COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2017-J-293

GUSTAVO GERMAN,
Plaintiff/Appellee

v.

LEE L. RUBIN,
Defendant/Appellant

and

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,
Limited Intervenor and Non-Party Subject of Injunction,
Appellant

MEMORANDUM OF LAW IN SUPPORT OF AMENDED MOTION OF PRESIDENT AND FELLOWS OF HARVARD COLLEGE UNDER MASS. R. APP. P. 6(a)(1) FOR STAY OF JUDGMENT AND ORDERS PENDING APPEAL AND PETITION UNDER G.L. C. 231, § 118 FOR STAY, SUSPENSION OR MODIFICATION OF INJUNCTION AND ORDERS PENDING APPEAL AND EMERGENCY REQUEST FOR HEARING

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Dated: July 10, 2017

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INTRODUCTION

Pursuant to Mass. R. App. P. 6(a)(1) and M.G.L. c. 231, § 118, Limited Intervenor and Non-Party Appellant President and Fellows of Harvard College ("Harvard") hereby submits this Memorandum addressing Rulings and Orders of the Superior Court (Fahey, J.) on July 7, 2017, and in support of an immediate stay of those Rulings and Orders.

On the morning of July 10, 2017, the first business day after the issuance of the July 7th Orders, Harvard filed in the trial court a Notice of Appeal of the July 7th Orders, along with an Emergency Motion seeking to Stay the terms of those Orders pending action by a Single Justice of the Appeals Court. In light of the July 14th deadlines for compliance imposed by much of the July 7th Order, the text of that Order, and the history of this case, Harvard submits that it is not practicable to wait for that motion to be resolved before this Motion is considered by a Single Justice of the Appeals Court. Mass. R. App. P. 6(a).

RECENT PROCEDURAL HISTORY

The long and complex procedural history of this matter is described in the Timeline an Overview of

Proceedings set forth at Add. 488-499 of Harvard's Addendum to its previously-filed Motion and Petition (filed in this Court on July 3, 2017), and incorporated herein by reference.

Late Friday afternoon on July 7, 2017, Judge Fahey issued a series of additional Orders[1] in the underlying case. First, the trial court denied in large part[2] Harvard's Motion seeking a stay of its Orders of May 31, 2017 and June 19, 2017 pending appeal. Add. C.[3]

Second, the trial court granted in part and denied in part Harvard's and Rubin's Motion to Dismiss

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[1] In Harvard's view each of the newly issued Orders from the trial judge are improperly captioned insofar as they purport to list Harvard as a party defendant in the underlying action. *See, e.g.*, July 7th Order at n. 1. In fact, Harvard has been "added" solely through Rule 71, which applies only to non-parties. Mass. R. Civ. P. 71. Harvard was not, and is not, a party to the underlying Section 258E action. *See* Argument, *infra*., Harvard has been summoned as a party to the separate civil contempt proceeding that remains pending in the trial court. A. 2743.

[2]The trial court did temporarily stay the portion of the June 19th Order that required that Mr. German be granted access to the BRI facility on the Harvard campus. Add. C at 4. The trial court acknowledged that the provision of such access to a person unaffiliated with Harvard would have violated both federal and local law. *Id.* at 3.

[3] "Add. __" refers to the Addenda to the Amended Motion and Petition submitted herewith.

the Plaintiff's pending claim for civil contempt. Add. D. That order dismissed Plaintiff's claims for civil contempt arising from Dr. Rubin's alleged failure to turn over funds, his failure to hold "lab meetings," Harvard's use of security guards in the past, and Harvard's and Rubin's alleged denial of access to portions of the Bauer Laboratory at Harvard. Add. D at 16. The court allowed Mr. German to proceed on his claims for civil contempt as to Dr. Rubin's alleged lack of supervision of Mr. German's research, Harvard's administrative withdrawal of Mr. German, and Harvard's alleged failure to provide research assistants and resources and equipment needed for his research. *Id.*[4]

Third, the trial court granted the Plaintiff's Emergency Motion for an Order Disallowing Administrative Proceedings. Add. B. The decision invalidated Harvard's administrative withdrawal of the Plaintiff *nunc pro tunc* to May 4, 2017 (a date nearly a month before Harvard was "added" as a non-party to

[4] The Revised Order Issued July 7, 2017 Order expressly holds open possible liability for contempt for violation of earlier orders while they were in place, so the appeal of all those earlier provisions is not moot, especially given the Court's reference in a footnote to "punishment." *See* Add. A at ¶ 4.

this case). *Id.* at 7. Relying on its opinion, the Court separately issued a broad decree, labelled Revised Order Issued July 7, 2017 (the "July 7th Revised Order"). *See* Add. A.

