IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant American Academy of Actuaries ("the Academy") respectfully submits this supplemental memorandum in response to the Court's request for additional briefing on certain issues that were addressed during the September 9, 2009 hearing. In addition to the legal authority and other information provided below, the Academy is submitting additional documents demonstrating that Plaintiff both understood and contemporaneously acknowledged that he could be removed as President-Elect at the Board's August 5, 2009 meeting. The Academy also is submitting the accompanying Supplemental Declaration of Mary Downs, which provides additional details concerning the August 5 meeting, the Academy's customary notices, the ABCD disciplinary process, and the irreparable harm that would befall the Academy if

Plaintiff were even temporarily reinstated as President-Elect after a majority of the entire Board concluded, by a 17-9 vote, that his continued service would be contrary to the best interests of the Academy.

I. PLAINTIFF'S CORE ARGUMENT – THAT THE BOARD'S ACTION IS INVALID BECAUSE THE ACADEMY INSUFFICIENTLY DESCRIBED THE PURPOSE OF THE BOARD'S MEETING – FAILS FOR MULTIPLE REASONS

Plaintiff's core contention is that his removal as President-Elect was invalid because the notice of the Board meeting was flawed and allegedly left him unaware that the Board might remove him as President-Elect. This argument fails for numerous reasons, most notably because he was fully aware long before the Board meeting that one option was that the Board would consider removal.

A. PLAINTIFF WAS FULLY AWARE THAT THE BOARD MIGHT DECIDE TO REMOVE HIM AS PRESIDENT-ELECT

A linchpin of Plaintiff's argument is the claim that he was not aware that the Board might remove him as President-Elect at the August 5 meeting. For example, Plaintiff's most recent pleadings assert that Plaintiff had "*no* expectation that the subject of removal would even be discussed" at the Board meeting. *See* Pl. Supp. Mem. at 3 (emphasis in original); Third Schobel Decl. ¶¶ 2, 10. That assertion is flatly inconsistent with the facts, including Plaintiff's own contemporaneous statements. Indeed, it was clear long before the Board meeting that past presidents of the Academy were pushing for the Plaintiff's removal as President-Elect. As early as June 12, 2009, past Academy president Robert A. Anker wrote to Plaintiff to request that he "step down as President-Elect of the Academy." *See* Supplemental Declaration of Mary E. Downs ("Supp. Downs Decl.") (attached as Exhibit 1 hereto) at ¶ 5 and Att. J thereto. Mr. Anker also told Plaintiff that, if he did not step down, "the board must remove you in order to salvage the reputation of the Academy and the profession." Mr. Anker also advised Plaintiff that there

was "an active movement among past presidents of the Academy to petition the Board for [Plaintiff's] removal." *Id.* (emphasis added). 1/

Tellingly, in a July 16, 2009 e-mail nearly three weeks before the August 5 board meeting, Plaintiff described the letter signed by the 19 past presidents – the very letter that the Board convened to consider – as "asking that I be removed or suspended as president-elect." *See* Att. M to Supp. Downs Decl. (emphasis added). Plaintiff made this admission two days after receiving notice that a Board meeting had been scheduled to consider the matter. Equally significant, on August 3, 2009 – two days before the Board meeting – Mr. Schobel received an e-mail sent by a past Academy President to the entire Board specifically requesting that the Board not merely suspend Mr. Schobel, but that it "immediately ban Mr. Schobel from serving in any leadership or representative capacity of the Academy permanently, especially if he does not voluntarily resign" *See* Att. N to Supp. Downs Decl. (emphasis added). That same day, Mr. Schobel forwarded this e-mail to the Academy's counsel with a copy to his current counsel, whom he had retained to represent him in connection with both the Board meeting and the ABCD proceeding. *Id.*

Plaintiff may have been surprised that he lost the Board vote, but his own contemporaneous admissions and other evidence of record make crystal clear that he knew going

