

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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BRUCE D. SCHOBEL, Docket No. CA 09-1664
Plaintiff,

v. Washington, D.C.
September 3, 2009
2:00 p.m.

AMERICAN ACADEMY OF
ACTUARIES,
Defendant.
-----X

TRO HEARING
BEFORE THE HONORABLE EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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1 APPEARANCES: (CONT'D.)

2 ALSO PRESENT: Ms. Mary Downs
3 CORPORATE REPRESENTATIVE FOR THE
4 AMERICAN ACADEMY OF ACTUARIES

5 Court Reporter: Catalina Kerr, RPR, CRR
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11 Proceedings recorded by mechanical stenography, transcript
12 produced by computer.
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1 P-R-O-C-E-E-D-I-N-G-S

2 (2:00 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Civil Action 09-1664, Bruce
4 Schobel versus American Academy of Actuaries. Counsel, please
5 introduce yourselves to the Court.

6 MR. WACHEN: Good afternoon, Your Honor. David
7 Wachen from Shulman, Rogers, Gandal, Pordy & Ecker
8 representing the Plaintiff.

9 THE COURT: All right. Good afternoon.

10 MR. REES: Good afternoon, Your Honor. Jonathan
11 Rees of Hogan & Hartson representing the Defendant American
12 Academy of Actuaries. With me is Mary Downs, who is the
13 executive director and general counsel at the Academy, and
14 Philip Larson from Hogan & Hartson who has not yet entered his
15 appearance in this case but is present.

16 THE COURT: All right. Good afternoon. Let me
17 invite principal counsel to the microphone there. I read all
18 your pleadings, and I took the liberty, over the lunch hour --
19 because in my view, this case is crying out for settlement. I
20 took the liberty to see whether or not there would be a
21 magistrate judge available in the event that the parties wish
22 to speak with a neutral, so I called Judge Kay who actually is
23 available. He doesn't have unlimited time, but he's a
24 magistrate judge with a national reputation for his mediation
25 skills, and he's available. Any interest?

1 MR. WACHEN: Your Honor --

2 THE COURT: I'm not going to put off this hearing,
3 but I know he's available now.

4 MR. WACHEN: I would have to talk to my client about
5 that. It's not something we discussed.

6 THE COURT: Well, is he here?

7 MR. WACHEN: Unfortunately, he's not. He was here
8 on Tuesday when we filed, but he's unfortunately out of the
9 country. He might be reachable, but he's not here.

10 THE COURT: Well, you want to try and reach him?

11 MR. WACHEN: Well...

12 MR. REES: We have no objection to that.

13 THE COURT: I mean, look, I'm not trying to force
14 you to talk about settlement. If you want to, there's an
15 excellent person who's available to assist you with your
16 discussions. If not, then fine, we'll let the chips fall
17 where they may. What do you want to do?

18 MR. WACHEN: Your Honor, it's not something we
19 discussed.

20 THE COURT: Settlement?

21 MR. WACHEN: Well, we discussed it. The two sides,
22 we discussed it. Unfortunately, that's not where we ended up,
23 so once we filed the lawsuit --

24 THE COURT: You want to telephone and find out if
25 there's any interest, that's fine. I'm not going to keep the

1 magistrate judge waiting to talk with anyone, so see if you
2 can get ahold of him. If there's any interest, that's fine;
3 if not, then we'll proceed with this hearing.

4 MR. WACHEN: Okay.

5 THE COURT: All right. I'll give you a few minutes
6 to try and reach him.

7 MR. WACHEN: Thank you, Your Honor.

8 THE COURT: All right.

9 THE DEPUTY CLERK: All rise. This honorable court
10 stands in recess until return of court.

11 (A BRIEF RECESS WAS TAKEN.)

12 THE DEPUTY CLERK: Counsel please remain seated.
13 This honorable court is again in session.

14 THE COURT: All right. What's your pleasure?

15 MR. WACHEN: Your Honor, first, just as a
16 preliminary matter, I was remiss in not introducing my partner
17 Tina Hsu. She's with me representing the Plaintiff.

18 THE COURT: Good afternoon.

19 MR. WACHEN: We spoke with our client, had a very
20 long conversation with him. He's actually out of the country
21 right now, and you know, the way this all started was we had
22 made a settlement proposal to the other side.

23 THE COURT: I don't want to hear about any
24 proposals, what was requested, what was offered. I don't
25 want -- need to hear about anything in that regard. Go ahead.

1 I mean, it was clear --

2 MR. WACHEN: It's something that happened that --
3 it's referenced in the papers, Your Honor.

4 THE COURT: Just a minute. It was clear in the
5 papers that there had been some efforts to resolve the case,
6 so sometimes efforts can be more productive if you involve
7 someone who doesn't have a stake in the outcome, so...

8 MR. WACHEN: And I've had great success with
9 mediation, and I talked to my client about that, but he feels
10 given where we are now and he thinks there are very important
11 principles involved that --

12 THE COURT: So this is a case about principles; is
13 that right?

14 MR. WACHEN: Well, partially, yes, and where his
15 standing is, and, you know, what happened to him, and, you
16 know, he feels that what the -- what the Academy did was
17 wrong, and he's been seriously injured as a result.

18 THE COURT: All right. I'll give you a few minutes
19 with respect -- Yes, Counsel.

20 MR. REES: Oh, I was just going to say, we, Your
21 Honor, are, of course, prepared to talk but we can't just talk
22 to ourselves.

23 THE COURT: Absolutely, no harm in talking. That's
24 certainly cheap. All right. I'll give you a few minutes.
25 I've read all these pleadings. It's your motion.

1 Why isn't this the classic case for damages? Why
2 isn't damages an adequate remedy?

3 MR. WACHEN: Your Honor, because damages are not a
4 remedy for being the president of the top organization in the
5 actuarial profession.

6 THE COURT: Why not?

7 MR. WACHEN: Well, because it's an opportunity to
8 lead the Academy; something he's worked his whole career
9 towards.

10 THE COURT: Is there some case that says that? You
11 rely on Judge Oberdorfer's opinion. That's the only opinion
12 you rely upon for your reputation argument, for your
13 deprivaton of position argument. I mean, that's the only
14 case. You don't cite any circuit authority anywhere in the
15 country.

16 MR. WACHEN: Your Honor, he has put in -- we have a
17 declaration.

18 THE COURT: I read his declaration and that's why
19 it's, arguably -- I'm not ruling as a matter of law, but
20 arguably, this is the classic case for damages. He's been
21 removed; maybe he's been removed; maybe he hasn't been
22 removed. Arguably, he's been defamed. He alleges he's been
23 defamed. There are website postings. There are e-mails all
24 over the country. Probably every actuary in the country -- I
25 don't know. How many actuaries are there in the country?

1 Several thousand?

2 MR. REES: 17,000 members, Your Honor.

3 THE COURT: Everyone knows about this. Everyone
4 knows this man has got a what, a 30-year career; granted, some
5 blemishes along the road, but you know, no one's perfect, and
6 he, you know, arguably, why doesn't he make out the classic
7 case for damages to go before a jury? Don't you have to
8 persuade me that damages are indeed an inadequate remedy for
9 the Court to even consider your request for injunctive relief?

10 MR. WACHEN: That's one of the elements, Your Honor.

11 THE COURT: Right.

12 MR. WACHEN: But our position, as you read in our
13 papers, is that he's still the president-elect and director.
14 He hasn't been removed.

15 THE COURT: Well, maybe I'll resolve that. Maybe he
16 is; maybe he isn't. You know, at least there's been an effort
17 to oust him. Maybe he's been ousted. I don't know at this
18 point. I don't have to say what I think happened here, but it
19 seems to me, at least arguably, makes out a pretty compelling
20 case for damages, and if not, then I need to know why.

21 Just because he's the president doesn't make it less
22 compelling, I don't think. Why is it -- tell me why damages
23 wouldn't compensate him? I mean, I don't want to refer to the
24 sealed matter, but that's a classic case of -- that's a case
25 that makes the point I'm trying to make. I mean, that's

1 sealed, and I don't want to say too much on the public record,
2 but...

3 MR. WACHEN: I mean, I think the *Saunders* case is
4 exactly -- explains the reason, and I think our situation is
5 even more --

6 THE COURT: Wasn't there a trial in that case?
7 There were some compelling circumstances in that case that
8 prompted Judge Oberdorfer to do what he did. Hadn't that
9 trial been continued, I think, at a late date or something?

10 MR. WACHEN: In this situation, there is a -- I
11 mean, what we have asked for, Your Honor, because of the
12 October 26 deadline, is to resolve this -- that critical issue
13 before then. If we are right, as we believe we are, that he
14 is still the President-Elect and Director, on that date he
15 would become the President of this organization. Everybody
16 agrees with that, and --

17 THE COURT: And if the organization doesn't
18 recognize him, doesn't he have yet still another argument to
19 make before a jury?

20 MR. WACHEN: Yes, he would, but he would be deprived
21 of the opportunity -- I mean, he is -- if you start from the
22 proposition that he is the President-Elect and Director now --

23 THE COURT: Is there any circuit case anywhere that
24 would persuade the Court that deprivation of this type of
25 opportunity entitles one to the extraordinary remedy, not just

1 a remedy, the extraordinary remedy of an injunction? Aside
2 from Judge Oberdorfer's case, and I'm not minimizing my
3 colleague's case. I have a great degree of respect for him,
4 but I might want to focus on any circuit authority anywhere.

5 MR. WACHEN: I do not have any at the moment, Your
6 Honor. What we have, though, is a situation, and the courts
7 have said, the circuits have said, you don't need to meet all
8 four factors.

9 THE COURT: I'm well aware of that, Counsel. I'm
10 totally well aware of that, but -- I mean, and there are cases
11 that cry out for injunctive relief, something is indeed
12 irreparable, you know. A house that's on a historical
13 register is about to be destroyed; that's irreparable. I
14 mean, there are no damages that can compensate; real property,
15 the uniqueness, no damages can compensate, no damages can
16 compensate.

17 But here, I don't think that argument can be made,
18 no damages can compensate him for his loss. I can think of --
19 I can think of at least a number of reasons that would enable
20 me to stand before a jury for an hour and talk about all the
21 reasons why they should just put a lot of zeros behind an
22 award. I mean, it's compelling. The President, the
23 President-Elect, his reputation, defamation, but what's
24 missing here? I'm inviting you to tell me where my thinking
25 may be in the wrong place.

1 MR. WACHEN: Well, because, Your Honor, unlike in
2 the *Saunders* case, at least, where the professor, she was
3 working for George Washington University and the Court said
4 that money wasn't important to her. Here, he's a volunteer.
5 This is a professional organization, and it's almost akin to a
6 judge being improperly removed from the bench and not being
7 able to be a judge, and that's what his career path was and
8 he's at the pinnacle of his career. Obviously, there are
9 damages that flow from that.

10 THE COURT: A prestigious organization. Is this a
11 lobbying organization?

12 MR. WACHEN: It's a lobbying and professional
13 organization.

14 THE COURT: I see. So, there's contacts on the
15 Hill. I assume, over 30 years, he's had contacts with
16 representatives on the Hill and people know about this. That
17 ties into his damages.

18 MR. WACHEN: Yes, but Your Honor, at this point --

19 THE COURT: It's not about his loss of income, no.
20 It's about the prestige of this position. I mean, if
21 indeed -- if indeed you can prevail before a jury that he was
22 wrongfully ousted from this position, you make a compelling
23 case, I think, arguably, you know, for damages. For damages.

24 MR. WACHEN: Damages will not compensate him for the
25 opportunity to lead this prestigious organization, to have an

1 impact. I mean, he feels very passionate, obviously, since
2 he's been a volunteer in all these organizations and risen to
3 the top to be able to have an impact on the profession and to
4 lead the profession. He has a very strong opinion of that
5 and --

6 THE COURT: Isn't that an element of damages,
7 though, his lost opportunity? His lost opportunity to lead;
8 he's been waiting for this all his life. 30 years -- over 30
9 years, right, career as an actuary? Well recognized, well
10 respected in the community, he loses this opportunity. I
11 mean, that's an element of your argument.

12 MR. WACHEN: Your Honor, it's also -- we talked at
13 the beginning about principle. I think there is a very
14 important principle here, and that is that this is an -- if
15 any organization ought to be observing the -- treating someone
16 professionally and fairly and with due process, it's an
17 organization of the profession.

