

**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

**DEFENDANTS AMERICAN ACADEMY OF ACTUARIES AND THOMAS TERRY  
COMBINED MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS**

Defendants American Academy of Actuaries (the “Academy”) and Thomas Terry (“Terry”) submit this memorandum in support of their motion to dismiss 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 Complaint purports to assert claims against the Academy and Terry arising from two disciplinary complaints filed against him with the Actuarial Board for Counseling and Discipline (“ABCD”). Two claims are against the Academy – one alleging breach of contract (Count I) and the other seeking a declaratory judgment (Count II)<sup>1</sup> – and must be dismissed for two reasons. First, Freedman must exhaust the internal disciplinary processes of the Academy before seeking judicial intervention. Second, Freedman’s Complaint does not identify a single Academy bylaw or ABCD procedural rule that has been breached or violated. Rather, without

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<sup>1</sup> Freedman also asserts his declaratory judgment claim (Count II of the Complaint) against Terry. Terry, therefore, joins the Academy in seeking dismissal of that claim for the reasons stated herein.

any supporting factual allegations, Freedman contends that he will be deprived of a fair hearing on the disciplinary complaints if he must follow established disciplinary procedures. Such conclusory statements do not state a claim for relief.

Count IV (Defamation Per Se) of the Complaint alleges that Terry defamed Freedman in a September 27, 2014 e-mail message to the Board of Directors of the Society of Actuaries (“SOA”), a professional association of which Freedman was then serving as President. That putative claim also fails for two reasons. First, Terry was both an officer and director at the Academy when he sent the message in question. As such, section 108.70(a) of the Illinois General Not for Profit Corporation Act, 805 ILCS 105/108.70(a), bars damages claims against him. Second, the e-mail statements that Freedman challenges are not defamatory on their face and are, in any event, shielded by the “innocent-construction” rule. Count IV should be dismissed as well.

#### **FACTS RELEVANT TO THIS MOTION**

Freedman is a member and former President of the SOA. Complaint (“Comp.”) ¶ 19. He is also a member of the Academy. *Id.* Both the Academy and SOA are private, voluntary, professional associations, but neither licenses actuaries; a U.S. actuary may practice without being a member of either organization. *See id.* ¶ 12. The Academy is organized under the Illinois General Not for Profit Corporation Act, Affidavit of Mary Downs (“Downs Aff.”) ¶ 5 & Ex. A (attached hereto as Exhibit 1); *see also* Bylaws of the American Academy of Actuaries (“Bylaws”) (Comp. Ex. M) (caption noting that the Academy is “A Corporation Organized Under the Illinois General Not for Profit Corporation Act”), and is exempt from federal income taxation under section 501(c)(6) of the Internal Revenue Code. Downs Aff. ¶ 6 & Ex. B. The Academy promulgates a Code of Professional Conduct (the “Code”) for actuaries and has created the ABCD to process and investigate complaints alleging Code violations. Comp. ¶¶ 18,

50. All five U.S. actuarial organizations, including the Academy, the SOA and Defendant Casualty Actuarial Society (“CAS”), have adopted the Code, and all have delegated to the ABCD responsibility for considering alleged Code violations by their members. *Id.* ¶¶ 13, 18, 50-52.

The ABCD is housed in the Academy because the Academy is the long-standing professional organization established to provide for the self-regulation of the U.S. actuarial profession. *Id.* ¶¶ 18, 50-52, 58. The ABCD is authorized to establish Rules of Procedure (“ABCD Rules”), *see* Comp. Ex. N, and operating guidelines not inconsistent with the Academy bylaws, *see* Bylaws, art. X, § 1.B (Comp. Ex. N). Under the Academy bylaws, the ABCD uses Academy staff for necessary legal, logistical, and technical support, and may retain outside counsel for assistance, as needed. *Id.* art. X (Comp. Ex. M). ABCD members are appointed to serve three-year terms by a ten-person selection committee consisting of the President and President-Elect of each of the five U.S. actuarial organizations, including the SOA. Comp. ¶ 18; Bylaws, art. X, § 2.A-B (Comp. Ex. M).

Like some other professional self-regulatory bodies, the ABCD receives complaints, makes initial determinations on whether a complaint states a potential material violation of the Code, and if so, appoints an individual to investigate the facts and report to it. Bylaws, art. X, § 1.A (Comp. Ex. M). Consistent with its bylaws, the Academy provides the ABCD with counsel and administrative staff. Comp. ¶¶ 51, 58; Bylaws, art. X, §§ 7-8 (Comp. Ex. M). Since its inception, the ABCD has had dedicated legal counsel employed by the Academy to advise on legal and procedural issues affecting the ABCD and its investigators. Comp. ¶ 51; Bylaws, art. X, §§ 7-8 (Comp. Ex. M).

The dispute here grows out of two disciplinary complaints filed against Freedman – one by Defendant Terry and three others (the “Terry Complaint”), *see* Comp. Ex. E, and one by

Defendant Wayne Fisher (the “Fisher Complaint”), *see* Comp. Ex. G. At all relevant times, Terry was President of the Academy and on its board of directors. Comp. ¶¶ 5, 31; Affidavit of Mark Freedman filed with Plaintiffs’ Motion for Preliminary Injunction (“Freedman Aff.”) ¶ 23; Downs Aff. ¶ 7. Terry received no compensation for his service to the Academy other than “reimbursement of expenses only for specific travel-related expenses deemed useful to carrying out the work of the Academy.” *Id.* ¶ 9; *see also id.* ¶ 8.

