IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE THE AMYOTROPHIC LATERAL SCLEROSIS ASSOCIATION	:	C.A. No. 2023-0054-JTL
ALS ASSOCIATION OF GEORGIA, INC., THE ALS ASSOCIATION NORTH CAROLINA CHAPTER, and GREATER PHILADELPHIA CHAPTER, THE AMYOTROPHIC LATERAL SCLEROSIS ASSOCIATION,	:	
Plaintiffs,	:	
v	:	C.A. No. 2023-0413-JTL
THE AMYOTROPHIC LATERAL SCLEROSIS ASSOCIATION,	:	
Defendant.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Tuesday, April 25, 2023
4:00 p.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

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ORAL ARGUMENT and RULINGS OF THE COURT ON PLAINTIFFS' MOTION TO EXPEDITE, MOTION FOR A STATUS QUO ORDER, AND MOTION FOR A PRELIMINARY INJUNCTION - HELD VIA ZOOM

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THE COURT: Hello, everyone. Thanks for being here. I appreciate it.

Would someone from Delaware like to speak up for the plaintiffs and tell me who is going to be talking today.

ATTORNEY LINDSEY: Thank you, Your Honor. This is Mike Lindsey from Ballard Spahr in Wilmington. With me on the call today is Timothy Katsiff, Shawn Summers, and Aliza Karetnick of our Philadelphia office. Aliza Karetnick will be making the presentation for plaintiffs today. And we also have a client representative observing, Jeff Woodward, who is counsel for ALS Association of Georgia, Inc.

THE COURT: Thank you all for being here. I appreciate it.

Same question for the defendant.

ATTORNEY MAIMONE: Good afternoon, Your Honor. It's Mike Maimone of Barnes & Thornburg for defendant, National. With Your Honor's permission, I'll be presenting today. Also on the line is William Burton, but again, I'm the one Your Honor will hear from.

THE COURT: Wonderful. Thank you so much.

ATTORNEY MAIMONE: Thank you.

THE COURT: So, Ms. Karetnick, would you like to proceed.

ATTORNEY KARETNICK: Yes, Your Honor. You'd think after so many years of using this technology, I'd be more adept at it, but apparently not.

Your Honor, as I understand it, we are here today seeking to enjoin defendant, the ALS Association, or "National," from filing an amended certificate of incorporation and implementing bylaws to terminate the chapters', the plaintiff chapters' membership by ending National's federated existence.

There are several motions that are pending before the Court, and it's our understanding that three are at issue today. First is the chapters' motion for relief pursuant to the order maintaining status quo. That was filed in the plenary action. The second was the chapters' motion to expedite in the 225 action; and the third, the chapters' motion for status quo in the 225 action, which we moved, excuse me, unopposed, to consolidate.

In addition to these motions, there is a Rule 12(c) motion, which we understand is not ripe.

Some clarity on whether or not it's the Court's expectation that that motion be addressed today would be appreciated. We're prepared to do so, but if it's not on the Court's agenda, then certainly we can skip over that.

THE COURT: It was not on my agenda.

ATTORNEY KARETNICK: Fantastic. The argument just got a bit shorter.

Your Honor, with respect to the -- with respect to the motion pursuant to the order maintaining status quo, the chapters are seeking an injunction that would preclude National from filing its certificate of incorporation and making effective its amended and restated bylaws.

The chapters have shown the likelihood of success on the merits. They have met their burden for an injunction here. The chapters have shown -- bear with me just a moment. Okay. Sorry, Your Honor.

First, the chapters have shown a likelihood of success, both on the repudiation and on the coercion claims, among others, but those are the two that we think are most squarely at issue here. Ironically, there's really no greater evidence of that than the amended certificate of incorporation that

underlies this entire motion.

That certificate itself calls for the elimination of the chapters' membership, which is a primary benefit that's conferred by the chapter charter agreement and the supposed unification policy itself, which was put before the merging chapters to extract consent. That goes to success on the merits.

Second, Your Honor, the harm that the chapters will suffer if the certificate and amended bylaws are made effective is entirely irreparable. Loss of membership and the right to governance do not lend themselves to a damages calculation. And, frankly, this Court already found irreparable harm is manifest during the parties' last hearing.

With respect to the equities, Your Honor, the equities favor the chapters. And I think that this is an area that I'd like to spend just an extra moment focused on.

Once effective, the certificate of incorporation will disenfranchise the chapters completely. National will begin competing with them, according to the affidavit of the national organization's CEO, Calaneet Balas. National will begin competing with them in the territories that are

contractually deemed exclusive, and National will have perfected its mission to irreversibly impair "the right, power, authority and capacity of the Chapters to effectuate their rights," as it is contractually proscribed from doing.

On the other side of the ledger, National's plan to merge can be postponed without harm. As it represented, National is, and has been, in control of merging chapter staff and assets for quite some time. And National's original merger target date was February 2024, not May 2023.

National spends a great deal of time decrying the size of its staff as a burden and underscoring its eagerness to expand its operations, which it contends would be harmful if not permitted.

We understand that. We understand that National's staff is large, and we understand that National is anxious to expand its operations. But the chapters should not bear the burden of National's bloated payroll or its staffing issues or its lack of efficiencies resulting from its unilateral plan of merger.

An injunction here would do nothing more than preserve the status quo that has existed

between the parties without interruption for, in most cases, over a decade, and will not require anything of National that it is not already obligated to provide.

With respect to the 225 action, Your Honor, the relief that the chapters seek is largely the same and duplicative of what the chapters are seeking pursuant to the motion in the plenary action.

