

Opposition Arises to Charities' Merger

By Stephanie Strom

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For the last decade, Smile Train and Operation Smile have been the Hatfields and McCoys of the charity world.

Leaders of the two organizations, which work to repair cleft lips and palates of children in poor countries, have long been estranged. Even though Smile Train's founders at one time served on the board of Operation Smile, they and its founders, Dr. William P. Magee and his wife, Kathleen S. Magee, ran separate charities with similar goals while remaining divided by their differences year after year.

So the announcement on Feb. 14 that the two organizations were merging seemed, at least on the surface, an effort to set aside the longstanding feud in the interests of a greater good.

But as it turns out, according to some board members, the merger was the culmination of another feud, one that had been quietly building in Smile Train's offices and board room between Brian Mullaney, a co-founder and former advertising executive, and Smile Train's other founder, Charles B. Wang, owner of the New York Islanders and the founder and former chairman of Computer Associates.

In the nonprofit equivalent of a putsch, Mr. Wang and four Smile Train board members who are also employees of his businesses engineered the merger and presented it as a fait accompli at a regularly scheduled board meeting on Feb. 8, board members who opposed it said.

The opponents initially balked and have now complained to the New York attorney general's office. They contend that Mr. Wang set up a highly unusual financial structure under the merger.

The controversial deal gives Mr. Wang oversight of the bulk of Smile Train's roughly \$160 million in assets, and it guarantees lifetime tenure at the new organization to the Magees.

Additionally, it commits the merged organization to put half of all the money it raises over the next three years into a fund under Mr. Wang's control.

"It's kind of like handing the New York Yankees over to a high school team," said Mark Edward Atkinson, a Smile Train board member who opposed the merger. "Operation Smile gets a partner and a \$50 million dowry, and Smile Train fires its senior executives, all of whom are great, and the organization and money move to Virginia," where Operation Smile is based.

Mr. Wang, through an intermediary, Andrew Frank, a public relations executive hired to be a spokesman for Smile Train during the merger, has declined to comment. Mr. Frank defended the merger, saying it would create a larger, more efficient organization. "The idea is to help more children, and this merger will do that," he said.

Mr. Mullaney declined to comment.

Smile Train's donors are upset. "It kind of dropped like a bombshell," said Christopher Meloni, the actor who plays Detective Elliot Stabler on the TV show "Law & Order: Special Victims Unit" and a Smile Train donor. "I don't know much about these things, but it really sounds like the fox got loose in the chicken house," Mr. Meloni said.

William Conway, a partner at the Carlyle Group, resigned as a member of Smile Train's advisory board shortly after the vote. "Your new organization will be receiving no additional contributions from me and the Bedford Falls Foundation," Mr. Conway wrote in a terse e-mail on Feb. 16, referring to his foundation. "Frankly, I would like to get my past contributions returned, as I am afraid that the money will be wasted."

Smile Train is a spinoff of Operation Smile, where Mr. Mullaney and Mr. Wang sat on the board for a brief time. They resigned in 1998, expressing concerns about the organization's medical practices.

The New York Times in 1999 wrote two articles that highlighted those medical issues, including charges that children had died. The articles prompted an internal review that was never made public, though Operation Smile announced changes in its operations to improve its medical work.

The two organizations have different models. Smile Train spends its money training and equipping local doctors in China, India and elsewhere to do the operations as they are needed. Operation Smile pays to fly doctors and equipment around the world, providing services episodically.

Smile Train has supported more than 600,000 surgical procedures since its founding, to Operation Smile's more than 160,000 since it began, according to their Web sites.

Smile Train raised \$91 million in 2009, the last year for which its tax forms are available, and had \$103 million in net assets. (Recent, unaudited financial reports show that assets were expected to rise to about \$160 million by the end of last year, and board members confirmed that figure.)

By comparison, Operation Smile raised \$40.6 million in the fiscal year that ended June 30, 2010, and had \$20.4 million in net assets, according to its financial statements.

Howard J. Unger, Operation Smile's chief operating officer, said the deal was "a merger of two great organizations that in coming together will help more children, we believe, than they could individually."

The new entity will not, however, have the combined assets of the two organizations. Only roughly one-third of Smile Train's assets will go into the new charity, according to the merger agreement.

