IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE D. SCHOBEL, Plaintiff, v. AMERICAN ACADEMY OF ACTUARIES, Defendant.	Civil Action No.: 1:09-cv-01664-EGS

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN RESPONSE TO COURT'S REQUEST AT SEPT. 9 HEARING AND IN FURTHER SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiff Bruce D. Schobel submits this supplemental memorandum in response to the Court's request for legal authority as to the following issues that arose at the Court's hearing on September 9, 2009: (1) if the Academy provided notice of the purpose of the August 5 meeting but the notice was deceitful, inaccurate and/or untruthful, are the notice and the actions that flow from it invalid on that basis alone; (2) is injunctive relief the appropriate remedy when the Board has taken an invalid action stemming from a deceitful, inaccurate and/or untruthful special meeting notice; (3) how does this aspect of the Academy's conduct contribute to the irreparable harm that Mr. Schobel will experience if the Court does not immediately enjoin the Academy; and (4) can the Academy "cherry pick" certain statutory provisions from Illinois law and its own Bylaws that relate to Mr. Schobel's status and rights as a Director and the standards governing removal of a Director.

In addition to the legal authority below and in response to the Court's inquiries at the September 9 hearing, Mr. Schobel also offers the accompanying Third Declaration of Bruce D. Schobel ("Schobel 3d Decl.") that provides additional details beyond those referenced in his two

earlier declarations regarding what transpired at the portion of the August 5 meeting that he attended as well as a further articulation of the irreparable harm he (and the Academy's membership) will experience if the Court does not intervene with an immediate injunction.

ARGUMENT

I. THE ACADEMY'S NOTICE OF THE AUGUST 5 MEETING FALSELY DESCRIBED THE PURPOSE OF THE MEETING, MAKING THE RESULTING ACTIONS OF THE BOARD INVALID

Article III, section 3 of the Academy's Bylaws mandate that "Notice of the meetings of the Board *shall be given*" (emphasis added), and within certain time parameters. The notice of the August 5 meeting, which was issued by email on July 14, 2009 said that "the purpose of the meeting is to discuss with the Board the letter sent to it by Bob Anker on behalf of the 19 past presidents of the Academy."[1] (Schobel 3d Decl. ¶ 3; Downs Decl. Attachmt C.) The letter signed by the past presidents and authored by David Hartman ("Hartman Letter"), requested that the Board "*suspend* the privileges of Bruce D. Schobel's acting as President-Elect … pending the investigation of the complaint pending against Mr. Schobel and action by the ABCD, and if required, a *subsequent action* by the Board." (Emphasis added.) Indeed, that Hartman Letter specifically ruled out removal. It stated, "Determining whether further action, such as removing Mr. Schobel from office, may be appropriate, *but should await the outcome of the ABCD process* the profession has had in place since

[1] Among its many defects, the July 14 meeting notice makes no reference to the specific date of the special meeting. The notice also states: "As is our practice, we will not have a call-in number or proxies. Attendance in person is necessary to participate in the meeting." The first official word that the Academy would allow telephone participation, despite the previously expressed concerns about doing so, came in an email on Friday, July 31 email—a mere five calendar days, and three business days before the meeting was to occur. The impact of this change is critical because if the Board had followed the procedures articulated in the original notice, the vote to remove Mr. Schobel would have failed even by majority vote, to the extent it would have occurred at all since the maker of that motion was himself participating by telephone. (Schobel 3d Decl. ¶ 20.) Although the maker of that motion apparently felt strongly that the Board should take the extraordinary and unprecedented step of removing its President-Elect and future President from office, he apparently did not deem it worthy of a personal appearance where he could be confronted by the subject of his motion.

1992."[2] (Emphasis added.)

A subsequent email from Academy President John Parks on July 31, 2009, further indicated that "[t]his meeting *will not consider whether any disciplinary action* as to the President-Elect is appropriate at this time." (Emphasis added.) (Downs Decl. Att. F.) In addition, prior to the August 5 meeting, the possibility of removal of Mr. Schobel from office was never discussed in any conversations Mr. Schobel had with President Parks, Academy Executive Director and General Counsel Mary Downs, or anyone else in a leadership position at the Academy. (Schobel 3d. Decl. ¶ 9.) The Academy has similarly conceded that it was not known prior to the August 5 meeting that a vote to remove Mr. Schobel would occur at the August 5 meeting.[3] (Tr. (9/9/09) at 32.)

