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

DEFENDANT PRESIDENT & FELLOWS OF HARVARD COLLEGE'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT
(Motion for Leave to Exceed Page Limits ALLOWED on October 21, 2025)

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

By its attorneys,

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INTRODUCTION

In the year before plaintiff Benjamin Edelman ("Plaintiff" or "Edelman") sought tenure at Harvard Business School ("HBS"), his conduct created two public controversies that, in his own words, represented "high watermarks . . . of negative publicity" for the school. SF¶20. In January 2014, Plaintiff published a blog post that created a "firestorm" (again, *his* word) when it caused a company's stock price to plummet, leading to both public and internal questions about whether HBS professors are independent scholars or hired guns who do their private client's bidding to manipulate financial markets. SF¶11. In December 2014, Boston.com published an article headlined "Ben Edelman, [HBS] Professor, Goes to War Over $4 Worth of Chinese Food." That article led to what HBS's Dean at that time called a "tsunami" of negative emails and led one prominent commentor to post: "Here's why people hate . . .@Harvard." SF¶15;16.

Plaintiff has acknowledged that these events gave HBS "legitimate reason to be concerned about whether [he] was capable of exercising good judgment" and that HBS leaders "were right to be thinking about whether it could happen again." SF¶22-23. But HBS did not deny him tenure when he was first reviewed in 2015. Instead, HBS gave Plaintiff a second chance by extending his junior faculty appointment for two years so that his conduct during that time could be assessed. HBS made it clear, however, that there were "no guarantees" and that it would be Plaintiff's burden to demonstrate that he deserved tenure when he came up again in 2017.

In 2017, HBS Dean Nitin Nohria, the sole HBS decisionmaker on tenure matters, concluded that Plaintiff should not be granted tenure. Dean Nohria determined that Plaintiff's actions continued to raise concerns and that too many questions remained about his judgment for Plaintiff to receive the "privilege of a lifetime employment" at HBS. SF¶116.

Six years later, Plaintiff brought this suit, claiming that Dean Nohria's decision violated "rights that are contractual in nature" under Harvard's tenure process, violated the covenant of

good faith and fair dealing, and gave him the right to recover on a promissory estoppel theory. After extensive discovery, undisputed facts establish that Harvard is entitled to summary judgment. First, the policies Plaintiff has identified do not create an enforceable contract. Second, even if they did, HBS did not violate those policies. In addition, any claimed violation did not cause his review for tenure to fail. Plaintiff's other theories are likewise without merit. In sum, HBS denied Edelman tenure because his own actions proved he was unqualified for tenure, not because of any shortcomings in the process HBS followed.

A. The HBS Tenure Process.

Tenure at HBS is reserved for "extraordinary individuals who have demonstrated their ability and willingness to make a sustained contribution to the study, teaching, and practice of business." Addendum ("Add.") ¶1. In addition to excellence in scholarship and teaching, a candidate is required to "uphold HBS Community Values." Add. ¶3.

The primary policy guiding the tenure process is HBS's Policies and Procedures with Respect to Faculty Appointments and Promotions, commonly called the "Green Book." *See* SF¶2. Under the Green Book, "[t]he primary objective of the appointments process is to provide the Dean with the best possible information, judgment, and advice on various faculty appointments." Add. ¶5. The Green Book's guidance is designed to be flexible. The Dean has the ultimate responsibility for recommending to Harvard's President whether an HBS faculty member should be tenured and always retains the right to vary the procedures given the "circumstances of a particular case" or "the best interests of the School." Add. ¶4.

For each tenure candidate, HBS forms a three-member subcommittee of tenured faculty to evaluate the candidate. Add. ¶7. In cases like Plaintiff's, where a faculty members' conduct has raised a question of whether the candidate meets the School's criteria for "Effective Contributions to the HBS Community," HBS may choose to form a Faculty Review Board ("FRB") to review

whether the candidate has met those criteria. Add. ¶13b. Each of the two panels—the subcommittee evaluating a candidate's scholarship and teaching and the FRB—prepares a report. Add. ¶¶7, 13b-c.

The candidate's case then goes before the Standing Committee, which is composed of the members of the candidate's subcommittee and the members of subcommittees considering other tenure candidates that year. SF¶8. After the Standing Committee votes, the Appointments Committee—a large group consisting of the tenured faculty at HBS—meets to consider each tenure candidate. Add. ¶8. The Appointments Committee then provides advice to the Dean, who decides whether to recommend the faculty member for tenure to Harvard's President. *Id*.

B. Plaintiff Seeks Tenure at HBS in 2015

Plaintiff began teaching at HBS in 2007 and was scheduled for review for promotion to tenure in 2015. Joint Appendix ("JA") Ex. 175¶¶ 14, 29. In the year before his tenure review, Plaintiff became the center of two major controversies that were "high watermarks . . . of negative publicity." SF¶20. On January 28, 2014, Plaintiff published a blog post about a UK company called Blinkx, alleging that the company had engaged in deceptive advertising practices. SF¶11. The blog post caused, in Plaintiff's own words, "a firestorm." *Id*. The Blinkx stock price fell dramatically soon after the blog posted, and HBS began to field media questions about Plaintiff's potential conflict of interest as a paid researcher for short-selling investment firms that stood to benefit from his blog post. SF¶12.

In December 2014, Plaintiff created another public controversy, this time involving a Brookline-based Chinese restaurant named Sichuan Garden. On December 9, 2014, the news website Boston.com published an article headlined "Ben Edelman, [HBS] Professor, Goes to War Over $4 Worth of Chinese Food." SF¶14. The article reprinted verbatim email exchanges between Plaintiff and the restaurant's owner about the price the restaurant had charged Plaintiff for take-

out. Despite the restaurant's apology and offer to refund the difference, Plaintiff demanded treble damages ($12), then a 50% discount on his order, and told the owner that he had "referred this matter to applicable authorities in order to attempt to compel" the restaurant to identify and refund "all consumers affected[.]"[1]

During Nohria's decade-long service as HBS's Dean (2010-2020), no other incident resulted in more emails. SF¶16. An email from one alumnus captured the sentiment in the HBS community:

> If it isn't obvious, this type of behavior is truly embarrassing for me, as an alumnus and as someone who is proud of Harvard Business School . . . this type of behavior is damaging nationally. Worse, the faculty member in question is now on the record defending his actions, rather than apologizing. It likely goes without saying, but as a faculty member, Ben Edelman represents both the school, and to an extent, the alumni who attended the school . . . This behavior is bullying, masked in a thin guise of pseudo-legal rhetoric. I shudder to think at his behavior under the secure protection of tenure.

