COMMONWEALTH OF MASSACHUSETTS

Superior Court **Suffolk, SS**

BENJAMIN EDELMAN,

Plaintiff

v.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Defendant.

Civil Action 23-0395F

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2023 FEB 14 A 9:23

COMPLAINT AND JURY DEMAND

INTRODUCTION

1. Plaintiff Benjamin Edelman brings this suit in law and equity to correct the harm that Harvard University has caused to his career, livelihood, and reputation by unlawfully and brazenly ignoring its own policies, and acting in bad faith, when evaluating his conduct in conjunction with his candidacy for promotion to tenure at Harvard Business School ("HBS"). The mixed report from the relevant committee was the sole negative factor in his tenure process, and caused the failure of his candidacy.

2. Plaintiff was a tenure-track professor at HBS from 2007 until 2018. He is a world-leading expert on online markets and the internet. His academic work, teaching, and service at HBS were unusually clearly worthy of tenure, even by HBS's high standards.

3. Plaintiff was the subject of negative publicity, unrelated to his role at HBS, in 2014. In preparation for his review for tenure in 2015, Harvard Business School convened a Faculty Review Board ("FRB") to determine whether he had engaged in misconduct that should affect his candidacy. The FRB process was governed by a then-new HBS policy, the Principles and Procedures for Responding to Matters of Faculty Conduct (the "P&P").

4. Following the 2015 review, HBS determined to delay Plaintiff's candidacy for tenure by two years, while requiring him to take specific steps to contribute to the HBS community and demonstrate his fitness for tenure. He completed, and excelled at, each of these tasks.

5. In 2017, although there had been no new publicity or allegations of misconduct, HBS again convened an FRB. In violation of the clear terms of the P&P, in violation of HBS's promise to follow the P&P, and in violation of Plaintiff's reliance on that promise, HBS then used the FRB as a forum for anonymous complaints about Plaintiff's character.

6. The P&P establishes clear rights and specific procedures, but HBS's 2017 FRB process in numerous respects ignored those protections. Contrary to P&P rules about when and why an FRB can be opened, the 2017 FRB was convened without an allegation of misconduct. Contrary to P&P rules requiring a clear allegation at the outset, the 2017 FRB failed to provide Plaintiff with proper notice of the scope and nature of the inquiry. Contrary to P&P rules requiring the FRB to "investigate" the allegation, the 2017 FRB process by its own admission was "not an investigation." Indeed, the FRB's report presented 12 anonymous, context-free criticisms—totally abrogating the P&P requirement that the FRB report share its evidence both with its target and with its readers, and preventing Plaintiff from meaningfully rebutting incorrect claims. Furthermore, contrary to P&P rules requiring FRB to stay within the allegation it stated at the start, and more generally to follow an orderly process, the FRB expanded its inquiry dramatically in its final weeks, limiting Plaintiff's ability to respond to the spurious new concerns. The FRB's final report was the sole negative input into the tenure process, and the sole cause for denial of Plaintiff's application for tenure.

7. HBS's conduct in this matter was a breach of the black letter of its own policy, and of its contract with Plaintiff. HBS also acted in this matter in bad faith, misapplying and twisting its

policies in order to engineer the denial of Plaintiff's tenure application. Repeatedly, HBS made decisions motivated by public relations, political concerns, and personal animus. These tactics breached the governing contract and violated HBS's duty of good faith and fair dealing.

8. Plaintiff does not now allege that he was entitled to tenure at HBS. But he *was* entitled to have his candidacy considered according to the specific procedure HBS promised, including both compliance with the procedural protections established by P&P and good faith in its application.

9. As a result of HBS's unlawful conduct, Plaintiff's career has been damaged, and he has experienced significant and longstanding reputational harm and emotional distress.

PARTIES

10. Plaintiff Benjamin Edelman is an individual residing in King County, Washington. He was a faculty member at Harvard Business School from April 2007 to June 2018.

11. Defendant President and Fellows of Harvard College ("Harvard") is a body corporate and politic under Massachusetts law, and the governing body of Harvard University in Cambridge, Massachusetts.

JURISDICTION AND VENUE

12. This Court has subject matter jurisdiction over this action pursuant to G.L. c. 212, § 4, which provides this Court with general subject matter jurisdiction over all civil actions.

13. Harvard is a corporation with multiple places of business in Suffolk County, Massachusetts, including but not limited to 65 North Harvard Street and 25 Shattuck Street, Boston, Massachusetts. Venue in this Court is therefore appropriate pursuant to G.L. c. 223, § 8.

FACTS

Plaintiff's Background and Employment at Harvard

14. In 2007, Plaintiff joined the HBS faculty as a tenure-track professor in the Negotiation, Organizations and Markets ("NOM") Unit.

15. Plaintiff held a summa cum laude A.B. degree from Harvard College, an A.M. in Statistics, also from Harvard, a J.D. from Harvard Law School, and a Ph.D. in Economics from the Harvard Graduate School of Arts and Sciences. When he joined the HBS faculty at age 26, he was already an established authority, and sought-after expert witness, on online markets.

16. Plaintiff's research focused on competition, policy, and fraud in the contexts of online market design and networked businesses. This work included research about the game theory of online advertising, strategic behavior and fraud in online advertising, the special concerns raised by the largest online platforms, and strategies for fixing various aspects of online systems and services.

