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COMMONWEALTH OF MASSACHUSETTS

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

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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

Defendant President and Fellows of Harvard College (Harvard), the oldest university in the country, is no stranger to litigation. Its administrators and counsel know – or should know – of its obligations to preserve relevant evidence when litigation is foreseeable. Key Harvard leaders correctly recognized the likelihood that their procedurally faulty review of Plaintiff, and resulting denial of his tenure, made it likely that he would file suit. Litigation was not just foreseeable; it was actually foreseen, and memorialized including in emails between the then-Dean of Harvard Business School (HBS) and the Senior Associate Dean who managed faculty promotions.

Rather than issuing a litigation hold—setting software to retain emails, instructing custodians to preserve files and documents—Harvard decided to roll the dice and hope Plaintiff disappeared without the litigation they had recognized as likely. Since no efforts to preserve evidence were made, Harvard custodians deleted relevant documents:

- The Senior Associate Dean personally wiped his tablet—destroying relevant notes he took in meetings with no other notes available—eight months after emailing the Dean

about the likelihood of litigation and two months after receiving Plaintiff's increasingly formal claims both in person and by email.

- The Chair of the committee that evaluated Plaintiff was, by her own telling, "very disorganized" in email. She failed to retain 68% of relevant messages known to have been sent to or from her. And for reasons Harvard has not been able to explain, nine relevant emails were deleted, cleared, and purged (rendering them entirely invisible through Outlook) from her account sometime after Harvard belatedly implemented a litigation hold.
- Another committee member intentionally deleted every responsive email. His production, from five months on the committee, contained exactly zero messages.

The timeline is alarming. Plaintiff stated his claim in increasingly formal terms beginning in spring 2018—expressing more than mere dissatisfaction, he identified specific contract provisions he claimed were breached, and laid out the causal chain from breach to damages. Nonetheless, Harvard took no steps to preserve evidence for three-plus years. Only in August 2021 did Harvard even begin taking steps to preserve evidence—but even then, for only one of the five committee members who Plaintiff had identified as custodians of relevant documents.

After this lawsuit was filed, Harvard finally activated a broader litigation hold. But by then, substantial evidence had already been deleted. Notably, Harvard also failed to preserve data about who deleted or attempted to delete emails, both before and after the litigation hold took effect, making it impossible for Plaintiff to identify, in most cases, which messages were deleted, when, or by whom. Whether Harvard's loss or deletion of relevant evidence was in bad faith or merely negligent, action by the Court is warranted to address the prejudice to Plaintiff by authorizing appropriate adverse inferences.

I. Facts

In 2017, the HBS Faculty Review Board (FRB) conducted an inquiry into Plaintiff's behavior and colleagueship. The inquiry violated the governing policies and procedures ("P&P") in several ways, ultimately culminating in a report that negatively impacted Plaintiff's application for tenure. The decision to deny Plaintiff tenure was finalized in December 2017.

In March 2018, Plaintiff met with Dean Nohria and explained ways in which he believed the FRB had not followed its P&P to his detriment, stating "in no uncertain terms" that he believed it was a legal matter. (Edelman Dep. 53-55.) He left Dean Nohria with a color-coded copy of the P&P, marking specific provisions he believed had been violated. (Russcol Aff. Attach. U.) On April 27, 2018, Plaintiff met with Senior Associate Dean Healy to further explain his concerns about the FRB process and how it impacted his tenure case. As of that time, Healy testified that he "assumed [Edelman] might consider litigation" and "didn't know whether he would go so far as that stage of bringing a lawsuit" but thought it was a possibility. (Healy Dep. 179.)[1]

On May 16, 2018, Plaintiff emailed Dean Healy to reiterate his belief that the P&P had been violated, again citing specific provisions, and referencing "dispute resolution systems" as an appropriate way to proceed. (Russcol Aff. Attach. BB.) In response, Healy wrote to Dean Nohria, "Sounds like Ben is preparing to go to the next level," and Nohria responded, "That's

