

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock St., Room 250 Denver, CO 80202</p> <hr/> <p>Plaintiff: KRISHNA DONIPARTHI, MD</p> <p>v.</p> <p>Defendants: OBESITY MEDICINE ASSOCIATION, a Colorado nonprofit corporation, by and through its Board of Trustees.</p>	<p>DATE FILED: March 20, 2018 2:43 PM CASE NUMBER: 2017CV32820</p> <hr/> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2017CV32820</p> <p>Division: CV Courtroom: 203</p>
<p style="text-align: center;">ORDER</p>	

THIS MATTER was heard by the Court on February 16, 2018. After presentation of evidence by both parties, the Court allowed the filing of Findings of Fact and Conclusions of Law. Both Parties submitted such findings. Having heard the evidence, reviewed the proposed findings of both parties and the arguments of Counsel, the Court enters the following Order:

Summary

Defendant Obesity Medicine Association (“OMA”) is an association of medical providers and others involved in obesity medicine located nationwide who are dedicated to the treatment of obesity. Plaintiff Dr. Krishna Doniparthi (“Dr. Doniparthi”) is a physician whose practice includes obesity treatment. He is a member of OMA, has been active in OMA and, at the relevant time, was a board member of OMA.

In 2017, an election was conducted for certain board positions as well as officers of the eleven-member board (the “Board”). This election was to be conducted under the articles of incorporation and bylaws (“Articles” and “Bylaws”) existing at the time of the institution of the election. Pursuant to these Bylaws, candidates seeking to enter the election must be nominated to do so. There was a list of existing qualifications to run for office and, after review of the candidates by a Nominating Commission, the existing Board

had the opportunity to approve or reject the candidates. Thereafter, an electronic ballot was prepared which contained the candidates for each position as well as information provided by the candidate for inclusion in the ballot. The ballots were distributed electronically, received and tallied, and the results announced at the general session of the OMA Fall Conference.

In 2017, Dr. Craig Primack submitted an application for the position of President-Elect. He was approved by the Nominating Commission and his name was placed on the ballot after unanimous vote by the Board. Relevant to this matter, at the time he was sitting as Vice-President and a member of the Executive Committee. He had also been on the Board for more than one year. If he was elected, he would remain on the Board as President-Elect and subsequently as President for the following six-year period. If he was not elected, he would be removed from both his Executive position as well as his Board position.

Dr. Doniparthi also submitted an application for the President-Elect position. He was also approved by the Nominating Committee and his name was placed on the ballot after unanimous vote by the Board. At the time, he had been on the Board for less than one year, was not an Executive member, but had been active within various committees and involved in the OMA. As noted by the approval of the Board, however, he met all qualifications for the position under the existing Bylaws.

On June 18, 2017, the OMA opened voting in the 2017 elections with Dr. Primack and Dr. Doniparthi as the two candidates for President-Elect and various candidates for Vice-President, Secretary, Treasurer and three other Board positions.

On June 26, 2017, Dr. Doniparthi sent an independent e-mail to members of OMA whom he had interacted with through committees or otherwise. In the e-mail, he advocated for votes and outlined several agenda items that he desired to campaign on. He also endorsed other candidates whom he described as "like-minded". He did not previously get approval of these candidates to promote them, but they were his friends. This e-mail was not sent to other OMA members or to the Board. A copy of the e-mail, however, was forwarded by a recipient to the Director of OMA, who forwarded it to members of the Executive Committee.

As a direct result of the e-mail, the Board held a special meeting on July 10, 2017. As a Board member, Dr. Doniparthi was present. During that meeting, an Executive member, Dr. Ethan Lazarus, made two motions that were passed by the Board. The first was to cease the current election with the intent to initiate a new election. The second was to remove and disqualify Dr. Doniparthi from the 2017 candidates. A third motion to remove Dr. Doniparthi from the Board was made, but not seconded or voted on. As a result of this meeting, the OMA decided to cancel its election and invalidated all votes received so far. They also disqualified Dr. Doniparthi as having less than one-year experience on the Board and removed him from the Ballot. Dr. Primack was both present for the meeting and voted in favor of all the motions.

Following this meeting, Dr. Doniparthi wrote to the Board, through counsel, stating his position concerning the e-mail, directing the Board to specific Bylaw provisions that he believed were violated by the Board's motions, and requesting relief from them. This e-mail was not responded to until July 20, 2017.