Thus, Mr. Schobel's reasonable expectation going into the August 5 meeting was that there would be a discussion about the Hartman Letter and, potentially, whether the Board should take any action, possibly including suspending Mr. Schobel from his position pending the outcome of the ABCD proceeding. (Schobel Decl. ¶ 10.) Mr. Schobel had *no* expectation that the subject of removal would even be discussed. (*Id.*) As it turned out, ironically enough, the subject of *suspension* was never actually considered at the August 5 meeting. (*Id.* ¶ 11.)

Aside from the notice requirement in the Academy Bylaws, § 108.35(c)(2) of the Illinois General Not for Profit Corporation Act ("Act") requires highly detailed notice of a meeting where there will be consideration of an action as weighty as seeking to remove a director from office. 805 ILCS 105/108.35(c)(2). Section 108.35(c)(2), which was cited by the *Academy* at the September 9 hearing as bearing on the analysis here, states,

> No director shall be removed at a meeting of members entitled to vote unless

[2] As noted at the September 9 hearing, the ABCD is a creation and division of the Academy. It is not a separate corporate entity.

[3] Nevertheless, the Academy has taken the absurd position that Mr. Schobel should have anticipated something that the Academy itself had not anticipated when the Academy noticed and arranged the August 5 meeting.

> the written notice of such meeting is delivered to all members entitled to vote on removal of directors. *Such notice shall state that a purpose of the meeting is to vote upon the removal of one or more directors named in the notice.* Only the named director or directors may be removed at such meeting.

(Emphasis added.) Neither the July 14 meeting notice nor the Academy's subsequent communication regarding the August 5 meeting stated that a purpose of the meeting was to vote upon the removal of Mr. Schobel. As a result, the Board's purported action was invalid for this reason alone. *See Pegg v. United Mutual Life Ins. Co.,* 167 N.Y.S.2d 486 (NY Sup. Ct. 1957) (holding failure to give proper notice and fair hearing prior to seeking removal made action invalid); *Bruch v. Nat'l Guarantee Credit Corp.* 116 A. 738 (Del. Ch. 1922) (holding action by Board at improperly noticed meeting not binding). In *Pegg,* as here, nothing in the notice of meeting at issue indicated that the purpose of the meeting was to consider removal. 167 N.Y.S.2d 486. As the court recognized, "While it may be true that no organization can survive by permitting its members to thwart authority or to undermine its principles, and not considering whether the charges against petitioner are true or baseless, proper notice and a fair hearing are requisites to his removal." *Id.*

The specific notice requirement of § 108.35(c)(2) is in keeping with the seriousness and heightened level of scrutiny involved when a corporation attempts to remove one of its directors not only to guard against abuse and the potential for harm and deprivation of rights to the director whose removal is sought, but also to ensure that action is given full and fair deliberation.[4] *See Schroder v. Scotten, Dillon Co.,* 299 A.2d 431, 435 (Del. Ch. 1972) (recognizing the "rationale of the requirement for notice, which is not only to convenience directors, but also to assure that the

[4] Where longstanding Illinois law holds that directors have a recognized right to serve their complete term of office, *see Laughlin v. Geer*, 121 Ill. App. 534 (1905), it is not surprising that both the Illinois General Not For Profit Corporation Act and the Illinois Business Corporation Act contain detailed provisions governing the procedures by which a director may be properly removed. *See* 805 ILCS 105/108.35; 805 ILCS 5/8.35. There is no dispute that Mr. Schobel was a Director at the time of the August 5 meeting.

corporate body, including its stockholders, is given the 'benefit of the judgment, counsel and influence of all' of its directors") As one court observed,

> A corporation should not be encouraged to disrespect the procedural requirements of its by-laws at the expense of jobs held by corporate officers, particularly when the question of whether cause exists for a discharge is a closely contested issue. Thus, a special meeting called to consider the discharge of a corporate officer should comply with the notice requirements of the corporate by-laws. Otherwise, the corporation may not receive the benefit of full consideration and deliberation of its board of directors, and a corporate officer may not be accorded the benefit of full deliberation regarding his dismissal.

Motley v. Southeast Neighborhood House, 93. B.R. 303, 306 (D.C. Bankr. 1988) (holding that "[a]ny decision of the Board at a special meeting not properly noticed is invalid and is not binding on the corporation").