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1/ The desire that Plaintiff not serve as President-Elect or President for the good of the Academy also was reflected in former Academy president David Hartman's June 11 and 12, 2009 e-mails to Plaintiff. In those e-mails, Mr. Hartman asked Plaintiff to resign as President-Elect "for the good of the profession" because his "continuing in office is divisive" and his "effectiveness as a leader is severely undermined" as a result of what the Court has referred to as the "sealed matter." *See* Att. K to Supp. Downs Decl. Former Academy president Robert Winters echoed this view in a July 1, 2009 e-mail to Plaintiff, in which he advised Plaintiff that the sealed matter "and the ABCD complaint flowing from it pose significant reputation risks to the Academy should you become its President. The risk would be heightened if you were to assume office before the ABCD process is concluded." *See* Att. L to Supp. Downs Decl. These and related communications cited herein are being provided to the Court for its *in camera* consideration.

into the meeting that a Board vote to remove him as President-Elect was clearly a possibility at the Board's August 5 meeting.

B. THE BOARD NOTICES THEMSELVES PROVIDED SUFFICIENT NOTICE

The Board meeting on August 5, 2009 was convened in response to a letter that 19 past presidents of the Academy sent to the Academy's Board on July 9, 2009. Based on the gravity of the issues raised and requests from several Board members for a meeting, the Academy's President (John Parks) decided to convene a special meeting of the Board to consider the matters that had been raised. Accordingly, on July 14, 2009, he advised the Board (then including Plaintiff) by e-mail that a special meeting would be held on August 5, 2009 to determine how to respond to the letter. The notice stated that the meeting was being scheduled for August 5 so that the Board could "take up this important matter as expeditiously as possible." *See* Att. C to Downs Decl. (emphasis added). A July 16 follow-up communication to the entire Board likewise reflected the significance of the matter by expressly stating that the sole purpose of the meeting was to consider "a critical decision about [Plaintiff's] future." *See* Att. D to Downs Decl. (emphasis added).

President Parks followed up with a July 31 communication reiterating that "the purpose" of the meeting would be "to determine what action, if any, the Board should take at this time in response to the July 9, 2009 communication from a group of past Academy Presidents requesting that the current President-Elect be suspended from continuing to serve in that capacity and from assuming the position of President pending the outcome of ABCD proceedings relating to him." *See* Downs Decl. at ¶ 15 and Att. F thereto (emphasis added). Thus, the various communications explaining the purpose of the meeting did not in any way signal that the Board was limiting its agenda to the question of whether Plaintiff should be suspended – rather, the

express purpose of the meeting, as also reflected in the July 14 meeting notice was to consider what action to take in response to the letter, a range of actions that could include removal, temporary suspension, or some other action.

The conduct of the Board meeting itself further demonstrates that the Board carefully and appropriately considered the issue before it. The Board met in executive session – not an open session – with 27 of the 29 Board members participating in person or by telephone. *Id.* ¶ 16. Plaintiff participated in the Board's discussion, and voted in an open (not secret) vote. *Id.* ¶ 7. At his own request (and despite suggestions by some Board members that they would like to hear from him during the ongoing discussion), Plaintiff spoke last after other Board members had had an opportunity to speak so that he could address all the matters that had been raised. *See* Downs Decl. at ¶ 18; Supp. Downs Decl. at ¶ 8 and Att. O thereto. After considering all the information offered by various Board members in their deliberations, more than a majority of the whole Board concluded that it would not be in the best interests of the Academy for Plaintiff to continue as President-Elect (or to become President) and voted to remove him from his position as President-Elect. Supp. Downs Dec. at ¶ 9.

In proceeding in this manner, the Academy and Board acted in accordance with the Academy's established practices and basic principles of corporate governance. The Academy's regular practice has been to advise Board members of the general subject matters that are expected to be considered at an upcoming Board meeting in a meeting notice or agenda. *Id.* ¶ 3. Consistent with its fiduciary obligation, the Board may also consider other matters not in the meeting notice or agenda that are pertinent to the subject being considered. Based on its discussion at meetings, the Board then decides what action, if any, to take with regard to the subject matter being considered. The nature of that action – and of the Board's performance of its fiduciary responsibility to the organization – depends on the Board's discussion at meetings.

Id. Board meetings are deliberative sessions with lively debate that informs and determines its actions. As is often the case for non-profit boards, agenda or notices of meetings routinely state subjects to be discussed in an agenda without specification of the range of action, if any, the Board may or will take or vote on. Preparation of meeting materials often includes background information to inform the discussion but routinely does not suggest what the outcome of Board discussion will be. There is no requirement to describe or practice of describing all possible outcomes or actions that may result from Board discussion and action in one particular document such as a notice or agenda. *Id.* ¶ 3.

