IN THE
SUPREME COURT OF VIRGINIA

Record No. 120208

ONLINE RESOURCES CORP.,

Appellant,

v.

MATTHEW P. LAWLOR,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

Matthew Lawlor co-founded Online Resources Corp. ("ORC" or the "Company") and served as its CEO and Chairman of its Board for over 20 years, making it one of the most successful online banking businesses in the country. In 2006, ORC sold preferred stock to a California hedge fund, Tennenbaum Capital Partners ("TCP"), to raise funds for a strategic acquisition. TCP became the Company's largest shareholder and acquired contractual rights to designate a director to the ORC Board, to convert its preferred stock to common stock at a set price per share, and to block certain corporate actions. In 2007, after its initial designee left TCP and the ORC Board, TCP designated Michael Leitner as its representative director.

With the stock market downturn in 2008, TCP's interests diverged from those being pursued by the Company and its Board. TCP wanted to maximize the short term return on its investment by a quick sale of the Company instead of waiting for a rebound in the stock price to a level that made its conversion rights profitable. TCP saw Lawlor as the chief obstacle to its goal of aggressively pursuing a sale of the Company, and it did everything it could to effect his removal and cause the Company to pursue its preferred course of action. It ran a successful proxy contest to have three of its nominees elected to the Company's Board in May 2009; it

bought more stock, increasing its share of the vote; its designee Leitner threatened other Board members with lawsuits and accused the directors of breaching their fiduciary duties; and it threatened another proxy contest.

Throughout 2009 and most of 2010, the Board resisted TCP's efforts to force a change of direction, publicly affirming that the Company was performing well under Lawlor's management. But in December 2009, facing another potential proxy contest and a new threat from TCP to use its contractual rights to block any new issuance of stock rights to ORC employees, the non-TCP or "legacy" directors (*see* JA 2148) capitulated to Leitner and the TCP directors and removed Lawlor as CEO. A month later the Board removed Lawlor as Chair, and Lawlor and another director resigned from the Board the same day. ORC terminated Lawlor's employment shortly thereafter.

The jury found that a Change in Control had occurred, as defined in Lawlor's Severance Agreement and the Company's stock plans, rejecting ORC's arguments that Lawlor's termination resulted from poor performance rather than TCP's seizure of control. The jury also found that ORC was unjustly enriched by a voluntary pay cut that Lawlor initiated and accepted in 2009. The jury had evidence to support each of these findings, and its verdict should not be overturned in favor of ORC's one-sided view of the

dispute. Nor should the judgment be reversed on grounds of error by the trial court, which properly admitted the testimony of Lawlor's damages expert and awarded Lawlor his fees for the entire action as called for by the Severance Agreement.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

A. TCP acquires an interest in ORC

In 2006, TCP acquired $75 million in preferred stock of ORC and the right to designate a member of the Board, to block certain corporate actions, and to convert its preferred stock into common stock at a price of $16.23 per share. JA 1388-89, 2470-71, 3913-15. TCP also had the right to vote its preferred stock as if it were common stock, giving it about 14% of the shareholder vote. JA 1388. ORC's stock was trading around $12.98 per share at the time of TCP's purchase of preferred stock and occasionally reached higher prices before the market downturn in 2008. JA 3723-24.

ORC's management and the rest of the Board initially had a cooperative relationship with TCP and its first Board designee, Steven Chang. JA 2475. After Chang left TCP and the ORC Board, Lawlor met with TCP's founder and general counsel and proposed that TCP designate a third party – not affiliated with TCP – to the Board. JA 2477-78. TCP's general counsel told Lawlor in no uncertain terms that ORC "will choose

somebody internal to [TCP]" and recommended Michael Leitner. JA 2483. Leitner was then presented to the Board as TCP's designee. *Id.*

