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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 9, 2009
10:45 a.m.

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

TRO HEARING - CONTINUED
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
CORPORATE REPRESENTATIVE FOR THE
3 AMERICAN ACADEMY OF ACTUARIES

4 Mr. Philip Larson
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5 Mr. Bruce Schobel
6 PLAINTIFF

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1 P-R-O-C-E-E-D-I-N-G-S

2 (10:45 A.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Civil Action 09-1664. Bruce
4 Schobel versus American Academy of Actuaries. Would counsel
5 please identify yourselves for the record.

6 MR. WACHEN: Good morning, Your Honor. David Wachen
7 again representing Mr. Schobel, and with me at counsel table
8 is my partner Tina Hsu and also Mr. Schobel himself.

9 THE COURT: All right. Good morning.

10 MR. REES: Good morning, Your Honor. Jonathan Rees
11 representing the American Academy of Actuaries. With me is
12 Mary Downs from the Academy, and also present but not entered
13 an appearance is my colleague, Philip Larson.

14 THE COURT: All right. Good morning. I have two
15 matters scheduled for this time frame. What I'm going to do
16 is I have three questions I need to get answers to, and I'll
17 give you the questions.

18 Then I'll -- if you're prepared to give me the
19 answer, that's fine, I'll take the answer, but then I'm going
20 to take a short recess and call the other matters. It's a
21 short matter, and then recall this case.

22 But the questions -- I'll ask Plaintiff first. I
23 asked this question the other day. I don't think I followed
24 it up with asking the Defendant the same question. I don't
25 think I got a clear answer from Plaintiff, but the first

1 question was whether or not the Plaintiff could have been
2 removed as a Director only. You want to try and give me an
3 answer to that one?

4 You flattered me the other day and recognized it was
5 a good question, but I'm not sure I got a clear answer, or a
6 good answer, or any answer.

7 MR. WACHEN: If the Plaintiff could have been
8 removed as a Director only?

9 THE COURT: Right.

10 MR. WACHEN: I think in this circumstance, the
11 answer is probably no because the two positions are
12 intertwined. All the officers are directors, and when he
13 became an officer --

14 THE COURT: But not all the officers are directors.
15 There are some directors who are not officers.

16 MR. WACHEN: Correct, but there are no officers who
17 are not directors.

18 THE COURT: So, you're saying then that the removal
19 provisions for director only could not be followed by the
20 organization to remove your client as director, and that's
21 your answer?

22 MR. WACHEN: I'm sorry, I missed that. Whether the
23 removal --

24 THE COURT: -- provisions for director only could
25 not be followed because your client had dual capacity,

1 director/officer.

2 MR. WACHEN: No, I'm not saying that because the
3 director --

4 THE COURT: I need an answer. I mean, could he have
5 been removed as a director?

6 MR. WACHEN: And maintained his position as
7 President-Elect?

8 THE COURT: Right.

9 MR. WACHEN: Yeah, under the bylaws, I think the
10 answer to that is no, but there are certainly other directors
11 on the board who aren't officers who could be removed.

12 THE COURT: Right. What's your answer?

13 MR. REES: We'd agree, Your Honor, in that his
14 position as Director was entirely derivative as to his
15 position as President-Elect.

16 THE COURT: So, even if there were a basis for
17 removal of the Plaintiff as a Director without anyone focusing
18 on his -- his ancillary position of President-Elect.

19 MR. REES: I guess I'm just not sure how that would
20 arise in that the two positions are intertwined, just we
21 disagree as to how. He was elected President-Elect; there was
22 no separate election to make him a Director. Rather, under
23 the bylaws, he just became a Director. When he ceased to be
24 President-Elect, he ceased to be Director, and so the two were
25 tied in that way, and I guess I can't think of a situation in

1 which there might be an issue relevant to a directorship but
2 not his status as President-Elect, which was the originating
3 status.

4 But under the -- under the bylaws, again, he became
5 President-Elect, and by virtue of that, became a Director.
6 That's the only basis on which he became a Director.

7 THE COURT: All right. But technically, though,
8 there could be -- the Board could follow the procedures for
9 removal of him as Director. I mean, he's a Director also,
10 correct?

11 MR. REES: He is a Director by virtue of being
12 President-Elect, so yes, he is a Director.

13 THE COURT: All right. So if the -- if a quorum
14 decided to remove him as Director and he was removed as
15 Director, under those circumstances, he would no longer be
16 President-Elect then?

17 MR. REES: Well, it's not what the Board considered
18 or would have considered, just because, for him, the status --
19 he held the primary status from which all else derived was
20 President-Elect, so it's -- I don't mean not to answer the
21 question, but it's -- it's hard to see how that situation
22 would pertain to a situation such as this where the person is
23 elected President-Elect and that is -- that is how he comes to
24 be President-Elect, how he comes to be Director, and all
25 rights as Director are derived from or exist solely during his

1 term as President-Elect.

2 THE COURT: There was a referral early on in this
3 process, in this series of events that resulted in the
4 Plaintiff being referred to -- is it the ABCD? Is that the
5 ABCD?

6 MR. REES: Right.

7 THE COURT: It's as simple as that, ABCD.

8 MR. REES: It is.

9 THE COURT: And has that board acted?

10 MR. REES: No.

11 THE COURT: What are the time constraints for that
12 board to take whatever action?

13 MR. REES: That is, of course, a separate process
14 from the removal as President-Elect. My understanding of the
15 status is that the ABCD, which again is a separate entity that
16 would report to all the -- to various actuarial organizations,
17 not just to the Academy, has not acted, that Mr. Schobel has
18 not yet submitted a response to the ABCD, and so the matter is
19 pending.

20 THE COURT: All right. That's a national board, is
21 that correct, national organization, the ABCD Board?

22 MR. REES: The ABCD is an entity that, as I
23 understand it, handles or responds to complaints that will
24 need to be considered for purposes of discipline and will
25 issue a recommendation or finding that would then go to

1 various actual -- actuarial organizations, including the
2 Academy.

3 THE COURT: Right. That's a nationally recognized
4 organization, though, or is it just local?

5 MR. REES: I think it is -- I think it is under the
6 auspices but separate from the Academy. So, I don't know its
7 corporate status, if you will. I don't believe that it is a
8 stand-alone corporate entity.

9 THE COURT: Is it derivative of this organization,
10 the Defendant organization?

11 MR. REES: It is -- it is housed within it but
12 separate from it in that it exercises independent discretion
13 as to how to proceed.

14 THE COURT: All right.

15 MR. REES: It has its own staff, as I understand it,
16 but does not --

17 THE COURT: It derives its authority from the
18 Defendant organization then; is that right?

19 MR. REES: May I consult just to make sure I don't
20 misspeak?

21 THE COURT: Yeah. I'm just trying to think of this
22 in terms of -- it's not like a bar association, not like the
23 D.C. bar which, you know, it's -- which would discipline
24 members of the -- all members of the bar. Its -- its
25 disciplinary action is limited to membership in this Defendant

1 board or --

2 MR. REES: I don't think it so much takes
3 disciplinary action itself as will propose a private reprimand
4 or a public reprimand, and it wouldn't just propose that to
5 the Academy but would to the other actuarial organizations
6 that receive that information, which would include the Society
7 of Actuaries, for example.

8 THE COURT: Right. The second part of that question
9 is why shouldn't this court await the outcome of that
10 referral?

11 MR. REES: Well, it's -- that is a completely
12 separate process with separate implications from this.

13 THE COURT: I understand that.

14 MR. REES: I mean, what the Board did here was
15 remove Mr. Schobel as President-Elect. The issue before the
16 ABCD, as I understand it, would be whether to issue a public
17 reprimand or a private reprimand or perhaps recommend the
18 suspension of Mr. Schobel as a member of one or more of the
19 various actuarial organizations, but it's just a separate and
20 distinct process.

21 THE COURT: All right. But it's a process that the
22 Board -- that the Defendant undertook before this whatever it
23 did, removal or suspension. So, it was important enough for
24 the Board, for the Defendant to recognize as an appropriate
25 sanction before this rush to judgment to remove him, so why

1 shouldn't this court stay its hand until this organization has
2 had a chance to make a recommendation?

3 MR. REES: Well, just as a factual matter, they're
4 two separate proceedings. I mean, what the Board received was
5 a report from 19 past presidents of the organization for the
6 Board to consider. The Board met with 27 of 25 -- of 29
7 members of the Board, considered the matter that was
8 presented, and after a full debate, concluded that removal was
9 appropriate.

10 That process is just completely separate from the
11 process of discipline under the ABCD. I mean, they are --
12 they are -- there can be separate proceedings arising out of a
13 similar parallel complaint, but they really truly are two
14 separate proceedings.

