IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Defendant American Academy of Actuaries ("the Academy") respectfully submits this opposition to the motion for a temporary restraining order filed yesterday by Plaintiff Bruce Schobel. As explained below and in the accompanying materials (including one exhibit that is submitted for *in camera* review), Plaintiff's motion presents an incomplete and inaccurate depiction of the deliberations that led to the decision to remove him as President-Elect of the Academy. Plaintiff also has misstated the governing legal principles – by, for example, making the astonishing assertion that Illinois law prohibits his removal as President-Elect except by "court order" – and he cannot satisfy any of the criteria necessary to obtain a temporary

restraining order in any event. Plaintiff's motion for a temporary restraining order therefore should be denied. The Academy reserves the right to submit additional evidence and argument in the event that a hearing is scheduled on Plaintiff's separate motion for a preliminary injunction.

COUNTERSTATEMENT OF FACTS

The Academy is a non-profit corporation organized under the Illinois General Not For Profit Corporation Act ("the Illinois Act"). *See* Declaration of Mary E. Downs ("Downs Decl.") at ¶ 2 (attached as Exhibit 1 hereto). Of the five U.S.-based actuarial organizations, the Academy serves as the voice of the U.S. profession on public policy and professionalism issues. *Id.* In particular, it provides independent actuarial information and analysis for the formation of sound public policy; identifies and addresses public policy issues that would benefit from actuarial input; promotes public understanding of the value of the actuarial profession; facilitates and coordinates issues of common interest among U.S.-based actuarial associations; provides for the establishment and enforcement of high professional standards of actuarial qualification, practice, and conduct; and coordinates the representation of the U.S. profession globally. *Id.* ¶ 3.

The Academy operates under the overall direction of its Board of Directors. The Board consists of 29 members – the nine Officers of the Academy, the two immediate past Presidents of the Academy, and 18 other elected Directors, including eight Special Directors "consisting of representatives of other U.S. actuarial organizations whose presence on the Board is deemed helpful to the Academy." *Id.* ¶ 4; Academy Bylaws ("Bylaws") Art. III, Sec. 2 (attached as Attachment A to Downs Decl.). The Board elects the Officers, who automatically become Directors without any additional vote by the Board for so long as they remain Officers. Bylaws Art. V, Sec. 2. The Board also elects the Special Directors (currently eight). *Id.* Art. III,

sec. 2.A. The remaining regular Directors are elected by the general membership of the Academy. *Id.* Art. III, sec. 2.B.

Plaintiff Bruce Schobel ("Plaintiff") is an actuary and longstanding member of the Academy. Downs Decl. ¶ 6. Consistent with the Academy's Bylaws, he was elected by the Board to the position of President-Elect in October 2008 and thereby automatically became a member of the Academy's Board. He remained in that position until August 5, 2009, when a majority of the whole Board voted to remove him from that position pursuant to the Illinois Act and the Academy's bylaws. *Id.* ¶ 7. He continues to be a member of the Academy. *Id.*

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 by e-mail on July 9, 2009. Based on matters that Plaintiff characterizes as "a business dispute involving another organization and certain events that occurred over thirty years ago" (Complaint ¶ 3), these former leaders of the Academy questioned whether Plaintiff satisfied the standards the Academy should expect of its top elected officials and asked that a Board meeting be convened to consider whether or not Plaintiff should continue as President-Elect and then become the President of the Academy at the end of his term as President-Elect. A true and correct copy of that letter and of a document enclosed with and referred to in the letter are being submitted to the Court for its consideration *in camera* as Attachment B to the Downs Declaration. 1/

1/ The Academy is providing this document to the Court *in camera* in an effort to provide the information the Court needs to make an informed decision even on this highly expedited initial motion for a temporary restraining order while seeking to avoid any unnecessary impact on Plaintiff. As the Court will note, the document included with the past Presidents' letter was written several months after Plaintiff was elected as President-Elect of the Academy. The Academy has not circulated the document since receiving it. Moreover, as discussed in more detail below, the Academy did not allow detailed discussion of the document or the events to which it relates at the August 5, 2009 Board meeting.

