

**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

**OPPOSITION OF DEFENDANTS AMERICAN ACADEMY OF ACTUARIES AND  
THOMAS TERRY TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Defendants American Academy of Actuaries (the "Academy") and Thomas Terry submit this memorandum in opposition to Plaintiff Mark Freedman's ("Freedman's") motion for preliminary injunction.

**INTRODUCTION**

Freedman's motion asks this Court to halt an investigation of two complaints filed against him with the Actuarial Board of Counseling and Discipline ("ABCD"). To date, the ABCD has recommended no discipline against Freedman. It has merely appointed an investigator to look into the facts of the complaints, an interlocutory step in the ABCD process. Illinois law provides no basis for stopping this process that Freedman accepted as a condition of his membership in the Academy and the Society of Actuaries ("SOA"). To do so would hamstring the ability of private, voluntary, professional organizations to investigate violations of the rules of professional conduct.

The ABCD has no power to discipline Freedman and no ability to prevent him from continuing to offer actuarial services to the public. Freedman is a member of both the Academy

and the SOA. Both entities, along with three other U.S.-based actuarial organizations, have designated the ABCD as the body to investigate disciplinary complaints against their members. Rather than complete the typical internal investigatory process, however, Freedman has asked this Court to relieve him of the obligations applicable to every other member of these organizations. Under Illinois law, courts are reluctant to interfere in the internal disciplinary actions of private, voluntary associations, particularly before any action is taken against a member. That is precisely the case here. Freedman has suffered no injury and has no likelihood of succeeding on his claim. His motion should be denied.

#### **FACTS RELEVANT TO THE PRELIMINARY INJUNCTION 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; an actuary may practice without being a member of either organization. Affidavit of Mary Downs (“Downs Aff.”), attached hereto as Exhibit 1, ¶¶ 5, 13. While much of Freedman’s complaint and factual recitation in his motion concerns alleged competition between the Academy and SOA, the Academy does not consider itself a commercial competitor of the SOA.<sup>1</sup> The Academy aims to serve the public and the U.S. actuarial profession by providing independent, objective actuarial information, analysis and education to policy makers and by setting qualification, practice and professionalism standards for actuaries in the United States. *Id.* ¶¶ 8-12. Among those are promulgation of a Code of Professional Conduct (the “Code”) and the creation of the ABCD to process and investigate complaints alleging Code violations. *Id.* ¶¶ 9-15. The ABCD was created on an interim basis in

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<sup>1</sup> Unlike the SOA, the Academy does not sell basic educational and testing services for actuaries and has no financial interest in increasing sales of such services. All Academy members must obtain their basic education from other professional associations, such as the SOA, before being able to obtain Academy membership. Downs Aff. ¶¶ 7-12.

1992 and permanently established by the Academy's bylaws effective January 1, 1999. *Id.* ¶ 16. All five U.S. actuarial organizations, including the Academy, the SOA and Defendant Casualty Actuarial Society ("CAS"), supported establishment of the ABCD as an autonomous entity within the Academy, and all have delegated to the ABCD responsibility for considering alleged Code violations by their members. *Id.* ¶ 14.

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.* ¶¶ 14-15. The ABCD is authorized to establish Rules of Procedure, *see* Comp. Ex. N, and operating guidelines not inconsistent with the Academy bylaws, *see* Bylaws of the American Academy of Actuaries ("Bylaws"), art. X, § 1.B (attached to the Complaint as Exhibit M). Under the bylaws, 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. *Downs Aff.* ¶ 20. ABCD members serve at the pleasure of the selection committee, Bylaws, art. X, § 2.B (Comp. Ex. M), but no single member of the selection committee may remove an ABCD member. *Downs Aff.* ¶ 21. Rather, a majority vote would be required. *Id.*

Although Freedman makes much of the fact that Defendant Terry and non-party Mary Miller, both signatories on a disciplinary complaint against Freedman, participated in the selection of three ABCD members – two of whom were reappointed for new terms and only one of which is a new member, *id.* ¶ 22 – in October 2014, *see* Motion at 5, those members were selected unanimously and would have been appointed even had Mr. Terry and Ms. Miller

abstained from voting. *Id.* ¶¶ 22, 25-26. In addition, both Freedman, then SOA President, and Errol Cramer, then the SOA President-Elect, were provided repeated invitations to the selection committee meeting and full materials about the process and the candidates to be considered. *Id.* ¶ 23. Cramer did, in fact, participate and vote. *Id.* ¶ 24. Freedman did not, but never explained to Academy staff or other selection committee members why beyond stating the selection's committee meeting date "wouldn't work for me." He did not state any intention to "recuse" himself. *Id.* ¶ 23.

