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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 REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

In arguing that it met its obligations to preserve evidence, Harvard ignores evidence that Plaintiff specifically told Harvard administrators that he was "seriously considering" a lawsuit in May 2018, yet Harvard did nothing to prevent destruction of evidence for over three years. During those three years, Harvard deleted relevant evidence including Dean Healy's notes of Standing Committee and other meetings, and unknown quantities of emails from custodians including Amy Edmondson were lost. Even after Harvard in 2021 received a letter indicating that Plaintiff had retained counsel, it still implemented only a partial litigation hold, opting not to preserve records of four out of five FRB members until after Plaintiff filed suit nearly two years later. And both before and after the litigation hold, Harvard chose not to preserve metadata about the deletion of emails, which would have allowed the parties and the Court to understand specifically what was deleted, when, and by whom, in order to assess in detail the prejudice from Harvard's belated preservation efforts. Under the circumstances, targeted sanctions are appropriate in order to address the prejudice to Plaintiff from Harvard's deletion of evidence.

Harvard attempts to parse Plaintiff's written communications in order to justify its alleged failure to recognize the likelihood of litigation, but it fails to address the clearest evidence that it understood litigation was contemplated. Senior Associate Dean Healy conveyed

to Dean Nohria in October 2017 his concern about "legal follow up" if Plaintiff did not get tenure. (Russcol Aff. Attach. DD.) Healy testified that, when he met with Plaintiff in the spring of 2018, Healy "assumed [Plaintiff] might consider litigation… I didn't know whether he would go so far as that stage of bringing a lawsuit," but he "thought it was a possibility." (Russcol Aff. Attach. H, Healy Dep. 179.) Plaintiff testified that, also in the spring of 2018, he met with Nohria and "told him [] in no uncertain terms… that I thought this was a legal matter and a contractual dispute." (Russcol Aff. Attach. G, Edelman Dep. 54.) Harvard offered no evidence to contradict this, nor could it. On May 9, 2018, Healy wrote to Nohria that he had met with Plaintiff, and that Plaintiff "indicated that *he is seriously considering suing the school* over his concerns." (Dep. Ex. 158[1] (emphasis added); *see also* Russcol Aff. Attach. H, Healy Dep. 180-81.) In this context, Harvard implausibly protests that when Healy commented a week later that Plaintiff was "preparing to go to the next level," he referred *only* to internal Harvard processes.[2] (Opp. at 7-8.) Healy and Nohria did not need to guess whether Plaintiff might be considering litigation. He told them that he was. Alerting the Office of General Counsel was another sign that Harvard foresaw litigation. *See Keene v. Brigham and Women's Hosp., Inc.*, 439 Mass. 223, 234 (2003) (providing insurer with notice of claim established awareness of potential litigation).

The reality is that top Harvard administrators knew in May 2018 that Plaintiff was contemplating a lawsuit. The time to implement a litigation hold was then, not August 2021. Even if Harvard hoped that Plaintiff would pursue other avenues (such as an academic job search or persuading the Provost to revisit the situation), that is no excuse for failing to preserve

[1] Deposition Exhibit 158 is attached as an exhibit to this Reply.
[2] In fact, Harvard did not have any established process for resolving grievances of the sort Plaintiff eventually brought to then-Provost Garber, and has not provided evidence that such a dispute-resolution process existed within the University for HBS faculty.

documents. *See Weidmann v. The Bradford Group Inc.*, 444 Mass. 698, 706 (2005) (rejecting excuse that defendant did not believe plaintiff would sue).

As a result of Harvard's protracted delay in taking preservation measures, relevant evidence was deleted, and Plaintiff has been prejudiced as a result. The clearest example is that Healy, whom Plaintiff had told weeks earlier that he was "seriously considering suing the school," wiped his iPad containing the only copy of his notes of meetings in his role of Senior Associate Dean in charge of promotions, which would have included any notes he took on the Standing Committee meeting considering Plaintiff's tenure case. (Russcol Aff. Attach. G, Healy Dep. 72-73.) The split vote of the Standing Committee influenced the subsequent faculty vote, and FRB member Leonard Schlesinger spoke to them but could remember few specifics of the discussion. Nobody other than Healy was taking notes during the meeting. (*Id.* at 73.) The only official documentation of the Standing Committee deliberations is a one-page document that states Schlesinger "provided additional context" about the FRB's work, contrary to his testimony that he told them nothing that wasn't in the FRB report. (*Compare* Russcol Aff. Attach. X *with* Russcol Aff. Attach. I, Schlesinger Dep. 135-137.) Healy's notes of that meeting would have been valuable to assess the damage from the FRB's involvement with the Standing Committee, which Plaintiff contends was a breach of contract. (*See* Opp. to Def. MSJ at 21-23.) Healy's notes of conversations with Dean Nohria and other administrators would also have been important to explore.

Beyond Healy's iPad, Plaintiff can only guess at what emails and other evidence once existed but were deleted in the years between his unequivocal statements that he was considering litigation and when Harvard got around to halting deletion. Plaintiff has done the best he can by identifying twenty-plus messages that were responsive and had been deleted by all custodians,

but happened to be quoted in other messages that were preserved, as examples of the sorts of messages that might have been the subject of spoliation. The messages that someone cleared from Edmondson's Deleted Items folder, causing them to move to Recoverable Items\Purges, are informative for a similar reason: Those messages were cleared and purged at some point after the litigation hold took effect, suggesting that similar messages were probably cleared, purged, and lost before the litigation hold.