18 And for him, he -- he wants to be treated fairly.
19 If they were to comply with the requirements of the statute,
20 if that's what -- and this is what ended up happening. He
21 doesn't believe it would, so be it, but he -- all he is
22 interested in is to have the Academy follow the law, follow
23 his -- follow the --

24 THE COURT: Let's talk about that, follow the law.
25 What is it that you claim the Board didn't do or it should

1 have done?

2 MR. WACHEN: Well, many things, Your Honor. First
3 of all, the major thing is, according to the statute,
4 108-point --

5 THE COURT: The Illinois statute.

6 MR. WACHEN: Yes, the Illinois statute, Your Honor,
7 which everybody agrees applies. 108.35(a), the language of
8 the statute says --

9 THE COURT: One or more of the directors may be
10 removed with or without cause in the case of a corporation
11 having a board of directors which is classified in accordance
12 with subsection 108.10(e) of this act, no director may be
13 removed except for cause if the articles of the incorporation
14 or the bylaws so provide.

15 That focuses on a director. Now, granted, my
16 understanding is, and correct me if I'm wrong, he is
17 President-Elect or was President-Elect and will be President
18 or could be President or have the opportunity to be President,
19 but by virtue of that President-Elect position, he's also a
20 Director; is that right?

21 MR. WACHEN: He -- when he became -- when he was
22 elected to be President-Elect, he became a Director at the
23 same time.

24 THE COURT: Became a Director. Let me ask you this:
25 Could the Board remove him as a director without impinging on

1 his position as President-Elect or President?

2 MR. WACHEN: That's an interesting question, Your
3 Honor. According to the bylaws, the two are inter- --
4 inextricably intertwined. But what the statute says --

5 THE COURT: What does that mean then? How could the
6 Board remove him if he wears both of those hats, Director
7 and --

8 MR. WACHEN: They have to comply with the
9 requirements for removing a director, and the statute makes
10 it --

11 THE COURT: Where in this statute does it say that
12 in the case of a president-elect --

13 MR. WACHEN: Uh-huh.

14 THE COURT: -- the Board must -- for removal of a
15 president-elect, the Board must follow this 108.35(a)? Does
16 it say anywhere?

17 MR. WACHEN: Yes, it does, Your Honor. In Section
18 108.50(c), it says, "Officers can serve as directors, and if
19 they do serve as directors, they are accorded the same rights,
20 duties and responsibilities as all other directors," and one
21 of those rights is the right to a super majority or whatever
22 the statute requires for director removal to apply.

23 THE COURT: Let's see, 108.50(c). "The articles of
24 incorporation of the bylaws may provide that any one or more
25 officers," and he was, "of the corporation or any other person

1 holding a particular office outside the corporation shall be a
2 director or directors," we know that, "unless the articles of
3 the incorporation or the bylaws provide otherwise, such
4 director or directors, who are indeed officers, shall have the
5 same rights, duties and responsibilities as other directors."

6 So, your argument is that because he wore two hats,
7 he was a Director -- well, he was the President-Elect, and by
8 virtue of that, he was also a Director, and the bylaws don't
9 provide otherwise, then he, in his capacity as Director, has
10 the same rights, duties and responsibilities and he can only
11 be removed as President-Elect by following the Director
12 removal provisions then; is that right?

13 MR. WACHEN: Correct.

14 THE COURT: All that right?

15 MR. WACHEN: Correct.

16 THE COURT: What is it they should have done then,
17 if that's correct?

18 MR. WACHEN: Your Honor, what they should have done
19 is they should have followed the procedures in 108.35(a).
20 Makes it very clear. You read section (a), and what it says
21 is the first -- the first sentence has a general provision,
22 but the second sentence says that in the case of a corporation
23 like this corporation -- we all agree this is -- falls into
24 that category, no director may be removed except for cause if
25 the articles are -- of incorporation or the bylaws so provide.

1 So, no director may be removed. They can be removed
2 if the articles or the bylaws provide for removal for cause.
3 That's what the language says. That's what the statute says,
4 Your Honor, and that's not what happened here. And they say,
5 "Well, you know, it can't be that we can't remove him at all."
6 Well, of course, you can remove him.

7 THE COURT: So the bylaws -- I think everyone
8 agrees, or maybe not, are the bylaws silent with respect to
9 removal of the president-elect or president?

10 MR. WACHEN: Yes, Your Honor.

11 THE COURT: All right. So, the argument must be,
12 from your position, your vantage point, that he's certainly a
13 director and because he's a director, entitled to hold a
14 position as an officer, the Court has to read 108.35(a) in
15 tandem with 108.50(c).

16 MR. WACHEN: Correct.

17 THE COURT: And the board then had only one choice
18 to remove him and that was to remove him as a Director because
19 even though he's President-Elect, he's a Director and we know
20 there are provisions for removal of a director for cause,
21 right? And this certainly was at least arguably cause.
22 That's another issue.

23 MR. WACHEN: Well, they never -- they've never
24 alleged that it was for cause, and there was -- there was no
25 discussion, and it's in my client's affidavit, declaration

1 that he wasn't removed for cause. There was no discussion
2 about removing him for cause.

3 THE COURT: In fact, he was told in an e-mail prior
4 to the meeting that they weren't going to even discuss
5 discipline or anything like take any action regarding
6 discipline, words to that effect, right?

7 MR. WACHEN: Correct. I mean, there are two
8 fundamental problems here, Your Honor. There is the problem
9 that they did not follow the requirements of 108.35 regarding
10 removal of directors, and the other problem they had was they
11 did not follow proper procedures.

12 THE COURT: What were the procedures they should
13 have followed?

14 MR. WACHEN: Well, several. One is, in order to
15 remove a director --

16 THE COURT: All right.

17 MR. WACHEN: -- you have to give notice that you're
18 going to remove a director. They did not do that. The notice
19 didn't say, "We're going to remove Mr. Schobel; that's the
20 purpose of the meeting." That's -- the statute says that has
21 to be in the notice. They did not do that.

22 THE COURT: Yeah.

23 MR. WACHEN: They also -- the notice for the meeting
24 said "no telephone participation." They allowed telephone
25 participation, and the second --

1 THE COURT: Well, they can remove him as director
2 but he can still be president-elect, though, right?

3 MR. WACHEN: Could they remove him as a director
4 and --

5 THE COURT: Say they removed him as a director for
6 cause, could he still be president-elect?

7 MR. WACHEN: That's an interesting question. I'm
8 trying to think about that. The problem is that the two are
9 connected and --

10 THE COURT: But he's only a director if he's
11 president-elect.

12 MR. WACHEN: Correct.

13 THE COURT: But not the -- not vice-versa, though, I
14 mean, he's not --

15 MR. WACHEN: Well, I think, as a practical matter,
16 if they could remove him for a director, they would be able to
17 remove him as a president-elect, so the practicality of it --

18 THE COURT: I was trying to think of a situation
19 where they may not want him as a director, but he's fine where
20 he is as president-elect. I don't know. Maybe there is a
21 scenario there. I'm not sure what all the functions and
22 duties and responsibilities of director are, but to the extent
23 that maybe they conflict with him being president-elect or
24 president, query whether they could remove him as director. I
25 don't know. You don't think so.

1 MR. WACHEN: Well, I don't think so, and that's
2 not -- their focus was only on his being president-elect.
3 They ignored the fact that he was a director.

4 THE COURT: Right. They never mentioned him -- his
5 position as director at all.

6 MR. WACHEN: Well, they just -- and to this day they
7 are focused solely on removal of officer provisions. They're
8 not focused on removal of director position, which is really
9 the threshold issue here. Can you remove someone who is an
10 officer/director given the provision of 108.50 that
11 officer/directors have the same rights as regular -- as other
12 directors, not officer/directors.

13 THE COURT: They never focused on that. They never
14 said you're being removed as officer/director.

15 MR. WACHEN: Well, they just -- they just -- they
16 never said they were going to remove him, period. They just
17 said we're --

18 THE COURT: They don't talk about this.

19 MR. WACHEN: We're just going to talk about this
20 letter, and when they get to the meeting, they start talking
21 about other things.

22 THE COURT: And what happened here? He got an
23 e-mail or he got a telephone call and invited him to this --

24 MR. WACHEN: He was on the board. I think we all
25 agree that he was on the board on July 14th and the

1 President-Elect. He got a notice, like all the other
2 directors, that said there is going to be a meeting on
3 August 5th to consider what was written in this letter. The
4 letter referred to some things that both sides have provided
5 to you under seal, and --

6 THE COURT: Let's just refer to it as a sealed
7 matter for purposes of this, and we can delete that reference
8 to sealed matters.

9 MR. WACHEN: And -- I kind of lost my train of
10 thought. They provided that, and they said that there would
11 be no call -- there wouldn't be any call-in participation.
12 They weren't neutral on that. That's exactly -- the statement
13 is attached to Ms. Downs' declaration, the notice. It says:
14 "There will be no call-in participation."

15 The statute requires -- their bylaws require ten
16 days' notice for a meeting. They gave enough notice on July
17 14th, but the first time they ever mentioned anything about
18 that you would be allowed to call in by telephone was on
19 July 31st. That was five days before the meeting.

20 THE COURT: That was the letter -- that was the
21 e-mail letter, I guess, to members of the board, right?

22 MR. WACHEN: Correct, Your Honor.

23 THE COURT: And they told him then, this meeting
24 will not consider whether any disciplinary action as to the
25 President-Elect is appropriate at this time.

1 MR. WACHEN: Yes.

2 THE COURT: Under the Academy's bylaws, all
3 disciplinary matters -- this is paragraph 2 -- are considered
4 in the first instance by the ABCD. The Academy takes
5 disciplinary action, if at all, only in response to a
6 recommendation from the ABCD.

7 MR. WACHEN: And so this is -- I mean, this is the
8 ultimate discipline. They have removed him from office. They
9 said they aren't --

10 THE COURT: So, things accelerated when this meeting
11 started then. I mean, things -- he was not told you could
12 have an attorney present.

13 MR. WACHEN: Correct, Your Honor.

14 THE COURT: But he knew they were going to
15 discuss --

16 MR. WACHEN: He knew they were going to -- I didn't
17 mean to interrupt, but he knew they were going to discuss the
18 letter. The letter didn't even call for removal. It called
19 for suspension. He knew that was going to be a subject of the
20 conversation. He did not know --

21 THE COURT: How many members of the board
22 participated in this meeting? Some participated by phone; is
23 that right?

24 MR. WACHEN: Yes. There were a total of 27 who
25 participated of the ones who -- including the ones by phone.

1 Of the ones who participated in person, the majority voted to
2 keep him in office, didn't vote for a removal. So, if we
3 are --

4 THE COURT: The majority of the people in person.
5 Why is that significant, they were in person?

6 MR. WACHEN: To the extent that that meeting was
7 anything but meaningless, which -- because it didn't follow
8 the law. It was -- the notice for the meeting said everyone
9 who is going to participate had to be there in the room.

10 The people who are in the room, the majority of them
11 voted against removal. And the President in his -- in his
12 follow-up e-mail from the notice, identified the very concern
13 that basically played out; that he was concerned about the
14 fairness of someone being judged by his contemporaries and
15 it's -- that -- that e-mail is attached to Ms. Downs'
16 declaration as well.

17 THE COURT: I've seen it. Right.

18 MR. WACHEN: And it's in our complaint, that the
19 concern of being judged by your contemporaries from a distant
20 place; they don't get to see him in person...

21 THE COURT: Is there a tape of that? I don't recall
22 whether there's a transcript of that telephone hearing or not.

23 MR. WACHEN: I don't believe so. I wasn't there.
24 My understanding is, no, and during the meeting, it was
25 supposed to be a two-hour meeting. Half the meeting was -- he

1 wasn't part of it. When he did get allowed to come back in,
2 50 minutes of the discussion was attacking him not only on the
3 things in that sealed matter but also on subjects that had
4 never been noticed before.

5 The purpose of the meeting was supposed to be
6 limited to this discussion. The meeting, we weren't -- I
7 think that one of the notices says, "We're not going to get
8 into any of the specifics." So, essentially, my client is in
9 a position where he can't talk about the specifics to get his
10 side of the story in the sealed matter. He has to defend
11 himself on information that is thrown at him out of the blue
12 without any warning, and he has ten minutes to do so after
13 he's been attacked for 50 minutes.

14 That's giving -- that's fair? Your Honor, I would
15 submit just that alone is unfair. And for them to claim that
16 this was a deliberate process and they gave him the
17 opportunity is -- I mean, if that's deliberative, an hour to
18 decide whether you're going to be the president of the
19 organization or not? I mean, that's what we're talking about
20 here, Your Honor.

