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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

HARVARD'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR SPOLIATION SANCTIONS

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

By its attorneys,

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Dated: December 15, 2025

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I. INTRODUCTION

Plaintiff Benjamin Edelman's spoliation claim boils down to two principal contentions. First, he claims that sanctions are warranted because, before Plaintiff first threatened suit against Harvard and Harvard put a litigation hold in place, three Harvard Business School ("HBS") professors' emails and in two cases, either electronic or physical notes, were deleted in the ordinary course. Second, Plaintiff claims that the Court should impose sanctions because one of those professors did not personally save her emails; instead, *Harvard* **preserved** those emails when it put a "back-end" litigation hold in place.

Neither of Plaintiff's contentions warrants a spoliation finding or sanctions. In this litigation Harvard has produced nearly 5,500 documents (totaling almost 25,000 pages), including all the documents central to Plaintiff's claims and Harvard's defenses, most crucially: notes of interviews conducted by the HBS Faculty Review Board ("FRB") in 2015 and 2017; multiple drafts, comments, and edits of the 2015 and 2017 FRB Reports; notes of the FRB's meetings; and the voting sheets used by the HBS Standing and Appointments Committees to explain why they voted for or against Plaintiff's tenure candidacy.

The facts Plaintiff alleges here are a far cry from the facts courts have found warrant spoliation findings. In those cases, defendants failed to preserve critical evidence despite clear knowledge that litigation was likely. Plaintiff cannot come close to establishing that here. The Court should deny Plaintiff's motion.

II. BACKGROUND

A. Plaintiff's Contentions

Plaintiff relies on several assertions to bolster his spoliation claim and request for sanctions, including that Harvard should have anticipated litigation "no later than" May 16, 2018, but put its first litigation hold in place in August 2021; Harvard and certain of its custodians allegedly failed

to preserve, intentionally deleted, or attempted to delete evidence after they were supposedly on notice; and Harvard allegedly failed to preserve metadata that could have shown when certain emails were deleted and when.[1] Specifically, Plaintiff contends that former Senior Associate Dean Paul Healy "completely wiped" notes and other documents relevant to Plaintiff's tenure process after Healy was purportedly on notice of litigation. (Mem. at 4, 10.) Next, Plaintiff criticizes FRB Chair Amy Edmondson's "disorganized" email practices and purported gaps in her production, as well as the fact that a few emails produced from her file were in what Microsoft Outlooks labels her "Purges" folder, to argue that she (or someone with access to her account) intentionally spoliated evidence. (Mem. at 6-7.) Plaintiff also cites 2017 FRB member Professor Stuart Gilson's normal practices of deleting emails and cleaning out physical files as proof of further spoliation. (Mem. at 7, 14-15). As Harvard explains below, each of these assertions is negated by the factual record, which shows that Harvard was not on notice of litigation until summer 2021—over three years after Plaintiff claims—and that Harvard's efforts worked exactly as intended to preserve evidence for production in this litigation. Further, Plaintiff cannot show that he was prejudiced by any of these actions, and so his claim must fail.

B. <u>Harvard's Document Preservation Efforts and Production</u>

Harvard first received a communication revealing that Plaintiff had retained counsel on July 30, 2021,[2] when Edelman sent an email to new HBS Dean Srikant Datar that attached a memorandum (the "Baller Memorandum") from a lawyer, Morris J. Baller of Oakland, California—dated February 14, 2020, *more than 15 months earlier*—identifying potential legal claims Edelman could bring against Harvard related to purported contractual breaches in the course

[1] Plaintiff cites no precedent to suggest that Harvard was required to buy an additional license from Microsoft so that it could determine who deleted emails. (Plaintiffs' Memorandum in support of Motion for Sanctions, hereinafter referred to as "Mem." at 6-7.).

