IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARK FREEDMAN, Plaintiff, v. AMERICAN ACADEMY OF ACTUARIES, THOMAS TERRY, CASUALTY ACTUARY SOCIETY, and WAYNE FISHER, Defendants.	Case No. 14 CH 19600 Judge Peter Flynn

COMBINED REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS OF DEFENDANTS AMERICAN ACADEMY OF ACTUARIES AND THOMAS TERRY

Defendants American Academy of Actuaries (the "Academy") and Thomas Terry ("Terry") submit this combined reply memorandum in support of their motion to dismiss ("Motion" or "Mot.") Plaintiff Mark Freedman's ("Freedman's") Complaint ("Comp.") under section 2-619.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619.1

INTRODUCTION

Freedman's Opposition ("Opp.") confirms what is apparent from his complaint – namely that Freedman seeks to have this Court (1) stop a disciplinary process adopted by both of the actuarial organizations of which he is a member and to which he agreed and (2) substitute itself or some arbitrator to resolve the merits of the disciplinary complaints filed against him. Freedman has not completed the agreed-upon disciplinary process, and no discipline has been recommended in his case. Without exhausting his internal remedies, he may not seek judicial review of the disciplinary proceedings. Counts I and II of his complaint fail on that basis alone.

On the merits, his contract and declaratory judgment claims fail because the Academy's bylaws specifically permit or require every action that he alleges to be a breach. Instead of

demonstrating a breach, Freedman's Opposition, when laid next to the bylaws, shows compliance. Counts I and II of his complaint must be dismissed for this reason as well.

Finally, Freedman's Opposition does not salvage his defamation claim against Defendant Thomas Terry. On the merits, Freedman's arguments confirm that Terry's statements are not facially defamatory. In addition, his Opposition confirms that Terry is immune from damages suits under the Illinois General Not-For-Profit Corporation Act.

ARGUMENT

I. FREEDMAN MUST EXHAUST HIS INTERNAL REMEDIES BEFORE BRINGING AN ACTION CHALLENGING THE DISCIPLINARY PROCESS

A. Judicial Consideration of an Association's Disciplinary Process Occurs Only After Those Procedures Are Completed and Discipline Is Actually Imposed

Freedman's Opposition never comes to grips with the requirements of the exhaustion doctrine, which compels him to complete the ABCD process before filing an action. *Logan v. 3750 North Lake Shore Drive, Inc.*, 17 Ill. App. 3d 584, 587 (1st Dist. 1974) ("It is well established that members of voluntary associations are required to exhaust their internal remedies prior to instituting legal action to enforce certain rights.") (citing decisions). Defendants do not dispute that, in some cases, Illinois courts may review "disciplinary actions by voluntary unincorporated associations." Opp. at 2 (citing *Sheet Metal Workers Local Union No. 218 v. Massie*, 255 Ill. App. 3d 697, 702 (4th Dist. 1993)). The question here is *when* a plaintiff may ask a court to exercise that power. Every case Freedman cites, save one distinguishable decision, *see* Opp. at 2-3, involves judicial proceedings occurring *after* an organization's internal disciplinary proceedings have concluded *and* some form of discipline has been imposed.[1] Those

[1] *Van Daele v. Vinci*, 51 Ill. 2d 389, 390-91 (1972) (considering claims of improper process after grocers association completed internal proceedings and passed resolution expelling plaintiffs); *Sheet Metal Works Local Union No. 218 v. Massie*, 255 Ill. App. 3d 697, 698-99 (4th Dist. 1993) (reviewing union disciplinary process after completion of proceedings and imposition of fine);

cases fully support Defendants' position.