15 THE COURT: All right. Where in the record is there
16 notice that when a date certain and at a time certain the
17 Board was contemplating removal action against the Plaintiff?

18 MR. REES: Your Honor, every single notice that we
19 attached reflected that that -- there's no surprise to
20 Mr. Schobel. Every single --

21 THE COURT: To Mr. Schobel?

22 MR. REES: Yes, yes. I mean, the word "suspension"
23 is used in particular in the July 14th notice, but in the
24 context of someone who was President-Elect and absent action
25 against him would become President, suspension means removal.

1 I mean, Mr. Schobel knew and the --

2 THE COURT: Did the word "removal" ever appear?

3 You're invited to participate on a -- in a meeting that will
4 result in a potential removal?

5 MR. REES: The words that were used referred to a
6 critical issue that will -- that relates to Mr. Schobel's
7 status within the organization. I can't -- I didn't look back
8 at those notices this morning, but I don't --

9 THE COURT: That's why I'm asking you. What notice
10 was he given about the Board's intention to remove him? I
11 mean, a clear reading. I mean, I have to look at the plain
12 language and the plain interpretations, and the second part of
13 that is -- and correct me if I'm wrong, I'm inviting you to --
14 it appears that in the correspondence sent to Plaintiff by the
15 Board, he was put on notice that the Board was considering
16 suspension pending this referral to ABCD.

17 MR. REES: No, Your Honor. No, no, no. I think if
18 you look at the July 31st e-mail, for example, the paragraph
19 before the reference to "disciplinary proceeding" makes quite
20 clear that what is before the Board is --

21 THE COURT: It says -- Let me just read it. It
22 says, "The purpose of our meeting will be to determine what
23 action, if any, the Board should take at this time in response
24 to the July 9, 2009 communication from a group of past Academy
25 presidents to the Board requesting that the current

1 President-Elect be suspended from continuing to serve in that
2 capacity and from assuming the position of President pending
3 the outcome of ABCD proceedings relating to him."

4 And the second part says, "The meeting will not
5 consider whether any disciplinary action as to the
6 President-Elect is appropriate at this time. Under the
7 Academy's bylaws, all disciplinary matters are considered in
8 the first instance by ABCD."

9 So, where is this notice that -- it seems that it's
10 contingent on -- it's hinged on this referral on the outcome
11 of ABCD proceedings, suspension pending the outcome. But
12 where was he ever told, "Come meet with us; we're going to
13 consider you should be removed"? Where is that? If I'm
14 overlooking it, tell me. I don't see it.

15 MR. REES: Well, may I have a minute to consult,
16 Your Honor?

17 THE COURT: Yeah.

18 MR. REES: Thank you.

19 (PAUSE.)

20 MR. REES: Thank you, Your Honor. A couple of
21 points to make. The first is, as a factual matter, the
22 Board's -- the Board's bylaws and its practices provide that
23 while general notice is provided at a meeting of the agenda
24 items, there isn't -- there won't necessarily be a description
25 with greater specificity than was provided here, and that is

1 consistent with 108.30 of the Illinois statute.

2 THE COURT: Wait a minute, I'm sorry. What is the
3 bylaw provision that you're referring to?

4 MR. REES: Well, there is no specific provision in
5 the bylaw that calls for a specific notice of -- there are
6 requirements as to --

7 THE COURT: There is a notice provision in the
8 bylaws.

9 MR. REES: Of a time period and of the general --

10 THE COURT: Wait just a minute. There is a notice
11 provision. There's a precise notice provision in the bylaws,
12 correct?

13 MR. REES: As to -- yes, and as to a time period but
14 not as to the degree of specificity that needs to be set
15 forth.

16 Mr. Schobel knew exactly what was at stake here, and
17 I believe that's evident from each document that we attached.

18 THE COURT: Aside from what he may or may not have
19 known, my question is, what did the Board do to notify him
20 that at this meeting the Board was considering his -- the
21 Board would consider his removal?

22 MR. REES: The Board notified him in each of these
23 communications and in discussions with -- between,
24 particularly, it would have been between Mr. Parks, the
25 President of the Academy, and Mr. Schobel that removal was at

1 stake here, and Mr. Schobel knew that. I don't think --

2 THE COURT: Is there a declaration in this file? Is
3 there a declaration in this file that says that?

4 MR. REES: I don't think there's any -- I'm not
5 aware of a declaration in this file that says that, nor am I
6 aware of any argument --

7 THE COURT: These aren't trick questions. I'm just
8 trying to figure out --

9 MR. REES: No, I understand.

10 THE COURT: I'm just trying to figure out what
11 notice was given the man. That's all.

12 MR. REES: Right. And I don't think that --

13 THE COURT: Let me ask you this. Let me ask you
14 this. Is removal a form of discipline?

15 MR. REES: No, not as discipline as used in the July
16 31st e-mail. The --

17 THE COURT: Removal is not discipline. So we're
18 going to remove you for cause but that's not discipline?

19 MR. REES: Discipline is a term of art as used in
20 the July 31st e-mail. As used in the July 31st e-mail and
21 as referenced under the bylaws, discipline is something that
22 is considered by the ABCD. The ABCD has no power to remove
23 directors or officers, but rather the Board, under its bylaws,
24 is empowered to remove officers and --

25 THE COURT: How would you characterize removal if

1 it's not discipline for doing something wrong? What is it?

2 It's not a reward.

3 MR. REES: Your Honor, in lay terms, one might think
4 of removal as discipline, but in the context of these
5 documents that we have, the bylaws that talk about ABCD
6 discipline, they're talking about discipline as that term is
7 used --

8 THE COURT: That just sounds like -- that makes no
9 sense.

10 MR. REES: But that's exactly --

11 THE COURT: I mean, what you're telling me is that,
12 "Judge, there was a referral to ABCD for disciplinary
13 purposes, so obviously we could not be talking about
14 discipline at this -- at this meeting, and even though we
15 didn't give them notice that we were going to talk about his
16 removal, he knew what we were going to talk about somehow or
17 way." Somehow or way it was communicated to him, although
18 there's no declaration in the file from anyone that says,
19 "John, we're going to talk about your removal." There's
20 nothing here.

21 And now you're telling me that removal from
22 President-Elect is not discipline? We know it's not a reward.
23 It's not discipline because only ABCD could discipline? You
24 lost me.

25 MR. REES: Well, then let me try again because I

1 think it's not complicated.

2 THE COURT: You know it's not -- is it a reward for
3 doing something good?

4 MR. REES: Your Honor...

5 THE COURT: It's not, is it? We can agree on that,
6 right?

7 MR. REES: It's not reward.

8 THE COURT: All right. And it's not punishment.
9 It's not punishment then, is it?

10 MR. REES: Your Honor, the bylaws --

11 THE COURT: Is it punishment?

12 MR. REES: It is removal. It is removal of someone
13 who --

14 THE COURT: But it has to be punishment; it has to
15 be discipline.

16 MR. REES: Not at all in the sense that the term
17 "discipline" is used in either the July 31st e-mail or in
18 the bylaws. Discipline, in that context, has a precise
19 meaning, and it is referring to a public reprimand or a
20 private reprimand or a recommendation of a suspension.

21 THE COURT: All right. It's not discipline; it's
22 not reward; what is it?

23 MR. REES: It's removal. It's removing Mr. Schobel
24 by a vote of a majority of the whole Board of Directors. It
25 is not discipline in the sense that the ABCD considers

1 discipline. One might -- as a layperson, one might choose to
2 characterize removal as, it's action in response to serious
3 concerns that were brought by 19 past presidents, and each
4 communication in -- attached to our opposition makes clear, in
5 our judgment, that removal was a possibility, a very serious
6 possibility. This was the agenda item for the meeting.

7 THE COURT: Even though it's not spelled out -- even
8 though that word is not even used, though.

9 MR. REES: It is spelled out, but that word is not
10 used.

11 THE COURT: It's spelled out but it's not used?
12 What does that mean?

13 MR. REES: The purpose of the meeting was to
14 consider whether Mr. Schobel could serve as President-Elect.
15 Whether the word "removal" is used or not, Your Honor, the
16 purpose of the meeting was to consider whether Mr. Schobel
17 would be removed.

18 THE COURT: Is there a requirement anywhere that
19 notice be given of the Board's contemplated action to remove?

20 MR. REES: I don't believe so, Your Honor. I mean,
21 there's a ten-day notice requirement, and the Academy does
22 provide a --

23 THE COURT: Ten day -- wait a minute. Let me stop
24 you for a second. Ten-day notice requirement to do what? To
25 give him notice of the meeting?