The Terry Complaint alleges that a September 17, 2014 e-mail signed by Freedman and sent to members of the CAS violates the Code because, among other things, it contains misrepresentations about the value of SOA credentials and the ability of U.S. actuaries holding those credentials to change practice areas. Comp. Ex. E. The Fisher Complaint makes similar allegations and asserts that Freedman engaged in other conduct that violates the Code. Comp. Ex. G. As was his right under the ABCD’s rules of procedure, Freedman sought dismissal of the Terry and Fisher Complaints. Comp. Ex. H. The ABCD notified Mr. Freedman that its “initial disposition” was that further inquiry should be conducted and thus an investigator appointed.<sup>2</sup> Freedman Aff. Ex. 11. Under the ABCD’s rules, Freedman will have an opportunity to respond to the investigator’s report and an opportunity to be heard by the ABCD before it makes any determination about whether a Code violation has occurred. *Id.*; ABCD Rules §§ V.E-F, VII.B-C (Comp. Ex. N). To date, the ABCD has made no finding that Freedman violated the Code in any way and has not recommended any discipline.

On September 27, shortly after filing the disciplinary complaint with the ABCD, Terry sent an e-mail to the SOA Board of Directors in which he asserted that Freedman’s September 17 e-mail to CAS members “is a deliberate and self-serving misrepresentation of what it takes for a

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<sup>2</sup> Under the ABCD Rules, Mr. Freedman may object to the identity of the investigator for cause, ABCD Rules § V.B (Comp. Ex. N); Freedman Aff. Ex. 11, and he has, in fact, done so. The ABCD has not yet resolved that objection.

US actuary to move from one practice area to another” and that “[b]y misrepresenting the process as he does, Mark is signaling that the SOA values commercial ambitions over professional integrity.” Comp. ¶ 32, Ex. F. Freedman asserts in conclusory terms that both statements are defamatory per se and harmed his reputation in the actuarial profession, *id.* ¶¶ 97-98, but does not allege any facts in support of those assertions. Notwithstanding the alleged injury to his reputation, on October 20, 2014, the SOA board of directors adopted a resolution supporting Freedman and asserting that the Terry and Fisher Complaints were, in its view, “baseless and without merit.” *Id.* Ex. J. The SOA board also directed its counsel to submit that resolution to the ABCD. *Id.* Ex. H.

### LEGAL STANDARD

Section 2-615 of the Illinois Code of Civil Procedure provides for a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. 735 ILCS 5/2-615. Because Illinois is a fact-pleading jurisdiction plaintiff must allege facts sufficient to bring its claim within a legally recognized cause of action. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426-27 (1982); *Vernon v. Schuster*, 179 Ill. 2d 338, 344(1997). Failure to allege facts to support plaintiff’s allegations may not be cured by a liberal construction of the complaint. *Carter v. New Trier East High School*, 272 Ill. App. 3d 551, 555 (1st Dist. 1995).

In considering a motion to dismiss under 2-615, the court must accept all well-pleaded facts in the complaint, however, “[c]onclusions of law and conclusions of fact unsupported by specific factual allegations are not taken as true.” *Griffin v. Universal Cas. Co.*, 274 Ill. App. 3d 1056, 1063 (1st Dist. 1995). In short, a complaint that fails to contain *all* required factual allegations must be dismissed for failure to state a claim. *See id*; *see also Keef v. Widuch*, 321 Ill. App. 3d 571, 581 (1st Dist. 2001).

A motion to dismiss filed pursuant to section 2-619(a)(9) admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or matter outside of the pleading that avoid or defeats the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). The affirmative defense or matter negates a cause of action completely or refutes crucial conclusions of law or material fact unsupported by allegations of specific fact contained in the complaint. *Glass Specialty Co., Inc. v. Litwiller*, 147 Ill. App. 3d 653, 655 (1986). When ruling on a motion to dismiss pursuant to 2-619, a court must accept as true all well-pleaded facts, "but a court cannot accept as true mere conclusion unsupported by specific facts." *Patrick Engineering, Inc. v. Naperville*, 364 Ill. Dec. 40, \*51 (2012). The purpose of a Section 2-619 motion is to provide a mechanism to obtain summary disposition of issues of law or easily proved issues of fact. *Downey v. Wood Dale Park Dist.*, 286 Ill. App. 3d 194, 199 (2d Dist. 1997).

## ARGUMENT

### **COUNTS I, II, AND IV MUST BE DISMISSED PURSUANT TO 735 ILCS 2-615**

#### **I. FREEDMAN HAS NOT EXHAUSTED HIS INTERNAL REMEDIES AND HAS NOT ALLEGED THAT THE ACADEMY OR TERRY HAS BREACHED ANY CONTRACT WITH HIM**

Freedman's Complaint alleges two claims related to the ABCD's process. Count I (Breach of Contract) claims that the Academy has breached a contract with Freedman because it has failed to provide him an unbiased disciplinary procedure. Count II (Declaratory Judgment) seeks a declaration against the Academy and Terry, again alleging that the process for handling the proceedings against Freedman is biased and asserting that he has not violated the Code. Both counts fail because Freedman must exhaust his internal remedies before seeking judicial relief. He has not done so. Counts I and II should be dismissed with prejudice on that basis alone. In addition, both counts fail because they do not allege any facts showing that the Academy or

Terry breached any contract with Freedman. In fact, Freedman's Complaint and its attachments demonstrate the opposite: Freedman is being given all of the procedural protections to which he is entitled under the Bylaws and ABCD Rules. To the extent Counts I and II seek a declaration that Freedman has not violated the Code, substantive decisions on disciplinary complaints are for resolution by the private association itself, not the courts.

