

1 STATE OF ILLINOIS )  
 ) SS:  
2 COUNTY OF C O O K )

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

5 MARK FREEDMAN, )  
 )  
6 Plaintiff, )  
 )  
7 vs. ) No. 14 CH 19600  
 )  
8 AMERICAN ACADEMY OF ACTUARIES, )  
 THOMAS TERRY, CASUALTY ACTUARIAL )  
9 SOCIETY, and WAYNE FISHER, )  
 )  
10 Defendants. )

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Report of proceedings in the above-  
entitled cause, taken before the Honorable Peter A.  
Flynn on February 24, 2015, at Richard J. Daley  
Center, 50 West Washington Street, Room 2408,  
Chicago, Illinois, at approximately 10:01 a.m.,  
taken before Cordelia Busse Wert, a Certified  
Shorthand Reporter of the State of Illinois.

REPORTED BY:  
CORDELIA BUSSE WERT, CSR  
Illinois License 84-2985

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SWANSON, MARTIN & BELL, LLP, By:  
MR. CHRISTOPHER T. SHEEAN  
MS. JULIE D. MILLER  
330 North Wabash Avenue, Suite 3300  
Chicago, Illinois 60611  
(312) 321-9100  
csheean@smbtrials.com  
jmillers@smbtrials.com,

          Appeared on behalf of the Plaintiff;

HOGAN LOVELLS US, LLP, By:  
MR. J. ROBERT ROBERTSON  
Columbia Square  
555 Thirteenth Street, NW  
Washington, DC 20004  
(202) 637-5600  
robby.robertson@hoganlovells.com,

          Appeared on behalf of Defendants  
American Academy of Actuaries and  
Thomas Terry;

SYNERGY LAW GROUP, LLC, By:  
MR. JOSEPH L. KISH  
MS. ALEKSANDRA M.S. VOLD  
730 West Randolph Street, Suite 600  
Chicago, Illinois 60661  
(312) 454-0015  
jkish@synergylawgroup.com  
avold@synergylawgroup.com,

          Appeared on behalf of Defendants  
Casualty Actuarial Society and  
Wayne Fisher.

1 (WHEREUPON, the following proceedings  
2 were had in open court, to-wit:)

3 THE COURT: All right. 14 CH 19600,  
4 Freedman versus American Academy of Actuaries, et  
5 cetera.

6 MR. SHEEAN: Good morning, your Honor.  
7 Christopher Sheean on behalf of the plaintiff.

8 MR. ROBERTSON: Good morning, your  
9 Honor. Robert Robertson on behalf of the American  
10 Academy and also Thomas Terry.

11 MR. KISH: Good morning, your Honor.  
12 Joseph Kish and Alek Vold on behalf of Wayne  
13 Fisher and the Casualty Actuarial Society.

14 THE COURT: All right. We are here on  
15 two motions to dismiss, correct?

16 MR. SHEEAN: That's Correct.

17 MR. ROBERTSON: Yes, your Honor.

18 THE COURT: All right. I've read what  
19 you've given me. I don't want to stop anybody  
20 from adding anything that you think you should  
21 add. Go ahead. Somebody start.

22 MR. ROBERTSON: All right, sir. Both  
23 of us have separate motions.

24 THE COURT: All right. Flip a coin, if

1 you want.

2 MR. ROBERTSON: I will go first and he  
3 can go second?

4 MR. KISH: Go ahead. That's fine.

5 MR. ROBERTSON: Every time we've been  
6 in here on this case, as your Honor may recall,  
7 your Honor has said, you know, check the law on  
8 this because in Illinois the courts don't  
9 intervene in a disciplinary process, and they  
10 don't.

11 There's not a single case here  
12 where a court has actually done that. In fact,  
13 every court that's looked at the issue said you  
14 don't do that, and there are practical reasons for  
15 that. Because every -- if a person who was  
16 subject to disciplinary action in an association  
17 or a company or anything where they've agreed to  
18 go through an alternative dispute resolution  
19 process, they could just come into court and get  
20 the Court to make a judgment on the merits of the  
21 case which is what's being asked for here in  
22 declaratory relief.

23 The declaration is that the email  
24 was not false or misleading, that the website --

1 taking the information from the website was not  
2 unlawful, and then asking the Court to appoint a  
3 neutral arbitrator, that's what's being asked for  
4 in this case for declaratory relief.

5 Declaratory relief is based on the  
6 supposed breach of contract. The contract is a  
7 disciplinary proceeding. It's nothing else. And  
8 the disciplinary proceeding itself, each of the  
9 four claimed breaches, that procedure is actually  
10 in the bylaws. For example -- and there's only  
11 four claims in the breach of contract, and that's  
12 in Paragraphs 75A, B, C, and D.

13 The first one says, well, two  
14 individuals had voted for members of the ABCD.  
15 That's the Board itself that does the disciplinary  
16 and counseling, if there is counseling at the end  
17 of the day. But the contract requires that those  
18 two people vote. That's in Article 10-2B of  
19 Exhibit M to the complaint. So it's part of the  
20 pleading.

21 And that they appoint an  
22 investigator. Well, the Board has the right to  
23 appoint an investigator to review the matter, and  
24 that's also in the contract itself, 5A and C of

1 Exhibit M.

2 Then the third claim is the lawyer  
3 who works for the ABCD is paid for and is a member  
4 of the Academy, he's an Academy lawyer. Well,  
5 that's actually also in the contract in  
6 Article 10, Paragraph 7 of Exhibit M to the  
7 complaint which is the bylaws.

8 Then finally the claim is that the  
9 investigator who is appointed, Freedman claims, is  
10 biased. Now, there's nothing in the contract that  
11 requires anything except that an investigator be  
12 appointed. But the one that they claim in the  
13 complaint that was appointed is no longer the  
14 investigator, there's another investigator, and  
15 Mr. Freedman has already told the ABCD that he has  
16 no objection to that investigator. So that claim  
17 is completely out.

