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 REPLY IN FURTHER SUPPORT OF SUPPLEMENTAL MEMORANDUM IN RESPONSE TO COURT'S REQUEST AT SEPT. 9 HEARING

In its brief submitted Friday, the American Academy of Actuaries ("Academy") does not respond to *any* of the questions posed by the Court at the conclusion of the September 9 hearing and as outlined at the beginning of Mr. Schobel's brief submitted on Thursday, regarding the consequences of a deceitful notice, whether injunctive relief is appropriate in the case of a deceitful notice, the Academy's contribution to Mr. Schobel's irreparable harm, and whether cherry-picking of statutory provisions should be permitted. Apparently, the Academy agrees that deceitful notice makes the notice and subsequent Board action invalid, a circumstance that would contribute to irreparable harm and support injunctive relief. Likewise, the Academy does not appear to disagree that it is not free to cherry-pick statutory and Bylaws provisions to its liking, while ignoring others.

Although the Academy continues to argue that Mr. Schobel should have known that a vote for removal was coming at the August 5 Board meeting, the Academy conceded at the September 9 hearing that the *Academy* and its *leadership* had not expected a discussion, much less a vote, on removal—a critical point that the Academy chooses to ignore in its latest submission. If the Academy did not expect removal, why should Mr. Schobel have expected it? Moreover, is it not

reasonable to assume that had "removal"—something unprecedented in the Academy's history—ever been contemplated, that the Academy would have (and certainly should have) mentioned it explicitly in at least one of its numerous communications leading up to the August 5 meeting? As a matter of common decency, did it not owe that courtesy to its soon-to-be president and someone who has volunteered hundreds of hours to the Academy?

The Academy also continues to ignore the second sentence of § 108.50(c), making clear that officer/directors have the same rights as non-officer/directors, including the right to complete their term of office and to be protected against removal other than in accordance with § 108.35. The Academy does not dispute that its purported action failed to comply with § 108.35.

Instead of addressing these important issues, the Academy attempts once again to deny that it did anything wrong. The facts and circumstances, however, clearly suggest otherwise. Although the Academy now introduces a desperate series of emails suggesting that the Board should remove Mr. Schobel, none of those emails was sent by the Academy or current Directors, and there was no reason to believe the Board would consider such extreme, and unprecedented action. By the Academy's logic, if one of these emailers had said that Mr. Schobel should be hanged, drawn and quartered by the Board, then Mr. Schobel should have reasonably expected *that* eventuality. Presumably, the Academy would argue that such punishment would not be "discipline" either.

It has become quite evident that what really happened is that the Academy lost control of the situation on August 5. Rather than simply confess its errors now, it has instead resorted to desperate post-hoc reasoning and rationalizations to attempt to justify something it never anticipated, and to explain its own failure to ensure that the Board acted in accordance with Illinois law and the Bylaws, and in a fair and just manner. One would expect an organization that purports to be the profession's protector of the actuarial code of conduct to adhere to at least the same standards of integrity and

ethics by which it purports to judge its members.

ARGUMENT

I. THE ACADEMY DOES NOT DISPUTE THAT A DECEITFUL OR FALSE NOTICE RENDERS THE RESULTING BOARD ACTION INVALID

Nowhere in its brief does the Academy adequately respond to the authorities cited by Mr. Schobel that demonstrate that when a notice has been deemed misleading, false or deceitful, the resulting board action is invalid as well. (Supp. Br. at 4-9.) Rather, the Academy summarily declares the authorities "inapposite" with no meaningful analysis of these independent determinations that misleading and/or deceitful meeting notices in a variety of contexts cannot support valid and binding actions.

Tellingly, the Academy fails to offer even *one* case in which a court upheld a board action at a meeting, the notice for which was found to be misleading, false or deceitful.[1]

Thus, if the Academy's July 14 meeting notice for the August 5 meeting (along with subsequent communications leading up to the August 5 meeting) was deceitful or false, the notice and the action that resulted at the August 5 meeting are invalid.

II. THE ACADEMY FAILS TO SHOW WHY THE JULY 14 NOTICE WAS NOT DECEITFUL OR FALSE, RENDERING THE RESULTING BOARD ACTION INVALID

Although the Academy once again futilely asserts that its July 14 was not deceitful or false, that contention, even with its latest enhancements, fails for at least four key reasons.