Given the gravity of the issues raised by the 19 past Presidents 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 indicated in part that the Academy would be working "to develop a fair and proper meeting process and procedures" for deciding how to address the matter that had been raised. *See* Downs Decl. at ¶ 11 and Att. C thereto.

The July 14, 2009 meeting notice contemplated that all Board members would participate in person. *Id.* ¶ 12. In the days that followed that notice, it became apparent that it would be difficult or impossible for all Board members to do so. Accordingly, on July 16, 2009, the President sent a further e-mail to the Board inquiring about potential alternative ways to proceed. *Id.* By July 21, 2009, he advised the Board that he was "working to find an appropriate and confidential way to permit those Board members who cannot attend in person, which[he] strongly encourage{d] [them] to do if at all possible, to call in to the meeting." That e-mail also noted the need for sensitivity and confidentiality in handling the matters at issue and stated in part: "Because of the sensitivity of the issues to be discussed at th[e] special meeting, I ask you to refrain from any discussion of the matters to be considered . . . using this list serve or in any other unrelated meetings or communication in which you participate prior to that Board meeting. These are matters that need to be handled in the best interests of the Academy and with appropriate sensitivity and discretion." *Id.* Ultimately, to enable full participation and in conformity with section 108.15(c) of the Illinois Act, which authorizes telephonic board meetings, the Academy decided to permit Directors who were otherwise unable to participate in person to do so by telephone pursuant to procedures designed to allow directors to be heard in a

deliberative manner and to ensure the privacy and confidentiality of the Board's discussion. *Id.* ¶ 12. Those procedures are summarized in the July 31, 2009 e-mail to the Board discussed below. *See* Downs Decl. at ¶ 11 and Atts. D, E, and F thereto.

Consistent with the goals described in the July 14, 2009 meeting notice, the Academy adopted procedures and guidelines designed to ensure that the matters at issue would be considered and discussed in a fair and orderly manner that would be consistent with the best interests of both the Academy and Plaintiff. *Id.* ¶ 14. In an e-mail dated July 31, 2009, the President advised the Board (then including Plaintiff) of those procedures and guidelines and expressed confidence that they would permit the Academy "to protect the legitimate interests of the Academy and of all concerned in a manner consistent with applicable law and with the Academy's bylaws and other governing documents." *Id.* 2/ The e-mail further stated 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 . . . ." *See* Downs Decl. at ¶ 15 and Att. F thereto.

The Board met in executive session on August 5, 2009 with 27 of the 29 Board members participating in person or by telephone. *Id.* ¶ 16. Consistent with a prior discussion with Plaintiff's counsel and with the procedures and guidelines that had been established in light of Plaintiff's self-declared status as a potentially adverse party, Plaintiff absented himself during the initial portion of the meeting in which outside Academy counsel advised the Board of the potential legal ramifications of the matters to be discussed. *Id.* ¶ 17. Plaintiff returned for the remainder of the meeting, participated in the Board's discussion, and voted in an open (not

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2/ Through outside counsel, the Academy also advised Plaintiff's counsel of what these procedures would be prior to circulation of the July 31, 2009 e-mail to Plaintiff and other Academy Directors.

secret) vote. *Id.* 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. *Id.* ¶ 18. 3/ Ultimately, 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, which action is within the power of the Board pursuant to the Academy's Bylaws and section 108.55 of the Illinois Act. *Id.* ¶ 19. By operation of law, his status as a Board member also ended at that time since he was only a director by virtue of his officer position.

Following the vote, the Academy took steps to remove Plaintiff from the internal list serv for Officers and Directors but did not take any immediate action to delete him from the public listings of Officers and Directors on its web site or issue any statement to Academy members or to the public about the Board's action. *Id.* ¶ 20. Within a day or two after the Board meeting, Plaintiff and his counsel initiated discussions with the Academy about possible mutually acceptable resolutions of Plaintiff's concerns about the action the Board had taken. *Id.* ¶ 21.