18 That's all we have here. And the  
19 only thing that the plaintiffs have said is that,  
20 well, you should look at the cases because there's  
21 an exception, and they cite Logan.

22 Logan's a great case. It explains  
23 its law in great detail and explains exactly the  
24 law that your Honor had told us about the first

1 time we were here. It happened that there was a  
2 separate issue there on a lease contract that had  
3 nothing to do with the disciplinary proceedings,  
4 and the Court said that there was no obligation  
5 for that particular plaintiff to use that  
6 procedure because the contract itself/the  
7 procedure said that it may use it, and the Court  
8 even capitalized the word may. So it was not an  
9 obligation at all. There was no complaint in a  
10 disciplinary board like there is here or like all  
11 the other cases that the Logan Court explained.

12 Every other case; the Butler case,  
13 the Van Daele case, the Austin case, all the cases  
14 that the plaintiff cited, in every case the  
15 procedure, the disciplinary procedure, was already  
16 finished. It wasn't in the middle. It wasn't at  
17 the beginning. It was already finished.

18 Here, we just have an investigator  
19 who has been appointed to review the matter and  
20 make a recommendation. That's it. None of those  
21 cases hold that. In fact, in all those cases, the  
22 plaintiff lost because the Court didn't want to  
23 intervene and also explain the long history in  
24 Illinois, and frankly it's elsewhere, too, that

1 courts don't intervene in these processes.

2           The only thing that the plaintiff  
3 has raised is that, well, maybe there's an anti-  
4 competitive purpose here and maybe that's good  
5 enough to keep the breach of contract claim in.  
6 Well, we don't agree with plaintiff's position, of  
7 course, but it doesn't matter, it's not relevant.  
8 Because in a breach of contract claim, intent is  
9 not an element. It's not an element at all. We  
10 cited Album Graphics where fault is not even  
11 relevant.

12           And it's not. They don't have an  
13 antitrust claim here. There is an antitrust  
14 statute here in Illinois, and I'm very familiar  
15 with it. This case wouldn't fit in there at all  
16 because the only two things you can get besides  
17 pricing issues under the Illinois statute is a  
18 conspiracy to enter into an agreement to restrain  
19 trade which we don't have here, and, number two,  
20 that there's a monopoly. We don't have that in  
21 here, either. No allegations at all, even of the  
22 statute at all. It's a breach of contract case.  
23 So these other arguments just aren't relevant.

24           Then finally Mr. Freedman says,

1 well, I had to file this lawsuit to avoid waiving  
2 my claims, and he sites the Inwang case. Well,  
3 what the case there said is that the problem was  
4 that the plaintiff had not objected in the  
5 disciplinary proceeding, that was the waiver  
6 issue. It wasn't a waiver issue in court; it was  
7 that the person hadn't objected at the  
8 disciplinary proceedings.

9 Well, here, Freedman is free to  
10 raise objections to the ABCD. He can do that.  
11 He's already written a letter, and he can continue  
12 to do that. He has all the rights that are in the  
13 contract; right to an attorney, right to appear,  
14 right to question witnesses. There's a whole list  
15 of things that are typical in a proceeding like  
16 this that he has a right to. It's just not the  
17 kind of thing that the Court should, as your Honor  
18 explained and we agree, get involved with to  
19 decide the merits of an issue that the Board  
20 hasn't even dealt with yet.

21 Now, this is not a board that was  
22 set up for Mr. Freedman or for Mr. Freedman's  
23 case. It's a standing board that hears all kinds  
24 of cases throughout the year, each year that the

1 Board is in session. And they haven't yet heard  
2 the case yet, and they may never. We don't know.

3 The defamation claim that's in  
4 here, we just don't think it has any basis. It's  
5 claimed as a per se defamation. But the actual  
6 email itself, the two main problems with it, the  
7 two claims that are made, one is that the email  
8 clearly is talking about the Society of Actuaries.  
9 That's what's being said.

10 The email begins: The attached  
11 email from the SOA, that's the email that this  
12 whole case is about. It says: The email from the  
13 SOA is a deliberate and self-serving  
14 misrepresentation of what it takes for a US  
15 actuary to move to one practice to another. This  
16 is quoted in the complaint.

17 And it goes on and says that --  
18 the email shows that the SOA values commercial  
19 arbitrations over professional integrity. In  
20 their brief, the plaintiff says, oh, well, that  
21 means that we're saying that Mr. Freedman has no  
22 integrity.

23 Now, we don't think that's a fair  
24 reading of that, but it doesn't matter because if

1 there's any -- if there are two readings, this  
2 isn't a per se defamation case.

3           The second problem with it is that  
4 this email was sent to the Board of the Society of  
5 Actuaries which is where Mr. Freedman was formerly  
6 the president. It's not like his reputation was  
7 harmed with them because immediately they came out  
8 with a public statement that they didn't agree  
9 with the Academy, that they didn't agree with this  
10 email, and that the charges were baseless and  
11 without any merit. So they certainly didn't think  
12 that Mr. Freedman's reputation was at issue.

13           The only way any of this  
14 information became public that was Mr. Freedman  
15 filed a lawsuit here in this Court and attached  
16 all the documents and put them in the public  
17 record. He didn't seem to be concerned about  
18 that. Here, he's saying, well, that causes him  
19 great harm because he has to continue to fight  
20 this issue.

21           We don't think he has to continue  
22 spending money in this court fighting this issue  
23 at all, and we think that the case should be  
24 dismissed and allow the procedure to go forward

1 which it is with an investigator that Mr. Freedman  
2 has said he has no objection to and to allow the  
3 investigator to do her job, and we'll continue  
4 down the road here.

5 Your Honor, I just think that if  
6 we set precedent for people to come in and  
7 challenge these things, everybody would be in here  
8 and try to circumvent established contractual  
9 procedures that they agreed to. And the complaint  
10 actually says it's a contract, it's a breach of  
11 contract case, says he agreed to it, said that all  
12 of the Societies agreed to it, it's not a dispute;  
13 but if you can just circumvent a contract that you  
14 agreed to and ask a court to come up with a  
15 different answer because they don't agree with it,  
16 I don't think that's appropriate.

