COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
C.A. No.: 18-2603

WENDALL TANG, M.D., as Representative of the Estate of LUKE TANG,	)
Plaintiff,	)
v.	)
PRESIDENT AND FELLOWS OF HARVARD COLLEGE, CATHERINE R. SHAPIRO, CAITLIN CASEY, Ph.D., MELANIE NORTHROP, MSW, LICSW & DAVID ABRAMSON, M.D.,	)
Defendants.	)

Plaintiff's Opposition to the Defendants' Motion to Dismiss the Complaint and Jury Demand

Standard of Review

In order to survive a motion to dismiss, the Complaint must set forth "factual 'allegations plausibly suggesting (not merely consistent with)' an entitlement to relief," sufficient to meet the notice pleading requirements while showing that the pleader is entitled to relief. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008); *see* Mass. R. Civ. P. 8(e). "[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations," but must contain factual allegations that raise a right to relief above the speculative level. *Iannacchino*, 451 Mass. at 636 (emphasis supplied). The factual allegations in the Complaint must be accepted by the Court as true (even if

doubtful in fact) and all reasonable inferences must be drawn in the Plaintiff's favor. *See Harrington v. Costello*, 467 Mass. 720, 724 (2014); *Zelby Holdings, Inc. v. Videogenix*, Inc., 92 Mass. App. Ct. 86, 87 (2017).

The Plaintiff's Complaint

Under the required standard of review for a motion to dismiss, the following factual allegations of the plaintiff's complaint must be considered true:

- On or about April 11, 2015, Luke Tang attempted suicide in a dormitory at Harvard, *Plaintiff's Complaint with Demand for Jury Trial* ["Complaint ¶"], ¶10.
- On or after April 11, 2015, Luke Tang continued to have suicidal ideation while still enrolled at the school. *Id.*, ¶11.
- On or about April 22, 2015, Luke Tang was transferred by Harvard, its agents, servants and/or employees to McLean Hospital for in-patient care. *Id.*, ¶12.
- While at McLean it was determined that Luke Tang would enter into a contract with Harvard and that Ms. Shapiro would meet with Luke Tang to finalize the contract. *Id.*, ¶17.
- On April 29, 2015 Luke Tang told Melanie Northrop, a member of his treatment team, *see Contract*, that he planned on going on a week-long retreat on May 17, 2015 and would then leave for China. *Id.*, ¶25.
- Luke Tang also told Ms. Northrop on that date that he planned on returning directly to Harvard from China. *Id.*, ¶26.
- Ms. Northrop told Luke Tang that he will need to speak with his therapist about a support plan in China and that he would be expected to continue his treatment when he returned to the college and Lowell House. *Id.*, ¶27.
- On or about May 1, 2015, Luke Tang entered into a contract ["*Contract*"] with Harvard and Ms. Shapiro as a condition of his continued enrollment at the college. *Id.*, ¶28. The Contract is appended hereto as Exhibit A and incorporated by reference.
- Luke Tang reasonably relied upon the *Contract*, its terms and conditions. *Id.*, ¶30.
- As of May 1, 2015, Harvard, its agents, servants and/or employees held a great deal of concern for Luke Tang's safety and/or well-being and the appropriateness of his continued residence and enrollment at the college. *Id.*,¶34.
- As of May 1, 2015, Harvard, its agents, servants and/or employees needed to be sure that Luke Tang was taking appropriate steps to address the problems he had been experiencing, including attempted suicide and suicidal ideation. *Id.*, ¶35.
- Ms. Northrop on May 15, 2015 "urged" Luke tang to follow-up with his dean in Lowell House in September. *Id.*, ¶45.

- Luke Tang left Harvard on May 16, 2015 and returned to Harvard from China in August, 2015. *Id.*, ¶46.
- As of September 12, 2015, Luke Tang was an undergraduate sophomore at Harvard. *Id.*, ¶47.
- Luke Tang as of September 12, 2015, lived in Lowell House on the campus at Harvard. *Id.*, ¶48.
- Luke Tang committed suicide in Lowell House on September 12, 2015. *Id.*, ¶49.
- Luke Tang had no mental health counseling between May 16, 2015 and September 12, 2015. *Id.*, ¶50.
- Harvard its agents, servants and employees held a duty and/or voluntarily assumed a duty to Luke Tang to take reasonable measures to protect Luke Tang from self-harm. *Id.*, ¶55.
- Harvard its agents, servants and employees breached their duty of care and assumed duty of care, and were otherwise negligent for:
  a. Failing to initiate suicide prevention protocols;
  b. Failing to take reasonable steps to prevent Luke Tang from self-harm;
  c. Designing a contract between themselves and Luke Tang which failed to provide reasonable safety for Luke Tang;
  d. Failing to provide any terms or conditions in the Contract which required Luke Tang to seek mental health counseling upon his return to campus for his sophomore year;
  e. Failing to ensure that Luke Tang complied with the terms and conditions of the Contract upon his return to campus for his sophomore year;
  f. Forcing Luke Tang to sign the Contract as a condition of continued enrollment;
  g. Failing to enforce the terms of the Contract;
  h. Failing to require Luke Tang to seek mental health counseling upon his return to campus for his sophomore year;
  i. Failing to observe the behavior of Luke Tang while living in a campus dormitory in his sophomore year;
  j. Failing to monitor Luke Tang's compliance with the Contract upon his return to campus for his sophomore year;
  k. Failing to ensure that other departments and agents, servants and/or employees of Harvard were informed of Luke's situation and that Luke received proper supports, including properly-coordinated mental health supports; and,
  l. [Failing to] ensure that all applicable policies, practices, procedures and/or protocols of Harvard which related to Luke's situation were reasonably and appropriately followed and enforced.