The ABCD process operates like that used by many 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). Although it resides in the Academy, the ABCD makes decisions independently of the Academy officers, board and staff. Downs Aff. ¶ 17. Consistent with its bylaws, the Academy provides ABCD with counsel and administrative staff. Since its inception, the ABCD has had dedicated legal counsel employed by the Academy. *Id.* ¶¶ 18-19. That counsel advises the ABCD and its investigators on legal issues and procedures, but is not a member of the ABCD, has no vote on any ABCD decisions, and does not report to the Academy's officers, board or staff on any advice given on ABCD proceedings. *Id.* ¶ 19.

Once the ABCD receives a report of the facts from the investigator in any particular case, it provides the report to the actuary against whom the complaint was filed (the "subject actuary") and permits him or her to respond to that report. The ABCD also conducts hearings to permit the subject actuary to question any witnesses and make any arguments in support of his or her position. Bylaws, art. X, § 5.F.1 (Comp. Ex. M); Rules of Procedure of the Actuarial Board of

Counseling and Discipline (“ABCD Rules”) § VIII (attached as Comp. Ex. N). The subject actuary may also have the assistance of counsel in those proceedings. Bylaws, art. X, § 5.F (Comp. Ex. M).

After the hearing, the ABCD votes to (i) dismiss the complaint, (ii) counsel the subject actuary, or (iii) recommend discipline, including the form of discipline, to the subject actuary’s membership organizations. ABCD Rules § VIII (Comp. Ex. N). If it finds no violation, it dismisses the complaint. *Id.* Even if it finds a material violation, the ABCD has no power to discipline any actuary. Downs Aff. ¶¶ 35-40. Rather, it may only recommend discipline – which may range from private reprimand to expulsion – to the actuarial organizations of which the subject actuary is a member. ABCD Rules § VIII.B (Comp. Ex. N). No actuarial organization is compelled to accept the ABCD’s recommendation of discipline. Downs Aff. ¶ 35.

The dispute here grows out of two disciplinary complaints filed against Freedman – one by Defendant Thomas Terry and three others (the “Terry Complaint”), *see* Comp. Ex. E, and one by Defendant Wayne Fisher (the “Fisher Complaint”), *see* Comp. Ex. G. Complaints are filed by actuaries in their individual capacities, and the ABCD treats them as such. *Id.* ¶ 27.

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. *See* Freedman Affidavit Ex. 11. That “initial disposition” is not a decision on the merits of the Terry or Fisher Complaints. Downs Aff. ¶¶ 28-29. Rather, it means only that an investigator will look into the facts and report that information to the ABCD. ABCD Rules § III.B (Comp.

Ex. N).<sup>2</sup> 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.* ¶¶ 30-34. To date, the ABCD has made no finding that Freedman violated the Code in any way and has not recommended any discipline. *Id.* § 5.F (Comp. Ex. N). Freedman's motion seeks to end the ABCD's investigation and have this Court effectively adjudicate the merits of the complaints against him.

### ARGUMENT

Contrary to Freedman's motion, this dispute does not concern any commercial competition between the Academy and SOA. Instead, the issue on this motion is narrow – whether Freedman is entitled to a preliminary injunction halting consideration of disciplinary complaints through a procedure agreed to by all five U.S. actuarial associations even though no discipline has been recommended against him. “[A] preliminary injunction [is] an extreme remedy which should be employed only in situations where an emergency exists and serious harm would result if the injunction is not issued.” *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & W. Ry. Co.*, 195 Ill. 2d 356, 365 (2001). To obtain a preliminary injunction, Freedman must establish (1) a clearly ascertainable right in need of protection; (2) a likelihood of success on the merits; (3) irreparable harm absent preliminary injunctive relief; and (4) no adequate remedy at law. *Id.* at 365-66. Here, there is no emergency, and Freedman satisfies none of the requisite elements.