**A. Freedman Must Exhaust His Internal Remedies Before Seeking Judicial Relief**

Courts are reluctant to interfere with the disciplinary decisions of private voluntary associations. *Butler v. USA Volleyball*, 285 Ill. App. 3d 578, 583 (1st Dist. 1996); *see also Nat'l Ass'n of Sporting Goods Wholesalers, Inc. v. F.T.L. Mktg. Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985) ("Under Illinois law, a court ordinarily will not review the actions of a voluntary association with respect to its members"). "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." *Logan v. 3750 North Lake Shore Drive, Inc.*, 17 Ill. App. 3d 584, 587 (1st Dist. 1974) (citing *Johnson v. Schubert*, 40 Ill. App. 2d 467, 476 (1st Dist. 1963)); *see also Engel v. Walsh*, 258 Ill. 98, 105 (1913) (union member not entitled to judicial review of fine imposed by union without first exhausting internal remedies afforded by the union). Freedman, as a member of the Academy and SOA, must comply with the rules and regulations of those organizations. *Logan*, 17 Ill. App. 3d at 587 ("A member of a voluntary association necessarily agrees to the reasonable rules and regulations of the order."). Among those rules is submission to the ABCD for resolution of disciplinary complaints. Comp. ¶¶ 13, 18, 50-52; Bylaws, art. IX, §1.B (Comp. Ex. M). Having accepted the benefits of Academy and SOA membership, Freedman must submit to the ABCD's processes before invoking the jurisdiction of this Court. *See Logan*, 17 Ill. App. 3d at 587. Since the ABCD process is not complete (and Freedman does not allege otherwise), Counts I and II of his Complaint should be dismissed with prejudice. *See*

also *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502, 506 (7th Cir. 2000) (Posner, J.) (“The time to challenge an arbitration, on whatever grounds, including bias, is when the arbitration is completed and an award rendered.”).

**B. Freedman Has Not Been Denied Any Procedural Protections**

Even on their merits, Counts I and II fail. In Count I, Freedman alleges that Academy breached a contract with him in four respects: (1) the participation of Defendant Terry and Mary Miller, current President of the Academy and a signatory to the Terry Complaint, in the appointment of three members to the ABCD while their disciplinary complaint against Freedman was pending, Comp. ¶ 75a; (2) failure to dismiss the disciplinary complaints against Freedman, *id.* ¶ 75b; (3) the ABCD’s reliance on counsel employed by the Academy, *id.* ¶ 75c; and (4) appointment of James MacGinnitie to investigate the complaints against him. *Id.* ¶ 75d. Count II largely repeats these points and additionally seeks a declaration that Freedman has not violated the Code. None of these allegations evince any breach of contract or other legal wrong.

*First*, that two complainants participated in the appointment of ABCD members does not show that the members of the ABCD are biased against Freedman. Illinois courts have held as a matter of law that a complainant may sit on a voluntary association’s disciplinary body that decides whether a sanction will be imposed on a member. *Werst v. Three Fires Council of Boy Scouts of Am.*, 346 Ill. App. 3d 706, 717-18 (2d Dist. 2004). Freedman does not allege that the appointment of the three ABCD members or Terry’s and Miller’s participation in the meeting at which the appointment was made violates any Bylaw or ABCD Rule.

*Second*, the ABCD’s refusal to dismiss the complaints is not judicially reviewable. “Absent a violation of law or public policy, Illinois courts refrain from examining the substance of voluntary associations’ actions or regulations.” *Butler*, 285 Ill. App. 3d at 583 (citing *Werner v. International Ass’n of Machinists*, 11 Ill. App. 2d 258, 272, 275 (2d Dist. 1956); *Yeomans v.*



*Union League Club of Chicago*, 225 Ill. App. 234, 237 (1st Dist. 1922)). A decision not to dismiss a complaint is not final and results in no recommendation of discipline. ABCD Rules § III.B (Comp. Ex. N). Freedman cites no statute or public policy that has allegedly been violated by that decision. Instead, he asks the Court to substitute its judgment for that of the ABCD. Courts do not review interlocutory steps taken by professional disciplinary committees in the course of their proceedings. *See Butler*, 285 Ill. App. 3d at 583. Indeed, were they to do so, internal disciplinary proceedings would be brought to a standstill while disagreements over interim decisions were litigated piecemeal. *See Logan*, 17 Ill. App. 3d at 588-89 (noting the rationale for the exhaustion doctrine).

**Third**, the Academy's employment of counsel for the ABCD does not breach any agreement between Freedman and the Academy. Indeed, Freedman's Complaint does not identify any Academy bylaw or ABCD rule of procedure precluding the Academy from employing counsel for the ABCD. As the Complaint asserts, the ABCD is housed within the Academy. Comp. ¶¶ 18, 50-52, 58. All five U.S. actuarial associations, including the SOA and the Academy, have delegated responsibility to process and investigate complaints to that body. *Id.* ¶¶ 13, 18, 50-52. The ABCD needs legal counsel, and that counsel must be employed by some entity. That such counsel works for the Academy follows directly from the fact that the ABCD resides within the Academy structure. Nothing in such an arrangement violates the Academy's bylaws or the ABCD's Rules of Procedure or deprives Freedman of any procedural protections to which he is entitled.

**Fourth**, Freedman's claim concerning the appointment of James MacGinnitie to investigate the disciplinary complaints simply repeats the assertion that the disciplinary complaints against him should have been dismissed. Under the ABCD's Rules of Procedure, when a disciplinary complaint is not dismissed, the ABCD appoints an investigator to look into

the underlying facts. ABCD Rules § III.B.4 (Comp. Ex. N). That is what happened here. Freedman apparently believes that Mr. MacGinnitie is biased, Comp. ¶ 71, but even accepting that conclusory assertion at face value, it still states no claim against the Academy. Under the ABCD Rules, Freedman may object to the investigator's appointment for cause and has, in fact, done so. ABCD Rules § V.B (Comp. Ex. N). The ABCD will resolve that question during its proceedings. Once again, Freedman is receiving the procedural protection to which he is entitled under the Academy's bylaws and the ABCD Rules.

