NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 18-03729-E

ALPHA PHI INTERNATIONAL FRATERNITY, INC. & others[1]

VS.

PRESIDENT AND FELLOWS OF HARVARD COLLEGE

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO DISMISS COMPLAINT

Notice Sent 01.14.20 WMS GPLP RMB JJB EC GPLP ABG HAS EMQJ DAR AM ZDFB HAD

INTRODUCTION

This action concerns a student conduct policy of defendant President and Fellows of Harvard College ("defendant" or "Harvard") that precludes students who are members of unrecognized single-gender social organizations from holding leadership positions in recognized student organizations and athletic teams and from receiving college-administered fellowships (the "Policy"). Plaintiffs Alpha Phi International Fraternity, Inc. ("Alpha Phi"), an international sorority, Alpha Phi Iota Tau ("Iota Tau"); Alpha Phi's recently reopened chapter for Harvard undergraduates; and Delta Gamma ("Delta Gamma") Fraternity Management Corporation ("FMC"), the entity which manages property for the international Delta Gamma sorority (collectively, "plaintiffs"), bring this action challenging the defendant's Policy and its related conduct surrounding the Policy's implementation. Specifically, Alpha Phi and Iota Tau allege that the defendant violated G. L. c. 12, § 11I, the Massachusetts Civil Rights Act ("MCRA"), by interfering with their freedom of association (Count I) and by discriminating against their members on the basis of sex (Count II). FMC alleges tortious interference with advantageous

[1] Alpha Phi Iota Tau and Delta Gamma Fraternity Management Corporation

relations (Count III).

This matter is before the court on Harvard's motion to dismiss the complaint pursuant Mass. R. Civ. P. 12(b)(1) and 12(b)(6), which motion the plaintiffs oppose. After hearing, and for the reasons set forth below, the motion is **DENIED**.

BACKGROUND

For the purposes of ruling on the defendant's motion to dismiss pursuant to Mass. R. Civ. P. 12(b)(1) and 12(b)(6), the court accepts as true all factual allegations in the plaintiffs' complaint.[2]

Final clubs and Greek organizations are "unrecognized single-gender social organizations" that are open only to Harvard undergraduate students. Final clubs are non-residential social clubs for upperclass students that begin their selection process for new members during the fall of students' sophomore year, whereas Greek organizations, *i.e.*, sororities and fraternities, begin their recruitment process as early as spring of the students' first undergraduate year. These organizations meet off campus, do not have a formal affiliation with Harvard, and are private associations that operate wholly independently from the college. Single-gender, all-female organizations first came into being at Harvard in 1991, while single-gender, all-male organizations have existed at the college for centuries. Membership in all-female final clubs and sororities steadily increased from their inception until the implementation of the Policy.

[2] While the complaint uses the term "single-sex" organizations, this court refers to the organizations at issue as "single-gender" because that is the language used in the actual Policy.

In the fall of 2014, Rakesh Khurana ("Khurana") became Harvard's Danoff Dean. In 2011, before assuming that position, Khurana told *The Harvard Crimson* that he was "suspicious" of single-gender organizations and suggested that they were unnecessary. In his present capacity as Dean, Khurana oversees undergraduate student life at Harvard and guides decisions over both academic and social issues. To that end, Khurana met with unrecognized social organizations from October 2014 through April 2016. During those meetings, he questioned the "values" of single-gender organizations and expressed skepticism concerning whether the groups align with Harvard's mission; told the organizations to "do better"; indicated that he was determined to close all-male final clubs based on a report of the Harvard Task Force on the Prevention of Sexual Assault ("Task Force") even though the report had not yet been released and he did not yet know the Task Force's conclusions; "implicitly" threatened to publicize embarrassing information that he claimed to have concerning the all-male final clubs, including allegations of sexual assaults, if they did not become co-ed; suggested that members of single-gender groups could be expelled; explained that leadership of the all-female final clubs had not been invited to earlier meetings with the all-male clubs because the administration did not want them to be intimidated by the men; and stated that single-gender organizations need to be eliminated because closed cultures tend to foster violence and closed-minded thinking which inexorably leads to "terrorism."