On July 18, 2017, the Board held another Board meeting. After dispensing with the ordinary business of the Board, the Board's attorney, Patrick Ryan, caused Dr. Doniparthi to leave the meeting and the Board proceeded into "executive session". Dr. Primack was not asked to leave. During that executive session, the Board passed motions that 1) confirmed and ratified that the OMA had ceased the election and nullified all votes; 2) declared the election null and void and to begin a new election; 3) declared all the candidates for the old election to be the same as the last except that any Board member with less than one-year's tenure on the Board was disqualified for applying to run for the position of President-Elect; 4) to make exclusive campaign rules concerning campaigning; 5) to shorten the voting time to accommodate the new election prior to the Fall meeting; and, 6) to immediately put these rules in place *subject to later amendment to the Bylaws*, with the amendments being *nunc pro tunc* to July 18, 2017. The consequence of these motions on the election was to disqualify Dr. Doniparthi and only Dr. Doniparthi from the election and to start over. All remaining candidates remained unaffected. Dr. Primack was allowed to vote on these motions and voted in favor of all of them.

Dr. Doniparthi filed suit requesting declaratory relief that the actions of the Board were improper and/or illegal. He also requested injunctive relief. Preliminary injunctive

relief was not granted after hearing. He now seeks the declaratory and injunctive relief for the Court to declare the now-held election as null and void *ab initio* and order a new election. He is not requesting any damages, but, if successful, has requested that his fees and costs in bringing the action be restored. OMA denied all allegations and the trial proceeded.

Analysis

The OMA was and is governed by its own Articles and Bylaws. The Court cannot find any disputed legal issue prior to the July 10, 2017 meeting. That is, until that point, both parties had undergone all activities in compliance with and in accordance with those governing documents. While OMA contends that Dr. Doniparthi's e-mail of June 26, 2017 was improper, the Court finds that it was not a violation of the Articles and Bylaws at the time it was sent and that the Board also confirmed that with Dr. Doniparthi. The propriety of such an e-mail will be further discussed. As an initial analysis, however, it was not in *violation* of the governing documents merely by being sent.

Dr. Doniparthi contends that the Board acted *ultra vires* in its actions of July 10, 2017 and subsequently in an effort to disqualify him from the election. He claims that the Board was without authority to take the actions that they did and the subsequent actions taken exceeded the scope of the Board's power or authority. The OMA contends that the Board did not exceed its broad authority to manage its affairs under the governing documents and that their decision was allowable under the business judgment rule. The business judgment rule, however, does not protect the Board if the Court finds the act was an *ultra vires* act or if the act was not a reasonable and honest exercise of the Board's duties.

The real gravamen of this determination revolves around the timing of the actions. The Articles and Bylaws are very clear that the Board could have acted to amend the Bylaws at any time prior to initiating the election. Also, prior to the election being initiated, they could have amended their Bylaws to change the qualification of candidates. The Nominating Commission could have rejected Dr. Doniparthi's application to run or,

once nominated, the Board could have voted not to allow him to run. Once that process had begun and they had set the course, however, nothing in the Bylaws or Articles authorized them to intercede. In fact, the Bylaws specifically precluded them from doing so at that time. As noted by Dr. Doniparthi, once the original ballot had been delivered electronically to the eligible OMA members, the Board was mandated to only tally the votes and announce the results. Bylaws §8.06(c). The question then becomes, did the e-mail from Dr. Doniparthi invoke a different power to take immediate action contrary to the Bylaws? Dr. Doniparthi contends that no provision exists. The OMA has provided no authority to invoke such power. The Court's review of the Bylaws and Articles has revealed no authority either.

It is clear that the Board met on July 10, 2017 and, by motion, ended the election and chose to reinstate it with a new rule that would eliminate Dr. Doniparthi's eligibility. In a belated effort to remain in compliance with the Articles and Bylaws, they then instituted the process of retroactive amendment to justify their actions. It is those actions that the Court focuses on because it is the genesis of the controversy.

The evidence presented demonstrated to this Court that the e-mail raised concerns with the Board. While the Bylaws do not prohibit campaigning, the OMA representative testified that the e-mail was "outside the normal procedures" of past elections. Dr. Lazarus also testified that such an e-mail was simply not the way things had always been done. However, being contrary to prior practice in no way violated any rule in place. As stated by Mr. Ryan after the fact, elections had always been "sleepy affairs". Exhibit 17. Dr. Lazarus's testimony gave the Court a clear indication that Dr. Doniparthi's new method campaigning woke OMA up, and, according to them, commanded action.

