

1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLUMBIA

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3 BRUCE D. SCHOBEL, Docket No. CA 09-1664

4 Plaintiff,

5 v.

Washington, D.C.

September 15, 2009

2:10 p.m.

6 AMERICAN ACADEMY OF

7 ACTUARIES,

Defendant.

8 -----X

9 **TRO RULING**

BEFORE THE HONORABLE EMMET G. SULLIVAN

10 UNITED STATES DISTRICT JUDGE

11 APPEARANCES:

12 For the Plaintiff: SHULMAN, ROGERS, GANDAL,
13 PORDY & ECKER, P.A.
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1 APPEARANCES: (CONT'D.)

2 ALSO PRESENT: Ms. Mary Downs
3 CORPORATE REPRESENTATIVE FOR THE
4 AMERICAN ACADEMY OF ACTUARIES

5 Mr. Philip Larson
6 Hogan & Hartson

7 Mr. Bruce Schobel, Plaintiff

8 Court Reporter: Catalina Kerr, RPR, CRR
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14 Proceedings recorded by mechanical stenography, transcript
15 produced by computer.
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1 P-R-O-C-E-E-D-I-N-G-S

2 (2:10 P.M.; OPEN COURT.)

3 THE DEPUTY CLERK: Please remain seated and come to
4 order. Civil Action 09-1664, Bruce Schobel versus American
5 Academy of Actuaries. Would counsel please identify
6 yourselves for the record.

7 MR. WACHEN: Good morning -- good afternoon, Your
8 Honor. David Wachen again representing the Plaintiff. With
9 me at counsel table is my partner Tina Hsu and also the
10 Plaintiff himself, Mr. Schobel.

11 THE COURT: All right. Good afternoon.

12 MR. REES: Good afternoon, Your Honor. Jonathan
13 Rees representing the Defendant. Also with me is Paul Skelly,
14 a partner at Hogan & Hartson representing the Defendant, who
15 is in the process of being entered, Mary Downs with the
16 Defendant, American Academy of Actuaries, and also present but
17 not entering his appearance is Philip Larson.

18 THE COURT: All right. Good afternoon. Let me ask
19 you a question. Is there -- if the Court were to deny the
20 request for injunctive relief, would the Plaintiff be able to
21 run for office in October? And if not, why not?

22 MR. REES: Just to confirm.

23 (PAUSE.)

24 MR. REES: Your Honor, it's not an open election.
25 There's a nominating committee that meets, nominates someone

1 and then a vote is taken on that nominee.

2 THE COURT: He could be nominated by a committee
3 then?

4 MR. REES: Well, I understand that there's already
5 been a nominee, but he would not be nominated having been
6 removed as President-Elect.

7 THE COURT: All right. Yes, sir.

8 MR. WACHEN: Your Honor, my understanding is that
9 the current board, if there's a vacancy in the president-elect
10 position, will elect the next president, and that's in the
11 bylaws. So he would not be -- the Board that removed him
12 would basically have to elect him.

13 THE COURT: Right, right. All right. All right.
14 It's really unfortunate that what's put into motion the series
15 of the sequence of events since July is the undisputed fact
16 that the terms of a confidential arbitration agreement were
17 revealed. That's really -- that's really unfortunate. It's
18 unseemly. It's disgusting, but that's -- that's why you folks
19 are all here, and I think that when the final chapter is
20 written in this book, I think the world's going to know more
21 about the American Academy of Actuaries than it ever wanted to
22 learn and know about; nevertheless, the Court's prepared to
23 rule.

24 The Plaintiff filed a motion for a temporary
25 restraining order on September the 1st, 2009 seeking to enjoin

1 Defendant, American Academy of Actuaries, from taking any
2 action that would interfere with or prevent him from holding
3 office as and performing the duties of President-Elect of the
4 Academy. Based on the parties' representations that Plaintiff
5 was scheduled to make appearances as the President-Elect of
6 the Academy -- excuse me -- beginning as early as September
7 the 10th, the Court set an expedited briefing schedule and
8 held arguments on Plaintiff's motion on September 3rd.