[1] Although the heading for section II of the Academy's brief appears to promise authority on what happens "if Plaintiff somehow had been misled into believing that the Board would not consider his removal," the Academy never actually answers that question and related ones posed by the Court. (*Cf.* Supp. Op. at 11.)

A. The Academy Fails to Prove that Once it Provided Specific Notice About What Would and Would Not Transpire at the August 5 Meeting, It was Still Free to Proceed in Direct Contravention of Those Specified Parameters

Although the Academy argues that it was not required to specify the subjects for its special board meeting on August 5, 2009, that contention is beside the point. The fact is, the Academy *did* specify *the* purpose of this special meeting, which was convened solely for this purpose. The July 14, 2009 notice for the August 5 meeting 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." (*See* July 14 Email attached to Downs Decl. as Attachmt C.) The letter from the past presidents ("Hartman Letter") specifically recommended that the Board *not* consider removal at this time, but that it "*should await the outcome of the ABCD process*." The Academy conveniently ignores this key line from the Hartman Letter that was quoted in Mr. Schobel's opening brief. (Pl. Supp. Br. at 2-3.) In addition, a subsequent email from the Academy's President on July 31, 2009 that purported to lay out the ground rules for the meeting said that "[t]his meeting will *not consider whether any disciplinary action* as to the President-Elect is appropriate at this time." (Emphasis added.)

Regardless of whether the Academy was required to specify the purpose and parameters of the meeting, once it decided to do so, it was required to do so in a manner that was not deceitful, false or misleading. The Academy fails to offer any authority that says a corporation can validly issue a deceptive, false or misleading notice that says we will only discuss A, and not B, but then at the meeting proceed to not discuss A but to discuss B.

The situation is akin to a negligent misrepresentation, for which recovery is permitted "where one relies on statements of another, negligently *volunteering* an erroneous opinion, intending that it be acted upon, and knowing that loss or injury are likely to follow if it is acted upon." *Martens Chevrolet v. Seney,* 439 A.2d 534, 538 (Md. 1982) (Emphasis added). Here, the Academy undertook

to specify the purpose and parameters of the August 5 meeting. Once it did so, it could not have the meeting proceed in direct contravention of that purpose and parameters.[2]

None of the cases cited by the Academy involves situations, like the one at hand, in which the notice specifies distinct parameters for discussion, including a limited subject to be discussed, and possible action that may be taken at the meeting, and then the board discusses other subjects, does not discuss the one type of action referenced and instead pursues the very action that the notice explicitly and implicitly says the Board will not pursue. Rather, in each case, the notice at issue was vaguely or expansively worded; in no case was the complained-of notice described as misleading, deceitful or inaccurate.[3]

In *Lawrence v. I.N. Parlier Estate Co.*, 15 Cal. 2d 220, 233 (1940), the challenged notice broadly stated:

> The general nature of the business to be transacted at said special meeting of the shareholders is to *consider all questions* relating to the property, management and

[2] Although the Academy says that "[t]he clear purpose of the August 5 meeting was to discuss what action the Board would take in response to the [Hartman Letter]" (Supp. Opp. at 6), it concedes that the Board considered far more than the contents of the Hartman Letter in the discussion of its purported action. (*See* Supp. Downs Decl. ¶ 7 ("During the course of its executive session discussion, the Board considered …*other matters* they found pertinent to Mr. Schobel's suitability to serve as President-Elect and President of the Academy.") (emphasis added); Schobel 3d Decl. ¶ 13, 15.)