The Academy followed this same practice in providing notice to the Board regarding its August 5, 2009 special meeting. Included as part of that notice was the July 9, 2009 letter from 19 past Academy Presidents to the Academy Board. A copy of that letter was submitted to the Court for its *in camera* consideration as Attachment B to Ms. Downs's September 2, 2009 declaration.

Like most Boards, the Board is vested with broad authority to take such actions as will "further the interests of the Academy." It follows that the Board may consider such matters as it deems appropriate in the interests of the Academy. Thus, while the Board typically identifies the subject matter of a meeting when it is noticed, it is not required to do so, but rather is at liberty to take up any matters that are presented to it by Board members. Indeed, in considering the information leading up to and presented at the meeting and taking action, the directors were fulfilling their duties of care and loyalty to the Academy. The directors were required to act in a timely manner and in the best interests of the corporation in considering whether Plaintiff remained fit to represent the Academy as its leader. The clear purpose of the August 5 meeting was to discuss what action the Board would take in response to the letter from the past presidents. The Board was free, upon motion, to debate and then decide upon the action

that it deemed most appropriate. That analysis is not changed by the fact that the Board considered the removal of its President-Elect: the Board provided 10 days notice of its meeting, a quorum of Board members participated in the meeting, and a majority of those who participated voted to remove Plaintiff as President-Elect. Nothing more was required under either Illinois law or the Academy's Bylaws.

Although Plaintiff now emphasizes that the Board meeting notices referred to "suspension" and not "removal," this argument overlooks the fact that suspension is unquestionably a form of removal. Indeed, as Plaintiff acknowledges, he faced suspension from his position for an extended period of time, pending resolution of the ABCD proceedings, and there was no guarantee that he would ever be reinstated. *See* Third Schobel Decl. at ¶ 10; *see* Supp. Downs Decl. at ¶ 14 (ABCD process can take many months or more). Such a suspension would, of course, preclude Plaintiff from any role as President-Elect for the full period of the suspension. Indeed, given that the Academy's annual meeting was scheduled for less than three months after the Board's meeting, and given that Plaintiff could not ascend to the position of President if he had been suspended as President-Elect, any suspension could effectively have removed him as President-Elect for the balance of the term.

C. NEITHER THE CASE LAW NOR STATUTORY AUTHORITY ON WHICH PLAINTIFF RELIES SUPPORTS HIS POSITION THAT THE BOARD'S NOTICE WAS DEFECTIVE

Plaintiff's alleged authority that supposedly improper notice invalidates Board action is plainly inapplicable. Indeed, the vast majority of the cases cited by Plaintiff involve wholly inapposite principles of constitutional due process, terminations of directors who received no notice whatsoever of a Board meeting, or terminations in other factually and legally irrelevant contexts. *See, e.g., Huntley v. North Carolina State Bd. of Educ.*, 493 F.2d 1016, 1020 (4th Cir.

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1974) (constitutional due process case); *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563 (S.D.N.Y. 2009) (constitutional due process case); *Schroder v. Scotten, Dillon Co.*, 299 A.2d 431, 435 (Del. Ch. 1972) (terminated director received no notice of a Board meeting); *Bruch v. Nat'l Guarantee Credit Corp.*, 116 A. 738 (Del. Ch. 1922) (same); *Motley v. Southeast Neighborhood House*, 93 B.R. 303, 306 (D.C. Bankr. 1988) (termination ineffective because, unlike this case, untimely notice was provided; bylaws required three-days' notice, but one Board member received only two days' notice); *Pegg v. United Mutual Life Ins. Co.*, 167 N.Y.S.2d 486 (N.Y. Sup. Ct. 1957) (removal of director; court cited no authority for conclusion that notice was required).