*Finally*, to the extent that Freedman seeks to have this Court adjudicate the merits of the disciplinary complaints against him, *see* Comp. ¶¶ 83-85 (seeking declaration that his actions challenged in the disciplinary complaints do not violate the Code), he is in the wrong forum. Illinois courts do not adjudicate the substance of disciplinary complaints filed with voluntary professional associations. *See Butler*, 285 Ill. App. 3d at 583. Resolution of the merits of those matters lies with the ABCD and each of the associations of which Freedman is a member, not this Court. *Id.* Counts I and II of Freedman's Complaint state no claim against the Academy or Terry. They should be dismissed.

## **II. FREEDMAN'S DEFAMATION CLAIM AGAINST DEFENDANT TERRY FAILS AS A MATTER OF LAW BECAUSE IT DOES NOT ALLEGE THAT TERRY MADE ANY DEFAMATORY STATEMENT**

Count IV (Defamation Per Se) of Freedman's Complaint alleges that Defendant Terry defamed Freedman by making certain statements to the SOA board. That count fails because it fails to allege that Terry made any actionable defamatory statement.

Defamation per se must be alleged with particularity. *Green v. Rogers*, 234 Ill. 2d 478, 495 (2009) ("Like a common law fraud claim, a defamation *per se* claim must be pled with a heightened level of precision and particularity."). "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the

defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages.” *Id.* (citing *Krasinski v. United Parcel Serv.*, 124 Ill. 2d 483, 490 (1988)). Statements are defamatory only if they “tend[ ] to cause such harm to the reputation of another in that it lowers that 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). To be defamatory per se, such harm must be apparent and obvious *on the face* of the statements. *Green*, 234 Ill. 2d at 491. Freedman’s allegations do not meet these requirements.

#### **A. Terry’s Statements Are Not Defamatory**

Freedman challenges only two statements in Terry’s September 26 e-mail to the SOA Board of Directors: (1) “The e-mail [referring to Freedman’s September 17 e-mail sent to CAS members] is a deliberate and self-serving misrepresentation of what it takes for a US actuary to move from one practice area to another” and (2) “By misrepresenting the process as he does, Mark is signaling that the SOA values commercial ambitions over professional integrity.” Comp. ¶ 97, Ex. F. Neither is defamatory. “The preliminary construction of an allegedly defamatory statement is a question of law.” *Green*, 234 Ill. 2d at 492. A statement is defamatory per se only if it falls into one of five categories: (1) those imputing the commission of a criminal offense; (2) those imputing infection with a communicable disease which, if true, would tend to exclude one from society; (3) those imputing inability to perform or want of integrity in the discharge of duties of office or employment; (4) those prejudicing a particular party in his or her profession or trade; and (5) those stating false accusations of fornication or adultery. *Dunlap*, 298 Ill. App. 3d at 338. Only categories (3) and (4) are conceivably applicable here, but neither

of the challenged statements, when read in context, can reasonably be construed as harming Freedman's reputation as an actuary.<sup>4</sup>

On its face, the first statement says nothing about Freedman; it states that the "e-mail" is a misrepresentation of what is necessary for a U.S. actuary to move from one practice area to another. In fact, the previous statement attributes the e-mail to SOA, not to Freedman. The second statement references Freedman but makes clear that Terry believes the e-mail in question signals SOA's values, not Freedman's. Again, the statement on its face does not address Freedman's "integrity" or his professional competence in any fashion. Moreover, the SOA Board adopted a resolution expressly supporting Freedman and setting forth its view that his statements in the September 17 e-mail were not false, misleading or subject to discipline under the Code. Comp. Ex. J. Given this action, which occurred both after Terry's e-mail in question and the filing of his disciplinary complaint against Freedman, Terry's statements plainly caused Freedman no reputational harm. They do not meet the standard for defamation *per se*.

#### **B. Terry's Statements Are Subject to an Innocent Construction**

Freedman's defamation claim is also barred by the "innocent-construction rule." Under that doctrine, if a statement read in context can be given an innocent construction, then it is not actionable as defamation *per se*. *Green*, 234 Ill. 2d at 499-500 ("It is well settled that, even if an alleged statement falls into one of the categories of words that are defamatory *per se*, it will not be actionable *per se* if it is reasonably capable of an innocent construction."). Challenged statements must be given their ordinary meaning and construed in context by a reasonable

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<sup>4</sup> Freedman's conclusory assertion that Terry's statements harmed his reputation in the actuarial profession, Comp. ¶ 98, are inconsistent with his affirmative allegation that he was not acting as an actuary when he sent the September 17 e-mail that prompted Terry's challenged statements. *Id.* ¶ 40 ("When he signed the September 17 marketing communication on behalf of the SOA, Freedman was not acting in his capacity as an actuary"). If Freedman was, in fact, sending a "marketing communication" and not acting as an actuary, Terry's response, which addresses the substance of that "communication," could not harm Freedman's professional reputation.

person. *Id.* Whether a statement may be reasonably construed innocently is a question of law. *Chapski v. Copley Press*, 92 Ill. 2d 344, 352 (1982). Here, when read in context, Terry's statements say nothing about Freedman's integrity as an officer of SOA or as an actuary. They merely give Terry's opinion that the SOA values commercial objectives over concern for professionalism. For the reasons stated above, they are reasonably subject to an innocent construction. Accordingly, they are not actionable. Count IV should be dismissed for this reason as well.