[1] This was not the first time that HBS leaders recognized the possibility of litigation. In 2015, in the context of the first FRB review of Plaintiff, an interviewee remarked that the FRB members "will all be on the hot seat should Ben [Edelman] choose to sue, and he will sue," and FRB Chair Amy Edmondson said she agreed. (Russcol Aff. Attach. Z.) On October 25, 2017 (weeks after the FRB's report was finalized, but before the faculty vote on tenure, and before Plaintiff had raised any concern about handling of his FRB and candidacy), Senior Associate Dean Paul Healy discussed in an email with HBS Dean Nitin Nohria "fears that there will [be] a legal follow up if Ben [Edelman] does not get promoted and we do not have tight policies to defend ourselves." (Russcol Aff. Attach. DD.)

always his choice." (Russcol Aff. Attach. Y.) HBS Associate Dean Jean Cunningham promptly forwarded this thread to attorneys in the Harvard Office of General Counsel. (Russcol Aff. Attach. CC.) On May 31 and June 11, 2018, Plaintiff wrote to then-Provost Alan Garber expressing that "rules" had been "violated," asking for a meeting in order to avoid an "overly lawyerly" written submission, stating that "procedural commitments… weren't followed," and indicating that further discussion could "get[] legalistic and frankly argumentative pretty quickly." (Russcol Aff. Attach. V.) Plaintiff's June 19, 2018 letter to Garber quoted and analyzed the P&P, and identified "violations" of Harvard's "commitments." (Russcol Aff. Attachs. V, W.) Inexplicably, Harvard took no steps at this time, or for over three years afterwards, to implement a litigation hold—with predictable consequences in lost evidence.

In July 2018, Dean Healy "completely wiped" an iPad that had his notes and relevant documents from the promotion process, including notes related to the 2017 Standing Committee meeting about Plaintiff's candidacy for tenure. (Healy Dep. 72-73.) Healy remembered having taken notes at that meeting, whereas he believed that nobody else was taking notes. (Healy Dep. 72-73.) Healy indicated that his iPad also contained his notes on "various meetings" about all manner of subjects relevant to applicable policies and Plaintiff's candidacy. (Healy Dep. 72-73.)

On June 30, 2021, Plaintiff emailed the new HBS Dean, Srikant Datar, attached a letter from an attorney, and flagged "the need to preserve documents pertaining to my FRB and subsequent evaluation." (Russcol Aff. Attach. Q.) Plaintiff's email indicated having retained counsel, and the attached letter identified claims, applied legal reasoning, and cited case law. (Russcol Aff. Attach. R.) Nearly two months later, on August 24, 2021, Harvard finally implemented a litigation hold for some custodians. (Russcol Aff. Attach. D.) That hold covered the email accounts of Dean Nohria, Dean Healy, FRB Chair Edmondson, and Associate Dean

Cunningham. It did not cover the email accounts of the other four FRB members or other relevant custodians.

Between October 19, 2021, and November 4, 2021, Plaintiff communicated with Attorney Jennifer Kirby in the Harvard Office of General Counsel. Plaintiff flagged Harvard's document retention obligations and stated that pertinent custodians included "the FRB faculty and staff." (Russcol Aff. Attachs. S, T.) Harvard still did not place litigation holds on the other FRB members.

On October 4, 2022, Plaintiff's current counsel wrote to Attorney Kirby with a description of Plaintiff's legal claims and a request to preserve documents including "Documents, notes, communications, letters, emails, reports or records created by any Harvard employee related to Professor Edelman's candidacy for tenure or the 2015 and/or 2017 FRB processes" and "Communications from or to any Harvard employee… concerning Edelman's candidacy for tenure or the FRB process." (Russcol Aff. Attach. C.) Harvard again did not implement litigation holds for any additional custodians.

Only on February 24, 2023, after Harvard was served with the Complaint in this matter, did Harvard commence a litigation hold for Dean Crispi, the other members of the 2017 FRB (Profs. Gilson and Schlesinger), and the other member of the 2015 FRB (Prof. Reinhardt). Another six to sixteen more months passed before Harvard placed litigation holds on the account of other relevant custodians including Max Bazerman, who was referenced in the Complaint and 2017 FRB Report, and Brian Hall, Plaintiff's unit head and immediate manager.

Prof. Edmondson, the Chair of the FRB, was the natural hub for communications for all aspects of FRB, including receiving, evaluating, and summarizing information. Unfortunately, she did not reliably retain her email. Of the 355 responsive messages Harvard produced in

discovery that Edmondson sent or received, she produced only 36%. (Russcol Aff. ¶ 4 & Attach. A.) The other 64% of the produced messages were available only because someone else retained them; if Edmondson and all others did not keep a message, it was lost and not even considered in the counts reported above.[2] Presented with gaps in her email production, Edmondson was unable to describe her practices for deleting emails, testifying that she was "very disorganized" in email. (Edmondson Dep. 52.)