9 There have been a series of requests for
10 supplemental briefing with regards to issues that have come
11 up, and the Court, notwithstanding its comments about what
12 prompted all of this, appreciates the hard work of the
13 attorneys in this case and advocated on behalf of their
14 respective principals.

15 Now, I've considered the motion. Having considered
16 the motion and all the other pleadings, response, reply, et
17 cetera, and indeed the supplemental pleadings and all the case
18 law that counsel have brought to the Court's attention, the
19 arguments -- and I don't need to hear any further argument --
20 and notwithstanding the -- you know, what the Court said
21 earlier, the Court, nevertheless, denies Plaintiff's motion
22 for a temporary restraining order.

23 Unseemly as what may have happened, there's no basis
24 in fact or law for a temporary restraining order, an
25 extraordinary legal relief, and it's not sustainable at this

1 point.

2 Now, in considering whether to grant an application
3 for emergency injunctive relief, and that's what this is, the
4 Court must consider four factors in this circuit. One,
5 whether there is a substantial likelihood that Plaintiff will
6 succeed on the merits of his claims; two, whether Plaintiff
7 will suffer irreparable injury absent an injunction; three,
8 whether an injunction would harm Defendant or other interested
9 parties; and four, whether the public interest would be
10 furthered by an injunction. See *Serono Lab. v. Shalala*, 158
11 F.3d 1313, 1317-18 (D.C. Cir. 1998) (citing *Washington Metro.*
12 *Area Transit Comm'n v. Holiday Tours, Inc.*, 182 559 F.2d 841,
13 843 (D.C. Cir. 1977)).

14 And I'm not going to cite the authorities that the
15 Court's relied on. I'll give a copy of this to the court
16 reporter, and she can -- she can transcribe the authorities,
17 but I'm not going to sit up here and cite them.

18 The Court -- nevertheless, the Court has followed
19 circuit precedent in issuing its -- in reaching its decision.
20 The Court must balance the strength of Plaintiff's arguments
21 in each of those four elements when deciding whether to grant
22 a preliminary injunction. "If the arguments for one factor
23 are particularly strong, an injunction may issue even if the
24 arguments in another area or other areas are rather weak."
25 *Mills v. District of Columbia*, 571 F.3d 1304, 1309 (D.C. Cir.

1 2009).

2 In weighing these factors, the Court must also keep
3 in mind this circuit's instruction that injunctive relief is
4 extraordinary and indeed "an extraordinary remedy that should
5 be granted only when the party seeking relief, by a clear
6 showing, carries the burden of persuasion." *Cobell v. Norton*,
7 391 F.3d 251, 258 (D.C. Cir. 2004).

8 The essential facts are not -- are not in dispute.
9 Plaintiff was elected as the President-Elect at the Academy's
10 annual meeting in October 2008. Under the Academy's bylaws,
11 the President-Elect serves for a term of one year and then
12 automatically becomes the President at the close of the annual
13 meeting the following year.

14 Carol, let me borrow your pen for a second, or
15 pencil. All right. Thanks.

16 Therefore, following his election in October 2008,
17 the parties intended that Plaintiff would be the Academy's
18 President at the close of the annual meeting on October 26,
19 2009. Upon his election to the office of President-Elect,
20 Plaintiff also became a director of the Academy because the
21 organization's bylaws provide that the Board of Directors
22 shall consist of 29 directors, including the Academy's nine
23 officers. The President-Elect is indeed one of those nine
24 officers, the two immediate past presidents, and 18 additional
25 elected directors.

1 However, in June 2009, apparently after efforts to
2 pressure Plaintiff to resign his position proved unsuccessful,
3 a number of past presidents of the Academy petitioned the
4 current President to hold a special board meeting to consider
5 certain information about Plaintiff and whether the Board of
6 Directors should take action to prevent Plaintiff from
7 assuming the position of President in view of that
8 information.