During the pendency of those discussions, Plaintiff inquired by e-mail on August 14, 2009 whether he could speak before another organization on September 10, 2009 on behalf of the Academy as its President-Elect. *Id.* ¶ 22. The Academy's President responded that same day that, if Plaintiff chose to speak at the event, he should not hold himself out as an Officer or Director of the Academy. *Id.* and Att. G thereto.

3/ So far as the Academy is aware, and contrary to Plaintiff's claim (Complaint ¶ 62), the Academy did not tell Plaintiff to "hurry up" with his remarks or force him to cut them short.

The settlement discussions continued until the late afternoon of August 26, 2009, when Plaintiff rejected a counterproposal from the Academy. *Id.* ¶ 23. The following day the Academy posted a statement on its web site indicating that a Nominating Committee would be appointed to fill a vacancy in the office of President-Elect and removed Plaintiff from the list of officers and directors on its web site. *Id.* ¶ 24 and Att. H thereto The Academy has not made any announcement that refers to Plaintiff by name and has declined comment on questions about his status with the Academy. *Id.* ¶ 25.

Yesterday Plaintiff commenced this action and sought the temporary restraining order to which this initial response is directed. As explained below, the relevant facts and applicable law demonstrate that Plaintiff is not entitled to the relief he seeks, which would alter the status quo and needlessly disrupt the Academy's legitimate efforts to ensure that the critical positions of President-Elect and President are held by someone in whom the Academy's Board of Directors has confidence.

ARGUMENT

A temporary restraining order, like a preliminary injunction, is an extraordinary remedy that should be granted only when the party seeking the relief, by a clear showing, carries the burden of persuasion. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). In deciding whether to grant temporary injunctive relief, the court "must consider whether: (1) the party seeking the injunction has a substantial likelihood of success on the merits; (2) the party seeking the injunction will be irreparably injured if relief is withheld; (3) an injunction will not substantially harm other parties; and (4) an injunction would further the public interest." *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 670 (D.C. Cir. 2005); *Estate of Coll-Monge v. Inner Peace Movement*, 524 F.3d 1341, 1349 (D.C. Cir. 2008); *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995); *Virginia Petroleum*

Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); *Nichols v. Agency for Int'l Dev.*, 18 F. Supp. 2d 1, 4-5 (D.D.C. 1998).

For the reasons set forth below and in the accompanying materials (including the exhibit submitted for *in camera* review), Plaintiff cannot establish any of the prerequisites for a temporary restraining order. Indeed, a temporary restraining order would be particularly ill-suited for this case. A primary purpose of a temporary restraining order is to preserve the *status quo* pending a more thorough consideration of the parties' claims and defenses. In this case, by contrast, Plaintiff was removed as an officer (and hence as a director) of the Academy by a vote of the Academy's Board of Directors on August 5, 2009 – almost a month ago – and entry of a temporary restraining order therefore would disrupt rather than preserve the *status quo*. Accordingly, Plaintiff's motion for a temporary restraining order should be denied.

I. PLAINTIFF CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

It is particularly important for a movant to demonstrate a substantial likelihood of success on the merits. *Washington v. District of Columbia*, 530 F. Supp. 2d 163, 167 (D.D.C. 2008); *cf. Benton v. Kessler,* 505 U.S. 1084, 1085 (1992) (per curiam). Plaintiff has not demonstrated – and cannot demonstrate – a substantial likelihood that he will prevail on the merits of his claims. To the contrary, the evidence demonstrates that Plaintiff was properly removed from his position as President-Elect, and that the Academy acted legitimately and within its rights throughout its deliberations.

A. The Academy's Board of Directors Clearly Exercised Its Legitimate Powers in Removing Plaintiff As President-Elect.

It is undisputed that Article V of the Academy's Bylaws confers on its Board of Directors the power to elect officers of the Academy. (Bylaws, Art. V, Sec. 2.) Not only does that Article not place any limits on the Board's power subsequently 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." (*Id.*, Art. III, Sec. 5.) The Illinois Act likewise 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.