Plaintiff's arguments (*see* Pl. Supp. Mem at 3, 11-12) based on the Illinois Act are also irrelevant because they relate to the removal of a director, not an officer. 2/ Plaintiff was elected President-Elect in October 2008, and he became a director at that time solely by virtue of his status as an officer. *See* Def. Mem. in Opp. to Pl. Mot. for Temporary Restraining Order, at 3, 10. Similarly, when Plaintiff was removed as President-Elect, his status as a director terminated by operation of law. *Id.* And there can be no doubt that Plaintiff was validly removed as an officer. 3/

2/ This also applies to the notice requirements set forth for removal of directors as such in section 108.25 of the Illinois Act. Academy counsel did not recall this provision during the discussion of notice issues at the September 9 hearing. Since the provision relates solely to the removal of a director as such, however, it has no application in this matter.

3/ Even if the Court were to conclude that the Illinois Act's provisions relating to the removal of directors may be applicable and that Plaintiff may not have been properly removed as a director, it remains that Plaintiff was properly removed as an officer and therefore is not entitled to any relief based on his removal as President-Elect – much less extraordinary injunctive relief in the form of reinstatement to a position from which he was removed by a vote of 17 to 9.

D. PLAINTIFF PLAINLY WAS VALIDLY REMOVED AS AN OFFICER

As the Court knows, the Illinois Act places no limitation on the removal of officers, providing instead that "[a]ny officer or agent may be removed by the board of directors or other persons authorized to elect or appoint such officer or agent . . . ." Ill. Stat. Ann. § 105/108.55. The Academy's Bylaws rely on this broad grant of authority to remove an officer. There is no obligation in the Bylaws to specify the purpose of a Board meeting. Moreover, not only do the Bylaws not place any limits on the Board's power to remove officers, but also Article III of the Bylaws expressly provides that the Academy's Board of Directors shall have "the right, power, and authority to exercise all such powers and to do all such acts and things as may be appropriate to carry out the purposes of the Academy." (Bylaws, Art. III, Sec. 5.) The Bylaws plainly confer on the Academy's Board of Directors the power to elect officers of the Academy by a majority vote of the whole Board (Bylaws, Art. III, Sec. 5.F, Art. V, Sec. 2.), and it follows that the Board also may remove an officer – consistent with Section 108.55 of the Illinois Act and its general powers under Article III, Section 5 of the Bylaws – by a majority vote of the whole Board.

Thus, the basic requirements for removing an officer of the Academy are straightforward:

- The Board must provide 10 days notice of the Board meeting. *See* Bylaws Article III, Sec. 3 ("Notice of the meetings of the Board shall be given not less than 10 days nor more than 30 days before the meeting . . . ."). It is undisputed that the Board provided more than 10 days' notice of its August 5 meeting.

- A quorum of the Board must participate in the meeting. A quorum is defined in the Bylaws as "a majority of the members of the Board." Bylaws, Art. III, Sec. 4. It is undisputed that this requirement was satisfied, as twenty-seven of the 29 Board members participated in the August 5 meeting.

- A vote of the majority of the whole Board must authorize the action. It is undisputed that a majority of the whole Board, by a vote of 17 to 9, voted to remove Plaintiff as President-Elect. 4/

In short, notice that a Board meeting will consider whether to remove an officer is not a requirement under either the Illinois Act or the Bylaws. Plaintiff does not genuinely dispute this fact, but rather, as noted, relies almost entirely on the provision of the Illinois Act concerning removal of directors. Supp. Mem. at 3. 5/ As the Academy has already explained, the statutory procedures governing removal of directors are completely inapplicable to this case because Plaintiff's status as a director derived entirely from his status as an officer, and therefore terminated automatically by operation of law when he was removed as President-Elect. Moreover, as explained in footnote 3, *supra*, even if the Court were to reject the Academy's position and conclude that Plaintiff was not effectively removed as a director, he certainly was removed from his position as an officer (*i.e.*, President-Elect).

4/ Contrary to Plaintiff's suggestion, there is no requirement under Illinois law or the Bylaws that Board members must be physically present at a Board meeting in order to participate. Participation by conference call is lawful and customary. Ill Stat Ann. 105/108.15(c) (directors are authorized to participate telephonically in Board meetings and such participation "shall constitute attendance and presence in person at the meeting"); Supp. Downs Decl. at ¶ 17.