17. In addition to academic research, Plaintiff used his unique background as a lawyer and advocate to identify concrete strategies for improving the systems he studied, including how to make them fairer and better both for companies and consumers. To wit, he was instrumental in selling a successful computer security startup; his research about online malfeasance put three criminals in jail; and he was an expert witness in federal litigation making national headlines (work that he began less than two years into college). He was the world's leading expert on the scourges of adware and pop-up ads, serving dozens of clients including eBay, New York Times, Verizon, and the United States of America. A Nobel-prize winning economist referred to him as an "astonishing scholar of the internet," and praised his work improving online accountability: "It's the Wild West out there, and Ben is the sheriff."

18. Plaintiff used his unusual background in software design and forensic software analysis to uncover problems that others did not see. While a first-year law student, in 2003, Plaintiff was the first to report that Google was secretly removing some results from its search result pages in certain countries. Though not unlawful, Google's actions were exactly contrary to its contemporaneous statements. Plaintiff's combination of software prowess (to find such actions), legal understanding (to evaluate their propriety), and business acumen (to recognize their significance) led him to a series of notable discoveries over subsequent years. Plaintiff's research was the primary basis cited by FBI agents in pursuing and ultimately arresting eBay's two largest marketing affiliates, who had jointly stolen more than $20 million—but were caught red-handed by Plaintiff's automated search methods. Measuring race discrimination at Airbnb, Plaintiff's research was the scientific underpinning of the "Airbnb While Black" movement—rigorously proving that black guests have more difficulty booking short-term rentals. Plaintiff built a thriving research program, as well as a successful consulting practice, using this distinctive combination of skills.

19. Between 2007 and 2014, Plaintiff thrived at HBS. The Game Theory Society recognized his first major article as the best article in the intersection of computer science and economics *in a decade*. His teaching cases were widely used in other schools, and repeatedly awarded as the best in their categories. In 2010, HBS Dean Nitin Nohria generously praised his efforts on online privacy in a hand-written note. In 2013, Nohria granted him the prestigious Marvin Bower fellowship. A Nobel laureate cited one of his papers in his prize lecture. As of the end of 2014, Plaintiff had accumulated more than 2,500 academic citations of his academic publications, including more than 1,100 citations to a single article. His interdisciplinary flexibility was without question, including publications in economics, business, law, and computer science.

20. Plaintiff was also an educational innovator. He was the first HBS faculty member to devise a way to use digital tools to modernize and replace classroom chalkboards. He was the first to teach software development to HBS students—devising creative exercises to engage students new to coding just as much as those with significant prior experience. Leaders of significant companies flew cross-country (and a few, internationally) to visit Plaintiff's class and speak to his students.

21. In 2012, Plaintiff was promoted from Assistant Professor to a four-year appointment as Associate Professor, a change that followed a comprehensive review of his work including research, course development, teaching effectiveness, and contributions to the community. During that review, Plaintiff received extremely favorable feedback on his work and on his chances for receiving tenure. A senior member of the faculty said that Plaintiff's case for promotion to Associate was the strongest he had seen in his decade-plus on the Appointments Committee. Plaintiff received no negative feedback in that review, whether about interactions with others at HBS, about his outside activities, or on any other subject. By approving his promotion to Associate Professor, HBS determined that Plaintiff could realistically expect to meet the criteria for tenure within four years.

Negative Press Regarding Plaintiff in 2014

22. In January 2014, some commentators raised concerns about a blog post that Plaintiff had written about the company Blinkx and its deceptive "adware," which tracked users' browsing and showed extra ads including annoying pop-ups. Plaintiff had written about Blinkx and its predecessors for nearly a decade. In fact, Plaintiff's reports about a predecessor, Zango, had prompted an FTC complaint that the company placed its advertising software onto users' computers without their permission, among other violations, yielding a $3 million settlement and

ultimately Zango's bankruptcy. In 2014, Plaintiff updated his research in part pursuant to a consulting agreement with a company that wanted to know Blinkx's current practices. Under this agreement, Plaintiff was free to tell others about his findings, which he did via a posting to his public site, consistent with his standard practice of publicly documenting any notable malfeasance he uncovered. Plaintiff's post caused widespread investor and public concern about Blinkx's practices. Rather than engage with the substance, Blinkx hired publicists to attack Plaintiff and try to recast his findings as some kind of conflict. In fact, Plaintiff's post and its disclosure statement fully complied with HBS requirements expressed in the School's Conflict of Interest policy, and HBS never found any violation of that policy. Nonetheless, Plaintiff expanded the disclosure statement accompanying the post at HBS's request.

23. More significant negative publicity came in December 2014, when Plaintiff was the subject of a series of derogatory articles on the website Boston.com regarding his communications with the Brookline restaurant Sichuan Garden. Plaintiff realized that the restaurant was advertising lower prices on its website than it actually charged consumers when they picked up their food, and he raised concerns about this practice in emails to the restaurant's owner. His reasonable goal in this correspondence was consumer protection: he demanded that the restaurant not only update its online prices but refund past overcharges to its customers which, cumulatively, were significant. Nonetheless, as he acknowledged, the tone of his emails was disproportionate and unfortunate. At HBS's request, Plaintiff publicly apologized.

24. Press coverage of the Sichuan Garden incident was extremely negative and resulted in physical threats to Plaintiff and his family. Although Plaintiff wrote from his personal email account and never mentioned HBS, public commentary about the matter included negative statements about HBS.

The HBS "Faculty Review Board" and its Principles & Procedures contract

25. In spring 2015, the HBS faculty unanimously approved a document entitled "Principles & Procedures for Responding to Matters of Faculty Conduct" ("P&P"). This document arose from a perception, widely shared among HBS faculty, that certain prior investigations of alleged faculty misconduct had been handled at best haphazardly, and perhaps incorrectly, with corresponding harm both to those accused and to the composition of the faculty.