**COUNTS IV MUST ALSO BE DISMISSED PURSUANT TO 735 ILCS 2-619(a)(9)**

**III. TERRY IS IMMUNE FROM DAMAGES CLAIMS UNDER THE ILLINOIS GENERAL NOT FOR PROFIT CORPORATION ACT**

Count IV (Defamation Per Se) of Freedman's Complaint alleges that Defendant Terry defamed Freedman by making certain statements to the SOA board. That count alleges that Terry, while acting as an officer or director of the Academy, sent an allegedly defamatory e-mail about Freedman to the board of directors of the SOA. Freedman seeks damages for putative harm to his reputation as an actuary. Terry, however, is immune from any such claim under the Illinois General Non-Profit Act. Section 108.70(a) of that statute reads:

No director or officer serving without compensation, other than reimbursement for actual expenses, of a corporation organized under this Act or any predecessor Act and exempt, or qualified for exemption, from taxation pursuant to Section 501(c) of the Internal Revenue Code of 1986, as amended, shall be liable, and no cause of action may be brought, for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer unless the act or omission involved willful or wanton conduct.

805 ILCS 105/108.70(a). Under the statute, an officer or director of a non-profit corporation is immune from damages claims if four requirements are met: (1) the officer or director serves without compensation other than reimbursement of actual expenses; (2) corporation is organized under the Illinois General Not for Profit Corporation Act or any predecessor; (3) the corporation

is exempt or qualified for exemption from federal income taxes under section 501(c) of the Internal Revenue Code, 26 U.S.C. § 501(c); and (4) the officer's or director's act or omission does not involve willful or wanton conduct. *Robinson v. LaCasa Grande Condominium Ass'n*, 204 Ill. App. 3d 853, 857-58 (4th Dist. 1990). Terry satisfies every element of the statute.

The first three of these requirements are established by affirmative allegations in the Complaint, the documents attached to it and other evidence in the record. **First**, during the relevant times, Terry was President of the Academy. Comp. ¶¶ 5, 31; Downs Aff. ¶ 7. Under the Academy's bylaws, the Academy President is both an officer and director of the corporation. See Bylaws, art. V, § 1 (Academy President is an officer of the Academy) (Comp. Ex. M); *id.*, art. III, § 1 (Academy officers designated as directors) (Comp. Ex. M). Terry received no compensation for his service; the Academy reimbursed him only for specific travel-related expenses deemed useful to carrying out the organization's work. Downs Aff. ¶¶ 8-9.

**Second**, the Academy is organized under the Illinois General Non for Profit Corporation Act. See Bylaws caption (noting that the Academy is "A Corporation Organized Under the Illinois General Not For Profit Corporation Act") (Comp. Ex. M); Downs Aff. ¶ 5 & Ex. A; Comp. ¶ 3 ("Defendant Academy is an Illinois not for profit corporation.").

**Third**, the Academy is exempt from federal income taxation under section 501(c)(6) of the Internal Revenue Code. Downs Aff. ¶ 6 & Ex. B.

The only remaining issue is whether Freedman has alleged that Terry's conduct involves "willful or wanton conduct," 805 ILCS 105/108.70(a). To meet that standard, Freedman must allege facts, see *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989) ("Fact pleading, in contrast to notice pleading, is required in this State."), 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." See *id.* (applying that standard to similar

immunity provision in the Medical Practice Act); *Spencer v. Ill. Cmty. Action Ass'n*, 164 F. Supp. 2d 1056, 1064 (C.D. Ill. 2001) (applying same standard to section 108.70(a) of the General Not for Profit Corporation Act). Freedman's Complaint lacks any factual allegations meeting that standard.

The Complaint points to only two sentences in Terry's e-mail, Comp. ¶¶ 95-96, 98 (alleging that Terry's assertions that a statement in the September 17 e-mail from Freedman "is a deliberate and self-serving misrepresentation of what it takes for a US actuary to move from one practice area to another" and that "[b]y misrepresenting the process as he does, Mark is signaling that the SOA values commercial ambitions over professional integrity" are "false and misleading" and harm Freedman's reputation), and conclusorily asserts that those statements are defamatory per se. *Id.* ¶ 98. No well-pleaded factual allegation asserts that Terry had any intent to harm Freedman or acted with utter indifference or conscious disregard for his welfare. In fact, Freedman never mentions Terry's motivation for making the alleged defamatory statements.<sup>5</sup> His Complaint, therefore, fails to allege that Terry's conduct is "willful and wanton." As such, Terry is immune from damages claims under 805 ILCS 105/108.70(a). Count IV of the Complaint should be dismissed.

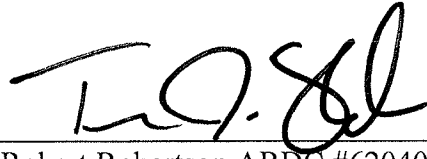
### CONCLUSION

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

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<sup>5</sup> The only allegations in the Complaint remotely touching on Terry's motivations for any action relate to his putative motivation for filing a *disciplinary complaint* with the ABCD. *See* Comp. ¶¶ 46-48. Freedman does not allege that Terry's disciplinary complaint contains any defamatory statement. *Id.*

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Defendants American Academy Of Actuaries And Thomas Terry's Memorandum in Support of their Combined Motion To Dismiss** was served upon:

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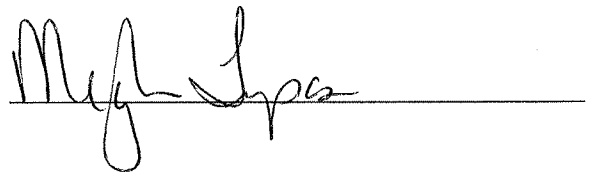
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*Counsel for Defendants*  
*Casualty Actuary Society and Wayne Fisher*

**via U.S. Mail, proper postage prepaid, and Electronic Mail before the hour of 5:00 p.m. this 14th day of January 2015**, from the law offices of FREEBORN & PETERS LLP, 311 S. Wacker, Suite 3000, Chicago, Illinois 60606.