9 That petition is referred to in the pleadings as the
10 "Hartman Letter." Thereafter, on July 14, 2009, notice of a
11 special meeting to discuss the Hartman Letter was sent to
12 members of the Board. Two subsequent e-mails were also sent
13 to members of the Board regarding the upcoming special meeting
14 set for August 5, 2009.

15 On August 5, 2009, the Board met in a special
16 meeting with some members appearing by telephone, and at the
17 conclusion of the meeting, a majority of the Board voted to
18 remove Plaintiff as the President-Elect. Some time later, the
19 Academy removed Plaintiff from its website and announced a
20 nominating committee had been formed to fill a, quote,
21 vacancy, end quote, in the office of the President-Elect.

22 Plaintiff maintains that the Board's actions
23 violated the Academy's bylaws and the Illinois General Not For
24 Profit Corporation Act, and that as a result, Plaintiff has
25 not been validly removed from the positions of President-Elect

1 and Director of the Academy.

2 The Academy is incorporated in Illinois. Defendant
3 insists that neither its bylaws nor Illinois law provide any
4 impediment to removing Plaintiff from his positions and that
5 indeed he was removed from those positions on August 5, 2009.

6 His dual status as both an officer and director are
7 central to Plaintiff's argument that the Board's actions
8 leading up to and on August the 5th failed to comply with the
9 procedural requirements of the bylaws and the Illinois Act.

10 The bylaws are silent with respect to removal of
11 officers or directors under the Act. However, removal of a
12 director is treated differently than removal of an officer.
13 Section 108.55 of the act provides that "any officer... may be
14 removed by the Board of Directors or other persons authorized
15 to elect or appoint such officer or agent" without further
16 elaboration. 805 Ill. Comp. Stat. 105/108.55.

17 Again, it's the Illinois statute. I'm not going to
18 cite the -- provide the official citation. It will be in the
19 transcript.

20 Section 108.35 of that Act provides -- strike that
21 -- by contrast, sets forth detailed and demanding requirements
22 for the removal of a director. See *id.* at 105/108.35.

23 Now, based on his dual status as an officer and a
24 director, Plaintiff argues that in order to remove him,
25 Defendant was required to follow the heightened requirements

1 for removing a director. Plaintiff relies on Section
2 108.50(c) of the Act which states that "unless the articles of
3 incorporation or the bylaws provide otherwise," an officer who
4 becomes a director by virtue of his office "shall have the
5 same rights, duties and responsibilities as other directors."
6 *Id.* at 105/108.50(c).

7 Defendant contends that those rights are limited by
8 the preceding sentence, however, which states that "the
9 articles of incorporation or the bylaws may provide that any
10 one or more officers of the corporation... shall be a director
11 or directors while he holds that office." *Id.* (emphasis
12 added).

13 In other words, Defendant maintains that because
14 Plaintiff was only a director by virtue of his position as an
15 officer and because there was no impediment to removing him as
16 an officer, once the Board voted to remove him from the
17 position of President-Elect, he was no longer a director and
18 therefore Defendant was not required to comply with the
19 procedures for removing a director.

20 Plaintiff also maintains that the notice of the
21 special meeting sent to the Board of Directors was deceitful,
22 inaccurate and/or untruthful because it stated that the
23 purpose of the meeting was to discuss the Hartman letter,
24 which called on the Board to suspend Plaintiff pending the
25 ABCD process and because the notice said that the Board would

1 not be discussing, quote/unquote, discipline at the meeting.

2 While the Court is indeed sympathetic to the manner
3 in which Plaintiff has been removed from his position as
4 President-Elect, the Court must agree with the Defendant that
5 the Board's actions, however disagreeable and arguably
6 disgusting, did not appear to be prohibited by either -- and
7 I'll add unseemly -- by either the bylaws of the Act. The Act
8 clearly states that officers can be removed, and his position
9 as a director was based on his status as an officer.