[2] Plaintiff's Memorandum erroneously states that the date of this email was June 30, 2021. (Mem. at 4.)

of his 2017 FRB review.[3] (*See* Russcol Aff., Attchs. Q, R.) Harvard acted promptly when it received this communication. It took steps in early August 2021 to preserve evidence by issuing litigation holds on the key decision-makers in Plaintiff's tenure case and his FRB review—including former Dean Nitin Nohria, former Senior Associate Dean Paul Healy, and FRB Chair Prof. Amy Edmondson. At the same time, HBS also placed a litigation hold on Associate Dean Jean Cunningham, who provided staff support for the FRB. These litigation holds did more than simply instruct potential witnesses to retain documents; HBS's IT department put holds on the email accounts of these individuals to ensure that all of their emails would be preserved on the "back end." (Ex. 30, Pringle Aff. ¶6.) Two years later, when Edelman actually filed suit, Harvard expanded its litigation hold to include, among others, the other faculty members and staff who had served on the FRB in 2015 and 2017. (Russcol Aff., Attch. D.)

To understand the effect a litigation hold has on an HBS email user's email account, it is important to highlight how certain deletion and background retention processes function in Microsoft Outlook at HBS. In the normal course, HBS email users delete items from their inbox or other email subfolders. Email items that are deleted from a user's inbox are moved into the "Deleted Items" folder of their email account until they are manually deleted (usually by the user). (Ex. 30 ¶5.) Once cleared from Deleted Items, items move into the Recoverable Items\Deletions folder, where they remain until HBS's automated background retention expiration policy kicks in after 14 days (or before then if the user manually clears them). (*Id*.) As the folder name implies, items in this folder are recoverable prior to being cleared. (*Id*.) Items cleared from Deletions then move into the user's Recoverable Items\Purges folder, where, like the Deletions folder, items remain until they are manually cleared, or the 14-day retention expiration policy is applied

[3] Mr. Baller has not appeared for Plaintiff in this action.

(whichever happens first). (*Id*.) Clearing items from Purges is normally permanent; "purged" items cannot be viewed or recovered. (*Id*.)

A litigation hold placed on an HBS email user's account, however, overrides any effort (whether intentional or automatic) to Purge email items. (Ex. 30 ¶6.) Under a litigation hold, items may still move from Deleted Items to Deletions to Purges by either the manual or automatic processes described above. (*Id*.) However, a litigation hold ensures that items are not permanently deleted from Purges, but are retained so that they can be extracted and produced as part of litigation discovery. (*Id*.) In other words, from the time when litigation holds were put in place on the respective HBS custodians, the hold ensured that email items associated with these users' accounts were saved, preventing permanent deletion, even if a user attempted to manually delete one or more items from their inbox, Deleted Items, Deletions, or Purges folders.

Accordingly, Plaintiff's description of how messages are permanently deleted from a user's Outlook account is *but one way* this can happen. (See Mem. at 6, n.3.) The way described here—where a user need only clear a deleted item from her Deleted Items folder before automated processes continue to clear the message from Deletions into Purges, *while still retaining the message* for discovery purposes when a litigation hold is in place, is almost certainly how Edmondson's emails ended up in her Purges folder. When confronted with Plaintiff's multi-step process for deleting and purging emails at her deposition, Edmonson testified that she was not familiar with the "Recoverable Items" or "Purges" folders, was not aware of having gone through the purging process as presented by Plaintiff's counsel, and did not recall seeing the different dialogue boxes and prompts that Plaintiff's counsel represented made up the process to delete and purge emails. (Ex. 1 at 56:6-58:19.) Further, while a handful of the responsive emails produced from her file were from her Purges folder, metadata for Edmondson's entire email file show that

there were over 293,000 emails total in her Purges folder at the time Harvard collected her file. (Ex. 6, Athay Aff. at ¶5.) These numbers, Edmondson's testimony, and the automated 14-day retention expiration policy that functions on HBS email accounts, make it much more likely that the emails Plaintiff points to as being purposefully selected and intentionally deleted by Edmondson were rather moved into Purges by the automated process after she took the first step of clearing her Deleted Items folder.[4] Regardless, the manner in which Edmondson's emails ended up in her Purges folder is irrelevant, *precisely because* those emails were preserved, produced to Plaintiff, and shown to Edmondson at her deposition thanks to Harvard's document preservation efforts. (*See* Ex. 1 at 60:1-62:9.) For this reason, Plaintiff's focus on the emails Harvard produced that he claims indicate an attempted "deletion" or "purging" from Prof. Edmondson's custodial file is a red herring. To put the matter as simply as possible: *Harvard's actions preserved these items and Harvard produced them in this litigation*.