26. The P&P created substantial protections for a faculty member accused of misconduct:

i. A new "Faculty Review Board" ("FRB") committee investigates any such accusation.

ii. Not every subject is within the FRB's scope. The P&P limits the FRB to faculty conduct alleged to be "egregious," or "persistent and pervasive." In the context of a promotion case, an FRB may be convened only where "serious questions about conduct are raised."

iii. The FRB must begin every investigation by writing an "allegation" of specific misconduct to be investigated, and providing that allegation to the subject of the investigation.

iv. The FRB must "investigate" the allegation that it is convened to examine, using means such as factual inquiry, interviews, and review of written materials.

vi. The FRB must provide both its draft report and its evidence to the subject of its investigation, so that the person accused has a reasonable opportunity to respond. The P&P instructs that the FRB must share "the evidence gathered" to the subject of the investigation and to all readers of its report.

27. The P&P indicates that it applies both to proceedings occurring in the ordinary course, and those occurring incidental to promotion cases. For an FRB incidental to a promotion case,

the P&P instructs that the same procedures are to apply "as outlined above," *i.e.* in the body of the P&P document.

28. A copy of the P&P is attached hereto as Exhibit A.

HBS Invokes its Faculty Review Board Procedure in Evaluating Plaintiff's 2015 Application for Tenure

29. Plaintiff was scheduled for review for possible promotion to tenure in 2015.

30. The tenure process at HBS is governed by the Policies and Procedures with Respect to Faculty Appointments and Promotions (the "Tenure Procedures").

31. The Tenure Procedures provide that the Appointments Committee advises the Dean of HBS on all appointments that require a formal review, including all promotions to tenured professor. The Appointments Committee consists of all tenured Professors and formerly tenured Baker Foundation Professors fully engaged at HBS. A subcommittee of the Appointments Committee (the "Standing Committee") undertakes an initial assessment of a candidate for tenure, gathers materials from the candidate and opinions from internal and external reviewers, and makes a recommendation. The report and recommendations of the Standing Committee are discussed by the Appointments Committee, which takes advisory votes on the candidate's tenure. The Dean then makes a decision whether to recommend to the President of the University that a candidate be granted tenure.

32. On July 16, 2015, Senior Associate Dean of the Faculty Paul Healy informed Plaintiff that the Business School had convened a Faculty Review Board ("FRB") to examine concerns about his conduct.

33. On July 31, 2015, Professor Amy Edmondson, the chair of the FRB, wrote to Plaintiff with a "summary of the scope" of the FRB's inquiry. She wrote that the FRB would consider two specific incidents: Plaintiff's "blog posting about Blinkx," and "interaction with Sichuan

Garden." In addition, she wrote, the FRB would consider "concerns . . . about your interactions with staff and other colleagues at the School, including around case copyright, travel arrangements, business cards, and classroom projectors." She gave no information about the details of these concerns, and did not allege that Plaintiff had violated any specific policies in any of these interactions.

34. Neither Dean Healy nor Professor Edmondson gave Plaintiff any notice as to the identity of the members of the FRB, nor any chance to object to their selection.

35. Plaintiff submitted an initial statement to the FRB, and agreed to be interviewed.

36. In October 2015, the FRB issued a draft report. That report concluded that Plaintiff had not upheld HBS's Community Values in the Blinkx or Sichuan Garden incidents, or in certain interactions with others at HBS. The report did not address either "business cards" or "copyright" issues at all. In addressing the projector dispute and travel arrangements, it relied on conclusory allegations and misleading, selectively chosen emails. The FRB report did not reveal which witnesses were interviewed to reach its conclusions.

37. Plaintiff responded to the draft report on August 15, 2015. He explained how his actions in the Blinkx and Sichuan Garden episodes were informed by his desire to apply his skills for the benefit of society—a desire that also informed his academic work. However, he acknowledged error in each instance, and discussed at length the lessons he had learned from the incidents and from public reaction to them. He then provided a fuller set of email correspondence that effectively rebutted the claim that he had acted inappropriately either as to classroom projectors or travel. As to his efforts to retain projector size, Plaintiff produced contemporaneous correspondence with the then-Dean of the MBA program, who thanked him for his efforts in the strongest possible terms ("I am SO grateful… You are a freaking genius…", emphasis in the

original). As to his efforts to assist colleagues with travel, he produced correspondence in which he offered to give his personal airline upgrades to staff traveling for HBS business (an offer which HBS travel planners declined), and he showed that he sought and received written approval from the HBS CFO for certain unusual travel purchasing that saved HBS money. Far from indicating anything improper, these messages showed Plaintiff to be thoughtful and successful in advancing goals including pedagogical effectiveness, generosity to colleagues, and cost reduction.

38. The 2015 FRB provided its report to the Standing Committee of the Appointments Committee, along with Plaintiff's responses. On information and belief, members of the committee were irritated by the report's focus on trivial instances of friction between Plaintiff and HBS staff, particularly where Plaintiff was able to demonstrate that he was not meaningfully at fault.

39. The senior faculty in NOM collaborated on a summary of their view of Plaintiff's tenure case following the FRB report, which they provided to the Standing Committee. They reported that "the NOM senior faculty remain solidly behind the view that Ben should be promoted to full professor." They described Plaintiff as "honest, courageous, sacrificial, and principled," adding, "Many of us view his passion and courage to make the world a better place as heroic." They further expressed their confidence that Plaintiff had learned from the Blinkx and Sichuan Garden incidents and would take a different approach going forward.