The full text of the July 7th Revised Order is set forth in the Addendum to the accompanying Amended Motion and Petition. *See* Add. A. Among its many directives are the following:

- An Order, apparently effective immediately, directing Harvard "to discontinue any use of security guards at the facilities used by German, to the extent such use exceeds that which was in effect as of March 10, 2016." *Id.* ¶ 3(g);

- An Order directing Harvard to "vacate" its May 16, 2017, withdrawal of Plaintiff and the terms of his previously imposed academic probation. *See id.* ¶ 3(a). The Order requires that such action be taken by Friday, July 14, 2017;

- Orders requiring that Dr. Rubin serve not only as Plaintiff's supervisor in the Rubin Lab, but also as Plaintiff's thesis advisor. *Id.* ¶¶ 1(b), 3(f). These same Orders grant Plaintiff, not Harvard, final authority over the selection of his thesis advisor. *Id.;*

- An Order directing Harvard to hire a research assistant for Plaintiff, and granting Plaintiff "final approval over the research assistant(s) assigned or hired, such approval not be unreasonably withheld." *Id.* ¶ 3(h).

- An Order granting Plaintiff the unfettered right to complete his research and thesis

> work in the Harvard graduate program "to his satisfaction," without regard to any requirements imposed by Harvard or his academic program. *Id.* ¶ 2; and

All of this has been done while denying Harvard its procedural rights to a trial and in clear violation of the authority granted to the trial court under the developed caselaw and underlying statutory scheme.

ARGUMENT

The Revised Order issued by Judge Fahey on July 7, 2017 exceeds all reasonable bounds of the statutory authority arising under Section 258E, constitutes an abuse of discretion, was entered without affording Harvard the procedural rights to which it is entitled, and impermissibly intrudes into Harvard's constitutional, legislative, and common law rights as a private university to protect its personnel, to control its educational programs and to make academic decisions. The balance of the equities supports a stay or a modification of the trial court's Orders.

I. THE ORDER REQUIRING HARVARD TO WITHDRAW SECURITY GUARDS FROM THE FACILITIES INVOLVED IN THIS CASE AND TO RESTORE SECURITY LEVELS TO THOSE IN PLACE FIFTEEN MONTHS AGO IMPERMISSIBLY INTERFERES WITH HARVARD'S RIGHTS AND RESPONSIBILITIES TO PROVIDE A SECURE CAMPUS TO ITS FACULTY, STAFF, STUDENTS AND VISITORS.

The July 7th Revised Order directs Harvard "to discontinue any use of security guards at the facilities used by German, to the extent such use exceeds that which was in effect as of March 10, 2016." Add. A at ¶ 3(g).[5] Unlike many other directives in the Order, which are effective on July 14th, this Order contains no start date and appears to require immediate compliance. Accordingly, notwithstanding the documented security concerns expressed by multiple individuals who work and study at the Rubin Lab during the course of this litigation, *see, e.g.*, A. 208-225, Harvard has been summarily required to withdraw the enhanced security presence that it put in place to address those concerns.

In its decision allowing the Plaintiff's Emergency Motion and vacating the disciplinary

[5] Given that Harvard deploys its security guards on an as-needed basis, and the facilities to which Mr. German is to have access are not expressly limited, it is unclear how Harvard is to determine what use would exceed that which was in effect as of March 10, 2016.

proceedings against German, the trial court provided no basis for the decision to limit Harvard's use of security guards on its campus. In the trial court's order on the Defendants' Motions to Dismiss, however, the court references German's allegation that he "was intimidated" by the presence of a security guard who looked at him in the Rubin Lab. *See* Add. D at 6 n.4. The trial court acknowledged that there was no allegation that the presence of the guard impaired German's ability to do his research, but noted that the presence of the guard "appears very different than the 'status quo' of March 10, 2016." *Id.*

While there has always been a security presence available on the Harvard campus, that security presence was likely less noticeable at the Rubin Lab prior to the disruption that commenced there after March 2016 and has continued throughout the pendency of the lawsuit. Harvard cannot and should not be directed to disregard record evidence submitted by laboratory personnel expressing concerns about their safety and security. *See* A. 208-227 (collection of affidavits from Rubin Lab personnel describing pre-litigation tensions in the lab and expressing their security concerns). Moreover, after Plaintiff's

lawsuit was initiated, tensions in the Rubin lab have increased significantly. A. 752-53 (expressing concern about how the litigation has "negatively impacted" the lab); A. 754-56 (expressing concern that the litigation has created a circumstance "perilous to my career").