SF¶17. A prominent legal commentator tweeted a link to the article and posted: "Here's why people hate . . .@Harvard." SF¶15. In response, one HBS student launched a fundraiser to help fight hunger to offset the "negative stereotypes" of HBS reinforced by "an HBS's professor's disrespectful treatment of a local business owner over a discrepancy of $4 for Chinese [food]." SF¶18.

In his deposition, Plaintiff acknowledged that, following the Blinkx and Sichuan Garden incidents, HBS's leaders "had legitimate reason to be concerned about whether [he] was capable of exercising good judgment" and that they "were right to be thinking about whether it could happen again." SF¶22-23. In Dean Nohria's view, the Blinkx and Sichuan Garden incidents "led to real question marks about whether [Plaintiff] was a person who could meet [HBS's] community

[1] The full published email exchange is set out in JA Ex. 14 at JA-758 as a summary is inadequate to capture its nature.

standards." SF¶21.

C. HBS Convenes an FRB in 2015

On July 16, 2015, Senior Associate Dean for Faculty Development Paul Healy, the HBS faculty member with responsibility for administering the faculty promotion process, informed Plaintiff that "concerns" about his conduct and his ability to meet the requirement for effective contributions to the HBS community had been raised and that Senior Associate Dean Healy had "referred this aspect of your case to the Faculty Review Board." SF¶25.

On July 31, 2015, Professor Amy Edmondson, as Chair of the FRB, wrote Plaintiff "to provide a summary of the scope of [the] review," which included Blinkx, Sichuan Garden and "concerns about your interactions with staff and colleagues at the school," identifying four separate issues. SF¶28-29. Thereafter, the FRB—comprising three senior faculty members and a senior administrator, Associate Dean Angela Crispi, with the staff support of Assistant Dean Jean Cunningham—began its review by gathering documents and interviewing Plaintiff and other witnesses. SF¶31. The FRB did not identify the witnesses or provide Plaintiff with its notes of the interviews. SF¶32. Plaintiff did not complain about not being told whom the FRB interviewed or about not receiving interview notes. *Id.* After the FRB issued its draft report to Plaintiff in October 2015, SF¶33, he was given an opportunity to respond in writing, which he did, SF ¶34.

The FRB's 2015 Report concluded that "Professor Edelman did not uphold the School's Community Values, and his conduct in each instance [of the areas under review] did not meet the criteria for 'Effective Contributions to the HBS Community.'" SF¶36. The FRB also found that they did "not see persuasive evidence of accountability for personal behavior that would reflect evidence of learning." *Id.* Regarding Blinkx, the FRB concluded that Plaintiff "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." SF¶37.

D. Plaintiff Is Offered a Two-Year Extension on His Tenure Case

HBS submitted the FRB Report and the separate report of the three-member Subcommittee evaluating Plaintiff's scholarship and teaching to the Standing Committee—a committee composed of every member of the three-member subcommittees who evaluated tenure candidates in 2015. SF¶8, 41.[2] The Standing Committee recommended that the Dean offer Plaintiff a two-year extension as a junior faculty member. SF¶42. Senior Associate Dean Healy told Plaintiff that the Standing Committee focused principally on Blinkx and Sichuan Garden and hoped that a two-year extension would give Plaintiff time to demonstrate he had "learned the lessons" from those incidents. SF¶44-45. Senior Associate Dean Healy also relayed a clear message from Dean Nohria: there were "no guarantees here." SF¶45. Plaintiff understood, following this conversation, that "it's always a burden on the candidate to produce a strong case for candidacy, for promotion[.]" SF¶54.

After discussing Plaintiff's extension with Senior Associate Dean Healy and Dean Nohria, the FRB wrote to Senior Associate Dean Healy and Dean Nohria, noting that it would need to convene again in 2017 so that Plaintiff's progress on FRB matters could be properly evaluated. SF¶48-49. Dean Nohria agreed that there should be an FRB review in 2017. SF¶50-51. And at least as early as January 2017, Plaintiff knew that the FRB would reconvene later that year and agreed to suggest names of HBS community members the FRB should speak to as part of its review. SF¶53-55.

E. The FRB Continues Its Work in 2017 When Plaintiff Is Again Reviewed for Tenure

In March 2017, when Plaintiff again sought tenure, Plaintiff submitted to the FRB a

[2] Plaintiff admits that he did not complain that the 2015 FRB Report was submitted to the Standing Committee. SF¶41.

document titled "Reflection on Feedback from Faculty Review Board," which included an extended discussion on his outside activities. SF¶56; 58. The FRB reviewed that submission and met to discuss it and to plan its review. On July 6, 2017, Prof. Edmondson replied to Plaintiff on behalf of the FRB. SF¶59. The FRB noted that "the Standing Committee [in 2015] recommended deferring your case for two years to enable you to demonstrate whether you had indeed internalized the lessons learned, anticipating that the FRB would again be activated during the summer/fall 2017 to review your conduct." *Id*. The letter identified the topics to be evaluated: the "FRB must now assess:

- 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."

Id. The FRB began conducting interviews later in July 2017. SF¶62. On July 31, 2017, Plaintiff followed up on the FRB's July 6 letter by submitting a response that, among other things, addressed his choice of outside activities, including his decision to file a class action lawsuit against American Airlines. SF¶68.[3] The FRB interviewed Plaintiff on August 14, 2017. SF¶69.

On August 25, 2017, Senior Associate Dean Healy brought to the FRB's attention a Wall Street Journal article headlined "Paying Professors: Inside Google's Academic Influence Campaign." SF¶74; 71. The article reported that "Microsoft has paid Harvard business professor Ben Edelman, the author of papers saying Google abuses is market dominance." SF¶72. Senior Associate Dean Healy asked the FRB's chair whether Plaintiff's "papers appropriately

[3] His submission did not inform the FRB that the named plaintiff in that suit was tenured HBS professor and fellow HBS unit colleague Max Bazerman.

acknowledge his relation with Microsoft[.]"[4] SF¶74. On September 1, 2017, Prof. Edmondson emailed Plaintiff, asking him to "submit for the approximately two years following your initial FRB review: "a complete listing of your outside activities, including client names and litigation" and a complete listing of all work products in the public domain (e.g., articles, reports, presentation). SF¶75. Prof. Edmondson also asked Plaintiff to explain more fully his thinking about his outside activities, particularly "when and where to seek advice or approvals on your outside activities, and when and how to include disclosures on your output," referring specifically to his decision to bring a class-action suit against American Airlines lawsuit as an example. SF¶76. Plaintiff responded on September 8, 2018.