21 A man who's given a tremendous amount to this
22 profession, to this organization, and they decide in an hour,
23 you know, after he's talked for ten minutes, "Okay, hurry up,
24 we want to vote." They decide, "You're out." And then they
25 say, "Well, we're not going to -- we're not telling anybody

1 why you're out," but since they never removed anyone from
2 office in their 40-year history, word gets out. I mean, all
3 they say is "the position is vacant."

4 Everyone knows this guy. Everyone knows he's
5 supposed to be the next President. He's a very outspoken --
6 and he's in the forefront of the profession and in the
7 organization, and then all of a sudden --

8 THE COURT: That's part and parcel of your closing
9 arguments for damages. I mean, that's it.

10 MR. WACHEN: Your Honor, for my client it's not
11 about money. It's about being treated fairly, having the
12 opportunity to serve as the President of this organization.
13 That's what's important to him.

14 THE COURT: I'm not minimizing his concern. I read
15 his declaration, and his pain came through. I'm just -- I'm
16 just concerned, though, as to whether the focus should be on
17 extraordinary -- the extraordinary relief of an injunction as
18 opposed to a remedy at law, which arguably is adequate.

19 MR. WACHEN: Your Honor, I would say it is
20 inadequate, respectfully, and the extraordinary remedy is, I
21 think in this context, not quite so extraordinary. Because
22 what we're talking about is a short amount of time. This is
23 basically a legal issue on whether or not he was properly
24 removed, and with everyone's cooperation, that issue could be
25 resolved before the 26th.

1 THE COURT: Do you really think it would be
2 resolved? I mean, let's play this out for a second. You
3 know, the Court grants a temporary restraining order for ten
4 days, maybe extends it for another ten days or so, and October
5 the 20th?

6 MR. WACHEN: 26th, Your Honor.

7 THE COURT: 26th. What, is there a ceremony to
8 swear him in?

9 MR. WACHEN: I believe there's an annual meeting,
10 and at the conclusion of the meeting --

11 THE COURT: He's sworn in and everyone's happy? You
12 got to be kidding.

13 MR. WACHEN: The members are behind him. I mean,
14 there are these --

15 THE COURT: Members of the Actuarial Association.

16 MR. WACHEN: Correct.

17 THE COURT: And we're talking how many members
18 there?

19 MR. WACHEN: I think 17,000, Your Honor.

20 THE COURT: 17,000 members.

21 MR. WACHEN: And we also have, you know, a situation
22 where most of the people who voted against him are coming off
23 the board this year, and the people who are coming on the
24 board are people who are friends with him, allies, and you
25 know, this notion that why would he want to serve with people

1 who voted against him, the reality is that's not what was
2 going --

3 THE COURT: Well, I'm not so concerned about that.
4 I'm just concerned about the scenario itself of him being
5 President. Would he really be a viable President under those
6 circumstances, or is that something the Court should concern
7 itself with?

8 MR. WACHEN: Well, I think in some ways -- first of
9 all, I think the answer to the question is, yes, he would be a
10 viable President.

11 THE COURT: Under those circumstances?

12 MR. WACHEN: Yes. Because what he -- I think
13 people --

14 THE COURT: I'm not focusing on his professionalism,
15 his -- you know, his professional acumen because that's fairly
16 well demonstrated. You know, he's a professional and has been
17 for over 30 years or so, but to be the leader of this
18 organization? I mean, is that the appropriate remedy?

19 MR. WACHEN: That is -- had there not been a board
20 meeting, that's what would have happened, and had the board
21 meeting -- had the board followed the proper procedures, I
22 mean, we wouldn't be even talking about this, because he would
23 still be -- they could --

24 THE COURT: I would have to also balance the harms
25 to everyone here, don't I? It's not just irreparable harm to

1 the Plaintiff. It's the interest of others that I have to
2 take in consideration, don't I?

3 MR. WACHEN: You have to consider what harm it's
4 going to have to others? I mean, one harm by ruling for them
5 is it's going to harm the organization, quite frankly.

6 THE COURT: It's going to harm the organization.

7 MR. WACHEN: Yes. It's going to deprive them of a
8 leader, it's going to embroil them in this litigation and they
9 are now part of an organization --

10 THE COURT: I'm sorry, if I grant the injunction?

11 MR. WACHEN: No, no, no. If you deny the
12 injunction.

13 THE COURT: If I deny the injunction, right. Well,
14 they're already embroiled in litigation. You filed a
15 complaint for money damages, they're here; regardless of what
16 I do with regards to the injunction, you're not going to walk
17 away from this lawsuit if you get an injunction, are you?

18 MR. WACHEN: You know, that's up to my client. As I
19 said, what's important -- this is not a suit about money.
20 That's what he said to me on the phone. This is a suit about
21 principle and this is a suit about doing the right thing and
22 following the proper procedures by a professional
23 organization, and this is a suit about allowing him to realize
24 what he is rightfully due. I mean, he is the
25 President-Elect/Director. I mean, that's -- that is the way

1 the law reads. And so essentially this is effectively like a
2 coup. They basically said, "We're not going to allow you to
3 serve as President."

4 That's effective. Suppose there hadn't been a
5 meeting, and all they did was say, "You know what, Bruce, we
6 don't like you anymore; we're going to do everything we can to
7 prevent you from serving as President"?

8 THE COURT: What is it that you're asking me to do?
9 I mean, normally -- and oftentimes litigants miss the point on
10 this, but normally when a court grants a restraining order,
11 it's to preserve the status quo.

12 MR. WACHEN: Correct.

13 THE COURT: Right, pending the outcome of
14 litigation. So, what is it that you're asking me to preserve?

15 MR. WACHEN: The status quo is that he is the
16 President-Elect and Director and that you'll rule on whether
17 what they did was valid or not at a preliminary injunction
18 hearing.

19 We moved for preliminary injunction, and as I said,
20 I think most of the issues here are legal issues, and so it
21 seems to me that it's something that could be -- it's
22 certainly on that issue, that can be resolved at that time, if
23 not now.

24 THE COURT: I mean, that's down the road somewhat,
25 but I'm not -- well, we can talk about that if we get to that

1 stage, preliminary injunction, merits determination, et
2 cetera, but arguably, if we get to that stage, the issues are
3 fraught with factual disputes and query whether an injunctive
4 relief lies as a matter of law absent some sort of
5 fact-finding hearing before a jury.

6 That's -- but we can talk about that if and when we
7 get to that point, but it's a little bit different here at
8 this stage, the TRO stage.

9 MR. WACHEN: What we're asking for, Your Honor, is
10 to enjoin them from interfering with his performance as the
11 President-Elect.

12 THE COURT: You're not asking me to reinstate him
13 because it's your position he was never lawfully removed as
14 President.

15 MR. WACHEN: Correct, Your Honor.

16 THE COURT: Not interfere with his current tenure as
17 President-Elect and do not interfere with him succeeding to
18 his office of President on October the 26th, right? That's
19 what you're asking for.

20 MR. WACHEN: Yes, Your Honor.

21 THE COURT: What else are you asking for at this
22 point?

23 MR. WACHEN: We're asking you to stop them from
24 interfering with his -- they are taking steps to essentially
25 try to fill in his position and they are treating him like

1 he's not the President-Elect and Director.

2 THE COURT: Has someone been appointed? Has a
3 successor been appointed as President-Elect?

4 MR. WACHEN: Not that I know of.

5 THE COURT: Has anyone called for a special
6 election?

7 MR. WACHEN: The President of the organization has
8 posted on their website last Thursday that he is putting
9 together a nominating committee to pick a replacement for the
10 President-Elect, which isn't something even contemplated in
11 their bylaws, didn't give a time frame that he announced to
12 the committees --

13 THE COURT: No one's ever resigned as
14 president-elect during a term or --

15 MR. WACHEN: I'm sorry?

16 THE COURT: No one's ever resigned as the
17 president-elect during a term or unfortunately died or
18 anything?

19 MR. WACHEN: Well, there are provisions in the
20 bylaws if somebody resigns. It's different than if
21 somebody -- I mean, resignation is different than removal.

22 THE COURT: Now, in the bylaws, are there provisions
23 for the replacement of a president-elect if he or she as
24 president-elect resigns, or just director?

25 MR. WACHEN: There is -- what it says, Your Honor,

1 is if the president resigns, then the president-elect succeeds
2 him.

3 THE COURT: I understand that.

4 MR. WACHEN: If the president-elect resigns?

5 THE COURT: Right.

6 MR. WACHEN: Then that position gets filled at the
7 annual board meeting. What happens is, my understanding is
8 they have an annual board meeting that precedes the annual
9 meeting, let's say a week or six or seven days, and if -- I
10 mean, it says explicitly in the bylaws that if the
11 president-elect position is vacant at the annual board
12 meeting, then they fill that position.

13 THE COURT: All right. An annual board meeting
14 would be the date that the President-Elect would normally
15 become President then, is that right, October the 26th; is
16 that right?

17 MR. WACHEN: You know what, I may have misspoke.
18 What it says is that if the president-elect position is
19 vacant --

20 THE COURT: Right.

21 MR. WACHEN: -- then I believe it says that they
22 vote on the next president. So, in other words, normally the
23 president-elect succeeds --

24 THE COURT: That would make sense because there
25 would be no one to succeed the outgoing president.

1 MR. WACHEN: Right. After they do that, then they
2 elect a president-elect as they normally would.

3 And so, Your Honor, the other aspects of injunction
4 are there are things that are happening today, next week that
5 my client has been promoted out there to organizations around
6 the country.

7 THE COURT: Let me go over this again. I want to
8 make sure I understand it. Your argument very succinctly is,
9 "Judge, my client is not only the President-Elect, but he's a
10 Director. The statute, the Illinois statute that everyone
11 argues controls in this case, provides for very precise
12 procedures for removal of the Director that were not afforded
13 to my client. The statute doesn't make any mention about what
14 happens in the event that there are efforts made to remove a
15 President-Elect."

16 So, your argument is that the Board didn't comply
17 with removal provisions for the Director, which my client was,
18 and therefore, whatever they did is unlawful.

19 MR. WACHEN: Correct.

20 THE COURT: Insofar as removal. That's your
21 argument.

22 MR. WACHEN: Well, it's a little more than that.

23 THE COURT: Well, tell me what else is missing.

24 MR. WACHEN: Yeah. Well, the other thing, the other
25 part of it is, they didn't even comply with the removal of

1 just an officer under that statute. If you had an officer who
2 wasn't a director, they didn't comply with that either.

3 THE COURT: That's 1.50, right. Yeah. So, I have
4 to read 1.08 --

5 MR. WACHEN: It doesn't apply, but to the extent
6 we're talking about the process that was observed, that was
7 not valid either because of the lack of sufficient notice, the
8 telephone participation, counting those telephone votes. I
9 mean, our position is, to the extent that meeting was validly
10 noticed, then he -- the vote -- the vote failed because the
11 people in the room voted against.

12 THE COURT: Right. But they disagreed with your
13 108.50(c) argument.

14 MR. WACHEN: Well, you know, there's a -- I forget
15 which -- there's a two-line footnote that just says I can't be
16 right, even though --

17 THE COURT: Aren't they relying on a catchall
18 provision that basically gives the board some sort of inherent
19 authority?

20 MR. WACHEN: Well, yes, Your Honor.

21 THE COURT: What about that? Why aren't they
22 absolutely correct?

23 MR. WACHEN: If that were the case, then basically
24 why do you need any other bylaws? The board can do whatever
25 it wants whenever it wants, can ignore Illinois law. I mean,

1 this is a creature of Illinois law. If there weren't Illinois
2 law, there would be no Academy. So, that obviously can't be
3 correct that -- I mean, they have directors who are not
4 officers.

5 Are they saying that we don't have to comply with
6 removal of directors under 108.35 because our bylaws say we
7 can do whatever we want whenever we want? They're not even
8 arguing that. I mean, it's an absurd provision.

9 So, that provision is a catchall to the extent they
10 are working within the boundaries of the law. The law is the
11 overlay. The Illinois statute is the overlay. You know,
12 there are some provisions that say, "Unless the articles or
13 bylaws provide," others don't say that. These ones on removal
14 of directors -- removal of a director, that's a pretty serious
15 thing, and that's why the Illinois legislature has required
16 such strict things to occur before they will allow a board to
17 do that.