Not surprisingly, Plaintiff's own aggressive, confrontational and intemperate language directed towards his colleagues at the Rubin Lab and towards various Harvard faculty members has contributed to these tensions. *See, e.g.*, A. 1034 ("I demand that you stop the defamation campaign"); A. 1727 ("You know that it is false that the research technicians at the iPS core cannot help me."); A. 1791-92 ("Please stop your farce, stop abetting Rubin, and stop fabricating academic reasons on his behalf."; A. 2130 ("[S]top this farce and stop abetting Rubin."); A. 2139-40 ("Given your behavior, I cannot accept any further dealings with you."); A. 2148 ("[A]ll of you have acted in bad faith. . . . For this reason, my good will . . . has ended."); A. 2352 ("As always, you ignore my concerns."). Whether any of these intemperate communications are merited is beside the point. The indisputable fact is that there is an air

of tension among lab members, which justifies a prudent security presence to deal with the present situation and any that arises in the future. A blanket return to fifteen months ago, blind to intervening events, is a foolhardy risk.

The trial court's total disregard of this record evidence, including its failure even to hold a hearing on the issue, is alone sufficient to justify a stay of the July 7th Order. As Harvard's counsel recently explained to the trial court, Harvard has *always* deployed security guards to its facilities as it deems appropriate in order to ensure the safety and security of its faculty, staff, students, and visitors. Supp. Add. 525-26, 529-30.[6] There is no basis to preclude such reasonable action now, especially where there is no evidence that the guards have interfered in any way with Plaintiff. Add. D at 6 n.4.

This litigation has already received publicity and public scrutiny. Heightened security is a fact of life for any modern university, especially a university with laboratories that engage in animal-related research. Supp. Add. 525-26. The

[6] "Supp. Add. __" refers to the Supplemental Addendum provided to this Court on July 7, 2017.

unrestricted injunction against Harvard's prospective use of its security guards is wholly unwarranted, especially in the absence of any reason to believe that Harvard's use of its security guards has interfered with Plaintiff's ability to undertake his work. That portion of the Court's July 7th Revised Order must be immediately stayed.

II. THE JULY 7TH ORDER IMPERMISSIBLY INTERFERES WITH HARVARD'S ACADEMIC PROGRAM AND ITS INTERNAL DISCIPLINARY PROCESS.

The July 7th Revised Order is an improper intrusion on Harvard's independence in managing its academic programs. Specifically, the provision in the July 7th Order directing Harvard, a non-party, to vacate its withdrawal of the Plaintiff from its graduate program as well as the academic probation that led to that withdrawal represents an unprecedented and unwarranted intrusion by the trial court into Harvard's academic decision-making. Such an order not only far exceeds the grant of authority provided to trial courts under Chapter 285E, it strays well beyond the limits of the court's general equitable authority. *See* Memorandum of Law in Support of Harvard's Motion under Mass. R. App. P. 6(a)(1) and Petition Under G.L. c. 231, § 118 (filed July 3, 2017)

at 7-24. Harvard reasserts and incorporates by reference those prior arguments.

A. The December 5, 2016, Revised Order Did Not Order Dr. Rubin to Serve as Mr. German's Thesis Advisor.

The Memorandum of Decision and Order on Plaintiff's Emergency Motion is particularly troubling because of the trial court's conclusion that Harvard's administrative withdrawal[7] of the Plaintiff in May 2017 somehow violated the terms of her December 5th Revised Order. Add. B at 4-6. The judge makes clear in a footnote that she takes her facts from allegations made by Plaintiff in both his motion to enjoin proceedings for his withdrawal and in his Complaint for Civil Contempt. *See* Add. B at 2 n.2. But the trial court's factual basis for its decision to order Mr. German's reinstatement is contradicted by the record and is riddled with inaccuracies, misrepresentations and critical factual omissions.

The judge has effectively prejudged the upcoming contempt trial without affording Harvard a trial.

[7] Under Harvard's rules, a withdrawal is not a permanent separation from the university as would be an expulsion. Withdrawn students may reapply and could be readmitted, especially if the reasons for the withdrawal are satisfactorily addressed by the applicant.

Most of the conduct she found troubling took place outside of the courtroom, and with respect to both that and what happened in the courtroom, she acted upon a version of events utterly unsupported by the record. The judge's clearly-announced (Add. B at 7) belief that Harvard sought to frustrate the Court's orders has no support in the actual record, which contradicts a good deal of the purported facts on which the judge's opinion rests. Rendering such conclusions without a trial is anathema to the fundamental procedural protections that are the bedrock of our system of justice, and requires a detailed response.