Indeed, Harvard's productions demonstrate that Harvard did not engage in the spoliation of evidence. Harvard is in possession of and has produced nearly 5,500 documents totaling almost 25,000 pages. (Ex. 6 ¶3.) These documents include:

- Notes from the 2015 and 2017 FRB witness interviews;
- Comments and edits on the multiple drafts of the respective 2015 and 2017 FRB Reports shared among the FRB members;
- Notes of FRB meetings;
- Notes of the personal impressions of FRB members regarding Plaintiff's written and oral statements, including those of Gilson;

[4] While Edmondson testified that she has engaged in a regular practice of clearing her Deleted Items folder, she also testified that she does not go into her Deleted Items folder to manually delete *particular* messages. (Ex. 1 at 55:15-56:1.)

- Voting sheets from the 2017 Standing and Appointments Committees;
- The summary of the 2017 Standing Committee's deliberations; and
- Emails between and among FRB members in 2015 and 2017. (*See* Ex. 6 ¶3.)

In short, Harvard acted exactly as it should have when it became aware that litigation was likely: implementing holds on key personnel to preserve responsive documents.

III. ARGUMENT

A. Under Massachusetts Law, Plaintiff Must Establish that Defendant "Culpably" Destroyed Evidence That Prejudiced His Ability to Prove His Case

The doctrine of spoliation permits a court, in certain circumstances, to impose sanctions against a litigant who "negligently or intentionally loses or destroys evidence." *Scott v. Garfield*, 454 Mass. 790, 798 (2009). "The premise underlying the doctrine is that a party who culpably destroys evidence 'should be held accountable for any unfair prejudice that results.'" *Santiago v. Rich Prod. Corp.*, 92 Mass. App. Ct. 577, 581 (2017) (quoting *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003)). "The doctrine does not extend to 'a fault-free destruction or loss of physical evidence.'" *Id*. (quoting *Kippenhan v. Chaulk Servs., Inc.*, 428 Mass. 124, 127 (1998).)

The party seeking a spoliation finding and sanctions has the burden of producing evidence sufficient to establish two important facts. *Scott*, 454 Mass. at 799. First, Plaintiff must establish that "[t]he threat of a lawsuit [was] sufficiently apparent . . . that 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*, 428 Mass at 127. Second, in order to warrant a spoliation finding, a party seeking sanctions also has the burden of demonstrating that the alleged spoliation caused prejudice. *See Zaleskas v. Brigham and Women's Hosp.*, 97 Mass. App. Ct. 55, 75 (2019) (rejecting spoliation finding where "[e]ven assuming spoliation, the plaintiffs did not demonstrate how the spoliation allegedly prejudiced them . . ."). Here, Plaintiff

cannot establish either.

B. Harvard's Obligation to Preserve Documents Was Not Triggered Until Edelman's July 30, 2021 Email

The Court should reject Plaintiff's claim that his efforts before his July 2021 email to get HBS leaders or Harvard's then-provost to voluntarily reconsider HBS's decision to deny tenure required Harvard to take steps to preserve documents. Despite Plaintiff's contentions to the contrary, Harvard's obligation to preserve documents was not triggered until Plaintiff's July 30, 2021, email to Harvard's Office of General Counsel ("OGC")—*and not earlier*, as supported by the factual record. *First*, Plaintiff *misleadingly characterizes* the May 16, 2018, email thread that purportedly started the clock on Harvard's preservation obligations. (*Compare* Mem. at 3, 9 *with* Russcol Aff., Attch. Y.) In that exchange, Plaintiff informed Healy that he was "thinking about appropriate next steps." (Russcol Aff., Attch. Y.) Plaintiff continued:

> As you know, *the university has a process* for receiving complaints from faculty who allege mishandling of promotions cases. *I plan to proceed accordingly in short order*, broadly raising the concerns I conveyed to you and Nitin, separately, these past two months. If you see a reason why *that's* not proper, or any reason why I should delay, please let me know."