Moreover, as this Court noted and as acknowledged by the Academy, inherent in any notice requirement is the obligation to ensure that the information contained in the notice is accurate and not misleading or deceitful. (Tr. (9/9/09) at 30 ("MR. REES: It can't be deceitful").) To issue a notice containing incorrect, incomplete or deceitful information is to provide no notice at all. *See, e.g., Huntley v. North Carolina State Bd. Of Educ.*, 493 F.2d 1016, 1020 (4th Cir. 1974) (ordering that revocation of plaintiff's certification was invalid and "of no effect" where notice indicated that proceeding would consider reinstatement, but during hearing defendant switched to consideration of revocation).

When a meeting notice incorrectly and/or deceitfully states the purpose of the meeting, the notice itself is invalid, as is any Board action that flows from it. *Koch v. Stearn,* No. 12515, 1992 WL 181717, at *5 (Del. Ch. July 28, 1992) (holding removal action by Board "void and of no effect" where notice made no reference to removal and "tricked" director in question into attending, noting that "[w]ithout doubt, [subject director's] inability to thus protect himself constituted a

disadvantage"); *Mercantile Library Hall Co. v. Pittsburgh Library Ass'n,* 33 A. 744 (Pa. 1896) (holding directors' meeting notice insufficient "in substance" where notice described purpose of meeting as "to hear the treasurer's report and transact any other business which may come before them," and the meeting was in fact called for purpose of authorizing the lease of all the company's property); *see also John E. Andrus Mem. v. Daines*, 600 F. Supp. 2d 563, 577 (S.D.N.Y. 2009) (enjoining closure of facility where plaintiff was invited to meeting purportedly to talk about work successes, but was instead informed at the meeting that her facility was slated for closure, finding that notice was impermissibly misleading, such that plaintiff did not have a fair opportunity to prepare for true purpose of meeting).

As explained in *Fletcher Cyclopedia of the Law of Private Corporations* ("*Fletcher*"), "it is well settled that corporate bodies, in proceedings taken for the removal of a corporate director or an officer are not bound to act with the strict regularity required in judicial proceedings; the courts will limit themselves to inquiring whether they have acted within their powers, after *giving notice to the accused* and *affording the accused an opportunity of making a defense*, and *whether they have exercised their powers fairly and in good faith*." 2 *Fletcher* § 360 (2006). None of that occurred here.

In the case of the August 5 meeting, not only did the July 14 notice and subsequent communications make no reference to the possibility of a vote on removal, but they indicated that removal or any other type of discipline would *not* be considered, and would be deferred until the outcome of the ABCD process. (Schobel 3d Decl. ¶ 16 (recounting that, during the meeting, "I noted that the July 31 email said explicitly that the meeting would not consider whether any disciplinary action was appropriate, and that I considered removal to be the ultimate form of discipline").) Indeed, the Academy now acknowledges that "It was not known when notice was given whether

there would be a vote to remove Mr. Schobel." (Tr. (9/9/09) at 32.)

After the subject of removal was first raised at the August 5 meeting, Mr. Schobel strongly objected in light of not only the lack of prior notice, but also the prior representations that removal would not be considered at the meeting. (Schobel 3d Decl. ¶¶ 15-16.) Mr. Schobel also strongly objected to the scope of the discussion, which had expanded well-beyond the topics raised in the Hartman Letter to wholly different subjects of which Mr. Schobel had no prior notice and no opportunity to adequately prepare. (Schobel 3d Decl. ¶¶ 15-19.) Indeed, Mr. Schobel stated that if the Board truly wanted to consider removal and based on the new subjects that were being raised, then, in the interests of fundamental fairness and due process, it should adjourn the August 5 meeting and schedule a new meeting, on proper notice, to give Mr. Schobel adequate time to prepare and sufficient time to respond to the scurrilous charges that were being raised—beyond the ten minutes offered at the August 5 meeting to address wholly unanticipated action (*i.e.,* removal) based on wholly unanticipated charges. (Schobel 3d Decl. ¶ 18.)

Because the Academy Board's notice of the August 5 meeting never mentioned that removal of Mr. Schobel was to be discussed, the notice and the subsequent action by the Board were invalid, void and of no effect.

II. THE COURT SHOULD IMMEDIATELY ENJOIN FURTHER ATTEMPTS BY THE ACADEMY TO EFFECTUATE ITS INVALID ACTION FROM THE AUGUST 5 MEETING

In the face of invalid action by a corporate board, courts have found injunctive relief to be the proper and appropriate remedy.