1 MR. REES: Of the Board meeting, yes.

2 THE COURT: And that's all. So, in other words, the
3 Board could say, We're convening a meeting, period. Give him
4 ten days notice, you're invited to attend, say nothing more
5 about that and then vote to remove him. Would that have been
6 appropriate?

7 MR. REES: Well, the Board gave more than that. I'm
8 looking for the notice.

9 THE COURT: Just answer my question. Would that
10 have been appropriate?

11 MR. REES: To say nothing more than "we're holding a
12 meeting"?

13 THE COURT: Right, and then remove him.

14 MR. REES: That is not how the Academy would have
15 treated Mr. Schobel.

16 THE COURT: I'm not asking -- I just want an answer
17 to my question. If they had done that, and if so, pursuant to
18 what authority in the bylaws or statute?

19 MR. REES: They would provide an agenda of the
20 meeting or a description of -- a summary of the topic for the
21 meeting.

22 THE COURT: All right. And he was given ten-day
23 notice. I don't think anyone disputes that. But let's
24 assume, for purposes of our discussion, he was given ten-day
25 notice. Was he given an agenda?

1 MR. REES: He was given each of these documents
2 attached to our opposition. He was, at that time, someone who
3 would have been copied as a matter of course on these
4 communications, and he received them. There is no dispute
5 about that. He and everyone else understood the --

6 THE COURT: What is the bylaw section that provides
7 for the agenda?

8 MR. REES: There isn't a specific bylaw.

9 THE COURT: What about the notice of hearing
10 section, what section number is that? You know there's a
11 precise notice section, Article XII.

12 MR. REES: Yeah, there's Article --

13 THE COURT: XII.

14 MR. REES: Well, there's Article III, section 3.
15 That's an annual meeting. Excuse me, Your Honor.

16 Meetings of the Board, this is section 3 of Article
17 III.

18 THE COURT: All right. "Meetings of the Board may
19 be held either within or outside the state of Illinois.
20 Notice of the meetings of the Board shall be given not less
21 than ten days, no more than 30 days before the meeting, except
22 in the event of a meeting following the annual meeting."

23 And that hasn't happened. That's the October
24 meeting; is that right?

25 MR. REES: Right.

1 THE COURT: Where is the -- where is the requirement
2 for an agenda?

3 MR. REES: There's no requirement for an agenda
4 there. It was, as I was trying to say, the practice of the
5 Academy to identify what the topic was, as it did.

6 THE COURT: Is that normally done, the agenda?

7 MR. REES: As I understand it, that's normally done.
8 It's not so much a formal agenda, as I understand it, but it
9 was precisely what was provided here on July 14th.

10 THE COURT: So -- all right. He wasn't given a
11 formal agenda. He was given that July 14th e-mail and
12 July 16th e-mail.

13 MR. REES: And the subsequent e-mails. Exactly,
14 Your Honor.

15 THE COURT: And the July 21 e-mail. So the Board
16 controlled what was said in these e-mails. I mean, the Board
17 controlled the intent that was communicated to him. We're not
18 going to talk about -- come meet with us, John. We're not
19 going to talk about discipline because that's for ABCD. We're
20 not going the talk about removal, but they didn't say that.
21 They didn't say that, nor did they say we're going to talk
22 about your removal or suspension.

23 So the Board controlled all of this. Isn't there a
24 requirement that a person be just given notice of what the
25 meeting is all about so maybe someone can go out and hire a

1 lawyer or something?

2 MR. REES: Your Honor, he was given notice. That's
3 exactly what these documents say, and the disciplinary
4 process, as reflected in Article IX of the bylaws, which talk
5 about the ABCD, is completely different. There can be no
6 confusion between discipline, as used in the July 31st
7 e-mail, and removal.

8 THE COURT: We're not going to talk about
9 discipline, so he can breathe a sigh of relief.

10 MR. REES: No. If you look at the prior paragraph,
11 Your Honor, and if you look at all the preceding e-mails,
12 there is no doubt that Mr. Schobel knew and that each of these
13 communications communicated that the issue before the Court
14 was what to do -- I mean, before the Board was what to do and
15 what action would be taken, if any, in response to a concern
16 raised by 19 -- virtually every living past president at the
17 Academy.

18 THE COURT: I understand that. But it also says,
19 "The meeting will not consider whether any disciplinary action
20 as to President-Elect is appropriate at this time."

21 MR. REES: And that's referring to the ABCD action,
22 which that's a separate process.

23 THE COURT: And that's also consistent with what you
24 said that removal is not any form of discipline. It's not a
25 reward; it's not discipline; it's removal.

1 MR. REES: It's not discipline as that term is used
2 in the ABCD process, which refers to a public reprimand or a
3 private reprimand. Removal is not a favorable action, but
4 it's not discipline as used in this context. And that's why
5 these -- the author of this and the recipients of it, who all
6 knew what discipline was within the meaning of the ABCD, would
7 know that what was at stake here was whether Mr. Schobel would
8 or would not continue as President-Elect --

9 THE COURT: Yeah.

10 MR. REES: -- of the Academy. It is completely
11 separate.

12 THE COURT: It's a clear statement of what the
13 purpose of the meeting is, seems to me, the July 31. "The
14 purpose of our meeting will be to determine what action, if
15 any, the Board should take at this time in response to the
16 July 9, 2009 communication, request that the current
17 President-Elect be suspended from continuing to serve in that
18 capacity and from assuming the position of President pending
19 the outcome of" -- I mean, that comes through loud and clear.

20 We're going to talk about -- at this meeting, we're
21 going to talk about whether you're going to be suspended
22 because of our previous referral to ABCD for ABCD to consider
23 disciplinary action.

24 MR. REES: Your Honor, the Academy did not refer
25 this matter to the ABCD. Okay. That is a separate process.

1 That resulted from separate individual complaints. The
2 Academy did not control the ABCD process.

3 THE COURT: But nevertheless, the center knew of the
4 referral to ABCD, though.

5 MR. REES: Well, it understood -- it understood.
6 But its position, and every single e-mail reflects that, was
7 that the Board had received a letter with the sealed matter
8 attached reflecting serious concern that in the best judgment
9 of the Academy there was a serious question as to whether
10 Mr. Schobel could serve as President-Elect and then as
11 President.

12 It's referred to as an important matter that needs
13 to be dealt with as expeditiously as possible. That's in the
14 July 14th e-mail. It -- the subsequent e-mails refer to
15 developing a fair and balanced process for making a critical
16 decision about Mr. Schobel's future.

17 Mr. Schobel has raised some --

18 THE COURT: Let me get just the document, Counsel.

19 MR. REES: Certainly, Your Honor.

20 (PAUSE.)

21 THE COURT: Right. And that -- sorry, I had to
22 locate a letter, and that's the Hartman letter. Because the
23 e-mails indeed follow the letter from Hartman, and all Hartman
24 asked for on behalf of these 19 former presidents was to
25 consider suspending him pending ABCD -- conclusion of the ABCD

1 proceeding, so everyone's on the same page, though.

2 Hartman says we want the Board to take certain
3 actions. The board sends an e-mail. We got this letter from
4 the 19 former past presidents asking us to consider your
5 suspension, so we're going to convene a meeting, John, meet
6 with us. And he's not told about removal, so the only notice
7 he's given, this man is given is notice that the Board is
8 considering suspending him, you know, pending ABCD conclusion
9 of its investigation. And then when he leaves, when everyone
10 hangs up the phone, he's removed.

11 MR. REES: No, Your Honor. I mean, every single
12 document in here makes clear the stakes that are at issue and
13 refers to developing a process to consider the serious
14 concerns that have been raised. They refer to a critical
15 issue about Mr. Schobel's future.

16 There can be -- although there are disagreements
17 about what procedures were required to be followed in terms of
18 a majority or two-thirds vote, there is -- there can be no
19 doubt that what was at stake here was whether Mr. Schobel
20 would or would not continue as President-Elect, and therefore,
21 whether he would be removed.

22 THE COURT: And not suspension pending --

23 MR. REES: Well, the Academy has no control over how
24 long that process takes. He was -- we were in a situation
25 where we were several -- just a few months away from -- from

1 the annual meeting at which the President-Elect, if he
2 remained President-Elect, would become President, and the
3 Board was considering what to do in response to the
4 allegations. The stakes were understood. This was a critical
5 issue about Mr. Schobel's future as stated in that e-mail, and
6 so there can -- there --

7 THE COURT: Let me ask you this. Let me ask you
8 this: And I'm just -- I'm not -- again, this is not a trick
9 question. Hypothetical. If my characterization,
10 hypothetically, is correct of what happened here, would that
11 have comported with the requirements of the bylaws and/or the
12 Illinois statute?