As explained *supra*, the Academy's Board concluded after careful consideration that Plaintiff's removal as President-Elect was entirely warranted, and its decision was a legitimate act to "carry out the purposes of the Academy." (Bylaws, Art. III, Sec. 5). Given the understandably broad grant of authority to the Board to manage the Academy's operations in furtherance of its mission, the fact that the Bylaws do not expressly speak to the removal of officers does not support Plaintiff's claim that the Board lacked such authority. To the contrary, the absence of limitations in the Bylaws on the Board's statutory authority to remove officers demonstrates that such power falls squarely within the general powers delegated to the Board.

The Board's legitimate removal of Plaintiff as President-Elect also removed him as a director of the Academy by operation of law. Indeed, as Plaintiff admits (Pl. Mem. at 20), 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 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). 4/ Thus, the Act expressly recognizes that a person's

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4/ The fact that this Section vests such directors with the same rights as other directors while they hold office in no way changes the voting requirements to remove them as an officer.

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 beyond that by the Board itself is prescribed for those who have been elected as officers. Bylaws, Art. V, Sec. 2.

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. It necessarily follows that, once Plaintiff was validly removed by the Board as President-Elect, he automatically ceased to serve as a director. To construe the Act and the Bylaws any other way (as Plaintiff apparently does) would necessitate that other provisions of the Bylaws be construed in a nonsensical manner. For example, under Plaintiff's interpretation, if the Board were to remove an officer and elect a replacement, that replacement could not become a director under the Bylaws without a Bylaw amendment to increase the number of directors, because the former officer would still be holding the Board seat to which the new officer would be entitled. Nothing in the Bylaws countenances such an absurd result, which, instead, clearly establish that the President-Elect's status as a director is concurrent with, and completely dependent upon, his status as President-Elect.

Studiously ignoring the Board's broad powers to take all action "as may be appropriate to carry out the purposes of the Academy," Plaintiff contends that he could be removed as an officer and director only in "extreme circumstances," i.e., only by "court action." Pl. Mem. at 18. However, this contention rests on a selective quotation of Section 108.35(a) of the Act, which provides in full as follows:

> One or more of the directors may be removed, with or without cause. In the case of a corporation having a board of directors which is classified in accordance with subsection 108.10(e) of this

> Act, no director may be removed except for cause if the articles of incorporation or the bylaws so provide.

Ill. Stat. Ann. § 105/108.35(a).

By its plain terms, this Section provides that a director may be removed "with or without cause" unless the corporation's articles of incorporation or bylaws further limit such removal power by specifically providing that "no director may be removed except for cause," in which case removal may only be for cause. Since the Academy's Articles of Incorporation and Bylaws do not limit removal to situations involving "cause" – to the contrary, the Bylaws confer power on the Board to take any act that "may be appropriate to carry out the purposes of the Academy" – Section 108.35(a) demonstrates that Plaintiff could be and was properly removed in the Board's discretion. Plaintiff's contrary interpretation of this statutory provision – that the Academy's directors cannot be removed except by court order because the Academy's Articles of Incorporation and Bylaws do not expressly state that directors can be removed for cause – cannot be reconciled with the plain language of the Act, and would needlessly enmesh courts in decisions concerning whether to remove directors any time the corporation's articles of incorporation or bylaws do not expressly provide for removal for cause.

In short, the Board's general powers clearly gave the Board authority to remove Plaintiff as President-Elect, and that action necessarily terminated his status as a director without the requirement of a Board vote. As explained *supra*, the Board did not make that decision lightly, but rather acted only after careful consideration of the concerns expressed by 19 Past Presidents of the Academy and other matters pertinent to Plaintiff's fitness to lead the Academy. The Board was entitled to act based on the broad powers granted to it, and nothing in the Act even suggests that Plaintiff could be removed as President-Elect only by court action.

B. Plaintiff Likewise Cannot Demonstrate Any Likelihood of Success in Connection with His Procedural Challenges to the Board's Actions.

It also is evident that the Board employed appropriate procedures both in its deliberations concerning Plaintiff's status as President-Elect and in its ultimate decision to remove him from that position. Although Plaintiff asserts that this process was procedurally flawed, his contentions are without merit.