The 225 action generally seeks the Court's determination of the effectiveness of the consent. That is the statutory remedy. It doesn't seek anything more or anything less. The pending motion for status quo simply asks that National not make effective the certificate of incorporation and bylaws until the Court can make such a determination.

Your Honor, from the chapters' perspective, National is, as we've said, attempting to strip away their membership and governance rights. And National, frankly, chose to do so via merger and to obtain membership approval through Section 228 non-unanimous written process.

So National is subject both to the statutory requirements that they chose to invoke, as well as the equitable stricture that are applied by the Court of Chancery. It goes without saying that a

consent can be ineffective for a number of reasons under Delaware law, both technical and equitable. And here, we have both.

On the technical, with respect to the technical side, National's consent is unsound. As the chapters spell out in their complaint and in their motion, National failed to comply with DGCL Sections 256(b), 255(c), and 256(c), principally by failing to provide an executed merger agreement to members for approval.

To cite a few more examples, Your Honor, the consent purports to approve a merger between National and an unidentified chapter -- or chapters, it's unclear -- and does not comport with National's own procedures under bylaws Section 4.5. It was not considered or approved by the chapter relations committee or Section 5.11, that requires consent be signed by a voting representative. In only one instance does it appear from the consent that a voting representative was a signatory.

Finally, National -- finally, Your Honor, and I think that this goes both to the motion in the 225 action; it similarly applies to the motion in the plenary action.

National has been threatening termination of membership and charter revocation through a unification policy from at least August 2021. Ultimately, National made the decision to formally adopt such a unification policy in January 2023.

That unification policy, and the threat of that unification policy, was squarely before the chapters for months. And the chapters had every reason to believe that if they did not choose to turn in their charters, their charters would be stripped. That is hardly a free choice or free consent. And for that reason, Your Honor, the consent is coerced and ineffective.

Until the Court has an opportunity, at a minimum, to make a determination, the certificate of incorporation, which would move the organization from a member corporation to a nonmember corporation, should not be filed, and the amended and restated bylaws should not be made effective.

Your Honor, with respect to expedition, it's our feeling -- and I don't think we need to waste a lot of time on this -- it's our strong feeling that by consolidating these actions because

discovery would be duplicative, we can proceed apace with both and have the Court address both the efficacy of the consent, as well as the more substantive claims in the plenary action at the same time.

Thank you.

THE COURT: Thank you very much.

Mr. Maimone.

ATTORNEY MAIMONE: Again, good afternoon, Your Honor. Mike Maimone of Barnes & Thornburg for defendant, National.

This action in general, and today's motions in particular, represent a marriage that has gone bad. National and a majority of the chapters want to unify, and plaintiffs do not. For some unknown reason, plaintiffs want to stay married, through a federation, and National and a majority of the chapters do not. As the marriage continues, the parties are becoming more resentful and less likely to resolve their differences. A divorce is the only answer, and unification through merger is the divorce.

If plaintiffs are entitled to damages and/or assets after the divorce, then so be it. But to force the parties to remain in an unhealthy relationship is not the answer. Continuing this

relationship will cause the dispute between the parties to intensify and will cause the parties to spend more time and money on continued litigation rather than on the mission.

Moreover, continuing this relationship will ultimately result in this Court, rather than the trustees, managing National's affairs. Plaintiffs and National will continue to disagree on whether the other party satisfied its obligations under the chapter charter agreement, which in turn will result in a series of actions and more motions being filed with this Court, and in reality will result in this Court managing National, which will cause both this Court and the parties to suffer extreme burden.

Finally, and most importantly, Your Honor, forcing this marriage to continue for at least six months will harm individual people. As asserted in National's affidavit, 15 people a day are diagnosed with ALS. This is a person every 90 minutes. Between now and trial, approximately 2700 people will be diagnosed with ALS. The life expectancy of a person diagnosed with ALS is approximately two to four years.

To delay the merger for six months or more will be significant. It will limit National's

ability to service some of these 2700 people, as well as some of the 33,000 people who currently are diagnosed with ALS. These people include three of National's trustees and the son of National's chairman. These three trustees and chairman all support unification.

It is indisputable that care services differ from geographic region to geographic region, from chapter to chapter. Even plaintiffs agree on this point. It's in their amended complaint at paragraphs 48, 49, 63, 64, and 222, 223. For example, people diagnosed with ALS in West Virginia or Mississippi have far less care services than people diagnosed with ALS in Los Angeles or New York.

A major reason for the merger is to increase care services in some of the regions without decreasing care services in any of the regions, which should result and make all care service at the highest level possible and make these care services a national standard. As stated in National's affidavit, a person's zip code should not determine a person's destiny.

Plaintiffs offered nothing in response to these facts. Plaintiffs may disagree with

National's reasons to merge, and plaintiffs may question National's ability to achieve this result. But the decision of disinterested and independent trustees and a majority of fully informed chapters should be respected. To grant the injunctive relief sought by plaintiffs would cause this Court to second-guess the trustees and a majority of the chapters, which would be contrary to the business judgment rule and the doctrine of ratification.

In sum, in this action, time matters, and people's lives are involved.

Plaintiffs repeatedly argue that the effective date of the merger was February 2024, so a delay will not harm National. This is completely wrong. As stated in National's affidavit, National will suffer harm if the merger is delayed. Moreover, and more tragically, the length of the delay suggested will cause some of the approximately 4500 people diagnosed with ALS between May 2023 and February 2024 to suffer harm.

What plaintiffs conveniently ignore is that the February 2024 date was an outside date to close the merger if all 34 chapters were merging. The trustees believed that extra time would be needed to

negotiate 34 merger agreements. Although it's the same agreement, all the chapters that want to merge are involved in the merger agreement. So the trustees thought it would be 34 chapters dealing with the merger agreement. So the trustees gave it more time.