The record below belies Plaintiff's alleged justification for his abject disregard of Harvard's basic academic rules. He claims that in its December 5, 2015, Revised Order requiring that Plaintiff be "supervised" by Dr. Rubin in the Rubin Lab, the Court had required that Dr. Rubin serve as Plaintiff's "thesis advisor." A. 1859. The trial court's acceptance of that premise, *see* Add. D. at 10 and n. 8, in the face an unambiguous record to the contrary, including previous Court orders, was error.

First, since Harvard's initial appearance as *amicus curiae* in this case, it was made crystal clear on multiple occasions to all involved—including the trial court judge—that the roles of a thesis advisor and a laboratory supervisor were separate and distinct. A. 1341 (explaining that Mr. German needs a different P.I. *and* a different thesis advisor); A 1150-51 (Court stating that Mr. German needs "both a P.I. and a new thesis advisor" and Harvard's counsel noting that it is "not required" that the two functions be performed by the same person). Mr. German was well aware of the distinction between these two roles, and he well knew the difference between the supervision required in the laboratory and the separate role of a thesis advisor. *See* A. 1612 (e-mail of Oct 5, 2016 from Mr. German stating "In addition to a research supervisor, I need a thesis advisor."); *see also* A. 1621-22 (letter from Mr. German to trial court agreeing "to have Lee Rubin fulfilling any research supervision requirement over me to comply with any mandated regulation while I work in the Rubin Lab.").[8]

[8] For ease of reference, Harvard has compiled a collection of the various record references setting

Second, in its Order of September 19, 2016, the trial court *itself* directed that Harvard identify a new thesis advisor for Mr. German to replace Dr. Rubin in that capacity. *See* A. 902 (court order directing Harvard's Dean McCavana "to propose at least one potential faculty member agreeable to serving as plaintiff's advisor for his current thesis work"). In the affidavit submitted the very next day by Dean McCavana, Harvard proposed *two* potential thesis advisors for Mr. German—including Dr. Sheila Thomas, the faculty member who was subsequently appointed to serve as Mr. German's thesis advisor. A. 1071-74.[9] The primary focus of the Court's initial remedial orders was to keep Dr. Rubin away from Plaintiff, who claimed to be terrorized by Dr. Rubin by the prospect of being in the same room with him. A. 1468 ("[Dr.

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forth the distinction between a thesis advisor and a laboratory supervisor in the Addendum E to the Amended Motion and Petition.

[9] Mr. German himself was well aware of Dr. Thomas's appointed role as his interim thesis advisor, and her role was confirmed in multiple e-mails that are part of the trial court record. *See*, *e.g.*, A. 2488 (October 28, 2016 e-mail from Mr. German to Dr. Thomas stating "You told me that you were temporarily and formally my thesis advisor. Until then, I am happy that you remain so."); A. 2493 (January 1, 2016, e-mail from Dr. Thomas to Mr. German stating, "[A]s you know, I was asked by the Graduate School and DMS to serve as your interim advisor.").

Rubin] has harassed me endlessly."); A. 1534 ("I don't want to have Dr. Rubin around in the lab."); A. 1555 ("I want the separation, I need the separation.").

An earlier Order to transfer Mr. German to another laboratory "did not work out" (*see* Add. D at 9) because the terms of that Order drove the other faculty member away. A. 1315-18. But the overriding concern to separate Dr. Rubin from Mr. German remained, and the limited "supervision" exception carved out in the December 5th Revised Order was obviously intended to provide the bare minimum involvement of Dr. Rubin with Mr. German needed to satisfy legal requirements to keeping the Rubin Laboratory open.

Since the court had previously specifically directed the re-assignment of a new thesis advisor for Mr. German, and the totality of the record from August 25 to December 30th demonstrates conclusively that Rubin was never intended to remain as Mr. German's thesis advisor with direct powers over his success or failure as a student, no record basis exists to support the court's conclusion that the December 5th Revised Order required that Dr. Rubin continue as Plaintiff's thesis advisor. *A fortiori* it was not

improper for the University to ask Mr. German to meet with Dr. Thomas to take routine steps to find an appropriate substitute advisor.

B. The Trial Court Failed to Consider the Full Reasons Why Mr. German's Conduct Violated Established Rules Governing His Academic Program.

The trial court's summary of the events leading up to Mr. German's scheduled dissertation advisory committee ("DAC") meeting of March 30, 2017, which he simply refused to attend, is grossly misleading. *See* Add. B. at 2-3. Among other things, the summary ignores the fact that the DAC meeting was required by Harvard's program rules to be held on or before the end of March 2017. A. 2514; *see also* Harvard BBS Program DAC Guidelines for Students (hereinafter "DAC Guidelines"), located at https://www.hms.harvard.edu/dms/bbs/documents/DACGuidelinesforStudents.pdf (explaining that graduate students in their fifth year or later "must" have DAC meetings "every six months or even more frequently"). In addition, the court's summary contends, *inter alia*, that program administrators informed Mr. German on March 6, 2017 "as a condition for the DAC meeting that German accept to have a new thesis advisor in Rubin's stead." Add.