First, Plaintiff is simply incorrect to contend that his removal required an affirmative vote of two-thirds the Academy's Board. (Pl. Mem. at 19.) This argument is based entirely on a statutory provision concerning the removal of directors (Ill. Stat. Ann. § 105/108.35(c). It fails at the threshold because, as noted above, Plaintiff's status as director derived entirely from his status as President-Elect, and no separate vote was required to remove him as a director. More specifically, once Plaintiff was removed as President-Elect in accordance with the Act and the Bylaws – which indisputably did not require a two-thirds vote 5/ – his position as a director automatically terminated without the requirement of any separate Board vote.

In any event, Plaintiff's claim that a two-thirds vote was required is inconsistent with the Act, which expressly provides that "[i]n the case of a corporation with no members or with no members entitled to vote on directors, a director may be removed by the affirmative vote of a majority of directors then in office present and voting at a meeting of the board of directors at which a quorum is present." Ill. Stat. Ann. § 105/108.35(b). It is undisputed that no members of the Academy were entitled to vote on Plaintiff's directorship – his status as director derived entirely from his election by the Board as President-Elect, not from any vote by the Academy's

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5/ As noted, the Illinois Act likewise 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.

members – and it therefore follows (if the procedures set forth in Section 108.35 were held to apply to a director who holds that position solely by virtue of his status as an officer) that an affirmative vote by a majority of the Board present and voting at a meeting at which a quorum is present would suffice to remove Plaintiff as a director. It is undisputed that more than a majority of the whole Board (not just those present and voting) voted to remove Plaintiff as an officer of the Academy (and, hence, as a director); that is the standard for electing officers under the Academy's bylaws (Bylaws, Art. V, Sec. 2), and it is the standard the Academy applied to remove Plaintiff as President-Elect. No vote – much less a two-thirds vote to remove him as a director – was required under the Illinois Act. 6/

Second, Plaintiff cannot plausibly contend that he was not given timely notice of the subject of the Board's August 5, 2009 meeting. On July 9, 2009, almost a month before the meeting, 19 past Presidents of the Academy wrote to the Board of Directors "to request that [the Board] suspend the privileges of Bruce D. Schobel's acting as President-Elect and becoming President in October 2009 and Past President in 2010." (This document is being submitted for the Court's consideration *in camera* as Attachment B to the Downs Declaration.) The July 14, 2009 notice of the August 5 Board meeting stated that discussion of this letter was "[t]he purpose" of the meeting, and that scheduling a Board meeting for August 5 would allow the Board "to take up this important matter as expeditiously as possible." *Id.* (emphasis added). A

6/ In contending that a two-thirds vote was required, Plaintiff mistakenly relies on Section 108.35(c), which provides that an affirmative vote for removal by two-thirds of the Board of Directors is required "[i]n the case of a corporation with members entitled to vote for directors." However, although the Academy's members are entitled to vote for certain directors, it is undisputed that they have no right to vote for directors who, like Plaintiff, become directors solely by virtue of their election by the Board to an officer position. Indeed, because Section 108.35(b) establishes that a Board can remove a director by only a simple majority vote when only the Board elects directors, it would be nonsensical to impose a higher, two-thirds voting requirement on the Board to remove a director it alone elects simply because members can elect other directors.

follow-up communication to the Board dated July 16, 2009 likewise referred to a "critical decision" concerning Plaintiff's "future" with the Academy. *See* Downs Decl., Att. D. As a Board member at that time, Plaintiff does not and cannot deny that he received these communications. Moreover, although he asserts that he understood from a subsequent July 31, 2009 communication that "no disciplinary action" would be taken against him at the meeting (Pl. Mem. at 12), that communication – as well as the Academy's Bylaws – make crystal clear that this reference to "disciplinary action" relates to a separate process not before the Board, *not* to the Board meeting that had been called for the very purpose of considering the petition of 19 past Academy Presidents. *See* Downs Decl., Att. F; Bylaws Art. IX.