#### A. Freedman Has No Likelihood of Success on the Merits

Freedman seeks injunctive relief only on Count II of his Complaint, a declaratory

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<sup>2</sup> Mr. Freedman also objected to the identity of the appointed investigator, as he was entitled to do, but based his objection on the appointed investigator having served as a former president of the Academy and the CAS. Mr. Freedman, however, failed to note that the appointed investigator has, most recently, also served as president of the SOA. Downs Aff. ¶ 30.

judgment claim that asks the Court to declare that Freedman has not violated the Code and that the proceedings against him must end because they are biased and will not accord procedural protections to him. Freedman has no likelihood of success on the merits of that claim for two reasons. *First*, the ABCD has no power to impose any discipline on Freedman. *Downs Aff.* ¶¶ 35-40. Rather, it investigates and hears complaints under the Code and, if it believes a material violation of the Code has occurred, recommends disciplinary action to each of the professional organizations of which an actuary is a member. The ABCD has not made any such recommendation. To date, it has done nothing more than offer the name of an investigator to Freedman that it considered appropriate to look into the allegations of the complaints. In other words, it has put the complaint into its normal investigatory process. Freedman now asks this Court to pretermitt that process. Under Illinois law, Freedman must exhaust internal remedies before seeking judicial review. He has not done so.

*Second*, Freedman's motion fails on the merits of his "due process" claims. Voluntary associations need not provide the same procedural protection applicable to judicial proceedings. They must provide members only with a fair and unbiased hearing. Nothing in Freedman's motion demonstrates that he has been deprived of a fair or unbiased hearing. In fact, the ABCD has not yet completed its investigation of the complaints, much less held a hearing. Freedman has not been denied any procedural protections to which he is entitled, and his motion fails for this reason as well.

**1. Freedman Must Exhaust Internal Procedures Before Bringing A Judicial Challenge To The ABCD's Process**

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 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). Here, the ABCD has not recommended discipline of any type be imposed upon Freedman. 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. 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. Freedman, therefore, has no likelihood of success on the merits.

## **2. Freedman Has Not Been Denied Any Procedural Protections**

Even on the merits of his “due process” claim, Freedman has no likelihood of success. Indeed, Freedman’s motion only cursorily addresses the issues, but appears to raise four points: (1) the ABCD refused to dismiss the complaints against him but appointed an investigator; (2) two of the complainants participated in the recent appointment of three members of the ABCD after filing their complaint; (3) the complainants have the ability to remove ABCD members; and (4) the ABCD relies on counsel employed by the Academy. *See Motion at 8-9*. None of these contentions support entry of a preliminary injunction.



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); *Downs Aff* ¶ 29. 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 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).

Freedman never explains how denial of his request to dismiss the complaints evinces bias. He asked for the complaints to be dismissed on their merits. Comp. Ex. H. Under the ABCD's procedures, the Chairperson and Vice Chairperson decide that question. ABCD Rules § III.B (Comp. Ex. N). They did so – albeit not to Freedman's liking.<sup>3</sup> That does not evince bias, and Freedman offers no evidence that it does.

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<sup>3</sup> Both of the complaints against Friedman allege violations of Precept 1 of the Code, specifically Annotation 1-4, which prohibits an actuary from engaging in "any conduct involving dishonesty, fraud, deceit, or misrepresentation." *See* Comp. Exs. E, G. Freedman's principal contention appears to be that the communication at issue in the complaints is not misleading, but there are significantly more allegations of dishonest conduct, particularly in the Fisher Complaint. *See id.* Ex. G (alleging use of e-mail addresses taken from a CAS directory without authorization). Freedman's response raises factual issues, which the ABCD has chosen to investigate.

Freedman's other points fare no better. 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's argument also lacks factual substance. The ABCD is a standing body, not an *ad hoc* group constituted to address specific disciplinary complaints. The selection committee unanimously appointed the new ABCD members and, as noted above, the SOA President-Elect voted on those appointments. *Downs Aff.* ¶¶ 22-26. Thus, even had the Academy members not voted, the members in question would still have been appointed.

Freedman's assertion that the "complaining parties also have the ability to remove ABCD board members," Motion at 8, is misleading. ABCD members serve at "the pleasure of the Selection Committee, composed of the Presidents and Presidents-Elect of the participating organizations." Bylaws art. X, § 2.B (Comp. Ex. M). Removal would require a vote of a majority of that committee. *Downs Aff.* ¶ 21. In any event, Defendants Terry is no longer a member of the selection committee and has no ability to affect whether any ABCD members are removed.<sup>4</sup> Fundamental fairness does not require that selection committee members who have filed complaints or are the subject of complaints to abstain from voting on committee members. *See Werst*, 346 Ill. App. 3d at 717-18. Freedman has offered no evidence suggesting that the

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<sup>4</sup> Mary Miller, current President of the Academy and one of the signatories of the Terry Complaint, remains a member of the selection committee, as do the President and President-Elect of the SOA, the organization of which Freedman is past president and which passed a board resolution supporting Freedman's position on the disciplinary complaints. Exhibit 3 to Comp. Ex. H. Under these circumstances, there is no potential for bias *against* Freedman.

appointment of ABCD members was tainted in any way. He remains free to raise these arguments before the ABCD and to ask for recusals.