  Id., ¶56.

- [Catherine] Shapiro had a special relationship with Luke Tang and a corresponding duty to prevent Luke Tang from self-harm. *Id.*, ¶64.

- Ms. Shapiro voluntarily assumed a duty of care to Luke Tang by designing, and requiring him to enter into, the Contract as a condition of continued enrollment at Harvard. *Id.*, ¶65.
- Ms. Shapiro breached her duty of care and/or assumed duty of care, and was otherwise negligent for:
    a. Failing to initiate suicide prevention protocols;
    b. Failing to take reasonable steps to prevent Luke Tang from self-harm;
    c. Designing a contract between Harvard and Luke Tang which failed to provide reasonable safety for Luke Tang;
    d. Failing to provide any terms or conditions in the Contract which required Luke Tang to seek mental health counseling upon his return to campus for his sophomore year;
    e. Failing to ensure that Luke Tang complied with the terms and conditions of the Contract upon his return to campus for his sophomore year;
    f. Forcing Luke Tang to sign the Contract as a condition of continued enrollment;
    g. Failing to enforce the terms of the Contract;
    h. Failing to require Luke Tang to seek mental health counseling upon his return to campus for his sophomore year;
    i. Failing to observe the behavior of Luke Tang while living in a campus dormitory in his sophomore year;
    j. Failing to monitor Luke Tang's compliance with the Contract upon his return to campus for his sophomore year;
    k. Failing to ensure that other departments and agents, servants and/or employees of Harvard were informed of Luke's situation and that Luke received proper supports, including properly-coordinated mental health supports; and,
    l. Failing to ensure that all applicable policies, practices, procedures and/or protocols of Harvard which related to Luke's situation were reasonably and appropriately followed and enforced.

  Id., ¶67.
- [Caitlin] Casey had actual knowledge of Luke Tang's suicide attempt while enrolled at Harvard and of his other stated plans or intentions to commit suicide. *Id.*, ¶73.
- Luke Tang's suicide was foreseeable to Dr. Casey. *Id.*, ¶74.
- Dr. Casey had a special relationship with Luke Tang and a corresponding duty to prevent Luke Tang from self-harm. *Id.*, ¶75.
- Dr. Casey breached her duty of care and was otherwise negligent for:
    a. Failing to initiate suicide prevention protocols;
    b. Failing to take reasonable steps to prevent Luke Tang from self-harm;
    c. Failing to ensure that Luke Tang complied with the terms and conditions of the Contract upon his return to campus for his sophomore year;
    d. Failing to enforce the terms of the Contract;

e. Failing to require Luke Tang to seek mental health counseling upon his return to campus for his sophomore year;
f. Failing to observe the behavior of Luke Tang while living in a campus dormitory over which she held supervisory responsibility in his sophomore year;
g. Failing to monitor Luke Tang's compliance with the Contract upon his return to campus for his sophomore year;
h. Failing to ensure that other departments and agents, servants and/or employees of Harvard were informed of Luke's situation and that Luke received proper supports, including properly-coordinated mental health supports; and,
i. Failing to ensure that all applicable policies, practices, procedures and/or protocols of Harvard which related to Luke's situation were reasonably and appropriately followed and enforced.

Id., ¶76.

Argument

1. **Massachusetts Law Related to Failing to Prevent Suicide**

For many years, the antiquated common law rule known as the "suicide rule" has been in retreat. *See generally*, Doug Blaze, *Abolishing the Suicide Rule*, 113 Nw. U. L. Rev. 767, 824 (2019) (the standard suicide rule is based on outdated science and a debatable appraisal of society's view of the morality of suicide; when suicide is recognized as a public health issue, courts do a disservice by applying an outdated approach). By way of a local example, in 2004, the Massachusetts Appeals Court issued its decision in *Delaney v. Reynolds*, 63 Mass. App. Ct. 239 (2004). In *Delaney*, the Appeals Court flatly rejected the argument that there is no duty in a suicide case subject to limited historic exceptions. In particular, the *Delaney* court held that under "present law regarding intentionally inflicted injuries" and assuming that the victim intended to harm or kill herself, she was entitled to a jury trial on her claims that the Defendant was negligent in allowing her access to a gun. *See id.* at 559. In rejecting the historic no

liability rule, the *Delaney* court reasoned:

> These cases and authorities lead to the question whether, as a matter of law, suicide is such an extraordinary event as not to be reasonably foreseeable. To date, reported decisions in which a defendant's antecedent negligence has been considered as a legal cause of a plaintiff's death by suicide have eschewed specific discussion of the foreseeability of suicide as a break in the chain of causation. Rather, it appears to be the historical view that a purposeful act of suicide, rather than any antecedent negligence, will be deemed the legal cause of a decedent's injury unless the defendant's negligence rendered the decedent unable to appreciate the self-destructive nature of the suicidal act or, even if able to appreciate the nature of the act, unable to resist the impulse.
>
> Other jurisdictions have more recently gone beyond the traditional and often categorical basis for treating suicide as an intervening and superceding cause of injury and have considered various nontraditional circumstances as relevant to the issue of foreseeability. *A review of these cases as well as our more recent holdings reveals that we have not limited our analysis of like cases to an iron-clad rule, subject to the limited exceptions set out in* Daniels *and* Freyermuth, supra, *that suicide or an intentionally self-inflicted injury constitutes an intervening and superceding cause as matter of law*. *See, e.g., Nelson v. Massachusetts Port Authy.*, 55 Mass. App. Ct. at 436 (court "declined to impute to the defendant a greater duty than currently exists" because "Massport neither caused the decedent's uncontrollable suicidal impulse nor had custody of the decedent and knowledge of her suicidal ideation" when she jumped to her death from bridge); *Carney v. Tranfaglia*, 57 Mass. App. Ct. 664, 669-670, 785 N.E.2d 421 (2003) (suggesting but not deciding that a suicidal act might not break the chain of causation).
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> ***
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> Even were the jury to find that Delaney intended to commit suicide when she turned Reynold's gun on herself with an intentional suicidal or self-injurious purpose, we think it should also be open to Delaney to show and the jury to find that the risk that she would handle or use Reynold's gun in a manner so as to cause intentional injury to herself was foreseeable and that his failure to secure his gun was a proximate cause of her injury.

Delaney, 63 Mass. App. Ct. at 241-45 (emphasis supplied, citations and footnote omitted). The *Delaney* Court is not alone.[1]

[1] *See, e.g., Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 608-12 (W. D. Va.2002)(recognizing duty

On May 7, 2018, the Supreme Judicial Court issued its decision in *Nguyen v. Massachusetts Institute of Technology*, 479 Mass. 436 (2018). In *Nguyen*, the SJC repudiated the argument advanced by the higher education industry in Massachusetts, including Harvard, that institutions of higher education [IHEs] owed no duty of care to prevent their students from committing suicide, because they were merely "bystanders" to these preventable tragedies. *See Nguyen*, 479 Mass. at 450 ("Universities are clearly not bystanders or strangers in regards to their students."). The *Nguyen* court, relying primarily on the Restatement (Third) of Torts § 40, pivoted from long-standing Massachusetts law, *see Mullins v. Pine Manor College*, 398 Mass. 47 (1983), and explained that "special relationships may arise in certain circumstances imposing affirmative duties of reasonable care in regard to the duty to rescue, including the duty to prevent suicide." *Nguyen*, 479

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of care in student suicide case); *Wyke v. Polk Co. Sch. Bd.*, 129 F.3d 560, 574 (11th Cir. 1997) (recognizing duty of care and noting that Court did "not believe (and neither did the jury) that a prudent person would have needed a crystal ball" to foresee suicide); *Doe v. Yale Univ.*, 252 Conn. 641, 663 (2000) (recognizing claim because it falls within the traditionally recognized duty not to cause physical harm by negligent conduct and educational setting is not sufficient to remove claim from traditional rule); *Furek v. Univ. of Del.*, 594 A. 2d 506, 519-20 (Del. 1991) (when college knows of danger students, it has duty to aid or protect them); *Eisel v. Bd. of Educ.*, 324 Md. 376, 597 A. 2d 447, 453- 54 (1991) (when risk of death is balanced against the burden of making phone call, scales tip overwhelmingly in favor of duty); *Turner v. Rush Medical College*, 182 Ill. App. 3d 448, 459, 537 N.E.2d 890, 897 (1989) (Pincham, J., dissenting) ("There is nothing unique, new or unusual in the requirement that teachers, schools, and school personnel exercise reasonable care to students"); *Shin v. MIT*, 19 Mass. L. Rprt. 570, 2005 WL 1869101, at *13 (2005) (McEvoy, J.) (recognizing special relationship between MIT administrators and student imposing duty to exercise reasonable care to protect student from harm); *Leary v. Wesleyan Univ.*, 2009 WL 865679 (Conn. Super. 2009) (denying summary judgment in student suicide case); *McClure v. Fairfield Univ.*, 2003 WL 21524786 (Conn. Super. 2003) (reviewing case law recognizing duty of care owed by IHEs in various settings). *See also* 4 Harper, James and Gray on Torts §20.5, n.45 at 195-98 (2007) ("Liability has been imposed both where the foreseeable danger of suicide was the principal risk that made the defendant's conduct negligent, and where it was considered within the scope of a more obvious risk the foreseeability of which made the defendant's conduct negligent.") (collecting suicide cases)); *Stehn v. Bernarr McFadden Foundations, Inc.*, 434 F.2d 811, 814-15(6th Cir. 1970) (private school must as a matter of law assume duty of exercising reasonable care in providing supervision, instruction and in the conducting of its activities); *Delbridge v. Maricopa County Community College District*, 182 Ariz. 55, 59 (1994) (teacher-student relationship is a special one, affording the student protection from unreasonable risk of harm; obligation includes the duty not to subject students, through acts, omissions or school policy, to a foreseeable and unreasonable risk of harm).

Mass. 436, 448 (2018). In rejecting the IHE's no duty argument, the *Nguyen* court, wrote that:

> a university has a special relationship with a student and a corresponding duty to take reasonable measures to prevent his or her suicide in the following circumstances. Where a university had actual knowledge of a student's suicide attempt that occurred while enrolled at the university or recently before matriculation, or of a student's stated plans or intentions to commit suicide, the university has a duty to take reasonable measures under the circumstances to protect the student from self-harm.