Plaintiffs, however, made it clear that they are not merging. All 18 merger agreements have been negotiated and agreed to by the parties. There simply is no reason to delay the merger. Again, time matters, and people's lives are involved.

Now turning to plaintiffs' probability of success on the merits. Plaintiffs have no reasonable probability of success. National demonstrated its power and authority to merge under Delaware law and National's governing documents. Plaintiffs disregard this power and authority. National also demonstrated that plaintiffs have no right to veto or block the merger, which plaintiffs actually conceded during the prior hearing.

Finally, National demonstrated that plaintiffs' lack of any vested right in their memberships under Delaware law and National's governing documents. Plaintiffs lack this vested right.

Basically ignoring their lack of a vested right, plaintiffs argue that their right to membership is created in the chapter charter agreement, rather than National's bylaws, and because the merger would be a -- and the merger would be a repudiation of the chapter charter agreement because National no longer will be a federation and plaintiffs no longer will be members of National. Accordingly, based on the chapter charter agreement, this Court should enjoin the merger.

This argument lacks any merit. Plaintiffs' memberships are not created in the chapter charter agreement. Plaintiffs have no right to memberships under the chapter charter agreement. Rather, plaintiffs' memberships are created in National's governing documents, and the disinterested and independent trustees and a majority of the members have the right to amend National's governing documents through the merger.

Nothing in the chapter charter agreement, not one word, mandates that National remain a federation and plaintiffs remain members of National. Indeed, plaintiffs' rights under the chapter charter agreement are conditioned on National

remaining a federation. It is a conditional right that can be changed.

The word "member" only appears in Article 1 of the chapter charter agreement and provides that the chapters are members of National as defined in National's bylaws. And the bylaws, and I quote, "may be amended from time to time." Based on this unambiguous language, plaintiffs' memberships are based on National's bylaws, and National's bylaws may be amended.

Accordingly, under Delaware law, plaintiffs lack a vested right in their memberships. Even if the chapter charter agreement contained language that somehow guaranteed memberships, which it does not, the fiduciary duties of the trustees may not be altered, limited, or eliminated by a contract. This is *Omnicare*, this is *QVC*, this is a variety of other decisions.

If the disinterested and independent trustees -- excuse me, Your Honor -- decided that it was in the best interest of National to unify -- which they did -- the contractual terms of the chapter charter agreement may not stop or alter this decision. There may be ramifications of this decision as breach

of contract, but the chapter charter agreement, as a contract, cannot alter a director or a trustee's fiduciary duties.

Notwithstanding National's power and authority to merge and plaintiffs' inability to stop the merger, National needed to address the members that refused to merge. In addressing these members, the disinterested and independent trustees adopted the unification policy.

National believes that the unification policy is valid and enforceable. If plaintiffs refuse to merge, then plaintiffs will be in breach of the unification policy and thus will be in breach of the chapter charter agreement. Plaintiffs fail to address the unification policy in their motion for preliminary injunction or in their reply.

Plaintiffs' failure to address the unification policy is telling, because the unification policy is the crux of plaintiffs' repudiation argument. If the unification policy is valid and enforceable, then National did not repudiate the chapter charter agreement by merging, and plaintiffs are not entitled to relief.

If the unification policy is not valid

and enforceable, then arguably, National repudiated the chapter charter agreement by merging, and plaintiffs may be entitled to relief. This relief, however, should not be an injunction of the merger. Rather, the appropriate relief is the payment of damages and/or the transfer of assets.

In reality, the merger is a sideshow. Based on plaintiffs' claims in their own complaint, this action involves damages and assets, rather than injunctive relief. In fact, plaintiffs merely are using this merger to obtain leverage in connection with the actual dispute between the parties, which involves money and resources.

Simply stated, if National breached the chapter charter agreement by merging, then plaintiffs may be entitled to damages and/or assets. Plaintiffs are not entitled to more. There is no basis for this Court to enjoin the merger, either preliminarily or, ultimately, permanently. Accordingly, plaintiffs have no reasonable probability of success on the merits.

Likewise, plaintiffs fail to demonstrate irreparable harm. Initially, it should be noted that plaintiffs submitted no factual affidavit

in response to National's affidavit.

Plaintiffs only argue that they will be irreparably harmed because they will no longer be members of National. This argument completely ignores the fact that they lack any right to be a member of National, no vested right. They may have a contractual right and a right under the bylaws, but that right is not vested, and based on Delaware law, that right can change.

In contrast, National submitted the affidavit of its CEO, which describes the harm that will be suffered by National and, more importantly, by people affected by ALS, if the injunction is entered.

In sum, if plaintiffs' motions are denied, then plaintiffs will not be harmed because, one, they have no right to their memberships. Two, National will continue to provide services to plaintiffs as mandated by the status quo order.

And I want to challenge one of the comments made by my friend on the other side. We intend to operate in all 50 states. That is the intent of National. But we will not do that as long as the status quo order is in place, because the status quo order respects the chapter charter

agreement. And National fully intends to satisfy all its obligations and to provide all services necessary under the chapter charter agreement.

Until this trial is over, there will be no competition between National and plaintiffs. However, once the trial is over -- and hopefully National will be allowed to unify now, but if not now, after trial -- there will be competition between National and plaintiffs.

And finally, number three, if, after trial, it is determined that National did repudiate the chapter charter agreement, an award of damages and assets may make plaintiffs whole.

In contrast, to delay the merger for six months will irreparably harm National and, more importantly, will deny critical care services for people diagnosed with ALS. Again, the facts established in National's affidavit have not been disputed by plaintiffs. Out of the 15 individual plaintiffs, not one was able to present an affidavit that disputed or responded to any fact presented by National.