(*Id*. (emphasis added).) Nowhere in this message did Plaintiff suggest litigation as a contemplated next step. As Plaintiff points out (Mem. at 3), his message referred vaguely to "dispute resolution systems," but when read in the full context of the email, it is clear that Plaintiff's message was meant to inform Healy that Plaintiff intended to use the dispute resolution system *provided by the university*. Indeed, no other alternative "dispute resolution system" was mentioned or implied. *See* Russcol Aff., Attch. Y.

Nor did Healy indicate, when he forwarded Plaintiff's message to Dean Nohria, any understanding that Plaintiff was contemplating a lawsuit when he said, "[s]ounds like Ben [Edelman] is preparing to go to the next level." (*Id*.) "[N]ext level" therefore referred to "the university . . . process for receiving complaints from faculty" that Plaintiff explicitly referenced.[5]

[5] Plaintiff cites the fact that Jean Cunningham, when seeing Healy's email message about the "next level," forwarded the exchange to OGC as purported additional support for his claim that Harvard

(*Id*.) Dean Nohria similarly gave no indication in his reply to Healy that he believed anything different: "That's always his choice[,]" where Plaintiff's choice was to raise his issues with the FRB process at the university level. (*Id*.)

A week later, Plaintiff gave HBS NOM Unit Professor Brian Hall a similar notification: "I will be asking the provost to look into this in the way provided by university policies. That process will be getting underway soon . . . Ultimately I am guided by my own assessment of what is *proper under university rules* and what I feel is proper." (Ex. 2 (emphasis added).) Less than a week after his message to Hall, Plaintiff did just what he told Healy and Hall that he was planning to do: he reached out to then-Provost Alan Garber asking him "to assess the handling of my [tenure] case, following your standard process for such matters." (Russcol Aff., Attch. V at -13395.) As part of the exchange between Plaintiff and Garber over the ensuing weeks, Garber accepted, as part of the dispute process, *Plaintiff's* "offer of a memo that in a few pages sets forth the basis for your belief that HBS did not follow its processes, and identifies specific procedural irregularities and provisions in the HBS policies that you believe may have been violated." (Russcol Aff., Attch. V at -13393.) Plaintiff sent Garber a ten-page memo (including a three-page appendix), which noted at the outset: "*If* the Provost's Office *opens a review of my case*, there are certain additional subjects, not related to FRB [sic] and not discussed in this document, which might also merit attention." (Russcol Aff., Attch. W at -13396 (emphasis added).) Although Plaintiff's Memorandum highlights certain language from these documents in an attempt to demonstrate a likely threat of legal action (Mem. at 4), this language was all in the context of the university procedures that Plaintiff himself initiated. No mention or indication of any kind was included in

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was on notice of a lawsuit on May 16, 2018. (Mem. at 4; Russcol Aff., Attch. CC.) Harvard will not waive privilege by discussing the substance of or purpose behind Cunningham's communication with university counsel. However, it notes that Plaintiff cites no authority supporting the proposition that the act of sending information to university counsel containing a professor's stated intent to use formal university procedures to challenge a school's tenure decision puts the university on sufficient notice of litigation such that its preservation observations are triggered. Indeed, such a position would be untenable.

these materials that would put Harvard on notice that a lawsuit was possible.

Garber responded to Plaintiff on June 30, 2018, attaching an explanatory memo for his decision "that there is no basis for [Garber] to interfere with the School's decision." (Ex. 3.) Plaintiff waited *over two months* before replying, asking Garber on October 1, 2018, to "reconsider my June 19 letter" and stating "If you contend that I am obliged to pursue this matter in a particular way, following a particular procedure, or in a particular time (other than that proscribed by applicable law), please provide the requirements that you believe govern." (Ex. 4.) Garber replied on October 23: "I continue to see no basis for me to intervene in the Business School's evaluation of your tenure candidacy." (Ex. 5.)

Harvard received no word from Plaintiff after this communication until *over two and a half years later*, when Plaintiff sent OGC a communication on July 30, 2021, revealing that he had retained counsel. (Russcol Aff., Attch. Q, R.) Plaintiff sent this correspondence to Dean Datar, attaching the Baller Memorandum.[6] Importantly, this communication marked the first time Plaintiff referred to "the need to preserve documents pertaining to my FRB and subsequent evaluation." (Russcol Aff., Attch. Q.) Within a couple weeks, Harvard initiated its first of several rounds of litigation holds. (Russcol Aff., Attch. D.)