18 And what you have here, we posited the scenario. If
19 their rule were right that officer/directors don't have the
20 same rights as directors, even though that's what the statute
21 says, then if they had a director they didn't like and they
22 know that it's very difficult to remove a director under
23 Illinois law, all they do is make him an officer and then they
24 can just remove him by a majority. Well, that can't be right.

25 THE COURT: Elect him out of office.

1 MR. WACHEN: Yeah.

2 THE COURT: Move him up, make him president.

3 MR. WACHEN: Exactly. Up and out. Exactly, Your
4 Honor.

5 THE COURT: Does Illinois statute provide for
6 removal of a president?

7 MR. WACHEN: Not specifically. It provides -- I
8 believe it has a general provision that boards can remove
9 officers. That's all it says. I mean, in effect. And -- but
10 again, I think it really comes back to 108.50(c) and the
11 meaning of what rights, duties and responsibilities are; what
12 are the rights of a director.

13 THE COURT: 108.55, I think everyone agrees the
14 bylaws don't really speak to the removal of officers, I think.
15 108.55, any officer or agent may be removed by the board of
16 directors -- any officer or agent may be removed by the board
17 of directors or other persons authorized to elect or appoint
18 such officer or agent, which arguably could include the
19 president-elect, but such removal shall be without prejudice
20 of the contract rights of any- -- et cetera. But it doesn't
21 say how, does it?

22 MR. WACHEN: Doesn't say how; it doesn't say by what
23 mechanism, by that vote.

24 THE COURT: May be removed by the board of
25 directors. It implies that there would be bylaws for that.

1 Any officer or agent may be removed by the board, but it
2 doesn't say how.

3 MR. WACHEN: What it does say, back to 108.50(c), I
4 think it's critical, that director/officers have the same
5 rights, duties and responsibilities as other directors.
6 Rights, Your Honor. This is an issue about rights.

7 And is requiring a board to meet a super majority
8 before they can arbitrarily knock someone out, I think that's
9 a right, Your Honor. Essentially, what this statute is saying
10 is you treat them no differently than anybody else, and
11 everybody agrees that the two positions are intertwined. He's
12 a director. No one disagrees with that.

13 THE COURT: What do the directors do? What do they
14 do? Do they have any function, any official function?

15 MR. WACHEN: You know, my understanding is they have
16 board meetings and they -- I think maybe it's defined in the
17 bylaws, but they carry on the business of the corporation,
18 make the big decisions, are leaders, essentially, in the
19 organization.

20 THE COURT: No one receives any compensation for --
21 the directors aren't compensated, the president's not
22 compensated.

23 MR. WACHEN: Correct.

24 THE COURT: Any fringe benefits they're entitled to
25 travel or...

1 MR. WACHEN: I'm not sure about that.

2 THE COURT: What does the president do? He
3 attends -- he lobbies. He does -- does he do -- does he or
4 she do the extensive lobbying, the handshaking and whatever
5 else is entailed by lobbying?

6 MR. WACHEN: I'm not sure about the answer to that,
7 Your Honor, but the president can set the policy. He's --

8 THE COURT: Set the policy, can set the directions,
9 he's the captain of the ship, he can determine in which
10 direction the organization is going to move in for the
11 upcoming year. The term is limited to one year; is that
12 right?

13 MR. WACHEN: The term of president is one year, yes.
14 It's -- the succession is your -- first you're a
15 president-elect, then you're president, then you're past
16 president, then you're secondary past president, so it's a
17 four-year term, essentially, and it's automatic. When you're
18 the president-elect, you automatically become the president
19 one year later. I just grabbed the bylaws, Your Honor.

20 Article VI, Section 1 talks about the president.
21 "The President shall preside at the meetings of the Board and
22 of the Academy shall appoint committees authorized by the
23 Board and may sign contracts or other instruments that the
24 Board has authorized to be executed."

25 THE COURT: What's your response to Defendant's

1 argument that *Murray v. Sampson* is applicable here?

2 MR. WACHEN: The case is totally different. This is
3 the case of the probationary -- am I thinking of the right
4 case, the probationary employee?

5 THE COURT: Supreme Court case, right.

6 MR. WACHEN: No, it's different in the sense that,
7 first of all, the Court -- there was some issues involving --
8 jurisdiction over these kinds of disputes because it was a
9 government employee. The employee had already been terminated
10 and this was her trying to get her job back.

11 THE COURT: And there was no dispute about that.

12 MR. WACHEN: Correct. And the Court did -- Justice
13 Rehnquist did recognize that there are situations -- we're not
14 saying -- effectively, what the Court said is, we're not
15 saying you can never get an injunction in a situation like
16 this. It has to be beyond kind of the normal situation. It
17 has to be about more than just money.

18 THE COURT: Wasn't that case about reputation,
19 though?

20 MR. WACHEN: Well, sure.

21 THE COURT: Yeah, right, and that's what the Court
22 basically is focusing on. The request for relief can be
23 compensated by virtue of the damages route, though.

24 MR. WACHEN: She was suing -- if I recall correctly,
25 she was suing, she had lost her job, she had lost her

1 benefits, and remember, this is a probationary employee, a new
2 employee who's on probation as opposed to the President-Elect
3 of the most prominent actuarial organization. He's working
4 for free; he's volunteering his time; it's a leadership
5 position.

6 THE COURT: So, what's the difference there?

7 MR. WACHEN: The difference is, I mean, what the
8 Court said, there may be situations -- I'm trying to find if
9 it's in a footnote. There may be situations -- looking at the
10 wrong case. There may be situations where it would be
11 appropriate, and the difference here is that in that case she
12 was removed from her job, terminated. She wasn't working. In
13 our case, he wasn't removed. He's still the
14 President-Elect/Director. We're just trying to keep them from
15 interfering with his performance in that position.

16 THE COURT: Now, so, the most significant date is
17 October the 26th, but you're concerned about -- or your
18 client's concerned about his ability to do what, to meet and
19 greet next week, September the 10th, something's going to take
20 place, what?

21 MR. WACHEN: Correct. I believe he has a speech. I
22 forget exactly, it's somewhere in the midwest. He has another
23 speech, I believe, on the 11th. These are things I --

24 THE COURT: He was invited to appear and speak?

25 MR. WACHEN: As the President-elect, he's been

1 promoted to --

2 THE COURT: Was he told "don't show up"?

3 MR. WACHEN: I'm sorry? No. Well, no. What
4 they're saying is you can go but you can't hold yourself out
5 as the President-Elect and Director, and that's the reason
6 he's there. You know, this is the opportunity, excuse me, to
7 hear from the President-Elect.

8 THE COURT: It would be kind of awkward to go and
9 not say who you are or what you do and what you envision for
10 the upcoming year, it's great to be here.

11 MR. WACHEN: So, the little sign in front of the
12 podium says President-Elect, you know, someone would just kind
13 of white it out and it's just Mr. Schobel.

14 THE COURT: Just says his name, yeah.

15 MR. WACHEN: So, what message is that going to
16 convey? People are speculating, why was he removed? He must
17 have done something wrong. This has never happened before.

18 THE COURT: The website says he was removed, is that
19 correct, the actuarial website?

20 MR. WACHEN: It implies it because it says -- his
21 picture and name had been posted there since he became
22 President-Elect and now it says "vacant." You know, instead
23 of his picture and name, there's the word "vacant" next to it.

24 They issued an announcement that said that they were
25 forming this committee and they were quoted -- we cited the

1 article in our brief. They were quoted --

2 THE COURT: So, there's this mystique about what
3 happened to him then.

4 MR. WACHEN: I'm sorry?

5 THE COURT: I assume there's this -- in some circles
6 there may be a mystique about what happened to him.

7 MR. WACHEN: Sure. He must have done something
8 really wrong. That's what they're speculating about in these
9 chat rooms, the actuarial outpost. We attached some of it,
10 some examples.

11 THE COURT: Are people saying in these chat rooms,
12 "Well, did you hear that he was removed?" Are they saying
13 that?

14 MR. WACHEN: Well, some of them are saying that,
15 sure. They say "must have been removed."

16 THE COURT: Has the Board issued an official
17 position that he indeed was removed from his position as
18 either Director or President-Elect?

19 MR. WACHEN: All the Board has officially done is
20 say that he is no longer the President-Elect and Director.
21 They were quoted as saying that. However, there is a
22 posting -- there was a posting that appeared shortly, shortly
23 after this happened on the website, and it says -- it kind of
24 recounts what happened, and the only people who were in the
25 room --

1 THE COURT: The Board's website; is that correct?

2 MR. WACHEN: This is the actuarial outpost. It's, I
3 guess, a profession's -- the profession's website. And
4 essentially -- I'm trying to find it, Your Honor. This is
5 what it says, "On August 5th" -- this was posted on the
6 website. "On August 5th, 2009, in Minneapolis, the AAA
7 Board met to remove Bruce Schobel from the office of
8 President-Elect, i.e., he was impeached, which they did by a
9 vote of 17 to 9. All eight special directors voted to impeach
10 in June of 2009. 19 former presidents, most living former
11 presidents, except for the immediate Bill Bluhm and the past
12 president Steve Lehmann, petitioned the AAA Board to remove
13 Mr. Schobel from office."

14 That appeared out there shortly after this happened.
15 The word is out.

16 THE COURT: Yeah, there's a reference to a petition
17 having been filed to remove him from office, but there was no
18 formal petition in writing, was there?

19 MR. WACHEN: Well, there was the letter, the sealed
20 matter. Here's another one, Your Honor, that my partner gave
21 to me. "Since you don't lose your AAA membership due to being
22 convicted of securities fraud," and that's a reference to --

23 THE COURT: I understand, the security event, right.

24 MR. WACHEN: Yes. No, no, no, actually that's not
25 what it is. There was a notorious case that most actuaries

1 know about involving an actuary who was convicted of
2 securities fraud; I believe served jail time; he was not
3 removed from the Academy. His membership was kept current.

4 So, what they're saying is, "Since you don't lose
5 your AAA membership due to being convicted of securities
6 fraud, we can only assume that Bruce did something worse than
7 that."

8 THE COURT: And that's a posting in some blog?

9 MR. WACHEN: That was a posting on the blog, and
10 none of this is coming from my client, Your Honor. My client
11 is not talking about this, but somebody leaked this
12 information. Someone on the Board or someone in the
13 organization, obviously, leaked this information to this guy,
14 or this guy is one of the board members himself.

15 So the information is out there, and that's the
16 message, and that's the message that people are taking from
17 the -- from what the Academy is saying. And the reality of it
18 is, it's just not true. He wasn't removed. He is the
19 President-Elect and Director. They are just effectively
20 keeping him from performing his duties, and that is -- that is
21 why the injunction is appropriate.

22 For now, to preserve the status quo, keep him where
23 he is and until Your Honor is ready to rule on the merits.

24 THE COURT: But even if I rule on the four factors
25 in your favor, though -- and again, I'm asking for your help.

1 Even if I say that there's a likelihood of success on the
2 merits, that you've demonstrated through declaration and
3 argument, irreparable harm, reputation -- irreparable harm,
4 that the balances are in your favor, how do I -- how do I
5 address the inadequacy of the remedy -- of the remedy at law,
6 though? Damages. How do I say damages, money is not adequate
7 enough to compensate your client for his loss?

8 MR. WACHEN: Well, because there are different
9 losses. What we have is, there's a reputational loss, and
10 that is something that can often be compensated by damages,
11 but that's not all that we're talking about here.

12 What we're talking about is the opportunity to be
13 the president of this prominent actuarial organization,
14 something he spent his whole career trying --

15 THE COURT: The uniqueness of the position.

16 MR. WACHEN: Exactly.

17 THE COURT: Yeah. No case law anywhere, though,
18 that deals with that uniqueness of the position? Someone was
19 ousted from -- I'm not going to say a president of a
20 university, although that might be unique.

21 MR. WACHEN: Your Honor, I don't know. The answer
22 is I don't know. What I do know is there is a case that we
23 cited in our papers, the *Muhammad* case, and that case is also
24 very similar to this situation. It's a case from an Illinois
25 appellate court, and in that case it was a president and -- a

1 president and chairman of the board, so similar situation,
2 officer and director, and the Court said that what the -- what
3 the board in that group did, in that case did in removing was
4 invalid, did not follow the statute and send it back down.