B. TCP and the Board clash over the future direction of the company

In 2008, due to a crash in interest rates (which were a major source of revenues) and other consequences of the recession, ORC's stock price fell to around $7.00. JA 2471-72, 2666-67, 2669-70. That was well below the conversion price of TCP's preferred stock; and TCP reacted by pushing for a quick sale of the Company, seeking to maximize the return on its investment in the short term. *See* JA 4976-78. From that point forward, the relationship between Leitner and the rest of ORC's Board and management was highly contentious. JA 1876-78. They disagreed over both the future direction of the Company and TCP's role in it. *Id.*

TCP began to accumulate more stock, ignoring the Board's efforts to limit its purchases. *See* JA 1425-26, 2775-76, 4742. It also exercised and threatened to exercise the control provisions of its preferred stock to block actions that management and the other Board members proposed to take. *E.g.*, JA 1851-53. Leitner was abusive and threatened to sue the other directors for breach of fiduciary duty. JA 1877-78, 4632-33.

TCP viewed Lawlor in particular as an obstacle to its goal of selling the Company. In December 2008, Leitner asked the Board to remove

Lawlor as either Chairman or CEO, but it refused. JA 1785, 4976, 4994.

C. The events leading to TCP's seizure of control

Leitner and TCP then picked and paid three nominees to run against the Board's nominees in the 2009 Board election. JA 1412-14. The Board warned shareholders that TCP's objective was to seek a quick sale of the Company; that TCP was the "wrong choice to steer Online Resources"; and that TCP's nominees would be the hedge fund's allies. JA 4624-25. But TCP's nominees prevailed and joined the Board in May 2009. JA 1422-23.

Shortly after the proxy contest, Leitner wrote in an e-mail to the other TCP nominees, who were now directors, that Lawlor "doesn't fully appreciate the significant governance change that has taken place, and that he is no longer in control. It just doesn't seep in for him." JA 4634. He added that Lawlor was resistant to "any process that requires him to seek our direction on issues" and "just doesnt [*sic*] get he is one election away from losing his job." *Id.*

Over the next few months, Leitner and the other TCP directors worked to force the Board to change direction and to eliminate Lawlor as an obstacle to TCP's goals. Leitner threatened another proxy contest, and Lawlor tried to avoid another hostile contest by proposing a standstill agreement. JA 2169-71, 2240-41. When that effort failed, a "legacy

director" (*see* JA 2148) proposed de-staggering the Board to open all seats for election. TCP had previously sought to de-stagger the Board; but it now opposed that proposal, Leitner again threatened to sue the legacy directors, and the proposal failed. JA 1709-10, 2591-93, 3053-54.

In its October 2009 meeting, at the behest of TCP director Edward Horowitz, the Board decided to ask Lawlor to engage consultants to make strategic presentations at its next meeting, in December. JA 3468-70. Horowitz drafted a memo asking for the presentations. *Id*. The legacy directors and the TCP directors debated the contents of the memo and whether Lawlor could realistically accomplish what the memo proposed. JA 1712. A legacy director, Barry Wessler, delivered the memo to Lawlor, telling him it was a "political document" that was negotiated between the Board members. JA 2621-22.

In November the four TCP directors had a private strategy call to discuss how best to "try to get this board to function more effectively and to hold management more accountable," but decided not to take any further steps until the December Board meeting. JA 2176-77, 4648. Horowitz wrote the other TCP directors that he did not believe Lawlor was approaching the December presentations properly, but that they should "let him make his own bed." JA 4650. The message that Lawlor received was

different: legacy director Steven Cole sent him an e-mail telling him, "I … like your instincts," and that he should go on vacation and "forget about the bad guys" – meaning the TCP directors. JA 1921-22, 4715.

Cole also testified to the tensions between Lawlor and Leitner. He testified that even before the proxy contest, their relationship was "strained," "like oil and water," and even worse after the proxy contest. JA 1909-10. Cole acknowledged that "[t]his tension between Matt and Michael made [him] and the other board members feel very uncomfortable." JA 1911. At the October meeting, tensions were "very high." JA 1912-14.