Freedman's remaining points are without basis in law or fact. Freedman claims that the ABCD's proceedings are biased because the ABCD is part of the Academy and the Academy employs the ABCD's counsel. While the ABCD is housed within the Academy, it operates independently to process and resolve complaints. *Downs Aff.* ¶¶ 17-19. All five U.S. actuarial associations, including the SOA and the Academy, have delegated responsibility to process and investigate complaints to the ABCD. *Id.* ¶ 14; *see also id.* ¶¶ 35-40. As a member of both entities, Freedman is subject to the rules and regulations of both organizations. *Logan*, 17 Ill. App. 3d at 587. He cites no authority supporting his position and does not explain how any professional group could self-regulate if its disciplinary committees or processes were required to be independent of the organization itself. His argument flatly contradicts Illinois law. *Butler*, 285 Ill. App. 3d at 583-84; *see also Werst*, 346 Ill. App. 3d 717-18 (permitting "primary accuser" to sit on disciplinary committee).

Similarly, that the Academy employs ABCD counsel does not make the ABCD's proceedings biased. 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. ABCD counsel operates independently when rendering advice on disciplinary proceedings and does not receive direction from the Academy's officers, board, or staff on such matters. *Downs Aff.* ¶¶ 17-19. Nothing in this arrangement deprives Freedman of any procedural protections to which he is entitled. Freedman has no likelihood of success on the merits.

**B. Freedman Has Suffered No Injury and Is Not Threatened With Irreparable Harm**

“A preliminary injunction is an extraordinary remedy and is generally employed only in matters of great injury, and then only with the utmost care and caution.” *Charles P. Young Co. v. Leuser*, 137 Ill. App. 3d 1044, 1052-53 (1st Dist. 1985). Freedman’s asserted “injury” here is entirely speculative. He does not allege that he has been disciplined by any actuarial organization or even that the ABCD has recommended that he be disciplined. His only alleged “injury” is his fear, unsupported by any evidence, that the ABCD will recommend that he be disciplined and that, if so, his professional reputation will be harmed. *See* Motion at 7. Such an amorphous and contingent concern does not constitute irreparable harm. *See In re Marriage of Slomka*, 397 Ill. App. 3d 137, 144 (1st Dist. 2009) (“allegations of mere opinion, conclusion, or belief are not sufficient to show a need for injunctive relief”).

*United Church of the Medical Center v. Medical Church Center Comm’n*, 689 F.2d 693, 701 (7th Cir. 1982), on which Freedman places principal reliance, is inapposite both factually and legally. Factually, the decision-making body in *United Church* consisted of individuals exercising state authority who had a pecuniary interest in the outcome of their decision. *Id.* at 699. Freedman makes no such allegation here. Legally, the threatened injury in *United Church* was a violation of the plaintiff’s rights under the Fourteenth Amendment of the United States Constitution. The Academy, by contrast, is not a state actor. Illinois does not require private, voluntary associations to provide the same due process protections as state entities. *Butler*, 285 Ill. App. 3d at 583 (“disciplinary proceedings conducted by voluntary associations do not require strict compliance with judicial standards of due process”). Given the absence of any recommendation of discipline, Freedman has not shown any harm, much less the necessary irreparable harm for a preliminary injunction.

**C. Freedman's Argument on Adequate Remedy of Law Fails for the Same Reasons as His Irreparable Injury Argument**

Freedman also claims that he has no adequate remedy at law but provides no support for the assertion. "A complaint for a preliminary injunction must plead facts that clearly establish that party's right to injunctive relief." *Slomka*, 397 Ill. App. 3d at 144. Freedman has failed to do so. His only argument on this point is that "a biased, improperly-influenced proceeding before the ABCD is likely to lead to a recommendation of discipline by Freedman's member societies," Motion at 8, which supposedly will lead to actual discipline by the Academy with consequent harm to "his career and livelihood." *Id.* On its face, the argument fails to address whether Freedman has an adequate remedy at law. Again, this harm is speculative and depends upon multiple contingencies: (1) the ABCD finds that the facts support the allegations of the complaints; (2) the ABCD determines that Freedman violated the Code; (3) the ABCD recommends some form of discipline as opposed to some form of counseling or other disposition; (4) the recommendation is made public; and (5) the Academy and SOA adopt the recommendation of the ABCD and actually impose some discipline. None of those things has happened. Plaintiff has failed to make a sufficient showing on this element of the preliminary injunction standard as well.