B at 2. Putting aside the fact that a different thesis advisor for Mr. German previously had been ordered by the trial court, *see supra*, the quoted language *simply does not appear* in the March 6, 2017 communication to Mr. German.[10] Instead, the program administrator, aware of Mr. German's dissatisfaction with Dr. Thomas as his advisor, explained that "we will ask the DAC committee to not only discuss your science, but to identify possible alternative advisors, of which you will need to secure one ASAP." A. 2514.[11] The trial court's one-sided characterization of this statement as an improper "condition" placed on the required DAC meeting is simply wrong. Indeed, a review of the extensive correspondence between Mr. German and Harvard faculty between December and May 2017 (*see* A. 2479-2563) makes clear that Mr. German consistently rebuffed any and all efforts by the Harvard faculty to obtain an update

[10] The trial court appears to have been quoting from Mr. German's own factual recitation. *See* Add. B at 2 n. 2.

[11] Under Harvard's rules and regulations, the DAC has the explicit authority to address and resolve any issues relating to any graduate student's dissatisfaction with his or her thesis advisor. *See* DAC Guidelines, *supra.*

regarding his research progress. *Id. passim.* Those sincere efforts were met by consistent and repeated personal attacks[12] from Mr. German, coupled with an unrelenting refusal to comply with the program's basic requirements. *See* A. 2498 (reflecting Mr. German's failure to attend a scheduled meeting with Dr. Thomas and member of his DAC); A. 2506-07 (reflecting an effort to schedule a meeting with the head of the BBS program to which Mr. German never responded); A. 2524 (Mr. German announcing his refusal to attend the scheduled March 30, 2017 DAC meeting).

The trial court's factual summary wholly omits *any* discussion of Plaintiff's specific probationary violations. Mr. German was withdrawn as a graduate student due to his failure to comply with the express written terms of his formal academic probation imposed upon him on April 25, 2017. *See* A. 2557-58. Those express written terms required, *inter alia*, that he meet with his dissertation advisory committee on May

[12] *See, e.g.* A. 2490 ("As always, you ignore my concerns."); A. 2502 ("[Y]our e-mail represents another attempt to distract me from attending to my legal obligations, to intimidate me, and to go on fabricating precedents of my presumptive academic misconduct."); A. 2530 ("You must end the psychological terror you have been inflicting on me with Lee Rubin's shared intent").

15, 2017, that he meet with his then-assigned academic advisor, Dr. Sheila Thomas, in advance of that meeting, and that he provide Dr. Thomas with a weekly schedule for his lab work every Friday, commencing on May 5, 2017. *Id.* Plaintiff complied with *none* of those entirely reasonable and hardly burdensome obligations. A. 2554-55. Indeed, he did he not even bother to participate in the GSAS Ad Board process. *Id.* Accordingly, just as he was told would take place if he violated probation, he was withdrawn in accordance with the express terms of his probationary letter and according to Harvard's published disciplinary rules. A. 2556.

Nothing in the trial court's December 5th Revised Order absolved Plaintiff from complying with the basic rules and regulations governing his academic program at Harvard. At a recent hearing in this case, the Judge repeatedly explained this precise point to Mr. German:

> THE COURT: **Mr. German, I didn't issue any protect[ion] to you concerning complying with all the rules and regulations with Harvard; I was pretty specific.**

A. 3195 (emphasis added); *see also* A. 3201 ("You have to comply with those requirements). A few minutes

later during that same hearing, the Court returned to the issue for a third time:

> THE COURT: **Well, there's nothing in my [December 5th] order, there's six paragraphs, nothing says you don't have to comply with Harvard's rules and regulations, nothing.**

3229 (emphasis added).[13] The trial court could not have been more clear that its December 5th Revised Order did *not* relieve Mr. German of his ongoing obligations to comply with the terms of his Ph.D. program at Harvard. Given its own on-the-record interpretation of the language of its December 5th Revised Order, there is simply no basis for the trial court now to conclude that Harvard somehow violated the terms of that Order by enforcing its rules as to Mr. German. Harvard's administrators had no reason whatsoever to abandon their efforts to find out what Mr. German was doing in order to monitor his efforts to advance towards a degree. The Court's subsequent decision castigating their actions is unsupported by the record.