Regarding a balance of the equities. Plaintiffs argue that the merger will cause

plaintiffs -- and I quote again -- "permanent loss of the right to membership guaranteed by the [chapter charter agreement]." This is in their reply at 6.

None of National's governing documents, which includes the chapter charter agreement, guarantees -- I use the word "guarantees" -- membership. Not a single fact presented by plaintiffs weighs in favor of a preliminary injunction.

In contrast, as set forth in National's affidavit, to grant a preliminary injunction will result in, among other things, inconsistent care services nationally, which will adversely impact some of the 2700 people who will be diagnosed with ALS between now and trial, as well as some of the other 33,000 people diagnosed with ALS; little or no care services in certain geographic regions; National possibly losing millions in State funding; National possibly losing millions in donations, especially during the May ALS awareness campaign, which is right around the corner; National losing a substantial number of staff members and incurring significant human resources expenses; National losing a substantial number of volunteers,

including potential trustees; and National suffering from organizational confusion and disruption.

It may be asked, why would the people who will be diagnosed with ALS and the people currently diagnosed with ALS, why can't they be serviced without a merger? Because this hybrid situation that's currently existing at National is causing organizational confusion and disruption. Right now, you have chapters still existing under a federated model but trying to act under a unified model. It just doesn't fit. It's a -- it's a square peg trying to fit into a round hole.

National needs unification and needs to deal with the organizational confusion and eliminate the organizational confusion and disruption to truly serve the people impacted and diagnosed with ALS.

Amazingly, it is plaintiffs' position that all of these harms, not to National, but to the mission, are outweighed by a purported guarantee to be a member of National. Let me say that again. The mission is being harmed -- the mission that not only National is in favor of, but plaintiffs are in favor of. And all of these things -- loss of money, loss of

staff, loss of volunteers, unable to serve people with ALS -- all of these things are outweighed by some hypothetical guarantee that plaintiffs have some vested right -- which they don't have -- to be a member of National.

Honestly, the balance of the equities, it's not even close. The equities overwhelmingly favor denying the preliminary injunction motion.

In addition, plaintiffs argue that National's opposition to plaintiffs' 225 motions -- their opposition is a sideshow. In reality, the sideshow is plaintiffs' Section 225 action and motions. That's the true sideshow.

As demonstrated in National's opposition, the written consent and the merger agreement comply fully with Delaware law. The Section 225 action is nothing more than a thinly veiled attempt to further delay the merger. Indeed, nothing in Section 255 or Section 256 of the DGCL mandate that an executed merger agreement be submitted to the members.

Contrary to plaintiffs' position, under Section 255 and 256, a brief summary of the merger agreement satisfies the statutory requirement.

National provided its members with more than a brief summary. It supplied its members with the merger agreement. Granted, there were blanks to deal with the various states that National needs to -- that the chapters actually need to file this merger agreement. It must comply with Delaware law, which it does, but also must comply with the individual states' law. And that's the only thing in the blanks. And the statutes also provide that the merger agreement can depend on other actions. And these other state requirements are the other actions.

So this is -- it's more than a summary, and it's, frankly, the full agreement, contrary to what plaintiffs are saying.

Finally, each and every signatory to the written consent was identified to National by the chapter as being a certified voting representative or alternative voting representative of the chapter, with full power and authority to execute the written consent. Plaintiffs' argument regarding the signatories to the written consent, frankly, are a mystery to National. My client has no idea why this argument's being made, because according to the chapters, who authorized the written consent to be

signed, every signatory is a voting representative or an alternative voting representative.

Finally, regarding plaintiffs' resurrected coercion argument, there was no coercion; and certainly there was no wrongful coercion, which is required under Delaware law.

If Your Honor goes back to the old *Sampsonite* case, which was, at the time, Vice Chancellor Jacobs, Vice Chancellor Jacobs said any tender offer is coercive. Just the fact that you're asking people to tender is coercive. That's not the standard under Delaware. The standard under Delaware is wrongful coercion, and that's basically the old concept of a prisoner's dilemma.

In this case, all of the chapters have been communicating between and among themselves for more than 18 months and, frankly, between and among themselves and National for 18 months. Each of the chapters knows the position of every other chapter and also knows the position of National.

Based on this extensive communication over an extended period of time, no prisoner's dilemma could exist. If plaintiffs were able to flip three chapters over 18 months through extensive

communication, they would have done so. There's no prisoner's dilemma. And thus there's no wrongful coercion. Every chapter knew what it was doing when it did it, either executing the written consent or refusing to execute the written consent.

Wrongful coercion does not exist, and this is demonstrated by two facts. First, plaintiffs themselves never executed the written consent, and thus plaintiffs were not wrongfully coerced. If it turns out that plaintiffs were wrong, the unification policy is valid and enforceable, and they, in turn, lose the assets that they hold for the benefit of the -- for National. That's their choice. They made that decision.

If it turns out that plaintiffs are correct, and if a unification policy is not enforceable and is not valid, then we'll deal with damages and assets. But there is no coercion here to sign a written consent that all the chapters knew about for months and years and discussed extensively for months and years. That's first.

Second, and importantly, no signatory to the written consent has withdrawn its support for unification based on coercion or any other reason.

And trust me, these chapters talk. They're always talking. They're always going back and forth. In fact, plaintiffs knew that this written consent went out to get signed by chapters and were calling chapters, telling them not to sign it. But they still signed it. That's not coercion, Your Honor.

Plaintiffs simply ignore and resent the fact that a majority of the chapters want to merge, as well as National. Such ignorance and resentment, however -- ignorance and resentment are not wrongful coercion and do not amount to wrongful coercion.