[3] Indeed, in the inapposite case of *In re William Faehndrich,* 2 N.Y.2d 468, 473 (1957), the court specifically found that the notice was *not* "insufficient or misleading in any way." In *Faehndrich,* the plaintiff unsuccessfully sought to set aside an election on the grounds of defective notice, even though the notice specified that the meeting was called "for the purpose of electing directors." *Id.* The case of *New Founded Indus. Missionary Baptist Ass'n v. Anderson*, 49 So. 2d 342, 344 (La. Ct. App. 1950) does not even discuss a meeting notice, much less whether it is misleading or deceitful. In *Anderson,* the court simply refuses to get into "the merits of the controversy" that led to the president's removal, noting that "[w]e do not believe we should pass upon that matter, as it seems to us that, in view of the power vested in a board of directors by [statute], a court has no right or jurisdiction to review the discretionary action of the board in removing an officer." *Id.* at 344. However, Mr. Schobel is not asking this Court whether he should or should not have been removed from office as a substantive matter, but rather whether the Academy Board complied with applicable Illinois law and its Bylaws in purporting to effect his removal—a perfectly appropriate inquiry for this Court to consider. *See Muhammad v. Muhammad-Rahmah,* 682 N.E.2d 336, 338, 340 (Ill. App. Ct. 1997) (holding that "trial court should have utilized 'neutral principles of law' analysis" in determining whether Illinois not for profit corporation complied with "the procedural requirements for removal of the plaintiff as president and chairman of the board," as specified in Illinois General Not for Profit Corporation Act § 108.35 concerning removal of directors). Indeed, it is now the Academy that has desperately resorted to arguing to the Court why it now believes (despite the letters from its President and two immediate Past Presidents (*see* Schobel 4th Decl. Ex. 1 and 2)) that Mr. Schobel would not make a good President (Supp. Opp. at 20), a point that is not relevant to the analysis here, but simply reflects a scurrilous attempt to poison the well in a manner that one would least expect from the self-proclaimed arbiter of professional ethics and integrity.

> business policy of the corporation . . . and to take such action as may be deemed expedient or necessary in connection therewith.

(Emphasis added.) Similarly, in *Independence Fed. Savings Bank v. Bender*, 326 F. Supp. 2d 36 (D.D.C. 2004), the challenged notice is described by the court as "oblique" and giving no "explicit notice."

As such, these cases do not bear on the Academy's July 14 notice, which together with the follow-up emails are far from being broad, general, oblique or "vaguely worded." Instead, the pre-meeting communications to the Board by President Parks took pains to limit the scope of the matters for the Board's consideration, specifying that the purpose of the meeting would be restricted to the requests made in the Hartman Letter, and specifically excluding "any disciplinary action as to the President-Elect."

Having made such assurances regarding the scope of the special meeting, the Board's ultimate decision to attempt to remove Mr. Schobel rendered the notice wholly misleading, false, inaccurate, and deceitful. Nothing in the Academy's brief contradicts this conclusion.

B. The Academy Fails to Demonstrate Why Mr. Schobel Should Have Anticipated That the Board Would Consider Removal When the Academy Itself Did Not Anticipate Such Action

The Academy has 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—a critical point that it chooses to ignore in its latest brief. (Tr. (9/9/09) at 32.) It similarly fails to explain why Mr. Schobel (especially in light of his purported unworthiness to be president) should have known something the Academy itself did not know. Presumably, if the Academy Board truly intended to consider removing Mr. Schobel from his position—something unprecedented in the Academy's entire history—it would have stated that explicitly (*e.g.,* "the Board will consider whether to remove Mr. Schobel") in the July 14 meeting notice or one of the subsequent communications from the Academy's President.

Instead, the word "removal" did not appear in either the meeting notice or the subsequent communications from the Academy President. As the Academy has conceded, the reason that it did not mention removal in the notice or subsequent communications is because it had no idea that the subject would arise.

Nevertheless, the Academy now drags out a series of inflammatory (and, in some cases, highly confidential) emails—some of which precede even the Hartman Letter, let alone the July 14 meeting notice—that say in various contexts that the Board should "remove" Mr. Schobel from office. One email says that the Board should "immediately ban Mr. Schobel from serving in any leadership or representative capacity of the Academy permanently." (Supp. Downs Decl. Att. N.) The Academy also quotes a confidential email from Mr. Schobel in which he says that the signers of the Hartman Letter are "asking that I be removed or suspended as president-elect." (Supp. Downs Decl. Att. M.) While the Hartman Letter does mention possible removal, it says that the Board should *not* consider removal until the ABCD proceedings, which were ongoing at the time of the August 5 meeting, had been completed.

Knowledge of communications from non-board members requesting certain action hardly equates with an expectation that the Board would actually consider such action. If it were otherwise, why didn't the Academy anticipate consideration of removal at the Board meeting?

None of these emails suggesting that the Board should remove Mr. Schobel came from current Directors, however. Thus, Mr. Schobel had no reason to believe that the Board would act on their request because the meeting notice indicated that the Board would not consider removal, and the Hartman Letter itself, which was the sole subject of discussion at the meeting, specifically requested that the Board *not* remove Mr. Schobel at this time.