It appears from metadata that Prof. Edmondson or someone with access to her email account tried not just to delete nine relevant messages, but then to clear and *purge* them, entirely removing them from Outlook's display and, as far as a user can tell, making the messages totally unrecoverable.[3] This occurred at some point after Edmondson was placed on litigation hold, which means that these relevant messages were still in Edmondson's account after August 2021, but someone was going out of their way to delete them permanently at some point after the litigation hold was implemented—either on the eve of this litigation, or when it was actually

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[2] Harvard's production also included 51 additional responsive messages that *no* custodian kept, but whose existence is shown because they are quoted within other messages. That creates a universe of 406 known responsive messages, which Edmondson sent or received, namely the 355 produced by at least one custodian plus these 51 known from quotes. Edmondson produced just 32% of the 406. (Russcol Aff. ¶ 5 & Attach. B.)

[3] Prof. Edmondson produced these nine messages from her "Recoverable Items\Purges" folder. Microsoft Outlook documentation indicates that a message is placed in the invisible Recoverable Items\Purges folder only after (1) the message is deleted from a normal folder, then (2) cleared from Deleted Items (with a confirmation screen), then (3) a user opens the Recoverable Items folder, (4) selects the messages at issue, (5) selects the command to Purge the message(s) and presses OK, and (6) accepts another confirmation screen. (The first two steps can be combined if someone holds the Shift key while deleting a message.) At the conclusion of the Purge command, the message cannot be viewed anywhere in Outlook and appears to a user to be, finally, totally gone. However, if the user is on a litigation hold, the message is preserved on Microsoft servers and remains available for production. *See* https://learn.microsoft.com/en-us/exchange/security-and-compliance/recoverable-items-folder/recoverable-items-folder.

underway. To date, Harvard has not been able to identify who deleted, cleared, or purged the messages, when, or why.

Prof. Gilson, an FRB member in 2017, testified that he periodically deleted his emails, and did not keep them until he was instructed to preserve them in 2023. (Gilson Dep. 61-63, 70-72, 75-76.) But by 2023, Gilson had already deleted all responsive emails, so no emails responsive to Plaintiff's discovery requests still exist in Gilson's email account. Many emails Harvard has produced relating to the FRB process are available only because Dean Cunningham retained them, whereas the members of the FRB did not; many emails on which she was not copied have likely been lost. With Gilson having deleted every email from his records, and Edmondson having deleted most of her copies, there exist no records of even a single 1:1 email between, for example, Gilson and Edmondson. There is good reason to think such emails existed. For example, Edmondson and Reinhardt exchanged at least 29 responsive 1:1 emails during the 2015 FRB, and because Reinhardt preserved most messages, many Edmondson-Reinhardt 1:1 emails exist (and are highly informative about FRB decision-making).[4] In contrast, because Gilson deleted all his emails, no one-on-one emails between Gilson and Edmondson have been preserved.

[4] Prof. Edmondson's emails with Prof. Reinhardt are an appropriate comparison for two different reasons. First, Prof. Gilson took over Reinhardt's seat on the FRB. And second, Edmondson, Reinhardt, and Gilson were members of both the FRB and the Appointments Committee, whereas Prof. Schlesinger was not an Appointments Committee member, making it more logical for Edmondson to have side conversations with Reinhardt and Gilson, especially on issues that may have related to the Appointments Committee process. For example, Edmondson communicated with Reinhardt about the potential use in the FRB context of information from letters submitted in the tenure process.