During this same time period, the then-President of Harvard, Drew Gilpin Faust ("Faust"), stated in an interview with *The Harvard Crimson* that Khurana and she were weighing options for regulating final clubs, that she was worried final clubs had become a hotbed of sexual assault fueled by alcohol, and that the major reason why the clubs needed to become co-ed was to

"dispense privilege and advantage." Khurana stated to *The Harvard Crimson* that he was crafting a set of recommendations concerning unrecognized social groups, noting that, while the college was not "driven by the notion of sanctions," "there is nothing off the table."

On May 6, 2016, Khurana proposed, and Faust accepted, the Policy which provides:[3]

> The College views a commitment to non-discrimination as essential to its pedagogical objects and institutional mission. It has adopted the following policies with regard to unrecognized-single-gender social organizations:
>
> 1. For students matriculating in the fall of 2017 and thereafter: any such students who become members of unrecognized single-gender social organizations will not be eligible to hold leadership positions in recognized student organizations or athletic teams.
>
> 2. For students matriculating in the fall of 2017 and thereafter: any such students who become members of unrecognized single-gender social organizations will not be eligible to receive College-Administered fellowships.[4]

Twelve faculty members introduced a motion to oppose the Policy. In January 2017, before the faculty was due to vote on that motion, Khurana announced the establishment of a faculty committee to review the Policy. In July 2017, the faculty committee issued a preliminary report recommending that Harvard undergraduates be penalized, including by suspension or expulsion, if they joined single-gender organizations. However, *The Harvard Crimson* reported that only seven out of the twenty-seven committee members actually supported this

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[3] Although the plaintiffs do not recite the language of the Policy verbatim or attach a copy of it to their complaint, the court nonetheless considers the language of the Policy in rendering its decision on the motion to dismiss because the plaintiffs referenced and relied on it in framing the complaint. See, *e.g.*, *Marram* v. *Kobrick Offshore Fund, Ltd.*, 442 Mass 43, 45 n.4 (2004) (court may consider documents to which plaintiff had notice and relied on in framing the complaint without converting a motion to dismiss to a motion for summary judgment); *Kilnapp Enterprises, Inc.* v. *Massachusetts State Auto. Dealers Ass'n*, 89 Mass. App. Ct. 212, 213 (2016) ("[T]he judge initially evaluating and ruling upon a motion to dismiss . . . is entitled to consider materials not appended to the complaint, but referenced or relied upon in the complaint.").

[4] These fellowships include Rhodes, Marshall, Truman, and Fulbright fellowships. Compl., para. 4.

recommendation. In August 2017, Khurana sent a letter to Harvard's incoming class. The letter noted that other administrators and he intended to penalize anyone who joined a single-gender organization, even though the faculty had not approved or enacted the Policy.

In September 2017, the faculty committee revised its preliminary report to propose three options: (1) implement the Policy as drafted by Khurana, (2) ban membership in unrecognized single-gender social organizations, or (3) enact "some other possible solutions." Harvard officially adopted the Policy in December 2017 and implemented it in March 2018. Moving forward, students seeking leadership positions or fellowships were required to affirm that they do not belong to a single-gender final club or Greek organization. Harvard's Honor Council and/or Administrative Board may punish students up to expulsion if they misrepresent their non-membership in such an organization. Any organization seeking to avoid having its members subject to the Policy must commit to gender-neutral membership criteria and disaffiliate from or limit the role of external bodies including national organizations and alumni boards. Those organizations seeking to transition from unrecognized single-gender to recognized gender-neutral organizations are required to meet periodically with Alexander Miller ("Miller"), the Associate Dean of Student Engagement. Miller has made veiled threats to these organizations if they fail to comply with the Harvard's requirements, including "you know what the alternative is," or "we might have to go there." Miller also screamed at a student on one occasion regarding an aspect of a social organization's transition.

In the 2017-2018 academic year, new membership in sororities sharply declined. *The Harvard Crimson* reported that interest in sororities was down sixty *per cent* by spring of 2018; and, between spring of 2017 and 2018, membership in Iota Tau declined by thirty-five *per cent*.