F. The FRB's 2017 Report

The FRB issued its 2017 draft Report on September 27, 2017. SF¶78. Plaintiff replied to the 2017 Report on October 5 (SF¶79), and the FRB issued its final Report and Addendum to the 2017 Report on October 12, which included a list of changes it made to the initial 2017 Report (SF¶80) following its review of Plaintiff's reply. The final 2017 Report focused on two issues: (1) respect for others inside the institution and (2) outside activities and conflict of interest. SF¶81. On the first topic, the 2017 Report contained 27 bullet points noting favorable information about Plaintiff. SF¶91. There were 13 bullet points that contained negative information. *Id.*

The Report's discussion of Plaintiff's outside activities focused on two issues: Plaintiff's decision to represent a tenured HBS faculty member in a class action suit against American Airlines and Plaintiff's disclosures in written work and presentations about his financial relationship with Microsoft. SF¶82. With respect to American Airlines, the FRB expressed concerns that, "given his prior history with situations that had complicated consequences for him

[4] Between 2006 and 2015, Microsoft paid Plaintiff [redacted]. SF¶73.

and for the School," Plaintiff "did not engage" the Dean, the Dean's Office or HBS's Director of Communications before filing suit. SF¶84. The FRB noted that this "gave us continuing reason to be concerned that Professor Edelman can be quick to act on his perceptions of wrongdoing by others, without first reaching out to understand different points of view."[5] *Id.*

The FRB also raised concerns about Plaintiff's disclosures about his financial relationships with Microsoft in his written work about Google. The FRB found: "Professor Edelman's reporting of disclosures is, at best, inconsistent . . . We would suggest that rather than providing information so that a reader might determine potential conflict, Professor Edelman instead omits many of the required elements, and himself seeks to make that determination." SF¶85. The FRB also observed: "one might expect the need for appropriate disclosures to be top of mind for Professor Edelman during this time period, given the express concern raised by the FRB [in its 2015 Report] about 'the public's trust in the independent and objective nature of [his] scholarship.'" *Id.*

The FRB 2017 Report concluded that the FRB was "unable to say, with full conviction, that the issues raised following the 2015 review have been satisfactorily resolved" or that Plaintiff met "the School's standards for colleagueship." SF¶86.

G. <u>Dean Nohria's Decision Against Recommending Plaintiff for Tenure</u>

The Standing Committee reviewed Plaintiff's tenure materials, including the 2017 FRB Report, and met to deliberate on October 17. SF¶100. After a sharply divided Standing Committee vote (*Id*), the Appointments Committee met to consider Plaintiff's tenure case on November 16, 2017. SF¶102. At the meeting and in written ballots, the Appointments Committee provided its advice to Dean Nohria. SF¶104. Plaintiff received a lower percentage of favorable votes from Appointments Committee members than any successful candidate had in at least the previous ten

[5] In his interview with the FRB, Plaintiff said that "I can't sit on my hands when I know about something like this." SF¶70.

years: favorable votes from 41 members of the Appointments Committee (57% of those voting) and negative votes from 29 members of the Appointments Committee (42% of those voting). SF¶103-104. There were two abstentions. *Id*. Indeed, from 2006 to 2017, no candidate with less than a 65% favorable vote from his or her colleagues had been granted tenure. SF¶104. Given these votes, Dean Nohria viewed Plaintiff's case as one where there was "not a clear mandate in either direction . . ." and therefore one "where [he had] to exercise [his] best judgment." SF¶105.

Dean Nohria decided against recommending Plaintiff for tenure in 2017. SF¶106. Dean Nohria made this decision because he had "concluded that [Plaintiff] had not met our standards for being a member of our community that we could have faith would meet collegiality standards and community standards over the long run." *Id*. In Dean Nohria's view, Plaintiff:

> continued to have blind spots in relationship to how others might see situations that he would see differently; that on issues where it would have been very easy to check in with someone else, he would personally make determinations for when it was correct for him to check in and when it was not; and that he continued to be excessively self-confident about his opinion relative to consulting others and paying careful attention to what their views might be, which is the heart of what our community encourages in our classrooms and encourages of each other.

SF¶107. Dean Nohria specifically had in mind:

> [s]everal things that go all the way back to the Chinese restaurant situation, where it was very clear that other people thought he was bullying someone and he didn't think -- he couldn't imagine why anybody would believe that, that some people may have thought that if he had any economic relationship with someone who had done a study, he couldn't imagine that if he just published the study because he thought it represented his academic integrity that someone else might imagine that it didn't, that if he took on a lawsuit that he didn't think that it would be worth just talking to someone to see if that was an okay thing, whether that might end up dragging him into a situation in which the amount of work involved or effort involved would create challenges or whether it would create any reputation issues. These are just things where you don't have to say whether you should do it or not, but just having the ability to talk to someone to get a second opinion, to listen to that opinion carefully, to weigh those matters would allow you to make better

decisions and he repeatedly seemed to not want to do that.

SF¶108. In Dean Nohria's view these concerns about Plaintiff's judgment—independent of the concerns about his relationships with subordinates expressed in the FRB's 2017 Report—were sufficient to cause him to recommend against tenure. SF¶110; JA Ex. 183 ¶13.

On December 5, 2017, Dean Nohria called Plaintiff to tell him that he would not recommend him for tenure. SF¶113. Dean Nohria told Plaintiff in that conversation that Plaintiff had "dug [himself] into a hole from the 2015 incidents" which Plaintiff understood to mean Blinkx and Sichuan Garden. SF¶114. Plaintiff "understood [Dean Nohria] to be saying that he judged all of the other matters in both the 2015 and 2017 reports to be kind of inconsequential." SF¶115. Plaintiff told others that he believed the Sichuan Garden controversy caused him to be denied tenure. SF¶117.