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.



A handwritten signature in black ink, appearing to read 'Mark Freedman', is written over a horizontal line.

# **EXHIBIT 1**

**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

**AFFIDAVIT OF MARY DOWNS**

I, Mary Downs, under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certify that the statements set forth in this instrument are true and correct.

1. I am above the age of eighteen (18) years and not a party to this action. I am competent to testify to the matters contained in this affidavit. I testify to the matters stated in this affidavit from my own personal knowledge.

2. I am the Executive Director of the American Academy of Actuaries (the "Academy"). I have held that position since April 2009. Before becoming Executive Director, I was General Counsel and Director of Professionalism of the Academy. I held that position from May 2006 until May 2010. From April 2009 until May 2010, I held both positions.

3. I hold a Bachelor of Arts degree from Newton College of the Sacred Heart and a Juris Doctor degree from Boston College School of Law. In addition to my work at the Academy, I have held legal positions at MCI, Federal National Mortgage Association, the Air Transport Association and the Civil Aeronautics Board, all in Washington, D.C. I also was in private practice for a time in Washington, D.C.

**Exhibit 1**

4. In my more than eight years at the Academy, I have gained substantial knowledge of the Academy, its operation and its organizational structure.

5. The Academy is an Illinois corporation. It is organized and existing under the Illinois General Not for Profit Corporation Act. A true and correct copy of the Academy's certificate of incorporation is attached to this affidavit as Exhibit A.

6. The Academy is a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code. True and correct copies of determination letters from the Internal Revenue Service showing that the Academy is tax-exempt under Section 501(c)(6) are attached to this affidavit as Exhibit B.

7. At all relevant times related to the Complaint in this action, Defendant Thomas Terry was President of the Academy. As President, Mr. Terry was an officer of the Academy. Mr. Terry was also a director of the Academy. Mr. Terry is still a director of the Academy.

8. Academy officers, board members and committee members are all volunteers. They are not compensated for their service. Officers and board members receive reimbursement of expenses only for specific travel-related expenses deemed useful to carrying out the work of the Academy.

9. At all relevant times related to the Complaint in this action, Mr. Terry was not compensated for his service and received reimbursement only for specific-travel related expenses deemed useful to carrying out the work of the Academy.

  
\_\_\_\_\_  
Mary Downs

# **EXHIBIT A**

Certificate Number. 2948



**To all to whom these Presents Shall Come, Greeting:**

**Whereas,** *Articles of Incorporation, duly signed and verified, of*

**AMERICAN ACADEMY OF ACTUARIES**

*have been filed in the Office of the Secretary of State, on the 27th  
day of April A. D. 19 66 as provided by the "GENERAL NOT  
FOR PROFIT CORPORATION ACT" of Illinois, approved July 17, 1943, in force  
January 1, A. D. 1944;*

*Now Therefore, I, PAUL POWELL, Secretary of State of the State of Illinois,  
by virtue of the powers vested in me by law, do hereby issue this Certificate of  
Incorporation, and, attach thereto, a copy of the Articles of Incorporation  
of the aforesaid corporation.*

**In Testimony Whereof,** *I hereto set my hand and cause to  
be affixed the Great Seal of the State of Illinois  
Done at the City of Springfield, this 27th  
day of April A. D. 19 66 and  
of the Independence of the United States  
the one hundred, and 90th.*

(SEAL)

*Paul Powell*

SECRETARY OF STATE



EXHIBIT A

4649 410107

**FILED**

APR 27 1966

*Paul Powell*  
Secretary of State

Filing Fee \$10.00

FORM NP-1

ARTICLES OF INCORPORATION  
UNDER THE  
GENERAL NOT FOR PROFIT CORPORATION ACT

(These Articles Must Be Filed in Duplicate)

(Do Not Write in This Space)

Date Paid 4-27-60  
Filing Fee \$ 10.00  
Clerk [Signature]

To PAUL POWELL, Secretary of State, Springfield, Illinois.

1045 9

We, the undersigned,

(Not less than three)

Name	Number	Street	Address City	State
Henry F. Rood	1301	South Harrison St.	Fort Wayne,	Indiana
William E. Groves	420	Audubon Building	New Orleans,	Louisiana
Thomas E. Murrin	3333	California Street	San Francisco,	California
Laurence H. Longley-Cook	1600	Arch Street	Philadelphia,	Pennsylvania
John H. Miller	1250	State Street	Springfield,	Massachusetts
Frank J. Gadiant	1504	Third Avenue	Rock Island,	Illinois

being natural persons of the age of twenty-one years or more and citizens of the United States, for the purpose of forming a corporation under the "General Not For Profit Corporation Act" of the State of Illinois, do hereby adopt the following Articles of Incorporation:

- The name of the corporation is: American Academy of Actuaries
- The period of duration of the corporation is: Perpetual  
(Please state "perpetual" or a definite number of years)
- The address of its initial Registered Office in the State of Illinois is: 211 East Chicago Avenue Street  
in the City of Chicago (11) County of Cook and  
(Zone)  
the name of its initial Registered Agent at said Address is: Henry A. Warchall
- The first Board of Directors shall be 26 in number, their names and addresses being as follows:  
(Not less than three)

Name	Number	Street	Address City	State
------	--------	--------	--------------	-------

See attached list, which by this reference is made a part hereof.