5 THE COURT: Yeah. What precipitated all of this?
6 There was a telephone call from someone basically applying
7 pressure to --

8 MR. WACHEN: Yes. Well, there was, I believe -- I
9 don't know if there was a letter first or telephone call.
10 There was the fellow who wrote that letter, who is the
11 ringleader with that letter --

12 THE COURT: He was the director.

13 MR. WACHEN: He was a past president. I'm not sure.
14 I don't think he's a director.

15 THE COURT: He was not a current director at the
16 time he wrote the letter.

17 MR. WACHEN: That's correct.

18 THE COURT: All right.

19 MR. WACHEN: What happened is, there was a
20 proceeding involving another organization. It had nothing to
21 do with my client acting as an actuary. It had nothing to do
22 with the Academy. It was another organization. It was a
23 proceeding there, a private proceeding. A decision was made.
24 That decision, somehow this guy got ahold of that decision and
25 used that as a tool.

1 This is an opportunistic situation. People don't
2 like -- there's some people out there who don't like my client
3 because they don't agree with his agenda. They don't agree
4 with the fact that he is trying to push the organization to a
5 place where he thinks it belongs in terms of the prestige, in
6 terms of what it can do for the actuaries out there. That's
7 what he did in the case of the Society of Actuaries where he
8 served previously. The board was totally behind him.

9 And by the way, the organization -- and I don't know
10 that we need to get into the merits of what kind of -- you
11 know, what the underlying issue was, but you will see, we
12 submitted with our declaration, the counter- -- a
13 counter-letter from the current president of the organization.

14 THE COURT: I read it, yeah.

15 MR. WACHEN: And their position was this is
16 ridiculous.

17 THE COURT: I read it. I read it. If I issued a
18 TRO, would that preclude the Board from calling for a new
19 election or removal of him after two-thirds vote?

20 MR. WACHEN: What I think it basically does is it
21 basically -- he is the President-Elect/Director. They can do
22 whatever they want as long as they comply with the law.

23 Yeah, if they comply -- if there was enough -- if
24 there were enough directors -- we don't think there are -- if
25 there were enough directors to remove him the right way, they

1 could pursue that if they wanted to. We're not precluding
2 that.

3 THE COURT: Well, certainly the Court could curtail
4 whatever the injunction the Court issued.

5 MR. WACHEN: Sure.

6 THE COURT: All right. Anything further?

7 MR. WACHEN: No, Your Honor, unless you have other
8 questions. I think the point --

9 THE COURT: I'm just about questioned out. We're
10 going to give the court reporter a short recess, though.

11 All right. We'll take a ten-minute recess, and I'll
12 hear from Defense counsel. And again, you know what, I'm
13 going to use every opportunity I have, as I oftentimes do in
14 cases, to say, you know, everyone's got something at stake
15 here, and that's the reason why I suggest -- I take these
16 matters very seriously, and if I didn't think that -- you
17 know, most of us have been doing this for awhile and can, you
18 know, spot a case that in someone's reasoned opinion calls out
19 for a fair settlement, and this seemed to be one of those
20 cases where everyone, everyone has a lot at stake here. You
21 have a prestigious organization, you have a prestigious
22 Plaintiff and battle lines are drawn, but that's not to say
23 that there cannot be a fair, fair resolution.

24 It may take some time, but oftentimes all you need
25 is the involvement and active participation of a skillful

1 third party, you know, who has no stake in the outcome of the
2 case other than to be a fair mediator. There's no harm in
3 talking. It's not to say I'm not going to grant the relief,
4 you know, I haven't gotten to that point yet, but I'm not
5 going to lose the opportunity to remind everyone again that
6 there's no harm in talking about these issues, because both
7 sides have a lot at stake here.

8 MR. WACHEN: Your Honor, if you want me to go back
9 to my client and tell him that message, I'm happy to do it.

10 THE COURT: You know, he doesn't have to be here,
11 he's not here, that's fine, but you know -- and he's got --
12 you know, he's got a wonderful lawyer, but you know, there's a
13 lot to be said about sitting down at the table to see if he
14 can strike a fair resolution.

15 Sometimes that means everyone gives in a little bit,
16 too, but you move on, you know, you put this behind you. This
17 case conceivably could drag on for some time. I mean, it's a
18 very interesting case. It's very complicated. Will it be
19 resolved quickly? You know, I don't know enough about the
20 case, you know. What's the next step down the road? Will it
21 be discovery? Will it be motions? Will it be more public
22 attention and scrutiny? I don't know. But right now we're
23 going to have a recess, ten-minute recess.

24 THE DEPUTY CLERK: All right. This honorable court
25 stands in recess for ten minutes.

1 (A BRIEF RECESS WAS TAKEN.)

2 THE DEPUTY CLERK: Please remain seated. This court
3 is again in session.

4 THE COURT: All right. I'll hear from Defense
5 counsel. Keep in mind I read your pleadings. I need to get
6 some answers to some questions I have first.

7 Under this Illinois statute, an officer who's also a
8 director gets all the same rights as other directors,
9 including certain procedural rights with respect to removal.
10 Why isn't Plaintiff accorded those rights of removal in this
11 case?

12 MR. REES: There's no reference to "right of
13 removal" there. In this case, the Plaintiff was appointed, he
14 was elected an officer, and by virtue of that, he became a
15 director. He has --

16 THE COURT: He's got -- the director has greater
17 rights than a president-elect?

18 MR. REES: No, no, he is -- his rights as and his
19 existence or status as a director are derived entirely from
20 his status as a president. There was no separate vote to make
21 him a director. It simply happened automatically under the
22 bylaws by virtue of his becoming president.

23 That provision referring to the rights, an officer
24 shall have the same rights or duties as director. If the
25 officer is serving as a director, must be read in harmony with

1 the other provision that says, this is 108.50, which says that
2 the articles of incorporation or the bylaws may provide that
3 an officer shall be a director or directors while he or she
4 holds that office.

5 In other words, just during the duration of being an
6 officer, the officer may be a director, and that's precisely
7 what happened here. And so when the -- when his -- when he
8 was removed as President-Elect, that terminated --

9 THE COURT: But the Board's position is that he has
10 been removed then, correct?

11 MR. REES: Oh, yes, absolutely.

12 THE COURT: You haven't published this anywhere,
13 have you?

14 MR. REES: Out of great sensitivity to Mr. Schobel,
15 the Board has announced a vacancy but hasn't referred to him
16 by name.

17 THE COURT: Doesn't that raise more questions than
18 answer those questions?

19 MR. REES: No. The questions that have been raised
20 have come from Mr. Schobel's own publicity in the blog excerpt
21 that's attached to our opposition in the on chat room comments
22 that have been made. The Board has voted by a majority,
23 properly under Illinois, to remove Mr. Schobel. He has been
24 removed from the position.

25 THE COURT: Was the proper notice given, the ten

1 days' notice given for this meeting?

2 MR. REES: Yes, absolutely. There was --

3 THE COURT: Tell me about that. When was the notice
4 properly given?

5 MR. REES: Sure. The notice was initially given on
6 July 14th, I believe, well in advance of the ten-day notice.
7 The procedures --

8 THE COURT: What about notice on July 31, what was
9 the purpose of that?

10 MR. REES: And the notice of -- that was a follow-up
11 communication, which was -- in connection with -- Mr. Schobel
12 was consulted that -- that specified that the meeting indeed,
13 it confirmed that the meeting was to consider Mr. Schobel's
14 removal as President, and it very carefully delineated
15 procedures for telephonic communication, or telephonic
16 participation in the meeting.

17 THE COURT: And this on July 14, did it mention that
18 the purpose of the meeting was to address his removal? That
19 didn't mention that, did it?

20 MR. REES: Well, it mentioned -- what it mentioned
21 was that a request, that a letter had come in from 19 past
22 presidents concerning a sealed matter, and that in light of
23 that, a meeting was being convened to discuss that subject.
24 That was the purpose of the meeting. The 19 past
25 presidents --

1 THE COURT: This is to discuss the letter, right,
2 but it didn't -- it wouldn't signal to any reasonable person
3 that the subject of the meeting was going to be a discussion
4 about his removal, though.

5 MR. REES: Your Honor, every single communication, I
6 think if you look at them, signifies that this relates to
7 his -- Mr. Schobel's future with the organization, a critical
8 issue, it's referred to as whether he should be suspended, in
9 other words, not serve as president-elect or president. Every
10 single one of those communications deals with removal. And if
11 I may clarify something --

12 THE COURT: Wait, wait. July 14, what is it about
13 the July 14 communication that signals removal discussion? It
14 says, "We're going to talk about this letter that was
15 received."

16 MR. REES: Right, but the letter itself, which is
17 what we submitted to you in camera, provides context for this
18 July 14th notice. This July 14th notice can't be read in
19 isolation without the context of the sealed matter, which was
20 submitted in camera to you. When those are read clearly
21 together, there's no doubt that what was on the agenda and the
22 purpose of the meeting was whether or not to remove the
23 Plaintiff as president as he was removed by a majority of the
24 vote.

25 There is a separate reference, Your Honor, and this

1 was pointed out --

2 THE COURT: What about the communication dated
3 July 31, paragraph 2, which basically says, "This meeting will
4 not consider whether any disciplinary action as to the
5 President-Elect is appropriate at this time"?

6 MR. REES: Yes, Your Honor, that's an important
7 point. This was not discipline. If Your Honor looks at the
8 preceding paragraph, it makes crystal clear that disciplinary
9 action is something entirely different from what was being
10 considered because paragraph 1 --

11 THE COURT: Disciplinary action. He was removed,
12 wasn't he, at this meeting?

13 MR. REES: That wasn't -- under the Board's bylaws,
14 and this is addressed in the bylaws, this action of removal
15 was not discipline. Discipline refers to a public reprimand
16 or a private reprimand.

17 This, in context, as is made clear by the first
18 paragraph enumerated number 1, in the July 31st e-mail, was
19 to address the request that the Plaintiff be suspended from
20 continuing to serve, in other words, not serve as
21 president-elect or president, and the disciplinary proceedings
22 are a separate mechanism, and Mr. Schobel knows that, and to
23 argue that somehow Paragraph No. 2 didn't put -- didn't
24 somehow lull Mr. Schobel into thinking that his status as
25 President-Elect wasn't the topic for the meeting is to miss

1 the point.

2 THE COURT: Let's assume you're correct. Paragraph
3 1 talks about suspension, though, doesn't talk about removal
4 at all. So how was -- he wasn't put on fair notice that
5 they'd be talking about his removal.

6 MR. REES: Your Honor, every communication
7 referred -- there was -- his term as President-Elect was
8 approaching the time of the annual meeting when if he were not
9 removed as President-Elect, he would become President.

10 THE COURT: Is there any communication that says --

11 MR. REES: Suspension is tantamount to removal.

12 THE COURT: Is there any communication that predates
13 this meeting that tells him or any reasonable reader that the
14 subject of this meeting was to discuss his removal? Were the
15 words "removal" used anywhere in any of these e-mail notices?

16 MR. REES: I don't know if the word "removal" was
17 used, but in substance, every communication refers to this
18 critical issue. And furthermore, the procedures on which the
19 Plaintiff is relying are procedures that simply do not apply.

20 They are Illinois procedures that applied for the
21 removal of directors. They do not apply in the context of the
22 removal of an officer, which is what was voted on.

23 THE COURT: All right. What's the authority for the
24 removal of an officer?

25 MR. REES: The authority for removal of any officer

1 is Article III, Section 5 of the bylaws which provides that
2 the board shall have power to do all such acts and things as
3 may be appropriate to carry out the purposes of the Academy,
4 which would include responding to a letter from 19 past
5 presidents raising a significant issue as to whether the
6 Plaintiff was suitable to serve as President-Elect or
7 President of the organization.

8 THE COURT: That's called that catchall language.
9 Has that language been interpreted by any circuit court
10 anywhere?

11 MR. REES: I'm not aware of any interpretation, Your
12 Honor. But also, the Illinois act itself places no limitation
13 on removal of officers, providing that any officer or agent
14 may be removed by the board of directors or other persons, and
15 that's 108.55.

16 That does go on and point out that that's without
17 prejudice to any contract rights. In other words, it's
18 possible an officer might have an employment agreement and
19 would have rights under that. An officer could be removed
20 under the Illinois law, but to the extent that that prejudiced
21 any contract rights of the -- and here there's no contract,
22 but the point is there's nothing in Illinois law that is
23 prohibiting removal.

24 There's no reference in this provision to any
25 particular procedures that apply. Rather, it's understood

1 that officers may be removed. They may be removed by the
2 board if that's what the bylaws provide. That's consistent
3 with the bylaws here and --

4 THE COURT: So, you're asking me to read 108.55 into
5 the -- in tandem with the catchall language in the bylaws
6 then?