The rest, estimated by Smile Train board members to most likely exceed \$100 million when the deal is complete, will go into a separate "legacy fund." Mr. Wang, who will be chairman emeritus, will have the right to appoint — and remove — four of the fund's five board members; they will decide how to disburse and invest the money.

In an e-mail to the Smile Train board last week, Robert K. Smits, a lawyer and board member opposed to the merger, wrote that giving Mr. Wang "absolute authority" over the fund was "not appropriate for a public charity."

Lawyers who specialize in nonprofit matters say it is unclear what regulatory authority would apply to the fund. They noted that while the merger agreement spells out potential uses of the fund's assets, it does not require any payout.

"We should be concerned about it because a lot of charitable assets that are dedicated to charitable purposes are going to be administered essentially as a fiefdom," said William Josephson, who led the charities bureau in the New York State attorney general's office from 1999 to 2004.

Mr. Frank of Smile Train dismissed those concerns, saying the legacy fund's purpose was to continue to finance the programs that Smile Train had started. "That is the intention for it," he said.

That is one of the uses defined in the merger agreement, which also says the fund may be used to cover severance costs for Smile Train employees and contractors, many of whom are integral to the organization's programs. Its top five executives were dismissed the day the merger was approved.

Smile Train has been loosely linked to Mr. Wang's empire, which includes the Islanders and an Internet-based television services company, NeuLion, where his wife, Nancy Li, is chief executive.

His \$3.8 billion plan to refurbish Nassau Coliseum, where the Islanders play, has stalled, and the team's franchise value has dropped.

NeuLion lost money in the last two years. Smile Train's most recent tax form includes a \$108,000 payment to NeuLion for services, and earlier, it was paid to build the charity's digital patient charts.

For many years, Mr. Wang presided over Computer Associates, a software company whose accounting practices were deemed fraudulent in a 2007 report commissioned by the company's board.

Mr. Wang, who was not accused of any wrongdoing, described the report as "fallacious." A five-year federal inquiry did not result in criminal charges. Four of Smile Train's nine board members — Robert Bell, Susannah Schaefer, Roy Reichbach and Arthur McCarthy — are employees of Mr. Wang's various businesses or his foundation.

Mr. Wang also donated the money to pay Mr. Mullaney's compensation — totaling \$678,058 in 2009 — at Smile Train, according to its tax forms.

Nonetheless, relations between the two men were strained, reaching a boiling point at a board meeting on Feb. 9, 2010, when Mr. Mullaney made a presentation arguing that because of the organization's success, the backlog of cleft surgeries was declining. He proposed that Smile Train expand its mission to include operations to repair problems like club feet and burn scars, saying he was concerned that donors would become disenchanted if their money went unspent for a good cause.

According to a draft of minutes of that meeting, Mr. Wang objected to that proposal, insisting that the money should "just be allowed to pile up" as an endowment. He said the other missions could be pursued, but not within Smile Train.

Mr. Frank, the spokesman for Smile Train, said other board members also disagreed with the presentation and the assertion that the demand for cleft surgery was decreasing.

In an effort to repair relations in June, Mr. Mullaney supported Mr. Wang's suggestion that Mr. Reichbach and Mr. McCarthy join the board. "He thought it would be a way of burying the hatchet with Charles," Mr. Atkinson said.

Instead, Mr. Wang used the new board members to remove Mr. Mullaney as president of the organization in October, though he remained on the board.

Mr. Atkinson said he received a call the next month from Mr. Unger of Operation Smile, who asked about Mr. Mullaney's status.

In December, Mr. Unger said, he called Mr. Wang. "As a business person, I've just wanted to, for a long time, contact someone from the organization, and I felt this was just a good time to do it," Mr. Unger recalled he said, though he said he did not propose a merger.

At the regularly scheduled board meeting on Feb. 8, Smile Train board members were handed a thick binder containing Operation Smile's last three annual reports, its direct mail materials, a list of the awards it had won and other publicly available materials.

Mr. Smits, Mr. Atkinson and Mr. Mullaney voted against the merger in a meeting on Feb. 14. Donald B. Murphy, a partner at Brown Brothers Harriman, abstained because his firm manages Smile Train's assets. The opponents were outnumbered by Mr. Wang and his four employees on the board.