13 MR. REES: Yes, Your Honor.

14 THE COURT: Hypothetically.

15 MR. REES: As I understand your hypothetical, it's
16 that there was a -- the communications reflected that there
17 might be a suspension pending the outcome of the separate
18 proceedings.

19 THE COURT: And that was the only notice given to
20 the Plaintiff, hypothetically. I'm not asking you to agree
21 with me.

22 MR. REES: Yes, yes. No, I understand. I think you
23 know my views.

24 THE COURT: Right.

25 MR. REES: Yes. Well, the Illinois -- the Illinois

1 statute itself provides no limitation on the removal of an
2 officer other than officers may be removed, and doesn't
3 provide for full notice of the fact that removal will occur or
4 the grounds for removal, so -- and then --

5 THE COURT: So the sentence would read, the ruling
6 would be, notwithstanding the fact -- hypothetically -- that
7 the only clear communication from the Board to the Plaintiff
8 was that the Board was going to meet to consider this letter
9 from 19 past presidents requesting that he be suspended
10 pending ABCD action, notwithstanding that, and notwithstanding
11 the only communications in writing from the Board to Plaintiff
12 that the meeting would not focus on discipline by ABCD but
13 only consider the request from 19 past presidents, and in
14 addition, notwithstanding the fact that he never received any
15 written notice that the Board's intended purpose for meeting
16 was to consider his removal, removal nevertheless complied
17 with the Illinois state statute and the bylaws as a matter of
18 law, right?

19 MR. REES: They did. Yes, Your Honor. As you --

20 THE COURT: There's something unfair about that,
21 though, isn't there?

22 MR. REES: Well, first of all, of course --

23 THE COURT: If hypothetically that's correct, isn't
24 there something hypothetically unfair about that?

25 MR. REES: An officer, as the Illinois statute makes

1 clear, and as the -- and as consistent with the bylaws, an
2 officer will serve at the pleasure of the entity he is
3 serving, and in this case, he received notice of a meeting and
4 there was a requirement for ten days' notice that expressly --

5 THE COURT: So unfairness doesn't enter the picture
6 at all then? Doesn't -- is not a factor for this court to
7 consider in the context of a temporary restraining order?

8 MR. REES: There is fairness to the --

9 THE COURT: What about clean hands? Oh, that's --
10 what about clean hands? Should the Defendant have clean
11 hands?

12 MR. REES: The Defendant has clean hands, and there
13 is an issue of fairness to an organization of being able to
14 act in the best interest of the organization.

15 THE COURT: Right.

16 MR. REES: In response --

17 THE COURT: After appropriate notice to its
18 President-Elect.

19 MR. REES: And appropriate notice was provided,
20 so...

21 THE COURT: Tell me very precisely what the
22 requirements are for removal of an officer. I'm not talking
23 about a director. I'm talking about an officer,
24 President-Elect, more particularly.

25 MR. REES: The -- if I may, Your Honor. Under the

1 Illinois act, it's -- it's just that any officer or agent may
2 be removed by the board of directors.

3 THE COURT: Period. So they didn't have to give him
4 any notice at all, did they?

5 MR. REES: That's the only provision that speaks to
6 that.

7 THE COURT: Right. But once they decide to give him
8 notice, shouldn't the notice be accurate, though?

9 MR. REES: Well, it was accurate. But the bylaws --

10 THE COURT: I'm saying, let's assume that the notice
11 that they gave him, hypothetically, wasn't accurate. Let's
12 assume they say, "John, we're going to celebrate you being
13 President-Elect in two weeks. We're going to have this
14 affair. We're going to celebrate what's going to happen.
15 You're going to ascend to the presidency." And he goes in and
16 they all stand up and vote to have him removed. Would that
17 have been fair?

18 MR. REES: Your Honor, the only requirement is a
19 requirement of a majority vote, which of course there was and
20 so --

21 THE COURT: Here's the problem. Here's what's
22 confronting the Court. The Board -- I may agree with you that
23 the Board was under no obligation to give notice, but once it
24 gave notice, shouldn't the notice be accurate to inform
25 someone what the action of the Board, someone -- Strike that.

1 Shouldn't the notice accurately inform the
2 President-Elect what action that the Board was contemplating
3 taking against him?

4 MR. REES: Two responses, Your Honor. And the
5 first, of course, is that notice was provided and that all
6 that was necessary --

7 THE COURT: All right. But first --

8 MR. REES: But if I may answer your second, get to
9 the core of your --

10 THE COURT: Just answer -- it requires "yes" or
11 "no." Shouldn't the notice be accurate? If the Board
12 undertakes to give notice, shouldn't the notice be accurate
13 and truthful?

14 MR. REES: If the Board can take action without
15 notice other than calling a meeting at which matters will be
16 decided by a majority vote, then whether a notice is accurate
17 or not is beside the point. In this case, providing notice --

18 THE COURT: So, you're telling me no, the notice
19 doesn't have to be truthful and accurate.

20 MR. REES: I'm not saying it doesn't have to be
21 truthful, but I'm saying that --

22 THE COURT: Well, doesn't it have to be truthful?

23 MR. REES: A notice that provides for more than just
24 notice that a meeting has been called...

25 THE COURT: Difficult getting straight answers out

1 of you, Counsel. Either notice has to be truthful or it
2 doesn't have to be truthful. If you're telling me, "Judge, it
3 could be fanciful. It doesn't have to be truthful at all";
4 Is that your answer?

5 MR. REES: No. It may, of course --

6 THE COURT: The answer is it has to be truthful,
7 right?

8 MR. REES: It can't be deceitful and therefore --

9 THE COURT: It can't be deceitful. Wait. And if
10 it's deceitful, then what? Then what?

11 MR. REES: I don't know, Your Honor. The --

12 THE COURT: Then maybe a court should grant a
13 temporary restraining order if indeed the notice was
14 deceitful.

15 MR. REES: There is absolutely nothing to suggest
16 that, Your Honor. That's all I can say is that every -- the
17 notice here provided more than sufficient notice. It advised
18 Mr. Schobel and everyone else who was participating what the
19 stakes were, and the fact --

20 THE COURT: And the notice is clear from the plain
21 language of the notice, correct? All the letters and the
22 Hartman's letter, right?

23 MR. REES: It -- yes, it is.

24 THE COURT: And the Board's actions were a reaction
25 to Hartman's letter, right?

1 MR. REES: Yes. Yes. It is -- yes, the Board was
2 responding and considering the Hartman -- the Hartman letter,
3 and the notice -- each notice that was provided clearly
4 identifies the topic to be considered.

5 THE COURT: Why hasn't the Board publicly stated
6 that the Plaintiff was removed as President-Elect?

7 MR. REES: The Board was in -- I mean, the Academy
8 was in discussions --

9 THE COURT: Why isn't the Defendant? I said the
10 Board. The Defendant.

11 MR. REES: The Academy was in discussions with
12 Mr. Schobel for a number of weeks and has been very sensitive
13 to Mr. Schobel's interests in not broadcasting his removal
14 other than to note that a nominating committee was being
15 formed.

16 THE COURT: I mean, it's as if it hasn't happened,
17 though, this removal.

18 MR. REES: Well, it has. I mean, and the website
19 itself indicates that that position is vacant. The Board has
20 voted. Mr. Schobel knows that.

21 THE COURT: All right.

22 MR. REES: May I consult for a moment, Your Honor?

23 THE COURT: Sure.

24 (PAUSE.)

25 MR. REES: Your Honor, if I may amplify on two

1 points I made.

2 THE COURT: Sure.

3 MR. REES: One is that it was not known when notice
4 was given.

5 THE COURT: I'm sorry?

6 MR. REES: It was not known when notice was given
7 whether there would be a vote to remove Mr. Schobel. There
8 was a clear possibility --

9 THE COURT: Is there any declaration in the record
10 that supports that?

11 MR. REES: Well, I think -- I think each of our
12 exhibits supports that in that they make clear that this is a
13 critical issue warranting serious consideration through a fair
14 and balanced process.

15 The second point is that suspension in this context,
16 as I mentioned previously, is tantamount to removal because
17 the term of office of President-Elect and President is set by
18 the bylaws to run from annual meeting to annual meeting. And
19 so, again, as I mentioned previously, if we are -- as we were
20 shortly before --

21 THE COURT: There's no transcript of this meeting,
22 is there?

23 MR. REES: No, there's no transcript.

24 THE COURT: Let me ask you, did the Board -- did the
25 people assembled ever vote on suspension pending ABCD action?

1 Was there ever a call for a vote on that?

2 MR. REES: I don't think so.

3 MS. DOWNS: I can answer. There was no vote on
4 that.

5 MR. REES: The vote was on --

6 THE COURT: Did anybody ask for a vote? There's no
7 transcript.

8 MR. REES: Well, people's memory is controlled but
9 not mine. I wasn't there.

10 THE COURT: And there are no declarations in the
11 record, are there?

12 MR. REES: The vote was on whether to remove
13 Mr. Schobel as an officer.

14 THE COURT: So, he was lured there with this other
15 carrot and then things accelerated and someone called for a
16 vote on removal?