7 MR. REES: Exactly, Your Honor, exactly.

8 THE COURT: And there's no precise procedures in the
9 bylaws that the board must follow to remove?

10 MR. REES: There's no -- there's no specification
11 with respect to removal.

12 THE COURT: Could two board members vote to remove
13 him?

14 MR. REES: No. I mean, there are specifications
15 regarding a quorum for a board meeting, and those were fully
16 satisfied.

17 THE COURT: What about the specifications for people
18 being present as opposed to being on the telephone and after
19 ten days' notice? Those are all procedures that have to be
20 followed, right?

21 MR. REES: The Illinois statute -- well, they have
22 to be followed, first of all, with respect -- certain of them
23 have to be followed with respect to the removal of directors,
24 which is separate. But on the telephonic procedure, the
25 Illinois statute itself provides that participation by

1 telephone is deemed to be participation in purpose -- in
2 person.

3 So when the Plaintiff says that Illinois law wasn't
4 complied with because those who -- not all of those who voted
5 were present in person, that is ignoring a related provision
6 or the same subsection in that Illinois statute that says
7 participation by telephone is participation in person, so that
8 portion of Illinois was complied with, even assuming it
9 applied.

10 And furthermore, the e-mail communications to the
11 board, all of which Mr. Schobel received, were very clear
12 along the way in explaining that there was a desire that
13 people be present in person but that it began to be recognized
14 that getting 29 people or 27 people to Minneapolis was not
15 going to be feasible. There was great effort, therefore, to
16 protect Mr. Schobel's interest and confidentiality.

17 THE COURT: There's no tape recording of this
18 conversation?

19 MR. REES: Not that I'm aware of, Your Honor, but
20 what I would note about that is that, as the Plaintiff has
21 pointed out, the vote to remove him, while done by a majority
22 of the board, was not unanimous. Mr. Schobel had advocates,
23 or at least those who were not prepared to vote for his
24 removal, and that actually included, as a personal matter, the
25 current president of the association.

1 THE COURT: I mean, that line was fairly well drawn
2 throughout the organization with respect to the pros and cons
3 as to whether he should stay or go.

4 MR. REES: Well, the vote was by a majority to
5 remove him, but there were certain members who did not feel
6 that way, and I think this is important to recognize that
7 given the attacks on the process, even though they're legally
8 irrelevant, it's important to recognize that the person who is
9 sending out these e-mails is a person who is the president of
10 the board, who actually is -- has the personal view that
11 Mr. Schobel should not be removed.

12 These were fair procedures that were set up. They
13 were set up with his interests in mind. The sealed matter was
14 not gone into in the meeting with that consideration in mind.
15 So, these notice provisions and the two-thirds requirement
16 don't apply in this case because Mr. Schobel was removed as an
17 officer and that terminated his rights as a director. And
18 every single provision that the Plaintiff relies on to allege
19 some sort of right is one relating to directors. Those don't
20 apply in this context because his rights as a director were
21 derivative of and stemmed entirely from his rights as an
22 officer.

23 When he was removed as an officer, he ceased to be a
24 director by operation of law, and that is entirely consistent
25 with the Illinois statute 108.50 which says that the officer

1 may be a director while, also, while he or she holds that
2 office. In other words, just as --

3 THE COURT: So, essentially, Plaintiff's correct
4 then, if you want to get rid of a director, just make him a
5 president-elect and get rid of him then.

6 MR. REES: Well, that's a rather farfetched
7 scenario. What's more likely, if you take the Plaintiff's
8 view, is that if an officer were terminated and yet kept the
9 director position, you'd have to amend the bylaws to have a
10 new director added because there's --

11 THE COURT: That cannot happen then, as a matter of
12 law, could it?

13 MR. REES: Well, the bylaws could be amended, I
14 suppose. It's preposterous.

15 THE COURT: Meaning the current bylaws.

16 MR. REES: Right. No, that couldn't happen, and
17 that is proof that officership and directorship are linked.
18 They just aren't linked in the way the Plaintiff says.

19 Plaintiff is essentially arguing, "I became an
20 officer, I was elected officer, and then by virtue of that I
21 became a director." That was a subsidiary. "But now I'm
22 being terminated, I'm relying on my rights as a director and
23 using those to try to hold onto my status as an officer."
24 That's inconsistent with Illinois law and with the bylaws.

25 His rights as a director were derived from his

1 status as an officer. When his officer status was removed,
2 that terminated, by operation of law, his rights as a
3 director.

4 And if he, again, kept that directorship position
5 when his presidency was terminated, to elect a new or nominate
6 and then elect a new president, would require amending the
7 bylaws to add a new director, which just shows that the
8 directorship -- one's status as director, if one is on the
9 board solely by virtue of being an officer, terminates when
10 the officer status --

11 THE COURT: That is a fairly unique position,
12 though. I mean, he's president of a very prestigious
13 organization. You know, I guess for purposes of this
14 argument, is it fair to say that the Plaintiff has a national
15 reputation?

16 MR. REES: Well, I don't know. I wouldn't --

17 THE COURT: He is in the actuarial community, I
18 assume.

19 MR. REES: Without deprecating my client at all,
20 it's the -- the assertion is that it is the most prestigious
21 actuarial organization, overlooks the Society of Actuaries
22 which is a, by all believers, a preeminent actuarial
23 organization, and actually of which the Plaintiff is a
24 director and he also was a director of the Conference of
25 Consulting Actuaries. In other words, he has a reputation

1 that extends far beyond this particular position.

2 THE COURT: And this is about his reputation,
3 though. I mean, this -- and Plaintiff makes a pretty
4 compelling argument about his reputation that arguably the
5 damages to his reputation if he's -- if there's interference
6 with him continuing to serve as President-Elect or indeed
7 succeeding to the office of President, you know, why aren't
8 those -- why wasn't Judge Oberdorfer correct in that case? I
9 mean, reputation means a lot. Why shouldn't that be a
10 significant reason why this court grants a temporary
11 restraining order?

12 MR. REES: Well, there are a variety of reasons why
13 most courts -- why no court has really followed the *Saunders*
14 case and why, as a result, that's the only case that the
15 Plaintiff cites. I mean, *Saunders* itself arose in the
16 separate context of the public's overriding interest in
17 preventing discrimination. That was, as the court in *George*
18 *Katz v. Georgetown* [ph.], an animating consideration in that
19 case.

20 Second, you know, most courts have recognized,
21 including the *Sampson* decision and many others that followed,
22 that particularly in the context of damages where they have to
23 be shown to be concrete and particularized in order to make a
24 showing of irreparable harm, that an assertion that reputation
25 has been harmed or will be harmed is not remotely sufficient

1 to entitle one to injunctive relief.

2 *Saunders* does not in any way alter that conclusion
3 for purposes of this case.

4 THE COURT: So damages would be adequate? Money
5 damages would be adequate to compensate?

6 MR. REES: Yes. There are reputational issues in
7 every employment.

8 THE COURT: This isn't a paid position that he was
9 removed from, if he was indeed removed. Is that a factor?

10 MR. REES: If anything, it weakens his argument. I
11 mean, someone who is earning a livelihood from a position,
12 whose career and livelihood depends on it, who is then removed
13 and has the stigma of job loss and end of career prospects --

14 THE COURT: Why doesn't that strengthen his
15 argument? You know, "Judge, this isn't about money. I wasn't
16 being paid a dime. I wasn't looking for a dime. It's the
17 prestige of being the head of this organization, to take it
18 into the next year, to determine the future of the -- it's
19 about all these intangibles. It's not about money at all."
20 Why doesn't that strengthen his argument?

21 MR. REES: Because there is -- there are greater
22 reputational issues for someone who's actually not just doing
23 this as one of a series of different activities in which he's
24 involved for other actuarial organizations, for his own
25 employer, New York Life Insurance Company. This is -- is

1 something he volunteered to do, but actually, I would submit
2 that someone who is -- who is being compensated and whose
3 livelihood is associated with a particular job and whose
4 career may end in a particular area suffers a more -- a
5 greater reputational harm and yet courts after court have held
6 that that is not sufficient for purposes of the irreparable
7 harm.

8 THE COURT: Is it contemplated at the next board
9 meeting, October the 26th, that there will be a special
10 election for the President-Elect?

11 MR. REES: I can't speak to precisely what is
12 contemplated, but what -- what would happen is there will need
13 to be a president and a president-elect, and the Plaintiff
14 is -- has been removed as president-elect and therefore --

15 THE COURT: Could he run? Is there any impediments
16 to him running again if he doesn't -- he's not successful in
17 seeking his TRO?

18 MR. REES: Well, my understanding is that there is a
19 nominating committee that then proposes a name or names to the
20 board of directors for a vote. Mr. Schobel has already been
21 removed from office by this board validly under Illinois law.

22 THE COURT: It's very strange, though, that the
23 board has not publicized his removal. Did the board send him
24 a letter saying, "This is to confirm your removal"?

25 MR. REES: Well, he was present at the meeting. He

1 knows.

2 THE COURT: I understand that. Did he ever get a
3 letter from the board duly authorized and signed by the
4 president or whatever saying, "This is to confirm your
5 removal"?

6 MR. REES: That I don't -- that I don't know, but
7 what I do know is --

8 THE COURT: I can probably ask. Did you ever get a
9 letter?

10 MR. REES: But keep in mind and as you know from the
11 outset --

12 THE COURT: What's the reason for that? Why wasn't
13 he sent a letter? This was a major event, president-elect
14 removed.

15 MR. REES: Well, keep in mind that the parties have
16 been in discussions over a number of weeks now, as you alluded
17 to at the outset.

18 THE COURT: And hopefully you'll continue over the
19 long Labor Day weekend.

20 MR. REES: We're here.

21 THE COURT: Judge Kay will be here, see. He'll be
22 here this weekend.

23 MR. REES: But -- so that plays into the context as
24 well. But in terms of providing notice of removal, there's no
25 doubt. And that -- and that -- there's not a vehicle by

1 which, as I understand it, he can sort of run for re-election
2 and it certainly can't be correct to say, as was said --

3 THE COURT: His chances are going to be enhanced if
4 he doesn't get the TRO?

5 MR. REES: No. That he has the support of 17,000
6 members behind him, which is one of the assertions made. What
7 he's attached, Your Honor, are a few chat room blogs by, you
8 know, a few different individuals, including Mr. Schobel.

9 THE COURT: Those blogs, that's communication to the
10 world, and those messages will always be out there forever.

11 MR. REES: They are, and they aren't made by the
12 Academy and that's another important point.

13 THE COURT: That's a horrible message. You know
14 what, if you can't be removed for stealing money, what in the
15 world did he do? I mean, that's pretty damning.

16 MR. REES: Who knows if it's even accurate, Your
17 Honor. If I'm thinking of the chat room comment you're
18 thinking of, who knows? This is chatter on the internet.

19 But what I do know, Your Honor, is that that's not
20 the Academy. The Academy is not controlling what third
21 persons do, and in fact, the Plaintiff, through his blog,
22 through participating in chat rooms, through a public filing
23 of this lawsuit, is in fact rather than mitigating whatever
24 monetarily compensable harm there would be --

25 THE COURT: You can't -- you know, you can't condemn

1 the man for fighting for his reputation. I mean, the effort
2 is either to remove him or he's been removed, you know, he's
3 fighting for his life. He says this was -- I don't know.
4 It's not about money.

5 MR. REES: He's fighting against something that he's
6 publicizing at the same time, Your Honor. That's telling.
7 But to return to *Saunders*, another point about *Saunders* --

8 THE COURT: So what's the alternative? Just to go
9 quietly into the dark? Just do nothing?

10 MR. REES: No, I'm not -- I'm not suggesting that.
11 But I'm suggesting that actively publicizing and pressing
12 one's case in the manner in which he has done is -- is
13 inconsistent with a claim that he has experienced reputational
14 harm, which to get to the more fundamental point, is fully
15 compensable in damages if he were ever able to prove a claim,
16 and he cannot under Illinois law or the Bylaws, because his --
17 to turn to another argument that he makes that also is a
18 lynchpin under 108.35, he argues that -- and we don't concede
19 that applies.

20 Because, Your Honor, as we have pointed out, when he
21 was terminated as an officer, he was automatically terminated
22 as a director. But assuming that 108.35 applied, which is a
23 critical statutory provision from Plaintiff's perspective, the
24 manner in which he reads that contravenes the plain language
25 of that provision. That provision provides one or more of the

1 directors may be removed with or without cause, meaning cause
2 is not required.

