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 BRIEF IN FURTHER SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

The American Academy of Actuaries ("Academy") has utterly failed to disprove that Mr. Schobel remains the Academy's duly elected President-Elect and a Director, that the actions of the Academy's Board at its August 5 meeting were illegal and invalid, and that Mr. Schobel is entitled to immediate injunctive relief to prevent further interference with and harm to Mr. Schobel.

Although the Academy acknowledges that the "plain language of the [Illinois General Not for Profit Corporation Act]" governs here, the thrust of the Academy's argument in opposing Mr. Schobel's request for relief is that the Court should nevertheless ignore the plain and clear language of the Act, and ignore the procedural shortcomings in the Board's attempted action here. Ironically, it is the *Academy* which, in its words, seeks after the fact "to rewrite the Bylaws and the Illinois Act to make them more advantageous." (*Cf.* Opp. at 20.) Clearly, the Court should not follow the path laid out by the Academy, which ignores applicable law. That law establishes that Mr. Schobel will likely prevail on the merits of his claim.

In its submission, the Academy does not dispute that Mr. Schobel was unanimously elected to

be the Academy's President-Elect, automatically became a Director at that point, and will automatically become the Academy's President/Director at the Academy's annual meeting on October 26, 2009 if he is the President-Elect/Director at that time.

The Academy also concedes that a variety of procedural defects and irregularities occurred with respect to the August 5 meeting, including that:

- although the July 14 meeting notice said that all participants would have to appear in person, a number of Directors were allowed to participate and vote by telephone;
- after the July 14 meeting notice was sent, the Academy's current President voiced his opposition to permitting participation by telephone, aptly expressing his concern on the simple question, "Would you want a number of contemporaries considering a critical decision about your future to be a distant voice over the phone or present and attentive in the room where the discussion occurred" (Compl. ¶ 34);
- although the Academy contends that the vote of the Board came after "careful consideration" and that the Academy "did not make the decision lightly" (Opp. at 11), it concedes that it "did not allow detailed discussion" of any of the allegations in the Hartman Letter, which gave rise to the meeting (Downs Decl. ¶ 10), and does not dispute that Mr. Schobel was given only 10 minutes to respond to 50 minutes of attack on subjects well-beyond the Hartman Letter and of which he had no notice;[1]
- a majority of Directors present in person voted *against* Mr. Schobel's removal;
- two-thirds of Directors present in person *did not vote to remove* Mr. Schobel and two-thirds of all Directors participating in the meeting, including those who participated by telephone, *did not vote to remove* Mr. Schobel;
- That no one Director who voted to remove Mr. Schobel said he or she believed Mr. Schobel deserved to be removed for cause; and
- the Academy was quoted publicly as saying that Mr. Schobel "is no longer [the Academy's] president-elect" and posted the word "vacant" on its website where Mr. Schobel's name and picture appeared under the label "President-Elect" for the past year.

Mr. Schobel has met all of the elements justifying his request for immediate injunctive relief

[1] Mr. Schobel offers an additional declaration and accompanying documentation for *in camera* review to respond and put in context the materials that the Academy submitted for *in camera* review as Attachment B to the Downs Declaration. Mr. Schobel includes a detailed response in defense and support of Mr. Schobel from the Academy's current President and its two immediate past presidents.

here. Accordingly, the Court should immediately enjoin the Academy as specified in Mr. Schobel's Motion.

ARGUMENT

THE ACADEMY HAS FAILED TO UNDERCUT MR. SCHOBEL'S ENTITLEMENT TO IMMEDIATE INJUNCTIVE RELIEF HERE

A. Mr. Schobel Will Prevail on the Merits of His Claims and the Academy Has Failed to Show Otherwise

A threshold issue here is whether § 108.35, governing removal of directors, applies to an attempted removal of Mr. Schobel as President-Elect/Director. If it does, the Academy does not seriously dispute that the Board's action at the August 5 meeting failed to meet the strict standard for removal of an Academy Director.

1. Section 108.35 Applies to Any Attempted Removal of an Academy Officer/Director

While the Academy contends that the "general powers" provision of Article III, section 5 of its Bylaws give its Board the ability to remove Directors, it does not and could not argue that the Bylaws in some way trump the applicable provisions of the Act. While it acknowledges the existence of § 108.50(c) and argues that the first sentence of that section makes reference to officers also holding director positions "while he or she is holding office," it essentially ignores the critical second sentence, which states that such officer/director "*shall have the same rights,* duties and responsibilities as other directors." (Emphasis added).[2] Clearly, one of those rights, is the protection from arbitrary removal from the officer/director position absent compliance with the provisions governing removal of directors in § 108.35. The Academy's conclusory footnote 4 offers no authority to believe an officer/director does not enjoy the right to serve in his position for the length

[2] Although the second sentence begins, "Unless the articles of incorporation or the bylaws provide otherwise," there is no dispute that the Academy's Articles and Bylaws are silent on this issue.

of his term as any non-officer/director can, subject to the strict removal standards in § 108.35. The Academy also does not dispute that were it otherwise, a mischievous bare majority of a board could simply end-run the protections accorded directors by "promoting" an undesirable director to an officer position and then simply voting by a bare majority to remove him, when as a director a minimum of a two-thirds vote is required for a corporation like the Academy.