Then, before the December meeting, TCP threatened to use its contractual rights to prevent ORC from issuing stock to its employees as part of the Company's customary incentive program. JA 2653-54, 4722-23. TCP also bought additional shares of ORC stock, even though Leitner had already been sent the Board book for the upcoming meeting. Management believed that those purchases violated both company policy and federal securities law because the Board book contained material non-public information about the company's strong fourth quarter and prepayment of debt.[1] JA 1425-26. The night before the meeting, Leitner e-mailed his

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[1] TCP's purchase, and Lawlor's reporting of that purchase, was the principal basis for Lawlor's claim for wrongful termination in violation of

(footnote continued)

fellow TCP directors to "[l]et em have it tonight." JA 4647. He began the Board's closed session the next day by telling the other Board members that Lawlor "is going to have to go," then departed. JA 2180-82. Days later, at the Board's request, Lawlor resigned as CEO. JA 2183-84. Steven Cole testified that he supported that decision, in part, because "the tension between [Lawlor and Leitner] … made [him] and the other board members very uncomfortable." JA 1924. Even for Lawlor's allies, it was either Lawlor or Leitner; and with Leitner's control position, Lawlor had to go.

After Lawlor's resignation, Leitner told the other TCP directors that "Matt needs to get off the board asap." JA 4646. Lawlor thereafter was excluded from all but formal, scripted Board proceedings. JA 2940-42. On January 20, 2010, the Board removed him as Chairman and he resigned as a director. JA 1924, 4443.[2] Another director, Joseph Spalluto, had resigned the same day, leaving only four legacy directors. JA 2193. Four seats were held by TCP's designee and nominees, and two seats were empty as a result of Lawlor's and Spalluto's resignations. JA 2148.

TCP steadily accumulated stock before Lawlor's ouster, eventually

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public policy, on which the jury found for ORC. But TCP's purchases of ORC's stock were also relevant to its efforts to exercise control.

[2] ORC emphasizes that Lawlor resigned at "11:44 p.m.," as if it were important. But the e-mail that ORC references actually refers to 11:44 p.m. (GMT) – Greenwich Mean Time – or 6:44 p.m. Eastern time. JA 4442.

owning 24% of the Company. JA 1590. After Lawlor was removed, it never bought another share. *Id*. Nor did it run a competing slate of directors in the 2010 election. JA 3053-55, 3433-44. Soon after Lawlor left the Company, one of the TCP directors, John Dorman, was installed as Chairman and acting CEO; several other high-level executives were fired; and Leitner's desired replacement for Spalluto joined the Board. JA 1720-21, 2194, 2342-44, 3512-13, 4650. Within a year, ORC was actively considering a sale, as TCP had wanted. *See* JA 3345-46, 3757.

D. Lawlor's contracts with ORC

Lawlor had three contracts with ORC which entitled him to benefits in the event of a "Change in Control." Those were the "1999 Stock Plan," JA 4963; the "2005 Stock Plan," JA 5027; and a Severance Agreement, entered into in May 2009, JA 4957.

1. The 2005 Stock Plan (Count 1)

The 2005 Stock Plan provides that upon a Change in Control, all restricted stock rights, options and other grants made pursuant to the plan vest and become non-forfeitable. It defines a Change in Control in several ways, one of which is relevant here: a Change in Control occurs when "[t]he individuals who, as of January 1, 2005, constitute the Board (the 'Incumbent Board'), cease … to constitute at least a majority of the Board";

but anyone who became a director after that date, whose election or nomination was approved by a majority of the Incumbent Board, would "be counted as a member of the Incumbent Board in determining whether the Incumbent Board constitutes a majority of the Board." JA 5045 (§ (d)(ii)).