5/ Plaintiff also purports to rely on Article III, Section 3 of the Bylaws, but his argument mischaracterizes that Section. According to Plaintiff, that Section provides that "[n]otice of the meetings of the Board shall be given, and within certain time parameters." Supp. Mem. at 2. In fact, Section 3 provides that "[n]otice of the meetings of the Board shall be given not less than 10 days nor more than 30 days before the meeting." By inserting the nonexistent conjunction "and," Plaintiff has glossed over the fact that the only notice requirement in the Bylaws relates to the timing of the notice, not the substance of what will be considered at the meeting.

II. EVEN IF PLAINTIFF SOMEHOW HAD BEEN MISLED INTO BELIEVING THAT THE BOARD WOULD NOT CONSIDER HIS REMOVAL AT THE AUGUST 5, 2009 BOARD MEETING, HE COULD NOT ESTABLISH A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

The Academy clearly communicated the issue of whether Plaintiff would be permitted to continue to serve as President-Elect would be considered at the August 5 Board meeting. Plaintiff's own contemporaneous admissions prove that he understood that fact. *See* Att. M and N to Supp. Downs Decl. Moreover, even if this record evidence did not exist, and even if Plaintiff could plausibly claim that he was misled about the purpose of the August 5 meeting, he still could not establish that any failure to provide him with accurate or complete notice enables him to demonstrate a substantial likelihood of success on the merits of his claims.

Specifically, because Plaintiff had no right to any notice of the purpose of the August 5 meeting, he cannot legitimately complain of any perceived deficiency in the notice provided. In *Independence Federal Savings Bank v. Bender*, 326 F. Supp. 2d 36 (D.D. C. 2004), for example, the directors received a Notice of Special Meeting of the Board of Directors which merely stated that the meeting was being held to provide "an update on the Merger and related matters." At the special meeting, however, the board of directors discussed and adopted a shareholders' rights (*i.e.*, "poison pill") plan that stymied the plaintiff's ability to take control of a company in which he held a substantial minority ownership interest. The court rejected a request for injunctive relief premised in part on the assertion that the failure to provide notice that these topics would be discussed and voted upon constituted "procedural infirmities" that rendered the Board's actions invalid. As the court noted, the vaguely worded Notice of Special Meeting satisfied the requirements of the Bank's bylaws, which provided that "[n]either the business to be transacted at, nor the purpose of, any meeting of the board of directors need be

specified in the notice ... of such meetings." Because the Bank's bylaws were complied with, no procedural irregularity existed. As the court explained:

> The oblique nature of the Agenda for the Board meeting, which gave no explicit notice that either the Rights Plan or this lawsuit would be discussed, does not affect the legitimacy of the majority vote of a quorum of the Board after provision of notice of the meeting to all Directors and a full discussion by those Directors present. It cannot be said that these facts support the likelihood of success on the merits.

Id. at 45. So too in this case. Under both the Illinois Act and its own Bylaws, the Academy was not required to provide any notice of the purpose of its August 5 Board meeting, and any perceived inadequacy therefore cannot justify a temporary restraining order. Indeed, even where the purpose of a meeting must be provided, courts have been clear that the notice need not recite the precise course of conduct contemplated, nor explain the potential outcome of the contemplated action. *See Lawrence v. I.N. Parlier Estate Co.*, 15 Cal. 2d 220, 233, 100 P.2d 765, 772 (1940) (holding that while special meeting notice did not state election of directors would be held, a reference in the notice "to tak[ing] such action as may be deemed expedient and necessary in connection" with "management" of the corporation gave "ample notice that such consideration might involve a change of the officers and directors responsible for such management"); *see also*, *e.g.*, *In re William Faehndrich, Inc.*, 2 N.Y.2d 468, 473, 141 N.E.2d 597, 600, 161 N.Y.S.2d 99, 103 (N.Y. 1957) (although it was "quite likely that the [plaintiff] did not fully realize the significance of such an election or the consequences to himself that would flow therefrom . . . there generally is no duty to specify the course of conduct contemplated by the directors after their election, and no requirement to explain the consequences that will follow from the action they plan to take.").