17 MR. REES: Your Honor, he was advised. The word
18 "suspended" is used. He understood, as everyone in this
19 context would, that that would prevent him from continuing as
20 President-Elect or serving as President. That was a topic
21 under consideration. It was the critical issue. Fair and
22 balanced procedures were developed for it. 27 of the 29 board
23 members participated, and there was a majority vote to remove
24 him. There was no surprise.

25 THE COURT: All right.

1 MR. REES: And it's reflected in the exhibits we
2 have attached.

3 THE COURT: Two more questions. You're troubled by
4 the hypothetical that I talked about where the request to
5 participate or to come to the meeting is not truthful, and you
6 agree that that's problematic. Hypothetically, if the -- if
7 the notice is not truthful, that's problematic, correct?

8 MR. REES: I mean, I can't cite any law on that, but
9 it seems to me problematic, yes.

10 THE COURT: Absolutely, all right. Then,
11 hypothetically, if what leads up to the action is untruthful,
12 should the action be sustained?

13 MR. REES: Well, the -- the -- if all that's
14 required is notice that a meeting will be held, which is the
15 case, then --

16 THE COURT: No, no, stick with my hypothetical.

17 MR. REES: I'm trying to, Your Honor.

18 THE COURT: No, stick with my hypothetical. That
19 may have been required but --

20 MR. REES: The answer is yes.

21 THE COURT: But hypothetically, the Board said
22 something untruthful. Hypothetically, the Board said
23 something untruthful and you say that's problematic, and if
24 untruthful, if pretextual, then the action should not be
25 sustainable; wouldn't you agree with that, hypothetically?

1 MR. REES: No.

2 THE COURT: It wouldn't?

3 MR. REES: No.

4 THE COURT: It's okay to deceive someone and tell
5 him we're going to talk about something else? We're going to
6 celebrate you, John, and then he's removed, that's okay?

7 MR. REES: As a legal matter, if the one procedural
8 requirement is to have a majority of the Board vote for
9 removal and that's what transpires --

10 THE COURT: Where is that? Where is that
11 requirement?

12 MR. REES: That's in the bylaws.

13 THE COURT: Right. If you need to consult with your
14 client, that's fine, Counsel.

15 MR. REES: Okay. Thank you.

16 (PAUSE.)

17 MR. REES: Thank you, Your Honor.

18 THE COURT: Sure.

19 MR. REES: What the bylaws speak to, and this is in
20 Article III, section 5(f) and Article V, section 2 --

21 THE COURT: Wait a minute, Article III, section 5(f)
22 says, "To Elect the officer of the Academy."

23 MR. REES: That's correct. And Article V, section
24 2, which likewise refers to election, is that the Board is
25 empowered to elect officers of the Academy and that it would

1 do so by a vote of a majority of the whole board.

2 THE COURT: Right. But that goes to elections,
3 though.

4 MR. REES: It does.

5 THE COURT: We're talking about the action here.
6 Where is the bylaw language that sanctions the majority vote
7 for this -- for this action?

8 MR. REES: There's no -- these are the provisions,
9 plus the Article I -- the Article III, section 5 provision
10 giving the Academy the right, power and authority to exercise
11 all other powers. Because if an officer can be --

12 THE COURT: Wait a minute, wait a minute. You're
13 saying Article III, section 5(f), right?

14 MR. REES: 5(f) and also above that, before (a), the
15 general reservation of powers.

16 THE COURT: Where?

17 MR. REES: Immediately above (a), two sentences
18 above that in the right column. It gives the Board, on the
19 second line, the right, power and authority to exercise all
20 such powers and to do all such acts and things that may be
21 appropriate.

22 THE COURT: So that was the authority then for the
23 Board to say that a majority of people have voted to remove,
24 even though it's not -- that's not clearly spelled out
25 anywhere?

1 MR. REES: There is no specific removal provision,
2 and so what one looks to -- either under -- either anything in
3 Illinois law or in these bylaws restricting the right of
4 removal. So we look to the bylaws, we look at the provisions
5 for election as well as the general reservation of powers to
6 the Board. The officer is elected by the Board and is elected
7 by a vote of the majority of the whole board.

8 When it comes to removal, it can't be that something
9 else is required given that under section 5 of Article III the
10 power is reserved to the Board to take all other actions in
11 the interest of the -- best interest of the Academy, and given
12 further that there's nothing in the Illinois act that requires
13 anything different from this with respect to officers.

14 THE COURT: All right. Thank you.

15 MR. REES: Thank you, Your Honor.

16 THE COURT: Any response?

17 MR. WACHEN: Yes.

18 Is this yours?

19 MR. REES: Yes, it is. Thank you.

20 MR. WACHEN: Your Honor, I want to correct some of
21 the things he said and maybe shed some light on some of the
22 questions you asked that I don't think were answered.

23 The ABCD is a corporate child. It's part of the
24 Academy. The bylaws -- the bylaws of the Academy create the
25 ABCD. It is not an independent entity. It is not an

1 independent corporate entity. It's not -- it's a subset.

2 THE COURT: It's an arm of the Academy.

3 MR. WACHEN: Correct.

4 THE COURT: It's an arm of the Defendant.

5 MR. WACHEN: That's right. So that's the first
6 thing. The -- let me just look here. The notice is not only
7 to notify Mr. Schobel. It's also to notify all the other
8 directors of what's going to happen at the meeting and to
9 provide people the opportunity to prepare for the meeting.

10 So if they know, for example, we're going to vote on
11 removal -- I mean, removal of the President-Elect is about is
12 about as serious as it gets.

13 THE COURT: It's not discipline; it's not reward;
14 it's removal.

15 MR. WACHEN: Of course it's discipline. I mean, the
16 original premise here was we're going to suspend him to wait
17 and see what the ABCD does, and then when we hear what they
18 do, the assumption is then we'll remove him. But they decide,
19 "You know what, let's just jump the gun and we don't need to
20 wait for the ABCD."

21 THE COURT: But counsel says that your client knew
22 exactly what the deal was when he was invited to this meeting.
23 He knew that they were going to be talking about removal and
24 his -- and his removal as President-Elect, his removal as
25 President.

1 MR. WACHEN: Well, first of all, not only -- there's
2 not only the issue about removal, and I'll get to that in a
3 minute. There's also the issue of what the subject is
4 going -- that they're going to use to talk about. And
5 everyone agrees that all the notices talk about the Hartman
6 letter. However --

7 THE COURT: Wait just a minute. Not so quick.
8 What's going on?

9 (PAUSE.)

10 MR. WACHEN: Your Honor, the Board -- Mr. Schobel
11 was ambushed at the meeting, not only on the issue of
12 removal --

13 THE COURT: He was what? I'm sorry.

14 MR. WACHEN: He was ambushed. The original subject
15 was supposed to be the Hartman letter and whether to suspend
16 him. They end up voting to remove him and they bring up other
17 subjects.

18 THE COURT: Let's assume he was ambushed. So what?
19 I mean, the statute says, they don't have to do any of this
20 stuff, they don't have to give him notice, they only have
21 to -- can just get a majority of the people on the phone, I
22 guess, pursuant to all these, you know, Articles III and V,
23 and you know, you read into it, they have the same authority
24 to remove as they do to elect. They didn't have to give
25 notice.

1 MR. WACHEN: Well, first of all, under the statute,
2 notice is required to remove a director. That is clear.

3 THE COURT: Under the Illinois statute.

4 MR. WACHEN: Under the Illinois statute, it has to
5 be specific. It has to say, "We're going to remove Director
6 X."

7 THE COURT: No, you're talking about the director
8 removal statute.

9 MR. WACHEN: Correct.

10 THE COURT: I'm not focusing on that. I'm focusing
11 on the catchall statute that provides for -- I understand your
12 argument with respect to director. I'm not focusing on that.
13 There is a statute that requires removal of officers, and your
14 client is indeed an officer.

15 All right. What's the notice that's required under
16 that section?

17 MR. WACHEN: The statute doesn't specify, although
18 it does specify as to directors.

19 THE COURT: I understand your argument about
20 directors. We don't need to rehash that. I understand that.
21 I'm not focusing on that right now.

22 MR. WACHEN: He also -- I believe he said that it
23 was not even known to the Board, when they sent out the
24 notice, that removal was a possibility. I believe that's what
25 he said when he was answering your questions before.