In August 2018, Iota Tau requested that Alpha Phi suspend its chapter in direct response to the Policy. In November 2018, at Iota Tau's request, Alpha Phi reinstated the chapter. Iota Tau is now the only all-women social organization open to Harvard undergraduates. However, the Policy has affected Iota Tau's ability to recruit new members and to function as a organization.

In August 2018, the Zeta Phi chapter of the Delta Gamma sorority, which was open to Harvard undergraduates, voted to relinquish its charter as a result of the Policy. FMC is the not-for-profit corporation that supports chapters of Delta Gamma that do not have Delta Gamma-owned housing or fully-operating volunteer housing corporation boards. Specifically, FMC leases and manages a space known as "the Cove" on Mount Auburn Street in Cambridge that was used by members of the Zeta Phi chapter. During the 2017-2018 academic year and in years prior, FMC and Zeta Phi had a contract that required Zeta Phi and its members to compensate FMC for use of the Cove. FMC had a reasonable expectation that Zeta Phi and its members would continue to enter into these contract annually. However, Zeta Phi did not execute an agreement for the 2018-2019 academic year because it had disbanded. FMC continues to hold a lease to the Cove through January 31, 2020, which obligates it to make monthly rent payments. Since August 2018, the Cove has sat vacant and FMC has been unable to sublet the property. FMC continues to pay rent even though it is not receiving any revenue.

In December 2018, the plaintiffs initiated this action. They allege that the Policy and Harvard's conduct surrounding its enactment violates the MCRA by interfering with Alpha Phi, Iota Tau, and their members' right to free association (Count I) and by discriminating against the members on the basis of sex (Count II). The plaintiffs also allege that Harvard tortiously interfered with FMC's advantageous business relations (Count III). The defendant now moves to

dismiss the complaint in its entirety on the grounds that Alpha Phi and Iota lack standing to bring MCRA claims and because all the plaintiffs have failed to state a legally sufficient claim.

DISCUSSION

I. Legal Standard

The pending motion is brought pursuant to both Mass. R. Civ. P. 12(b)(1) and 12(b)(6). The court reviews a motion to dismiss under Mass. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction based solely on the allegations in the complaint under the same standard as a motion brought under Mass. R. Civ. P. 12(b)(6). See *Bevilacqua* v. *Rodriguez*, 460 Mass. 762, 764 (2011); *Hiles* v. *Episcopal Diocese of Massachusetts*, 437 Mass. 505, 516 n.13 (2002). Under Mass. R. Civ. P. 12(b)(6), the complaint must set forth "factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007) (internal quotations omitted). Detailed factual allegations are not required; but the pleading "requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief about the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." *Iannacchino*, 451 Mass. at 636, quoting *Twombly*, 550 U.S. at 555 (internal quotations omitted).

II. Analysis

A. Standing

Harvard argues that Alpha Phi and Iota Tau lack standing because the MCRA precludes associations from bringing claims on behalf of their members. The court disagrees.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Modified Motorcycle Ass'n of Massachusetts, Inc.* v. *Commonwealth*, 60 Mass. App. Ct. 83, 85 n.6 (2003), quoting *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). Here, Alpha Phi and Iota Tau have demonstrated that they meet each of these requirements.

Members of Iota Tau, a chapter of Alpha Phi, are directly affected by the Policy. The plaintiffs allege that the Policy and the college's conduct surrounding it caused the chapter to close temporarily, presently bars some members from obtaining certain leadership positions and fellowships, and continues to impact recruitment of new members. Thus, the members as individuals have standing to bring this action under the MCRA on the grounds that Harvard violated their constitutional rights. See G. L. c. 12, § 11I.

The interest that Alpha Phi and Iota Tau are seeking to protect, *i.e.*, the ability to organize as a single-gender association, is central to their purpose. Indeed, the plaintiffs allege that Iota Tau cannot both comply with the Policy and Alpha Phi's membership requirements because the two are inconsistent. See Compl., para. 110. The plaintiffs also maintain that membership in the broader national organization is "an integral component of the sorority experience." Compl., para. 111.

