IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE D. SCHOBEL, Plaintiff, v. AMERICAN ACADEMY OF ACTUARIES, Defendant.	)	Case No. 09-1664 (EGS)

DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Nothing in Plaintiff's Supplemental Memorandum in Further Support of Motion for Temporary Restraining Order and Preliminary Injunction ("Supplemental Memorandum" or "Supp. Mem.") alters the conclusion that Plaintiff is not entitled to the extraordinary remedy of injunctive relief. To the contrary, the caselaw cited in the Supplemental Memorandum confirms that Plaintiff's Motion for a Temporary Restraining Order should be denied.

I. THE ADDITIONAL CASES CITED BY PLAINTIFF FURTHER DEMONSTRATE THAT PLAINTIFF CANNOT ESTABLISH IRREPARABLE HARM

Contrary to Plaintiff's assertion, the additional cases cited in his Supplemental Memorandum do not involve "similar circumstances to those presented here" (Supp. Mem. at 2),

nor do they support Plaintiff's core contention that his highly generalized allegations of reputational injury qualify as irreparable harm. 1/

For example, in *Schwartz v. Covington*, 341 F.2d 537 (9th Cir. 1965) – which was decided almost ten years before *Sampson v. Murray*, 415 U.S. 61 (1974) – the court addressed the "stigma" associated with an "undesirable discharge" from the United States Army for allegedly engaging in homosexual activity. The facts in *Schwartz* cannot be analogized to Plaintiff's removal as President-Elect. Indeed, Plaintiff has not been removed from his profession, but rather remains a member of the Academy, an officer and director of the Society of Actuaries and a director of the Conference of Consulting Actuaries. Plaintiff's continued involvement in these actuarial organizations, coupled with his continued employment with New York Life Insurance Company, likewise renders irrelevant *Assaf v. University of Texas System*, which held that the plaintiff's termination as a faculty member would cause him to experience a severe "loss of standing in the academic community," since it would leave him "without research resources which are a sheer necessity to an academician" and would deprive him of the ability to "mingle as an equal in the academic milieu." 399 F. Supp. 1245, 1251 (S.D. Tex. 1975), *dismissing appeal*, 557 F.2d 822 (5th Cir. 1977), *vacating as moot*, 433 U.S. 992 (1978). Given Plaintiff's many other professional activities and leadership positions, it is beyond dispute that

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1/ Plaintiff's claim that the Academy is causing him reputational harm also rings hollow because it is he – and not the Academy – who has been aggressively publicizing the facts relating to his removal. Plaintiff was interviewed for an article in today's *New York Times* (attached as Exhibit 1 hereto) just as he has posted a blog and participated in chat room discussions concerning his removal. In contrast, in a continuing effort to minimize any publicity or embarrassment for Plaintiff regarding his removal as President-Elect, the Academy has not made any announcement that refers to Plaintiff by name and has declined comment on questions about his status with the Academy, including a request for comment by the *New York Times*. In these circumstances – where Plaintiff is actively fomenting the very discussion of his removal that he claims will injure his reputation – his contention that the Academy is causing him irreparable injury is particularly unjustified.

Plaintiff's reputation and recognition are based on far more than his relationship to the Academy and that he continues to "mingle as an equal" with other actuaries notwithstanding his removal as President-Elect, and it defies credulity to assert that Plaintiff has been "irreparably harmed" by the action he now challenges.

Gately v. Commonwealth, 2 F.3d 1221 (1st Cir. 1993) likewise does not support Plaintiff's assertions of irreparable harm. In *Gately*, the court made clear that reputational injury was a "tenuous" basis for injunctive relief under *Sampson*, and the court therefore affirmed the issuance of an injunction only because plaintiffs' allegations went "beyond temporary loss of pay or irreparable injury" and instead were based on their claim that their "statutorily-based civil rights had been violated." *Id.* at 1234. Finally, Plaintiff's two cases involving the removal of directors – one of which is unpublished and the other of which was decided long before *Sampson* – provide no support for Plaintiff's claims. Rather, both cases were decided on purely procedural grounds, and as a result, neither case addressed any claim of reputational harm or even explained why an injunction might or might not have been appropriate. *See Forbes v. Board. of Directors for the NAACP*, 65 Fed. Appx. 517, 518 (6th Cir. 2003) (dismissing appeal as moot without analyzing propriety of injunction); *Wahyou v. Central Valley Nat'l Bank*, 361 F.2d 755, 756-57 (9th Cir. 1966) (dismissing appeal on mootness grounds because the injunction at issue had expired). 2/

2/ *Robinson v. District of Columbia*, No. 97-787 (GK), 1997 WL 607450, at *8 (D.D.C. July 17, 1997) also is inapposite, as that case did not even discuss reputational harm, but rather focused on the financial harm that would ensue if an injunction did not issue. *Id.* ("The financial losses have placed significant strain on [plaintiff's] personal relations with his wife. . . . [H]is wife is ill. If he were to lose his job, his wife and four children would be without the health insurance that they need."). In this case, by contrast, the position of President-Elect is an unpaid position. Plaintiff has not alleged that he has experienced (or will experience) any financial harm as a result of his removal, much less the type of immediate and extraordinary harm at issue in *Robinson*.