10 Plaintiff's efforts to read procedural requirements
11 and protections into the Act, despite the provision allowing
12 removal of officers, are, at best, strained. Moreover, even
13 if Plaintiff is correct that he could not be removed as a
14 director, I emphasize that, as a director without the
15 procedures required by the Act, those procedural protections
16 would only extend to his position as a director. However, it
17 is Plaintiff's position as President-Elect that is the focus
18 of his request for injunctive relief and those procedures
19 simply do not extend to that position.

20 In other words, even if the Defendant is required to
21 take extra steps to remove Plaintiff from the Board of
22 Directors as a director, they were not required to take those
23 steps to remove him as an officer, and it is his loss of
24 status as the President-Elect for which he claims irreparable
25 injury.

1 Finally, Plaintiff cannot establish a substantial
2 likelihood -- I emphasize the word "substantial" because
3 that's the key in this circuit -- he cannot establish a
4 substantial likelihood of success on the merits with respect
5 to his defective notice argument. While both sides agree that
6 10-day notice of the meeting was required, Plaintiff argues
7 that the notice did not indicate that his removal as an
8 officer would be considered at the meeting.

9 There's no requirement in the Act or the bylaws,
10 however, that the notice include that level of specificity.
11 The July 14, 2009 notice of a special meeting of the Board of
12 Directors gave notice of the date, time and place for the
13 meeting and indicated that the purpose of the meeting was,
14 quote, to discuss with the Board the letter sent to it by Bob
15 Anker on behalf of 19 past presidents of the Academy, end
16 quote.

17 The notice also indicated that this was a special
18 and critically important meeting. The parties have not cited
19 and the Court has not found any authority that this notice was
20 insufficient to support the Board's subsequent action to
21 remove Plaintiff as an officer, as distinguished from a
22 director. The fact that the Defendant followed that notice
23 with additional information and details about the process and
24 procedures for the meeting does not make that initial notice
25 invalid.

1 For those reasons, the Court finds that Plaintiff
2 has failed to meet its burden of showing a substantial
3 likelihood of success on the merits as to his claims with
4 respect to his removal as an officer. To be clear, this
5 analysis obviously does not extend to the merits of any of
6 Plaintiff's other claims, because only the issue surrounding
7 his removal are relevant to the request for temporary
8 restraining order. This analysis, therefore, does not extend
9 to the likelihood of success as to Plaintiff's claims of
10 defamation, tortious interference, et cetera.

11 The Plaintiff also argues that the position of
12 President of the Academy is without adequate substitute and is
13 for him, in his words, quote, a crowning achievement, end
14 quote, following a distinguished career of more than 30 years
15 as an actuary. Plaintiff maintains that if the Defendant is
16 not enjoined from taking steps to remove him as
17 President-Elect, such removal, quote, will preclude from
18 ever -- preclude him from ever serving as the Academy's
19 President and place a permanent stain on his professional
20 career, end quote.

21 He notes that he spent nearly a year fulfilling the
22 duties of the President-Elect without compensation and with
23 the reasonable expectation that he would automatically succeed
24 to the position of President in October. He points out that
25 in its 40-year history, the Academy has never removed a

1 President-Elect and that removing him in the public and in the
2 unprecedented manner in which the Board has sought to remove
3 him, it's a devastating blow to his professional and personal
4 reputation because the implication of wrongdoing is strong and
5 inescapable, in his words.

6 Finally, Plaintiff insists that no amount of
7 compensation can adequately substitute for the loss of this
8 singular achievement and opportunity.

9 In response, the Defendant argues that Plaintiff
10 cannot meet the demanding standard required to establish
11 irreparable injury, that he cannot point to any economic loss,
12 any concrete reputational harm, or any harmful public
13 disclosure that does not result from Plaintiff's own actions.
14 Moreover, Defendant argues that monetary damages can fully
15 compensate Plaintiff for any alleged injuries he has suffered.