In conclusion, plaintiffs' motion should be denied. And I'm happy to answer any questions Your Honor may have.

THE COURT: Great. Thank you.

Reply.

ATTORNEY KARETNICK: Yes, Your Honor. Thank you. And I will keep my remarks in reply brief, Your Honor.

First, with respect to care services, uniformity is not the hallmark of legality. And respectfully, it is a sideshow to talk about uniformity of care services across the country,

particularly when it is the 15 most successful chapters who are those chapters that have declined to participate in this merger.

Indeed, National has been, and for some time now, in charge of and in control of West Virginia, for example. And West Virginia's care services are at the bottom of the country. So this notion that the other chapters should lower their standards to create the lowest common denominator across the country makes absolutely no sense and, in fact, I think, Your Honor, plays to the argument that the harm that these chapters will suffer is not insignificant if they should participate in this merger. That's number one.

Number two, Mr. Maimone mentioned competition will not begin until after this case is adjudicated. That is contradicted by paragraph 10 of Calaneet Balas's affidavit, which expressly states that as soon as the merger is made effective -- and according to Ms. Balas, that is going to be on May 1 -- competition in all of the territories that are exclusive to the 15 plaintiff chapters will commence.

Number three, Your Honor, to the

extent that my opponent contends we have not presented this Court with any verified facts, he is mistaken. We presented this Court with a lengthy verified complaint. All of those facts were incorporated into our motions expressly.

Number four. Your Honor, with respect to the right to veto or block, the plaintiff chapters understand that if a chapter chooses to merge with National, it may, provided the processes spelled out in the bylaws and in the applicable agreements are followed. What we do not agree with is the notion that the chapters choosing not to merge are stripped of their membership, in contravention of their contractual rights and in contravention of existing bylaws and governance processes.

The concern that National clearly has is that should it proceed apace to merge with chapters whose assets and employees are already within National's control, that the 15 remaining chapters will have complete governance control over the member organization. That is their fear. But candidly, that is a bed of National's own making.

With respect, Your Honor, to the question of whether the chapters have a right to stop

the merger, the answer is yes. Yes, they do. Whether that's stopping the merger of any or all of the merging chapters or simply stopping the filing of the COI, there are contractual provisions that provide the plaintiff chapters with a basis to stop this merger.

They include the chapter charter agreement at 5.12, which states expressly that the duration of the chapter charter agreement is perpetual until terminated pursuant to Sections 4.1 and 4.2 of the merger agreement. Neither Section 4.1 or 4.2 were followed by National. Similarly -- and those provisions, Your Honor, are consistent with Section 4.5 of National's current bylaws. They are coextensive.

There is also Section 5.7 of the chapter charter agreement that expressly states that the parties entered into a mutual covenant that a nonviolating party to the chapter charter agreement can get specific performance or other equitable relief if a provision of the agreement is violated. And here, the agreement has been violated.

We understand, Your Honor, that a stipulation of irreparable harm may not be binding on this Court, but that provision very clearly tells us

what the parties intended at the time that they entered into the chapter charter agreement. And it clearly indicates that they intended to protect plaintiffs' membership rights, which are at risk.

Your Honor, with respect to the 225 action, wrongful coercion, I don't know what else to say. We've articulated wrongful coercion. We have articulated the prisoner's dilemma that Mr. Maimone contends we did not. The chapters were given a choice: Choose to die or be killed. I know of no better or more significant example of a prisoner's dilemma.

And finally, Your Honor, with respect to harm and mission. The 15 chapters that are our clients have chosen this uncomfortable path because it is their grave concern that their mission will fail if they're forced to merge. And there is evidence to support their concern. Their concern is not without foundation.

During the pendency of this matter, the chapters will continue to do the good work that they have done consistently for decades. They will continue to serve the ALS population in their regions, and they will continue to do so at the highest level.

They are the most successful chapters. So the concern that National articulates about the harm that will befall it if it cannot proceed with this merger according to its unilateral timeline rings hollow.

And finally, Your Honor, with respect to coercion, it is true that the weakest chapters agreed to merge. And it is true that the weakest chapters agreed to merge precisely because they were put in a bind. And it is true that they haven't withdrawn their consents; perhaps because they no longer have employees and they have already agreed to transfer their assets. And they did that over a year ago, before there was a proof of concept.

There is, however, one chapter that, having lived through the proof of concept, chose not to sign the consent. And that is San Diego. San Diego's position today, as we understand it, is they will sit by and watch the litigation unfold, but they do not want to merge.

So it is not true that there are chapters that have not chosen to walk away from their initial commitment, that commitment made over a year ago, before -- before the consent was put in front of them. It was a commitment to commit, as it were.

Your Honor, I have nothing further.

THE COURT: Great.

Well, thank you all for your presentations. I appreciate it. I gave this considerable thought before the hearing, and I think it's suitable for me to give you an answer now.

We're here today in two actions. One is a 225 action, C.A. No. 2023-0413. The other is a plenary action, C.A. No. 2023-0054. Both disputes involve disagreements between the national headquarters of the ALS Association and various chapters. We're here right now on the plaintiffs' application in the 225 action for a status quo order and for expedited proceedings and, in the plenary action, for a preliminary injunction.

Both requests for relief deal with the closing of a proposed series of mergers between the national headquarters organization and various chapters that have executed a written consent purporting to affirm the mergers with National. If that merger goes into effect, it will have significant consequences for National's governance structure, including for its charter and bylaws.

To give you the answer up front, I am

going to issue the injunction. I'm going to do it both as a preliminary injunction and as a status quo order. And I will give you my reasons now.