II. Legal Standard

If a party negligently or intentionally destroys or loses relevant evidence after being on notice of a potential claim, sanctions for spoliation are appropriate. "[P]ersons who are actually involved in litigation (or know that they will likely be involved) have a duty to preserve evidence for use by others who will also be involved in that litigation." *Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 549-50 (2002). "[A] party who has negligently or intentionally lost or destroyed evidence known to be relevant for an upcoming legal proceeding should be held accountable for any unfair prejudice that results." *Keene v. Brigham and Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003). "Sanctions may be appropriate for the spoliation of evidence that occurs even before an action has been commenced, if a litigant… knows or reasonably should know that the evidence might be relevant to a possible action." *Kippenhan v. Chaulk Servs., Inc.*, 428 Mass. 124, 127 (1998).[5] A party is on notice of a claim if they are contacted by a lawyer threatening legal action or requesting relevant records, but also if they subjectively understand that an event has occurred that might give rise to a lawsuit. *See Weidmann v. The Bradford Group Inc.*, 444 Mass. 698, 706 (2005) (defendant on notice after receiving letter from plaintiff's attorney notifying them of potential claim and requesting employment records); *Keene* at 227, 234 (defendant on notice because it notified insurer of potential claim after receiving request for medical records from patient's family, even though suit was not filed for 8 years); *Westover v. Leiserv, Inc.*, 64 Mass. App. Ct. 109, 111, 113 (2005) (defendant on notice where plaintiff was injured by broken chair and defendant's general manager set chair aside, demonstrating

[5] Spoliation of evidence before an action commences is not subject to Mass. R. Civ. P. 37 as such, because "there can be no discovery violation… when a party fails to produce documents it does not possess." *Keene* at 233. Sanctions for spoliation are independent of the rules of discovery. *See id.* at 233-34.

awareness of possible litigation). Even if a defendant believes that litigation will not occur or fails to subjectively realize the need to preserve evidence, sanctions are still appropriate if "a reasonable person in the spoliator's position would realize, at the time of spoliation, the possible importance of the evidence to the resolution of the potential dispute." *Kippenhan* at 127; *see Weidmann* at 706 (rejecting "excuse that they did not think the plaintiff would be filing a claim against them"). When litigation is reasonably anticipated, parties are obliged to prevent deletion of electronically stored information through a litigation hold. *See* Mass. R. Civ. P. 37, Reporter's Notes (2014). Remedies for spoliation may include exclusion of evidence related to that which is no longer available, an adverse inference against the responsible party, allowing evidence about the circumstances of the spoliation, and "instructing the jury on the inferences that may be drawn from spoliation." *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 488 (2003).

III. Argument

Harvard's failure to preserve evidence for years despite ample notice of Plaintiff's legal claims is egregious—particularly for such a sophisticated institution represented by counsel, with counsel actually informed by their client as the dispute developed, and with litigation not just foreseeable but actually foreseen. *Compare Linnen v. A.H. Robins Co., Inc.*, 10 Mass. L. Rptr. 189, *9 (Super. Ct. Middlesex Cty. June 16, 1999) (Brassard, J.) (finding spoliation where party failed to stop automatic deletion of backups for four months after suit was filed). As outlined above, Harvard actually anticipated litigation no later than May 16, 2018, by which point Plaintiff had personally met with two top deans of HBS to discuss his legal claims, those deans understood that Plaintiff was likely to escalate, Dean Healy recognized that litigation was a possibility, and HBS staff informed Harvard counsel of Plaintiff's potential claims. *See Keene v. Brigham and Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003) (duty to preserve evidence arose

at latest when defendant notified insurer of potential claim). Yet more than three years passed before Harvard implemented litigation holds on even a single relevant custodian.

We know that some specific evidence, such as Dean Healy's notes, was deleted. Other lost data is difficult to identify with specificity. That task is made more difficult because Harvard failed to preserve metadata about what messages were deleted, when, and by whom, both before *and after* commencing litigation holds. That compound failure to preserve evidence should not inure to Harvard's benefit. Focused adverse inferences in Plaintiff's favor are necessary to cure the prejudice from Harvard's spoliation.

a. Harvard Failed to Preserve Dean Healy's Notes of Relevant Meetings, and Healy Personally Destroyed Those Notes, Even Though He Understood Litigation Was Contemplated