17 So let me finish and turn to my  
18 colleague here. Unless your Honor has any  
19 questions for me?

20 THE COURT: Go ahead.

21 MR. KISH: Do you want to hear from me  
22 first, your Honor, or Mr. Sheean in response?

23 THE COURT: I will let the plaintiff  
24 respond to everyone as long as there's overlap

1 here.

2 MR. KISH: Okay. And I will be brief  
3 because of that reason.

4 What Mr. Robertson just told you,  
5 your Honor, applies equally to my client, Wayne  
6 Fisher and the Casualty Actuarial Society. I  
7 would make a couple brief additional arguments,  
8 and they are these:

9 The Casualty Actuarial Society is  
10 a complete stranger to this process. They have  
11 nothing to do with the ABCD process yet there are  
12 declarations and injunctions sought against them  
13 for reasons which cannot be discerned from this  
14 complaint. There's this anticompetitive undertone  
15 that's neither supported by any facts, nor does it  
16 point to any claim, and I don't think it could.

17 Mr. Fisher is equally a stranger  
18 to these proceedings, once he files his complaint  
19 which he is allowed to do. And what essentially  
20 the declarations are seeking from you is to  
21 circumvent his right to go through the ABCD  
22 process which he did in accordance with all of its  
23 rules and which he is entitled to have seen  
24 though. There's been no reason, no articulated

1 reason in this case whatsoever, that Mr. Fisher  
2 should be denied that right.

3 In the papers before you, there's  
4 been some what I would view to be desperate  
5 attempts to try to stake claims here. There's  
6 been notions of agency, but there's no facts that  
7 allege any agency on behalf of CAS that ties  
8 Mr. Fisher's complaint to the ABCD. There's been,  
9 again, these anticompetitive undertones which --  
10 the words that are thrown out there in various  
11 spots in the complaint. But beyond that, your  
12 Honor, there's just no reason for Count II to  
13 exist as against Mr. Fisher and the Casualty  
14 Actuarial Society.

15 With respect to the defamation  
16 claim, that has the same problems with respect to  
17 Mr. Fisher's email. His email was sent not only  
18 to Mr. Freedman, but to Board members of the CAS.  
19 In response, the CAS basically adopted a  
20 resolution which approved of Mr. Freedman's  
21 actions. So clearly, if you work backwards,  
22 there's just absolutely no defamation per se here  
23 because there's been no injury.

24 But more importantly, the email

1     itself, the way it's worded, it's a very vague  
2     reference, and it's basically Mr. Fisher  
3     complaining about the fact that certain  
4     information was appropriated from the CAS. He  
5     doesn't really cast aspersions directly to  
6     anybody, he just throws it out there, and he  
7     basically opines that that's not going to be  
8     looked at with any favor. That cannot give rise  
9     to a defamation per se claim under Illinois law.

10                     The only other arguments that we  
11     made with respect to the defamation claims that  
12     are slightly different than Mr. Robertson's claim  
13     is that we believe that what Mr. Fisher said in  
14     his email is subject to an innocent construction  
15     by your Honor as a matter of law. The whole  
16     notion that the word hacking directly and clearly  
17     gives rise to a violation of the Computer Fraud &  
18     Abuse Act, I don't think any reasonable person,  
19     person, would make that conclusion.

20                     And then finally, your Honor,  
21     there's an immunity statute in Illinois that we  
22     have invoked that clearly covers Mr. Fisher's  
23     actions in this case. There's been no allegations  
24     of the heightened level of conduct that's required

1 under Illinois law to divest Mr. Fisher of the  
2 exemption that's afforded -- the immunity that's  
3 afforded to him under the Not-For-Profit Immunity  
4 Act under Illinois law.

5 And that's it for me.

6 THE COURT: Plaintiff?

7 MR. SHEEAN: Thank you, your Honor.

8 Your Honor, Mr. Robertson and  
9 defendants' counsel have for the most part  
10 accurately stated the cases that were cited by the  
11 parties with respect to the Court's right to  
12 intervene in a voluntary disciplinary proceeding.  
13 The facts that are glazed over are completely  
14 ignored by the defendants.

15 THE COURT: Let's not get too tangled  
16 up in wording, but I would suggest to you the  
17 Court as a court has no rights.

18 MR. SHEEAN: Can I address that fact,  
19 your Honor?

20 THE COURT: The Judicial Branch is  
21 famously reactive, not pro. The Judicial Branch  
22 can't file a lawsuit. The Judicial Branch has no  
23 right to intervene in anything.

24 A party may have a right to ask

1 the Judicial Branch to get involved in something,  
2 but absent a request, the Judicial Branch has no  
3 right whatsoever to that part, and the Judicial  
4 Branch for a variety of reasons turns down a good  
5 many requests.

6 So your client may have rights,  
7 but the Court doesn't.

8 MR. SHEEAN: Understood, your Honor.

9 THE COURT: Okay?

10 MR. SHEEAN: The Illinois Courts have  
11 recognized that an individual may come in and ask  
12 the Court to allow an intervention using the  
13 equity of the Court where, as we have alleged in  
14 this complaint, there is an allegation of bias, a  
15 lack of impartiality, and an anticompetitive or  
16 improper purpose as we have alleged here exists on  
17 the part of all of the defendants against  
18 Mr. Freedman and against the SOA, a nonparty here.

19 Each of the cases that we cited;  
20 Logan, Van Daele, Austin, and Butler, cite that as  
21 the hallmark or the benchmark that courts can use  
22 in determining whether or not to intervene in a  
23 voluntary disciplinary proceeding in order to  
24 protect that individual's rights which are being

1 railroaded in a kangaroo court which is what we've  
2 alleged here.