ARGUMENT

"Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Godfrey v. Globe Newspaper Co., Inc.*, 457 Mass. 113, 118-19 (2010). "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Kourouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 716 (1991). Moreover, "[c]ourts must be extremely wary of intruding into the world of university tenure decisions. These decisions necessarily hinge 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). In this case, the Parties have engaged in extensive discovery

revealing facts that provide the "full record" the Court said was required when it ruled on Harvard's motion to dismiss. Dkt. 12.

A. Plaintiff's Claim That HBS Violated the FRB Principles in His Tenure Case Provides No Basis for Relief

1. The FRB Principles Did Not Create an Implied Contract with Plaintiff

Plaintiff claims that the FRB Principles created "rights that are contractual in nature" that HBS violated when it denied his tenure application. JA Ex. 175 ¶85. Plaintiff bears the burden to establish that the FRB Principles created an implied contract, which he cannot do because "the circumstances as disclosed by the undisputed facts" demonstrate no such contract was formed. *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"). The fact that HBS issued Principles to guide the FRB is insufficient. Rather, the Court—guided by the factors set out in *Jackson* and its progeny—should look to "all the circumstances here," which point to the conclusion that the FRB Principles were not a contract. *Jackson*, 403 Mass. at 14. The specific factors set forth in *Jackson* include whether:

> (1) the employer retained the right to unilaterally modify terms; (2) the terms of the manual were not negotiated; (3) the manual stated that it provided only guidance regarding the employer's policies; (4) [a] term of employment was specified in the manual; and (5) the employee did not sign the manual to manifest assent.

Ray v. Ropes & Gray LLP, 961 F. Supp. 2d 344, 353 (D. Mass. 2013), quoting *Day v. Staples, Inc.*, 555 F.3d 42, 58-59 (1st Cir. 2009) (citing *Jackson*, 403 Mass. 8, 14); *see also Englund v. Big Y Foods, Inc.*, 98 Mass. App. Ct. 1102, at *2 (2020) (unpublished), citing *Jackson*, 403 Mass. at 14-15. These factors, as well as additional circumstances surrounding the FRB Principles' creation, adoption, and maintenance, all point in Harvard's favor.

First, the FRB Principles were intended to serve as guidance for the faculty tasked with

carrying out a faculty review—a "flexible . . . framework" for resolution of concerns about faculty conduct, as stated within the documents itself:

> The FRB procedure is designed to be *flexible*, recognizing the need to weigh multiple factors such as the nature and seriousness of the conduct in question, the supporting evidence, and any mitigating factors and circumstances. At the same time, the FRB procedure aims to provide a *framework* to allow an appropriate resolution of concerns in a wide variety of circumstances.
>
> The following principles and considerations shall *guide* those carrying out the FRB procedure . . . . Recognizing that it can be difficult to anticipate every circumstance that may arise, the individuals responsible for administering the FRB procedure will use their *best efforts and judgment*.

Add. ¶¶10-12. (emphasis added). Where, as here, the FRB was convened in connection with a tenure proceeding, HBS specifically reserved the right to modify or amend the procedures, as set forth in HBS's Tenure Procedure: "Because the Dean has the sole responsibility for the recommendations made to the President, the Dean may initiate or approve variances from these procedures when, in his or her judgment, the circumstances of a particular case warrant it or are in the best interests of the School." Add. ¶4. This flexibility weighs against a finding that the FRB Principles were a contract. *See*, e.g., *Grant v. Target Corp.*, 2017 WL 2434777, at *4 (D. Mass. Jun. 5, 2017) (applying *Jackson* and determining there was no contract where the policy "repeated language indicating that it only created guidelines and recommended procedures numerous times throughout the manual"); *Englund*, 98 Mass. App. Ct. at *3 (employee handbook did not create an implied contract, in part because the employer "retained the discretion to deviate from the progressive discipline measures set forth in the handbook by the imposition of more or less severe measures"); *Battenfield v. Harvard Univ.*, 1993 WL 818920, at *10 (Mass. Sup. Ct. Aug. 31, 1993) (referencing the *Jackson* factors and finding no contract where a personnel manual "specified that it was intended for the 'guidance' of Harvard University supervisors").

Second, there is no evidence showing that Plaintiff negotiated the terms of the FRB Principles with HBS or that he was required to "manifest assent" to them. *See Jackson*, 403 Mass. at 15 (employee manual not a contract where "nothing in the circumstances here reveals any negotiation over the terms of the personnel manual" and where "there [was] no indication that the plaintiff signed the manual, or in any way manifested his assent to it or acknowledged that he understood its terms"); *Battenfield*, 1993 WL 818920 at *10 (employee manual not a contract where plaintiff "did not negotiate the terms of the Manual, did not sign a copy of it, or assent to any of its terms"). In fact, the FRB Principles were drafted by a small committee and later presented to the faculty. SF¶5. In addition, HBS did not post the FRB Principles to the internal site where other school policies were made available for faculty to review and download at will. SF¶7. This also weighs against the FRB Principles constituting an implied contract. *See e.g.*, *Grant*, 2017 WL 2434777 at *6 ("the Policy was not distributed to all employees such that the workforce would believe that it contained certain promises by Target; rather, the Policy was stored in the Human Resources office for human resources and management personnel to reference if disciplinary action was needed for employee misconduct.").

Finally, Plaintiff cannot point to any other "evidence of promises, conduct or employment circumstances" supporting his claim that the FRB Principles were a binding contract. *Battenfield*, 1993 WL 818920 at *9. In fact, Plaintiff himself paid no special attention to the FRB Principles *during the period in which he was subject to an FRB*, as he does not even recall reading the FRB Principles between the time HBS convened the FRB in 2015 and the time it issued its final report in 2017 despite acknowledging that he began thinking about suing Harvard as early as 2015. SF¶26-27.

Plaintiff's breach of contract claim therefore fails, as the FRB Principles did not confer

"rights that are contractual in nature" to begin with. *See Battenfield*, 1993 WL 818920 at *10 ("Because [plaintiff] has failed to demonstrate any of the elements necessary for the formation of a contract, her claim for breach of contract must fail"); *see also Grant*, 2017 WL 2434777 *6 (same).