Even though Dean Healy personally understood that Plaintiff might sue Harvard in May 2018, and specifically reported that understanding to Dean Nohria, Healy wiped an iPad containing notes of relevant meetings and tenure files.[6] For instance, Dean Healy (and nobody else) took notes during a 2017 Standing Committee meeting to consider Plaintiff's tenure application. In that meeting, one of the FRB members, Prof. Schlesinger, took "a lot of questions" for "about 45 minutes" from tenured faculty members who voted on Plaintiff's tenure case, but the Standing Committee's summary of the meeting was extremely vague about what was asked or how Schlesinger answered. (Schlesinger Dep. 134-35, 137; Russcol Aff. Attach. X.) A month after presenting to the Standing Committee, Schlesinger told the FRB that a major theme of the discussion was "Who did we really talk to – to reach the conclusions." (Russcol Aff. Attach. AA at 3..) Yet in his deposition, Schlesinger testified that the Standing Committee did not ask who the FRB had interviewed. (Schlesinger Dep. 136-37.) Dean Healy's

[6] Healy stated that he wiped the iPad when he stopped being Senior Associate Dean for Faculty Development in June 2018.

contemporaneous notes of the discussion would have helped clear up this discrepancy by providing more reliable evidence of what Schlesinger actually said.

As Senior Associate Dean for Faculty Development, Dean Healy led the full-faculty Appointments Committee meeting that led to the faculty vote on Plaintiff's tenure case, and he was involved in numerous other discussions related to this case, including the design of the FRB, coordinating the interaction between the FRB and the Subcommittee evaluating Plaintiff's scholarship, conveying the FRB report to the Appointments Committee, and assisting Dean Nohria in forming a recommendation. The iPad could have contained notes on any or all of this, relevant to Plaintiff's claims in ways Plaintiff cannot now know.

Notably, Healy personally recognized the likelihood of litigation (and reported that to his boss, Dean Nohria) and Healy personally wiped his iPad. That is intentional spoliation of evidence. The Court should remedy the prejudice from this intentional destruction of evidence.

b. Harvard Failed to Preserve Data from Key Custodians Well After It Was On Notice of Plaintiff's Legal Claims

It was amply foreseeable that Dean Nohria, Dean Healy, Dean Cunningham, and Prof. Edmondson would have emails relevant to Plaintiff's claims about the FRB process and the consideration of his tenure application. Yet Harvard delayed preservation measures for these custodians until August 2021, over three years after Harvard administrators and counsel identified and discussed the likelihood of litigation. There is no way to reconstruct what data was lost during those years, because Harvard does not keep records of data deletion.

This problem is most stark for Prof. Edmondson, who as FRB Chair is a pivotal witness. Edmondson testified that she had no standard practices about email retention and did not know whether she had retained all emails pertaining to FRB consideration of Plaintiff. When asked if she had deleted a particular message that was preserved by other custodians but not by her, she

answered "I don't know. I mean, anything's possible." (Edmondson Dep. 50-52.) Harvard activated Edmondson's litigation hold in August 2021, but Edmondson testified that she had no understanding that she was required to preserve documents until Plaintiff filed this lawsuit in February 2023. In the intervening eighteen months, Edmondson testified that she was unaware that she was obliged to preserve relevant materials, which raises the possibility that paper files and electronic data not automatically preserved could have been lost. (Edmondson Dep. 62-63.) She was unsure whether or not she deleted emails related to Plaintiff after she understood that obligation. (*Id.*)

As discussed above, someone attempted to permanently delete messages from Prof. Edmondson's email account after the litigation hold was put in place. Those messages included some from the 2015 FRB process and some from the 2017 FRB review. Many of those messages portray Edmondson in a bad light – as disliking Plaintiff, attempting to turn the discussion against him, hoping that he would see the "writing on the wall" and leave HBS, and regretting that he had procedural rights in the P&P that he might use to his benefit. (Russcol Aff. Attachs. K, L.) Edmondson expressed uncertainty about whether the FRB was permitted to finalize its report without addressing new evidence contradicting its criticism of Plaintiff, and speculated about "reputational… challenges" that would arise from "having a law office as an HPS [sic] professor," even though no policy prohibited law practice by HBS faculty. (Russcol Aff. Attachs. L, N.) Edmondson also deliberated about whether and how to address the American Airlines lawsuit in the FRB's review, and how to communicate about that with Plaintiff and with the rest of the FRB. (Russcol Aff. Attachs. M-P.) Perhaps someone sought out these messages to cover up certain information about the FRB process, or perhaps it is coincidental that these delete-clear-purged messages portray Edmondson unfavorably. Either way, these messages still exist

only because of the belated litigation hold. The unexplained multi-step attempt to delete these messages suggests that other relevant and damaging messages may have been successfully deleted before the hold went into effect.