**D. Freedman Has Not Shown a Protectable Interest**

Finally, requiring Freedman to complete the ABCD process does not burden a protectable interest. Freedman willingly joined both the Academy and the SOA. Both organizations require members to submit to any disciplinary complaints filed with the ABCD. Downs Aff. ¶ 14. A member of a voluntary organization necessarily is bound by the rules and regulations of those organizations and must fulfill the requirements of membership. *Logan*, 17 Ill. App. 3d at 587. Freedman cites no authority to the contrary. Instead, he seeks relief from the requirements of

membership in both the Academy and the SOA because he believes that he will be denied procedural protections.

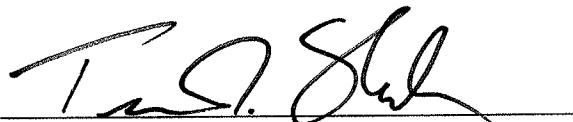
The only bases Freedman cites for this belief are that two of the complainants participated in an election for three ABCD members and that the ABCD relies on counsel employed by the Academy. *See* Motion at 7. As noted above, *see supra* at 10-12, neither provides a basis for inferring a violation of Freedman's procedural rights, much less halting the ABCD's consideration of the complaints against him. *See Clinton Landfill, Inc. v. Mahomet Valley Water Auth.*, 406 Ill. App. 3d 374, 380 (4th Dist. 2010) (allegation that local water authority's comments to Environmental Protection Agency might unduly influence EPA's consideration of plaintiff's permit application not sufficient to show irreparable harm). Freedman remains free to raise these issues in the ABCD proceedings.

Yet to the extent that he seeks injunctive relief on those bases, Freedman exposes yet another flaw in his motion. Preliminary injunctions are intended to preserve the status quo pending a full trial on the merits. *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 397 (1993) (holding that preliminary injunctions may not be granted when they would alter the status quo). Freedman's motion does not seek to preserve the status quo, which would necessitate that he complete the ABCD process before invoking this Court's jurisdiction. Rather, he asks this Court to halt the investigatory process and effectively dismiss his complaint, Motion at 10, the same relief he would obtain if he prevailed after trial. That is not the purpose of a preliminary injunction. *See Postma*, 157 Ill. 2d at 397. His motion fails on this element as well.

## CONCLUSION

For the foregoing reasons, Defendants American Academy of Actuaries and Thomas Terry respectfully request that Freedman's motion for preliminary injunction be denied.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a copy of the foregoing **Opposition of Defendants American Academy of Actuaries and Thomas Terry to Plaintiff's Motion for Preliminary Injunction** was served upon:

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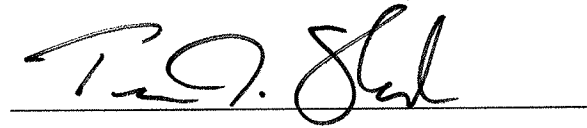
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**via U.S. Mail, proper postage prepaid, and Electronic Mail before the hour of 5:00 p.m. this 7th day of January 2015**, from the law offices of FREEBORN & PETERS LLP, 311 S. Wacker, Suite 3000, Chicago, Illinois 60606.

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.



Handwritten signature of Christopher T. Sheean, followed by a horizontal line.



# **EXHIBIT 1**

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

MARK FREEDMAN,

Plaintiff,

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AMERICAN ACADEMY OF ACTUARIES,  
THOMAS TERRY, CASUALTY ACTUARY  
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Defendants.

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**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.

**PERSONAL BACKGROUND**

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.

4. In my more than eight years at the Academy, I have gained substantial knowledge of the Academy and its operation, the Academy's bylaws, the Code of Professional Conduct (the "Code") applicable to actuaries, and the processes and procedures of the Actuarial Board for Counseling and Discipline ("ABCD").

