he could adhere to these criteria. Plaintiff understood that another assessment would need to be made at the end of this period to determine whether he had acted in a way that allayed the concerns expressed by the 2015 FRB Report. The FRB's first letter to Plaintiff as part of the 2017 process made clear that its focus was on evaluating whether there was, among other things, "sufficient evidence of changed behavior" since the events that gave rise to the 2015 FRB review. (Ex. 26 at JA-426.) And the 2017 FRB Report reached a clear conclusion on this point: "We therefore find ourselves unable to say, with full conviction, that the issues raised following the 2015 review have been satisfactorily resolved." (*Id.* at JA-425; *see also id.*, JA-465 ("While recognizing his many positive contributions, we struggled to find a pattern of evidence—following the findings and feedback of the 2015 review—that would allow us to say, with conviction, that the issues had been satisfactorily resolved or that he meets the School's standards for colleagueship")).

### C. The Undisputed Facts Establish That the FRB Did Not Cause Plaintiff Harm As a Result of Any Purported Breaches of the FRB Principles

Plaintiff devotes a full page to the conclusions reached by his tenure Subcommittee in 2017 that he met HBS's "research, course development, and teaching standards for promotion." *See* Mem. at 18-19; (Ex. 141 at JA-900.) The requirements for tenure, however, require a candidate to meet *all three* standards of review (Ex. 13 at JA-263), and Plaintiff failed to meet one of them: "Contributions to the HBS Community. This standard requires, among other things, a candidate to demonstrate "honesty, integrity, and respect for others." (*Id.* at JA-267.) Plaintiff attempts to place the blame for this failure on the supposed breaches committed by the FRB in 2017. However, in searching for someone to blame for his failed tenure campaign, Plaintiff looks everywhere but

at himself. It was *he* who decided to take on a class action lawsuit against a major American corporation without consulting—or even informing—a single person in the Dean's Office. (Ex. 26 at JA-464.) It was *he* who continued to keep his own counsel on whether his disclosures provided sufficient information for a "reasonable reader" to judge whether he was free from conflicts of interest. (*Id.*) He made these decisions knowing that his poor judgment related to outside activities and conflicts of interest rightly put him under direct scrutiny by HBS and caused the delay of his tenure case in 2015. And it was these decisions that led Dean Nohria to conclude in 2017 that Plaintiff *still lacked the proper judgment required of a tenured HBS Professor*. (Ex. 183.)

Plaintiff's claims regarding the evidence gathered and the supposed lack of allegation, improper expansion, or lack of conclusion therefore cannot establish that he was harmed, as Dean Nohria's decision about whether Plaintiff met the tenure requirement of "Effective Contributions to the HBS Community" ultimately rested on what the FRB Report revealed about Plaintiff's *judgment* as demonstrated by his conflict of interest disclosures and his pursuit of the American Airlines lawsuit without consultation with the Dean's Office. (Ex. 8, 140:7-141:7.) Plaintiff cannot overcome the evidence—equally available to both him and Dean Nohria—that Plaintiff's judgment on these matters rendered him unsuitable for tenure at HBS. Plaintiff states, pointing to nothing, that Dean Nohria "probably" would have made a different choice absent any purported breaches. (Mem. 20.) The facts show otherwise, and Plaintiff's motion for summary judgment should therefore be decided in Harvard's favor.

## CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court deny Plaintiff's Cross Motion for Partial Summary Judgment and grant any other relief in Defendant's favor as is just and proper in the circumstances.

**CERTIFICATE OF SERVICE**

I, Martin F. Murphy, hereby certify that I have caused a true and correct copy of the foregoing document to be served on counsel of record for Plaintiff by email on December 5, 2025.

*/s/ Martin F. Murphy*
Martin F. Murphy