Finally, Plaintiff cannot legitimately object to the fact that certain Board members who voted to remove him as President-Elect participated in the meeting by telephone. Plaintiff contends based on Section 108.35(c)(2) of the Illinois Act that each Board member was required to vote "in person or by proxy," Pl. Mem. at 19. However, as the Academy has already explained, that statutory provision concerning removal of directors is inapplicable because Plaintiff's status as a director terminated automatically by virtue of his removal as President-Elect. That statutory provision also is inapplicable because it concerns the removal of directors who are elected by a corporation's members, whereas, pursuant to the Academy's Bylaws, Plaintiff was elected by the Board, not by members of the Academy. Moreover, another provision of the Illinois Act (section 108.15(c)) specifically authorizes telephonic Board meetings, and the Academy's articles and bylaws do not limit that authority in any way. In any event, the record is replete with evidence that the Board ensured that participation by telephone did not compromise Plaintiff's privacy or the quality of the Board's deliberations, and Plaintiff did not contemporaneously object to this procedure even though he was aware of it well before the Board meeting.

C. Because Plaintiff Is No Longer President-Elect, the Academy's Efforts to Nominate a New President-Elect Are Both Proper and Absolutely Necessary to the Proper Functioning of the Academy.

Because the Board's removal of Plaintiff as President-Elect (and hence as a director) was completely proper under the Illinois Act and the Academy's Bylaws, Plaintiff is simply incorrect to contend that the Academy should be enjoined from attempting to nominate and seat a new President-Elect (or President). Indeed, there is no valid reason to prevent the Board from exercising its delegated powers to ensure that a qualified President-Elect (or President) is promptly nominated.

Moreover, Plaintiff is simply incorrect to contend that the Academy's Bylaws "provide no mechanism for filling a vacant President-Elect position." Pl. Mem. at 15. As noted, the Bylaws confer on the Board "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.) Such authority necessarily encompasses the power to carry out the purposes of the Academy by ensuring that a President-Elect has been nominated prior to the Academy's October 2009 annual meeting. It would make no sense to conclude otherwise, since that could leave the Academy without a President-Elect for the better part of a year if a vacancy were to occur for some reason early in the incumbent President-Elect's term. Moreover, there is no reason to conclude, as Plaintiff contends, that the selection of a new President-Elect will necessarily lead the Academy's members and others not involved in this matter to conclude that Plaintiff is "unfit" to be President or President-Elect. The Academy has thus far declined comment on questions about Plaintiff's status with the Academy, and it is Plaintiff who has elected to adjudicate and otherwise publicize his claims in public forums.

II. PLAINTIFF IS NOT ENTITLED TO AN INJUNCTION BECAUSE HE HAS NOT ESTABLISHED IRREPARABLE HARM

A temporary restraining order is "an extraordinary remedy" that should be granted only when the movant "by a clear showing, carries the burden of persuasion." *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). Its purpose is to "preserve the relative positions of the parties until a trial on the merits can be held." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (citing *Univ. of Tex. V. Camenisch*, 451 U.S. 390, 395 (1981)). As a result, a movant's failure to show irreparable harm is grounds for denying a motion for preliminary relief, even if the other relevant factors for such relief were satisfied. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

The longstanding basis for injunctive relief in the federal courts is irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 88 (1974). This Circuit has set "a high standard" for irreparable injury. *Hunter v. FERC*, 527 F. Supp. 2d 9, 14 (D.D.C. 2007). First, the injury "must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Injunctive relief will not be granted against something "merely feared as liable to occur at some indefinite time." *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)). Second, "mere economic loss does not, in and of itself, constitute irreparable harm." *Hunter*, 527 F. Supp. 2d at 14 (citing *Wisconsin Gas Co.*, 758 F.2d at 674). Third, the movant must show that the alleged harm is or will be a *direct result* of the action which the movant seeks to enjoin. *Id.* at 14-15.