2. The 1999 Stock Plan (Count 2)

The 1999 Stock Plan provides that if an employee is terminated after a Change in Control, then upon termination his awarded options will vest and be exercisable for one year. JA 4969-70. In addition to defining a Change in Control as occurring when the individuals constituting the "Incumbent Board" cease to be a majority (as the 2005 Plan does), the 1999 Plan also defines a Change in Control as "a change in control of the Company of a nature that … would be required to be reported in response to Item I of the current report on Form 8-K, as in effect on the date hereof, pursuant to Section 13 or 15(d) of the Exchange Act." JA 4963 (§ 1(e)(i)).

3. The Severance Agreement (Count 3)

The Severance Agreement provided that upon his termination Lawlor would be entitled to (i) severance payments and (ii) immediate vesting of the options and stock rights awarded him under the 1999 and 2005 Stock Plans. JA 4958-59. Under the Severance Agreement, if Lawlor's termination followed a Change in Control – as it did here – his severance

payments and stock benefits would be larger than if he were terminated without a Change in Control. The Severance Agreement also provided that ORC would reimburse Lawlor for legal expenses if he prevailed in litigation to obtain benefits under that agreement. *See* JA 4962; Argument VI, *infra*.

Like the 1999 Stock Plan, the Severance Agreement defined a Change in Control in two ways that are relevant here. The first was a Change in Control of a nature that would be required to be reported to the SEC. JA 4957 (§ 2(e)). Under the second, a Change in Control was defined, similarly but not identically to the definition in the 2005 Stock Plan, as happening when the "Incumbent Board" – "[t]he individuals who, as of the date hereof [*i.e.*, May 13, 2009], constitute the Board" – cease to constitute at least a majority of the Board; but anyone who became a director after that date, whose election or nomination was approved by at least three-quarters of the Incumbent Board, would be considered as a member of the Incumbent Board. JA 4957-58.

The Severance Agreement also entitled Lawlor to benefits (of lesser magnitude) for a termination prior to a Change in Control. It stated: "For terminations prior to [a Change in Control], the severance benefits that are payable to the Participant are as set forth in the Company's Severance Pay Policy in effect on the date of execution of this Agreement." JA 4957 (§ 1).

ORC changed the language from “may be payable,” in a near-final draft, to “are payable,” in the final, specifically to make it clear that those benefits were non-discretionary. *See* JA 4707, 4681; *infra* at 35.

4. The voluntary pay cut (Count 5)

Lawlor was consistently underpaid in comparison with his CEO peers. He also accepted a significant amount of his compensation in stock rights, forgoing a larger salary. JA 1632, 1658-60, 1897-98. In February 2009, as a way of reducing costs in the face of a severe recession, Lawlor proposed that he and other employees accept a further reduction in pay. The Board agreed. JA 1656-57, 1898, 1929.

E. The Change in Control dispute and the ensuing litigation

After the events of December 2009 and January 2010, ORC denied that a Change in Control had occurred. It instead offered Lawlor a severance payment that did not recognize the Change in Control and demanded that he enter into non-compete and non-disparagement provisions to receive it. JA 2765. Lawlor declined.

ORC terminated Lawlor’s employment on February 19, 2010. JA 4439. That same day, ORC sued Lawlor in a Delaware court, seeking a declaration that Lawlor was not entitled to Change in Control benefits under the Severance Agreement. That action was stayed and ultimately

dismissed in favor of this action, which Lawlor filed on April 16, 2010.

In this action, Lawlor initially alleged that the Company had breached the two Stock Plans by not providing him the benefits to which he was entitled upon a Change in Control, that ORC had wrongfully terminated his employment in retaliation for his reporting of TCP's insider trading, and that ORC had been unjustly enriched by his services after the cut in pay. *See* JA 27-46.[3] He amended the complaint twice to add claims that the Company had breached the Severance Agreement by not providing him the payments and benefits to which he was entitled upon the Change in Control. Lawlor's complaints consistently demanded attorneys' fees, *see* JA 24, 46, 217, and his amended complaints attached as an exhibit the Severance Agreement containing the fee provision on which his demand was based. *See* JA 13 (¶ 34), 206 (¶ 36), 407.