Second, evidence shows that Healy and Dean Nohria were—at the same time they were purportedly anticipating a lawsuit from Plaintiff—interested and involved in helping Plaintiff obtain a satisfactory position once his time at HBS was up. These efforts began the same day Dean Nohria informed Plaintiff of his tenure decision and continued well into the spring of 2018. *See, e.g.*, Ex. 9 (December 5, 2017, email to Plaintiff from Healy, stating: "Please do not hesitate to reach out if there is anything I can do to help you in the coming days and weeks"); Ex. 10 (January 2018 email exchange between Hall and another HBS professor with individuals from MIT, with

[6] Notably, Edelman's email attaching the Baller Memorandum stopped short of suggesting that Edelman actually intended to file suit and instead asked Dean Datar to "think through what should be done . . . you uniquely have the authority to find a solution") and expressed his desire to *avoid* a lawsuit ("The obvious instinct is to call in the lawyers, as to be sure I have already. *But this needn't come to that*"). (Russcol Aff., Attch. Q (emphasis added).)

one person on the MIT acknowledging, "Yes, I did speak briefly with Nitin [Nohria] about Ben [Edelman]. I agree he's a terrific researcher and might be great at MIT"); Ex. 11 (February 5, 2018 email between Dean Nohria and MIT where Dean Nohria says: "Thanks very much for the heads-up on how MIT views an appointment for Ben . . . I am certainly grateful for all you did to explore this at MIT"); Ex. 7 (March 20, 2018 email from Edelman to senior NOM Unit professors: "I met with Dean Nitin this morning. His intended agenda was broadly as we expected – telling me that he's doing what he can for me, and encouraging me to ask him for assistance").

Thus, Edelman purposefully chose to seek job search help from HBS leaders rather than put them on notice of litigation and deliberately chose not to mention potential litigation in his efforts to appeal Dean Nohria's decision internally. Edelman's conduct stands in stark relief to the clear intention to pursue litigation found in Massachusetts cases addressing spoliation and, in particular, the cases cited by Plaintiff that resulted in spoliation findings. Those cases show that Courts find spoliation and impose sanctions only when the threat of litigation was far clearer than it was when Healy cleared his iPad or when Edmondson and Gilson, before Harvard implemented a "back-end" hold, continued their regular practice of deleting emails when their inboxes became full. In each of the cases Plaintiff cites, the Plaintiff had either actually filed litigation or the defendants had taken actions that made it clear they expected litigation.

In *Wiedman v. The Bradford Grp.*, 444 Mass. 698 (2005) (Mem. at 8), for example, a suit over allegedly unpaid commissions, "through counsel, the plaintiff sent a letter demanding full payment of commissions she claimed she was owed [and] also requested copies of all of her records, including employment records, commission schedules, and records of fees received. *Id*. at 702. When plaintiff sued, she learned that the defendant had failed to preserve her employment records. The Court found spoliation.[7] In *Gath v. M/A Com, Inc.*, 440 Mass. 482, 483 (2003), plaintiff was seriously injured when a gate maintained by the defendant swung out in the street where he was riding his bicycle. A month after suit was filed, the defendant "decided, without

[7] The Court noted that, in addition, the employer had a statutory obligation to retain hour and wage records for two years. *Id*. at 704.

notifying [plaintiff], to have the gate removed and replaced." *Id*. at 486. The Court found spoliation. In *Keene*, 439 Mass. at 224 (2003) (*see* Mem. at 8), a newborn suffered "catastrophic harm" in the hospital in hours after his birth. *Id.* A year later, after the parents requested the baby's medical records, the hospital "filed a notice of a potential claim with its insurer . . ." *Id*. at 227. When suit was filed, however, the hospital could not locate hospital records documenting the first day of the baby's life, "the critical time period during which the alleged malpractice occurred."[8] *Id*. at 237. Again, the Court found spoliation. And in *Fletcher v. Dorchester Mut. Ins. Co.,* 437 Mass. 544, 550 (2002) (*see* Mem. at 8), a fire killed three children living in a leased house. The owner's insurance company retained a fire expert who removed wiring components and fixtures in connection at issue in the fire. No surprise: there too, the Court found spoliation. *See also McLellan v. Shaw's Supermarket, Inc.*, C. A. No. 04–01862A, 2008 WL 2889921 at *2-3 (Sup. Ct. Jun. 23, 2008) (spoliation sanctions appropriate where, after supervisor notified store's loss department of accident and attorney sent letter requesting surveillance video, store destroyed scissor list involved in plaintiff's accident and failed to preserve surveillance video).