These messages were responsive and relevant. The fact that they exist now, and were found in the Recoverable Items\Purges folder, indicates that they were kept until at least August 2021, but then someone tried to permanently erase them. As discussed below, Harvard has no explanation for how these messages came to reside in that folder. One possible inference is that Prof. Edmondson intentionally deleted evidence during the litigation hold period—from which some might conclude that she also intentionally deleted evidence before the litigation hold took effect. There are other possible explanations. But, as explained below, Harvard's decision not to retain metadata about email deletion hinders any effort to explore whether deletions were negligent or in bad faith. And because Harvard did not keep earlier records of who deleted what messages or when, there is also no telling how many other relevant messages were deleted before August 2021.

The unavailability of a full record of contemporary emails to refresh Prof. Edmondson's recollection in particular is highly prejudicial. Edmondson's memory is remarkably poor. Other evidence indicates that she presented the FRB's findings to the full senior faculty at the Appointments Committee meeting in 2017, and that she spoke more than anyone in that meeting. (Healy Dep. 167-68, 177-78) Nonetheless, Edmondson has no recollection of what she said, and does not even remember being there. (Edmondson Dep. 96-97, 191-92.) At her deposition, Edmondson answered questions with some variation of "I don't recall" or "I don't remember" at

least 131 times, not including when those were part of a longer answer.[7] Given Edmondson's poor memory as to many important events, any additional emails she wrote or received would have been valuable to refresh her recollection.

A timely litigation hold would have instructed Edmondson that she must preserve documents, and would also have used software protections to preserve at least her emails. Had such a litigation hold been implemented in early 2018 when Plaintiff asserted his claims to them and they alerted counsel, it is likely that many more of Edmondson's messages would have been available for preservation.[8] And similarly, unknown numbers of documents that Dean Nohria, Dean Healy, and Dean Cunningham possessed during the time period before August 2021 are no longer available because Harvard failed to implement a litigation hold.

c. Harvard Failed to Implement a Litigation Hold on FRB Members and Others Even After It Recognized a Litigation Hold Was Needed

Harvard delayed even longer in preserving data from the other FRB members and witnesses such as members of Plaintiff's unit who objected at the time to how the FRB process unfolded. It was on notice of Plaintiff's claims by 2018, and in 2021 Plaintiff explicitly wrote to Harvard's counsel to ask that Harvard preserve documents from the FRB members, but Harvard chose not to implement litigation holds for these custodians until after suit was filed in 2023.

Prof. Gilson deleted all his emails about Plaintiff before he got a preservation notice, but he kept most of them while the FRB review was ongoing and for some time afterwards. (Gilson Dep. 75-77.) He had his electronic files related to the FRB on an Apple laptop that he likely

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[7] Edmondson Dep. 28, 29, 33, 34, 40, 41, 42, 43, 44, 47, 49, 63, 65, 68, 70, 75, 78, 81, 82, 85, 86, 87, 88, 89, 90, 91, 93, 94, 97, 98, 102, 107, 108, 109, 110, 111, 112, 114, 118, 119, 120, 121, 122, 128, 129, 130, 131, 132, 133, 134, 136, 137, 143, 144, 146, 149, 150, 151, 155, 158, 161, 162, 163, 164, 166, 182, 193, 203, 205, 208, 211, 212, 215, 218, 220, 221, 223, 224.

[8] When the litigation hold for Prof. Edmondson was finally implemented in 2021, 40% of the responsive emails from 2017 still retained by at least one custodian were still in Edmondson's account, compared to only 27% of those from 2015 and 2016. (Russcol Aff. ¶ 4 & Ex. A.)

replaced a year or two after 2017 (Gilson Dep. 72-73.), which would have been preserved if Harvard had timely processed a litigation hold as soon as Edelman raised concerns to Healy and Nohria. He also shredded files related to his committee service, like the FRB, every year or two. (Gilson Dep. 71-72.)