The relevant facts are actually fairly few. The principal organization in this country that battles ALS is not a single entity, but, rather, a combination of over 35 different entities. Broadly speaking, it consists of a national headquarters entity and at least 34 member entities that are its chapters. To reiterate, however, the separate organizations are separate jural entities.

Under the current governance structure, the various member entities are members of the national entity. They elect representatives to a board of representatives of the national organization. Then the board elects trustees who serve as the governing body of the national headquarters organization.

In January 2022, the executive leadership of the national headquarters adopted a policy of merger and de-federation under which all the chapters would merge with the national headquarters to form a single unitary national organization. After that merger, there will be no member chapters with

voting rights. There will only be a self-perpetuating board of trustees.

Under chapter agreements between the national headquarters and the various membership organizations, the national headquarters can terminate the membership of a member organization if the member organization fails to comply with the organization's policies. Upon termination, National can take possession of the assets of the formerly affiliated and now-terminated organization.

By declaring a policy of merger, the national headquarters created a situation in which opposing the plan of merger constituted a violation of policy, entitling National to seize the assets of chapters that might otherwise oppose that result and effectively extinguish their existence.

Whether a policy of merger can be used to effect that outcome, I think, is a fairly litigable question. There is reason to think that that type of policy -- effectively, a board-adopt policy that would trigger a mandatory buyout right -- goes beyond what a policy can do.

This is a nonstock corporation, but if you want to analogize it to a stock corporation and

the type of redemption rights or acquisition rights that the DGCL would allow, Section 202 would not allow that, simply flat not. A unilateral acquisition right could be imposed by some means, but not against nonconsenting stockholders.

Likewise, a redemption right could not be imposed unilaterally by board policy. It would have to be imposed through the charter.

At a minimum, the claim that National would terminate member organizations that oppose the merger and seize their assets constitutes an obvious threat that I think would coerce them into supporting the merger. In fact, one can hardly imagine a more direct threat to an organization than the threat that you will terminate its existence and seize its assets.

Maybe for human parents, the idea that your children get threatened might be higher on the threat chart than being threatened yourself, but for an organization that doesn't have that type of biological lineage, I think the termination of your existence is about as big as it gets.

And that doesn't mean that everyone will knuckle under to that type of threat. Some people respond to threats of that type by fighting

back. Some people respond to threats of that type by knuckling under. The fact that you have different types of reactions to a threat doesn't make the threat non-coercive. It simply means that there may be variability as to the effectiveness of that threat against different members of the population.

The threat, however, is quite obviously a coercive threat that affects the decision-making of the people who are subject to that threat. Whether it causes a tipping point to be reached in that organization's decision-making or whether it drives the outcome can be debatable. That depends on the other factors, such as the alternatives that the organization has and how strong the organization's culture is. But it is quite obviously a threat.

At this point, 18 of the member organizations have signed transfer agreements with the national headquarters. They have transferred their assets to National and now exist as mere shells. Approximately 16 of the member organizations, give or take, oppose the merger. The plenary action in this Court is an effort by those organizations to protect their rights and prevent National from doing what it's

doing.

A section 225 action has been filed because the majority of the member organizations that have already transferred their assets to National have purported to act by written consent to approve a de-federating merger, adopt a new certificate of incorporation, and adopt a new set of bylaws. That's what brings us here today.

There are three motions at issue, all of which have standards that coalesce. The standard for a preliminary injunction starts with a reasonable likelihood of success on the merits. That doesn't mean that you have to show that you will prevail on the merits. It doesn't even mean that you have to show that you're more likely than not to prevail on the merits. It simply means that you have to have a reasonable likelihood of prevailing on the merits.

The second element of a preliminary injunction is a showing of irreparable harm. The third element of the preliminary injunction standard is a balancing of the hardships, such that the issuance of the injunction does not do more harm than good.

The other two standards are similar.

The standard for what is really a temporary restraining order, but in the 225 context is framed as a status quo order, asks whether there is a threat of irreparable harm and whether there is a colorable claim. And then there's also an issue of balancing of the equities.

In a Section 225 context, status quo orders are regularly granted because we are dealing with major corporate governance issues that will determine the fate of an entity. And when there is a litigable question about that type of governance issue, we routinely prevent the governance measure from going into effect until we can determine its validity.

That way, unalterable things don't happen. Instead, we get to figure out whether what is being proposed to happen really should happen before it goes into effect.

And then the last motion is a motion to expedite. The standard for that is similar to a motion for a temporary restraining order, in that it requires a colorable claim and a showing of irreparable harm, and then the Court takes into account whether the balancing of the hardships

warrants going forward with an expedited proceeding.

Let me make one statement up front. I do not decide this motion based on any view about which side is correct about the most efficacious way to provide care to vulnerable people. I am not in a position to judge that. I am confident that each side's beliefs about the most efficacious way to provide care to deserving and vulnerable people are sincerely held. I think that there is room for disagreement on those beliefs.

I will not decide this case based on threats to me about people being about to die. Nor will I accept any effort to put on my shoulders the deaths of vulnerable individuals. Whichever way this case comes out, it is a problem for vulnerable people, because rather than moving forward with the mission, the key stakeholders are in disagreement.

One way of looking at it is that people will die if there isn't a federated model. That is a sad thing, and for those who believe it, that is a harm that they wish to avert.

The other way of looking at it is that with a federated model, the quality of care will suffer and people will die. That is a sad thing for

people who believe it and something they want to avert.

The causal factor that is leading to vulnerable people being in danger is your inability to agree, not whether or not this court makes some decision in a more or less timely fashion. My job is to give you-all due process. My job is to decide what your governance agreements say and what they permit. My job is to decide this case based on the facts and the law, and not based on inflammatory rhetoric about people being about to die. That is not on me.