Thus, § 108.35 regarding removal of Directors applies in the case of Mr. Schobel as the Academy's President-Elect/Director.

2. Section 108.35(a) Precludes Removal of an Academy Director Absent a Bylaw/Articles Change or Court Action

While it is true, as the Academy argues, that the first sentence of § 108.35(a) indicates that directors can generally be removed with or without cause, the Academy does not dispute that the second sentence (which does not apply to all Illinois not for profit corporations) applies to the Academy and can limit the first sentence. The only difference between the parties' positions is whether the Court should apply, what the Academy calls, "the plain language of the Act," or should somehow pretend that the Act does not say what it actually says, as the Academy is plainly advocating. The Academy does not dispute that if Mr. Schobel's reading is correct and § 108.35(a) applies, then the Board's action was clearly invalid.

The second sentence says that "*no director may be removed* except for cause if the articles or the bylaws so provide." (Emphasis added). The only reasonable construction of this sentence is that the Legislature has decided that a nonprofit corporation like the Academy cannot remove a director at all, except that if the articles or bylaws provide for removal for cause, then a director can be removed for cause. The Academy does not dispute that its Articles and Bylaws are silent on

removal.[3] Thus, under the plain reading of the statute, the Academy does not have the power currently to remove a director, period. However, as noted previously, there are two possible exceptions to this: (1) amend the Articles or Bylaws, which has not occurred; or (2) petition an Illinois Circuit as provided for in § 108.35(d), which also has not occurred here.

In ignoring the plain language of § 108.35(a), the Academy is reduced to arguing that essentially the language cannot mean what it says and/or that it does say what it says but that the Court should ignore the language because the Academy does not like it. Taking these in reverse order, if the Academy does not like § 108.35(a), the place to address that is before the Illinois legislature, not here. Regarding whether the language of the Act can mean what it says, Mr. Schobel directs the Court to the language of the Illinois Business Corporation Act of 1983, 805 ILCS 5, and specifically section 8.35 governing the removal of directors. That statute provides for removal with or without cause, but in the case of a corporation with multiple classes of directors and staggered terms (like the Academy's structure) says simply that "the articles of incorporation may provide that directors may be removed only for cause." This is the provision that the Academy wants to read into § 108.35(a) of the General Not for Profit Corporation Act of 1986 governing the Academy. Unfortunately, for the Academy § 108.35(a), which was written three years *after* the act governing for profit businesses, says something entirely different. Thus, if the Illinois legislature wanted § 108.35(a) to read the way the Academy wants it to read, just as § 8.35 of the Business Corporation Act reads, then the Illinois legislature clearly knew how to write a statute that said what the Academy wants § 108.35(a) to say (*e.g.,* 805 ILCS 5/8.35), but what, in fact, § 108.35(a) does not say.[4]

[3] The Academy also does not dispute that no one who voted to remove Mr. Schobel said they were doing so for cause.
[4] Moreover, it is hardly surprising that the Illinois legislature would impose a higher standard for removal of directors of not for profit corporations, with generally less scrutiny than for profit businesses, to guard against the very abuse begun by opportunistic board members here.

Accordingly, under § 108.35(a), the Academy does not have the power currently to remove a director without a court order, and the actions of the Board against Mr. Schobel were invalid.

3. Regardless of Whether 108.35(a) Applies, the Academy Failed to Comply with 108.35(c), Which Would Otherwise Apply

In the case of not for profit corporations where removal of directors can occur under the Act, 108.35(b) describes the approach for removal for corporations "with no members or with no members entitled to vote on directors," while 108.35(c) applies to corporations "with members entitled to vote for directors." Thus, the two are mutually exclusive, and, as a matter of simple logic, only one can apply.

The Academy does not dispute that if 108.35(c) applies, then the Academy has not met the requirements for removal—namely that, in contravention of subsection (3) a two-thirds vote for removal did not occur, and that, in contravention of subsection (2), the August 5 meeting notice did not say that "a purpose of the meeting is to *vote upon the removal* of one or more directors named in the notice" (*i.e.,* Mr. Schobel). (Emphasis added).