PAID

APR 27 1960

*Paul Powell*  
Secretary of State

- The purpose or purposes for which the corporation is organized are:
  - To advance the knowledge of actuarial science, which had its origin in the application of the doctrine of probabilities to human affairs and from which life insurance, pension plans, casualty insurance, and other analogous institutions derive their principles of operation;
  - To encourage the consideration of all monetary questions involving, separately or in combination, the mathematical doctrine of probabilities and the principles of interest;
  - To promote education in actuarial science and the interchange of information among actuaries and among the various actuarial organizations;

(OVER)



(d) To establish, promote and maintain high standards of conduct and competence within the actuarial profession;

In furtherance of these ends the Academy may promote activities to recruit and educate those who desire to become actuaries and to undertake such other activities as may seem desirable.

6.

(NOTE: Any special provision authorized or permitted by statute to be contained in the Articles of Incorporation, may be inserted above.)

(INCORPORATORS MUST SIGN BELOW)

*Henry F. Poind*  
*W.C. Linn*  
*Thomas E. Murren*  
*H.H. Langley Gales*  
*John Murphy*  
*Frank J. Madient*

Incorporators

ACKNOWLEDGMENT

STATE OF ILLINOIS,

ss.

County of \_\_\_\_\_

I, \_\_\_\_\_, a Notary Public do hereby certify that on the

\_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_

(Names of Incorporators)

personally appeared before me and being first duly sworn by me severally acknowledged that they signed the foregoing document in the respective capacities therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

PLACE  
(NOTARIAL SEAL)  
HERE

Notary Public

FORM NP-1

ARTICLES OF INCORPORATION  
under the  
GENERAL NOT FOR PROFIT  
CORPORATION ACT  
of

(These Articles Must Be Executed and Filed in  
Duplicate)

Filing Fee \$10.00

CV66-20M-12-60 3

Edward D. Brown, Jr., 209 West Jackson Blvd., Chicago, Illinois 60606  
Robert E. Bruce, 7620 North Rogers Avenue, Chicago, Illinois 60626  
George M. Bryce, 1301 South Harrison Street, Fort Wayne, Indiana 46801  
George B. Buck, Jr., 60 Worth Street, New York 13, New York  
Donald F. Campbell, 221 North LaSalle Street, Chicago, Illinois 60601  
Mary M. Cusic, 230 Sixteenth Street, Rock Island, Illinois 61202  
Gilbert W. Fitzhugh, 1 Madison Avenue, New York, New York 10010  
Frank J. Gadiant, 1504 Third Ave., Rock Island, Illinois  
William E. Groves, 420 Audubon Building, New Orleans, Louisiana 70112  
Frank Harwayne, 123 William Street, New York 38, New York  
Victor E. Henningsen, 720 E. Wisconsin Avenue, Milwaukee, Wisconsin 53202  
Walter Klem, 1285 Avenue of the Americas, New York, New York 10019  
William Leslie, Jr., 80 Maiden Lane, New York, New York 10038  
Laurence H. Longley-Cook, 1600 Arch Street, Philadelphia 1, Pennsylvania  
Daniel J. McNamara, 125 Maiden Lane, New York 38, New York  
Norton E. Masterson, 200 Strongs Avenue, Stevens Point, Wisconsin  
Allen L. Mayerson, University of Michigan, Ann Arbor, Michigan 48104  
John H. Miller, 1250 State Street, Springfield, Massachusetts 01101  
Wendell A. Milliman, 914 2nd Avenue, Seattle, Washington 98104  
Thomas E. Murrin, 3333 California Street, San Francisco, California 94120  
Joseph Musher, 1625 K Street N.W., Washington, D. C. 20006  
Robert J. Myers, Social Security Administration, Washington 25, D. C.  
Henry F. Rood, 1301 South Harrison Street, Fort Wayne, Indiana 46801  
Walter L. Rugland, 222 West College Avenue, Appleton, Wisconsin 54912  
H. Raymond Strong, 511 North Akard Street, Dallas, Texas  
Andrew C. Webster, 1740 Broadway at 55th Street, New York, New York 10019

Attached to and made a part of the Articles of Incorporation  
of the American Academy of Actuaries, an Illinois General Not  
For Profit Corporation.

ACKNOWLEDGMENT

STATE OF Indiana }  
County of Allen } ss.

I, Gloria Dean Asbell, a Notary Public for the State of Indiana do hereby certify that on the 12<sup>th</sup> day of April, 1966, Henry J. Rood

(Name of Incorporator)

personally appeared before me and being first duly sworn by me acknowledged that he signed the attached Articles of Incorporation of the American Academy of Actuaries, an Illinois General Not For Profit Corporation, in his capacity as an incorporator and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

Place  
(Notarial Seal)  
Here

Gloria Dean Asbell  
Notary Public

ACKNOWLEDGMENT

STATE OF LOUISIANA }  
PARISH of ORLEANS } ss.

I, DAVID EARL HOGAN, a Notary Public for the State of LOUISIANA do hereby certify that on the 14<sup>th</sup> day of APRIL, 1966,

WILLIAM E. GROVES

(Name of Incorporator)

personally appeared before me and being first duly sworn by me acknowledged that he signed the attached Articles of Incorporation of the American Academy of Actuaries, an Illinois General Not For Profit Corporation, in his capacity as an incorporator and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

Place  
(Notarial Seal)  
Here

David Earl Hogan  
Notary Public

ACKNOWLEDGMENT

STATE OF California }  
County of San Francisco } ss.