I agree that you-all should not be having this fight and that you should be focusing on the vulnerable individuals that deserve your help. And I will do my best to decide this matter as promptly as possible so that whichever side prevails, and whatever outcome emerges, people can get back to that.

But do not put on me the idea that people are going to die if I don't rule in a particular way. That eventuality is because of the problem that the two sides here have created.

Clearly, I am going to do everything I can to bring this case to a fast resolution so that

people can get back to doing what they should be doing and helping people. But I will not be making decisions based on emotional appeals and inflammatory rhetoric on issues where both sides have deeply held beliefs about what is the best way to serve these vulnerable and deserving communities.

With that preliminary statement out of the way, let's turn to the actual claims on the merits that bring us here today.

In terms of an injunction enjoining the merger from being implemented and the charter amendments and bylaw amendments from going into effect, there are more than colorable claims. There is more than a reasonable probability of success on the merits. There is at least one claim where I could grant relief as a matter of law in favor of the objecting organizations. And that is the claim that the consent validly approves a merger agreement. It does not. It purports to approve a draft unsigned merger agreement.

Section 256(b) quite clearly says that the parties to the merger agreement, the constituent corporations, actually have to execute the merger agreement. An agreement is an agreement. It is an

executed contract. It is not a draft. It is not a proposal. It is not something unsigned with blanks in it.

It is also not something where you can make the parties to the agreement and its actual execution dependent on facts outside the merger agreement. Yes, Delaware law allows you to make aspects of a transaction dependent on facts outside the merger agreement. But there has to be an agreement for there to be facts outside of.

Here, there is no agreement. There is nothing for the stockholders to approve. Now, true, you can go back tomorrow and get the relevant people to sign the agreement and come back with an agreement that actually complies with the statute and with 228. That's fine. That's actually what you have to do.

What you have right now is not a valid written consent. It is not a valid merger approval.

As I say, I could grant summary judgment in favor of the plaintiffs in the 225 action on that basis alone and enter a final judgment in that case invalidating the consent, because it is clear as a matter of statute that the consent is not effective to adopt a merger because there is no merger agreement

right now.

Now let's talk about some other things. This is not about the power to merge. At present, this is about whether people have validly executed the power to merge. And when it comes to statutory issues, Delaware focuses on formalities. You don't just get to wave your hands and say, "We're going to do something like this, and we'll fill in some blanks and we'll sign it all up, so we're going to approve it now."

There is a specific order of events that has to happen for a merger to become effective. One of those events is that you have to first have board authorization. Then you actually have to have an agreement. Then the agreement or a summary of the agreement has to be provided to the stockholders. There actually has to be an agreement to summarize if you want to go that route.

Another theory that seems to me to be quite plain as a matter of law is that the merger has to be proposed by the chapter relations committee. The plain language of Section 4.5 of the bylaws applies to any merger of two or more chapters or a chapter and another organization. National is another

organization.

National says that that provision only applies to a merger between chapters, but that is plainly wrong. The express language of the provision says, "or another organization." That has to mean something.

Now, again, people may be able to go back and fix that. Maybe tomorrow the chapter relations committee could put forward the requisite recommendation and report. Right now, you don't have it. You haven't complied with your bylaws. I could grant final relief in the 225 action right now in favor of the plaintiffs invalidating the consent, because it didn't comply.

Those are two claims that I think are so clear that I could grant affirmative relief. That is sailing well above any of the standards for injunctive relief. Now let's move down a level and talk about a claim where there is a reasonable probability of success on the merits.

I think there is a reasonable probability of success on the merits that this vote is tainted by coercion. Now, we can litigate that. There can be factual findings on that. But at least

at present, there is an obvious threat of coercion; and, yes, wrongful coercion.

My personal exegesis on coercion appears in *Dell Class V Stockholders*. I understand the distinction between wrongful coercion and real coercion. I think it's a little bit of quibbling around the edges. But, yeah, we have it. That's true.

The threat that we will eliminate you and seize your assets is about as coercive as it gets. Now, it may well be proved at trial that that threat did not wrongfully taint the atmosphere. And it may be proven at trial that, in fact, that threat was not a wrongful threat, but simply a promise to do something that National could always do.

But right now, there is a reasonable probability of success on the merits of the claim that the invocation of the pro-merger policy, the unification policy, and the concomitant assertion of the power to destroy was in fact a threat.

Another argument where I think the plaintiffs have shown at least a reasonable probability of success on the merits is the contention that the merger will repudiate the chapter agreements.

This is not a standard governance structure. Maybe there are other organizations with this governance structure. I certainly haven't seen an organization with this type of governance structure. I've had cases involving nonstock membership organizations. I've had a lot of cases involving stock organizations. I have had cases involving nonstock, nonmember corporations which had perpetual boards of trustees but otherwise no members.

I have never seen an animal that is set up like this one, with this odd combination of charter, bylaws, and these chapter agreements where, as to some things, the chapter agreements seem designed to be the actual governing agreements, rather than the subservient agreements. It is weird.

I do not know how the interaction of these provisions turns out. I do know that, given this bizarre structure, I cannot say as a matter of law that the merger can go through and effectively eliminate the member interests of all of the chapters, including the nonconsenting chapters.

Normally, can a merger do that with stock interests? Yes, it can. But this is a bizarre structure, and I think there is a litigable issue

where the chapters have a reasonable probability of success that, because of the irreparable harm provisions in the chapter agreements and because of the commitments made in the chapter agreements, those were intended to establish a governance structure in which the chapters remained members.