#### **THE MISSION AND WORK OF THE AMERICAN ACADEMY OF ACTUARIES**

5. The Academy is an 18,000-member, private, voluntary, professional association. All of the Academy's members are individuals; the Academy has no corporate members or affiliates.

6. The Academy is a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code. Its 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.

7. The Academy's membership includes actuaries serving as consultants, corporate executives and staff, regulators, government officials, and academics. The membership also includes retired actuaries. The Academy's mission is to serve both the United States actuarial profession and the public. All members of the Academy obtain their basic actuarial education from other professional actuarial organizations, such as the SOA, and must provide documentation of actuarial educational credentials to become an Academy member.

8. The Academy aims to serve the public by providing independent, objective actuarial information, analysis and education to policy makers. The Academy also aims to serve

the U.S. actuarial profession by developing and maintaining qualification, practice and professionalism standards for actuaries in the United States.

9. Among its activities, the Academy provides for the establishment, maintenance, and enforcement of high professional standards of actuarial qualification, practice, and conduct. It promulgates Qualification Standards for Actuaries Issuing Statements of Actuarial Opinion in the United States. The Actuarial Standards Board, an autonomous board established within the Academy and established by the Academy bylaws (similar to the ABCD), promulgates the Actuarial Standards of Practice.

10. Through a Joint Committee on the Code, created within the Academy committee structure, a single uniform Code of Professional Conduct (the "Code") was created and in 2001 was adopted by the boards of each of the five U.S.-based actuarial organizations: the Academy, the Society of Actuaries ("SOA"), the Casualty Actuary Society ("CAS"), the Conference of Consulting Actuaries ("CCA") and the American Society of Pension Professionals and Actuaries College of Pension Actuaries ("ACOPA"). Therefore, the Code applies to all actuaries that are members of those organizations.

11. The Code prescribes ethical and other professional standards for actuaries. Through the Code the actuarial profession in the U.S. has set forth what it means for an actuary to act as a professional. The Code identifies the responsibilities that actuaries have to the public, to their clients and employers, and to the actuarial profession as a whole. Under the Code, an actuary is required to perform services only when qualified and to abide by applicable standards of practice.

12. Unlike the SOA, the Academy does not sell basic educational and testing services and has no financial interest in increasing the sales of such services. Education requirements for

Academy membership prescribe that applicants who have attained actuarial education credentials from certain other organizations, including the SOA, are deemed to meet the education requirements for admission to the Academy. The Academy does not consider itself a commercial competitor of the SOA. Rather, the Academy aims to serve the actuarial profession in the United States and the public and to promote professionalism and ethics in U.S. actuarial practice.

13. Although employers and clients recognize the credentials conferred by the Academy and other U.S. actuarial organizations as indicative of competence and professional standing, neither the Academy, the SOA nor any other U.S. actuarial organization licenses actuaries. An actuary may practice and describe himself or herself as an “actuary” in the United States without being a member of any of those organizations.

#### **THE ACTUARIAL BOARD FOR COUNSELING AND DISCIPLINE**

14. As part of its efforts to promote consistency and clarity in professionalism and ethics among U.S. actuaries, the Academy, with the support of other U.S.-based actuarial organizations, created the ABCD. All five actuarial organizations in the United States – the Academy, SOA, CAS, CCA and ACOPA – have delegated to the ABCD responsibility for considering alleged Code violations by their respective members.

15. Like some other professions in the United States, actuaries are self-regulating. The ABCD is an important part of that self-regulation. The ABCD is housed in the Academy because the Academy is the long-standing professionalism organization for the U.S. actuarial profession.

16. The ABCD is a nine-person standing body that processes and investigates complaints alleging violations of the Code. The ABCD was created on an interim basis in 1992

and established by the Academy's bylaws permanently effective January 1, 1999. The ABCD is jointly funded by all five of the participating organizations and has been since 1992.

17. Although the ABCD is housed in the Academy, the ABCD makes decisions independently of the Academy officers, board and staff. The ABCD does not report to or take direction from Academy officers, board or staff concerning the processing, investigation or disposition of any complaint alleging a violation of the Code.

18. Consistent with the Academy's bylaws, the Academy provides the ABCD with counsel and administrative staff. Since its inception in 1992, the ABCD has had dedicated counsel from the Academy. Brian Jackson currently serves as counsel to the ABCD.

19. Like his predecessors, Mr. Jackson advises both the ABCD and any investigators that it may appoint on legal issues and procedures. He is not a member of the ABCD and has no vote on any ABCD decisions. Mr. Jackson does not report to the Academy's officers, board or staff on any advice he gives to members of the ABCD or investigators in connection with any ABCD proceedings or the consideration of any complaint alleging a violation of the Code.