In sum, none of the additional cases cited by Plaintiff in his Supplemental Memorandum casts doubt on the conclusion that generalized assertions of reputational harm – which is all Plaintiff has alleged here – are wholly insufficient to demonstrate irreparable injury. To conclude otherwise would require ignoring *Sampson* and the numerous cases that have rejected reputational harm as a basis for injunctive relief. *See, e.g.*, *Morton v. Beyer*, 822 F.2d 364, 374 n.13 (3d Cir. 1987) (rejecting argument that reputational damage, characterized by plaintiff as the erosion of "trust and confidence" of peers, constituted irreparable harm); *Stewart v. I.N.S.*, 762 F.2d 193, 199-200 (2d Cir. 1985) (stating that injury to plaintiff's reputation including, *inter alia*, degrading and humiliating him in the eyes of peers, fell "far short" of irreparable injury necessary for temporary injunction); *Hunter v. FERC*, 527 F. Supp. 2d 9, 16 (D.D.C. 2007) (rejecting claim of irreparable harm and refusing to "speculate as to the degree to which [plaintiff's] reputation ha[d] been lessened in the eyes of the investing public").

II. THE "FUTURE AMENDMENT" TO SECTION 108.35(A) OF THE ILLINOIS STATUTE IS IRRELEVANT AND CANNOT TRUMP THE PLAIN LANGUAGE OF THE STATUTE IN ANY EVENT

Plaintiff also is incorrect that a "future amendment" to the Illinois Not for Profit Corporation Act is germane to the Court's interpretation of Section 108.35(a) of that Act. Section 108.35(a) is irrelevant at the threshold because it applies solely to the removal of *directors*, whereas Plaintiff's status as a director was derived entirely from his status as an officer, and therefore terminated automatically by operation of law when Plaintiff was lawfully removed as President-Elect. In any event, the "future amendment" simply reflects the same intent as the existing language of Section 108.35(a): a director may be removed "with or without cause," except that a director may be removed only for cause if the articles of incorporation or

the bylaws so provide. Nothing in the short and cryptic summary of the purpose of the "future amendment" either alters this conclusion or trumps the plain language of the Act.

Indeed, the legislative history of the "future amendment" itself undermines Plaintiff's assertions. As currently enacted, Section 108.35(a) provides in full as follows:

> One or more of the directors may be removed, with or without cause. In the case of a corporation having a board of directors which is classified in accordance with subsection 108.10(e) of this Act, no director may be removed except for cause if the articles of incorporation or the bylaws so provide.

Ill. Stat. Ann. § 105/108.35(a). To conclude that the second sentence means that directors cannot be removed except for cause would make the first sentence meaningless and defies established principles of statutory construction. Any suggestion that an amendment was necessary to permit removal without cause (unless the articles of incorporation or bylaws provide otherwise) is simply misguided and erroneous.

As initially introduced, Illinois Senate Bill 1390 proposed to delete the second sentence of Section 108.35(a). *See* 2009 Il. S.B. 1390, at 7 (attached as Exhibit 2 hereto). It was in this context that, as Plaintiff notes, the stated purpose of Senate Bill 1390 was, among other things, to "[d]elete[] [the] provision that prohibits the removal, except for cause, of directors of different classes with non-uniform terms." *See* Exhibit 3 hereto, at 2. As actually adopted, however, Senate Bill 1390 did not delete that sentence, but instead revised it – consistent with the language currently in effect – to confirm that a director may be removed "with or without cause" unless the articles of incorporation or the bylaws provide for termination only for cause. *See* Exhibit 2 to Plaintiff's Supp. Mem.

Because the second sentence of Section 108.35(a) was not deleted, the purpose of the originally proposed "deletion" is irrelevant. Moreover, even assuming that a one-sentence statement of purpose in a 2009 statutory amendment could be used to interpret statutory language

enacted years earlier – and it cannot – that sentence does not support Plaintiff's position. Rather, the sentence on which Plaintiff relies is best read as an incomplete summary of the second sentence of Section 108.35(a), which, when read in tandem with the first sentence of that Section, makes clear that a director may be removed "with or without cause," except that a director may be removed only for cause if the articles of incorporation or the bylaws so provide. The Academy's articles and bylaws do not do so. Plaintiff's argument that Section 108.35(a) requires a court order to remove a director unless the articles of incorporation or bylaws provide for removal for cause is not supported by the "future amendment" and ignores both basic principles of corporate governance (which do not require court action to effect removal) and the plain language of the statutory text at issue. 3/

CONCLUSION

For these additional reasons, Plaintiff's motion for a temporary restraining order should be denied.

Dated: September 8, 2009

Respectfully submitted,

/s/ Jonathan T. Rees

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3/ Plaintiff also cannot rely on *Laughlin v. Geer*, 121 Ill. App. 534 (1905) to support his claim that he had a right to continue as a director under Section 108.50(c). As Plaintiff acknowledges, *Laughlin* (which was decided over a century ago) noted that "a director having been elected is entitled to hold his position until the expiration of his term of office." 121 Ill. App. 534, *cited in* Supp. Mem. at 5. However, Plaintiff was not elected a director; he became a director solely by virtue of his election as President-Elect. He thus was "entitled to hold his position" as a director only until he ceased to be an officer on August 5, 2009. *Laughlin* thus supports the Academy's position, not Plaintiff's.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2009, I caused a true and correct copy of Defendant's Response to Plaintiff's Supplemental Memorandum to be served via electronic mail and certified mail, return receipt requested, to:

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