Accordingly, even if Plaintiff genuinely believed that his removal as President-Elect would not be considered – a belief he cannot credibly claim based on his own admission and other evidence (*see*, e.g., Atts. J-N to Supp. Downs Decl.) – this supposed "procedural irregularity" does not support his request for extraordinary relief where the Academy had no obligation to inform him of the purpose of the meeting. *See also*, *e.g.*, *New Founded Indus. Missionary Baptist Ass'n v. Anderson*, 49 So. 2d 342, 344 (La. Ct. App. 1950) ("a court has no right or jurisdiction to review the discretionary action of the board in removing an officer, unless the contract rights of the person removed are involved.").

III. THE STATEMENT THAT "DISCIPLINE" WOULD NOT BE CONSIDERED AT THE BOARD MEETING IS ACCURATE AND DID NOT MISLEAD PLAINTIFF OR INVALIDATE THE BOARD'S ACTION

The July 31 e-mail from Board President John Parks stated that the Board would consider "what action" to take in response to the letter from the 19 past presidents but would not consider "discipline" because, "[u]nder the Academy's Bylaws, all disciplinary matters are considered in the first instance by" the Actuarial Board for Counseling and Discipline ("ABCD") and "the Academy takes disciplinary action, if at all, only in response to a recommendation from the ABCD." *See* Att. F to Downs Decl. This statement plainly recognized the separate issues and processes at hand. Disciplinary issues would be addressed through the separate processes of the ABCD and the Academy, but the corporate governance issue of whether Plaintiff should continue as President-Elect was before the Board.

It is undisputed that the Academy's Board has the authority to remove officers such as the President-Elect under Illinois law and its own Bylaws. In contrast, the ABCD is not involved in the internal governance of the Academy, but rather focuses on individuals' status as members of their respective actuarial organizations and whether or not discipline against a <u>member</u> of the actuarial profession may be warranted. Supp. Downs Decl. ¶ 11. This is

reflected in the Academy's Bylaws, which describe the ABCD, make clear that it has its own procedures and requirements, 6/ and also demonstrate that "discipline" under ABCD procedures has nothing to do with whether a President-Elect is removed. *See* Att. A to Downs Decl.

If the ABCD concludes that an actuary has violated the Code of Professional Conduct, it may recommend that an actuarial organization of which the actuary is a member take disciplinary action against that member. Supp Downs Decl. ¶ 12; Bylaws Art. X sec. V.G. The only permitted forms of discipline which the ABCD can recommend are private discipline, public reprimand, and suspension or expulsion from membership in the organization. *Id.* If the ABCD recommends such discipline, the actuarial organizations who participate in the ABCD may decide whether to impose discipline on the actuary in his or her capacity as a member of the organization. Supp. Downs Decl. ¶ 11.

Whether to remove an officer, by contrast, is a matter of corporate governance, and it cannot be reasonably construed as "discipline" within the context of ABCD proceedings. 7/ Indeed, none of the ABCD's forms of discipline relates to the removal of officers; that is far beyond the purview of the ABCD, which has responsibility for investigating

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6/ The ABCD is an autonomous body that serves all five US-based actuarial organizations, not just the Academy, and has its own procedural rules and requirements. Supp. Downs Decl. ¶ 10. Although the ABCD does "utilize the staff of the Academy for necessary legal, logistical, and technical support," it performs its substantive duties autonomously from the Academy and not with input from the Academy Board or the four other participating actuarial organizations. Bylaws, Art. X, , Sec. 7.

7/ Removal of an officer is not discipline where, as here, the term "discipline" clearly has a separate and distinct meaning. *Cf. Austin v. UAW*, 175 L.R.R.M. 2827 (E.D.Mich.2004) (denying request for preliminary injunction of special recall meeting in disregard of proper procedures for disciplining union members because discipline as used in the LMRDA did not include removing a member from elected office) (citing cases); *Finnegan v. Leu*, 456 U.S. 431 (1982) (removal from appointive office is not "discipline.").

complaints concerning members of the participating actuarial organizations, not for purposes of internal corporate governance. Supp. Downs Decl. ¶ 12.