20. Members of the ABCD are appointed by a selection committee consisting of the President and President-Elect of each of the Academy, SOA, CAS, CCA and ACOPA. Members serve staggered three-year terms and serve at the pleasure of the selection committee. Three members of the ABCD are appointed each year.

21. Although ABCD members serve at the pleasure of the selection committee, no single member of the selection committee has the ability to remove an ABCD member. Removal could occur only upon a majority vote of the members of the selection committee. In my eight years at the Academy, no member of the ABCD has ever been removed by the selection committee.

**THE OCTOBER 2014 APPOINTMENT OF THREE MEMBERS TO THE ABCD**

22. In October 2014, the selection committee appointed three members to the ABCD. Two of the three members appointed were already members of the ABCD and were reappointed to a new term. The third appointee is a new member. All three were appointed unanimously. Thomas Terry, a defendant in this action, was then President of the Academy and participated in appointment of the new members. Mary Miller, then President-Elect of the Academy, also participated in the appointment of the new members.

23. Plaintiff Mark Freedman was President of the SOA at the time of the October 2014 selection committee meeting. Mr. Freedman was entitled to participate in that meeting and to vote on the appointment of new members. He received all of the material about candidates being considered. Mr. Freedman chose not to participate. Although he now says that he recused himself from the vote, he did not offer any explanation to Academy staff or to other members of the selection committee for his absence from the meeting other than to say that the meeting date “wouldn’t work for me.” Mr. Freedman did not state any intention to “recuse” himself from the October 2014 selection committee.

24. Errol Cramer, who was then President-Elect of the SOA, did participate in the meeting and voted on the appointment of the three members. Mr. Cramer supported the appointment of the three members.

25. The three members were appointed by a unanimous vote of the selection committee members present at the October 2014 meeting. As noted, Mr. Freedman did not attend the meeting, and he did not vote.

26. Since ABCD members are appointed by a majority vote of the selection committee, the three members of the ABCD appointed at the October 2014 selection committee

meeting would have been appointed even had Mr. Terry and Ms. Miller, the two Academy representatives on the selection committee, abstained from voting or recused themselves from the meeting. Moreover, only one of the persons appointed to the ABCD at that meeting is actually new to the ABCD. The other two were previously members and were simply reappointed for new terms.

**ABCD PROCEDURES AND PROCEDURAL PROTECTIONS AFFORDED ACTUARIES AGAINST  
WHOM DISCIPLINARY COMPLAINTS ARE FILED**

27. Mr. Freedman refers to the complaint filed with the ABCD by Mr. Terry and others as the “Academy Complaint.” That characterization is not correct. The complaint filed by Mr. Terry and others was not pre cleared or pre-approved by the Academy board and is not the action of the Academy. As the ABCD complaint filed by Mr. Terry and others (attached as Exhibit E to the Complaint in this action) states, Mr. Freedman’s role in the profession is, in the opinion of those who filed the complaint, relevant to the matters described. Mr. Terry and others who submitted the complaint also have roles in the profession that are relevant to their knowledge of the facts and obligation to abide by the Code with respect to the matters described. Based on my understanding of the ABCD’s operating procedures and rules, the ABCD will treat that complaint as a complaint filed by the signatory actuaries acting individually and not as a complaint filed by the Academy.

28. The ABCD’s process for handling complaints operates like that used by many other professional self-regulatory bodies. When it receives a complaint, the Chairperson and Vice Chairpersons of the ABCD make an initial determination whether the complaint alleges a potential material violation of the Code. If they determine that the complaint does not allege a potential material violation of the Code, the complaint is dismissed. If they determine that the complaint appears to involve a potential material violation of the Code, an investigator is



appointed to look into the facts, provided that the information on which that decision is made has previously been furnished to the actuary against whom the complaint is filed (the “subject actuary”) and that individual has been provided a reasonable opportunity to respond.

29. A decision to appoint an investigator is an interlocutory decision and not a decision on the merits of a complaint alleging a violation of the Code. Under the ABCD’s rules of procedure, the subject actuary may object to an appointed investigator for cause.