The Board presented evidence that the contents of the e-mail concerned them because it allowed Dr. Dr. Doniparthi to gain an unfair advantage by soliciting votes, divulged confidential information, had accessed Association information to obtain member e-mail addresses, and was poised to create a dangerous precedent for future elections. The Court finds these conclusions illusory based on the evidence. First, nothing in the Bylaws prohibited campaigning by the nominated candidates. Thus, there was no "unfair advantage" as Dr. Primack could have easily sent his own rebuttal e-mail to solicit votes.

Second, Dr. Doniparthi had not accessed some secret database of members to campaign, but had utilized his own professional contacts through his extensive work within OMA. Third, even if true that such campaigning would set a dangerous precedent, the Board could have easily rectified this by amending the Bylaws to prohibit such activity *after the election*, making such precedent unavailable for use in the future. Finally, and importantly, no credible evidence was presented to the Court that confidential information was divulged by the e-mail.

In his e-mail, Dr. Doniparthi campaigned on one particular platform of “[e]nsuring that OMA remains the leading clinical organization for the treatment and management for OM, instead of merging with TOS/ASMBS.” OMA attempted to paint the mention of possible merger with TOS as confidential and, therefore, Dr. Doniparthi had violated confidential Board information by giving it to the members. That attempt was unconvincing. Members of the OMA had been informed of partnering with TOS previously by Dr. Primack. Exhibit 27. Dr. Doniparthi testified that he had had multiple discussions with other OMA members about potential merger well prior to becoming a Board member. The Court was presented with no evidence that a Board discussion had occurred about a merger with TOS at any time. Simply put, if such a merger was subject of confidential Board discussions, this Court cannot find that Dr. Doniparthi was aware of that or used information he gained in a Board meeting to prepare his platform.

This Court also cannot read the platform point to mean anything but a statement that Dr. Doniparthi wanted OMA to be the best of the various organizations instead of the largest by merger. Such a statement, when read in the context it was sent in, neither discloses information nor identifies if such a merger was even contemplated. As noted in Exhibit 13, the point “was a pledge of my [Dr. Doniparthi’s] vision for the organization, nothing more.” It is merely a hopeful desire to make OMA the best through substance rather than through membership.

As to the evidence presented concerning Dr. Doniparthi’s use of a “slate” of like-minded people, the Court finds that this was not a concerted effort to align himself with potential candidates, but more to promote people he believed would be qualified to govern with him accordingly. True, the Court believes he should have checked with them first.

There was no evidence presented, however, that those specific people objected to his inclusion of them in his e-mail sufficient to take the action that the Board did.

In reality, the contested points of the e-mail appear to the Court today to be just what they were at the time of the July 10 meeting; a list of hooks on which the Board came up with, after the fact, to hang their hat on to justify their actions. Importantly, the process under which they proceeded and the alacrity in which it was accomplished stands to demonstrate a lack of foresight for the actions taken and the motive driving those actions. The fact that the ratification of amendments to the Bylaws concerning the election occurred in executive session so as to remove Dr. Doniparthi from the proceedings, the fact that the effect of the alleged emergent amendments was to remove Dr. Doniparthi and *only* Dr. Doniparthi from the ballot, and the fact that the Board allowed a clearly conflicted Dr. Primack to vote on such measures in closed session belies any argument of regularity. In fact, it seems castigatory.¹

Notwithstanding their July 18 action, the Court finds that Dr. Doniparthi gave the Board the opportunity to correct or address their actions prior to the meeting without furthering the harm to OMA. These efforts went unaddressed. Dr. Doniparthi filed an objection with the Board action four days after the July 10 meeting. Exhibit 13. This was met with a formal response. Exhibit 17. OMA's counsel, Patrick Ryan, states that "none of us had ever considered that a person with less than 1-year experience on the board would run for the president-elect position". This statement is both significant and false. Dr. Doniparthi had been vetted by the Nominating Committee, approved, and had been voted on unanimously by the board to run. To claim surprise now and support the Board's actions in such a manner is clearly an obfuscation of true intent.