That is not surprising. Exhaustion of internal remedies is a logical corollary to the general rule that Illinois courts do not interfere in the disciplinary proceedings of private associations. *Butler v. USA Volleyball*, 285 Ill. App. 3d 578, 580-81, 583 (1st Dist. 1996). As the Court of Appeals has explained:

> With regard to discipline, policy or doctrine of an association, the doctrine of exhaustion of internal remedies, as we now know it, became a practical necessity. The courts were relieved of the burdensome task of proceeding with lengthy and often complicated inquiries into the matters of policy. Where such matters of policy were concerned, and where the governmental structure of the association or organization provided some procedure whereby an aggrieved individual member could seek redress or an appeal within the association or organization, the requirement of exhaustion of internal remedies as a condition precedent to the maintenance of legal proceedings was considered to be in the best interest of both the association and the member.

Logan, 17 Ill. App. 3d at 588-89. Here, as Freedman's complaint alleges, both the Academy and the SOA, the two actuarial organizations of which he is a member, Comp. ¶ 19, have adopted the same Code of Professional Conduct, *id.* ¶ 50 & Ex. D, and have "through their respective bylaws, delegated to the ABCD the authority to investigate and evaluate possible violations of the Code by their members." *Id.* ¶ 52. The ABCD has procedures safeguarding actuaries facing disciplinary complaints. *See id.* Ex. M, art. X, §§ 1.B, 5; Ex. N. Moreover, the ABCD has no power to impose any discipline on any actuary but may only *recommend* discipline to the actuary's member organization upon the finding of a violation of the Code. *Id.* Ex. M., art. X, § 5.G. Each organization itself then decides whether to impose any discipline, and the

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Local 336, Int'l Brotherhood of Elec. Workers v. Detorrice, 151 Ill. App. 3d 608, 610 (2d Dist. 1986) (same); *Int'l Brotherhood of Elec. Workers, Local No. 399 v. Zoll*, 135 Ill. App. 910, 911-12 (4th Dist. 1985) (same); *see also Austin v. Am. Ass'n of Neurological Surgeons*, 120 F. Supp. 2d 1151, 1153 (N.D. Ill. 2000) (reviewing association's disciplinary process after completion of proceedings and suspension of member); *Int'l Test & Balance, Inc. v. Associated Air & Balance Council*, 1999 U.S. Dist. LEXIS 9567 *7-15 (N.D. Ill. Jun. 9, 1999) (reviewing proceedings after plaintiff's expulsion from trade association).

Academy's procedures include a right to appeal any discipline imposed. *Id.* ¶55; Ex. M., art. IX §§ 3-4. Thus, "the governmental structure" of the Academy "provide[s] some procedure whereby an aggrieved individual member [can] seek redress or an appeal within the association or organization." *Logan*, 17 Ill. App. 3d at 589. Accordingly, Freedman must exhaust his internal remedies before bringing suit. *Id.*

B. Freedman Has No Proprietary Right That Would Be Impaired by Requiring Him to Exhaust His Internal Remedies

Freedman attempts to escape the exhaustion requirement by claiming that he is asserting "proprietary rights of fairness and due process." Opp. at 3. This argument rests on a fundamental misunderstanding of *Logan*, the only case he cites in which a court permitted judicial review of an association's action without exhausting internal remedies. In *Logan*, a tenant sought to sublet a cooperative apartment pursuant to a specific provision in her lease agreement. The cooperative board, however, acting pursuant to a "long-established policy of the building," *Logan*, 17 Ill. App. 3d at 586, declined to consider the request and did not review her application. When the tenant sued, the cooperative sought dismissal under the exhaustion doctrine, but the Court of Appeals refused, holding that the tenant's independent contract right to sublet "is a proprietary right, *hardly a matter of discipline, policy or doctrine*." *Id.* at 589 (emphasis added).