In *Tullos v. Parks*, 915 F.2d 1192, 1193 (8th Cir. 1990), the Eighth Circuit found that injunctive relief and maintaining the plaintiff in his corporate role was the proper remedy in light of the plaintiff's having received improper notice of the meeting at which the Board purported to take

action. Similarly, in *Forbes v. Board of Directors for the NAACP*, 65 Fed. Appx. 517, 518 (6th Cir. 2003), the NAACP was enjoined from removing plaintiffs, who were officers and directors of the organization, where the Board had failed to comply with its Constitution and procedures before attempting to remove them. As reflected in the district court's file, the court initially issued a temporary restraining order that "[o]fficers of the Cleveland Branch of the NAACP shall remain as they were prior to the purported removal." *Cleveland Branch of NAACP v. Rivers,* No. 1:01-cv-02562-DCN, Order (DE 5) (N.D. Ohio Nov. 9, 2001) (Ex. 1). In granting additional injunctive relief barring the attempted removal, the court noted that "voluntary associations are not privileged to ignore their own rules and procedures to the detriment of the personal rights of their members." *Forbes v. Board of NAACP,* No. 1:01-cv-02562-DCN, slip op., at 10 (DE 37) (N.D. Ohio Aug. 2, 2002) (Ex. 2). In granting the injunction, the court found that the allegedly removed board members "have no remedy at law" and that the "threatened injury to the Plaintiffs is real." *Id.* at 11. Indeed, the court recognized that the Board's attempted removal "resemble[d] 'disciplinary action.'" *Id.* at 14.

In *Wahyou v. Central Valley Nat'l Bank*, 361 F.2d 755, 756-57 (9th Cir. 1966), the Ninth Circuit upheld the district court's granting of an injunction to prevent alleged new directors, elected in a special election that was improperly called and noticed, from replacing existing directors.[5] *See Melissa Indus. Dev. Corp. v. North Collin Water Supply Corp.*, 316 F. Supp. 2d 421, 425-26 (E.D. Tex. 2004) (granting injunction to force nonprofit water service corporation to re-hold meeting to provide notice accurately describing items upon which vote would be taken).

Under the circumstances here, where the Board's purported action at the August 5 meeting

[5] The court also took issue with improper voting by individuals who "lacked authority to vote," *id.* at 756, which is akin to the voting of Academy Directors by telephone in contravention of the August 5 meeting notice, which prohibited telephone voting. The majority of Directors attending the meeting in person voted *against* removal of Mr. Schobel.

was invalid and illegal for a whole host of reasons, including the deceitful, inaccurate and/or untruthful notice, the proper remedy is for the Court to enjoin the Academy from continuing in its attempts to effectuate its invalid and illegal action. As discussed previously, and as articulated more fully in Mr. Schobel's Third Declaration, Mr. Schobel stands to suffer irreparable harm if the Board's invalid and illegal action is allowed to stand. (Schobel 3d Decl. ¶¶ 23-31.)[6] Moreover, unless the Academy is enjoined, the Academy's membership, which includes Mr. Schobel, will likewise be irreparably harmed because it will be arbitrarily, capriciously and illegitimately denied the continued leadership of someone who was duly elected—unanimously—and who the membership reasonably expected would complete his term as President-Elect/Director this year, become President/Director next year, and serve as Past President/Director for the following two years. (*Id.* ¶ 29.) In addition, it will "wreak further havoc as the legitimacy of the Academy's governing structure and future leadership is called into serious question by the Academy Board's illegal and invalid action." (*Id.*) Mr. Schobel has already observed Academy members "expressing their outrage and disillusionment, and questioning the value of continued membership in the Academy, on the Actuarial Outpost and elsewhere" as a result of the Academy's actions. (*Id.*)

III. THE ACADEMY CANNOT "CHERRY PICK" STATUTORY PROVISIONS BENEFICIAL TO IT WHILE IGNORING OTHER RELATED PROVISIONS THAT DIRECTLY UNDERMINE ITS MISGUIDED POSITION

In its attempt to end-run the protection of the rights of directors, such as Mr. Schobel, that are