16 While the Court may agree with the Plaintiff that
17 the actions by individual members of the Board and by the
18 Board, in this case, at least, create the potential of harm to
19 Plaintiff's reputation, and indeed Plaintiff has come forward
20 with evidence to support that contention, an injunction at
21 this point is unlikely to prevent that damage. The fact that
22 the Board has sought to remove him from office has already
23 been made public, and as Plaintiff's own submissions to the
24 Court demonstrate, the speculation among members of the
25 Academy and among others in the profession about the reasons

1 for that removal already exist.

2 In addition, while the Court may be sympathetic to
3 Plaintiff's position, the standard for irreparable injury is
4 extraordinarily high, and in that regard the Court relies on
5 the decision, the Supreme Court decision in *Sampson v. Murray*,
6 415 U.S. 61.

7 Accordingly, the Court finds that Plaintiff has not
8 established irreparable injury absent an injunction in this
9 case.

10 Plaintiff argues that keeping him in the position of
11 President-Elect pending resolution will not harm the
12 Defendant, while the Defendant argues that reinstating
13 Plaintiff as President-Elect would be highly disruptive to the
14 Academy. The Court finds that the balance of hardships tips
15 at least slightly in Defendant's favor.

16 Similarly, Plaintiff argues that the interest of the
17 public and particularly the Academy's members are best served
18 by an injunction and requiring the Academy to follow
19 applicable law and its governing documents. Defendant, on the
20 other hand, insists that the public interest is best served by
21 upholding the Academy's right under its bylaws and applicable
22 law to remove Plaintiff from office.

23 Because the parties' arguments with respect to this
24 factor are premised on their respective legal positions and
25 because, in the Court's view, this is not a case with an

1 overriding public interest that favors either side, the Court
2 finds that this factor is essentially in equipoise.

3 Upon consideration of the factors which courts are
4 directed to weigh in this circuit when considering whether to
5 grant the extraordinary relief of an injunction, the Court
6 concludes that Plaintiff has not demonstrated a likelihood of
7 success on the merits of his claims that the Defendant
8 unlawfully removed him from the office of President-Elect or
9 that an injunction at this stage would prevent irreparable
10 injury or harm. Therefore, for the reasons articulated,
11 Plaintiff's motion for a temporary restraining order is
12 denied, and that's the Court's ruling.

13 Now, I could spend a few minutes, and I only have a
14 few minutes, to talk about further proceedings in this case.
15 I have another matter scheduled. It's just as important as
16 this case. But normally I would focus on preliminary
17 injunction, I'd focus on whether or not this case is in a
18 posture or if it ever will be for consolidation of a request
19 for injunctive relief on a merits determination under Rule
20 65(a). I'm not so sure at this point.

21 The -- I did stay proceedings with respect to
22 preliminary injunction. I can hear briefly, very briefly from
23 the parties as to whether or not it would be appropriate for
24 the Court to consider the next stage as one that consolidates
25 the request for injunctive relief on a merits determination.

1 I'm just not so sure that's -- although I could separate out
2 the request for injunctive relief from the other actions for
3 defamation, intentional interference, et cetera, et cetera,
4 but let me hear briefly from the parties what -- or on the
5 alternative, I could give you a few days to think about your
6 request for -- maybe I should do that.

7 I mean, if you have something, if you have a burning
8 desire to say something now, fine, but I don't have a great
9 deal of additional time this afternoon to focus on this case.

10 Plaintiff's counsel? It's probably better part of
11 wisdom to give both sides a chance to persuade me with their
12 joint recommendation for further proceedings, but if you want
13 to say something, go right ahead.

14 MR. WACHEN: Thank you, Your Honor.

15 THE COURT: It's a case that cries out for
16 settlement. I said that the first day, and you know, the
17 tears are even louder now. It cries out for settlement, but
18 parties haven't seen fit to settle it, and that's fine. Then
19 I'll settle it and let the chips fall where they may.

20 What would you like to say?

21 MR. WACHEN: Your Honor, what I was going to say on
22 the issue of a preliminary injunction, we still have the issue
23 where the Board -- the position of President, which
24 Mr. Schobel would succeed to as the President-Elect, is not
25 going to occur till October 26th, so there's still time for

1 a preliminary injunction hearing, at least on the issues
2 relating to that.