The Academy Board has no role in directing the investigation or findings of the ABCD disciplinary process to which President Parks referred in paragraph 2 of his July 31, 2009 e-mail. Supp. Downs Decl. ¶ 15. Such responsibility lies with Academy's Disciplinary Committees and Appeal Panels. *Id.* ¶ 13. The Board's decision to remove Plaintiff as President-Elect thus was not a disciplinary action with respect to his status as a member of the Academy but was instead the exercise of the fiduciary responsibility of the Academy's Board – and of virtually all corporate boards -- to determine who can best lead the organization. *Id.* ¶ 15. In reaching such a decision, a board does not focus on "punishment" or "discipline," but rather on such things as an individual's ability to lead, build consensus, enhance the reputation of the organization, and the like. Moreover, Plaintiff is fully familiar with the separate ABCD disciplinary process, and he engaged his counsel to assist him with that process prior to the August 5 Board meeting. He could not have been misled by Mr. Parks's reference to discipline being handled through the ABCD process.

Plaintiff admits in his Supplemental Memorandum and supporting declaration that he understood that he might be <u>suspended</u> as a result of the Board meeting. Pl. Supp. Mem. at 3; Third Schobel Decl. ¶ 10. If removal were discipline in this context (and it is not), then suspension would be as well. Plaintiff cannot seriously contend that he knew he might be suspended but that he had no idea he might be removed because removal constitutes "discipline" whereas suspension does not. Such a distinction is particularly absurd given that the ABCD process can take many months or more to complete (Supp. Downs Decl. at ¶ 14), and if the Board had imposed an indefinite suspension pending the outcome of the ABCD process, that action likely would at a minimum have prevented him from serving for the balance of his term as

President-Elect. Thus, as a practical matter, there would have been little difference between a "suspension" and "removal."

IV. THE ACADEMY APPROPRIATELY REFERRED THE COURT TO SECTION 108.35 OF THE ILLINOIS ACT

Near the end of the September 9 hearing, counsel for the Academy referred to Section 108.35 of the Illinois Act (which concerns the removal of directors) as evidence that the Board was not required to notify Plaintiff that it intended to consider removing him as President-Elect at the August 5 meeting. Tr. 49. The Court's skepticism concerning the relevance of a provision concerning the removal of directors is fully justified insofar as it recognizes that Plaintiff cannot use a provision concerning the removal of directors to challenge Plaintiff's removal as an officer. For the reasons the Academy has already explained, Plaintiff's status as a director terminated automatically by operation of law when he was removed as President-Elect, and the Illinois Act's provisions concerning the removal of directors therefore are inapplicable.

However, counsel for the Academy was not suggesting that Section 108.35 somehow is relevant or applicable to this case, nor was counsel "cherry-picking" favorable statutory provisions. Counsel believes that this and other provisions relating to removal of directors are plainly irrelevant to Plaintiffs removal as an officer. Rather, counsel for the Academy was simply contrasting the director-related removal provision set forth in Section 108.35 with the officer-related removal provision set forth in Section 108.55. While only the latter provision is applicable here, the differences between those two removal provisions are instructive with respect to whether or not Plaintiff was entitled to notice that the Board would consider his removal – and, specifically, whether Plaintiff was entitled to additional or different notice that his removal would be discussed and voted on at the August 5 Board meeting. A comparison of the requirements for removing directors under Section 108.35 and for removing

officers under Section 108.55 helps show that Plaintiff was not entitled to any more notice than he received.

Section 108.35(c)(2) of the Illinois Act provides as follows:

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

Ill. Stat.. Ann. 105/108.55. This provision thus expressly requires that the "members entitled to vote" on the removal of a director receive written notice that a purpose of the meeting is to vote on "the removal of one or more directors." *Id.*

The Illinois Act's provision concerning the removal of officers contains no such notice requirement. To the contrary, Section 108.55 simply provides that:

> Any officer or agent may be removed by the board of directors or other persons authorized to elect or appoint such officer or agent but such removal shall be without prejudice to the contract rights, if any, of the person so removed. Election or appointment of an officer or agent shall not of itself create any contract rights.

Ill. Stat.. Ann. 105/108.55. That fact that removal of a director at a meeting of members entitled to vote on the removal requires express written notice that a purpose of the meeting is to vote on "the removal of one or more directors" – coupled with the fact that Section 108.55 requires no such notice with respect to the removal of officers – is additional evidence that Plaintiff was not entitled to notice that a purpose of the Board's August 5 meeting was to remove him as President-Elect. If the Illinois legislature had intended to require that such notice be provided in connection with a Board meeting to consider the removal of an officer, it would have so provided. It did not. As a matter of statutory construction, then, the absence of any notice provision in Section 108.55 underscores the conclusion that Plaintiff had no statutory entitlement

to notice that his removal would be considered (though, as noted, he had ample notice that that was indeed the purpose of the meeting).