Finally, to the extent that the plaintiffs seek declaratory and injunctive relief, their MCRA claims do not require extensive participation of individual members in the lawsuit because the plaintiffs contend that Harvard's conduct, including the enactment of the Policy, categorically

violates the rights of all its members. See *Camel Hair & Cashmere Inst. of Am., Inc.* v. *Associated Dry Goods Corp.*, 799 F.2d 6, 12 (1st Cir. 1986) ("Actions for declaratory, injunctive and other forms of prospective relief have generally been held particularly suited to group representation."). *Cf. National Ass'n of Gov't Employees* v. *Mulligan*, 914 F. Supp. 2d 10, 13-14 (D. Mass. 2012) (associational standing is inappropriate if adjudicating the merits or determining damages requires a fact-intensive individual inquiry). However, Harvard *is* correct that Alpha Phi and Iota Tau are precluded from seeking money damages on behalf of their members under the MCRA because monetary claims are peculiar to their individual members. See, *e.g.*, *Massachusetts Bay Transp. Auth.* v. *Local 589, Amalgamated Transit Union*, 406 Mass. 36, 41 (1989); *Camel Hair & Cashmere Inst. of Am., Inc.*, 799 F.2d at 12.

Harvard argues that, even if Alpha Phi and Iota Tau meet the three conditions of associational standing, the court must take the additional step of looking to the statute to determine whether the MCRA permits a claim to be asserted by an association on behalf of its members. See *Carroll* v. *Marzilli*, 75 Mass. App. Ct. 550, 554 (2009), citing *Boston Edison Co.* v. *Boston Redevelopment Auth.*, 374 Mass. 37, 46 (1977) ("when an issue involves an area of law governed by a specific statute with a standing requirement, that issue is governed by the standing requirements of the particular statute and not by a general grant of standing"). Specifically, Harvard asserts that associations like Alpha Phi and Iota Tau are precluded from raising a MCRA claim based on alleged violations of their members' rights because, by the terms of the statute, only the Attorney General can bring such a claim on behalf of others. See G. L. c. 12, § 11H (Attorney General may bring an action for injunctive or equitable relief in the name of the

Commonwealth "in order to protect the peaceable exercise or enjoyment of the right or rights secured."). This argument is unpersuasive.

General Laws Chapter 12, Section 11I provides that "[a]ny person . . . may institute and prosecute in *his own name* and on *his own behalf* a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages." G. L. c. 12, § 11I (emphasis added). Stated another way, "[p]rivate parties may sue on their own behalf for violations of their own civil rights and the Attorney General can bring suit to protect the civil rights of the public at large." *Carroll*, 75 Mass. App. Ct. at 555. Associational standing is derivative of the standing of its members. See *OCA-Greater Houston* v. *Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Thus, where the MCRA gives individual members the right to sue, Alpha Phi and Iota Tau do not need to demonstrate separate statutory authority to sue as an organization on their behalf. Moreover, the Appeals Court has explained that G. L. c. 4, § 7, Twenty-Third provides the applicable definition for the term "person" as it is used elsewhere in the MCRA. See *Howcroft* v. *Peabody*, 51 Mass. App. Ct. 573, 592 (2001) ("By the terms of G. L. c. 4, § 7, its definitions govern the construction of statutes unless a contrary intention clearly appears, and here there is no indication in the MCRA that the word 'person' includes either the Commonwealth or any of its political subdivisions."). That statute expressly defines person to include "corporations, societies, *associations* and partnerships." G. L. c. 4, § 7, Twenty-Third (emphasis added). Nothing in the MCRA signals that the Legislature intended for term "person" to have a different meaning in the context of who may bring a suit under G. L. c.

12, § 11I.[5] See *Commonwealth* v. *Stokes*, 440 Mass. 741, 748 (2004), quoting *Commonwealth* v. *Dunn*, 43 Mass. App. Ct. 58, 60 (1997) ("Terms appearing within the same or related statutes are to be given the same meaning unless the Legislature intends a different meaning."). Accordingly, the court concludes that the plain language of the MCRA permits an association to bring suit alleging a civil rights violation.

B. The Merits

1. Introduction

Harvard also contends that the plaintiffs have failed to allege sufficient facts to support of each of their claims. For the reasons that follow, the court disagrees.