Nguyen, 479 Mass. at 453 (*citing Mullins*, 389 Mass. at 52; *Schieszler*, 236 F. Supp. 2d at 608-609; Restatement (Third) of Torts, § 40(b)(5)). "[T]his duty, [like every duty,] hinges on foreseeability." *Nguyen*, 479 Mass. at 455.

> Where a student has attempted suicide while enrolled at the university ... suicide is sufficiently foreseeable as the law has defined the term, even for university nonclinicians without medical training. Reliance of the student on the university for assistance, at least for students living in dormitories or away from their parents or guardians, is also foreseeable. Universities are in the best, if not the only, position to assist. [] They have also "fostered" expectations, at least for their residential students, that reasonable care will be exercised to protect them from harm.

Nguyen, 479 Mass. at 455.

The SJC further went on to reason that:

> where a student has attempted to commit suicide while enrolled at the university or recently before matriculation or stated plans or intentions to commit suicide, that probability is sufficient to justify imposition of a duty on the university.

Nguyen, 479 Mass. at 455-56.

Thus, where one of the duty-triggering suicide risk factors is known to an IHE, or its employees, a duty arises to take reasonable measures under the circumstances to protect the student from self-harm. *See Nguyen*, 479 Mass. at 453. Here, of course, Luke attempted to commit suicide in his Harvard dormitory during his freshman year.

Complaint, ¶¶ 9-10. Harvard and the individually-named defendants were all aware of this suicide attempt, *Complaint* ¶¶53, 62, 73, and consistent with *Nguyen,* this knowledge triggered a duty of care by each of them.

It is conspicuous to note that the moving parties do not allege that they did not owe Luke Tang a duty of care other than to argue that once Luke Tang was admitted to McLean Hospital, visited by Dean Shapiro and required to sign the contract, that they no longer owed Luke Tang a duty of care. *Defendant's Memorandum of Law in Support of Motion to Dismiss Complaint and Jury Demand* ["*Motion*"], p.7. "By taking these steps, Harvard, Dean Shapiro and Dean Casey satisfied any duty they had to Tang…Plaintiff has not pled facts…that would have triggered a new duty to Tang after the spring semester ended and prior to his death in the fall." *Motion*, p.8. This argument ignores the holding in *Nguyen* which explicitly provides that the attempted suicide triggers the duty of care and that reasonable care will include, *inter alia*, initiating its suicide prevention protocol if the university has developed such a protocol. *Nguyen* at 456, 457. Each of the defendants failed to initiate suicide prevention protocols, *Complaint* ¶¶*56, 67, 76*, as required by *Nguyen* and otherwise failed to exercise reasonable care for Luke's safety. *Id.* Once a student attempts suicide or has attempted suicide recently before matriculation, the duty by the college and its employees is to "take reasonable measures to prevent his or her suicide," *Nguyen* at 453, and "reasonable care will be exercised to protect them from harm." *Nguyen* at 455. It is the prior suicide attempt which makes the next attempt foreseeable and which triggers the duty to take measures to prevent the next attempt. *Nguyen* does not limit the duty to making sure the student goes to the hospital and is

visited by a dean. *Nguyen* addresses what a college must do once the student is on the suicide radar screen. In this case, the plaintiff has specifically alleged that each of the defendants did nothing to protect Luke from harm once he was back on campus. *Complaint* ¶¶ 56, 67, 76. "Reliance of the student on the university for assistance, at least for students living in dormitories or away from their parents or guardians, is also foreseeable. Universities are in the best, if not the only, position to assist. [] They have also "fostered" expectations, at least for their residential students, that reasonable care will be exercised to protect them from harm. (citations omitted)."

Harvard and its employees knew Luke was going to China for the summer following his freshman year and would be returning directly to campus. *Complaint* ¶¶ 25, 26 and as of May, 2015, Harvard knew that Luke was "essentially not in treatment", *Complaint* ¶39, despite the requirement that he attend regular treatment sessions and actively participate in his treatment. *Contract* ¶2. Despite this knowledge, the defendants failed to contact Luke's parents as required by the contract, *Contract*, p.2 (second full paragraph), and *Nguyen*.

Luke left Harvard for China on May 16, 2015 and returned to Harvard and his dorm room in Lowell House in August of 2015. *Complaint* ¶¶ 46-47. Luke committed suicide in Lowell House on September 12, 2015. *Complaint* ¶48. Once Luke returned to campus, he had no treatment before his death, *Complaint* ¶50, and the defendants took no "measures to prevent his [] suicide." *Nguyen* at 453, *Complaint* ¶¶56, 67, 76.

While *Nguyen* put an end to the argument that IHE's – and their employees – have no duty of care to prevent student suicides, that case, of course, was analyzed by the SJC

on its unique facts ***at the summary judgment phase of the case*** and on a fully discovered factual record including expert disclosures. Notwithstanding, even at the inception of this case, it is clear that this case is remarkably different on its facts than *Nguyen*. For example, in sharp contrast to *Nguyen*, here: (1) the Defendants all knew about Luke's on-campus suicide attempt which triggered their duty of reasonable care under the circumstances; (2) Luke was a sophomore living in an on-campus dormitory ("[Nguyen] also was a twenty-five year old adult graduate student living off campus, not a young student living in a campus dormitory under daily observation." *Nguyen* at 458.); and, (3) the Defendants demanded that Luke contract with them in ways that defined their obligations over and above what the common law demands and at a minimum, created a duty to contact Luke's parents if he did not comply with Harvard's treatment plan. *Contract*, p.2 (second full paragraph). *Parent v. Stone & Webster Engineering Corp.*, 408 Mass. 108, 556 N.E.2d 1009 (1990)("It is settled that a claim in tort may arise from a contractual relationship, *see Larabee v. Potvin Lumber Co.*, 390 Mass. 636, 640, 459 N.E.2d 93 (1983)").