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[13] At the next hearing, the Court repeated this same point. *See* A. 3270 (THE COURT: "**[A]s I said the last time, I didn't interfere with what Harvard could do to you**. I didn't tell you, you didn't have to go to meetings, that you didn't have to follow whatever the course of requirements are . . . to get your Ph.D")

C. The Trial Court Was Wrong About Harvard's Efforts to Obtain a Hearing Prior to Mr. German's Being Withdrawn and Wrong About Harvard's Extensive Efforts to Help Achieve Mr. German's Academic Goals.

Finally, the trial court's factual summary blatantly misrepresents Harvard's efforts to notify the trial court of the impending withdrawal and mischaracterizes its legal position and arguments. The trial court states that "Harvard filed a request for hearing, but did not call the court to obtain a hearing on an expedited basis." Add. B at 1. In fact, the record shows that Harvard's counsel travelled *in person* to Middlesex Superior Court on May 10, 2017, to request a hearing on Plaintiff's Emergency Motion at the earliest practicable time on Thursday or Friday, May 11th or 12th. A. 2881-84. In response to the court clerk's request, he hand-typed a request for a hearing and personally delivered it to the clerk, who stated that the session was jammed but assured him that the request would be presented to the judge. *Id.* The request was not granted. Those personal efforts to obtain a prompt hearing are summarized in a sworn affidavit that was submitted to

the trial court, but are wholly disregarded in the trial court's factual summary. *Id.*

Nor is there any basis for the trial court's separate assertion that Harvard "conten[ds] that it was a non-party, unaware that it had obligations under the Court's orders." Add. D at 14. Harvard has *never* contended that it was "unaware" of the trial court's orders. To the contrary, while Harvard has consistently maintained its legal position that it was not a party and objected to the overreaching nature of the trial court's rulings were they to be imposed upon Harvard, Harvard has consistently been engaged, notwithstanding its objections, in efforts to facilitate compliance with the Court's orders by restoring Mr. German to his position in the Rubin Lab, facilitating the provision of supplies for his work, and encouraging him to engage with his faculty advisors. A. 1235; A. 1627-31.

The Court itself consistently recognized that Harvard was not a party and was not the subject of the Court's orders prior to the Order of May 31, 2017. The Court repeatedly explained that it lacked the

authority to impose any obligations on Harvard.[14] Indeed, the trial court began the November 30, 2016 hearing, which led to the December 5th Order, by barring Harvard's counsel from entering past the bar separating spectators from lawyers, and announced that she would not hear from him because Harvard had not intervened. A. 1794, 1805, 1813. Harvard was denied the opportunity to provide *any* information at the hearing, some of which would have relieved the Court of its mistaken understanding of what had happened.

Under these circumstances, the trial court's conclusion that Harvard engaged in an effort "to frustrate the clear language, and well known objective, of the December 5, 2016 Order" is wholly without merit. The invalidation of Harvard's disciplinary action and the wide range of affirmative obligations prospectively ordered interfere directly with Harvard's academic mission and its management of its facilities and personnel were error.

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[14] *See, e.g.,* A. 1339 (THE COURT: "You're not a party."); A. 1421 (THE COURT: "I don't have the authority to reach Harvard. They're here voluntarily. They have not sought to intervene. You haven't asked them to intervene. So that I have no way to do anything as to Harvard."); A. 1460 (THE COURT: "The only defendant now is Dr. Rubin."); A. 1824 (THE COURT: "[T]ake it up with Harvard. I have no recourse there.")

D. The Trial Court Acted Without Affording Harvard the Procedural Rights to Which it is Entitled.

Moreover, the Court has imposed this broad decree upon Harvard despite the fact that Harvard has not been a party to the case below and did not participate in the trial of the underlying 258E action or in certain of the post-trial proceedings.[15] Harvard was only "added" to the case as a non-party pursuant to Rule 71 on May 31, 2017—*after* Plaintiff had been formally withdrawn as a Harvard graduate student. A. 2646A. The trial court's effort to impose a broad and affirmative retroactive remedy upon Harvard under these circumstances, without the benefit of any trial, and to characterize the order as a necessary remedial order to cure Harvard's prior contemptuous conduct without benefit of a trial, should not be sanctioned by this Court.

[15] Although Harvard participated as an *amicus curiae* in some of the post-trial proceedings, *see* A. 1232-36, it was not a party to the underlying action. *Id.* Indeed, the trial court *specifically barred* Harvard from participating in the hearing leading to its December 5, 2016 decree—the very decree that the trial court now contends Harvard violated by withdrawing Plaintiff as a graduate student. *See* A. 1794.

III. THE JULY 7TH REVISED ORDER IMPERMISSIBLY SEEKS TO IMPOSE A TEACHER-STUDENT RELATIONSHIP BETWEEN PLAINTIFF AND DR. RUBIN AND INFRINGES UPON HARVARD'S RIGHTS AS A PRIVATE UNIVERSITY.