Lacking any legitimate basis for contending that the Academy has "cherry-picked" among statutory provisions, Plaintiff repeats once again his contention that the Board's removal of Plaintiff as President-Elect did not remove him as a director of the Academy by operation of law. Plaintiff has admitted, however, that his position as President-Elect was "inextricably intertwined" with his position as a director, and it follows that his proper removal as an officer of the Academy necessarily terminated his role as a director. The Illinois Act provides that "[t]he 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*. Ill. Stat. Ann. § 105/108.50(c) (emphasis added). The Act thus expressly recognizes that a person's status as a director may be derived from, and be entirely dependent upon, his status as an officer. That is the case under the Academy's Bylaws, which provide that the Academy's nine officers are among those who serve as directors, and which further provides that, while 18 other Board members are elected, no separate election or vote is prescribed for those who have been elected as officers. Bylaws, Art. V, Sec. 2. In short, consistent with both the Act and the Bylaws, and solely by virtue of being elected an officer, Plaintiff became a director without a separate Board vote. In other words, he served as a director merely in an "ex officio" status. It necessarily follows that, once Plaintiff was validly removed by the Board as President-Elect, he automatically ceased to serve as a director.

V. PLAINTIFF CANNOT ESTABLISH IRREPARABLE HARM

In his Supplemental Memorandum and accompanying declaration, Plaintiff essentially repeats his bald assertion that serving as President of the Academy is critical to his

professional life. In so doing, however, he ignores the fact that, even without this volunteer position, he still has a full plate of other professional endeavors, including leadership positions with two other actuarial organizations as well as full-time employment with New York Life Insurance Company. He also ignores the fact that monetary damages are available with respect to each of his claims, if he were somehow able to prove them. Moreover, if any reputational harm from removal as President-Elect has already occurred, it is in no small part because Plaintiff has discussed his removal in chat room communications, on a blog, and in a prepared statement he provided to the *New York Times*. 8/

Also absent from Plaintiff's submissions is any recognition of the harm to the Academy if he were even temporarily reinstated as President-Elect. The 19 past presidents who urged that Plaintiff not be permitted to continue to serve as President-Elect or President recognized that the Academy's top elected officials should be exemplars of the Academy's vision to preserve the public trust, and they recognized that the "sealed matter" would undermine that trust. *See* Atts. J-N to Supp. Downs Decl.; Att. B. to Downs Decl. Individual past presidents communicated the same sentiments to Plaintiff in an effort to persuade him to resign rather than face the prospect of removal. *Id.* Ultimately, a clear majority of the whole Board voted 17-9 to remove Plaintiff as President-Elect. Although Plaintiff challenges the validity of

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8/ Plaintiff's allegations of reputational harm would be insufficient to warrant injunctive relief in any event. *See, e.g.*, *Morton v. Beyer*, 822 F.2d 364, 373 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").

the Board's decision-making process, he does not dispute that the Board has the power and the right to remove him from office.

The term of the current Academy President will end in October 2009, and it is critical that the Academy have a new President in place at that time. Supp. Downs Decl. ¶ 18. It also is critical that the new President enjoy the widespread support and respect of the Academy Board and membership. The Academy Board has concluded that Plaintiff is not suitable to serve. Given that fact, and the fact Plaintiff would be suing the organization he claims to lead, it is inconceivable that he could meet his fiduciary obligations to the Academy. Reinstatement of Plaintiff as President-Elect and then President of the Academy thus would have highly disruptive and detrimental effects upon the Academy and, ultimately, upon the actuarial profession the Academy exists to serve. *Id.*

CONCLUSION

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

Dated: September 11, 2009

Respectfully submitted,

/s/ Jonathan T. Rees

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2009, I caused a true and correct copy of Defendant's Supplemental Memorandum to be served via electronic mail and certified mail, return receipt requested, to:

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