C. The Academy Continues to Fail to Demonstrate Why "Removal" Should not Have Been Regarded as "Discipline" or "Punishment" By Mr. Schobel or Any Other Reasonably Minded Person

Although the Academy goes to great lengths to attempt to explain the process of the ABCD, it has failed to establish why Mr. Schobel or any reasonable recipient of President Parks's July 31, 2009 email would not have concluded that when President Parks said that the Board would not consider "any disciplinary action *as to the President-Elect*" (emphasis added), it meant that the Board would not consider "removal"—the ultimate disciplinary action it can impose on the "President-Elect."

First, the Academy attempts to distinguish between discipline directed against Academy members, which it says is the purview of the ABCD in the first instance, and actions/discipline against the Academy's leaders. (*See* Supp. Opp. at 13-15.) However, this is precisely why Mr. Park's statement was understood to refer to an action by the Board since he said that the Board would not "consider any disciplinary action *as to the President-Elect."* (Emphasis added.) If Mr. Parks had been referring to discipline against Mr. Schobel as a professional actuary, he would have said so. As the Academy points out, the ABCD does not get involved in the discipline of members in their roles as officers, such as President-Elect. (*See* Supp. Opp. at 13.)

Second, Mr. Schobel and the others on the Board understand the role of the ABCD and that the Board does not take up professional disciplinary issues involving members in their professional capacity. Thus, Mr. Parks's statement that the Board would not consider disciplinary action clearly was referring to "discipline" in the commonly understood sense—*i.e.,* to punish, such as by removing Mr. Schobel from office. Indeed, Mr. Parks has told Mr. Schobel on multiple occasions that he did not expect the Board to consider removal at the August 5th meeting. (Schobel 4th Decl. ¶

9.)[4]

Third, Mr. Schobel has indicated that his understanding of Mr. Parks's statement was that the Board was not going to consider removal. (Schobel 3d Decl. ¶¶ 8, 10.)[5] This is consistent with the understanding of Mr. Parks and the Academy, as conceded at the September 9 hearing, that no one expected removal to be discussed. (Tr. (9/9/09) at 32.)

Fourth, the Hartman Letter itself, which was supposed to be the sole focus of the Board's special August 5 meeting, specifically recommended that the Board *not* consider removal at this juncture but that it "await the outcome of the ABCD process."[6] In other words, only after the ABCD has had an opportunity to review the matter discussed in the Hartman Letter should the Board consider the disciplinary action of removal, if appropriate at that time.

Fifth, the Academy argues that if removal were discipline in this context, then suspension would be as well, and, it says, Mr. Schobel understood that he might be suspended as a result of the

[4] The Academy's reliance in footnote 7 of its brief on two cases that turn on the statutory interpretation of the Labor-Management Reporting and Disclosure Act ("LMRDA") is entirely misplaced. In *Austin v. UAW,* No. 04-71015, 2004 WL 2112730, at *2 (E.D. Mich. June 4, 2004), the specific statutory safeguards that protect the rights and privileges of union members as members (*e.g.,* that "[n]o member of any labor organization may be fined, suspended, expelled or otherwise disciplined except …[if the member is] served with written specific charges") were simply found not to apply to the possible removal of a union member from his elected office (but not from membership in the union itself). Indeed, if anything, *Austin* supports the obvious fact that the Academy refuses to acknowledge that suspension or removal *are* a form of discipline, as the LMRDA explicitly states. By contrast, President Park's reference to "disciplinary action" does not refer to or turn on the interpretation of any statute, much less the LMRDA. Likewise, in *Finnegan v. Leu,* 456 U.S. 431, 438 (1982), the Court's reference to "discipline" refers to its meaning under the LMRDA and the protection that statute accords to union members. The Court held that that protection does not extend to union officers in their capacity as officers. While citing a couple of cases inapposite to the issue at hand, the Academy fails to even attempt to distinguish *Forbes v. Board of NAACP,* No. 1:01-cv-02562-DCN, slip op., at 14 (DE 37) (N.D. Ohio Aug. 2, 2002), discussed in Mr. Schobel's opening brief. (Pl. Supp. at 7-8.) In *Forbes,* which involved the analogous attempted removal of a corporate officer, the court enjoined the removal, recognizing that the Board's attempted removal "resemble[d] 'disciplinary action.'" *Id.*

[5] While the Academy asserts that Mr. Schobel "could not have been misled by Mr. Parks's reference to discipline" (Supp. Opp. at 15), if the Academy's tortured description of what discipline meant in the Parks email is to believed, then *Mr. Parks himself* was apparently misled by *his own email* since Mr. Parks has said that *he* did not expect the Board to consider removal at the August 5 meeting. (Schobel 4th Decl. ¶ 9.)