Freedman's complaint differs in two respects. First, it directly addresses a matter of "discipline, policy or doctrine." *Id.* Second, Freedman has no such independent contract right that he seeks to enforce here. In fact, his claim is just the opposite; his contract and declaratory judgment claims rest on the Academy's bylaws. Comp. ¶ 62; Opp. at 7-8 (citing *Rotary Club of Chicago v. Harry F. Shea & Co.*, 120 Ill. App. 3d 988, 997-98 (1st Dist. 1983)). Freedman affirmatively alleges that both the Academy and the SOA, the two organizations of which he is a

member, have "delegated to the ABCD authority to investigate and evaluate possible violations of the Code by their members." *Id.* ¶ 52. Thus, Freedman has a contractual obligation to follow the specified disciplinary procedures established by those organizations. Comp. Ex. M., art. X, § A.1; *Logan*, 17 Ill. App. 3d at 587 ("A member of a voluntary association necessarily agrees to the reasonable rules and regulations of the order."). Rather than follow that process, he seeks exemption from it through this lawsuit. The exhaustion doctrine bars such an end run. Counts I and II of Freedman's complaint should be dismissed.

II. NEITHER THE SPECIFIC FACTUAL ALLEGATIONS OF FREEDMAN'S COMPLAINT NOR HIS SPECULATIVE ASSERTION OF BIAS STATE A CLAIM FOR RELIEF

A. The Academy's Bylaws Authorize Every Act of Which Freedman Complains

Freedman's complaint asserts only two claims against the Academy – one for breach of contract and the other for declaratory judgment. Since the Illinois declaratory judgment statute creates no substantive rights, *Beahringer v. Page*, 204 Ill. 2d 363, 373 (2003), the complaint against the Academy survives only if it states a cognizable claim for breach of contract.

Freedman's complaint alleges only four putative contractual breaches. Comp. ¶ 75. *First*, Freedman alleges that Defendant Terry and Mary Miller, two signatories to a disciplinary complaint filed against him, "participated in the selection of three of the nine members of the ABCD." *Id.* ¶ 75a; Opp. at 5 (citing *id.* ¶¶ 60, 68). But the Academy bylaws specifically provide that "[Members of the ABCD] shall be appointed by . . . the Selection Committee, *composed of the Presidents and Presidents-Elect of the participating organizations.*" *Id.* Ex. M, art. X, § 2.B (emphasis added). Terry and Miller were respectively President and President-Elect of the Academy at the relevant time. *Id.* Ex. E at 5. There is no breach.

Second, Freedman alleges that the disciplinary complaints against him are facially deficient and should have been dismissed. *Id.* ¶ 75b; Opp. at 9. But the Academy's bylaws

specifically provide that the chair and two vice chairs of the ABCD have several options when conducting an initial review of a disciplinary complaint, including authorizing a review of the complaint and appointment of an investigator. Comp. Ex. M, art. X. § 5.A, C; *id.* Ex. N, § III.B. That is precisely what happened here. *Id.* ¶ 67. That is not a breach. In any event, Illinois courts do not review "the substance of voluntary associations' actions or regulations." *Butler*, 285 Ill. App. 3d at 583.

Third, Freedman alleges that the Academy provides legal counsel for the ABCD. Comp. ¶75c; Opp. at 5 (citing Comp. ¶ 51). But, again, the Academy's bylaws provide that "[t]he ABCD will utilize the staff of the Academy for necessary *legal*, logistical, and technical support any may retain outside counsel for assistance, as needed." Comp. Ex. M., art. X, § 7 (emphasis added). That is not a breach.

Finally, Freedman alleges that the Academy breached its bylaws when the ABCD selected James MacGinnitie to investigate the disciplinary complaints against him. *Id.* ¶ 75d. But that action is also specifically authorized by the Academy's bylaws. *Id.* Ex. M., art. X, § 5.C. That is not a breach.[2]

The remaining points in Freedman's Opposition – that the ABCD is a division of the Academy, Opp. at 5 (citing Comp. ¶ 58), that the Academy manages the ABCD's budget, *id.* (citing Comp. ¶ 51), that the Academy must provide Freedman "appropriate due process and respect his rights," *id.* (citing Comp. ¶¶ 62-63) and that the ABCD must "maintain a high level of professional objectively and independence," *id.* (citing Comp. ¶ 65) – are not alleged to be contract breaches in the complaint. In any event, none of them state violations of the Academy's