3 We specifically allege that --

4 THE COURT: Counsel?

5 MR. SHEEAN: Yes, sir? Yes, your  
6 Honor?

7 THE COURT: You know, I'm an old hand  
8 with adjectives and pejorative characterizations.

9 MR. SHEEAN: Sure.

10 THE COURT: I've probably used pretty  
11 much all of them that you could use for that  
12 action in the course of my practice before I went  
13 on the bench, but I usually had the sense when I  
14 was using them that I was using them because I  
15 didn't have anything better.

16 If you're going to tell me that  
17 everything is a kangaroo court, my automatic  
18 reaction is, gee, he must not have too much to  
19 say. So really --

20 MR. SHEEAN: Okay.

21 THE COURT: And in this instance, the  
22 kangaroo court charge has particular weakness, I  
23 think, in that almost the first thing that your  
24 client complained about which is the selection of

1 this MacGinnitie person, the kangaroo court  
2 accepted the complaint, rectified the situation,  
3 and appointed a new investigator that your client  
4 is perfectly okay with. This is not how kangaroo  
5 courts usually act, and it does suggest that there  
6 needn't have been a lawsuit about it.

7 MR. SHEEAN: Judge, can I offer an  
8 alternative?

9 THE COURT: Go ahead.

10 MR. SHEEAN: That the ABCD recognizes  
11 that it's being watched now and is attempting to  
12 rectify the failure to follow due process that my  
13 client is entitled to as a member of the Academy  
14 and is attempting to create the appearance of due  
15 process where none existed. And as we have  
16 alleged in our complaint, your Honor -- and with  
17 all due respect, you allowed my opponents the  
18 opportunity to speak, so if I can just get through  
19 my argument?

20 THE COURT: Certainly.

21 MR. SHEEAN: I know you're prepared to  
22 rule, and I'll certainly be interested in hearing  
23 what you have to say, your Honor.

24 But we've alleged that the ABCD is

1 not a separate legal entity. It's housed within  
2 the Academy. So we've got here the accuser, the  
3 president of the Academy, controlling the  
4 underlying disciplinary commission. We've also  
5 alleged that the Academy's budget and resources  
6 are managed by the Academy, that the staff  
7 including its legal counsel that support its  
8 operations and provide legal advise are paid for  
9 by the Academy, and that they are all required to  
10 follow the Academy bylaws which include providing  
11 Freedman with appropriate due process and  
12 respecting of his rights.

13 We've also alleged that two of the  
14 individuals who signed the complaint including  
15 Defendant Tom Terry were involved in the selection  
16 of the new commissioners for the ABCD commission  
17 starting January 1, 2015. So the individuals who  
18 would, in fact, hear my client's case potentially  
19 were selected or voted on by Mr. Terry and  
20 Ms. Miller. We believe that this demonstrates  
21 that there is a lack of due process.

22 We also, with all due respect to  
23 Mr. Robertson, believe that the anticompetitive  
24 purpose underlying this is relevant as discussed

1 by the cases that we have already cited; Logan,  
2 Van Daele, and the others, Austin, where you can  
3 demonstrate bad faith, the Court has the power to  
4 intervene on behalf of the plaintiff to rectify  
5 the situation. We believe there is bad faith  
6 here.

7 We believe we've demonstrated that  
8 these organizations, these sister organizations of  
9 the Society of Actuaries; namely, the Academy and  
10 the Casualty Actuarial Society, are trying to keep  
11 the society out of competing with them in various  
12 areas of the actuarial profession, and we've  
13 alleged those in our complaint.

14 We've set forth the bases for both  
15 the breach of contract claim under the basic  
16 elements under Illinois law as we set forth in our  
17 papers as well as the declaratory judgment action.

18 As far as the defamation claim,  
19 what's interesting here, your Honor, is that I'm  
20 hearing that both sets of defendants stand on both  
21 sides of the line with respect to their clients on  
22 the one hand. For instance, Mr. Fisher wants to  
23 say: I'm protected by the not-for-profit immunity  
24 because I was acting when I sent that email in my

1 capacity as the president of the Casualty  
2 Actuarial Society. But on the other hand, with  
3 respect to his filing of the complaint with the  
4 ABCD, he must not have been acting in his capacity  
5 as the president of the CAS; therefore, the CAS  
6 should not be subject to any claims involving that  
7 disciplinary proceeding. And with all due  
8 respect, they can't have it both ways, your Honor.  
9 We think at a minimum that raises an issue of fact  
10 as to what capacity Mr. Fisher was acting when he  
11 sent that email on September 27th.

12 As far as the Academy is  
13 concerned, they take a similar attack with respect  
14 to Mr. Terry, and I think the same analysis would  
15 have to be undertaken by the Court.

16 With respect to the innocent  
17 construction rule, we don't believe that as the --  
18 the standing alone of these emails can be  
19 innocently constructed.

20 Mr. Terry's email was sent to the  
21 SOA Board, but -- and in that email, he  
22 specifically identifies that he's filed a  
23 complaint against -- he and others have filed a  
24 complaint against Mr. Freedman. He talks about --

1 THE COURT: That's a truthful  
2 statement, isn't it?

3 MR. SHEEAN: The fact that he filed a  
4 complaint, yes. But he also then says that --  
5 they want to say, well, this isn't an email about  
6 Mr. Freedman; this is an email about the SOA.  
7 Well, why then do they mention that they filed a  
8 complaint against Mr. Freedman? Clearly this  
9 email was sent where they allege that Mr. Freedman  
10 has made an untruthful statement goes directly to  
11 his integrity and does constitute a defamation per  
12 se statement.

13 With respect to Mr. Fisher's  
14 statement regarding hacking --

15 THE COURT: Counsel, if somebody said  
16 that you made a really terrible legal argument, is  
17 that defamatory?

18 MR. SHEEAN: That's an opinion, your  
19 Honor. No.

20 THE COURT: So it doesn't -- well, but  
21 these emails aren't opinions?

22 MR. SHEEAN: No, they are not, your  
23 Honor.

24 I mean, Mr. Fisher specifically

1 argues that -- states that my client engaged in  
2 hacking which is under even the most liberal  
3 construction --

4 THE COURT: Okay. I have a little  
5 difficulty with that because the recipients of the  
6 email must necessarily have known that the  
7 addresses which were used were publicly available,  
8 and the email itself says: We're going to have  
9 improve our security.