In requesting such extraordinary relief, Plaintiff plainly misstates "the status quo" as "Mr. Schobel *continuing* to hold the position of President-Elect/Director." Pl. Mem. at 24 (emphasis added). But that assertion is simply contrary to reality. What Plaintiff is asking this Court to do is to reinstate Plaintiff to a position from which he was validly removed almost one

month ago. "Such a ruling would alter, not preserve, the *status quo*." *Veitch v. Danzig*, 135 F. Supp. 2d 32, 35 (D.D.C. 2001). Because Plaintiff is asking this court to change, not maintain, the status quo, he is subject to an even higher standard than if he were seeking a prohibitory injunction. *Id.* at 35 n.2 (noting that "where an injunction is mandatory – that is, where its terms would alter, rather than preserve, the status quo by commanding some positive act, . . . – the moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from a denial of the injunction") (internal citations omitted); *see also Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969) ("The power to issue a preliminary injunction, especially a mandatory one, should be 'sparingly exercised.'"). 7/ Moreover, the relief Plaintiff requests would constitute a significant and unwarranted intrusion into the Academy's internal decisionmaking.

7/ Courts have repeatedly held that injunctive relief is inappropriate where, in situations analogous to this case, a former employee seeks court-ordered reinstatement. In such circumstances, the United States Supreme Court – noting "the traditional unwillingness of courts of equity to enforce contracts for personal service either at the behest of the employer or of the employee," *Sampson v. Murray*, 415 U.S. 61, 83 (1974) – has stated that irreparable injury will exist only in "*extraordinary* cases." *Id.* at 92, n.68 (emphasis added). In *Sampson v. Murray*, 415 U.S. 61 (1974), the Supreme Court reversed the granting of a temporary restraining order and injunctive relief in favor of a probationary federal employee terminated from her employment. The Supreme Court reasoned that although "she might be deprived of her income for an indefinite period of time, that spurious and unrebutted charges against her might remain on the record, and that she would suffer the embarrassment of being wrongfully discharged in the presence of her co-workers" such injuries, "however substantial, in terms of money, time and energy necessary expended'" do not constitute irreparable harm. *Id.* at 89-90 (quoting *Virginia Petroleum Jobbers* at 110). *See also, e.g., Del Canto v. Sheraton-Carlton Hotel*, 1992 WL 78741 (D.D.C. Mar. 13, 1992) (denying request for immediate injunctive relief to terminated employee despite claim of temporary loss of pay and benefit and possible harm to reputation because "absent extraordinary circumstances, the loss of income pending a final determination of the validity of an employee's termination and the resulting damage to the employee's reputation 'falls far short of the type of irreparable injury which is a necessary predicate to the issuance of a temporary injunction.'").

Here, Plaintiff has failed to satisfy this demanding standard in three ways: (1) he cannot point to any economic loss; (2) he cannot show any concrete, actual reputational harm, and (3) he cannot point to any harmful public disclosure of the recent developments at issue in this case that do not result from his own actions. Moreover, monetary damages can fully compensate Plaintiff for any alleged injuries suffered; indeed, monetary damages are available in connection with each of the substantive causes of action Plaintiff has alleged. Indeed, Plaintiff himself admits that his position with the Academy was uncompensated, Pl.s' Mem. at 22-23, and his memorandum is tellingly devoid of any allegations that he has suffered any economic harm. *See, e.g. Trudeau v. FTC*, 384 F. Supp. 2d 281, 297 (D.D.C. 2005) (denying preliminary injunction and noting that "[Movant] does not claim that he sustained any financial or other harm.").

In addition, Plaintiff has not established that his removal as President-Elect will adversely affect his reputation. "[A]s with all other forms of irreparable harm, the showing of reputational harm must be concrete and corroborated, not merely speculative." *Id.* (citing *Bristol Myers Squibb Co. v. Shalala*, 923 F. Supp. 212, 215 (D.D.C. 1996)). Here, Plaintiff has offered "no documents, statements, or testimonials demonstrating that he has suffered harm to his reputation" as a result of the Academy's decision, or that such harm "is certain to continue if the [C]ourt does not impose an injunction." *Id.* Instead, Plaintiff merely makes conclusory statements that the Academy's decision will "place a permanent stain on his professional career" and constitutes a "blow to his professional and personal reputation." Pl. Mem. at 22-23. Such highly generalized statements do not meet this Circuit's high standard for seeking a temporary restraining order, *see, e.g., Hunter,* 527 F. Supp. 2d at 16, and they ring hollow in light of Plaintiff's own actions: not only did Plaintiff fail to take any steps to file this action under seal, thereby making the fact of and details relating to this litigation public knowledge, he also