2. The Undisputed Facts Establish That the FRB Did Not Violate the FRB Principles

Plaintiff's complaint presents a laundry list of claimed violations. None has merit. If this Court determines that the FRB Principles created contract-like rights, it must interpret them "by applying 'the standard of "reasonable expectation"' and give . . . 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. Sup. Ct. Jan. 16, 2019), citing *Driscoll v. New England Tel. & Tel. Co.*, 70 Mass. App. Ct. 285, 293; *accord Berkowitz*, 58 Mass. App. Ct. at 269. The Court must also take care to "avoid reading the [FRB Principles] in a way that would unreasonably interfere with academic decisions by the institution." *Id.*, citing *Berkowitz*, 58 Mass. App. Ct. at 269. Plaintiff cannot establish that the FRB violated any reasonable expectation HBS should have expected Plaintiff to give the FRB Principles, so his breach of contract claim must fail.

Failure to Disclose Evidence Gathered. Plaintiff alleges that the FRB Principles "require[d] the FRB to prepare a draft report that included 'the evidence gathered'" but claims "the 2017 FRB did not." JA Ex. 175 ¶¶ 87-88. The FRB's 2017 Report focused on two issues: (1) respect for others inside the institution and (2) issues related to Plaintiff's outside activities and conflicts of interest. SF¶81. Plaintiff has acknowledged that the FRB disclosed the evidence on which it relied relating to the disclosures in his written work and on his outside activities, including the American Airlines suit. SF¶83. The FRB's conclusions about those matters therefore cannot form the basis for relief here.

Plaintiff's principal complaint is that the 2017 FRB Report did not identify the witnesses it interviewed and that the FRB did not provide him with the raw notes of those interviews. JA Ex. 175 ¶ 88. The Court should reject plaintiff's claim. First, the language of the FRB Principles demonstrates that, when HBS convenes the FRB in connection with a tenure case, the FRB is not required to provide the "evidence gathered." The FRB Principles contain a separate section, headed "Notes on Promotions, Reviews and Reappointments" that provides specific guidance about the FRB's work in tenure cases. Add. ¶13. For example, in tenure cases, HBS may convene the FRB based on "concerns" about a faculty member's conduct. Add. ¶13a. (In other contexts, the FRB principles call for a higher threshold: "egregious behavior or actions" or a "persistent and pervasive pattern of problematic conduct." Add. ¶9.) The section on the FRB's work on tenure case contains one cross-reference to specific procedures applicable to all FRB cases: it states that the FRB's work should begin with "drafting an allegation *as outlined above*." Add. 13b (emphasis added). But that is the *only* cross-reference. The section of the FRB Principles relating to tenure cases does not point to the language addressing the "evidence gathered."

Second, the undisputed facts establish that Plaintiff could not have reasonably expected the FRB in 2017 to provide the identities of the individuals it interviewed or provide the raw notes of those interviews. In 2015, the FRB conducted interviews but, just as in 2017, did not disclose the identities of those individuals or give Plaintiff copies of interview notes. SF¶31;62;65.[6] Plaintiff

[6] The FRB Report did not disclose the identities of the individuals who provided either the 27 positive comments or the 13 negative comments. Plaintiff had the opportunity to respond in his Reply to the 2017 Report, and did—he not only directly addressed one of comments from the report, but provided a five-page, single-spaced Appendix to his Reply that sought to provide his perspective on his "interactions with staff, junior colleagues, and students." SF¶79. His Reply and Appendix were provided to the Appointments Committee alongside the 2017 report. Moreover, the comments Plaintiff complains about represent others' perceptions and opinions about Edelman (for example: "In conversations, he can be abrasive, arrogant, and stubborn; he

has acknowledged he had no information about whether the FRB provided respondents with the identity of witnesses or raw notes of interviews in other FRB proceedings and, in fact, they did not. SF¶75.

The FRB Principles do not require the FRB to record or transcribe witness interviews and attach them to the report, or to disclose the names of every witness the FRB interviewed. *See generally* Add. Ex. B. If HBS had intended the FRB to attach every item it reviewed, create a transcript of every witness interview, or even to identify the witnesses it interviewed, it would have been simple for the FRB Principles to say so. They do not. *Contrast, e.g.*, *Sonoiki v. Harvard Univ.*, 2024 WL 760844 at *15 (D. Mass. Feb. 6, 2024) *appeal filed, Sonoiki v. Harvard Univ.* (1st Cir. Feb. 23, 2024) (where the policies allegedly provided for the respondent's representative to attend all witness interviews, failure of the representative to tell the respondent the witnesses' names could be a breach); *Doe v. Stonehill College, Inc.*, 55 F. 4th 302, 312 (1st Cir. 2002) (policy gave parties the right to "be informed of all witnesses being interviewed").

In addition, the FRB Principles repeatedly refer to the importance of confidentiality and privacy: "the FRB and Executive Dean may seek and report on *confidential* input—from faculty colleagues, staff, students, alumni, or others—about concerns about the candidates . . . . *Privacy and confidentiality* are important considerations; information generally should be shared only on a need-to-know basis, and consistent with what is practicable . . . the work and activities of the FRB are considered *private* . . . ." Add. ¶10-12. Moreover, the Green Book contains repeated references to the central importance of confidentiality to the tenure process. *See* Add. ¶¶6, 8. During the process, HBS solicits letters from HBS faculty and outside reviewers, but HBS does

is not empathetic to another side or point of view") not statements of facts that access to the identity of witnesses would permit him to challenge.

not share those letters with the candidates. SF¶4. Given the language in the FRB Principles, and the overriding concern about confidentiality in the tenure process, Plaintiff cannot plausibly contend that a reasonable person would have expected to receive the names of the witnesses or the raw notes of interviews conducted by the FRB in connection with a tenure review.

The FRB should not have convened in 2017. Plaintiff contends that the 2017 FRB's scope exceeded proper bounds, alleging that under the FRB Procedures, the FRB was permitted to investigate only "instances of egregious behavior or actions or incidents that indicate a persistent and pervasive pattern of problematic conduct." JA Ex. 175 ¶ 91. According to Plaintiff, the "2017 FRB alleged neither of these." *Id*. at ¶¶ 91-92. However, the language of the FRB Principles and the undisputed evidence prove this claim false. First, as noted above, under the "Notes on Promotions, Reviews, and Reappointments" section of the FRB Principles, HBS may convene an FRB when a community member "raises a question" or "concern" about "whether the candidate meets the School's criteria for 'Effective Contributions to the HBS Community.'" *See* Add. ¶13b. An allegation of "egregious behavior" or "a persistent and pervasive pattern of problematic conduct" was not required.