It is clear however that when an IHE knows about the duty-triggering risk factors in relation to a student, the IHE, which has a special relationship with such students, has a "corresponding duty to take reasonable measures to prevent his or her suicide[.]" *Nguyen*, 479 Mass. at 453. The motion to dismiss should be denied.

2. **<u>Traditional Tort Analysis</u>**

A. **<u>Special Relationship</u>**

Like the *Nguyen* Court, this Court should begin its examination of the issue with

the Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(a). *Id.* This section of the Restatement provides, in relevant part to this case:

> § 40. Duty Based on Special Relationship with Another
>
> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:
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> ***
>
> (5) a school and its students[.]

Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(b)(5) (2012). The duty imposed by this section is one of reasonable care under the circumstances. *Id.*, at cmt. d. The duty described in this section:

> applies regardless of the source of the risk. Thus, it applies to risks created by the individual at risk as well as those created by a third party's conduct whether innocent, negligent, or intentional.

Id., at cmt g.[3]

There can be little reasoned dispute that §40, which was just endorsed by the SJC in *Nguyen*, and the *Nguyen* holding itself, supports the recognition of a duty of care on the Defendants in this case. *See also Mullins*, 389 Mass. at 51-52; *Whittaker v. Saraceno*, 418 Mass. 196, 197 (1994) (duty arose out of "the distinctive relationship between colleges

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[3] If the actor's conduct plays a role in creating the risk of harm, § 7 is also a source of a duty. *Id.* at cmt. g. The term "special relationship" has no independent significance. *Id.* at cmt. h. "It merely signifies that courts recognize an affirmative duty arising out of the relationship[]." *Id.* "The affirmative duty imposed on schools in section 40 is in addition to the ordinary duty of a school to exercise reasonable care in its operations for the safety of its students[.]" *Id.* at cmt l.

and their students.").[4]

The Defendant's motion to dismiss should be denied.

B. **Voluntary Assumption of a Duty of Care**

Here, as established by the allegations of the Complaint, and the plain text of the Contract executed by Luke and Harvard, Harvard and several of its employees voluntarily assumed a duty of care to Luke. *Complaint* ¶¶ 56, 67, 76, *Contract*.

The Restatement (Third) of Torts § 42 (2012) provides:

> § 42. Duty Based on Undertaking
>
> An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to the other has a duty of reasonable care to the other in conducting the undertaking if:
>
> (a) the failure to exercise such care increases the risk of harm beyond that which existed without the undertaking; or
>
> (b) the person to whom the services are rendered or another relies on the actor's exercising reasonable care in the undertaking.

Restatement (Third) of Torts § 42 (2012); *Mullins*, 389 Mass. at 50-62. "An actor who engages in an undertaking is subject to the ordinary duty of reasonable care provided in §

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[4] As noted by leading commentators in this area:

> Traditional tort law also says that whenever the university *acts* it is responsible to use care. [] Some Courts and commentators confuse this a bit and assume that because special relationships are a feature of business/college law, duty is owed only under special circumstances. Let us make this perfectly clear: *Universities can owe duties to their students on and off campus irrespective of whether there is a special relationship of any kind. Legal special relationships only potentially enhance responsibility to include affirmative duties to proactively prevent harm even when caused by third parties, non-negligent forces, and/or students themselves. Special relations are not prerequisites to duty, per se, but only prerequisites to certain kinds of duty to take affirmative action. Custodial relations are only a subset of special relationships.* This is basic tort law.

Robert D. Bickel & Peter F. Lake, The Rights and Responsibilities of the Modern University: Who Assumes the Risks of College Life? 179-80 (1999) (emphasis in original).

7 for risks created by the undertaking." Restatement (Third) of Torts § 42 cmt. b (2012).[5]

Here, in response to the known duty-triggering prior on-campus suicide attempt, and other troubling conduct by Luke, the Defendants took steps to craft protections intended to ensure that Luke was both safe and supervised while at Harvard. *See, generally, Contract.* This, as well as Luke's status as a college sophomore living in a college dormitory, sets this case apart from the aspects of the *Nguyen* decision that were focused on protecting student autonomy at the expense of student safety. While the tension between the two is understandable, in this case those issues are not in play. In response to Luke's earlier suicide attempt, Harvard made Luke's continued matriculation dependent on his surrendering his autonomy and privacy in order to ensure his safety during his time at Harvard. Despite the fact that properly-coordinated, on campus mental health supports are known to be extremely effective at saving students at risk of suicide,[6] the defendants in this case failed to follow suicide prevention protocols, failed to ensure that Luke received properly-coordinated mental health supports, failed to ensure his compliance with the Contract and were otherwise negligent. *Complaint* ¶¶56, 67, 76.

Further as pled in the *Complaint* ¶30, Luke relied upon Harvard's adhesion contract, *Complaint* ¶¶31-33, as a condition of his continued enrollment at Harvard. *See generally also, Contract.*

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[5] Section 7 provides that "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) of Torts §7 (2012).

