

MEMORANDUM

**To: The National Executive Committee
Soba America**

Re: Credit Card Transactions in Soba America Bank Account

This matter was forwarded to legal counsels, HRH Fuajiwung Michael Fondungallah and Ernest Tate, by the National Executive Committee of Soba America to provide a legal opinion on how the association should proceed given the information below.

FACTS

During a financial reconciliation of Soba America's bank accounts, the Financial Secretary discovered that deposits of around \$1,500 were made into Soba America's accounts from a credit card bearing the name of a lady. For privacy reasons, we will call her Jane Doe.

On May 10, 2019, the matter was brought to the attention of Chairman of the Board of Directors, Dr. Fote. The Financial Secretary, Professor Ngassa, also reached out to President Mafany and Treasurer, Chief Fomenky to ascertain what these transactions were for. On May 11, 2019, Dr. Fote reported that he is not aware of any donation from Jane Doe to the Endowment Fund. Chief Fomenky confirmed that he made the payments with the credit card and that these were for dues. He also stated that Jane Doe gave him permission to get a card for her to help build her credit and is fully aware of the transactions. On May 20, 2019, Chief Fomenky sent an e-mail attaching a paypal comprehensive report and indicating that, "all payments in the month of December 2018 were processed by my account PayPal and credit cards." However, in a National Executive Conference call on Saturday May 18, 2019 where this matter was being discussed, Chief Fomenky had stated in response to a question from a member that the accounts used to pay membership dues is Soba America's paypal account.

Contacts were made with Jane Doe to ascertain whether she gave Chief Fomenky permission to use her credit card. On May 16, 2019, Jane Doe wrote to Soba America stating among other things, the following:

**MR. JOSEPH N. FOMENKY DOES NOT HAVE ANY PERMISSION AND
AUTHORIZATION FROM ME TO USE MY PERSONAL INFORMATION FOR ANY
REASON WHATSOEVER!**

Ms. Doe also stated that she no longer use the names on the credit card since her names have changed due to her marriage and she does not have any credit card bearing those names. Ms. Doe requested that Soba America reverse all the charges made with the card bearing her previous names immediately. She further stated that she was “very disappointed that an honorable association like yours will process credit card payments using a credit card that does not bear the name of the member or his spouse.”

Soba America also received communication from Jane Doe’s daughter. She writes:

I say it again categorically that my mother DID NOT GIVE MR. FOMENKY ANY AUTHORITY TO USE HER INFORMATION AS HER PREVIOUS LETTER TO YOU CLEARLY STATES!!! He got access to her information via his relationship with me so many years ago and has apparently been using it!!!! My mother is not worried about her citizenship as she is already a sworn citizen of the USA! She is worried that a scammer and a con man is using her information!!! If he can use it to pay dues at SOBA then what else is he using her information to do?????

LAWS IMPLICATED

Maryland Code, Criminal Law § 8-301

Prohibited--Assuming identity of another

(c) A person may not knowingly and willfully assume the identity of another, including a fictitious person:

- (1) to avoid identification, apprehension, or prosecution for a crime; or
- (2) with fraudulent intent to:
 - (i) get a benefit, credit, good, service, or other thing of value;
 - (ii) access health information or health care; or
 - (iii) avoid the payment of debt or other legal obligation.

Prohibited--Claim to represent another without consent

(f) A person may not knowingly and willfully claim to represent another person without the knowledge and consent of that person, with the intent to solicit, request, or take any other action to otherwise induce another person to provide personal identifying information or a payment device number.

Restitution and costs

(g)(1)(i) A person who violates this section where the benefit, credit, good, service, health information or health care, or other thing of value that is the subject of subsection (b), (c), or (d) of this section has a value of at least \$1,500 but less than \$25,000 is guilty of a felony and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding \$10,000 or both.

(ii)(4) A person who violates subsection (b-1), (c)(1), (e), or (f) of this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 1 year or a fine not exceeding \$500 or both.

GEORGIA NON-PROFIT LAWS

Ga. Code Ann., § 14-3-808

§ 14-3-808. Removal of elected directors by members

Unless the corporation's articles or bylaws provide otherwise:

- (1) The members may remove, with or without cause, one or more directors elected by them;
- (2) (5) A director elected by members may be removed by the members only at a meeting called for the purpose of removing the director and the meeting notice must state that the purpose, or one of the purposes, of the meeting is removal of the director;

Ga. Code Ann., § 14-2-830

§ 14-2-830. General standards for directors

(a) A director shall discharge his duties as a director, including his duties as a member of a committee:

- (1) In a manner he believes in good faith to be in the best interests of the corporation; and
- (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- (1) One or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;
- (2) Legal counsel, public accountants, investment bankers, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or
- (3) A committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) In the instances described in subsection (b) of this Code section, a director is not entitled to rely if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) of this Code section unwarranted.

(d) A director is not liable to the corporation or to its shareholders for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this Code section.