The Court finds that the Board's actions were not an effort to "level the playing field" as Mr. Ryan stated, but an effort to change the rules mid-game and to remove an

¹ During the presentation of evidence, it was clear to the Court that the believability of some of the testimony was in question. Specifically, the testimony of the OMA representative and Dr. Lazarus were, at best, contradictory at times, and, at worst, implausible as to content. On the other hand, Dr. Doniparthi's testimony was straightforward and clear. Even on cross-examination, he never shied away from an answer that may affect his position, choosing to answer clearly and openly. This credibility issue was a pertinent consideration as to the Court's perception of motivation.

unwanted player from the field. There simply is no other conclusion that can be drawn from their actions, actions which have no support under the Bylaws. While they have every right to maintain and manage their own organization, they have to do so under the rules in play while the game is going on. Once the game started, the playing field was determined and couldn't be changed or "leveled". The Court finds, therefore, that the actions of the Board at the July 10, 2017 meeting were *ultra vires* acts that violated those rules and they needed to take what action they did either prior to the election initiation or after, not during.

The Court thus finds for the Plaintiff, specifically that the OMA Board violated the OMA Articles and Bylaws and Colorado law by its actions on July 10, 2017 to: 1) cancel the 2017 Election; 2) invalidate votes cast by OMA members; and 3) disqualify Dr. Doniparthi and remove him from the ballot. The OMA Board further violated the Articles and Bylaws by its actions on July 18, 2017 to ratify its unlawful actions taken on July 10, 2017. The OMA Board also violated the Articles and Bylaws by passing the 2017 Bylaws Amendment for the unlawful purpose of ratifying previous unlawful actions taken July 10 and July 18, 2017 and with the singular effect of assuring Dr. Doniparthi, and Dr. Doniparthi alone, remained off the ballot. Each of these acts was without authority under the Bylaws, Articles, or Colorado law and, therefore void *ab initio*.

The Court also finds that the Colorado Nonprofit Corporation Act provides that injunctive relief is appropriate for *ultra vires* acts.

(3) In a proceeding under paragraph (a) of subsection (2) of this section to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if it would be equitable to do so and if all affected persons are parties to the proceeding, and may award damages for loss, including anticipated profits, suffered by the nonprofit corporation or another party because of the injunction.

Colo. Rev. Stat. Ann. § 7-123-104.

The Court finds that OMA and Dr. Primack, through his prior Board position and as the now President-Elect, are parties to the proceedings and that it is equitable to set aside the actions of the Board. The Court also finds that the injunctive relief requested will not cause irreparable injury to either OMA or Dr. Primack. Both OMA and Dr. Primack contributed to the actions undertaken. To claim irreparable injury from an activity found later to be improper is highly theoretical and possibly hypocritical.

Dr. Doniparthi has requested attorney fees under C.R.S. § 7-123-104 and C.R.S. § 13-17-102. C.R.S. §7-123-104 allows for an award of damages for loss of a party “because of the injunction.” The Court does not find that this includes damages, i.e. attorney fees, undertaken in pursuit of the injunction. C.R.S. §13-17-102 allows for reasonable attorney fees for a party who has litigated a position that the court determines lacked substantial justification. While this Court did not agree with OMA’s reasoning, it cannot find that its defense was substantially frivolous, groundless or vexatious. Therefore, the Court finds that each party will be responsible for their own attorney fees in bringing this action. However, Under C.R.C.P. 54(d), Dr. Doniparthi is entitled to reasonable costs associated with bringing this action. He is therefore awarded his costs.

Based upon the foregoing, **IT IS ORDERED** that:

1. The above-stated actions taken by the OMA’s Board on July 10, 2017 and July 18, 2017 are **HEREBY SET ASIDE** as unlawful;
2. Within fifteen (15) days of the date of this Order, the OMA shall initiate a new election for the position of President-elect for the 2017 term as follows:
 - a. The OMA shall prepare a ballot in standard form that shall include Dr. Doniparthi and Dr. Primack for the President-elect position;
 - b. The OMA shall send to all eligible OMA voting members an electronic notification of the new election in the form and include the new ballot with the notification;
 - c. The OMA shall conduct the election in accordance with the Bylaws, provided that the winner of the election shall be announced to the OMA

membership electronically within ten (10) days of the voting tally, which shall be timely done in accordance with the Bylaws;

- d. Counsel for both parties shall have access to the OMA's Survey Monkey system as reasonably necessary to confirm the election outcome at the conclusion of the election; in the event of any dispute regarding how the election is conducted, counsel are directed to promptly notify the Court; and,
- e. The winner of the election shall be promptly installed in office.

3. Plaintiff is directed to file its Bill of Costs within fifteen (15) days of the date of this Order and in accordance with Colo. R. Civ. P. 121 § 1-22.

SO ORDERED this 20th day of March, 2018.

BY THE COURT:



Brian R. Whitney
District Court Judge