10 If hacking covers misuse, use for  
11 a purpose other than that for which we put the  
12 things out there, then okay, you know, I guess you  
13 could get the hacking. But the notion that it is  
14 using a publicly available address list to send  
15 ads is defamatory, accusing somebody of doing that  
16 is defamatory, seems a bit of a stretch.

17 MR. SHEEAN: Your Honor, with all due  
18 respect, accusing somebody of hacking in an email  
19 to the members the SOA as well as the Board of the  
20 CAS which were recipients of that email as well,  
21 with all due respect, I -- and tend to unravel it  
22 in order to suggest that, oh, well, you knew this  
23 was not hacking and therefore it's not defamatory,  
24 certainly the Board members of the CAS didn't know

1 that when it was sent out, or they didn't -- I  
2 would elect to think that if they did know that,  
3 then why is the president sending out an email  
4 alleging that he hacked them, why did he file a  
5 complaint against my client?

6 THE COURT: The Board members of the  
7 CAS weren't the recipients of the email.

8 MR. SHEEAN: They're listed as CCs on  
9 the email.

10 THE COURT: Okay. Go ahead, counsel.

11 MR. SHEEAN: Well, your Honor, again,  
12 with respect to whether or not there is any  
13 immunity, again, we believe that's a question of  
14 fact. We also believe that it's a question of  
15 fact as to whether or not the senders of those  
16 defamatory emails acted in a willful and wanton  
17 manner which would except them from the immunity  
18 provided under the general Not-For-Profit Act.

19 Your Honor, with all due respect,  
20 we believe we have set forth a complaint that  
21 demonstrates that my client is not getting a  
22 fair -- cannot get a fair hearing from the ABCD  
23 and that these complaints were brought for an  
24 improper purpose and that this Court has the power

1 and the authority under its equitable powers to  
2 intervene and to ensure that my client receives  
3 his due process rights.

4 Thank you.

5 THE COURT: Okay.

6 MR. ROBERTSON: Your Honor, do you want  
7 me to respond or not?

8 THE COURT: I don't think so.

9 MR. ROBERTSON: I'm sorry, sir?

10 THE COURT: I don't think it's  
11 necessary.

12 MR. ROBERTSON: Okay. Thank you.

13 THE COURT: By way of preface, it seems  
14 to the Court relatively clear from looking at the  
15 facts alleged in the complaint that it is ironic  
16 for the plaintiff in this litigation to claim an  
17 anticompetitive motive on the part of the  
18 defendants inasmuch as this entire flap appears to  
19 have begun through plaintiff's initiation into  
20 something into a turf war.

21 If the various parties to this  
22 litigation want to fight over who can be a member  
23 of what, that's their privilege and they can go to  
24 it. But it is a little bit ironic that plaintiff

1 having started the war now objects that other  
2 people shot back.

3 Be that as it may, there are two  
4 sets of issues raised in this complaint. The  
5 second set of issues consists of two causes of  
6 action or asserted causes of action for  
7 defamation.

8 Defamation is a cause of action at  
9 law. It carries a right to a jury on either side.  
10 This Court is a Chancery Court and has no  
11 intention of presiding over a defamation suit, let  
12 alone two of them.

13 Were the Court to retain  
14 jurisdiction over the rest of the complaint, the  
15 Court's inclination would be to stay the  
16 defamation claims until the rest of the complaint  
17 had been adjudicated and then send the case --  
18 send the rest of the case, the defamation claims,  
19 to the Law Division where, among other things, the  
20 parties' right to a jury can be accommodated. I  
21 have no jury box. It would be difficult for me to  
22 do a jury trial even if I wanted to. So I'm going  
23 to leave those defamation claims to the end.

24 The other two claims are in effect

1 requests that the Court intervene in a  
2 disciplinary proceeding before it has begun, a  
3 proceeding and the parameters of which the  
4 plaintiff agreed to in the course of the becoming  
5 a member of these various organizations and  
6 signing onto their bylaws, but the plaintiff's  
7 position apparently is that his agreement to the  
8 procedures set forth in the bylaws of the  
9 organizations for the activities of the Actuarial  
10 Board of Counseling & Discipline only applies if  
11 he likes what the Board is doing.

12 Mr. Robertson asked, and I am  
13 inclined to wonder, if that is true for  
14 Mr. Freedman, why isn't it true for anybody else  
15 involved in any of these organizations?

16 The notion that this Court should  
17 judicially supervise the activities of the  
18 Actuarial Board of Counseling & Discipline would  
19 appear to empower anybody who was the subject of  
20 any proceeding in any of these organizations to  
21 demand judicial intervention. Our court system is  
22 inclined not to want to overturn contractually  
23 agreed upon alternative dispute resolution  
24 mechanisms without some reason to do it.

1                   Let me begin, however, by  
2                   outlining the situation:

3                   The two defendants, the American  
4                   Academy of Actuaries and the Casualty Actuarial  
5                   Society, are two of the five actuarial membership  
6                   organizations in the US. Defendant Thomas Terry  
7                   is the current president of the Academy.  
8                   Defendant Wayne Fisher is the current president of  
9                   the Casualty Actuarial Society or the CAS.

10                  Plaintiff Mr. Freedman is a member  
11                  and former president of a third actuarial  
12                  membership organization, the Society of Actuaries.  
13                  Mr. Freedman is also a member of the Academy. All  
14                  three of these organizations are private  
15                  voluntarily professional associations.

16                  The Academy promulgates a code of  
17                  professional conduct for actuaries. The Actuarial  
18                  Board of Counseling & Discipline, or ABCD, is the  
19                  body housed within the Academy, charged with  
20                  processing and investigating complaints alleging  
21                  code violations.