§ 14-3-842. Standards of conduct for officers

Unless a different standard is prescribed by law:

- (1) An officer with discretionary authority shall discharge his or her duties under that authority:
 - (A) In a manner he or she believes in good faith to be in the best interests of the corporation; and
 - (B) With the care an ordinarily prudent person in a like position would exercise under similar circumstances;

Ga. Code Ann., § 14-3-843

§ 14-3-843. Resignation and removal of officers

(a) An officer may resign at any time by delivering notice in writing or by electronic transmission to the corporation. A resignation is effective when the notice is effective unless the notice specifies a future effective date. If a resignation is made effective at a future date and the corporation accepts the future effective date, its board of directors may fill the pending vacancy before the effective date if the board provides that the successor does not take office until the effective date.

(b) A board may remove any officer at any time with or without cause.

(c) Unless otherwise provided in the articles or bylaws, any vacancies in the corporation's officers may be filled by the board.

§ 14-3-865. Officers' conflicting interest transactions

(a) As used in this Code section, the term:

(1) "Officer" means a person who is not a director and who is holding an office described in the bylaws of the corporation or appointed by the board of directors in accordance with the bylaws of the corporation.

(2) "Officer's conflicting interest transaction" means any transaction, other than a director's conflicting interest transaction as defined in paragraph (2) of Code Section 14-3-860, between a corporation (or a subsidiary of the corporation or any other entity in which the corporation has a controlling interest) and one or more of its officers or between a corporation and a related person of an officer.

(3) "Related person" of an officer shall have the same meaning with respect to an officer that this term has with respect to a director in paragraph (3) of Code Section 14-3-860.

(4) "Required disclosure" with respect to an officer shall have the same meaning as this term has with respect to a director in paragraph (4) of Code Section 14-3-860.

(5) "Time of commitment" shall have the same meaning as in paragraph (5) of Code Section 14-3-860.

(b) No officer's conflicting interest transaction shall be void or voidable solely because the officer is present at or participates in the meeting of the board of directors or committee thereof which authorizes the contract or transaction.

(c) An officer's conflicting interest transaction may not be enjoined, set aside, or give rise to an award of damages or other sanctions, in an action by a member or by or in the right of the corporation, on the ground of an interest in the transaction of the officer or any person with whom or which he or she has a personal, economic, or other association, if:

(1) The transaction was approved by the board of directors after required disclosure;

(2) The transaction was approved by the members after required disclosure;

(3) The action was approved by the superior court in an action to which the Attorney General was a party; or

(4) The transaction, judged in the circumstances at the time of commitment, is established to have been fair to the corporation.

Soba America by-laws ratified and adopted on May 28th, 2016 in Houston, TX

Article III

Any Director may be removed from office, with or without cause, upon the majority vote of the shareholders, at a meeting with respect to which notice of such purpose is given.

Article 4.9 Eligibility

Only Shareholders in good standing shall be eligible to accept nomination to be voted for office during the general elections.

ANALYSIS

Officers and members of the board of directors of non-profit corporations owe a fiduciary duty to the members who elected them to perform their duties ethically. They also owe a duty of loyalty to the corporation to faithfully pursue the interest of the corporation, and its nonprofit purpose, rather than their own financial or other interests, or those of another person or organization.

The non-profit laws of the State of Georgia where Soba America is incorporated requires that directors and officers perform their functions in good faith and in the best interests of the corporation; and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

The laws of the state of Maryland where this occurred, prohibits the knowing and willful use of the identity of another to get a benefit, credit, good, service, or other thing of value. The law also prohibits the knowing and willful claim to represent another person without the knowledge and consent of that person, with the intent to solicit, request, or take any other action to otherwise induce another person to provide personal identifying information or a payment device number.

The facts as has been presented to us show that a credit card in the name of Jane Doe was used by Chief Fomenky to pay the dues of some members for a total of \$1,500. Ms. Doe denies giving permission for Chief Fomenky to use her personal information to obtain a credit card in her name and to use the card to pay membership dues for some members.

This knowing and willful use of Ms. Doe's identity to obtain a credit card without her consent in the State of Maryland implicates Maryland Criminal Law § 8-301. Ms. Jane Doe has indicated to Soba America that she is taking action in that state to resolve the matter.

The action also implicates Chief Fomenky's standing as an officer and director of Soba America and his eligibility to run for office under Georgia's non-profit laws and Soba America's bylaws. The actions of Chief Fomenky violates the standards of conduct of officers and directors of non-profit corporations in the state of Georgia and the conflicting interest transactions were not approved by the National Executive Committee of Soba America.

This action by the treasurer was dishonest in thought and deed, and showed disrespect for Soba America and violates the integrity of the office of the treasurer of Soba America. An incident of this nature involving the top leadership of Soba America, can irreparably damage Soba America's most valuable asset: its reputation. The National Executive Committee of Soba America has a responsibility to ensure that SOBA America's funds are obtained lawfully.

RECOMMENDATIONS

1. Soba America refund all the charges that were made on Jane Doe's credit card;
2. Soba America issue an official apology to Jane Doe
3. The National Executive Committee of Soba America declare Chief Joseph N. Fomenky ineligible to run for any office in Soba America
4. Chief Joseph N. Fomenky be required to produce the names of members whose dues were paid using Jane Doe's card so that they be contacted to regularize their status with the organization

Respectfully submitted

May 21, 2019

Ernest Tate, Esq.

HRH Fuajiwung Michael Fondungallah, Esq.