Plaintiff has no way of knowing how many other relevant emails or files were deleted or destroyed by the various other custodians. Their evidence would have been useful for better understanding the work and perspectives of the FRB members and how the FRB process played out.

d. Harvard Failed to Preserve Metadata That Would Have Shown What Was Deleted, When, and By Whom

Plaintiff cannot tell who deleted messages, or when, because Harvard decided not to preserve Microsoft metadata concerning deletion, even after establishing a litigation hold. A Microsoft function called "mailbox audit log" stores information about which emails are deleted, cleared, or purged, who did so (the user personally, a delegate such as an administrative assistant, or an IT administrator), and when. *See* https://learn.microsoft.com/en-us/purview/audit-mailboxes. Harvard configured its systems not to retain email audit logs longer than 90 days, even when a litigation hold is in place. (Russcol Aff. Attach. E.) If preserved, these logs would have stated who deleted, cleared, and purged Prof. Edmondson's responsive emails. The mailbox audit logs would also have revealed what emails were deleted (and by whom) from 2018 to 2023.

Given Plaintiff's showing that Harvard was on notice of his claims and failed to act to preserve relevant evidence, the burden should be on Harvard to show a lack of fault or bad faith relating to the lost evidence. *See Scott v. Garfield*, 454 Mass. 790, 799 (2009) (once plaintiffs

made preliminary showing, burden was on defendants as they were "in a better position to prove that there had been no fault in their failure to preserve… evidence").

The loss of metadata compounds the loss of the underlying records; it cannot excuse it. To the extent that Plaintiff is unable to make a more particularized showing of exactly what evidence was deleted, that gap of proof is squarely Harvard's fault.

e. As Appropriate Remedies, Adverse Inferences Should Be Applied Against Harvard

The remedy for spoliation of evidence must be tailored to the unfairness created by the unavailability of that evidence, and an adverse inference should be tailored to address the prejudice to the other party. *See Fletcher v. Dorchester Mut. Ins. Co.*, 437 Mass. 544, 551 (2002); *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 488 (2003). In this case, there are numerous events, meetings, and conversations that the participants cannot recall. Missing notes and emails could have been used to refresh witness recollections or impeach their testimony, and they were deleted after Harvard had an obligation to preserve them. In order to ameliorate the prejudice from this missing evidence, the jury should be given three related instructions:

1) For meetings attended by Paul Healy while he was Senior Associate Dean for Faculty Development, the jury may infer that he took notes of those meetings and that those notes would have contained information helpful to Plaintiff and harmful to Defendant.

2) The jury may infer that any documents which Harvard failed to preserve after it was on notice of Plaintiff's claims would have contained information helpful to Plaintiff and harmful to Defendant.

3) If Harvard witnesses no longer remember events in 2017, and the jury finds that they likely sent or received emails that would have refreshed their memories about

those events, but those emails no longer exist, the jury may infer that those emails would have contained information helpful to Plaintiff and harmful to Defendant.

See Maclellan v. Shaw's Supermarket, Inc., 24 Mass. L. Rptr. 317, *4 (Super. Ct. Worcester Cty. June 23, 2008) (Agnes, J.) (ordering instruction that "The jury may infer that if the evidence was available it would have helped [plaintiffs'] case against [defendant]"); *Fitchburg Gas and Elec. Light Co. v. OneBeacon America Ins. Co.*, 2010 WL 5489974, *2 (Super. Ct. BLS Nov. 16, 2010) (Neel, J.) ("Defendants shall be entitled to an instruction that the jury may (but are not required to) infer generally from such evidence that among the documents destroyed were documents pertaining to the matters at issue in this case, and that such documents contained information favorable to defendants and unfavorable to plaintiff.").

Because these inferences would be available to the jury, they should be applied in Plaintiff's favor in considering Defendant's motion for summary judgment. *See Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 38 (2005) ("all reasonable inferences" must be drawn in nonmoving party's favor); *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, PC*, 474 Mass. 382, 404 n.32 (2016) (drawing any inferences in employer's favor would be inconsistent with summary judgment standard).

IV. Conclusion

For the foregoing reasons, the Court should apply appropriate inferences and sanctions against Harvard for its spoliation of evidence; should require Harvard to pay Plaintiff's attorneys fees for time reasonably attributable to spoliation; and should order such other and further relief as may be just and proper.

Respectfully submitted,
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By his attorneys,

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Dated: November 21, 2025

CERTIFICATE OF SERVICE

I, David A. Russcol, hereby certify that I have caused a true and correct copy of the foregoing document to be served on counsel of record for Defendant by email on November 21, 2025.

David A. Russcol