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[6] In its supplemental memorandum filed on September 8, 2009, the Academy attempts to employ a "straw man strategy" by mischaracterizing Mr. Schobel's irreparable harm as simply "highly generalized allegations of reputational injury." (Def. Resp. at 2 (DE 10). As made clear in prior submissions and at prior hearings in this matter, the irreparable harm that Mr. Schobel will experience if the Academy's illegal and invalid actions are not enjoined extends far beyond mere reputational injury. Similarly, the Academy's unsupported suggestion that the damaging New York Times article—a direct byproduct of the Academy's actions—about Mr. Schobel and the Academy from September 8, 2009 came about as a result of "aggressive publicizing the facts relating to his removal" has no basis in fact. (*Cf. id.* at 2 n.1.) Contrary to the Academy's claim, Mr. Schobel was *not* interviewed for the New York Times article, which simply quotes a prepared statement. (*Cf. id.*)

laid out in the Illinois Act, the Academy essentially ignores the fact that Mr. Schobel was a *director* at the time of the August 5 meeting, and attempts to treat him as a mere officer in purporting to unceremoniously oust him from his position. While doing so, however, the Academy continues to "cherry pick" portions of the Act that it deems favorable while ignoring those appearing in the same section (in some cases, the very next sentence!) that clearly undermine the Academy's purported action. It may not do so. *See, e.g., Babineau v. Federal Express Corp.,* No. 08-16227, __ F.3d ___, 2009 WL 2212158, at *8 (11th Cir. 2009) ("If the FLSA regulations are applicable, then Plaintiffs may not cherry-pick only those regulations that work in their favor.")

Most recently, at the September 9 hearing, the Academy cited § 108.35, titled "Removal of Directors," and, in particular, subsection (c)(2), which prescribes specific and detailed notice that a Board will consider the removal of a specific director at an upcoming meeting. Likewise, the Academy relies on the its Bylaws for its contention that Mr. Schobel is somehow a lesser breed of director even though Article III, section 1 says, "The Board shall consist of 29 Directors, comprising the nine Officers, the two immediate Past Presidents, and 18 elected Directors."[7] There is no indication in the Bylaws that a duly elected Officer/Director is any less of a Director than other types of Directors on the Academy's Board. Moreover, there have been occasions where elected non-officer/directors, while in office, have been elected to an officer position. Taking the Academy's position to its logical conclusion, such a non-officer/director who is duly elected to be an officer/director while serving his or her non-officer/director term of office takes that "promotion" at his or her extreme peril for, according to the Academy, he or she will be unwittingly giving up the protections accorded directors in § 108.35 concerning removal and will now be subject to removal at

[7] Although the Academy has repeatedly made the unsubstantiated claim that when Mr. Schobel was purportedly removed as an officer, he ceased being a director "by operation of law," it has yet to indicate what *law* it is referring to as well as what law allows it to disregard Mr. Schobel's status as a full-fledged director.

whim, by majority vote, without notice, as compared with the rights accorded § 108.35, which require, at a minimum, a two-thirds vote and specific prior notice before any consideration of removal by the Board can occur.

Nevertheless, in support of its claim that an Officer/Director is indeed inferior—that would include its current President, but apparently not its Immediate Past President, who is not technically an officer— the Academy has relied on the first sentence of § 108.50(c), which says, "The articles of incorporation or the bylaws may provide that any one or more officers of the corporation or any other person holding a particular office outside the corporation shall be a director or directors while he or she holds that office." The Academy attempts to derive some significant meaning from the unremarkable "while he or she holds that office" language, which simply makes clear that the statute permits officers to also service as directors "while they hold that office." When officers are not holding their office as officers, they can simply be non-officer/directors like everyone else and this provision is then inapplicable.

In making its argument, however, the Academy chooses to simply ignore the critical very next sentence, which states that "[u]nless the articles of incorporation or the bylaws provide otherwise," officer/directors "have the same *rights*, duties and responsibilities as other directors." (Emphasis added.) No limitation appears in the Academy's Articles or Bylaws, and the Academy has offered zero authority or explanation as to why the rights of a director to hold office for his term, fulfill his responsibilities, and be protected against arbitrary removal in contravention of the protections afforded the director and the organization's members in § 108.35 governing removal of directors should be ignored. Given what is at stake—an attempted, unnoticed removal of the Academy's unanimously elected President-Elect and future President and anticipated attempted replacement with an illegitimate substitute—the Academy should at least have to demonstrate why

Mr. Schobel's rights under § 108.50(c) should simply be ignored, especially if the Academy intends to rely on other portions of § 108.50, including other portions of § 108.50(c). Moreover, if the Academy wanted to treat officer/directors as if they were simply officers and not also directors, it should not have made them directors in its Bylaws or should have provided explicitly as such in its Articles or Bylaws, as § 108.50(c) requires to treat an officer/director as inferior to all other directors in terms of rights, duties and responsibilities.

CONCLUSION

For these additional reasons, Mr. Schobel respectfully requests that the Court immediately enjoin the Academy, as specified in the accompanying Motion and proposed Order.

Dated: September 10, 2009

Respectfully submitted,

/s/David S. Wachen

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