Because HBS made a choice not to preserve data about the deletion of emails, Plaintiff cannot do more to prove the counterfactual. There may have been messages providing evidence of who made the decision to expand the FRB inquiry to include Plaintiff's disclosures related to Google and Microsoft, or why, which witnesses could not recall. There may have been further evidence of the FRB's bias and bad faith (on full display in the nine messages in Purges, see Memo 12-13). As is common in spoliation proceedings, the prejudiced party cannot know what he does not know.

Harvard argues that no court has ever required a litigant to preserve logs about deletion. But those logs would be unnecessary had Harvard timely established a litigation hold. And whether or not other litigants learned about the Microsoft logs, Plaintiff did and seeks nothing more than the information Harvard at one point possessed, but instead allowed to be deleted. Harvard further objects to having to "buy a license" from Microsoft, but if Harvard wanted to retain logs without Microsoft expense, it could have downloaded the logs periodically, obviating the need to pay Microsoft. Harvard had access to that data (as Harvard indicates it is available by default for the past 90 days), and it should not benefit from its decision not to retain it.

The remedies Plaintiff seeks are proportional to the evidence destroyed through Harvard's intentional or reckless failure to preserve it. If the jury believes that relevant evidence

may have existed but no longer does, it should be able to infer that the evidence would have been helpful to Plaintiff. Such inferences should be applied in Plaintiff's favor in opposing Defendant's Motion for Summary Judgment. *See Hankey v. Town of Concord-Carlisle*, 136 F. Supp. 3d 52, 72 (D. Mass. 2015) ("where the innocent party has produced some (not insubstantial) evidence in support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line." (quoting *Kronisch v. United States*, 150 F.3d 112, 128 (2d Cir. 1998)). The destruction of evidence here is not as extreme as in cases like *Keene v. Brigham & Women's Hosp.*, 439 Mass. 223, 238 (2003), but that means that the sanction is correspondingly limited, not that no sanction is appropriate at all. In *Zaleskas v. Brigham & Women's Hosp.*, 97 Mass. App. Ct. 55 (2020), the Appeals Court questioned the prejudice from the destruction of notes of a meeting that the plaintiffs themselves had attended; in contrast, Plaintiff was not at the Standing Committee meeting or privy to the FRB's deliberations. *See id.* at 75-76. Even in that case, the jury was permitted to draw an adverse inference based on spoliation, as the jury could here. *See id.* at 76 ("the plaintiffs are free to argue that a trier of fact should hold the hospital's failure to retain Bukuras's notes against the hospital"). In *Santiago v. Rich Prods. Corp.*, 92 Mass. App. Ct. 577 (2017), there was no prejudice to the loss of documents because the plaintiffs had other means to explore or demonstrate the physical composition of a meatball. *See id.* at 582-83. Here, questions of motivation and who said what during meetings can only be answered by the memories of witnesses (which have been exhausted) and contemporary documents (some of which have been destroyed). Under these circumstances, focused sanctions for spoliation are reasonable and appropriate.

Respectfully submitted,
BENJAMIN EDELMAN,
By his attorneys,

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Dated: December 24, 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 December 24, 2025.

David A. Russcol

EXHIBIT

From: Healy, Paul
Sent: Wednesday, May 9, 2018 3:32 PM EDT
To: Nohria, Nitin
CC: Mucciarone, Rae
Subject: Ben Edelman

Nitin:

Sorry to burden you with this, but while you were in India Ben Edelman met with me to discuss the concerns he raised with you over the FRB report. He indicated that he is seriously considering suing the school over his concerns. I told him that while I am sorry for his situation, I have no power to change the votes or the decision. He asked me if I would look to see whether the faculty who voted against his case indicated in their feedback whether their primary concern was about Ben's interactions with the staff. He argued that the latest report had presented these too cryptically for him to be able to adequately defend himself, and that he should either have been able to see the actual data collected or some disguised version provided in the report. I indicated I would look at the faculty feedback, but doubted that it would be definitive. However, I did take a look and here is what the faculty reported. Note that some faculty mentioned multiple reasons for voting against the case.

No explanation provided:	4
Risk for the school	12
Poor judgment	8
Lack of transparency around conflicts of interest	8
Respect for others	5
Teaching not up to standard	2
Concern over American Airline case	2

The category most likely to reflect Ben's concern over the report is respect for others. But of these five faculty indicating concern, 4 5 mentioned at least one other area of serious concern. I don't know how much of this I should report back to Ben. My sense is that if he sues us, he will learn this information. I don't like the idea of sharing it with him, but providing some modest information now may help him to realize that the issue he has most concern over was not the one most questioned by the faculty. For example, one approach would be for me to tell him that almost all voters indicated their concerns, but only one indicated that respect for others was the sole reason for denying tenure. Most of the concerns were about poor judgment, and risk for the school. It probably makes sense for us to chat about this [redacted]

Paul