Here, in sharp contrast to the cases described above, Plaintiff did not send Harvard a communication revealing that Plaintiff had retained counsel until July 30, 2021, when Edelman sent an email to HBS's new dean, attaching the Baller Memorandum. (Russcol Aff., Attchs. Q, R.). Plaintiff chose not to share his plan to sue Harvard, a plan he had evidently been secretly nursing since 2015, until 2021 (Ex. 12 at 26:7-11); instead, he chose initially to seek the help of HBS leaders in obtaining employment elsewhere, then sought internal university review of Dean Nohria's decision. Despite his training as a lawyer, Plaintiff did not send notice of potential litigation, or request that Harvard preserve documents, until 2021.

In sum, Plaintiff has offered no evidence to suggest that, in 2018, the "threat of a lawsuit [was] sufficiently apparent . . . that a reasonable person in [Healy's, Edmondson's, or Gilson's] position would realize, at the time of the [alleged] spoliation, the possible importance of the

[8] The Court also noted that the hospital had a statutory obligation to retain the records. *Id* at 236.

evidence to the resolution of the potential dispute." *Kippenhan*, 424 Mass. at 127. Instead, he kept his plan to sue to himself until 2021 at the earliest.

C. Edelman Has Failed to Establish Prejudice

To succeed on a spoliation claim, Plaintiff must establish that he suffered prejudice as a result of the actions he complains about it. *See Zaleskas*, 97 Mass. App. Ct. at 75. Here, too, a review of the case law—starting with the cases Plaintiff cites—shows that Plaintiff's allegations fall far short of what is required to warrant a spoliation finding or sanctions. For example, in *Keene*, 439 Mass. at 238, the Supreme Judicial Court affirmed the trial court's spoliation finding and sanction, holding:

> This case is an exceptional one. The missing records, which the defendant concedes are irreparably lost, contain the only documentation of the critical time period during which the alleged malpractice occurred. Because of the defendant's failure to maintain the missing records, as it was required by law to do, the plaintiff's family will never know for certain what actions were, or were not, taken when the severity of the plaintiff's medical condition became apparent, or the identities of those responsible for his care at that time.

Similarly, in *Gath*, where, after suit was filed, the defendant intentionally removed and destroyed the gate that badly injured a bicyclist when the gate swung out in the case, the Court found spoliation and ordered, as a sanction, that the defendant be "precluded . . . or offering any evidence that the gate had not been blowing out into Chelmsford Street to a distance equal to the length of the gate." 440 Mass. at 487. *See also Wiedman*, 444 Mass. at 700 (where defendant in action for unpaid commissions failed to preserve plaintiff's entire personnel file, court ordered, as a sanction, that the defendants could not dispute plaintiff's calculation of her commissions).

Courts reject sanctions, however, where the plaintiff cannot show that the evidence lost was critical to plaintiff's case. In *Zaleskas*, 97 Mass. App. Ct. at 57, for example, a patient brought a battery claims based on the allegation that "she asked X-Ray technologists to stop amidst the taking of X-Rays . . ." A hospital employee took notes of a meeting where the patient complained about the X-Ray procedures but, based on her custom and practice, destroyed those notes before litigation began. *Id.* at 75. The Court rejected plaintiff's request for a spoliation finding, noting

that the plaintiff had the opportunity to take the depositions of witnesses at the meeting and had access to a report based on those notes. *Id. at* 75-76. The court held: "Even assuming spoliation, the plaintiffs did not demonstrate how the spoliation allegedly prejudiced them, nor what remedy was warranted." *Id*. And in *Santiago*, 92 Mass. App. Ct. at 578, the plaintiff sued a meatball manufacturer after suffering traumatic brain injury caused when he choked on a meatball made by the defendant. He sought spoilation sanctions against the manufacturer based on its failure to preserve (1) laboratory notebooks and production records from 2004 relating to the development of the formula for the meatball and (2) the results of product-development and production testing from 2004." *Id.* at 579-80. The trial court rejected plaintiff's request for a spoliation finding and the Appeals Court affirmed, concluding, *inter alia*, that that plaintiff had failed to establish prejudice:

> The plaintiffs here have not shown how the alleged spoliation prejudiced them in any significant way. With respect to the first category of missing documents—laboratory notebooks and other records relating to the development of the meatball formula—the plaintiffs' claim of prejudice is that they did not have 'confirmation regarding the actual formula' and 'the spoliated documents would have shown that Rich [Products] changed the formula one year into production.' But these issues were thoroughly explored at trial . . .

Id at 582. *See also Westover v. Leiserv, Inc.* 64 Mass. App. Ct. 109, 114 (2005) (Appeals court vacated summary judgment sanction against defendant bowling alley operator whose employee discarded chair that caused patron's injury; because other chairs the operator set aside "were substantially similar" to other chairs defendant had manufactured."); *Fitchburg Gas and Elec. Light Co. v. OneBeacon Am. Ins. Co.,* 2010 WL 5489974, *2 (Sup. Ct. Nov. 16, 2010) (defendants suffered prejudice where, plaintiffs, who contemplated insurance discovery litigation not later than 1985, destroyed more than 700 boxes of documents in 1996, 1998, and 2006, including some "relevant to the Site and to insurance matters pertaining thereto (as demonstrated, *e.g.*, by the contents of the four boxes of documents that were retrieved by plaintiff's employees from the 1996 destruction . . .)").

Here, Plaintiff cannot establish that he was prejudiced by any alleged destruction of

evidence. Plaintiff deposed Healy, Edmondson, and Gilson, and all three testified that clearing out documents or deleting emails was part of their normal practice. (Russcol Aff., Attchs. F at 55:15-19; H at 72:9-73:16; J at 61:2-8, 70:22-72:5.)[9] *See Zaleskas*, 97 Mass. App. Ct. at 75 (spoliation sanctions not warranted as there was no finding of prejudice because even though notes that were unavailable prior to the commencement of litigation were destroyed as part of defendant's witness's "custom and practice," witness was deposed by plaintiff and could testify about the meeting memorialized in her destroyed notes). Further, Harvard preserved and produced to Plaintiff the key reports and documents that resulted from (or were related to) all three custodians' efforts as part of Plaintiff's tenure case: the summary of the 2017 Standing Committee's deliberations and the Standing Committee voting slips (in the case of Healy), and the FRB's 2017

[9] Plaintiff contends that, had he the access to the Edmondson emails he claims are missing from her file, he could have better refreshed her recollection during her deposition. (Mem. at 13-14.) Such a claim belies the factual record: out of the 131 times Plaintiff claims Edmondson answered "I don't know" or "I don't remember" at her deposition (something not surprising given Plaintiff's decision to wait six years before filing suit and the fact that her deposition took place between eight and ten years after the events in question), at least 92 of those instances were (i) in response to questions *based on a document in front of her* (e.g. Russcol Aff., Attch. F at 70:19-22 ("And at the time the projector issue came up, was Professor Moon the senior associate dean for the MBA program? A: I don't remember. Q: Well, *looking at the first full paragraph of the email [in Ex. 42] . . . .*") (emphasis added)); (ii) in response to a question for which a document *was produced to Plaintiff but was not shown to her* (e.g. *compare id.* at 43:16-18 ("Were there times when you emailed only one of the faculty members of the FRB?") *with Ex. 13*); (iii) in response to questions on matters concerning which documents *would not have been produced to Plaintiff*, either because they were related to matters which Harvard objected to producing (e.g., *compare* Russcol Aff., Attch. F at 28:22-23 ("When was the last time you had a [FRB] case?") *with* Defendant's Responses and Ex. 7, Response No. 8) or because they would have been outside of the relevant time period (e.g., *compare* Russcol Aff., Attch. F at 33:19-21 ("When did Forrest Reinhardt take on that role [of senior associate dean for faculty development]?") *with* Ex. 8, General Objections ¶3); or (iv) in response to questions for which *no document would likely be available* to refresh her recollection (e.g. Russcol Aff., Attch. F at 28:16-19 ("When was the last time you reviewed" the FRB Principles?). At least two of Edmondson's "I don't remember" answers were in response to questions not pertaining to Plaintiff's claims at all. Russcol Aff., Attch. F at 223:16-224:5 ("Q: [H]ave you ever done any work for Microsoft . . . How many times? A: I don't remember . . . Q: What was your compensation for that? A: I don't remember).