2. MCRA Claims (Counts I and II)

To establish a claim under the MCRA, Alpha Phi and Iota Tau must demonstrate: "(1) the exercise or enjoyment of some constitutional or statutory right; (2) has been interfered with, or attempted to be interfered with; and (3) such interference was by threats, intimidation, or coercion." *Currier* v. *National Bd. of Med. Examiners*, 462 Mass. 1, 12 (2012). With respect to the third prong, "a 'threat' consists of 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'; 'intimidation' involves 'putting in fear for the purpose of compelling or deterring conduct'; and 'coercion' is 'the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done.'" *Glovsky* v. *Roche Bros. Supermarkets*, 469 Mass. 752, 763 (2014), quoting *Haufler* v. *Zotos*, 446 Mass. 489, 505 (2006).

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[5] The MCRA discusses a person's right to sue "in his own name and on his own behalf." G. L. c. 12, § 11I. However, the court does not read the use of gender-specific pronouns as an indication that the Legislature intended a different definition of a "person" to apply.

Alpha Phi and Iota Tau have alleged adequately that Harvard violated the MCRA by interfering with their rights to free association as recognized under art. 19 of the Massachusetts Declaration of Rights and to be free from discrimination on the basis of sex pursuant to arts. 1 and 106. Harvard's arguments to the contrary are unpersuasive at the pleadings stage.

In Count I, Alpha Phi and Iota Tau allege that Harvard interfered with their members' rights to associate with other individuals in a private organization and to express a common interest and message of sisterhood by associating together with other people who identify as women. See Compl., para. 125. "Freedom of association guarantees an opportunity for people to express their ideas and beliefs through membership or affiliation with a group." *Caswell* v. *Licensing Comm'n for Brockton*, 387 Mass. 864, 871-72 (1983). "[T]his right protects forms of association that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members." *Id.* at 872, quoting *Griswold* v. *Connecticut*, 381 U.S. 479, 483 (1965) (internal quotations omitted).

Harvard submits that Alpha Phi and its chapter for Harvard undergraduates, Iota Tau, are not "expressive associations" subject to constitutional protection. However, resolution of this issue requires a fact-intensive inquiry that cannot be undertaken at the motion to dismiss stage in this case. See *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 648 (2000) (to determine whether a group is protected by the First Amendment's expressive associational right, the court must determine whether the group engages in "expressive association," meaning that it engages in some sort of public or private expression); *Pi Lambda Phi Fraternity, Inc.* v. *University of Pittsburgh*, 229 F.3d 435, 444 (3d Cir. 2000) (noting that "[i]t is entirely possible that a fraternity (or sorority, or similar group) could make out a successful expressive association claim," but

concluding that the fraternity failed to make out such a claim at summary judgment).[6] Here, the complaint alleges that Alpha Phi's mission is "Sisterhood, Scholarship and Service" and that Iota Tau has focused on empowering women to be strong leaders in their community. Compl., paras. 11, 13. These allegations are sufficient to support a claim for the violation of art. 19's expressive associational right. See *Iota XI Chapter of the Sigma Chi Fraternity* v. *Patterson*, 538 F. Supp. 2d 915, 923 (E.D. Va. 2008), aff'd on other grounds, 566 F.3d 138 (4th Cir. 2009) (college fraternity with institutional mission of instilling leadership skills and community values in its members protected by First Amendment's expressive associational right); *Beta Upsilon Chi* v. *Machen*, 559 F. Supp. 2d 1274, 1278 (N.D. Fla. 2008), vacated as moot and remanded, 586 F.3d 908 (11th Cir. 2009) (Christian fraternity with mission of developing morality of its members and helping them cultivate leadership traits based on a belief in God engaged in expressive activity protected by First Amendment); *Chi Iota Colony of Alpha Epsilon Pi Fraternity* v. *City Univ. of New York*, 443 F. Supp. 2d 374, 391-92 (E.D.N.Y. 2006), vacated on other grounds, 502 F.3d 136 (2d Cir. 2007) (predominantly Jewish male fraternity whose members met weekly with a Rabbi and engaged in community service, with main pursuit of "brotherhood," was an expressive association). *Cf. Dale*, 530 U.S. at 650 (Boy Scouts engage in expressive activity given their general mission to instill values in young people). But see *Williams* v. *Wendler*, No. 05-4157-JPG, 2007 WL 329131, at *2 (S.D. Ill. Feb. 1, 2007) (Gilbert, J.) (dismissing fraternity's expressive associational claim because fraternities and sororities are "primarily social" organizations not protected by the First Amendment).