I, ETHEL L. WATKINS, a Notary Public for the State of California do hereby certify that on the 18<sup>th</sup> day of April, 1966,

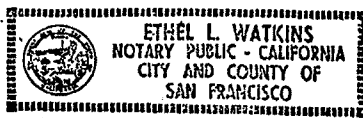
Thomas E. Murrin

(Name of Incorporator)

personally appeared before me and being first duly sworn by me acknowledged that he signed the attached Articles of Incorporation of the American Academy of Actuaries, an Illinois General Not For Profit Corporation, in his capacity as an incorporator and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

Place  
(Notarial Seal)  
Here



Ethel L. Watkins  
Notary Public

ACKNOWLEDGMENT

STATE OF Pennsylvania }  
County of Philadelphia } ss.

I, Leon Latimer, a Notary Public for the State of Pennsylvania  
do hereby certify that on the 20th day of April, 1966,

L. H. Langley Cook  
(Name of Incorporator)

personally appeared before me and being first duly sworn by me acknowledged that he signed the attached Articles of Incorporation of the American Academy of Actuaries, an Illinois General Not For Profit Corporation, in his capacity as an incorporator and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

Place  
(Notarial Seal)  
Here

Leon Latimer  
Notary Public  
MY COMMISSION EXPIRES  
JANUARY 7, 1967  
1800 ARCH STREET  
PHILA., PA.

ACKNOWLEDGMENT

STATE OF Massachusetts }  
County of Hampden } ss.

I, Marion E. Gray, a Notary Public for the State of Mass.  
do hereby certify that on the 22nd day of April, 1966,

John M. Miller  
(Name of Incorporator)

personally appeared before me and being first duly sworn by me acknowledged that he signed the attached Articles of Incorporation of the American Academy of Actuaries, an Illinois General Not For Profit Corporation, in his capacity as an incorporator and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

Place  
(Notarial Seal)  
Here

Marion E. Gray  
Notary Public  
My Commission Expires April 6, 1973

ACKNOWLEDGMENT

STATE OF Illinois }  
County of Rock Island } ss.

I, Aileen M. Taylor, a Notary Public for the State of Ill.  
do hereby certify that on the 23 day of April, 1966,

Frank J. Kachish  
(Name of Incorporator)

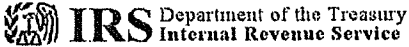
personally appeared before me and being first duly sworn by me acknowledged that he signed the attached Articles of Incorporation of the American Academy of Actuaries, an Illinois General Not For Profit Corporation, in his capacity as an incorporator and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year above written.

Place  
(Notarial Seal)  
Here

Aileen M. Taylor  
Notary Public  
My Commission Expires  
May 25, 1969

# **EXHIBIT B**



Department of the Treasury  
Internal Revenue Service

P.O. Box 2508  
Cincinnati OH 45201

In reply refer to: 0248567569  
Aug. 21, 2009 LTR 4168C E0  
36-6142798 000000 00  
00017315  
BODC: TE

AMERICAN ACADEMY OF ACTUARIES  
1850 M STREET NW SUITE 300  
WASHINGTON DC 20036



022083

Employer Identification Number: 36-6142798  
Person to Contact: MRS. BLACK  
Toll Free Telephone Number: 1-877-829-5500

Dear TAXPAYER:

This is in response to your request of Aug. 12, 2009, regarding your tax-exempt status.

Our records indicate that a determination letter was issued in NOVEMBER 1966, that recognized you as exempt from Federal income tax, and discloses that you are currently exempt under section 501(c)(6) of the Internal Revenue Code.

Because you are not an organization described in section 170(c) of the Code, donors may not deduct contributions made to you. You should advise your contributors to that effect.

If you have any questions, please call us at the telephone number shown in the heading of this letter.

Sincerely yours,

Michele M. Sullivan, Oper. Mgr.  
Accounts Management Operations I

EXHIBIT B



U. S. TREASURY DEPARTMENT  
 INTERNAL REVENUE SERVICE  
 DISTRICT DIRECTOR  
 17 North Dearborn Street  
 Chicago, Illinois 60602  
 Telephone 222-7076

NOV 29 1969

*Path Send C/*  
*Mr Tom Nowak*  
*Natl Council on*  
*Compensation*  
*1 Penn Plaza*  
 IN REPLY REFER TO  
 NYNY Form L-179  
 CHI-EO-66-467  
 Group 410

American Academy of Actuaries  
 208 South La Salle Street  
 Chicago, Illinois 60684

I. R. CODE
SECTION 501(c) ( 6 )
ADDRESS INQUIRIES AND FILE RETURNS DISTRICT DIRECTOR OF INTERNAL REVE
Chicago
ACCOUNTING PERIOD ENDING December 31

Gentlemen:

On the basis of your stated purposes and the understanding that your operations will continue as evidenced to date or will conform to those proposed in your ruling application, we have concluded that you are exempt from Federal income tax under the provisions of the Internal Revenue Code section indicated above. Any changes in operations from those described, or in your character or purposes, must be reported immediately to your District Director for consideration of their effect upon your exempt status. You must also report any change in your name or address.

You are not required to file Federal income tax returns so long as you retain an exempt status, unless you are subject to the tax on unrelated business income imposed by section 511 of the Code, in which event you are required to file Form 990-T. You are required to file an information return, Form 990, annually on or before the 15th day of the fifth month after the close of your annual accounting period indicated above.

You are liable for the taxes imposed under the Federal Insurance Contributions Act (social security taxes); and for the tax imposed under the Federal Unemployment Tax Act if you have four or more individuals in your employ.

Any questions concerning excise, employment or other Federal taxes should be submitted to this office.

This is a determination letter.

Very truly yours,

*E. C. Coyle Jr.*  
 E. C. Coyle, Jr.  
 District Director