3 The Plaintiff then focuses on the second sentence of
4 that provision, however, and says in certain cases, no
5 director may be removed except for cause if the articles of
6 incorporation or the bylaws so provide.

7 In other words, under that provision, a director may
8 be removed with or without cause, but if the articles or the
9 bylaws provide that removal must be for cause or can only be
10 for cause, then that will apply. That's a straightforward
11 matter of interpreting those two sentences.

12 What the Plaintiff has argued instead is that in
13 fact the second sentence means that cause is the only basis by
14 which a entity governed by this provision can terminate a
15 director, and that if the bylaws or articles don't provide for
16 termination for cause, then the entity either needs to amend
17 its articles or bylaws or go to court to get permission to
18 terminate a director, and that would render the first sentence
19 of this provision meaningless which says that one or more
20 directors may be removed with or without cause.

21 So, the issue of cause was not before the Board
22 because the Board was not proceeding under this section, but
23 rather was terminating Mr. Schobel's status as an officer,
24 which by operation of law --

25 THE COURT: Not for cause.

1 MR. REES: Well, not -- I think it's fairly
2 construed that cause would exist, but my point is that was not
3 the -- that was neither the legally relevant nor factually
4 relevant inquiry. The question was simply whether to
5 terminate his status as an officer, which necessarily
6 terminated his status as the director.

7 The board voted by a majority to do so after giving
8 ample notice to the Plaintiff, after complying with any
9 applicable procedures, and acted fully in accordance with the
10 law and to himself.

11 THE COURT: Was it necessary that he be given
12 notice? Could the Board have done this without giving any
13 notice?

14 MR. REES: No. I believe he would need -- I
15 believe, under the bylaws, he would need notice, but any
16 notice or super majority provision applicable to directors
17 would not apply.

18 THE COURT: All right. And under the bylaws, he
19 would have -- the Board would have -- was required to give at
20 least 14 days' notice; is that correct? Or not?

21 MR. REES: At least. At least ten, Your Honor.

22 THE COURT: At least ten days' notice.

23 MR. REES: I believe so. I'll rely on the bylaws.

24 THE COURT: So what -- which one of these
25 communications does the Board rely on for its triggering

1 notice of intended action?

2 MR. REES: Well, the July 14th notice called the
3 special meeting.

4 THE COURT: Right. Was he given notice of what
5 the -- what the contemplated action is, though?

6 MR. REES: Yes. It says, "The purpose of the
7 meeting is to discuss with the board the letter sent to it by
8 Bob Anker on behalf of 19 past presidents of the Academy," and
9 to take up this important matter as expeditiously as possible.
10 And when read in conjunction with that letter to which this
11 refers, it is crystal clear and was understood by Mr. Schobel
12 what this -- what the potential import of this was.

13 THE COURT: I'm reading this hastily. What's the
14 date of the meeting? Does it have a date in there?

15 MR. REES: The meeting was August 5th.

16 THE COURT: Yeah, but does that -- does that letter
17 say there's a meeting on August the 5th?

18 MR. REES: No, it's the July 16th letter.

19 THE COURT: Right. Well, that's why I was asking
20 you, what's the triggering notice that says, "This is the
21 ten-day notice letter of contemplated action"? Where is that?
22 It's not there, is it?

23 MR. REES: Well, I'm not sure that was even
24 required, and I don't think that's an allegation.

25 THE COURT: I thought you said they had to give at

1 least ten days' notice. That's why I was asking, where is the
2 triggering letter?

3 MR. REES: Well, I'm -- I'm not sure under the
4 bylaws. I think I said the bylaws would control and they
5 would have to. I'm not sure precisely --

6 THE COURT: And the bylaws provide for how many
7 days? Ten days' notice, right?

8 MR. REES: I'm not sure, Your Honor.

9 THE COURT: Well, let's figure it out here. I've
10 got a copy here. I think it's ten days. This letter doesn't
11 even set the -- all the writer says is "I'm calling for a
12 meeting here." He doesn't even tell you when the meeting is
13 going to take place, and you would agree that if the requisite
14 notice wasn't given, then the action is fatal, right?

15 MR. REES: Well, the requisite notice was given,
16 Your Honor. I don't think that's even challenged, honestly.

17 THE COURT: I think they have challenged that.

18 MR. REES: I mean, they've challenged telephonic
19 participation and claimed that certain topics came up later,
20 but in terms of these notices --

21 THE COURT: Well, let's assume they didn't do it,
22 but during the course of this hearing it becomes apparent that
23 the bylaws weren't complied with; isn't that something the
24 Court can consider in determining whether an injunction is at
25 issue?

1 MR. REES: Well, I think the Court can consider it.
2 I think that it needs to consider all the factors, including
3 the evidence that it was complied with under the --

4 THE COURT: I understand that, but the question
5 is -- I thought you said it was ten days' notice, but if it's
6 not, you know, I'll move away from it, but I thought it was
7 ten days' notice. I thought the bylaws required it, and I was
8 just trying to find out what the triggering letter is.

9 MR. REES: May I consult for a minute? That might
10 help.

11 THE COURT: Yes. Sure.

12 (PAUSE.)

13 MR. WACHEN: Your Honor.

14 THE COURT: Wait a minute. Just a minute, Counsel.

15 (PAUSE.)

16 MR. REES: Yes, Your Honor.

17 THE COURT: Just a minute, Counsel.

18 (PAUSE.)

19 THE COURT: Yes. I'm sorry, go ahead.

20 MR. REES: Your Honor, it is ten days' notice, and
21 if we look further at the July 14th meeting, this
22 communication, it says that the Academy's executive committee
23 already has a scheduled meeting that will occur on --

24 THE COURT: Just a minute. I folded my page. Let
25 me get it back. I got it. All right. The July 14th letter

1 is the triggering letter.

2 MR. REES: It was the notice letter, and there is --
3 there was another separate e-mail that's not a part of the
4 record that identified August 5th as the date for the
5 meeting, and if you look at this letter, it says that the
6 executive committee has an already scheduled meeting that will
7 occur on that date. And the date doesn't appear in this
8 letter, but there was a separate communication providing the
9 August 5th date. And I don't understand --

10 THE COURT: When was the separate communication set?

11 MR. REES: It was that same day.

12 THE COURT: Is that appended to anything?

13 MR. REES: No, it's not. And I don't understand
14 there to be any dispute that a notice was provided on this
15 date.

16 THE COURT: All right.

17 MR. REES: That that was consistent with the bylaws
18 in terms of providing notice.

19 THE COURT: Let me just ask Plaintiff's counsel.
20 Is that an issue that you're relying on?

21 MR. WACHEN: The issue is that the notice was
22 defective. We don't dispute that it was notice given, but the
23 notice was not sufficient for purposes of what happened.

24 THE COURT: All right. Plaintiff's counsel, what is
25 it -- which document is the notice that you're relying upon is

1 the triggering notice of the event?

2 MR. WACHEN: I would say the July 14th.

3 THE COURT: July 14th, the one that's appended to
4 the pleadings then.

5 MR. WACHEN: Yes, Your Honor.

6 THE COURT: I only have one. You say there was
7 another letter sent July 14th?

8 MR. REES: An e-mail with the August 5th date in
9 it.

10 MR. WACHEN: That appears to be the notice, the one
11 that's attached to the declaration as Exhibit C.

12 THE COURT: All right. Okay. All right.

13 MR. WACHEN: That's the one that mentioned "no
14 telephonic."

15 THE COURT: All right.

16 MR. REES: Right. And again, under Illinois law,
17 telephonic participation counts as in-person communication or
18 participation in the meeting, and the subsequent e-mails also
19 discuss the issue of telephonic communication. There was no
20 objection from the Plaintiff at that time to telephonic
21 participation, given the fact that a meeting was being called
22 from Minneapolis and the sheer number of members involved who
23 would need to participate.

24 THE COURT: All right. Which case do you
25 principally rely on? Is it the *Murray* case for your argument

1 that damages to reputation don't justify the issuance of an
2 injunction? Is that your --

3 MR. REES: The *Murray v. Sampson* case, and in
4 addition, I think the *Hunter versus Federal Energy Regulatory*
5 *Commission* case. It's a district court decision but it makes
6 clear that the Court won't speculate about the extent to which
7 Plaintiff's reputation has been harmed, and there are other
8 cases cited in our brief as well.

9 They made clear that even reputational damages are
10 the type that can be compensated for by monetary damages and
11 they don't rise to the level of irreparable harm as a result,
12 especially whereas here, what we have is a very generalized
13 allegation of reputational harm. In the sense that it is --
14 that it is in terms of evidence provided of the type that
15 would render, in most cases, injunctive relief warranted if it
16 were appropriate. Here, essentially is saying, I may be
17 already known as prominent in my profession, I may have a job,
18 I may have other professional organizations which I serve as a
19 chair or a member of the board of directors but somehow this
20 one, to lose this one is embarrassing for me.

21 And that type of allegation, you know, whether true
22 or not, is not the type of concrete particularized allegation
23 that can support injunctive relief under the very strict
24 burden that applies, especially whereas here and the burden is
25 stricter in the context of someone who is seeking to reverse

1 the status quo rather than preserve it.

2 There is no doubt that Mr. Schobel has been removed
3 as President-Elect of the organization and he no longer holds
4 an officer or director position. You know, the parties have
5 contesting views on the litigation, and for the reasons we
6 have submitted, the Plaintiff can't show any substantial
7 likelihood of success, but as a factual matter, he is not in
8 that position. He is seeking to reverse the status quo.

9 THE COURT: Would you agree that putting aside
10 success on the merits, could you agree that the harm is
11 irreparable?

12 MR. REES: No, no. That his harm is irreparable?
13 No, absolutely not, not at all on the record that we have
14 presented here and certainly not in the sense that given
15 particularly that every cause of action he has alleged allows
16 for monetary damages to be awarded. You know, certainly not
17 in the sense that is applied under -- under Rule 65 in the
18 context of a temporary restraining order.

19 THE COURT: All right. Let me do this. I'm not
20 going to keep you here too much later, Counsel. I need to
21 take a five-minute recess, though, and then I'll just hear
22 very briefly from Plaintiff's counsel.

23 Do you have anything else you wanted to say?

24 MR. WACHEN: Yes, I did.

25 THE COURT: We'll take a five-minute recess. All

1 right.

2 THE DEPUTY CLERK: All rise. This honorable court
3 stands in recess for five minutes.

4 (A BRIEF RECESS WAS TAKEN.)

5 THE DEPUTY CLERK: Remain seated. Court is again in
6 session.

7 THE COURT: All right. Counsel? They abandoned the
8 lawsuit.

9 (LAUGHTER.)

10 THE COURT: That's all right. He'll be right back.

11 (PAUSE.)

12 MR. WACHEN: I'm sorry, Your Honor.

13 THE COURT: I said five minutes; we came back
14 sooner. That's all right.

15 MR. REES: Your Honor.

16 THE COURT: Yes.

17 MR. REES: May I mention one small factor without
18 argument, just to elaborate on one point, and that was if I
19 could direct the Court's attention to Attachment E to our
20 opposition. That attachment does refer to the August 5th,
21 2009 meeting date, and it was 16 days before the board
22 meeting, so we don't need to rely on the e-mail to which I
23 referred that had not been included in the record that that
24 was more than ten days before the meeting. Thank you.

25 THE COURT: All right.

1 MR. WACHEN: Your Honor, if I heard correctly, I
2 think counsel conceded --

3 THE COURT: Let me just read Attachment E for just
4 one second.

5 MR. WACHEN: Yes.

6 (PAUSE.)

7 THE COURT: All right. Yes, Counsel.

8 MR. WACHEN: Your Honor, I think counsel conceded
9 his case because I heard him repeatedly refer to my rights as
10 a director in reference to removal. That's exactly what the
11 issue is. And really, 108.50(c) is the controlling provision.

12 He talks about the first sentence. The first
13 sentence is meaningless on this issue. All the first sentence
14 says is simply that, you know, let's read it. "The articles
15 of incorporation or the bylaws may provide that any one or
16 more officers of the corporation or other any person holding a
17 particular office outside the corporation shall be a director
18 or directors while he or she holds office."

19 Okay. That's what they had at the Academy, big
20 deal. The next sentence is critical, though, because the next
21 sentence reads, "Unless the articles or bylaws provide
22 otherwise," which in this case they do not, "such director or
23 directors shall have the same rights, duties and
24 responsibilities as other directors."