3 On the damages issues, I would agree with the Court
4 that that ought to await a jury trial down the road, and
5 there's no urgency with respect to the schedule for next
6 year's officers and directors, but there is, at least on the
7 issues relating to --

8 THE COURT: Your motion for preliminary injunction
9 has been filed, correct?

10 MR. WACHEN: Yes, Your Honor.

11 THE COURT: I'm not sure -- I don't know whether you
12 need to amend it or not or the -- I don't know. What's your
13 best thought now as to whether or not you'd want a day or two
14 or so to amend your request for injunctive relief before I
15 require the Defendant to respond?

16 MR. WACHEN: You know, I have to take this in a
17 little bit and think about it, so I would -- if Your Honor
18 would allow us a couple of days to consider that.

19 THE COURT: Yeah, yeah.

20 MR. WACHEN: That would be appreciated.

21 THE COURT: The other thing is this, without putting
22 everyone on the spot, because I really had not indicated how I
23 was going to rule on this up to this point, but I've ruled and
24 maybe what I should do is just get your best thoughts from
25 both sides in the form of a joint proposal for further

1 proceedings. And today's Tuesday, say by noon on Thursday or
2 so. I'm especially sensitive to the timing, and it may well
3 be that the Court should then focus on the request for
4 injunctive -- preliminary injunctive relief in advance of
5 that -- what is that date? October the 20th; is that
6 correct?

7 MR. WACHEN: There is a Board meeting on -- the
8 annual board meeting is October 20th and the annual meeting
9 of members is October 26th.

10 THE COURT: And what is the significant date insofar
11 as -- which one of those dates is more significant than the
12 other? I think the 20th.

13 MR. SKELLY: Your Honor, the 20th would be.

14 THE COURT: That's what I thought from my
15 recollection of what someone may have said early on.

16 MR. WACHEN: I think that's right, Your Honor.

17 THE COURT: So, what do you think? Maybe a day or
18 two? You agree with that, Counsel, get your best thoughts in
19 say by Thursday noon or so?

20 MR. SKELLY: Yes, Your Honor. I think that makes
21 sense, or perhaps by close of business on Thursday gives us a
22 little more time.

23 THE COURT: All right. That's fine. I extend the
24 same courtesy to you if you would like to say something. I'm
25 not going to cut you off from saying something.

1 MR. SKELLY: I see no reason to delay, Your Honor.
2 We can confer with other counsel and get back to you by
3 Thursday afternoon.

4 THE COURT: Okay.

5 (PAUSE.)

6 THE COURT: You know, there are a lot of things
7 going on in my chambers as well, Counsel, and I'm not, you
8 know, saying this for a sympathy factor, but there are a lot
9 of other factors that are requesting immediate relief, so I'm
10 going to stick with noon on Thursday.

11 I mean, I'm sensitive to the time sensitivity that
12 the parties have focused on, the October 20th. I think
13 between now and noon on Thursday is ample opportunity to
14 consider, hopefully, your joint recommendation for further
15 proceedings, and if not, the individual recommendation, but
16 hopefully, it's -- in good faith, hopefully, you can talk
17 about realistic reasonable joint -- one joint recommendation
18 for further proceedings.

19 MR. WACHEN: How would you like us to communicate
20 that?

21 THE COURT: File it. File it ECF. That's the best
22 way to get our attention. I mean, we can spend half-an-hour
23 talking on the phone, but if I have your best thoughts in
24 writing, I'm going to read it and get back to you just as soon
25 as I can.

1 So, I guess the crying goes on for another day.

2 Parties are excused.

3 MR. SKELLY: Thank you, Your Honor.

4 THE COURT: All right.

5 (PROCEEDINGS END AT 2:30 P.M.)

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12 **CERTIFICATE OF REPORTER**

13 I, Catalina Kerr, certify that the foregoing is a
14 correct transcript from the record of proceedings in the
15 above-entitled matter.

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Catalina Kerr

Date

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