22                  Importantly all five of the US  
23                  actuarial organizations which includes the  
24                  Academy, CAS, and the Society of Actuaries have

1 adopted the code and have delegated to the ABCD  
2 responsibility for investigating and evaluating  
3 alleged code violations by their members.

4 Mr. Freedman is, of course, a member of the  
5 Society of Actuaries and also of the American  
6 Academy of Actuaries.

7           The ABCD is authorized to  
8 establish rules and procedures and operating  
9 guidelines not inconsistent with Academy bylaws.  
10 Under the Academy bylaws, the Academy provides the  
11 ABCD with counsel and administrative staff. Since  
12 its inception, the ABCD has had dedicated legal  
13 counsel employed by the Academy to advise on legal  
14 and procedural issues affecting the ABCD and its  
15 investigators. The ABCD may also retain outside  
16 counsel for assistance as needed.

17           The ABCD consists of nine persons  
18 who are appointed from the membership of the  
19 participating organizations which, you will  
20 recall, are the five US actuarial membership  
21 organizations. ABCD members are appointed to  
22 serve three-year terms by a ten-person selection  
23 committee consisting of the president and  
24 president-elect of each of the five organizations.

1           The ABCD receives complaints and  
2 makes initial determinations on whether the  
3 complaints states a potential material violation  
4 of the code. If the ABCD determines a complaint  
5 does not state a potential code violation, it  
6 dismisses the complaint. If the ABCD determines  
7 that a complaint does state a potential code  
8 violation, the ABCD appoints an individual to  
9 investigate facts and report to the ABCD. After  
10 reviewing the investigator's report, the ABCD can  
11 then decide whether to dismiss the complaint or to  
12 hold a factfinding hearing.

13           It will have occurred to anyone at  
14 this point that so far the ABCD hasn't actually  
15 done anything. And even if the ABCD gets to the  
16 point of holding a factfinding hearing, the ABCD  
17 itself still can't do anything.

18           Following a factfinding hearing,  
19 the ABCD may decide to dismiss the matter, to  
20 counsel the actuary, or to recommend discipline to  
21 the subject actuary's member organization.

22           Note that the ABCD itself has no  
23 power to impose any discipline on any actuary;  
24 rather, each organization then decides whether to

1 impose any discipline on its member who is the  
2 subject of the proceeding.

3           The ABCD does have procedures  
4 safeguarding actuaries facing disciplinary  
5 complaints, including notice to the actuary and an  
6 opportunity to comment on the matter before the  
7 ABCD determines whether an investigation should be  
8 initiated, an opportunity to object for cause in  
9 writing to any of the investigators appointed by  
10 the ABCD, an opportunity to comment on an  
11 investigative report, and notice of any hearing to  
12 be conducted by the ABCD and an opportunity to be  
13 heard.

14           As to members of the Academy, the  
15 Academy bylaws provide that the disciplinary  
16 committee within the Academy will consider and act  
17 upon recommendations from the ABCD concerning  
18 Academy members.

19           The member who is the subject of a  
20 disciplinary recommendation from the ABCD, who,  
21 you will recall, has already had a right to a  
22 hearing before the ABCD, has a further right to  
23 appear before the Academy's disciplinary committee  
24 to explain why the ABCD's recommendation should

1 not be followed.

2           The member also has the right to  
3 appeal any discipline which his or her  
4 organization may choose to impose based on a  
5 recommendation by the ABCD.

6           This lawsuit arises out of a  
7 program the SOA, under Mr. Freedman's aegis, began  
8 in 2013. Both the SOA and CAS have a two-tiered  
9 membership structure. Associates are junior  
10 proficiency in training to members who are  
11 fellows. An SOA fellow can specialize in one of  
12 six different tracks across industries and  
13 disciplines including, among other things, general  
14 insurance. CAS members are generally focused  
15 exclusively on the general insurance discipline.

16           In 2013, the SOA Board of  
17 Directors approved a program that would allow CAS  
18 members to join SOA's general insurance track  
19 without having to complete the otherwise required  
20 exams that SOA members who were not CAS members  
21 would have to take to join SOA's general insurance  
22 track. This meant that CAS fellows could also  
23 become SOA fellows simply by applying to SOA and  
24 paying the membership fee.

1                   On September 17, 2014,  
2 Mr. Freedman sent an email to CAS members  
3 announcing the SOA program. SOA staff members  
4 obtained the CAS members' emails from CAS' website  
5 which included a public directory of all of its  
6 members. There was pushback, surprisingly.

7                   In response to this, two  
8 disciplinary complaints were lodged with the ABCD  
9 against Mr. Freedman. One of them was filed by  
10 Mr. Terry and three others. Another was filed by  
11 Mr. Fisher.

12                   The Terry complaint was filed on  
13 September 26, 2014. It alleges that  
14 Mr. Freedman's September 17th email violated the  
15 code because, among other things, it contained --  
16 it is alleged to have contained misrepresentations  
17 about the value of SOA credentials and the ability  
18 of US actuaries holding those credentials to  
19 change practice areas.

20                   Additionally on September 27th,  
21 Mr. Terry sent an email to the SOA Board of  
22 Directors stating that Mr. Freedman's September  
23 17th email to CAS members was, quote, a deliberate  
24 and self-serving misrepresentation of what it

1 takes for a US actuary to move from one practice  
2 area to another, end of quote, and that, quote, by  
3 misrepresenting the process as he does, Mark is  
4 signalling the SOA values commercial ambitions  
5 over professional integrity, end of quote. The  
6 language I have just quoted is part of one of the  
7 defamation claims in this case.

8           On September 23, 2014, Mr. Fisher,  
9 president of the CAS, sent an email to SOA Board  
10 members which stated, quote, I expect that our  
11 members will be thoroughly annoyed about this  
12 hacking of our membership data and hence the need  
13 for increased security measures for our contacts'  
14 data. This reflects poorly on the profession. I  
15 don't believe that this will reflect favorably at  
16 all on the SOA, either, quite the opposite, and  
17 this action may well be a violation of Precept 1  
18 of the code of professional conduct, end of quote.  
19 That language which I just quoted is the subject  
20 of the other defamation claim at issue in this  
21 case.