A. The July 7th Order Improperly Requires Dr. Rubin to Serve as Mr. German's Thesis Advisor.

Another fundamental infirmity in the July 7th Revised Order is its repeated insistence that Dr. Rubin, the defendant in the underlying harassment action, be required to serve as Plaintiff's thesis advisor, *unless and until another person acceptable to Mr. German is appointed*. *See* Add. A at ¶¶ 1(b), 2(f). On this score, the Court has not only completely reversed course from its prior efforts to keep them apart, but has also gone beyond the outer bounds of its equitable powers.

The equitable powers of courts are not limitless. Indeed, it has long been recognized that courts of equity cannot compel or coerce a personal relationship, where that relationship has fractured. *See Rice v. D'Arville*, 162 Mass. 559 (1895); *see also White v. Thompson*, 324 Mass. 140 (1949); *Butterick Pub. Co. v. Fisher*, 203 Mass. 122, 130 (1909); Restatement (Second) of Torts §§ 936-37, 941-43; Restatement (Second) of Contracts §§ 365-66. Similar

concerns limit the equitable power of the court to interfere with the student-university relationship.[16]

Here, the July 7th Revised Order plainly attempts to compel a result that exceeds its equitable powers: a renewed student-teacher relationship between the Plaintiff and Dr. Rubin. *See* Add. A §§ 1(b); 3(f). By forcing Dr. Rubin to serve as Plaintiff's "thesis advisor," and compelling Harvard to direct that same relationship, the trial court has imposed precisely the type of personal services arrangement that the law forbids. 14 Mass. Prac., Summary of Basic Law § 5:98 (5th ed.) ("As a general rule contracts for work and services are not specifically enforced, mainly because courts lack the ability to supervise such contracts and are reluctant to compel the continuance of a personal association after a dispute has arisen."); *see also* Restatement (Second) of Contracts § 367 ("A

[16] As a rule, Massachusetts Courts are "chary about interfering with academic and disciplinary decisions made by private colleges and universities." *Schaer v. Brandeis Univ.*, 432 Mass. 474, 482 (2000); *see also Russell v. Salve Regina Coll.*, 890 F.2d 484, 489 (1st Cir. 1989), rev'd on other grounds, 499 U.S. 225 (1991) ("There can be no doubt that courts should be slow to intrude into the sensitive area of the student-college relationship, especially in matters of curriculum and discipline.").

promise to render personal service will not be specifically enforced").

B. The July 7th Order Impermissibly Grants Plaintiff Broad Authority over Harvard's Hiring Processes.

The July 7th Revised Order also directs Harvard to provide Plaintiff with the "equivalent of one full time research assistant" and further explained that Plaintiff "shall have final approval over the research assistant(s) assigned or hired, such approval not to be unreasonably withheld." Add. A at ¶ 3(h).

Again, this court-ordered obligation, imposed without any hearing or valid evidentiary basis, turns the university-student relationship on its head, and effectively has the court acting as administrator of Harvard's Ph.D. program. As an initial matter, the record below already reflects that it is extraordinarily unusual for a Harvard graduate student to have a paid research assistant. A. 2899-2900; 2908. This is so because, according to the handbook governing all GSAS students, all work submitted by students is expected to be their own. A. 1629; see also GSAS Student Handbook, Part VII, Academic Standards (located at https://handbook.gsas.harvard.edu/academic-dishonesty-and-plagiarism.pdf).

Despite this limitation, in order to facilitate compliance with the trial court's orders, Harvard engaged in extensive efforts to hire a research assistant. *See generally* A. 2893-2941. As part of that process, Harvard encouraged Mr. German to meet with prospective candidates to ensure that they could have an effective working relationship. A. 2918; A. 2922. In so doing, however, Harvard made clear to Mr. German that, as a graduate student, he did not have the authority to hire employees on Harvard's behalf, nor did he have authority to review or discuss the terms of employment for any Harvard employee. A. 2922. Harvard also required that any employee have a formal legal supervisor who is a Harvard faculty or staff member. A. 2927.[17]

Mr. German objects to these entirely ordinary conditions, A. 3506, and the trial court has now endorsed those objections by granting him broad "final approval" rights over any prospective assistant. For all the reasons discussed in Harvard's prior Memorandum of Law, such an order oversteps the bounds

[17] The assistant who was hired to work with Mr. German, never commenced work because Mr. German refused to meet with her and the person who was to serve as her formal supervisor. A. 2896-97.

of the authority granted to this Court by Chapter 285E, has been improperly applied to Harvard, and should be stayed pending the appeal of this matter.