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[6] As the plaintiffs properly note, art. 19 creates associational rights similar to that of the First Amendment. See *Caswell*, 387 Mass. at 871 n.5.

In Count II, Alpha Phi and Iota Tau allege that Harvard discriminated against their members on the basis of sex. A facially neutral policy that is applied in a discriminatory fashion can violate the constitution. See *Buchanan* v. *Director of Div. of Employment Sec.*, 393 Mass. 329, 335 (1984), and cases cited therein. Under this so-called disparate impact theory of discrimination, Plaintiffs must show that the Policy had a disproportionately adverse impact on women.[7] See *id.* Here, the complaint alleges that, as a result of the Policy, the reopened Iota Tau is the only all-female unrecognized social organization open to Harvard undergraduates and that it has lost past and prospective members. See Compl., paras. 122-123. In contrast, most all-male unrecognized social organizations remain open. See Compl., para. 1. This is sufficient to support a claim for sex discrimination at this juncture.[8] Relying on cases involving disparate impact in the employment context, the parties dispute whether Alpha Phi and Iota Tau also must demonstrate that Harvard acted with the intent to close disproportionately all-female organizations. See *Lopez* v. *Commonwealth*, 463 Mass. 696, 711 (2012) (defendant must know practices or criteria had significant disparate impact on a protected group or class). Given that this case law arises in a different context, it is far from clear whether such intent is required or must be alleged with specificity; thus, the court declines to dismiss the complaint on this basis. See *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99 (1987) ("[T]he provisions

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[7] Citing *Commonwealth* v. *Chau*, 76 Mass. App. Ct. 1127, 2010 WL 1655526 (2010) (Rule 1:28 decision), Harvard asserts that the Policy cannot be construed to discriminate based on gender because it is equally applicable to men and women. The court need not reach this issue because the plaintiffs have advanced a plausible claim under a disparate impact theory.

[8] Because Alpha Phi and Iota Tau have alleged sufficiently a violation of the expressive associational right and their right to be free from sex discrimination on the basis of disparate impact, the court does not reach their alternative argument under Count I of a violation of their right to intimate association and under Count II of discrimination based on sex-stereotyping.

of §§ 11H and 11I must apply to any threatening, intimidating, or coercive behavior regardless of whether the defendant specifically intended to interfere with a right to which the plaintiff is entitled."); *Breault* v. *Chairman of Bd. of Fire Comm'rs of Springfield*, 401 Mass. 26, 36 n.12 (1987) (MCRA addresses intentional conduct as defined in the Restatement (Second) Torts § 8A).[9]

Alpha Phi and Iota Tau also have stated adequately that Harvard interfered with these constitutionally protected rights through the use of threats, intimidation, or coercion.[10] In order to determine whether conduct constitutes threats, intimidation, or coercion, the court applies an objective, reasonable person standard. See *e.g.*, *Currier*, 462 Mass. at 13. In some circumstances, economic coercion alone may be actionable. *Buster* v. *George W. Moore, Inc.*, 438 Mass. 635, 648 (2003). The instant complaint alleges that Harvard engaged in a course of conduct before, during, and after the implementation of the Policy that was meant to coerce undergraduate students to forgo membership in Alpha Phi and Iota Tau, including by questioning the values of single-gender organizations and suggesting that their members may be subject to expulsion. Harvard ultimately precluded any members of those organizations from receiving

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[9] In relevant part, the Restatement provides: "Intent is not . . . limited to consequences which are desired. If the actor knows the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." Restatement (Second) Torts § 8A, cmt. b.