[6] *See* Kelley Kalchthaler, *Wake-Up Call: Striking a Balance Between Privacy Rights and Institutional Liability in the Student Suicide Crisis*, 29 Rev. Litig. 895, 924 (Summer 2010) (proactive plans by colleges greatly mitigate the likelihood a student will commit suicide); Paul Joffe, Ph.D., *An empirically supported plan to prevent suicide among a college population*, (Available at https://www.stetson.edu/law/ conferences/highered/archive/2003/PreventSuicide.pdf (last viewed 2/13/19)).

In any event, basic tort analysis requires that the Court deny the motion to dismiss.[7]

3. **<u>The Court Should Deny the Motion to Dismiss as it Relates to the Individual Defendants</u>**

Employees are liable for torts in which they personally participated. *See LaClair v. Silberline Mfg. Co.*, 379 Mass. 21, 29 (1979); *Jet Spray Cooler, Inc. v. Crampton*, 377 Mass. 159, 181 (1979); *Restatement (Second) of Agency* § 343 (1958). This liability stems from the general rule that every person has a duty to exercise reasonable care for the safety of others. *Kane v. Fields Corner Grille, Inc.*, 341 Mass. 640, 642 (1961).

As it relates to the individual Defendants here, the Supreme Judicial Court has rejected their arguments with binding authority. In *Jean W. v. Commonwealth*, 414 Mass. 496, 508 (1992), the SJC stated that:

> [p]rivate persons have affirmative duties arising from their employment responsibilities that others do not have. For example, the manager of an inn has duties to the public that he would not have were it not for his employment, and these duties might well require him to prevent or mitigate harm brought about by a situation not caused by him.

Jean W., 414 Mass. at 508 (noting that one's employment can impose on him an affirmative duty to act and that people have affirmative duties arising from their employment responsibilities that others do not have.) Similarly, the *Nguyen* court has held that university employees – as opposed to just the university – can be properly held liable when they have actual knowledge of a student's suicide attempt that occurred while enrolled at the university. *See Nguyen*, 479 Mass. 457. Moreover, as explained by the SJC

[7] *See, supra* at n.4.

in *Santos v. Kim*, 429 Mass. 130 (1999), the analysis "depends on the particular facts" of the case, *id.* at 137, and "it is important not to announce a rule in terms of which no human being is ever responsible for failures in the system." *Id.* at 135. *Cf. United States v. C.R. Bard, Inc.*, 848 F. Supp. 287, 289 (D. Mass. 1994) (discussing corporate officer's criminal liability in a case in which the defendant corporation pled guilty to violating the federal food drug and cosmetic act); *Mullins*, 389 Mass. at 48; *Robert Williams, Inc. v. Ferris*, 355 Mass. 288, 294 n.7 (1969) (that one under a duty fails to discharge it does not lessen the duty; on the contrary, it tends to show a breach).

In this case, each of the individual defendants had actual knowledge of Luke's prior suicide attempt while at Harvard, *Complaint* ¶¶62, 73, which triggered their duty under *Nguyen*. Each of them failed to initiate suicide prevention protocols, failed to ensure that Luke received properly-coordinated mental health supports and, failed to take any reasonable steps to prevent Luke from his suicide. *Complaint* ¶¶67, 76.

4. Courts Should Not Be Quick to Dismiss Complaints that Raise New or Novel Theories of Liability.

Even if the liability theories advanced in this case were viewed as novel or new, the case should not be dismissed. The appellate courts have been quite clear that the better practice is for trial courts to deny a motion to dismiss and permit the parties to develop the facts and make a determination at the close of discovery on a motion for summary judgment. *Jenkins v. Jenkins*, 15 Mass. App. Ct. 934, 934 (1983); *Capazzoli v. Holzwasser*, 397 Mass. 158, 165-66 (1986) (Abrams, J., concurring). Specifically, *Jenkins v. Jenkins* held that, "A complaint should not be dismissed simply because it

asserts a new or extreme theory of liability or improbable facts." *Jenkins*, 15 Mass. App. Ct. at 934. The appellant/plaintiff in *Jenkins* was the administrator of his mother's estate and brought a claim for damages and wrongful death against his brother. *Id.* at 934. The trial court dismissed the case because the statute of limitations had expired and barred the claim for wrongful death. *Id.* The appeals court reversed stating the defendant had concealed the death of the plaintiff's mother, and that there was at least some question of fact that this caused the statute of limitations to toll, which would have allowed the case to proceed. *Id.* Though it was improbable that the statute had tolled long enough to allow the case to proceed, the court reversed, allowing the parties to develop the facts in discovery to determine if the plaintiff still had grounds to bring the claim.

Similarly, Justice Abrams wrote a concurring opinion in *Capazzoli v. Holzwassler* that echoed the sentiment laid out in *Jenkins*. *Capazzoli*, 397 Mass. At 158 (Abrams, J., concurring). Justice Abrams wrote that where a plaintiff presents a novel legal claim the better practice is for the trial court to deny a motion to dismiss and permit the parties to develop the facts so that the theory may be explored in the light of actual facts. *Id.* In *Capazzoli* the plaintiff brought a claim for breach of contract. *Id.* at 158-59. The plaintiff broke off her marriage to a third party upon the reliance that the defendant would provide and support for her for the remainder of her life. *Id.* The plaintiff attempted to amend her complaint, but the case was dismissed before any amendment could be made. *Id.* at 159-60. The SJC ultimately reversed the trial court's decision, stating that it was preferred that plaintiffs be given a chance to amend claims, to ensure they are given their day in court. *Id.* at 161. The SJC held that it was better to allow a case to develop before dismissing it.