C. **The July 7th Order Imposes No Obligations Upon Plaintiff to Comply with the Policies and Rules Governing Harvard's Academic Program.**

The July 7th Revised Order suffers from one additional, and critical infirmity: it seeks to restore Mr. German to his prior status as a graduate student at Harvard, while failing to impose *any* concomitant requirement upon him that he comply with the rules and regulations governing Harvard's academic program. To the contrary, the Order specifically grants Mr. German the right "to complete his research and thesis work, ***to his satisfaction,***" Add. A at ¶ 2 (emphasis added), irrespective of the views of the degree-granting institution and its faculty. Coupled with the direction that Dr. Rubin serve as his thesis advisor, veto power over any replacement of Dr. Rubin, and the grant of "final approval" over the research assistance to be hired, the trial court's order not only overrides all academic judgment but also places no obligations upon Mr. German, thereby absolving him from complying with any of the rules and regulations

governing all other graduate students at the University. If Mr. German is to be returned "in all respects" to the status quo he enjoyed as of March 10, 2016, the carte blanche exemption from all academic rules endorsed by the judge's rulings must be revoked.

As Harvard has previously argued, "he who seeks equity must do equity," and one seeking to enforce another's obligations must live up to his own. *See New England Merchants National Bank. v. Kann*, 363 Mass. 425 (1973). The trial court's broad approval of Mr. German's disregard for the rules and regulations of Harvard's graduate program cannot stand, and falls far beyond the scope of the trial court's authority under Chapter 258E or the bounds of equitable relief available under general equitable principles. Accordingly, the July 7th Revised Order should be stayed.

IV. THE BALANCE OF THE EQUITIES

Although Harvard is confident in the merits of its case and believes it has established a strong probability of success on the merits, it recognizes that in determining whether to stay an order or injunction, the Single Justice must take other factors into account. *See* Armstrong & Carey, LexisNexis

Practice Guide: Massachusetts Appellate Practice § 8.07 (2015 ed.). The single justice also has "plenary" authority under G.L. 231, §118 to suspend or modify the injunction, "with the result that his or her order will be reviewed on appeal in the same manner as if it were an identical order by the trial judge considering the matter in the first instance." *Id.* (citing cases).

In all candor, the provisions in the July 7th Revised Order requiring that Dr. Rubin serve as Mr. German's thesis advisor are unworkable and unacceptable. The intensely personal teacher-student, mentor-mentee, collegial relationship that is emblematic of higher education and University research laboratories has been torn asunder by the charges in this case. To think it can be restored by judicial fiat runs counter to centuries of judicial experience and the considered judgments of our Supreme Judicial Court and many other distinguished jurists in federal and state courts. These provisions of the Order must be stayed, lest the remedy destroys what Plaintiff seeks.

Were the Single Justice unwilling to stay the balance of the Order in its entirety, however, Harvard would suggest that, at a minimum, any modified order

should abandon both the effort to force Dr. Rubin to teach and to keep Mr. German in the Rubin Laboratory. The history of this case, with its numerous court hearings, series of orders, retroactive mandates, threats of contempt, and lack of progress by the student, demonstrates the unworkability of a judicial attempt to force a student-teacher relationship. In addition, any modified Order should impose concomitant obligations upon Mr. German -- including a specific obligation that he will comply with *all* of the rules and regulations governing the BBS program in which he has been enrolled, such as the well-established requirements (1) that he attend any and all scheduled DAC meetings, (2) that he accept and comply with any and all directions provided by his DAC and/or the BBS Program, including any direction to relocate to another research laboratory, if such relocation is deemed appropriate by the BBS Program, and (3) that he accept and confer regularly with a thesis advisor that has been approved by the BBS program.[18] Such rules apply to *all* graduate students in the GSAS, and there

[18] Plainly, that thesis advisor cannot be Dr. Rubin. *See supra.*

is no basis on this record to exempt Mr. German from those rules.

CONCLUSION

For all the foregoing reasons, as well as those advanced by Harvard it its prior submissions, Harvard respectfully requests that this Court grant its Amended Motion and Petition and enter an Order staying the trial court's Orders issued July 7, 2017. In the alternative, Harvard respectfully requests that, at a minimum, those Orders be modified in accordance with the terms proposed by Harvard above.

Dated: July 10, 2017

Respectfully submitted,

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

By its attorneys,

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CERTIFICATE OF SERVICE

I, Daniel J. Cloherty, Esq. hereby certify under the penalties of perjury that on July 10, 2017 I served the foregoing document upon all parties and counsel of record by electronic mail and by mailing copies, first-class, postage-prepaid, addressed to the following:

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_____
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