22           On October 1, 2014, Mr. Fisher  
23 filed his complaint with the ABCD alleging that  
24 Mr. Freedman violated Precept 1 of the code by,

1 without permission, accessing and downloading CAS  
2 members' email addresses and using those email  
3 addresses to send his September 17th email to CAS  
4 members.

5           You will recall that the SOA Board  
6 of Directors was the primary recipient of the two  
7 emails, one from Mr. Terry and one from Mr. Fisher  
8 which were quoted a moment ago.

9           On October 20, 2014, the SOA Board  
10 of Directors adopted a resolution supporting  
11 Mr. Freedman and asserting that the Terry and  
12 Fisher complaints to the ABCD were in the opinion  
13 of SOA Board of Directors, quote, baseless and  
14 without permit, end of quote.

15           The SOA Board of Directors'  
16 resolution also acknowledged the role of the SOA's  
17 staff and leadership in sending the September 17th  
18 email and obviously in obtaining the email  
19 addresses of CAS members to which to send that  
20 email.

21           The SOA Board directed its counsel  
22 to submit the SOA Board's October 20th resolution  
23 to the ABCD. Mr. Freedman then sought dismissal  
24 of the Terry and Fisher complaints under the ABCD

1 rules of procedures. The ABCD notified  
2 Mr. Freedman that its initial disposition was that  
3 further inquiry should be conducted and appointed  
4 an investigator.

5 As of now, that's about as far as  
6 it's gotten with one exception which I will  
7 address.

8 On December 8, 2015, Mr. Freedman  
9 filed his four-count complaint before this Court:

10 Count I of Mr. Freedman's  
11 complaint asserts that the Academy through ABCD  
12 breached its rules of procedure and bylaws by,  
13 among other things, selecting James MacGinnitie as  
14 the investigator to look into the Terry and Fisher  
15 complaints which had been filed with the ABCD.  
16 That's moot.

17 Mr. Freedman complained that  
18 Mr. MacGinnitie was not an appropriate  
19 investigator. The ABCD said okay, and the ABCD, I  
20 am advised in the briefing, has now appointed a  
21 replacement investigator who is, in fact,  
22 acceptable to Mr. Freedman.

23 So what we have at this point is  
24 the very beginning of a procedure for the

1 application of which Mr. Freedman and the other  
2 members of these organizations contracted which so  
3 far has done nothing other than initiate an  
4 investigation, which may go nowhere, and accepted  
5 Mr. Freedman's objection to an initial  
6 investigator and replaced that person with  
7 somebody who was acceptable to Mr. Freedman.

8           Yet this Court is asked at that  
9 early stage and before anything has happened,  
10 before the investigation has been conducted, much  
11 less terminated, this Court is asked apparently to  
12 take the whole thing over. The caselaw does not  
13 support that sort of early drastic intervention by  
14 a judicial body in a membership organization's  
15 internal agreed upon disciplinary procedure.

16           It is manifest, and Mr. Freedman  
17 concedes, that he is a long way from having  
18 exhausted his remedies within the ABCD or before  
19 the ABCD. Indeed even if the ABCD ultimately  
20 comes out with something that Mr. Freedman regards  
21 as adverse to him, that in itself cannot lead to  
22 any actual discipline anyway and there has to be  
23 another step before the Academy in connection with  
24 which Mr. Freedman can in effect ask for a

1 do-over.

2                   The parties correctly invoke Logan  
3 versus 3715 North Lake Shore Drive, 17 Ill.App.3d  
4 584, which held at Page 587 that a member of a  
5 voluntary association necessarily agrees to the  
6 reasonable rules and regulations of the  
7 association and further held that, quote, it is  
8 well-established that members of voluntary  
9 associations are required to exhaust their  
10 internal remedies prior to instituting legal  
11 action to enforce certain rights, end of quote.

12                   In that regard, it is true, as  
13 Mr. Freedman asserts, that courts distinguish  
14 between controversies concerning proprietary  
15 rights of members and controversies concerning the  
16 discipline policy or doctrine of the association.  
17 The rationale for the distinction is set forth in  
18 some detail in Logan at Page 588 of 17 Ill.App.3d,  
19 and the Logan Court squarely holds that, quote,  
20 with regard to discipline, policy, or doctrine of  
21 an association, the doctrine of exhaustion of  
22 internal remedies as we now know it became a  
23 practical necessity, end of quote.

24                   This requirement does not

1 ultimately deprive a member of such an association  
2 of a judicial remedy. It does require the member,  
3 however, to pursue the course to which the member  
4 contractually agreed before complaining about it  
5 and suggests, as we do in the numerous other areas  
6 in which exhaustion of nonjudicial remedy is  
7 required, that it is better to solve a problem  
8 outside the courthouse than inside the courthouse  
9 and certainly better to let an agreed upon  
10 external procedure work itself through rather than  
11 asking the court system to overturn it in mid  
12 process.

13           The Logan case was an exception to  
14 the Logan rule insofar as it involved a denial of  
15 a plaintiff's request to sublet her apartment  
16 which, as it happens, violated a specific  
17 provision in the plaintiff's lease that allowed  
18 her to sublet her apartment.

19           One can contrast that with  
20 proceedings involving subletting of apartments in  
21 cases where a plaintiff's lease or unit ownership  
22 does not specifically authorize the permission to  
23 sublet an apartment.

24           There is plenty of the latter

1 going on within condominium associations, even in  
2 Chicago. In fact, it's a topic of great interest  
3 to a number of condo owners, whether subletting is  
4 a good or a bad idea. It is not a judicial  
5 process unless and until it has worked its way  
6 entirely through the condominium process.

7 Ms. Logan was different because  
8 she had a pre-existing lease. There is no such  
9 pre-existing proprietary right at issue in this  
10 case.

11 In this case, both the Terry and  
12 Fisher complaints involve purely a matter of  
13 internal discipline, alleged violations of the  
14 code.