30. The investigator appointed to Mr. Freedman’s case is James MacGinnitie. Mr. Freedman correctly states that Mr. MacGinnitie is a former president of the Academy (serving in 1988-89) and of the CAS (serving in 1979). However, Mr. Freedman fails to note that Mr. MacGinnitie is also a former president of the SOA, the same organization that Mr. Freedman led. In fact, Mr. MacGinnitie was president of the SOA (serving in 2001-02) long after serving as president of the Academy or of CAS.

31. The investigator appointed in an ABCD proceeding will gather information, interview persons with knowledge and compile a report of the facts related to a complaint to the ABCD. The Investigator may contact the complainant and the subject actuary and any other persons who may possess relevant information. Any person being interviewed by the investigator may, at his or her choice and expense, be assisted or represented by counsel. The investigative report produced after completion of the investigator’s inquiry is also provided to the subject actuary, who then is given an opportunity to respond as set forth in Section V of the ABCD Rules of Procedure (attached as Exhibit N to the Complaint in this action).

32. In addition to having an opportunity to respond to the investigator’s report, the subject actuary has a plethora of procedural protections in all stages of the process under the Rules of Procedure of the ABCD. The subject actuary is entitled to a hearing before the ABCD

and to question any witnesses appearing at the hearing. The subject actuary is also entitled to make arguments in his or her favor to the ABCD. The subject actuary is further entitled to have counsel present at the hearing. The subject actuary is also free to seek recusal of any ABCD member that he or she believes to be biased from the consideration of the complaint.

33. Even after receiving an investigator's report, the ABCD may decide not to have a hearing because a hearing may be unnecessary. The ABCD's Rules of Procedure (Complaint Ex. N) make clear that the complaint may be dismissed without hearing or that the subject actuary may be counseled. Counseling is not considered a recommendation for discipline or a form of discipline under the ABCD's Rules. In short, the appointment of an investigator does not preordain a hearing or the recommendation of any discipline. A recommendation of discipline, however, will be made only after a fact-finding hearing under the ABCD's Rules of Procedure

34. If the ABCD does conduct a hearing, then after such hearing, it has several options for disposition of a complaint. It may: (a) return the case to the investigator for further gathering of evidence; (b) vote to dismiss the complaint because it concludes that the subject actuary has not materially violated the Code; (c) counsel the subject actuary, which is not considered a form of discipline; or (d) find that the subject actuary has violated the Code and recommend a form of discipline ranging from private reprimand to expulsion from an organization. If the ABCD recommends discipline, then it must make a written report explaining the reasons for its recommendation.

**THE ABCD HAS NO AUTHORITY TO DISCIPLINE ANY ACTUARY AND HAS NOT  
RECOMMENDED ANY DISCIPLINE FOR MR. FREEDMAN**

35. Notably, the ABCD has no authority to discipline any subject actuary even in the clearest cases of violations of the Code. It may only make a recommendation of discipline to the

U.S. actuarial organizations of which the subject actuary is a member. No organization is compelled to follow the recommendation of the ABCD. Thus, while the ABCD may recommend discipline, it has no power to impose discipline on any subject actuary. The actual decision whether to discipline an actuary is made by each organization of which the subject actuary is a member. Only individual membership organizations can implement discipline against their own members.

36. Each organization has its own procedures for dealing with a recommendation of discipline by the ABCD. The Academy's procedures are set forth in Article IX of the Academy's bylaws, which are attached as Exhibit M to Mr. Freedman's complaint in this action, and provide for a number of additional procedural protections for the subject actuary, including the right to appeal from any decision imposing discipline.

37. The Academy's bylaws contemplate that the Academy may refer recommendations for discipline it receives from the ABCD to discipline its members to a Joint Discipline Council ("JDC") in which other organizations also are represented. The bylaws also provide for proceedings without referral by the Academy to the JDC. In either event, procedural protections are specified in addition to those provided to the subject actuary in the ABCD process. In either process, only an individual membership organization can impose discipline on its own members.

38. The ABCD has not completed its process concerning the complaints filed against Mr. Freedman and has not recommended that the Academy or any other U.S. actuarial organization discipline Mr. Freedman.

39. The Academy has not taken any action against Mr. Freedman and has imposed no discipline on him.

40. Consistent with its bylaws, the Academy will not consider any discipline against Mr. Freedman until the ABCD has completed its investigation, conducted its hearing, made a finding that Mr. Freedman has materially violated the Code and made a recommendation that Mr. Freedman should be disciplined. Then, and only then, would the Academy begin to consider whether to impose any discipline against Mr. Freedman.

/s/  
Mary Downs