40. Ultimately, the Standing Committee recommended that Plaintiff's tenure case be delayed for two years, extending his appointment as an Associate Professor until 2018. During that time, he was asked to take a number of steps to demonstrate that he had learned from the 2014 incidents, including joining the Leadership and Corporate Accountability ("LCA") teaching

group, teaching LCA, relocating his office, and joining the Academic Technology Steering Group.

41. Plaintiff accepted the two-year extension as an Associate Professor, and agreed to undertake the requested activities, in reliance on HBS's policies and its promises to follow those policies, including the FRB P&P as well as the Tenure Procedures.

Despite Plaintiff's Success Between 2015 and 2017, HBS Reconvenes the FRB in 2017

42. At the time of his 2017 application for promotion to tenured Full Professor, Plaintiff had published 21 peer-reviewed articles, 26 other articles (including solicited articles and book chapters), 25 cases (plus two abridgements), ten supplements, 19 teaching notes, and four module notes and technical notes. He had made significant contributions to research, teaching, and the practice of both high-tech business and corresponding government policy, and he was a leading voice in these fields.

43. At HBS's request, Plaintiff had begun to teach LCA. Student reviews of Plaintiff's LCA course indicated that he was an especially well-liked and effective teacher: In 2018, Plaintiff achieved an unusual 6.7/7 "overall effectiveness of the instructor" rating in student evaluations, compared to an average of 6.0 among the other instructors teaching the same course. Furthermore, fellow instructors in his teaching group valued his significant and creative contributions to their teaching plans, including updating historic examples with recent experiences drawn from tech companies and current events.

44. Plaintiff had also contributed significantly to the HBS community. In addition to traditional service as an instructor and committee member, he made unique contributions by building software to support HBS's teaching mission. Most notably, he built a system to allow sight-impaired colleagues to teach in the interactive, Socratic-style MBA program: Students

pressed tabletop buttons to signal interest in speaking (rather than raising hands). Plaintiff's system selected a student to recognize, then played the name of the selected student to the instructor through a wireless earpiece. Without Plaintiff's system, a sight-impaired instructor would need an assistant to see hands and call on students, but Plaintiff's system granted sight-impaired instructors the same independence that other instructors enjoy. Plaintiff was proud to have built this system in a matter of weeks, despite initial objections from HBS staff and others that it couldn't be done at all or in the available time.

45. Between 2015 and 2017 Plaintiff worked hard to demonstrate that the concerns that the FRB raised in 2015 would not recur. As far as he was aware, he was on good terms with members of the HBS community, including staff. He had successfully become a valued member of the LCA team. And his recent work had attracted no negative publicity.

46. In March 2017, at the instruction of his unit head, Plaintiff submitted materials to the subcommittee responsible for evaluating him for promotion, including a personal statement and curriculum vitae. He also wrote a thoughtful letter to the FRB describing what he had learned from the events it had criticized in 2015, and the steps he had taken to successfully avoid any recurrence. He provided a lengthy list of faculty and staff who he believed would attest to positive interactions with him.

The 2017 FRB Report Presents Anonymous Criticism to Attack Plaintiff

47. On July 6, 2017, Professor Edmondson wrote to Plaintiff and stated that the FRB was reconvening and would examine the following questions:

> • Whether you understand the aspects of your conduct—regardless of your intent—that made them problematic;
> • Whether there is sufficient evidence of changed behavior;
> • Whether there is a reasonable expectation that your changed behavior will be sustained in the future.

48. Professor Edmondson asked Plaintiff to provide detailed examples of *how* he changed his thinking about activities and interactions with staff. And she asked for a shorter list of witnesses. Plaintiff fully complied with her requests.

49. Professor Edmondson's July 6, 2017 letter did not contain any allegations of misconduct, or reference any conduct by Plaintiff occurring after the 2015 FRB report.

50. On August 14, 2017, the FRB interviewed Plaintiff. During that interview, the members of the FRB questioned Plaintiff about his experiences of the past two years and the lessons he had learned from the 2015 FRB report.

51. On September 1, 2017, Professor Edmondson wrote to Plaintiff to dramatically change the scope of the FRB's inquiry. Suddenly, the FRB was examining, not Plaintiff's 2014 activities or his subsequent learnings, but his outside activities. Edmondson asked for a list of *all* of his outside activities from the past two years and an accounting of when and where he thought about disclosures or seeking approval from the Dean. In particular, she asked Plaintiff to discuss class action litigation in which he was representing a class of passengers suing American Airlines about baggage overcharges, and the disclosure statement accompanying an article he had written addressing the implications of consolidation among online travel agencies (the "OTA project"). She gave him just one week to defend his past two years' worth of outside activities.

52. Within the timetable Professor Edmonson specified, Plaintiff provided the requested information. He noted that the plaintiff in the American Airlines lawsuit—also a HBS faculty member—had in fact informed the Dean about the matter. He further pointed out that the OTA project's disclosure had been approved by the Associate Dean for Faculty and Academic Affairs (who also served as staff to the FRB).

53. Had he been on notice of concerns about his outside activities, Plaintiff would have approached the 2017 FRB differently from the start. For example, he would have discussed his approach to outside activities in his 2017 opening statement to FRB. He would have provided additional information to demonstrate that his disclosures were in all instances appropriate, and met or exceeded both the governing policy and the practice of other faculty. He would have established that his law practice had obtained tens of millions of dollars of benefits to consumers and small businesses, and brought only positive publicity.

54. The FRB's draft report, issued on or about September 27, 2017, found that members of Plaintiff's own unit, the NOM unit, were "uniformly and unambiguously enthusiastic about Professor Edelman as a colleague," and gave concrete examples of the ways that he supported their own work and teaching. They also universally agreed that his conduct had changed and that he had become more reflective since 2015.