apparently has discussed his removal with third parties and even posted a blog concerning his removal. *See* Downs Decl. and Att. I thereto. Plaintiff, not the Academy, is responsible for the alleged harm of which he complains. Indeed, the document that 19 Past Presidents of the Academy presented to the Board, and which the Academy has now submitted to this Court for *in camera* review as Attachment B to the Downs Declaration, involved matters that did not involve Academy conduct, but rather related to Plaintiff's conduct in connection with his activities with another actuarial organization.

III. THE BALANCE OF INJURIES WEIGHS HEAVILY IN FAVOR OF THE ACADEMY

Courts are loathe to grant preliminary injunctive relief where the non-movant *(i.e.*, the Academy) is likely to suffer harm. *See Washington v. District of Columbia,* 530 F. Supp. 2d 163 (D.D.C. 2008). In this case, reinstating Plaintiff as President-Elect would be highly disruptive to the Academy given the legitimate basis for his removal, the fact that he was removed nearly one month ago, and the Academy's obvious need to ensure that it has an appropriate leader ready to become President at its October 2009 annual meeting.

As already discussed, under settled Supreme Court and D.C. Circuit precedent the harms that Plaintiff alleges he will suffer do not result from any violation of law, and are not sufficiently concrete or serious to warrant a temporary restraining order. By contrast, if a temporary restraining order issues, the injury to the Academy will be substantial. Requiring any not-for-profit institution to reinstate its President-Elect pending the outcome of a lawsuit surrenders the institution's autonomy to a court. *Vargas Figueroa v. Saldana*, 826 F.2d 160, 162 (1st Cir. 1987). "Should the [Academy] eventually win this case, it cannot recover compensation for the loss of freedom to conduct its affairs while the injunction is in effect." *Id.* at 163. This is especially true where, as here, virtually the entire Board of Directors of the Academy was

actively involved in the decision at issue. The balance of hardships to the Academy and to Plaintiff therefore tips strongly against issuing any temporary restraining order. Id.

IV. THE PUBLIC INTEREST MILITATES AGAINST GRANTING PRELIMINARY RELIEF

The public interest also is served by upholding the Academy's right under its Bylaws and applicable law to remove Plaintiff from the position of President-Elect in light of the information that was presented to the Board. *See Government of Jamaica v. 1201 29th St., N.W. Tenants Ass'n*, Civ. A. No. 92-0836 (JHG), 1992 WL 84908, at *4 (D.D.C. Apr. 7, 1992). There is no legal foundation for asking this Court, as Plaintiff does, to rewrite the Bylaws and the Illinois Act to make them more advantageous to Plaintiff. Because this dispute turns on the Academy's Bylaws, and enforcement of those Bylaws does not support Plaintiff's application for relief, the public interest militates against granting the relief sought by Plaintiff. *See Berman v. DePetrillo*, No. CIV. A. 97-70 (TAF), 1997 WL 148638, at *4 (D.D.C. Mar. 20, 1997) (injunction would not serve public interest where plaintiff not entitled to the relief sought).

CONCLUSION

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

Respectfully submitted,

/s/ Jonathan T. Rees

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

ORDER

Upon consideration of Plaintiff's Motion for a Temporary Restraining Order filed on September 1, 2009, the memorandum in support thereof and Defendant's Opposition thereto, and the entire record herein, it is this ____ day of _____, 2009,

ORDERED that Plaintiff's Motion should be and hereby is **DENIED**.

_____
The Honorable Emmet G. Sullivan
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of September, 2009, I caused a true and correct copy of Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Temporary Restraining Order, Declaration of Mary E. Downs, and *in camera* document to be served via electronic mail and certified mail, return receipt requested, to:

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