[2] Exercising his rights under the ABCD's procedures, Freedman objected to Mr. MacGinnitie's appointment. Mr. MacGinnitie has now been replaced with a new investigator. This issue is moot.

bylaws. *See* Comp. Ex. M, art X, § 1 (ABCD established with in the Academy); *id.* § 8.A (Academy board to make provision for operating expenses of the ABCD in the Academy budget); *id.* §§ 1.B., 5 (establishing procedures to protect actuaries subject to disciplinary complaints). In sum, every point Freedman raises in his Opposition demonstrates compliance with, not a breach of, the Academy's bylaws. Counts I and II fail for this reason as well.

B. Freedman's Remaining Arguments Do Not Salvage Counts I and II of His Complaint

Having failed to allege an actual breach of contract, Freedman's Opposition raises a handful of unrelated points on Counts I and II of the complaint. None of them have merit.

First, Freedman claims that the Academy is not merely a "social" organization and that "membership is often a requirement to render certain opinions or obtain employment." Opp. at 6 (citing *Van Daele*, 51 Ill. 2d at 394). That is irrelevant; it says nothing about whether the Academy has violated its bylaws.

Second, Freedman insists that the disciplinary complaints were filed against him for an "anti-competitive purpose." Opp. at 7, 9 (citing Comp. ¶¶ 46-47). But the motivation of the *complainants* says nothing about whether the Academy has followed its bylaws in addressing those complaints. *See Album Graphics, Inc. v. Beatrice Foods Co.*, 87 Ill. App. 3d 338, 341 (1st Dist. 1980) ("Fault is irrelevant to breach of contract.").

Finally, Freedman claims that absent this action, he risked waiving his objections to the allegedly biased ABCD proceedings. Opp. at 6. But nothing precludes Freedman from raising his claims of bias before the ABCD. Indeed, the case he cites contemplates that procedure. *See Inwang v. Community College Dist. No. 508*, 117 Ill. App. 3d 608, 615 (1st Dist. 1983) (finding waiver because plaintiff failed to object to procedural irregularities at the ***disciplinary hearing***). This contention, like the others, does not entitle Freedman to relief.

III. FREEDMAN'S COMPLAINT FAILS TO STATE A CLAIM OF DEFAMATION PER SE AGAINST DEFENDANT THOMAS TERRY

Freedman makes three arguments in support of his defamation claim against Defendant Terry: (1) he is not obligated to show harm to his reputation on a claim of defamation per se; (2) a fact question exists whether Terry's statements are protected by the innocent construction doctrine; and (3) a fact question exists whether Terry was acting in his capacity as Academy president when he made the allegedly defamatory statements. All of these arguments fail.

A. Freedman's Complaint Fails to Allege Defamation Per Se

Freedman's contention that he need not show harm to his reputation to state a claim for defamation per se is irrelevant. Terry never contended that a defamation per se claim requires a showing of harm to the plaintiff's reputation. Rather, as Terry noted, statements are defamatory only if they "tend[ ] to cause such harm to the reputation of another . . . that it lowers the person in the eyes of the community or deters third persons from associating with him or her." *Dunlap v. Alcuin Montessori School*, 298 Ill. App. 3d 329, 338 (1st Dist. 1998). Moreover, to be defamatory per se, such harm must be apparent and obvious on the face of the statements. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Terry's argument was and remains that the two statements challenged in Freedman's complaint simply are not defamatory *on their face* as the Illinois courts have defined defamatory statements. That is a question of law for this court on a motion to dismiss. *Id.* at 492. When read in context, neither of the statements can reasonably be construed to meet the *Dunlap* standard. *See* Mot. at 12. The first challenged statement never mentions Freedman. *See Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 390 (1st Dist. 1995) ("A statement which does not mention the plaintiff by name cannot be injurious to him or her on its face"). The second addresses the SOA's values, not Freedman's "integrity." Neither is defamatory. Count IV must be dismissed.