55. The FRB's draft 2017 report indicated that staff and colleagues from outside Plaintiff's unit also offered extremely positive feedback.

56. However, the FRB's draft 2017 report also contained 12 conclusory derogatory comments, presented in a bulleted list, effectively a string of personal attacks on Plaintiff's character. The FRB's report did not disclose how many of the people interviewed had expressed the concerns summarized in these 12 derogatory bullets, or whether the critics were faculty or staff. The FRB's report did not give readers any way to determine whether the 12 derogatory comments came from 12 different people, all from one person, or something in between. It is possible, given the conflicts of interest in the FRB's membership (discussed below), that one or more comments came from members of the FRB or its supporting staff.

57. Most significantly, although the P&P required the FRB to disclose "the evidence gathered," the FRB presented the 12 derogatory comments with neither source nor context. Nine consist of only one sentence, and all 12 lack the facts or context that would allow a reader to evaluate the merit of the attack (or allow Plaintiff to provide a substantive defense). For example, a representative comment was "He's incapable of seeing why his preferred solution can't or won't be implemented." That brief remark omits the context that would allow readers to evaluate whether Plaintiff was right or wrong in the instances in which he resisted changing his mind. Without those facts and context, Plaintiff could not offer a compelling reply to clear his name.

58. The draft report's most serious criticism was the following:

> What concerns the FRB most is the intimation that Professor Edelman manages up, interacting differently with at least some staff than he does with faculty colleagues, and differently with staff depending on whether other faculty members are present during the exchange.

Contrary to the requirements of the P&P, the FRB did not provide any evidence supporting this assertion. FRB offered only a single anonymous, context-free quote that "With his superiors, he has more of a filter"—without the name of the source, the context, or any other information that would allow Plaintiff to respond in substance. This portion of the FRB's report is just plain wrong: Plaintiff *does not* interact differently with staff than with faculty; quite the contrary, he is well-known for being outspoken about his beliefs regardless of the status of the person with whom he is speaking. Had the FRB provided the name of the person who claimed otherwise, and the full context, Plaintiff could almost certainly have provided counterexamples in that area to disprove the claim. For example, Plaintiff could have provided contexts in interacting with the same person or team, in which he critiqued a proposal from a senior colleague, or in which he endorsed a suggestion from a junior colleague or staff person. But without the context that FRB withheld, Plaintiff could offer no such response.

59. The FRB knows the identity of each person who made the 12 derogatory bulleted remarks, and the context in which each such person indicated they reached this view. The FRB withheld these names and contexts from Plaintiff and from its report.

60. On information and belief, the FRB audio-recorded its interviews, and FRB members and staff also made contemporaneous written notes. The FRB withheld these materials from Plaintiff and from its report.

61. On information and belief, at least half of the negative comments in the FRB's 2017 report result from the project in which Plaintiff led the modification of classroom technology to assist a colleague with a vision disability. HBS IT staff had initially claimed that such modification would be impossible. Ultimately, Plaintiff's suggested modification was implemented successfully, and on time, using software he personally wrote, tested, and demonstrated. On information and belief, his solution remains in use to this day. His efforts in this area brought a significantly improved teaching experience for a colleague, improved her students' learning, and advanced HBS's mission—with limited costs in HBS IT staff time and resources. Faculty members on the Appointments Committee might have been more sympathetic to Plaintiff and his sight-impaired colleague if they had been aware of these facts and if they had known which of the derogatory remarks in the report stemmed from this effort. But that context was entirely absent from the report, making it impossible for readers of the report to fairly evaluate Plaintiff's behavior.

The 2017 FRB Report Presents Unfounded and Untimely Allegations to Attack Plaintiff

62. The 2017 FRB's draft report also presented purported concerns about Plaintiff's outside activities. In particular, the report suggested that Plaintiff should have disclosed, in certain written work about Google, that he had consulted with Microsoft in the past.

63. Plaintiff learned of these allegations for the first time when he reviewed the draft report. No such allegations appeared in the FRB's 2015 correspondence or report, nor were any such allegations included in the scope of the FRB's review as framed on July 6, 2017, discussed in his FRB interview, or disclosed in the FRB's request for more information on September 1, 2017. Because the FRB did not make these allegations at the outset of its process, Plaintiff was not able to address them in his written statement or his in-person interview with the FRB.

64. In fact, the work products the FRB identified did not have to contain a disclosure regarding Plaintiff's work for Microsoft under the terms of HBS's Conflict of Interest Policy ("COI Policy"). For one, none of the work product at issue was funded by Microsoft. Second, the FRB had no basis to believe that Plaintiff's work for Microsoft was "directly related" to Google (nor did the FRB present evidence or even allege that it was), and for that reason the HBS COI Policy does not require disclosure. Finally, when the articles in question were written, Plaintiff did not have any ongoing relationship with Microsoft, financial or otherwise, a fact which the draft report glaringly fails to mention—instead leaving readers with the misimpression that the work was ongoing at the same time when the research was published.

65. Far from violating the COI Policy, Plaintiff more than complied with its requirements. Plaintiff has a genuine and longstanding focus on appropriate disclosures. Plaintiff routinely provided proper disclosures years before any HBS policy so required. And when Plaintiff provided a disclosure, he typically presented it with extra prominence, often including top-of-page placement, bold type, and/or a distinctive box or background color for emphasis. Furthermore, Plaintiff personally participated in the HBS policymaking process leading to the HBS COI Policy, and HBS staff once remarked that Plaintiff was the sole faculty member who attended an optional discussion about the then-proposed policy.