Plaintiff did not raise any concerns at the time to HBS about whether an FRB should have been convened in 2015 or, indeed, any concerns about how the FRB was conducted. SF¶39. That process resulted in a two-year extension, and Plaintiff was told that there "were no guarantees" that he would be tenured at the end of the two years. SF¶45. Following the extension, by the end of 2017, Plaintiff "had to affirmatively prove" that he could meet community standards to receive tenure. SF¶46. Dean Nohria and the FRB expected that the FRB would convene again in 2017 to review whether Plaintiff's actions during the two-year extension showed he had learned from the incidents of 2014. SF¶50; JA Ex. 183 ¶7. And Plaintiff also knew—at least as early as January

2017—that the FRB would re-convene to assess whether he had internalized the lessons from the 2015 review. SF¶53. Plaintiff therefore has no basis to contend that the 2017 FRB "lacked proper scope" or "was convened in the absence of any alleged misconduct[.]" JA Ex. 175 ¶¶ 91-92.

The FRB Failed to Provide "a Summary of the Allegation." Plaintiff claims that the FRB Principles require the FRB Chair to draft a "summary of the allegation, as it is known at the time" at the outset of the process, and claims the 2017 FRB "failed to articulate any allegation." JA Ex. 175 ¶¶ 93-94. But Plaintiff's characteristically hyper-technical claim ignores the evidence. He acknowledges that, in 2015, the FRB articulated the allegations it would review in its letter to him. SF¶30. And in March 2017, Plaintiff submitted a lengthy statement intended for the FRB's review purporting to show how he had learned from the FRB's 2015 review. SF¶56. When the FRB formally re-convened in 2017, it sent Plaintiff a letter that made the focus of its review clear. Given the very specific questions the FRB posed to Plaintiff in 2017, and the detailed follow-up questions it asked, Plaintiff can hardly claim that HBS should have reasonably expected that Plaintiff was entitled to more. *See Guarino*, 2019 WL 1141308, at *8.

Scope Expansion. Plaintiff contends that the 2017 FRB "improperly expanded its scope midway through its 2017 proceedings." JA Ex. 175 ¶ 96. Again, this claim ignores the evidence. Plaintiff's March 2017 submission to the FRB repeatedly mentioned his outside activities. SF¶58. Plaintiff spoke about his outside activities, including the lawsuit he brought against American Airlines, in his interview with the FRB. SF¶69-70. Separately, the FRB learned of an article mentioning Microsoft's payments to Plaintiff in the *Wall Street Journal*, then followed up with requests for written responses from Plaintiff, offering him more time if he needed it (which he declined to accept). SF¶74-77. In response to these requests, Plaintiff provided a one-page response about his outside activities, a list of his publications over the interceding two years, and

a five-page, single-space explanation. SF¶77. Given (a) the FRB's focus in 2015 on his outside activities; (b) his own focus on outside activities in his submission to the FRB in 2017; and (c) the discussion of his outside activities in his FRB interview, Plaintiff could not have reasonably expected that the FRB's request for additional information related to his outside activities violated the FRB Procedures.

What's more, even if the scope of the 2017 FRB was "expanded" as Plaintiff claims, it was not impermissible under the FRB Principles—a fact which Plaintiff was on notice of in 2015. As Prof. Edmondson informed Plaintiff at the outset of the 2015 FRB review: "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*." SF¶29. Plaintiff took no issue with this statement in 2015 or 2017, nor has he since; on the contrary, Plaintiff testified that the 2015 letter complied with the FRB Principles. SF¶30; 39. He also testified that he believes the 2015 FRB should have been "guided by the evidence to a greater extent than they were[,] especially when they received the *additional evidence* in my reply." SF¶38. Plaintiff cannot have reasonably expected that the FRB would not "follow the evidence" as other incidents came to their attention during its 2017 review. As noted, the FRB Principles are a flexible framework and recognize that because "it can be difficult to anticipate every circumstance that may arise, the individuals responsible for administering the FRB procedure will use their *best efforts and judgment*." Add. ¶12b.

Submission of FRB Report to the Standing Committee. Finally, Plaintiff contends that HBS' submission of the 2017 Report to the Standing Committee violated the FRB Procedures. JA Ex. 175 ¶¶ 103-11. The FRB Principles' reference to the Standing Committee refers to the Standing Committee for Practice Faculty. SF¶9. The "tenure" Standing Committee did not exist

when the FRB Principles were issued; it was created following a faculty vote in May 2015, the month after the FRB Principles were finalized. *Id*. Further, the FRB Principles also refer to the Subcommittee receiving "the FRB's conclusions on whether a candidate has upheld the School's Community Values" and that it would be "included with that group's report to the full Appointments Committee." Add. ¶13c. The FRB Principles cannot refer to the tenure Standing Committee because the tenure "Standing Committee," unlike the Subcommittee and the Standing Committee for Practice Faculty, does not prepare a report. SF¶10; JA Ex. 183 ¶9. And Plaintiff knew, in 2015, that the Standing Committee considered the FRB's 2015 Report (SF¶41); it was therefore not reasonable for him to expect that the Standing Committee would not receive the 2017 Report.

Here, the undisputed facts show that Plaintiff cannot claim that the FRB violated any provision of the FRB Principles, or any reasonable expectation HBS could have expected Plaintiff to place on them. Summary judgment should be entered in Harvard's favor on Plaintiff's breach of contract claim.[7] *See Guarino*, 2019 WL 1141308 at *8 ("[a]bsent 'a violation of a reasonable expectation' created by contract . . . courts and juries may not second-guess decisions by an academic institution about who should serve on its faculty"), citing *Berkowitz*, 58 Mass. App. Ct. at 269-70.