[10] Harvard reasons that Alpha Phi and Iota Tau are precluded from demonstrating the use of threats, intimidation, or coercion as a matter of law because the Policy only applied prospectively to students who were aware of its existence at the time they accepted the offer to attend Harvard. However, this point is contradicted by allegations in the complaint, which the court must accept as true at this stage. The complaint alleges that Harvard sent a letter notifying the incoming class in August 2017 of the college's intent to penalize students who joined single-gender organizations even though the Policy had not yet been approved or enacted. The complaint also avers that the faculty actually adopted the Policy in December 2017 and that it was implemented in March 2018. The Policy applies to all students "matriculating in the fall of 2017 and thereafter." Thus, it is reasonable to infer from the allegations in the complaint that students received notice and the Policy took effect *after* some affected students decided to attend the college. Moreover, given the other allegations in the complaint discussed herein of conduct beyond the Policy itself, Alpha Phi and Iota Tau have pled sufficiently their MCRA claims.

fellowships, some of which provide significant financial benefits to recipients. See Compl., para. 108. Compare *Bally* v. *Northeastern Univ.*, 403 Mass. 713, 719 (1989) (plaintiff failed to demonstrate at summary judgment that university's requirement that student athletes undergo "indiscriminate, impartially administered [drug] testing" constituted "threats, intimidation, or coercion" under the MCRA). These allegations are enough to support a claim under the MCRA.[11]

3. Tortious Interference with Advantageous Relations (Count III)

To establish a claim for tortious interference with advantageous relations, FMC must demonstrate that: "(1) [it] had an advantageous relationship with a third party (e.g., a present or prospective contract or employment relationship); (2) the defendant knowingly induced a breaking of the relationship; (3) the defendant's interference with the relationship, in addition to being intentional, was improper in motive or means; and (4) the plaintiff was harmed by the defendant's actions." *Blackstone* v. *Cashman*, 448 Mass. 255, 260 (2007).

In the case at bar, FMC alleges that it had a contractual relationship with Zeta Phi that it anticipated would continue into the future requiring the Zeta Phi chapter and its members to compensate FMC for use of the Cove. See Restatement (Second) of Torts § 767, cmt. a (tort concerns interference with existing and prospective contractual relationships). FMC further maintains that Harvard induced Zeta Phi to break that relationship by making it impossible for Zeta Phi to both comply with the Policy and meet the membership requirements of the FMC-

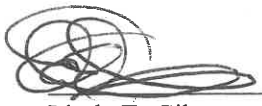
[11] Harvard contends that, even if Alpha Phi and Iota Tau have alleged the existence of certain protected rights, the Policy does not burden unconstitutionally those rights and the Policy would survive under even a strict scrutiny analysis. This is a fact-intensive inquiry; and in light of the allegations in the complaint, this is an issue not suitable for resolution on a motion to dismiss.

affiliated national Delta Gamma sorority. Specifically, Harvard allegedly mandated that organizations be governed locally and that they sever ties with their national sororities. See *id.* § 766, cmt. k (interference can be shown by threat of economic harm, promise to benefit third person if person refrains from dealing with another, or by persuasion exerting only moral pressure). FMC also asserts that Harvard's conduct was intentional and undertaken with the improper motive of sex discrimination. See *id.* § 767, cmt. c (factors to consider when determining if actor's conduct is improper include whether the conduct is contrary to established public policy or violates a statute and whether the actor exerts economic pressure). Finally, FMC states that it was harmed as result of Harvard's actions because Zeta Phi closed and ceased to make payments to FMC for use of the Cove.

Harvard counters that this claim must fail because Harvard did not know of any contractual relationship between FMC and Zeta Phi or its members and because Harvard did not know that interference with the contractual relationship between FMC and Zeta Phi was certain or substantially certain to occur. However, it can be inferred reasonably from the allegations in the complaint that Harvard knew there were contractual arrangements between local chapters and their national Greek organizations and affiliates and that it was substantially certain that the Policy would interfere with membership such that the contracts would no longer be maintained. Resolution of these issues is best borne out through discovery. See Restatement (Second) of Torts § 766, cmt. i (actor must have knowledge of contract and the fact that he is interfering with that contract); *id.* § 766, cmt. j (rule applies "to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action").

ORDER

For all the foregoing reasons, it is hereby **ORDERED** that the motion to dismiss of defendant President and Fellows of Harvard College be **DENIED**.



Linda E. Giles,
Justice of the Superior Court

Dated: January 9, 2020