Despite this argument, the Plaintiff maintains that the facts of this case fit squarely within, and are based upon, the black letter law set forth in Restatement (Third) of Torts § 40, its predecessor, Restatement (Second) of Torts § 314A - which has long been the law in the Commonwealth, *see Mullins* and, now, *Nguyen*.

5. **The Plaintiff's Claims, Including Those for Punitive Damages, Based on Gross Negligence or Recklessness Should not be Dismissed at this Time.**

On review of a motion to dismiss, this Court must accept as true all well-pleaded allegations of the complaint, *Curran v. Boston Police Patrolman's Ass'n, Inc.*, 4 Mass. App. Ct. 40, 41 (1976), and the Court must also accept as true such inferences as may be drawn from the complaint in the plaintiff's favor. *See Natick Auto Sales, Inc. v. Dep't of Procurement and General Serv.*, 47 Mass. App. Ct. 625, 630 (1999); *Nader v. Citron*, 372 Mass. 96, 97 (1977). A Rule 12 (b)(6) motion "is ordinarily not the proper vehicle for testing the factual sufficiency of the plaintiff's claim." *Reardon v. Commissioner of Correction*, 20 Mass. App. Ct 947, 947 (1985). These are properly "generous principles," *Connerty v. Metropolitan Dist. Comm'n.*, 398 Mass. 140, 143 (1986), and the courts, including the appellate courts, *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004), will apply them accordingly, especially in a wrongful death case, where a personal representative may particularly need an opportunity for discovery. *Coughlin v. Dep't. of Correction*, 43 Mass. App. Ct. 809, 816 (1997).

> Because the complaint serves merely to give defendant notice of the claim sufficient to permit a response, a motion to dismiss will be granted only when the movant shows to a certainty,[*DiNitto v. Pepperell*, 77 Mass. App. Ct. 247, 249 (2010)], that the claiming pleader is entitled to no relief under any state of facts which could be proved in support of the claim. [*HTA Ltd. Partnership v. Massachusetts Turnpike Authority*, 51 Mass. App. Ct., 449, 451 (2001) (court

must disregard any improbability of proof).].

Smith and Zobel, 6 Massachusetts Practice - Rules Practice, § 12.13 (Oct. 2018 update). "The simple truth is that the appellate courts, expressing an eviscerative distaste for Rule 12(b)(6), have made clear that summary judgment, not a motion to dismiss, should be "the weapon of first choice." *Id.* (*quoting Kirkland Construction Co. v. James*, 39 Mass. App. Ct. 559, 564 (1995) (Brown, J., concurring).

Under the wrongful death statute, punitive damages are available in cases involving gross negligence of recklessness. "[A] motion to dismiss should only be allowed if 'it appears certain that the complaining party is not entitled to relief under any state of facts which could be proved in support of his claim.'" *Kent v . Commonwealth*, 437 Mass. 312, 317 (2002) (*citing Spinner v. Nutt*, 417 Mass. 549, 550 (1994), *quoting Logotheti v. Gordon*, 414 Mass. 308, 310–311 (1993)).

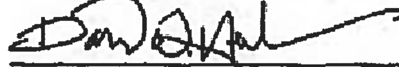
"Especially in a wrongful death case where many relevant facts may not be known to the plaintiff (as administrator of an estate), not allowing the opportunity for discovery seems especially inequitable. The Plaintiff is entitled to engage in discovery to develop further his theories[.]" *Coughlin*, 43 Mass. App. Ct. at 817.

This Court should deny the Defendants' motion to dismiss.

Request for Hearing

The Plaintiff respectfully requests a hearing.

Respectfully submitted,
The Plaintiff, Wendell Tang,
By His Attorneys,



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CERTIFICATE OF SERVICE

I, David W. Heinlein, certify that on the 22nd day of February, 2019 I served a true and accurate original and copy of this document by email and first class mail upon:

Martin F. Murphy, Esq.
Madeleine K. Rodriguez, Esq.
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210

William J. Dailey III (copy only)
SLOANE AND WALSH LLP
One Center Plaza
8th Floor
Boston, MA 02108

David W. Heinlein (BBO#550598)

EXHIBIT A

Luke Tang

HARVARD COLLEGE
FRESHMAN DEAN'S OFFICE

6 PRESCOTT STREET
CAMBRIDGE, MASSACHUSETTS 02138
E-MAIL: FDO@FAS.HARVARD.EDU

TELEPHONE: 617 495-1574
TDD: 617 495-7936
FAX: 617 496-1624

Student understands his margin & wording changes do not hold. He signed & is in possession of a clean copy of this contract.
CRS

May 1, 2015

Luke Tang
HAND DELIVER

Dear Luke,

I am so very glad that you are well enough to be back on campus. As we have discussed, the events that resulted in your hospitalization in McLean caused a great deal of sincere concern about your safety and/or well-being and the appropriateness of your continued residence and enrollment at the College. After considering all of the issues presented, and in consultation with Melanie Northrop, MA, MSW, LICSW, and Dr. David Abramson at Harvard University Health Services ("HUHS"), the College has decided to permit you to reside on campus and remain enrolled in the College under the terms and conditions set forth in this letter, which will serve as a contract between us. Please understand that we all want you to succeed at Harvard. At the same time, we need to be sure that you are taking appropriate steps to address the problems that you have been experiencing. Therefore, this letter sets forth our expectations for the measures you need to take to better ensure your well-being during your remaining time at the College. Our agreement is as follows:

✓ 1. The current members of your treatment team include:

- Rev. Larry Mynatt M.Ed., psychotherapist, Discovery Learning Associates, 617-497-1214
- Ms. Melanie Northrop, MA, MSW, LICSW, Harvard University Health Services

All members of your team will receive a copy of this contract. If you decide to make changes or additions to the team, you must let me (or any new Allston Burr Assistant Dean in your House) know so we can include them in an updated contract.