I think that it is likely that the governance structure was not intended to establish a regime where National could simply unilaterally eliminate their membership interests. I certainly don't think people generally contemplate that through a bylaw amendment. That's a move. Normally, you cannot do that through a bylaw amendment.

I am more than happy to hear about this at trial. I am more than happy to think about it more with the benefit of the parties' help, but I think there is a reasonable probability of success on the merits on the argument that, under this structure, people were trying to protect their ability to remain as members and protect against unilateral elimination except as provided in this governance structure. And it is not clear to me that what is happening here complies with that governance structure.

Now let's get to an argument that I

think is colorable. I think it's enough to move the needle on the 225 and the TRO, but it wouldn't be enough to move the needle for the other forms of relief. And that's the voting representative argument.

The plaintiffs have identified a colorable reason why they think that some of the signatories might not be voting representatives. That's because only one of the signatories is actually identified as a voting representative. The others are not identified as voting representatives.

Perhaps people know that all these folks are voting representatives. Perhaps discovery would show that all these people are voting representatives. I don't think you-all should spend a lot of time on this one. I think you ought to figure out whether these people really are voting representatives and then move on to other stuff. But it is at least a colorable argument.

For all those reasons, I think that there is a reasonable likelihood of success on the merits on certain claims, my ability to grant relief as a matter of law on other claims, and then a colorable basis for at least one of the claims.

Bottom line, the first aspect of the injunctive standard is met.

Now we go to irreparable harm. This obviously exists. I said that the last time around. It is unchanged. The chapters are being threatened existentially. They're being threatened with being eliminated. That is irreparable harm.

Now let's look at the balancing of hardships. And this is where, again, I am not going to be drawn into the game of which outcome results in people being served less well and more people dying. I think you both have sincerely held beliefs about that. What I care about is the balance of hardships as to whether this merger should go through now or whether it should wait until we've actually had a hearing on the merits.

In terms of the actual corporate structure, I see no reason why it has to go through now. Is it going to be difficult to manage this entity pending the outcome of the litigation? Yes. Just as it's been difficult to manage the entity over the past year-plus since the executive team came up with this merger plan and other people decided to resist it. That conflict has been ongoing. Yes, it

may intensify, but that's simply a reality.

I also do not give serious weight to the fact that National has expended resources pursuing this option. A, that's a monetary investment. B, that's their decision. If anyone is responsible for that decision, it's the executives at National.

On the other side of the ledger, the objecting chapters have likewise incurred expenses. They've invested resources. So from a balancing of the financial interests, to me, that's a wash.

What I think is most important is the degree to which I can fix this and to what degree can I issue relief later that would unwind or change something if the merger goes through now. And that's where I'm worried. And that's where, having thought about this more, I am in a marginally different place than I was when I was with you the first time.

The first time I was with you, I was trying to find a way that this merger could happen and we could preserve the status quo, notwithstanding this merger, and people's rights could remain in place and people could continue to operate. And then, once we find out what happens at the end, we would true everything up and somebody would get the assets and

somebody wouldn't. And everybody would go on their merry way.

When I now see what the merger actually contemplates, in terms of the fundamental changes in the organizational structure, to me, that route is no longer viable. The status quo here means the status quo. The status quo means the premerger status quo. That's what you're going to have to live with until we all get together and try this case and I can give you an answer.

I think that's a reason why you ought to be trying to figure out a different path, like a way to either work together or a way to go your separate ways. I told you this last time when we were all together, because I thought that this was, to be blunt, a bone-headed use of resources. You-all should be using your resources to help the people who actually need your help, not to fight about this type of stuff.

Now, what would a resolution require? It would require some compromising. People who right now think that they should get everything they want would have to come to grips with a world where they weren't going to get everything they want. That's

what compromising is about. It's about figuring out what you really need so that you can live with other people, rather than trying to impose your will on them.

If it is difficult between now and when we have a trial, find some solutions. Put on your problem-solvers' hats. Figure out ways to compromise. If I have to resolve some interim disputes, I'll resolve them. If I have to appoint a Master to come in who is wise in the ways of nonprofit governance and who can be my eyes and ears on the ground and make recommendations to me as to what should happen during this interim period, I can do that.

I really think you-all ought to take these issues off the table and figure out a way to move forward. But if you can't do that, you're going to have to stay in the status quo until we can all get together and we can have a trial and I can issue some rulings. Because that's the way we do it. We actually have trials. We actually get evidence.

What is extraordinary about a preliminary injunction is not that it is, wow, Superman extraordinary. It's extraordinary in the

sense that it is out of the ordinary, in the sense of out of the ordinary progression of a case because you are granting relief early.

What is also out of the ordinary is for someone to radically change the status quo before you can figure out whether they should radically change the status quo.

So here, the injunction is maintaining the state of play so we can figure out what should happen. We'll do that on a record after a trial so that you-all can make your best arguments and I can try to get it right. There's simply too much risk of error right now for me to let people go off doing things that may be unfixable later.

For all those reasons, I am granting the requests for relief. I'm happy to enter a judgment in the 225 if that matters. I frankly don't think it does matter, because some of these issues could be fixed and we'd just be back with another 225 dispute the next time around.

I think what really matters is the injunction ruling telling you-all that you have to remain in the status quo until we get to trial. I will enter an order to that effect.

I want to thank everybody for bearing with me and listening to my ruling. I appreciate all the presentations you've made. I also know how hard you're working on this case, in terms of getting me filings and doing all the work that goes into it.

With my thanks, I'll bid you a good rest of the day.

(Proceedings concluded at 5:17 p.m.)

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CERTIFICATE

I, JULIANNE LABADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify that the foregoing pages numbered 3 through 556 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 27th day of April, 2023.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public