66. In presenting Plaintiff's supposedly-deficient disclosures and the requirements of the HBS COI Policy, the FRB's 2017 report did not accurately apply the COI Policy and implicitly misrepresented its requirements. The FRB criticized six work products that it said demonstrated Plaintiff's "inconsistent" disclosures, yet never mentioned the situations in which the policy applied, nor applied those tests to the work products at issue. In fact, two of the FRB's examples *did* include disclosures, and one pertained neither to Microsoft nor Google, so couldn't violate the COI Policy even if the relation and proximity tests were satisfied.

67. The FRB's 2017 report also complained about Plaintiff acting as legal counsel in the American Airlines class-action lawsuit. The FRB went so far as to question whether "activities such as this . . . should be intertwined with Harvard and Harvard Business School," on the grounds that they could hypothetically lead to negative publicity and "reputational risk" for HBS. The FRB claimed that the American Airlines case "has already been connected to" HBS. The FRB cited two sources in supposed support for this proposition: an online article and a blog. But the article mentioned HBS only to indicate the employment of the named plaintiff, and never mentioned Plaintiff; furthermore, the article presented the case in neutral terms, and it in no way criticized HBS, the plaintiff, or anyone else. And the blog was about an entirely different subject, occurring two years earlier. Neither cited source supports the proposition that the American Airlines lawsuit presented any form of risk to HBS. The FRB's criticism of Plaintiff's work as an attorney stands in stark contrast to HBS's actual policies. The HBS Policy on Outside Activities of the Faculty does not prohibit faculty members from serving either as counsel or parties in lawsuits. Furthermore, when Plaintiff previously inquired about serving as counsel, he was told there were no restrictions in this area. In particular, shortly after joining the HBS faculty, Plaintiff noticed that there was no policy on point, and sought advice about when and how to

disclose outside legal activities. A senior staff person—who also served as staff to the FRB—instructed Plaintiff that acting as a lawyer was a permissible activity and did not require any special approval.

68. The FRB's speculation of negative media publicity was, with time, proven incorrect. Media coverage of the filing of the airline lawsuit at the time of the FRB report was quite positive. A settlement brought millions of dollars of refunds and even more positive coverage. The Honorable Judge William G. Young of the United States District Court for the District of Massachusetts, who presided over the case, offered a favorable assessment of plaintiffs' counsel's work and the benefits obtained which, he said, called for higher-than-normal fees.

69. Had the FRB followed the P&P by identifying all areas of concern at the outset, Plaintiff could have convinced the FRB that its concerns about his disclosures and his work as an attorney were misplaced. In particular, Plaintiff would have discussed the governing rules and his compliance with them in his opening written statement to the FRB, and in his oral remarks to the FRB. Furthermore, Plaintiff would have gathered evidence showing positive reaction to his work as an attorney. Instead, the FRB's haphazard process first raised these subjects months into its 2017 inquiry. By the time the FRB shared its draft report with Plaintiff, just days remained before the FRB was obliged to finalize and circulate its report to the Appointments Committee. By then, the FRB was manifestly disinclined to revisit its conclusions, making it needlessly difficult for Plaintiff to convince the FRB of errors in its draft or the necessity of removing sections shown to be incorrect.

70. The FRB's final report reiterated the draft report's criticisms of Plaintiff's character and outside activities, without material revision from the draft. Plaintiff alerted FRB to the general concerns above, including the impropriety of anonymous out-of-context comments, the

misapplication of the COI Policy, and the mistaken citations not supporting the corresponding claim. The FRB made no revisions in these regards.

Plaintiff is Denied Tenure as a Result of the 2017 FRB Report

71. The FRB's 2017 final report was provided to the Appointments Committee. Members of the Committee contemporaneously told Plaintiff that evaluations of his research from both internal and external letter-writers were effusive, his teaching was well-regarded, and his impact on practice was exceptional. On information and belief, the FRB's report was the only negative factor before the Appointments Committee.

72. Dean Nohria took the position, after the faculty's vote on Plaintiff's candidacy for tenure, that he would advance Plaintiff's case for tenure to the University's President only if two-thirds of the faculty voted in favor of tenure. On information and belief, this was not an established standard and not a position that Dean Nohria had articulated with respect to any prior tenure review.

73. On information and belief, 43 of 73 faculty members voted in favor of Plaintiff's tenure, just short of the supermajority that Dean Nohria required.

74. Multiple members of the Appointments Committee told Plaintiff that the members of the faculty who spoke against his promotion indicated that their opposition was primarily or solely based on the FRB's report.

75. Along with a summary "vote" recommendation, each member of the Appointments Committee provided a written statement of the reasons for such recommendation. Plaintiff requested those written statements from Harvard University, which has not provided them. On information and belief, the written statements confirm that the FRB's report was the sole or primary factor causing votes against Plaintiff's promotion.

76. Plaintiff was not granted tenure and his appointment at HBS was not renewed.

77. In December 2017, Plaintiff spoke to Dean Nohria, who informed him that he had "dug himself into a hole with the 2015 [sic] incidents," but did not cite any other concerns about his conduct at HBS.

The Staff who Served on and Supported the FRB Had Conflicts of Interest

78. An administrative dean who served on the FRB (S1) and another administrative dean who was the staff member primarily responsible for supporting the FRB (S2) were directly involved in the interactions between Plaintiff and HBS staff that the 2015 FRB alleged were problematic and that were the subject of the FRB's investigation. Because S1 and S2 were both adverse fact witnesses in the interactions they caused to be included within the FRB's inquiry, and also adjudicators of that inquiry, they had an incurable conflict of interest. Their conflict of interest gave them strong motives to oppose Plaintiff's tenure and to ensure that the FRB reached a negative assessment of Plaintiff.