✓ 2. You are expected to follow the recommendations of your treatment team. These include attending sessions regularly and actively participating in your treatment. They may also include medication and/or medical follow up and monitoring on a regular basis, as defined by your treatment team.

✓ 3. You are expected to remain on any prescribed medications, in the interests of your health and your enrollment. Any changes in your medication regime must be discussed in advance with the members of your treatment team and coordinated under their care.

✓ 4. You hereby agree that all members of your treatment team have permission to communicate with each other, to communicate with former members of your treatment team, and to communicate with me and your Allston Burr Assistant Dean if concerns arise. You agree to sign any additional authorization forms that may be required by any member or former member of your treatment team in order that they may communicate with each other regarding your treatment and progress or with me if concerns arise. If you

miss any visits or fail to comply with the recommendations of your treatment team, or compromise your progress by not cooperating with your treatment team, a member of the treatment team will contact Melanie Northrop and me to alert us to their concerns and your actions. I can be reached at 617-495-1577 and Ms. Northrop can be reached at 617-495-2042. This will lead to a review meeting where a decision will be made about your continued enrollment in the College.

5. If any House Master, House Dean, Freshmen Dean or other College official asks you to be evaluated, you will comply with that request immediately by going either to HUHS or to the Cambridge City Hospital Emergency Room. If you elect to go the Cambridge City Hospital, your return to campus must be cleared through Melanie Northrop or the physician on call at HUHS and your Yard or House Dean.

6. If you feel distressed or if you feel any inclination to harm yourself, ~~you will not rely on friends or clergy, and~~ will ~~instead~~ take your concerns ~~immediately~~ to HUHS Urgent Care or to the Cambridge City Hospital.

Please understand that while the College does not expect your treatment team to disclose the substance of your conversations with them, it is vital that they continue to confirm that your treatment is proceeding as planned. It is important to note that you may decline to pursue the treatment program recommended to you, that you may revoke permission for your treatment team to speak with me, and that you may decline to meet with me to discuss your progress at any time. Needless to say, we hope that you will not make such choices, as the conditions imposed by this contract are intended to provide support for you from trained professionals for problems that may arise. If you cannot meet these conditions, then the College will need to re-evaluate whether you may continue to be enrolled and in residence. The College very much wants you successfully to address the problems you have encountered, and in assessing your progress in doing so, we hope to have available the most complete and accurate information possible. If that information is denied to us, however, we must and will still make judgments about your progress and about your ability to remain enrolled at the College.

Luke, as a matter of your safety, the College will contact your parents if you fail to meet the conditions set forth in this letter, including, for example, if you stop attending appointments with your treatment team. ~~Ordinarily~~, we will not initiate this contact without first having a discussion with you, ~~but for a variety of reasons, this may not always be~~ possible. Should it be necessary to contact your parents, we will explain to them the entire circumstances of this contract and the resulting problems and inform them that we will have to consider whether you can remain in residence on campus in and enrolled in the College.

Further, I want to remind you that, should you anticipate the need for academic or other accommodations while enrolled in the College, you and your treatment team should be in contact with Harvard's Accessible Education Office (AEO). In consultation with HUHS clinicians and the College, AEO makes determinations about accommodations based on a student's provision of appropriate supporting clinical documentation, in keeping with generally accepted guidelines as found at: http://www.aeo.fas.harvard.edu/documentation.html. The AEO serves as an important resource for students who may be in need of accommodations, either on a temporary or more long-term basis. In obtaining necessary information and in developing recommendations regarding accommodations, AEO consults with students' clinicians, with HUHS, and with senior members of the College staff. Sheila Petruccelli, the Director of AEO, may be contacted at telephone at 617-496-8707 and by e-mail at aeo@fas.harvard.edu. Information about AEO, the resources that it offers eligible students, and guidelines for clinical documentation may be found at http://www.fas.harvard.edu/~aeo/.

Please sign this letter to indicate that you have read and agreed to its conditions. We will forward copies of this letter to Melanie Northrop and to the members of your treatment team so everyone has a clear

understanding of our expectations. We hope that the measures we have instituted will provide a structure to help you successfully continue your studies at Harvard. Ultimately, we want to work together to help you be well and do well here. Please feel free to speak with me (or your Allston Burr Assistant Dean at Lowell House starting in July 2015) at any time about this agreement or about your academic and personal progress. I appreciate that you have been through a difficult time, and hope you understand that our intention is to support you as you work towards your degree within the Harvard community.

By signing this letter, we are all affirming our understanding and agreement with its provisions.

Sincerely,

Catherine R. Shapiro
Resident Dean of Freshmen, Crimson Yard
Assistant Dean of Harvard College

Signed: ______________________ Date: 5/1/15