3. The Undisputed Facts Establish That the FRB's Alleged Violations of the FRB Principles Did Not Determine the Outcome of Plaintiff's Tenure Review

To succeed on his breach of contract claim, Plaintiff must not only establish the FRB Principles created a contract and that Harvard violated its terms—which, as explained above, he

[7] Plaintiff also claims that the 2017 FRB "failed to investigate the allegation." JA Ex. 175 ¶¶ 100-02. The FRB conducted interviews (including an interview of Plaintiff), collected and reviewed documents, and prepared a report. SF¶¶32-36. Nothing more was required.

cannot do—he must further demonstrate that he "suffered harm as a result." *Sonoiki*, 2024 WL 760844 at *10 (D. Mass. Feb. 6, 2024), citing *Bulwer v. Mount Auburn Hosp.*, 473 Mass. 672, 690 (2016). "Specifically, as to harm, he must present evidence showing that the breach committed by Harvard would have 'changed the outcome' of his disciplinary cases." *Sonoiki*, 2024 WL 760844 at *11. Here, however, the undisputed facts establish that Dean Nohria decided against Plaintiff's tenure case for reasons based on Plaintiff's actions, not because of any of the alleged violations Plaintiff claims the FRB committed.

Dean Nohria did not recommend Plaintiff to President Faust for promotion to full professor because Dean Nohria had "concluded that [Edelman] had not met our standards for being a member of our community that we could have faith would meet collegiality standards and community standards over the long run." SF¶106. He was focused in particular on Plaintiff's judgment, expressing concerns about Plaintiff's "blind spots," the fact that he "continued to be excessively self-confident about his opinion relative to consulting others and paying careful attention to what their views might be, which is the heart of what our community encourages in our classrooms and encourages of each other." SF¶107. Plaintiff has not claimed that the FRB failed to give him the evidence relating to Blinkx, Sichuan Garden, his disclosures about Microsoft, or about the American Airlines litigation. SF¶39; 83.

In short, even if the FRB Principles created an implied contract that the 2017 FRB process violated, the undisputed facts establish that, in the end, Dean Nohria's misgivings about Plaintiff's judgment—and not anything the FRB did or failed to do—led him to deny tenure for Plaintiff. Accordingly, Plaintiff cannot prove harm, and his breach of contract claim must fail. *See Sonoiki*, 2024 WL 760844 at *10-11.

B. Plaintiff's Claim That HBS Violated the Covenant of Good Faith and Fair Dealing Provides No Basis for Relief

Plaintiff's second claim alleges that Harvard violated the implied covenant of good faith and fair dealing. While "[e]very contract in Massachusetts is subject, to some extent, to an implied covenant of good faith and fair dealing," *Ayash v. Dana-Farber Cancer Inst.*, 443 Mass. 367, 385 (2005), this implied covenant "does not create rights or duties beyond those the parties agreed to when they entered into the contract." *Bos. Med. Ctr. Corp. v. Sec. of Exec. Off. of Health & Hum. Servs.*, 463 Mass. 447, 460 (2012) (affirming dismissal of claim) (quoting *Curtis v. Herb Chambers I-95, Inc.*, 458 Mass. 674, 680 (2011)). Since the FRB Principles did not form a contract (*see supra*, pp.12-15), the Court need not address whether Harvard violated the covenant of good faith and fair dealing. *Englund*, 98 Mass. App. Ct. at *3 n.5 ("Because we conclude that the handbook did not constitute an implied contract, we need not reach [plaintiff's] other claims") (citing *Eigerman v. Putnam Invs., Inc.*, 450 Mass. 281, 288 (2007) ("the scope of the covenant [of good faith and fair dealing] is only as broad as the contract that governs the particular relationship")).

Plaintiff argues that Harvard violated the implied covenant of good faith and fair dealing because the FRB included staff members who allegedly had personal conflicts with him. JA Ex. 175 ¶¶ 119. But "[a]cademic adversaries . . . are not meant to be excluded from the [tenure] process." *Berkowitz*, 358 Mass. App. Ct. at 272. Even putting aside this basic principle, Plaintiff's argument also differs from cases where the court has held that the inclusion of individuals with conflicts might violate a contract's terms and implied covenant. *See*, *e.g.*, *Barry v. Trs. of Emmanuel Coll.*, 2019 WL 499774 at *7-8 (D. Mass. Feb. 8, 2019). The FRB is not a jury; nothing in the FRB Principles requires that HBS must choose FRB members who do not know the plaintiff, who have not formed views based on their experience with him, or do not form views—even strong

views—based on their reactions to what plaintiff has written or said.[8] *Cf. Haddad v. Gonzalez*, 410 Mass. 855, 863 (1991) (trial court judge not required to recuse himself because there was no bias when the formation of the judge's negative opinion of plaintiff was *based on the circumstances connected to the case*). Indeed, the evidence shows that the FRB chose *not* to include significant negative information about Plaintiff it heard from other members of the HBS community during interviews.[9] The FRB Principles do not preclude the participation of faculty or staff members on the FRB who know the Plaintiff or have formed views about him. This claim must also fail.

C. Plaintiff's Claim for Promissory Estoppel Provides No Basis for Relief

Plaintiff's third claim of promissory estoppel centers around two allegations: that "individuals acting on behalf of Harvard represented" "that [Plaintiff] was likely to be awarded tenure if he took the agreed-upon steps" presented to him as part of the 2015 extension; and "that any FRB process would comply with the" FRB Principles. JA Ex. 175 ¶¶ 127-28. To prevail on a promissory estoppel claim, Plaintiff must show that Harvard made a specific, unambiguous promise, and that his reliance on the alleged promise was reasonable. *See Upton v. JWP Businessland*, 425 Mass. 756, 760 (1997); *Motzkin v. Trs. of Boston Univ.*, 938 F. Supp. 983, 999 (D. Mass. 1996) ("In order for there to be an estoppel, there must be some promise or representation by the party against whom the estoppel is asserted which induced reasonable, detrimental reliance by the person asserting the estoppel.").

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[8] For example, Prof. Stuart Gilson, who joined the FRB in 2017, had no prior relationship with Plaintiff, but concluded after reading Plaintiff's March 2017 submission to the FRB that Plaintiff was "arrogant." SF¶61.

[9] For example, interviewees described Plaintiff as "arrogant," "unable to restrain himself," having "no sense of what's appropriate," and "unable to see [the] to other side's point of view." SF¶94-95. Another interviewee wondered whether Plaintiff was "a Ted Kaczynski or a John Nash?" SF¶96. Still another person expressed "doubts about his ability to resolve his behavioral issues." SF¶97.