79. Plaintiff learned only when he was interviewed in 2015, well into the process, that S1 was serving as a member of the FRB. S1 was the same person with whom he had disagreed about a reduction in the size of classroom projection screens—one of the interactions that the FRB elected to examine in 2015. In a stern email to Plaintiff earlier that year, S1 had insisted that the reduction was wise, and S1 rejected the alternative Plaintiff proposed because "a decision has been made and is final." But when Plaintiff demonstrated the impact of the proposed change to MBA program leaders, they insisted that the change be reversed, just as Plaintiff had favored. S1's claim that the decision was correct and final was thus doubly incorrect; senior decision-makers found the change ill-advised and were amenable to the alternative Plaintiff proposed. This interaction was widely discussed among HBS faculty and senior administrators.

80. S2 also had a conflict of interest with regard to Plaintiff, for three reasons. First, in 2009, S2 had demanded in writing that Plaintiff cease his efforts to assist a colleague who could not use a standard computer while experiencing a temporary medical disability. Plaintiff had resisted S2's demand, explaining that he wished to honor his colleague's request that Plaintiff, rather than HBS staff, assist him, particularly as this assistance would occur away from the HBS campus and would not use HBS funds. On information and belief, Plaintiff was able to fully meet his colleague's needs, at no cost to HBS for IT equipment, via the exact method Plaintiff had proposed and S2 had sought to obstruct.

81. Second, in 2014, S2 incorrectly told a journalist that Plaintiff had violated HBS policy in the Blinkx incident. The governing policy said that only the Dean could determine that the policy had been violated – which he had not, and never did. At the time, Plaintiff told S2 that he believed that her statement was improper and he wished she had made no such statement.

82. Third, S2 was involved in the "business cards" dispute referenced in the July 31, 2015 letter defining the scope of the 2015 FRB inquiry (*see* ¶ 31). In 2011, S2 denied Plaintiff's request to put the URL of his personal website on his HBS business cards in order to assist members of the public in finding his research. Because another senior HBS administrator approved Plaintiff's request at the same time that S2 denied it, Plaintiff was ultimately able to put a personalized URL on his business cards. Only S2 could have caused this subject to be included in the 2015 FRB's opening letter.

COUNT 1

Breach of Contract

83. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

84. Defendant Harvard and its agents' actions set forth above constitute breach of contract.

85. HBS's policies, including the P&P, afforded Plaintiff, as a member of the HBS faculty, rights that are contractual in nature.

86. HBS violated those rights in at least five distinct ways.

87. FIRST, the P&P requires the FRB to prepare a draft report that includes "the evidence gathered." The faculty member then "will have an opportunity to review . . . the evidence gathered, and the draft report, and to respond in writing." The P&P offers examples of what kind of evidence might be at issue: "factual inquiry, interviews, and the review of materials (e.g. documents, email exchanges, social media)."

88. The 2017 FRB did not provide the evidence that it gathered either with its draft report or its final report. The 2017 FRB report embedded a single email favorable to Plaintiff, but attached no evidence whatsoever. Neither Plaintiff nor the members of the Appointments Committee ever received the evidence that the FRB gathered. Indeed, the FRB provided no notes, recordings, or interview transcripts. Instead, the FRB relied on decontextualized anonymous criticisms to reach its conclusions. This is contrary to the P&P obligation to provide "the evidence gathered."

89. The FRB's failure to provide Plaintiff with the evidence that it gathered prevented him from providing the context that was necessary to permit a fair evaluation of the criticisms that the FRB's report leveled against him.

90. The FRB's failure to include the evidence that it gathered with its final report also prevented members of the Appointments Committee from fairly evaluating the report's conclusions.

91. SECOND, the 2017 FRB lacked a proper scope consistent with the P&P. The P&P instructs that the FRB may be invoked to investigate "instances of *egregious* behavior or actions,

or incidents that indicate a *persistent and pervasive pattern* of problematic conduct." (emphasis in original). But the 2017 FRB alleged neither of these. Indeed,

92. In the context of a tenure case, according to the P&P, "If no serious questions about conduct are raised," then the case is to proceed without the involvement of an FRB. When "serious questions about conduct" are raised in the context of a tenure case, the P&P states that "the FRB will be asked to undertake a review, beginning with drafting an allegation" as outlined in the P&P's description of the process overall. In contrast, the 2017 FRB was convened in the absence of any alleged misconduct whatsoever. The P&P allows no such thing.

93. THIRD, the P&P requires the Chair of the FRB to draft a "summary of the allegation, as it is known at the time" at the outset of its process. The faculty member is then to "have an opportunity to review the allegation."

94. In contrast, the 2017 FRB failed to articulate any allegation against Plaintiff at the outset of its process, and the FRB communicated to Plaintiff only that it was exploring whether he had learned from the incidents it investigated in 2015. Professor Edmondson's July 6, 2017 letter failed to provide any allegation whatsoever, and did not put Plaintiff on notice of what, specifically, the FRB would examine. Only after conducting its proceeding and interviewing Plaintiff, the FRB unveiled a host of spurious complaints about his outside activities.

95. Plaintiff never had the early notice or full opportunity to respond to these complaints that the P&P requires. Had they been presented to him at the outset of the process, he could have responded fully and presented additional evidence regarding his activities.

96. FOURTH, the FRB improperly expanded its scope midway through its 2017 proceedings. The P&P requires the FRB to investigate "the allegation" that it stated when commencing its

process, thus giving the faculty member notice of the scope of its inquiry at the outset and a fair opportunity to be heard during the process.