1 So the Board didn't even know that removal was going
2 to happen. And they have this -- they have this meeting, and
3 this is in Mr. Schobel's declaration, the sequence of events
4 was after they conferred with counsel for an hour, they come
5 back in, someone makes a motion to ask Mr. Schobel to resign,
6 and somebody else, who's dialed into meeting, says, "Oh, you
7 know, let's just remove him, and I move to remove him." There
8 was never a motion to suspend him.

9 It went from "Let's ask him to resign" to, "No, no,
10 let's remove him." And speaking of the notice, the notice
11 clearly said that you weren't allowed to call into the
12 meeting. You had to be there in person, and then they send
13 out a thing on August -- on July 31st --

14 THE COURT: Which letter says that?

15 MR. WACHEN: I believe it's the July 14th.

16 THE COURT: I think you're correct. I don't need to
17 find it right now, but it's the July 14th letter?
18 July 14th e-mail.

19 MR. WACHEN: The July 14th e-mail. "As is our
20 practice," and he talked about practice, "we will not have a
21 call-in number or proxies. Attendance in person is necessary
22 to participate in the meeting." That's what it says.

23 THE COURT: Was that ever changed?

24 MR. WACHEN: Yes, on July 31st they sent an e-mail
25 that said, "Oh, now we're going to allow call-ins." The

1 problem is that was given less than ten days before the
2 meeting, didn't give Mr. Schobel opportunity to talk to the
3 people who weren't going to be there in person who were going
4 to be dialed in.

5 The President expressed -- I believe it was in the
6 July 16th e-mail, one of the e-mails where he said -- he
7 expressed his concern.

8 THE COURT: Let me stop you right now.

9 MR. WACHEN: Yes.

10 THE COURT: Only because this has gone a little bit
11 longer and I started off with two questions, but I'm glad I
12 did this, and I'm going to give you a chance to respond. But
13 there's some attorneys here in a couple of other matters and
14 they're shorter matters and I can let them go.

15 MR. WACHEN: Sure.

16 THE COURT: All right.

17 MR. WACHEN: That's fine.

18 THE COURT: You can leave your materials there, if
19 you like, but let me just take a short recess, and I'll give
20 you a fair opportunity to respond to the questions.

21 MR. WACHEN: Thank you, Your Honor.

22 THE COURT: But it's all going to lead up to this.
23 Putting aside your director argument, hypothetically again, if
24 what they said -- hypothetically, if what they said is not
25 true, is that in and of itself a basis for a temporary

1 restraining order?

2 In other words, if the notice that they provided, if
3 the notice they provided is not true, what application of law
4 entitles you to a temporary restraining order? That's the big
5 question.

6 I mean, let's assume that they didn't have to do any
7 of this, but nevertheless, they chose the language, they chose
8 what to put in, they chose to say it's in response to
9 Hartman's language, which only requested consideration of
10 suspension pending the culmination of ABCD matters,
11 procedures, it's all they asked for, but nevertheless what
12 happened was totally contradictory to what he had been
13 provided advance notice.

14 If all that is true, and indeed, it's not truthful
15 what they said, under those circumstances, why are you
16 entitled to a temporary restraining order, which is still
17 extraordinary relief? That's what it's all going to come back
18 to. We can talk about that after the recess.

19 MR. WACHEN: Yes, Your Honor.

20 THE COURT: And counsel admitted he would be
21 troubled by that if, hypothetically, it were not true. But
22 his position -- and I understand his position clearly is
23 "Judge, there's nothing untruthful there because everyone knew
24 what we were talking about," even though they controlled the
25 language of the e-mails and the letters and -- All right.

1 We'll talk in, I'm going to say, 15 minutes. It may
2 be a little bit longer than that, but I'm going to call the
3 other cases and let the attorneys go.

4 (A RECESS WAS TAKEN TO CALL OTHER DOCKET MATTERS.)

5 THE DEPUTY CLERK: Please remain seated and come to
6 order. Resuming Civil Action 09-1664, Bruce Schobel versus
7 American Academy of Actuaries.

8 THE COURT: You want to finish your sentence?

9 MR. WACHEN: If I can remember what it is. You had
10 asked me a hypothetical. If the notice was invalid, would
11 that be a basis for the TRO, and the answer to that is yes.

12 THE COURT: Why? What case says that?

13 MR. WACHEN: What case says that? Well, I mean, you
14 have -- it goes to the likelihood of success, and if the
15 notice was invalid, the bylaws require notice. If the
16 notice -- the Academy has admitted that no one -- none of the
17 Board members coming to the meeting had any idea that they
18 were going to vote on removal, although they expected that
19 Mr. Schobel would have known that, even though they didn't
20 know about it.

21 THE COURT: That's in the record this morning,
22 right?

23 MR. WACHEN: Right.

24 THE COURT: Yeah.

25 MR. WACHEN: And so the notice was invalid. It

1 didn't properly notice the meeting, and the action of the
2 Board was invalid, and that's it.

3 THE COURT: Anything further with respect to any of
4 the other questions the Court asked?

5 MR. WACHEN: Yes. Oh, and as he acknowledged, it
6 can't -- the notice can't be deceitful, and obviously, a
7 notice that doesn't say --

8 THE COURT: Does all that dovetail into a TRO, and
9 if so, says who? Says what court for what reason?

10 MR. WACHEN: Well, the reason would be that they
11 need to comply with their own bylaws. I don't think anyone
12 would disagree with that, and I'm sure there are cases that
13 would support that. I believe the statute probably says that.

14 So, they have not complied with their bylaws. Once
15 they've given notice, it can't be deceitful, it can't be
16 misleading, it can't be inaccurate, and that's exactly what
17 happened here. So, it goes to the issue of likelihood of
18 success on the merits. We should be able to succeed on that.

19 And we can talk about irreparable harm and the other
20 factors if you'd like, but we talked about that the other day.
21 It's in our papers, so that's the other leg of the stool. And
22 as a result, there is -- the meeting was invalid. The vote
23 was invalid.

24 THE COURT: What about that ten-day notice argument?
25 You agree with what counsel said?

1 MR. WACHEN: In what respect?

2 THE COURT: With his argument as to how -- as to
3 where it appears in the bylaws, the requirement for ten days'
4 notice and the -- and I'm sorry, for a majority vote.

5 MR. WACHEN: I'm sorry.

6 THE COURT: Counsel draws an analogy between a
7 majority vote for this action and the election of officers.

8 MR. WACHEN: Well, I mean, the best illustration of
9 that, leaving aside the question of whether he's a director or
10 not, there are certain directors who are not officers of the
11 Academy. They are elected -- there's a group of them who are
12 elected by a majority vote of the membership, but the statute
13 doesn't permit removal by majority vote. The statute requires
14 removal by two-thirds vote on special notice.

15 So, clearly the standard for removing someone is
16 higher for directors, certainly, than it is for electing them.

17 THE COURT: You keep going back to that argument.

18 MR. WACHEN: Well, I'm using that as an example,
19 Your Honor. So, just for the notion that just because you can
20 elect one by a majority doesn't mean you can remove them by a
21 majority.

22 THE COURT: What about the catchall language,
23 though?

24 MR. WACHEN: Well, the catchall language, if taken
25 to its natural conclusion, why do they even need the bylaws?

1 They just need that one sentence that says we can do whatever
2 we want whenever we want, and clearly that catchall language
3 doesn't permit them to ignore the other provisions of the
4 bylaws and doesn't permit them to ignore the provisions of the
5 statute.

6 The bylaws can't be used to override the statute,
7 and it can't be used to override other provisions of their
8 bylaws. That wouldn't allow them to call a meeting with no
9 notice, and effectively that's what happened here. There was
10 a meeting, but there wasn't proper notice.

11 THE COURT: Are the minutes of that meeting in the
12 record?

13 MR. WACHEN: I don't believe there are any minutes,
14 Your Honor.

15 THE COURT: Is there a requirement that there be
16 minutes of each meeting?

17 MR. WACHEN: I don't know the answer to that.

18 THE COURT: Is there? Let me ask the Board's
19 counsel.

20 MR. REES: No, Your Honor.

21 THE COURT: There is no requirement for minutes?

22 MR. REES: No.

23 THE COURT: So there's no recordation, there's no
24 minutes. Strange.

25 MR. WACHEN: Your Honor, my colleague pointed me to

1 the case that we've cited in our supplemental brief, *Wahyou*
2 *versus Central Valley National Bank* in which the Court granted
3 an injunction, in part because of the invalidity of the
4 notice. That's a case from the Ninth Circuit.

5 So courts have granted injunctions where the notice
6 of a board meeting has been ineffective. I think there may be
7 one other case like that.