B. The Challenged Statements Are Protected by the Innocent Construction Doctrine

On the innocent construction doctrine, Freedman's Opposition largely recites legal principles that Terry does not dispute. Terry agrees that statements must be construed in context and that courts need not strain to find an "unnatural but possibly innocent meaning for words *where the defamatory meaning is far more reasonable*." Opp. at 12 (quoting *Bryson v. News Am. Publications*, 174 Ill. 2d 77, 94 (1996) (emphasis added)). But as noted, the first of his challenged statements does not mention Freedman at all, and the second does not challenge Freedman's integrity but states only that Freedman's September 17, 2014 e-mail to members of the Casualty Actuary Society "signal[s] that the SOA values commercial ambitions over professional integrity." Both statements are reasonably susceptible to innocent constructions and, therefore, not actionable.

C. Terry Is Immune from Damages Suits under the Illinois General Not-for-Profit Corporation Act

On Terry's claim for immunity under section 108.70(a) of the Illinois General Not-for-Profit Corporation Act, 805 ILCS 105/108.70(a), Freedman principally argues that there is a fact question about whether Terry was acting in his capacity as an Academy board member when he sent the allegedly defamatory e-mail with the challenged statements,[3] claiming that the Academy has submitted contradictory affidavits on the point. Opp. at 13. There is no contradiction. The first affidavit states only that Mr. Terry was not acting for the Academy when he filed the

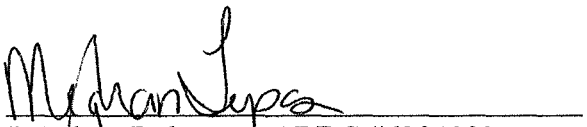
[3] Freedman also asserts that he has alleged Terry's conduct is willful and wanton because the allegedly "defamatory statements are part of a larger scheme to harm Freedman and to deter the SOA from competing with the Academy and CAS." Opp. at 14 (citing Comp. ¶ 1). No specific factual allegations in the complaint detail any such "scheme." Moreover, to allege willful or wanton conduct, the complaint must allege facts that, if proved, would show that Terry acted with "either a deliberate intention to harm or an utter indifference to or conscious disregard for *the welfare of the plaintiff*." *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989) (emphasis added). Freedman's pleading lacks any such allegations.

disciplinary complaint against Freedman. *See* Affidavit of Mary Downs in Support of Opposition to Motion for Preliminary Injunction ¶ 27. But the allegedly defamatory statements are not in the disciplinary complaints; they are in a separate e-mail Terry sent to the SOA board on September 26, 2014. The second affidavit merely states an objective fact: "At all relevant times related to the Complaint in this action, Defendant Thomas Terry was President of the Academy." Affidavit of Mary Downs in Support of Opposition to Motion to Dismiss ¶ 7. Freedman made the exact same allegation in his complaint. Comp. ¶ 5. There is no factual issue about whether Terry was acting in capacity as an Academy officer; Freedman's Opposition makes clear that the complaint explicitly pleads that he was. Accordingly, Terry is immune from liability on Freedman's defamation claim under section 108.70(a).[4]

CONCLUSION

For the foregoing reasons, Defendants American Academy of Actuaries and Thomas Terry respectfully request that Freedman's Complaint be dismissed with prejudice.

Respectfully submitted,



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[4] Freedman states that if the Court dismisses his defamation complaint against Terry on immunity grounds, he will seek leave to amend his complaint to assert the claim against the Academy. Opp. at 14. Leave is not warranted because, as noted above, *see supra* § III.A-B, the challenged statements are not defamatory.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Combined Reply Memorandum in Support of the Motion to Dismiss of Defendants American Academy of Actuaries and Thomas Terry** was served upon:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and accurate.