Report, witness interview and FRB meeting notes from 2017, and notes for 2017 the Appointments Committee discussion (in the case of Edmondson and Gilson). *See, e.g.*, Exs. 14-23. *See also Zaleskas*, 97 Mass. App. Ct. at 75 (no prejudice because plaintiff also had access to a report based on the destroyed notes).

There are further reasons why no prejudice exists from Edmondson's or Gilson's missing documents. As to Edmondson, the very claims Plaintiff makes as to why spoliation occurred show that there was no prejudice. Plaintiff asserts that a certain percentage of Edmondson's documents must have been deleted because they were not produced from her file. (Mem. at 5-6.) Embedded within this claim is the implicit acknowledgment that Plaintiff *received those very messages* as part of Harvard's production, precisely *because* they were preserved by Harvard custodians. Plaintiff also points to 51 documents that he claims were "deleted" by all Harvard custodians, "but whose existence is shown because they are quoted within other messages." (Mem. at 6 n.2; Russcol Aff. ¶5.) It is difficult to see how these messages could be missing when Plaintiff admits that they were produced.[10] Regardless, Plaintiff's inferences about purportedly missing documents miss the forest for the trees: Harvard had no duty to preserve Edmondson's emails prior to July 2021, when it first became aware of possible litigation. *See supra*, Section III.B. Since Edelman cannot show prejudice, that Edmondson may have deleted emails in the normal course prior to this time does not support a spoliation claim.

Similarly with Gilson, no prejudice exists because Plaintiff is in possession of Gilson's thoughts and impressions about Plaintiff's FRB case after Gilson joined the FRB and read the 2015 Report and Edelman's 2017 submissions to the FRB. (*See* Exs. 24-28 (showing Gilson's highlights

[10] Plaintiff's number is also incorrect. Of the 51 messages cited by Plaintiff as missing, seven were produced. (Ex. 6 ¶4.a.) Of the remaining 44, 20 were not included in Harvard's production because these messages did not hit upon search terms and therefore were not pulled into Harvard's document review universe as standalone messages. (*Id.* ¶4.b.) Yet, as Plaintiff acknowledges, he is in possession of all 22 of these messages because they are included in other produced documents. Similarly, the remaining 22 messages are also in Plaintiff's possession, although Harvard acknowledges that the original iterations of these messages were not among the documents it collected from custodians. (*Id.*)

and notes).)[11] There is also no basis to suggest that there must have been any number of one-to-one communications between Edmondson and Gilson in 2017 just because there were one-to-one communications between Edmondson and Forest Reinhardt in 2015.[12] (Mem. at 7.) When asked, neither Edmondson nor Gilson remembered one-to-one communications with each other during their depositions. (Russcol Aff., Attch. F at 43:9-44:22; Gilson Dep. Tr. 51:9-52:15.) Regardless, Harvard has produced over 170 email messages that include both Gilson and Edmondson during the period in 2017 when the FRB was active. (Ex. 6 ¶6.) Plaintiff's extrapolations about the number and nature of missing emails from Edmondson and Gilson are just that—speculation that does not rise to the requisite showing he must make to show prejudice. He has therefore failed to support his claim for spoliation sanctions.

IV.CONCLUSION

For the reasons stated above, Harvard respectfully requests that the Court deny Plaintiff's Motion for Sanctions for Spoliation of Evidence and grant any other relief to Defendant as is just and proper in the circumstances.

[11] Despite being in possession of these notes, Plaintiff's counsel did not ask about them during Gilson's deposition.

[12] Plaintiff claims there were *no* "1:1 email[s] between . . . Gilson and Edmondson" in Harvard's production. (Mem. at 7.) In fact, there was one. *See* Ex. 13.