The Academy also does not dispute that it has members and that its Bylaws permit members to vote for directors. Even though these characteristics make it clear under the plain language of the Act that 108.35(c), not 108.35(b), would apply to the Academy, the Academy persists in the delusion that 108.35(b) somehow applies anyway.

The plain language of the Act makes it clear that 108.35(b) applies to corporations with no members or with no members entitled to vote on directors. The Academy does not dispute that it has members and it has members entitled to vote on directors.

Nevertheless, the Academy argues that because members did not elect Mr. Schobel—Directors did—that therefore 108.35(b) should apply. First, the Academy ignores the fact that its

voting Directors *are* members, many of whom were elected directly by member vote. Second, 108.35(c) contemplates a corporation like the Academy where some of the Directors are not voted in directly by members. Section 108.35(c)(4) provides, "*If a director is elected by* a class of voting members entitled to vote, *directors* or other electors, that director may be removed only by the same class of members entitled to vote, directors or electors which elected the direct. Thus, 108.35(c) specifically applies to a corporation, like the Academy, in which some directors are *elected by directors,* as opposed to directly by members, as in the case of Mr. Schobel.[5]

Because the Academy does not and cannot dispute that its actions did not comply with 108.35(c), which clearly would apply if the Academy had the ability to remove an officer/director like Mr. Schobel, the Academy's action at the August 5 meeting was invalid, and Mr. Schobel remains the President-Elect/Director.

Accordingly, Mr. Schobel is highly likely to prevail on the merits of his claim that 108.35 applies to an attempt to remove him from his position as President-Elect/Director, and the Academy has failed to satisfy the heavy burden needed under that Act for removal.

B. Mr. Schobel Has More Than Sufficiently Demonstrated Irreparable Harm

While the Academy recognizes that the purpose of an immediate injunction is often to preserve the status quo, its argument simply begs the question of what is the status quo here. If, as Mr. Schobel has clearly demonstrated, the actions of the Academy were invalid in its attempt to remove Mr. Schobel from office, then the status quo is that he *still is* the President-Elect/Director.

[5] Even if 108.35(b) did apply, the Academy has not satisfied that provision either. Removal can occur only by majority vote of "directors then in office present and voting at a meeting of the board of directors at which a quorum is present." However, the Academy does not dispute that a majority of the Directors *present* at the meeting and voting voted against removal. In addition, 108.25 requires that, in the case of removal under 108.35(b), "no special meeting of directors may remove a director under Section 108.35(b) of this Act unless *written notice of the proposed removal* is delivered to all directors at least twenty days prior to such meeting." The Academy does not dispute that the July 14 notice for the special meeting does not mention "proposed removal" of Mr. Schobel as a subject of the August 5 meeting.

The Academy's argument that an injunction would "reinstate" Mr. Schobel to the position he currently holds because the Academy has falsely communicated to the world (at great harm to Mr. Schobel) that he is no longer the President-Elect/Director of the Academy is akin to Thomas Dewey arguing that because the Chicago Tribune reported that "Dewey Wins" across its front page, that allowing Harry Truman to take office as President would have altered the status quo. No doubt President Dewey would have agreed that the Academy's position is absurd.

In fact, it is the Academy that is attempting to change the status quo by ignoring the Illinois statute, which it concedes applies along with its own governing documents, by interfering with Mr. Schobel's ability to complete his term as President-Elect/Director and succeed to the position of President/Director, a position that is rightfully his under the Academy's Bylaws, at the Academy's annual meeting on October 26, 2009. The Academy, which acknowledges its preeminence in the actuarial world (Downs Decl. ¶¶ 3-4) cannot seriously contend that depriving Mr. Schobel of becoming the President of the Academy—an eventuality that has been anticipated for a year by the Academy's 17,000 members and a large portion of the profession in which Mr. Schobel practices and earns a living—would not cause him irreparable harm. Likewise, the Academy cannot seriously argue that it is not the one that has told the world that, in its mistaken view, Mr. Schobel is no longer the President-Elect of the Academy. The Academy does not dispute that a leading industry journal quoted the Academy as indicating as much. Plus, the Academy cannot seriously contend that its mysterious replacement of Mr. Schobel's name and picture on its website where they have appeared for the past year with the word "vacant" implied that Mr. Schobel was removed from office, and under circumstances of a serious nature, given that such an occurrence was unprecedented.

Likewise, the Academy acknowledges that it told Mr. Schobel that he could no longer hold himself out as the Academy's President-Elect/Director in conjunction with upcoming appearances

and engagements, including as early as next week.