The factual record belies Plaintiff's claim that he reasonably relied on any purported promises, or that Harvard even made those promises at all. Plaintiff's own testimony and contemporaneous notes acknowledge that he was told that his two-year extension came with "no guarantees" (SF¶45)—the opposite of a promise. To the extent Plaintiff relied on such a statement, it was unreasonable and his claim must fail. And Plaintiff's reliance on any purported representation that "any FRB process would comply with the" FRB Principles is also unreasonable, as the FRB Principles themselves state that they are intended to be a "flexible" "framework" and a "guide," and allowed for deviation from the FRB Principles subject to the "best efforts and judgment" of those administering the principles in recognition of the fact that it would be "difficult to anticipate every circumstance that may arise." Add. ¶13b. Accordingly, Plaintiff's promissory estoppel cannot survive summary judgment.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court enter summary judgment on all counts and grant any other as is just and proper in the circumstances.

ADDENDUM

Excerpts from Ex. A, HBS's Policies and Procedures with Respect to Faculty Appointments and Promotions ("Green Book"):

1. "Tenure is granted to extraordinary individuals who have demonstrated their ability and willingness to make a sustained contribution to the study, teaching, and practice of business." Ex. A at 2.
2. "Three standards guide our evaluation of candidates: A. Intellectual contributions; B. Teaching contributions; C. Contributions to the HBS community." Ex. A at 2.
3. "Contributions to the HBS community[:] All successful candidates must uphold HBS Community Values; accept a fair share of School responsibilities; and contribute to the community." Ex. A at 2.
4. "Recommendations for Corporation appointments are the responsibility of the President, who, in turn, receives recommendations from the Dean, who makes use of faculty information, judgment, and advice. Because the Dean has the sole responsibility for the recommendations made to the President, the Dean may initiate or approve variances from these procedures when, in his or her judgment, the circumstances of a particular case warrant it or are in the best interests of the School." Ex. A at 11.
5. "The primary objective of the appointments process is to provide the Dean with the best possible information, judgment, and advice on various faculty appointments. The process must strive to consider simultaneously the interests of individual candidates and the interests of HBS. It must also satisfy the President and relevant governing bodies of Harvard University. It is important to recognize the vital role of the appointments process in shaping the strategy and shared values of HBS. The appointments process—for any individual case and cumulatively across cases—provides the tenured faculty with the opportunity to continuously reexamine, renew, and revitalize the distinctive mission of the School, which fundamentally depends on the composition of its faculty." Ex. A at 11.
6. "Membership in the Appointments Committee is a privilege with attendant responsibilities. These include: serving on ad-hoc subcommittees, writing review letters and reports, reading reports in advance, and regular attendance at meetings. The deliberations of the Appointments Committee are highly confidential. Its usefulness would be destroyed if reports of its deliberations were communicated to anyone outside the Committee. Members who fail to fulfill the responsibilities of serving on the Appointments Committee or fail to abide by this requirement of confidentiality can be asked by the Dean to withdraw from the Committee." Ex. A at 12.
7. "Based on their evaluation of the letters received and their own reading of the candidate's materials, subcommittees will prepare a report with a recommendation for the full Appointments Committee. The subcommittees' recommendations will be based on a vote of its members. Upon initial review of the case, subcommittees may recommend to the Dean that the candidate needs an extension before his or her case can be reviewed with a reasonable prospect for success, or that the case is simply too weak and that the candidate should be encouraged to withdraw from consideration. The decision on whether to proceed with the review, extend the candidate's appointment, or ask the candidate to withdraw rests

with the Dean. If the subcommittee arrives at a negative recommendation after it solicits letters from reviewers and finishes reviewing the case, the candidate will be informed by the Senior Associate Dean, responsible for faculty development or the Dean." Ex. A at 13.

8. "At a series of meetings convened for the purpose, the report and recommendations of the subcommittee on each candidate being reviewed will be discussed by the full Appointments Committee. At the completion of each discussion, the Dean will ascertain the view of the Appointments Committee, requesting, if needed, an initial vote by signed and confidential ballot to accept, reject, abstain, or modify the recommendation of the subcommittee. Written comments are also solicited by the Dean from members of the Appointments Committee at this stage. The outcome of that vote is not announced to the Appointments Committee at this time. When the series of reviews on individual candidates is completed, the Dean may request a further review of a subset of the candidates for comparative purposes, and another ballot may be requested. The results of all these votes are also confidential. All evidence, recommendations, views, and votes are taken into account by the Dean in making decisions or recommendations to the President. Upon completion of this process, the Dean holds a final meeting with the Appointments Committee, at which time the Appointments Committee is informed of the decisions and recommendations made by the Dean to the President and the reasons therefore, including the results of advisory votes. It is the exclusive responsibility of the Dean to disclose his or her recommendations to the individual candidates." Ex. A at 13.

Excerpts from Ex. B, HBS's Principles and Procedures for Responding to Matters of Faculty Conduct ("FRB Principles"):

9. "In some instances, however—for example, instances of egregious behavior or actions, or incidents that indicate a persistent and pervasive pattern of problematic conduct—a more structured procedure may be needed to investigate the concern and determine whether misconduct has occurred." Ex. B at 1.

10. "[T]he work and activities of the FRB are considered private[.]" Ex. B at 2.

11. "The FRB procedure is designed to be flexible, recognizing the need to weigh multiple factors such as the nature and seriousness of the conduct in question, the supporting evidence, and any mitigating factors and circumstances. At the same time, the FRB procedure aims to provide a framework to allow an appropriate resolution of concerns in a wide variety of circumstances." Ex. B at 2-3.

12. "The following principles and considerations shall guide those carrying out the FRB procedure:"

    a. "Privacy and confidentiality are important considerations; information generally should be shared only on a need-to-know basis, and consistent with what is practicable." Ex. B at 3.

    b. "Recognizing that it can be difficult to anticipate every circumstance that may arise, the individuals responsible for administering the FRB procedure will use their best efforts and judgment." Ex. B at 3.

13. "Notes on Promotions, Reviews, and Reappointments"

a. "[T]he FRB and Executive Dean may seek and report on confidential input—from faculty colleagues, staff, students, alumni, or others—about concerns about the candidates that were not previously reported." Ex. B at 3.

b. "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." Ex. B at 3.

c. "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, and included with that group's report to the full Appointments Committee. In these cases, the Subcommittee or Standing Committee will prepare its report and recommendation, including its vote, based on the criteria excluding colleagueship and adherence to Community Values." Ex. B at 3.

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 19, 2025.

/s/ Martin F. Murphy
Martin F. Murphy