8 THE COURT: It's the Ninth Circuit?

9 MR. WACHEN: And of course we have the case, the
10 *Muhammad* case that was in our reply brief in which the person,
11 the plaintiff there was both an officer and director, and the
12 Illinois appellate court looked to the standard for removing
13 directors.

14 You know, if Mr. Schobel -- why make Mr. Schobel a
15 director at all if you're not going to treat him like a
16 director? I mean, he didn't have to be a director. There are
17 organizations out there where officers are not directors, but
18 in this case they are. So when he was elected -- and
19 everybody knows that. It's in the bylaws. So when he was
20 elected to be an officer, he was elected to be a director. He
21 was elected to be -- to hold the position of officer/director.

22 Yeah, the other case is the *Tullos* case, *Tullos*
23 *versus Parks*. That's an Eighth Circuit case. It's in our
24 supplemental brief. Another one where the notice -- an
25 injunction was issued where the notice was invalid.

1 THE COURT: All right. Anything further, Counsel?

2 MR. WACHEN: No, Your Honor. Thank you.

3 THE COURT: Yes, sir.

4 MR. REES: Your Honor, may I respond briefly?

5 THE COURT: Yeah.

6 MR. REES: First and most importantly, I think
7 calling attention to two provisions of the Illinois Not For
8 Profit Corporation Act. The first is Section 108.30 which
9 deals with directors, and we've contended that that isn't
10 significant or legally relevant, but it does, in this respect,
11 highlight an important issue.

12 It says in -- it is actually 35(c)(2) that no
13 director shall be removed at a meeting of members entitled to
14 vote unless the written notice of such meeting is delivered to
15 all members entitled to vote on removal of directors. And
16 then it says that such notice shall state that a purpose of
17 the meeting is to vote upon the removal of one or more of the
18 directors.

19 In other words, for a director where the members are
20 voting, there is a requirement of notice that removal is being
21 considered. There's no similar requirement with respect to
22 directors who are being removed by the Board and there
23 certainly is no similar requirement with respect to officers
24 who are being removed, so that provision is telling.

25 Second in 108 --

1 THE COURT: If there's no provision for an officer,
2 why wouldn't the courts look to the removal provisions for
3 director then?

4 MR. REES: Well, those are specific to directors,
5 but in other words, in there's a -- the fact that there's a
6 particular procedure or notice requirement for directors that
7 doesn't exist either with respect to directors who are being
8 removed by the Board as opposed to members of the organization
9 or who are being -- or with respect to officers who are being
10 removed, the fact that there's no corollary provision for our
11 situation indicates that no such notice of a particular -- the
12 content or subject of a meeting is required, and that's
13 consistent with Section 108-point --

14 THE COURT: I may agree with you, I may not, but
15 nevertheless, the Board took it upon itself to provide notice,
16 though, and that's what's concerning to the Court.

17 MR. REES: It did, Your Honor. And if we look back
18 at --

19 THE COURT: If removal is not discipline, I don't
20 know what is. I mean, it's certainly not a reward.

21 MR. REES: Right. If we look back at the
22 July 31st letter, for example, Your Honor, in Paragraph No.
23 1 it says, "The purpose of our meeting will be to determine
24 what action, if any, the Board should take at this time." And
25 then it goes on and it uses the word "suspension." It tells

1 about what action it should take in response to the letter
2 from the 19 presidents.

3 In other words, the 19 presidents had written the
4 letter addressed in the sealed matter that had used -- that
5 had referred to suspension, but here the notice is that the
6 entire purpose of this meeting in executive session, for which
7 there wouldn't be minutes -- this was not an open board
8 meeting. It was an executive session meeting -- would be to
9 purpose what action to take.

10 And so not -- although no notice was required of the
11 specific subject of the meeting, that, by itself, coupled with
12 the earlier communications which refer to the critical
13 decision before the Board make abundantly clear that this was
14 a significant topic. It was not a discussion of a suspension
15 for a couple of weeks, which would not be a critical issue
16 about Mr. Schobel's future but rather was a question of
17 removal.

18 I did, by the way, not say -- and I need to correct
19 this -- that the members of the Board had no idea.

20 THE COURT: Well, you said --

21 MR. REES: No, I said that they did not know that
22 they would vote on removal. And there's a big difference
23 between the two.

24 THE COURT: If they didn't know what the purpose
25 was, how in the world did they know --

1 MR. REES: Well, they knew what the purpose was. It
2 was to consider what action to take, and that would include a
3 range of actions and nothing further was required. If we look
4 back at 108.10 of the Illinois act, it provides that a
5 majority of the directors then in office shall constitute a
6 quorum, and then in subsection (b), that an act of the
7 majority of the directors present at the meeting at which a
8 quorum is present shall be an act of the Board of Directors.

9 The bylaws go a little further than that and say
10 that it has to be an act of the majority of the whole board,
11 not just a majority of those who are present. But that is --
12 that sets forth the requirement for a meeting, that there be
13 a -- that there be a quorum and that the decision acted upon
14 be -- be adopted by a vote of a majority, of the whole board
15 in the case of the Academy's bylaws, and that there be ten
16 days' notice given of the meeting. Nothing more than that is
17 required.

18 And if you consider the fundamental purpose of an
19 organization's being able to ensure that the person at the
20 helm belongs there and can act and serve the best interest of
21 the Academy or any other Not For Profit Organization, that
22 demonstrates why such latitude would be provided to a board of
23 directors.

24 THE COURT: Is that it?

25 MR. REES: And that's it, Your Honor. Thank you.

1 THE COURT: All right. Yes.

2 MR. WACHEN: Your Honor, may I point something out?

3 THE COURT: Very briefly.

4 MR. WACHEN: I just want to point out in -- a
5 section that counsel was reading from, 108.35(C)(2). It says,
6 "No director shall be removed at a meeting of members." Well
7 these directors are members. This is a meeting of members.
8 So this --

9 THE COURT: I'm sorry, 108.35 (C)(2).

10 MR. WACHEN: 108.35 (C)(2) was the provision that
11 counsel referred to in trying to argue that somehow this type
12 of notice wasn't required, but the provision refers to a
13 meeting of members, and the directors are members, so that's
14 Point No. 1.

15 THE COURT: I'm sorry, I don't have that in front of
16 me. What does it actually precisely say, 108.35 (C)(2)?

17 MR. WACHEN: Yes. Your Honor, it says -- this comes
18 into the -- in the section that says, "In the case of a
19 corporation with members entitled to vote for directors, no
20 director may be removed except as follows..." And No. 2 says,
21 which is what counsel read before, "no director shall be
22 removed at a meeting of members entitled to vote unless a
23 written notice of such meeting is delivered to all" --

24 THE COURT: That gets back to your removal of
25 director argument. I understand. All right.

1 MR. WACHEN: He brought it up. I just want to point
2 out to the Court that his argument that somehow a lesser
3 notice is required isn't even made out by looking -- When you
4 look at the language of the statute, it undercuts exactly what
5 he just said.

6 THE COURT: Because the Board's availing itself of
7 that section that deals with removal of elected directors
8 then, right?

9 MR. WACHEN: That's one point, and also because it
10 talks about a meeting of directors requiring that special
11 notice.

12 THE COURT: Right.

13 MR. WACHEN: Also, Your Honor, for him to suggest
14 that suspension is not a serious -- I forget exactly the word
15 it said in that e-mail, but that suspension is not a serious
16 matter, I don't believe any director had ever been suspended
17 or officer had ever been suspended before.

18 So the fact that they didn't know they were going to
19 vote on removal, they knew they were going to consider a
20 suspension, and one of the issues was, well, do we suspend
21 this guy, you know, is he innocent until proved guilty? Or do
22 we wait till the ABCD -- treat him as if he's innocent, leave
23 him on the Board; if the ABCD does something, then we'll act
24 accordingly, as opposed to what the Hartman people were
25 advocating, which is let's suspend him now and see what the

1 ABCD does.

2 That was what the purpose of the meeting was, as
3 communicated in the notice, and for them to suggest that
4 removal was on the table -- we're talking about a serious
5 issue, removal of the next president.

6 THE COURT: Right.

7 MR. WACHEN: I mean, if that was what they wanted to
8 talk about, why didn't they put it in the notice, so everyone
9 could be prepared, so Mr. Schobel could be prepared to answer
10 all the questions, could talk to people before the meeting.

11 I mean, one of reasons for having notice is so
12 members can get prepared for at the meeting, can decide if
13 they're going the attend the meeting. I mean, if the purpose
14 of the meeting is the discuss next year's Christmas party,
15 some people might decide not to go, but if it turns out the
16 real purpose is to vote to remove all the officers, well, then
17 they might want to go. So, it's certainly an important thing.