With the Court's approval, Lawlor and ORC agreed to bifurcate the proceedings so that Lawlor's demand for attorneys' fees would be heard and decided by the court after the jury trial on his other claims, assuming that he prevailed. JA 141 (unopposed motion to defer Lawlor's "claim against defendant for attorneys' fees and costs incurred by plaintiff in

[3] Lawlor also alleged claims for breach of implied-in-fact contract, which he nonsuited at trial, JA 2612, and for declaratory judgment and injunctive relief, which the Court dismissed after trial. JA 580, 4341-55.

connection with this matter"), JA 432 (agreed order).

The jury trial lasted 11 days. The witnesses included Lawlor; the Company's CFO, Catherine Graham, who was its corporate designee at trial; seven ORC directors; and damages experts on both sides. After deliberating for two days, the jury reached a verdict for Lawlor as follows:

Count 1 – Breach of 2005 Stock Plan – $2,325,000

Count 2 – Breach of 1999 Stock Plan – $494,266

Count 3 – Breach of Severance Agreement – $4,935,619[4]

Count 5 – Unjust Enrichment – $360,000

Total compensatory damages – $5,295,619

JA 435. The jury also awarded prejudgment interest. It returned a verdict for ORC on Lawlor's wrongful termination claim. *Id.*

ORC moved to set aside the verdict and, just as the parties had contemplated when they agreed to bifurcate the proceedings, Lawlor moved for reimbursement of his attorneys' fees pursuant to the Severance Agreement. The trial court denied both motions, accepting an argument that ORC made for the first time in opposition to the attorneys' fee motion,

[4] This was the total of the damages for the stock rights at issue in Counts 1 and 2 – which were also at issue under Count 3 – and the lump sum payment due under the Severance Agreement. JA 1983-84, 4177-78. The total award therefore equaled the sum of the awards under Counts 3 and 5, but not Counts 1 and 2, avoiding duplication.

that Lawlor had not sufficiently pleaded the basis for his demand under Va. S.Ct. Rule 3:25. JA 4338-39. The trial court declined to consider Lawlor's oral motion for leave to amend the complaint to state more fully the basis for his fee demand, but it later granted a written motion and awarded the requested fees. JA 4334-35, 582, 625-28. The trial court entered its final order on November 8, 2011. JA 629-30. ORC timely appealed.

STANDARD OF REVIEW

Lawlor, who comes before this Court with a jury verdict approved by the trial judge, holds "the most favored position known to the law." *Banks v. Mario Indus. of Va.*, 274 Va. 438, 450, 650 S.E.2d 687, 694 (2007). Most of the issues presented by ORC's appeal are factual. For these issues, "[t]he trial court's judgment is presumed to be correct" and will not be set aside "unless the judgment is plainly wrong or without evidence to support it." *Id.* "[T]he evidence and all reasonable inferences fairly deducible from it" are viewed "in the light most favorable" to Lawlor. *Id.* at 450-51, 650 S.E.2d at 694. *See also* Brief of Appellant at 6.

Interpretation of an ambiguous contract presents a question of fact for the jury. *E.g.*, *Greater Richmond Civic Recreation, Inc. v. A.H. Ewing's Sons, Inc.*, 200 Va. 593, 596, 106 S.E.2d 595, 597 (1959). Its verdict is tested by the standard described just above.

Other standards of review applicable to the issues presented by ORC's appeal are addressed in the argument below.