In addition to the clear evidence of irreparable harm described in Mr. Schobel's declaration, as well as in his opening memorandum and Complaint, Mr. Schobel offers further proof, as reflected in Mr. Schobel's supplemental declaration, which is being provided to the Court for *in camera* review (with a copy being served to the Academy's counsel for its confidential review) given the sensitive nature of the harm that Mr. Schobel has experienced and expects to experience if the Court does not grant his request for immediate injunctive relief.

Moreover, the Academy wholly ignores the case of *Saunders v. George Washington University,* 768 F. Supp. 843 (D.D.C. 1991), which was cited in Mr. Schobel's opening brief and is directly on point. In *Saunders,* a court in this district enjoined George Washington University from terminating a professor out of recognition of "the harm to her career and professional reputation" that would occur that, even if she prevailed on the merits at trial, would "always casts a cloud" on her professional reputation. *Id.* at 845. In reaching its decision, the court noted that the plaintiff "does not teach merely to make money." *Id.* By contrast here, Mr. Schobel's service as an Academy Officer/Director is on volunteer basis, making the impact of the Academy's improper actions on Mr. Schobel's professional reputation and standing in the actuarial community even more significant than in *Saunders.*[6]

While the Academy notes the passage of time from the August 5 Board meeting to Mr. Schobel filing suit and seeking injunctive relief on September 1, the Academy also acknowledge that

[6] The situation in *Sampson v. Murray,* 415 U.S. 61 (1974), cited in footnote 7 of the Academy's brief and involving the discharge of a *probationary* employee—as contrasted with the Academy's President-Elect/Director and future President— is entirely inapposite to the circumstances here. Moreover, the Court in *Sampson* said, "We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." *Id.* at 92 n.68. The improper removal of Mr. Schobel from high office by a leading professional organization would certainly fit into the category of a departure for the "normal situation."

Mr. Schobel was working with the Academy to achieve a resolution of this issue, during which time there was limited communication by the Academy about the circumstances of the August 5 meeting. As the Academy further acknowledges, a day or so after the parties reached an impasse the Academy publicly and falsely communicated that Mr. Schobel was no longer the President-Elect/Director and that it was seeking a replacement for him, thus necessitating the request for immediate relief less than three business days later.

Mr. Schobel has more than sufficiently demonstrated irreparable harm to justify the issuance of an immediate injunction in these circumstances.

C. The Academy Has Failed to Establish that it Would Be Meaningfully Harmed By Issuing an Injunction Now, Especially Compared With the Harm that Mr. Schobel Would Otherwise Experience

The Academy argues that its status as a not-for-profit institution shields its attempted removal of Mr. Schobel from review by this Court. There is no such deference when statutory procedures and requirements have been violated. This very argument was rejected by the court in *People v. Muhammad-Rahmah*, 289 Ill.App.3d 740, 779, 682 N.E.2d 336, 340 (1997). In this case, a mosque claimed that the court could not review its decision to remove one of its directors because the court could not make a determination of whether the director was a "good Muslim." On review, the Appellate Court of Illinois reversed, ordering the lower court to apply a "neutral principles of law" analysis to determine whether the mosque had properly followed the requirements imposed by the Illinois General Not For Profit Corporation Act in seeking to remove one of its directors. Similarly, this Court is empowered to determine whether the Academy's attempt to remove Mr. Schobel as President-Elect/Director was a valid action pursuant to the requirements of the Act and the Academy's Bylaws, without deciding the merits of whether Mr. Schobel should or should not continue to serve the Academy in this capacity.

In addition, while the Academy expresses concern about filing allegedly vacant positions, Mr. Schobel's request for immediate relief and an expedited hearing on the merits should obviate any concern, particularly since Mr. Schobel full expects to prevail on the merits and succeed to the position of President/Director at the October 26, 2009 annual meeting.

D. The Public Interest Clearly Favors Injunctive Relief Here

Mr. Schobel's request for the Court to put a stop to the Academy's actions in contravention of the governing Illinois Act clearly serves the public interest in terms of respect for applicable law, as well as the interest of the 17,000 Academy members of having their organization follow the law and respect the individuals who have been duly elected to positions of leadership.

The Academy is quite correct that "[t]here is no legal foundation for asking this Court … to rewrite the Bylaws and the Illinois Act. That is precisely what the Academy is trying to do by refusing to recognize that under its own Bylaws and the Illinois Act, Mr. Schobel remains its President-Elect/Director and is to succeed to the position of President/Elect at the Academy's October 26, 2009 annual meeting.

Mr. Schobel simply seeks to have the Academy respect Mr. Schobel's election to his and invalidity of the Board's improper attempt to remove him. Since the Academy refuses to do, Mr. Schobel respectfully requests that the Court enjoin further interference and illegal action by the Academy.

CONCLUSION

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

Respectfully submitted,

Dated: September 2, 2009

/s/David S. Wachen
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