18 And that didn't happen here. There can be no doubt
19 about that. So, the notice was invalid, they did not comply
20 with their own bylaws, did not comply with Illinois law;
21 likelihood of success on the merits, Mr. Schobel's been
22 irreparably harmed by being deprived of the opportunity to
23 serve as president, a unique opportunity. And by the way, the
24 harm to the Academy, it's worth noting that the Academy is a
25 professional organization that views itself as kind of the

1 epicenter of actuarial professionalism and integrity.

2 So, isn't it quite ironic that they would act in
3 this way, and certainly the public interest is served by
4 making sure that Illinois corporations comply with notice
5 requirements and so forth. Thank you, Your Honor.

6 THE COURT: All right. Let me just take a
7 five-minutes recess, Counsel.

8 THE DEPUTY CLERK: This Court is now taking a short
9 recess.

10 (A BRIEF RECESS WAS TAKEN.)

11 THE DEPUTY CLERK: This honorable court is again in
12 session.

13 THE COURT: All right. Folks, sorry, we're going to
14 have to go back to the drawing board here. I need some
15 additional briefs with respect to matters that the Court's
16 raised as a result of the Court's questioning this morning and
17 this afternoon.

18 I understand that the Plaintiff wanted to attend
19 some dinner or luncheon tomorrow. I can't do anything about
20 that. The Court is not in a position to rule as a matter of
21 public record everywhere, that this litigation is pending, and
22 I'm not a position to rule on his request for a TRO, and
23 that's all I have to say about tomorrow. I'm just not ruling
24 on it.

25 I will reschedule -- I'll continue this hearing

1 to -- I have a busy day Tuesday, but 2:00 o'clock on Tuesday
2 is the only time I have available to proceed with this hearing
3 and resolve the issues, if it's appropriate to do so at that
4 time, but I'm going to need some additional briefs with
5 respect to the issues that the Court raised as a result of its
6 questioning, and very succinctly. I'm not going to go over
7 everything for fear I'll leave something out.

8 It's one thing to say that no notice is required.
9 It's another thing to say that if notice is given, it ought to
10 be accurate and truthful. And there's some serious questions
11 raised here as to whether or not the notice given was indeed
12 truthful. Serious question as to whether people who received
13 this notice even knew that they would be asked to vote on
14 removal by virtue of counsel's own statement on the record.
15 So, they didn't know what they were going to be voting on, how
16 in the world could Plaintiff have known that this was a
17 meeting convened to determine his removal.

18 There's nothing in the -- any of the notices, any of
19 the e-mail notices that refers to removal in the slightest
20 bit. So, the issue that arises out of that is this:
21 Notwithstanding an argument that the Board didn't have to
22 make -- the Defendant didn't have to give any notice, if
23 indeed the Defendant decided to give notice, the notice wasn't
24 truthful, you know, what's the impact there with respect to a
25 litigant's request to have proceedings enjoined?

1 And just so the record is clear, what is the
2 irreparable harm we're talking about at this point? Is it
3 the -- you tell me. What is the irreparable harm? Very
4 succinctly, what is it? I'm not talking about something
5 that's already taken place. What is the irreparable harm that
6 you're trying to enjoin at this point?

7 MR. WACHEN: If I may come up here.

8 THE COURT: Yeah.

9 MR. WACHEN: The irreparable harm is Mr. Schobel was
10 elected to be the President-Elect, he was elected to become
11 the next President, and he is being prevented from carrying
12 out his position. So, the irreparable harm is the ability to
13 hold that position, operate and lead the organization, have an
14 impact, engage in public policy for the organization. This is
15 the public policy arm of the actuarial world.

16 THE COURT: And I assume to ascend to the office of
17 President in October; is that right? Is that part of the --

18 MR. WACHEN: Absolutely. In fact, their actions at
19 the moment are depriving him of the opportunity to participate
20 in weekly conference calls at the -- there's like an executive
21 group of the Board that he was a member of. He can't
22 participate in those, so he's being kept out of the loop of
23 the governance of the organization, and that's something he
24 feels very passionate about, he's worked toward his entire
25 career and --

1 THE COURT: All right. You've answered the
2 question. Thank you.

3 MR. WACHEN: Thank you.

4 THE COURT: So that's -- that's what's troubling.
5 All the questions the Court asked this morning are questions
6 that -- the answers, especially, trouble the Court.

7 So, is there case law out there that addresses those
8 set of circumstances, what happens, should a court grant
9 injunctive relief if that process evolves the way that
10 arguably it could have evolved here where the notice was, at
11 best, misleading and at worst, something else?

12 The other thing, it doesn't seem to me that
13 Defendant can just cherrypick statutes, portions of bylaws,
14 piecemeal here a piece of the statute that deals with
15 procedures to remove elected directors to kind of cobble out
16 this procedure after the fact. You can't have it both ways.
17 Either the -- either the Plaintiff was removed as a result of
18 authority to remove an officer who happens to be a director,
19 or Plaintiff was removed as a result of effort -- Plaintiff
20 was removed or should have been removed pursuant to
21 procedures, statutory and bylaws, to remove elected directors.

22 It doesn't seem clear that it should be a portion of
23 both. We looked at bylaws for a certain paragraph, then we
24 looked to removal of elected directors provision for certain
25 authority, that doesn't make any sense, but that Plaintiff --

1 the Defendant can spell all that out in a pleading, address
2 that concern that the Court has.

3 I'm not ruling on anything right now. There are
4 more questions raised as a result of the Court's questions
5 this morning and this afternoon, and I want answers, and I
6 want to know what all that means with respect to the correct
7 application of precedent somewhere.

8 And it's just gotten to the point where all of this
9 is crystallized in the Court's view, and I want the parties to
10 look at case law, other precedent and provide the Court with
11 any supplemental points and authorities that will assist the
12 Court in resolving these very important issues to both sides.

13 As I said -- the first thing I said when I took the
14 bench last week was both sides have a lot to lose here. It's
15 a case that cries out for settlement, and indeed there are
16 more questions that have been raised, and I'm not persuaded at
17 this time that -- well, I'm just not going to rule on anything
18 at this point.

19 So, I want Plaintiff, though, to file first. I want
20 Plaintiff to file by noon tomorrow any supplemental
21 authorities that address what we've discussed today and the
22 application of any precedent, any case law, any other law that
23 on those issues. And Defendant should respond by noon on
24 Friday, and I'll give -- because we're filing ECF, I'll give
25 Plaintiff an opportunity to reply by noon on Saturday.

1 Do not raise any new issues, though. Do not do
2 that. I'll telling you now I'm not going to allow any
3 surreplies, but this has been very helpful this morning for
4 the Court's benefit anyway, and I want the benefit of your
5 continued thoughts, and I want the opportunity to consider any
6 additional case law that the parties wish to bring to the
7 Court's attention.

8 The hearing will be at 2:00 o'clock on the -- I
9 think I said 15th. That's the only time I have available.
10 That's it. So -- excuse me.

11 (PAUSE.)

12 THE COURT: Addy has reminded me, in the event that
13 you need to file any in-camera submissions, you need to e-mail
14 them to us and for our eyes only. But this has been extremely
15 helpful to the Court. And again, parties see fit to go knock
16 on Judge Facciola's door, I'm sure you'd find a willing judge
17 willing to talk to you.

18 We don't talk about what you folks -- I do know we
19 reached out to him because Judge Kay was unavailable, but
20 whatever you talk about with him is between you and Judge
21 Facciola. Any questions?

22 MR. REES: Your Honor, one procedural matter. There
23 is, of course, the separate motion for preliminary injunction.
24 Our opposition to that would be due on Monday. We would
25 request a one-week extension.

1 THE COURT: Yeah. Thank you for bringing that up.
2 Let's deal with TRO first, and I'm not going to deprive you of
3 your fair opportunity to respond to that.

4 MR. REES: Or if we could just hold that in abeyance
5 and --

6 THE COURT: Let me just stay everything else right
7 now. Stay proceedings. Well, let me be careful of what I'm
8 staying. You're not required to file your response to the PI
9 on Monday. We'll talk about further briefing, if appropriate,
10 on Tuesday.

11 MR. REES: Thank you, Your Honor.

12 THE COURT: All right. Thank you for bringing that
13 up. See you next week.

14 MR. REES: Thank you, Your Honor.

15 MR. WACHEN: Thank you.

16 THE COURT: All right. Thank you for very
17 interesting, very informative morning. I appreciate it.
18 Thank you. Have a nice day.

19 THE DEPUTY CLERK: This honorable court stands in
20 recess.

21 (PROCEEDINGS END AT 1:00 P.M.)
22 *-*_*-*

23 **CERTIFICATE OF REPORTER**

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

Catalina Kerr

Date