[6] For obvious reasons, the Academy has chosen now to completely ignore this portion of the Hartman Letter recommending against consideration of removal at this time that may well have served as the inspiration for Mr. Park's statement that there would be no disciplinary action (*i.e.,* no consideration of removal).

Board meeting. (*See* Supp. Opp. at 15.) What Mr. Schobel has said is that he expected that there might be *discussion* about suspension because the Hartman Letter, which was to be the sole focus of the August 5 meeting, requested that the Board suspend (but not remove) Mr. Schobel pending the outcome of the ABCD proceeding. (Schobel 3d Decl. ¶ 5; Schobel 4th Decl. ¶ 4.) However, Mr. Schobel did not believe that the Bylaws provided for the suspension of an officer/director and was unaware of any past instance in which the Board had suspended a Director, including an Officer/Director.[7] (Schobel 4th Decl. ¶ 5.) Moreover, Mr. Schobel considered any suspension to be a form of discipline and was therefore comforted by Mr. Park's email that no disciplinary action would be taken at the meeting (*i.e.,* no removal or suspension).[8] (Schobel 4th Decl. ¶ 4.)

Accordingly, the only reasonable interpretation of the statement in the July 31 email from Mr. Parks that no disciplinary action would be considered is that the Board would not consider removal or suspension.

D. The Academy Does Not Dispute that the July 14 Notice Fails to Satisfy the Notice Provisions for Removal of A Director, Such as Mr. Schobel

There is no dispute that, prior to the August 5 meeting, Mr. Schobel was a Director. There is also no dispute that neither the notice nor the other Academy communications leading up to the August 5 meeting complied with the notice requirements for removing a director under § 108.35 of the Act. Section 108.35(c)(2) provides: "No director may 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*

[7] The act of "suspension" is discussed nowhere in the Academy Bylaws, except as a possible disciplinary action by the ABCD. *See* Bylaws Article X, Section 5, Part G.

[8] It is entirely self-serving and speculative for the Academy to now argue that suspension is the equivalent of removal because the ABCD process would have taken "many months or more," especially since suspension was never even discussed at the August 5 meeting. In addition, it was (and remains) possible that the ABCD would summarily dismiss the complaints to the ABCD in short order, as it often does, and prior to the October meetings. (Schobel 4th Decl. ¶ 6.)

removal of one or more directors named in the notice. Only the named director or directors may be removed at such meeting." (Emphasis added.) There is no dispute that the meeting notice (and subsequent communications) did not say that "a purpose of the meeting is to vote upon the removal of Mr. Schobel."

For that reason as well, the July 14 notice was defective, and the subsequent Board action was invalid.

III. THE ACADEMY DOES NOT DISPUTE THAT THE COURT MAY ENJOIN THE ACADEMY HERE IF IT FINDS THE NOTICE TO HAVE BEEN DECEITFUL OR FALSE

Nowhere in its brief does the Academy address, as requested, whether the Court is empowered to grant a temporary restraining order or preliminary injunction if the notice is determined to be deceitful or false. The Academy not only fails to provide the Court with any cases on this point, but also fails to address the authority cited by Mr. Schobel that demonstrates that injunctive relief—including a temporary restraining order—is entirely appropriate to protect a party from harm caused by a board's improper attempt to remove him or her from office. (*See* Pl. Supp. Mem. at 7-9.)

Accordingly, the Academy does not dispute that the Court may enjoin the Board's action that resulted from the Academy's deceitful and/or false July 14 meeting notice and subsequent communications.

IV. THE ACADEMY ONCE AGAIN DOES NOT DISPUTE THAT § 108.50(c) REQUIRED THE ACADEMY TO FOLLOW § 108.35 IN ANY ATTEMPT TO REMOVE AN OFFICER/DIRECTOR

Once again, the Academy has wholly ignored the critical provision in the second sentence § 108.50(c) of the Act that provides that officer/directors, like Mr. Schobel, "shall have the same rights, duties and responsibilities as other directors." The Academy *cannot* dispute that this includes

the *right* to serve out his or her term in office and to be protected against removal from office, except in compliance with the strict removal of director provisions in § 108.35.[9]