25 THE COURT: Right, but counsel is saying also, I

1 have to read that in tandem with 108.55 also, don't I?

2 MR. WACHEN: 108.55?

3 THE COURT: Yeah.

4 MR. WACHEN: Talks about removal of officers. You
5 can remove officers.

6 THE COURT: Right.

7 MR. WACHEN: That's true, but it doesn't give any
8 parameters. And also, by the way, Your Honor, I wanted to
9 point one other thing out.

10 THE COURT: It says, "Any officer or agent may be
11 removed by the board of directors," and then you look to the
12 bylaws to determine how much notice the board has to give
13 before it can take official action, whether it's a majority or
14 a quorum, so I have to read that in tandem again with the
15 bylaws.

16 So, why doesn't -- you know, why doesn't everything
17 just lead to 108.55 as being the remedy for the board's
18 actions in removing your client?

19 MR. WACHEN: Your Honor, if my client was not a
20 director, I think that would probably be the right result, but
21 he is a director and that's what leads us back to 108.50(c),
22 which says -- there's no reason to believe that 108.55 --

23 THE COURT: Then I have to overlook 108.55 then.

24 MR. WACHEN: No, you don't. No, you don't. Because
25 if they comply with the provisions for removing him as a

1 director, they will also be removing him as an officer. We're
2 not disputing that if he were just an officer -- there are
3 plenty of corporations where there are officers who are not
4 directors, you can remove them, that's true. But in a case
5 where someone is both, in this case, you can't. You can't
6 unless you follow 108.35(a) -- 35. And let me -- let me go
7 back to something that --

8 THE COURT: Is there a statute that says that in the
9 event that indeed a president-elect is a director and all
10 president-elects -- presidents-elect are directors, right?

11 MR. WACHEN: At the Academy.

12 THE COURT: Yeah. All right. Is there any part of
13 the statute that says, in that scenario, removal proceedings
14 are governed by director removal sections only and no
15 reference need be made to 108.55? That's not what the statute
16 says.

17 MR. WACHEN: Yes, it does, Your Honor. 108.50(c)
18 says, "such director or directors shall have the same rights,"
19 and counsel referred to the rights of removal as being a right
20 of director. So that's exactly where we get it.

21 And I do have a case on this, Your Honor, which is
22 in our papers. It's the *Muhammad* case. It's an Illinois
23 appellate case. It involved a president and it involved --
24 who is also the chairman of the board of directors, and the
25 Court applied 108.35. That was the one they provided. It's

1 an Illinois court interpreting Illinois law.

2 Now, I want to go back to 108.35.

3 THE COURT: Is that the religious institution case?

4 MR. WACHEN: Yes, Your Honor. 108.35, we have a
5 difference of opinion on the reading of section (a). For
6 purposes of today's argument, I'm willing to concede that
7 their reading is correct. It doesn't matter. They haven't
8 complied with the rest of the statute, because the rest of the
9 statute says -- and if we turn to (c), and I know they like
10 (c) but we'll tell you why that's not -- it doesn't even make
11 any sense.

12 (c) says, "In the case of a corporation with members
13 entitled to vote for directors," that's the -- the Academy
14 allows members to vote for directors. It's in the Bylaws.
15 "No director" -- no director, not just directors who are
16 elected by members. "No director may be removed except," and
17 one of them is "two-thirds vote." They acknowledge there was
18 not a two-thirds vote, end of story.

19 Now, they say, "Well, you know, we look at (b). (b)
20 says, "In the case of a corporation with no members or with no
21 members entitled to vote on directors," well, that's not their
22 corporation. Well, they say, "Well, Mr. Schobel, you know, he
23 wasn't voted in by directors, so even though (b) doesn't say
24 it applies to us, that's kind of what we're talking about."
25 The problem with that argument is all you got to do is go back

1 to section (c) and (c)(4) and you see that section (c)
2 contemplates this exact situation.

3 So, (c), again, Your Honor, in the case of a
4 corporation with members entitled to vote for directors,
5 that's the Academy, no director may be removed except in these
6 ways. (4) says, "If a director is elected by a class of
7 voting members entitled to vote, or directors," that's
8 Mr. Schobel, "or other electors, that director may be removed
9 only by the same class of members."

10 It's clear. I mean, there can't be any question.
11 (c) applies. They didn't have a two-thirds vote. They didn't
12 comply with some of the other things in (c), but it doesn't
13 really matter because they didn't have a two-thirds vote, end
14 of story. So, it just comes back to -- and you know, they
15 want to talk about the status quo. The status quo is he is
16 still the President-Elect. They're the ones who want to
17 change the status quo by fiat essentially, by ignoring their
18 own bylaws, by ignoring the law.

19 You know, they basically -- we didn't talk about the
20 public interest. This delegitimizes the Academy's governance.
21 They are basically ignoring the law, putting someone in there
22 who is illegitimate, in place of the person who was duly
23 elected, who is promised -- and in a way it is almost like a
24 contract. The bylaws say that once you become a
25 president-elect, you automatically become the president the

1 following year. The consideration for becoming president is
2 I'll serve for a year as president-elect. Arguably, that is a
3 contract. That certainly is expectation, and that's been the
4 case in their 40-year history since that provision has been in
5 there. That's always what's happened.

6 So, 108.50(c) says you apply, in the case of
7 officers and directors who -- in the case of
8 officer/directors, they get the same rights as directors, one
9 of those rights has to do with you're not going to be removed
10 except in accordance with 108.35. That has not occurred.

11 Now, in terms of the harm, I wanted to go back to
12 the *Sampson* case because I actually think the *Sampson* case
13 helps us, not them. Because the *Sampson* case -- the facts are
14 completely distinguishable for what we talked about before,
15 but what I was looking for before when we were talking, the
16 footnote in the case says, "We recognize that cases may arise
17 in which the circumstances surrounding an employee's
18 discharge," and that's, you know, a different situation,
19 "together with the resultant effect on the employee may so far
20 depart from the normal situation that irreparable injury might
21 be found."

22 So the Court is contemplating a situation where
23 discharge from employment could constitute irreparable harm.
24 This is a situation where he's not an employee. You're
25 basically taking away the position he holds.

1 THE COURT: Is it significant or not that that
2 opinion has never been cited in 38 years?

3 MR. WACHEN: Which one? The *Sampson* case?

4 THE COURT: No, I'm sorry, Judge -- I'm sorry, I
5 thought you were referring to Judge Oberdorfer's.

6 MR. WACHEN: No, I was taking about the Supreme
7 Court, Your Honor.

8 THE COURT: *Murray v. Sampson*, right.

9 MR. WACHEN: Yeah. The *Saunders* case, my answer to
10 them would be, where is their case that says a guy who is
11 going to be the president of a volunteer organization if he
12 gets kicked off --

13 THE COURT: You've got the burden, though.

14 MR. WACHEN: I understand. But the burden -- I
15 think we've met the burden. It's a unique position and
16 there's no substitute for it, and the train will have left the
17 station if we don't -- if we don't stop them from hijacking it
18 and taking it the wrong direction.

19 And by the way, I wanted to just point to this,
20 because for them to say they haven't communicated is just
21 simply false. This is an article from National Underwriter.
22 It's referenced in our papers. The first sentence, "The
23 American Academy of Actuaries says Bruce Schobel is no longer
24 the President-Elect," period. This is -- we found this on the
25 internet. This wasn't -- you know, it's out there.

1 They said it. They are the ones who are
2 communicating falsely that he is no longer the president, and
3 he's -- all they're doing is increasing the harm. The
4 reputational injury, yes, that can be compensable by damages,
5 but that's not what we're talking about today. What we're
6 talking about is taking away something that is his that he
7 is -- he is holding the office. They are, by fiat,
8 essentially, ignoring law, taking away the position that he
9 was duly elected to. They have not complied with the
10 provisions for removal, and therefore, there's no basis and
11 the Court should not let them get away with it.

12 It's just -- it's just -- as a matter of policy,
13 especially in a professional organization, to allow them to do
14 what they are doing is just -- I mean, you read the chat
15 rooms, people are ready to resign over this. It's just
16 outrageous. And I'm just looking at my notes. I think those
17 are -- those are the -- those are the key points.

18 I mean, you know, without a TRO at this point, the
19 Court is effectively ratifying the illegal action by the Board
20 or looking the other way and denying him the opportunity to
21 serve and --

22 THE COURT: If you don't get a TRO, it's because the
23 Court's balanced the factors that the Court, as a matter of
24 law, has to balance and in an effort to determine whether
25 you're entitled to this extraordinary relief.

1 All right. Thank you, Counsel, and anything
2 further? One minute. Anything else?

3 MR. REES: Very briefly, Your Honor. I certainly
4 didn't make their concession, that rights of removal as
5 director. That's contrary to the substance of my argument,
6 which leads to the conclusion that 108.35 doesn't apply.

7 THE COURT: I understood your argument.

8 MR. REES: So, as for *Sampson*, it recognizes that
9 different cases can be decided on different facts, but if you
10 look at all the subsequent law, including what we cited, only
11 the *Saunders* decision is the one that the Plaintiff can rely
12 on.

13 This decision is very important to the Academy, too.
14 When if the issues are -- if the interests are balanced and
15 the importance of the Academy having no President and
16 President-Elect who are deemed to best serve the organization,
17 given its compliance with the law, is recognized, that, along
18 with the other factors, weighs in favor of denying the
19 application for a temporary restraining order.

20 Thank you, Your Honor.

21 THE COURT: All right.

22 MR. WACHEN: Your Honor, may I make one final point
23 about the sealed matter if you would?

24 THE COURT: Sure.

25 MR. WACHEN: Because I think earlier, Counsel said

1 that Mr. Schobel is making the situation worse by trying to
2 protect his rights. The perfect example is what happened in
3 the sealed case. A decision was made to move on, and now look
4 what has happened to him. In that case, the Society and
5 Mr. Schobel felt firmly that they were in the right, a mistake
6 was made, but as a business matter, they decided, you know
7 what, we'll move on with life. This is a business issue.

8 And now this has come back to haunt him because, as
9 you read in the letter, the implication they draw is, well, if
10 he -- he must not have thought he had a good case because they
11 didn't appeal it. Well, not that there was any way to appeal
12 it. I mean, that's the implication.

13 So, he's out there on his own nickel. He's paying
14 for this. He's hired a lawyer to protect his rights. It's
15 not about money, as Your Honor earlier said, repeating what I
16 had said. This is a matter of protecting his rights,
17 protecting something that he has earned and keeping them from
18 doing something that is just improper, illegal and certainly
19 not in the interest of the Academy, I would think.

20 THE COURT: All right. I'm not going to rule on
21 this matter this afternoon. I'm going to take the request
22 under advisement. I recognize that your client would -- he
23 would like to go forward and give a speech somewhere on the
24 10th.

25 I'm going to take it under advisement. I'm going to

1 continue this hearing until Wednesday at 10:15, and I'll issue
2 my ruling at that time.

3 I'm sorry the parties weren't able to take advantage
4 of the services of Judge Kay, but you know, there is some time
5 between now and when the Court will rule, and I encourage, you
6 know, the parties, at least the Plaintiff to reconsider his
7 position. I've not indicated how this court is inclined to
8 resolve the request for TRO. I asked probably a fair number
9 of questions to both sides, but I do want to give it some more
10 thought. These are important issues, and again, both sides
11 have a lot at stake in there.

12 There's a prestigious Plaintiff and a prestigious
13 Defendant organization, and maybe with a little bit of help
14 from someone who has no interest in the outcome other than,
15 you know, that see it fairly resolved, maybe you can reach a
16 resolution over the next several days. Maybe not.

17 But on Wednesday, absent a resolution by the
18 parties, the Court will address the only issue before the
19 Court, and that is, whether Plaintiff is entitled to a
20 temporary restraining order.

21 It's a very interesting case, very compelling case,
22 one I'll give some more thought over the weekend. Thank you.
23 I'll take it under advisement.

24 MR. WACHEN: Thank you, Your Honor.

25 MR. REES: Thank you, Your Honor.

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THE COURT: And even though we've invested a lot of time and effort, which we always do in all of our cases, I won't be offended if you settle the case.

(LAUGHTER.)

THE COURT: Enjoy your weekend.

THE DEPUTY CLERK: This honorable court stands adjourned.

(PROCEEDINGS END AT 5:15 P.M.)

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CERTIFICATE OF REPORTER

I, Catalina Kerr, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Catalina Kerr

Date