15 The ABCD has in no sense arrived  
16 at a conclusion. It is in the process of  
17 conducting the equivalent of a preliminary  
18 investigation. It's entirely possible that after  
19 reviewing the investigator's report or after a  
20 factfinding hearing, at either stage Mr. Freedman,  
21 of course, has a right to be heard, the ABCD may  
22 decide that no code violation actually occurred  
23 and dismiss the complaint.

24 Mr. Freedman, as is apparent from

1 his counsel's reference to the whole proceeding as  
2 a kangaroo court, is apparently of the view that  
3 an unfavorable ABCD finding is a foregone  
4 conclusion. However, the Court has no evidence  
5 that that is the case, and the procedures of the  
6 ABCD which I outlined earlier appear to be  
7 evenhanded and to afford ample opportunity for the  
8 subject of an ABCD complaint or investigation to  
9 be heard.

10 The ABCD can still find in  
11 Mr. Freedman's favor. As such, his claims here  
12 are premature.

13 Mr. Freedman's contention that he  
14 shouldn't have to bear the cost and expense of  
15 proceeding in front of the ABCD because he can't  
16 get a fair hearing does not provide a basis for  
17 judicial intervention. If that were the case,  
18 then anyone aggrieved by an administrative process  
19 conducted by an agency which he thinks is out to  
20 get him should be able to ignore the  
21 administrative process entirely, resort directly  
22 to the Court, and tell the agency to back off.  
23 That's not the law.

24 We wait to determine prejudice

1     until we have a record on which to base such a  
2     determination.

3                     Here, the record is still in the  
4     process of being made, and, to date, the one  
5     objective thing that's happened which is the  
6     replacement at Mr. Freedman's insistence of one  
7     investigator by another one who is acceptable to  
8     him hardly smacks at prejudice.

9                     I conclude, therefore, that  
10    although Mr. Freedman may ultimately be able to  
11    assert some claim or other with regard to the  
12    process which has barely begun, his claim is not  
13    yet written and indeed, and this is an important  
14    point from the standpoint of judicial efficiency,  
15    his claim is actually unknown. He is afraid that  
16    somebody is going to do something he doesn't like,  
17    but he can't tell us what because it hasn't  
18    happened yet. Courts don't do well at guessing,  
19    and this Court declines to guess.

20                    For that reason, the Court's  
21    exercise of choice between dismissing Counts I and  
22    II without prejudice on the one hand and staying  
23    Counts I and II on the other hand should be  
24    exercised in favor of dismissing Counts I and II

1 without prejudice.

2           If and when Mr. Freedman has a  
3 cognizable complaint with regard to something that  
4 happens to him in the course of this process, what  
5 he would have to do in order to raise it clearly  
6 would be to amend Count I and/or Count II anyway  
7 in order to assert specifically the thing that has  
8 happened as opposed to speculate about what might  
9 happen.

10           The only potential downside of a  
11 dismissal without prejudice on the ground of  
12 prematurity is that one might think that it is  
13 subject to the one-year refiling provision of Code  
14 Section 13-217, but it seems to me that that is  
15 inaccurate.

16           In the first place, we're not  
17 talking here about one of the kinds of things  
18 which Code Section 13-217 applies to. And in the  
19 second place, today's order which will dismiss  
20 Counts I and II without prejudice, number one,  
21 won't be a final judgment because we haven't dealt  
22 with Counts III and IV yet, and, number two, in  
23 any case it's going to state without prejudice to  
24 refiling if and when a cognizable cause of action

1 is asserted after exhaustion of administrative  
2 remedies. So the condition to refiling will be  
3 clearly stated in the order, and Mr. Freedman will  
4 have no risk that he is going to run out of room  
5 in the meantime.

6 That brings me to Counts III and  
7 IV. I said at the outset that a Chancery  
8 courtroom is not a good place to try a defamation  
9 claim. And since I have dismissed without  
10 prejudice as to Counts I and II, the  
11 non-defamation claims, I think the proper course  
12 is for me to transfer the remaining causes of  
13 action in Counts III and IV to the Law Division.

14 I have worked through the motions  
15 to dismiss the defamation claims, and I am not  
16 without opinions as to those motions and the  
17 opposition to them.

18 But when I was sitting on the  
19 commercial calendar section of the Law Division, I  
20 would get lots of cases from the Chancery  
21 Division, and it used to irritate me that some  
22 other judge's fingerprints were all over the  
23 issues that I was going to have to decide.

24 So what I will do is keep my mouth

1 shut and enter and continue the portions of the  
2 motions to dismiss which address the defamation  
3 counts so that they can be ruled on by a judge in  
4 the Law Division who will ultimately be presiding  
5 over those counts. It seems to me that that's the  
6 best way to go.

7 So that will be today's order.

8 Thank you all.

9 MR. KISH: Thank you, your Honor.

10 MR. SHEEAN: Thank you, your Honor.

11 MR. ROBERTSON: Thank you, your Honor.

12 (WHEREUPON, these proceedings were  
13 concluded at 10:59 a.m.)

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1 STATE OF ILLINOIS )  
 ) SS:  
2 COUNTY OF C O O K )

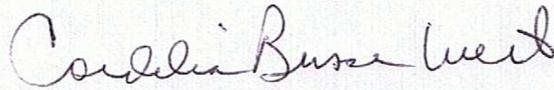
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I, CORDELIA BUSSE WERT, a Certified Shorthand Reporter, do hereby certify that I reported in machine shorthand the proceedings had on February 24, 2015, in the above-entitled cause, that I thereafter caused the foregoing to be transcribed which I hereby certify to be a true and accurate report of proceedings had before the Honorable Peter A. Flynn, Judge of said Court.

\_\_\_\_\_  
Cordelia Busse Wert  
IL Lic. No. 84-2985

1 STATE OF ILLINOIS )  
 ) SS:  
2 COUNTY OF C O O K )  
3

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15 Cordelia Busse Wert  
16 IL Lic. No. 84-2985  
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