Instead, the Academy cannot read past the first sentence of § 108.50(c), which contains the unremarkable provision that an officer may simultaneously serve as a director "while he or she holds that office." Rather than answer the question as to whether the director removal provisions in § 108.35 apply to such an officer/director, the first sentence of § 108.50(c) simply *begs* the question. If the director removal provision applies to officer/directors, then an officer/director "holds that office" until he or she has been removed in accordance with the director removal provisions of § 108.35. That point is made clear by the *second* sentence of 108.50(c)—the one the Academy chooses to ignore (and has to ignore to justify its improper action). Once an officer becomes a director as well, the second sentence of § 108.50(c) says he or she is treated like every other director, and accorded the same rights, duties and responsibilities, making them indistinguishable legally from all other directors. At that point, the officer/director can be removed only in accordance with § 108.35.[10]

In the case of the Academy, Mr. Schobel simultaneously became an officer and director. Thus, he cannot be removed from office, except in accordance with § 108.35, which is in no way inconsistent with the generic officer removal provision of § 108.55. That provision simply says that

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[9] The Academy has failed to adequately explain why, in light of this provision, it can treat officer/directors as second class citizens to non-officer/directors, as it has attempted to do in the case of Mr. Schobel. Moreover, it continues its mantra, without any legal support, that "when Plaintiff was removed as President-Elect, his status as a director terminated by operation of law." (Supp. Opp. at 8.) Likewise, it again fails to identify what *law* it believes is operating here. Although Mr. Schobel asked the Academy to identify what law it was referring to in its constant refrain (Pl. Supp. at 10 n.7), tellingly, the Academy failed to identify the supposed law—because there is none that supports the Academy's position. Indeed, the law on this issue is in the second sentence of § 108.50(c), which makes clear that, because Mr. Schobel was also a Director and his positions were inextricably intertwined, that the Academy needed to comply with the removal of directors provisions of § 108.35, which were not followed here. The Academy cannot seriously dispute that fact.

[10] Whether, as the Academy now suggests (Supp. Opp. at 18), he might have been "*ex officio,*" a designation that does not appear in its Bylaws, is beside the point. In the absence of a limitation in the Bylaws or Articles, an officer/director is accorded the same rights as other directors, pursuant to § 108.50(c).

officers may be removed. It does not say by what vote or what process. Thus, requiring a Board to comply with § 108.35 for removing an officer/director is perfectly consistent with § 108.55. Moreover, had the Academy wanted officer/directors to be subject to removal by some lesser standard than non-officer/directors, it could have easily provided for that in its Bylaws since the second sentence of § 108.50(c) permits an exception if the articles or bylaws provide otherwise. In the case of the Academy, its Articles and Bylaws are entirely silent on this issue.

In addition, the Academy asserted at the Court's September 3 hearing that, under the Academy's governing structure provided for in its Bylaws, Mr. Schobel's officer and director positions were inextricably intertwined and that he could not be removed as an officer and remain a director (and vice versa).[11]

Because it is clear that § 108.50(c) required the Academy to comply with § 108.35 in attempting to remove an officer/director like Mr. Schobel, and the Academy does not seriously dispute that its purported action did not comply with the removal provisions of § 108.35, its purported action was invalid because it failed to comply with § 108.35. For that reason alone, Mr. Schobel remains the Academy's President-Elect/Director.

V. THE ACADEMY HAS FAILED TO IDENTIFY ANY LEGITIMATE HARM THAT IT WILL EXPERIENCE IF THE COURT IMMEDIATELY ENJOINS THE ACADEMY

The Academy has not identified any legitimate harm that it would sustain if the Court grants Mr. Schobel's request for immediate injunctive relief. Moreover, any harm experienced by the Academy by the granting of an injunction would pale in comparison to the substantial and irreparable harm that Mr. Schobel will sustain if the injunction is not granted.

[11] While arguably nothing in the Illinois Act would prohibit a nonprofit corporation's bylaws from providing for stripping an officer/director of the officer or director portion of his or her position and allowing him or her to continue in the other portion, the Academy's Bylaws do not specifically contemplate, much less provide for, that.