97. Instead, the FRB in 2017 expanded its scope at the last minute, turning in the final weeks from an inquiry into Plaintiff's progress since 2015 and compliance with the requirements he had agreed to in 2015, into an inquiry into his outside activities.

98. The FRB's last-minute change in focus significantly undermined Plaintiff's ability to participate in the process and to defend himself. The FRB provided Plaintiff just one week to respond to its final inquiry. Moreover, the P&P requires that notice to a faculty member be provided *at the start* of an FRB, giving the faculty member the opportunity to address all concerns in early remarks before FRB members have made up their mind and prepared a draft report.

99. The FRB's failure to follow its own procedures undermined its ability to find the truth and resulted in a final report that did not fairly represent Plaintiff's fitness for tenure.

100. FIFTH, the P&P requires the FRB to "investigate the allegation." The P&P does not authorize the FRB to convene simply to measure a faculty member's popularity or to collect grievances about a particular person.

101. By its own admission, the 2017 FRB report was "not an investigation," and the FRB said that it "did not seek to pass judgment on the particular outside activities and work that Plaintiff pursued." Yet the FRB's conclusions included that it "discovered examples of activities and behaviors that cause continued concern, including whether Plaintiff appropriately sought guidance on and disclosed his outside activities and potential conflicts of interest," and "heard unease voiced" about those activities by faculty members. The FRB violated the P&P when it made vague aspersions in place of actual investigation.

102. By including in its report subjects that it did not investigate, not to mention meaningfully evaluate, the FRB left an impression that Plaintiff had engaged in misconduct. An actual investigation, fairly conducted, would instead have cleared Plaintiff's name of these incorrect claims.

103. The entirety of the 2017 FRB report was tainted by these breaches.

104. The FRB's failure to follow its own procedures was the actual and the proximate cause of the Appointments Committee vote failing to achieve a two-thirds supermajority in favor of Plaintiff's tenure, and thus of the denial of his tenure.

105. As a result of Defendant Harvard's actions Plaintiff has experienced lost professional opportunities and other damages. All damages continue.

COUNT 2

Breach of the Duty of Good Faith and Fair Dealing

106. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

107. Good faith and fair dealing are implied in all contracts.

108. Neither party to a contract shall do anything that will have the effect of destroying or injuring rights of the other party to receive the fruits of a contract.

109. In breach of the covenant of good faith and fair dealing, Defendant Harvard purposefully, willfully, and knowingly failed to fulfill promises made in the P&P.

110. HBS included both as a member of FRB (S1) and as support to the FRB (S2), the staff members who had personal conflicts with Plaintiff that were the subject of the FRB's 2015 inquiry. These conflicts of interest made S1 unsuitable to serve as a member of FRB, and S2 unsuitable to serve as staff to FRB.

111. The FRB misrepresented evidence to suggest that Plaintiff was subjecting HBS to negative publicity, or that HBS faced a material risk of negative publicity, as a result of the lawsuit against American Airlines. It failed to alter these statements in its final report, even after Plaintiff directed its attention to the errors.

112. The 2017 FRB suggested falsely that Plaintiff had failed to make necessary disclosures, although he was in compliance with the requirements of the governing COI Policy.

113. The procedural errors in the 2017 FRB process amount to a denial of basic fairness. The FRB's actions had the effect of destroying or injuring Plaintiff's rights to receive the fruits of the contract, *i.e.* fair treatment as a respondent to a complaint under P&P.

114. The 2017 FRB report's criticism of Plaintiff was arbitrary and capricious when viewed in light of all the circumstances.

115. The 2017 FRB process and report were undertaken in bad faith. The FRB's negative assessment of Plaintiff was predetermined and used improper methods including expanding the scope of its inquiry, withholding evidence, and otherwise violating the P&P in order to reach that conclusion.

116. As a result of Defendant Harvard's actions Plaintiff has experienced lost professional opportunities and other damages. All damages continue to date.

COUNT 3

Promissory Estoppel

117. Plaintiff repeats and realleges the allegations above as if fully set forth herein.

118. Individuals acting on behalf of Harvard represented to Plaintiff in 2015 that the extension of his appointment was intended to give him time to demonstrate that he had learned from the

negative publicity that affected his first tenure application, and that he was likely to be awarded tenure if he took the agreed-upon steps including teaching LCA.

119. Harvard further represented to Plaintiff, and to all of its faculty, that any FRB process would comply with the P&P.

120. Plaintiff relied on these promises and spent two years working at HBS and taking all of the steps that HBS required.

121. Plaintiff could easily have secured more lucrative employment in the private sector, but chose to remain at HBS for two years based upon Harvard's promises.

122. HBS then denied Plaintiff's tenure based upon an FRB process that violated the P&P, despite his success at taking the steps it requested and his continued academic success.

123. As a result of Defendant Harvard's actions, Plaintiff has experienced lost professional opportunities and other damages. All damages continue.

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Declare that Harvard breached its contractual promises to Plaintiff;
2. Declare that Harvard violated the duty of good faith and fair dealing;
3. Order Harvard to review Plaintiff's application for tenure in accord with its policies, without reliance upon the 2017 FRB report, including corrective actions sufficient to dispel the harm from the 2017 FRB report and sufficient to assure that any subsequent proceedings are not tainted by recollection of that report or retaliation for this action;
4. Award Plaintiff damages in an amount to be determined at trial;
5. Award Plaintiff reasonable costs, expenses, and interest to the extent allowed by law;
6. Award Plaintiff all other damages as permitted by applicable law;

7. Grant all such other relief, including injunctive relief, as this Court deems equitable and just.

PLAINTIFF DEMANDS A TRIAL BY JURY.

Respectfully submitted,
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By his attorneys,

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