The Academy makes the startling claim that Mr. Schobel's many achievements and recognized leadership in the actuarial field somehow excuses the Academy's flouting of Illinois law and its own procedures in attempting to deny him the right to continue in his role as President-Elect and eventual President of the Academy. (Supp. Op. at 18-19.) There is no authority (and certainly none cited by the Academy) to support the bald assertion that the loss of the opportunity to serve as President-Elect and President is not an irreparable harm to Mr. Schobel precisely because he has distinguished himself in his profession. To the contrary, it is only after years of dedicated service and success in the profession that Mr. Schobel could even think to ascend to the top of the Academy. Thus, the deprivation of this unique and long-sought honor to lead the Academy is not, as the Academy seems to assert, a mere trifle.[12] Rather, this unique opportunity is of great importance to Mr. Schobel, and is something he has worked long and hard to achieve.

In addition, while the Academy patronizingly asserts that Mr. Schobel "still has a full plate of other professional endeavors,"—as if that should excuse the Academy's illegal, invalid and outrageous conduct—there is no reason to assume that Mr. Schobel's other pursuits, including his employment, will not be severely impacted if the Academy's conduct is not enjoined.

In addition, the Academy now takes the new tack of trying to persuade the Court to consider whether Mr. Schobel would be a good choice to be the next Academy President, an issue wholly irrelevant to the analysis, *see Muhammad,* 682 N.E.2d at 340, but one that allows the Academy to now impugn Mr. Schobel's character and reputation in the guise of legal argument. For example the Academy suggests—again, without any support—that Mr. Schobel lacks the widespread support and respect necessary to continue to lead the Academy. (*See* Supp. Op. at 20.) Even that is incorrect. To the contrary, Mr. Schobel has received countless messages of support from Academy members, some

[12] If anything is clear from the events here, it is that the Academy is in need of strong new leadership.

of whom will be serving with him on the incoming Board after the October meetings. (Schobel 4th Decl. at ¶ 10.) Many statements of support for Mr. Schobel and statements of condemnation of the Academy's actions appear online in the profession's chat room, www.actuarialoutpost.com. Indeed, in response to the Hartman Letter, Mr. Schobel received strong support from the Academy's current president and two most recent past presidents, in the form of a letter to Hartman and his cohort and to the Academy Board in which these current Academy leaders strongly defend Mr. Schobel against the attacks that had been lodged against him. Copies of these two letters are attached as Exhibits 1 and 2 to the Fourth Declaration of Mr. Schobel that accompanies this brief.

Despite these two recent, glowing endorsements of Mr. Schobel from the Academy's *current* leadership, the Academy says that "the Board has concluded that Plaintiff is not suitable to serve." There is no proof of that in the record either. Indeed, the only proof is to the contrary. Moreover, the Academy cannot deny that if Mr. Schobel were solely a director, and not an officer, the Board's action on August 5 would have been a nullity and Mr. Schobel would remain as a Director despite a faction (less than 2/3) of the Board that does not support him.

The action that the Academy took on August 5 is to blame for any disruption and harm to the Academy, which Mr. Schobel can help repair if the Academy is compelled to follow its own established procedures and the law, and refrain from further interference in the performance of his office as its President-Elect/Director and future President/Director. (Schobel 4th Decl. at ¶ 10.)

Finally, the Academy's assertion that Mr. Schobel could not meet his fiduciary obligations to the Academy if permitted to continue as President-Elect and ascend to the office of President is completely unfounded.[13] Mr. Schobel has sought injunctive relief because his present dispute with

[13] The suggestion by one of Mr. Schobel's attackers that he should not be President while an ABCD complaint is pending that this attacker helped lodge is akin to a child murdering his parents and then throwing himself on the mercy of the court because he is an orphan. By this twisted logic, Mr. Schobel could rid the Board of his adversaries by simply

the Academy is a matter of principle, and one for which he has no adequate remedy at law. By seeking to compel the Academy to honor the law and its own governing documents, Mr. Schobel is in fact *upholding* his fiduciary duties to the Academy—unlike other Directors who used the opportunity of the Hartman Letter to pursue a personal vendetta against Mr. Schobel at the expense of the Academy. If anyone has failed to uphold his or her fiduciary duties, it is these individuals who set out to destroy Mr. Schobel without any regard for their duties to or the implications for the Academy.

As noted above, injunctive relief is the appropriate remedy to safeguard not only Mr. Schobel's rights, but also the Academy's integrity and continued vitality as the voice of professionalism in the actuarial profession.

CONCLUSION

For these additional reasons, Mr. Schobel respectfully requests that the Court immediately enjoin the Academy.

Dated: September 12, 2009

Respectfully submitted,

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lodging ABCD complaints against them.