SUMMARY OF ARGUMENT

ORC has not met its high burden to show that the jury lacked evidence supporting its verdict. The jury could find a Change in Control (1) if a change in control occurred of a nature that would be required to be reported to the SEC or (2) if the individuals on the Company's Board at a particular time (the "Incumbent Board") ceased to hold a majority. The evidence was sufficient to support a finding of a Change in Control under either provision. The SEC provision called for a factual inquiry as to who actually directed the policies and management of the Company and whether that changed. The evidence showed that TCP exerted intense pressure on the Board to get its way, remove Lawlor, and change the direction of the Company, and that it prevailed. Thus, there was sufficient evidence to find a Change in Control under the SEC provision. Because there was no dispute that at least five Incumbent Board members were removed or resigned from the ten-seat Board, such that they no longer constituted a "majority of the Board," a Change in Control also occurred under the Incumbent Board provision. ORC's argument that the term "Board" meant only the remaining directors ignores the plain language of

the contract in favor of inconclusive and irrelevant extrinsic evidence and a misplaced emphasis on ORC's one-sided view of "practical reality."

Likewise unavailing are ORC's arguments that the trial court erred when it instructed the jury to construe ambiguities against the drafter, admitted the testimony of Lawlor's damages expert, and permitted Lawlor to amend his complaint and recover his legal fees under his Severance Agreement. First, ORC's counsel drafted the language at issue. Lawlor did not even review the drafts and was not involved in negotiating the terms. Second, Lawlor's expert was plainly qualified to calculate the damages arising from the Company's wrongful denial of Lawlor's options and other stock rights, and his methodology did not require him independently to value ORC's stock. Finally, in the bifurcated proceedings on fees, to which ORC agreed with full knowledge that Lawlor was asserting an entitlement to fees under the Severance Agreement, the trial court acted appropriately and within its discretion by permitting Lawlor to amend his complaint to add more detailed allegations about his claim for fees. The court also did not err when it allowed Lawlor to recover fees for the entire "legal action," based on the express language of the Severance Agreement. The fee award, and the rest of the judgment, should stand.

ARGUMENT

I. Substantial evidence supported the jury's finding of a Change in Control (Assignments of Error 1 and 6).

A. Substantial evidence supported the verdict on Counts 2 and 3 on the ground that a change in control occurred of a nature that would be required to be reported to the SEC.

Under the 1999 Stock Plan and the Severance Agreement, at issue in Counts 2 and 3, Lawlor was entitled to benefits if a change in control occurred "of a nature that would be required to be reported" to the SEC. SEC regulations governing the reporting requirement define "control" as

> the possession, *direct or indirect*, of the power to direct or cause the direction of the management and policies of a person, *whether through the ownership of voting securities, by contract, or otherwise*.

SEC Rule 12b-2, 17 C.F.R. § 240.12b-2 (2011) (emphases added). Thus, a change in control, as defined by this regulation, is a change in the possession of the power to direct or cause the direction of the management and policies of a company – whether by ownership, contract, *or otherwise*.

Two points are critical to analysis of the verdict on this issue. First, the contract controls whether there was a change in control, and it refers to and incorporates the federal law defining control. It makes no reference to the general principles of corporate law cited by ORC; those principles are not the standard that the parties adopted in the contract. ORC also misapplies those principles to this case – the question is not whether the

board controls the corporation or whether the board *qua* board lost control. The question is whether those directing the corporation's management and policies changed. That happened when TCP, Leitner and the other TCP directors finally were able to impose their own will on the Company's affairs.

Second, whether there was a change in control is an intensely factual inquiry. Indeed, at trial, ORC's own counsel and witnesses described this issue as whether there was a "factual" Change in Control. JA 3774, 3961. Federal caselaw makes clear that on facts similar to those in this case, the "factual" question is not answered simply by whether a controlling party owns more than 50% of a company's stock or holds an outright majority of seats on the board. *See Northway, Inc. v. TSC Industries, Inc.*, 512 F.2d 324 (7th Cir. 1975), *rev'd on other grounds*, 426 U.S. 438 (1976).

In *Northway*, the plaintiffs brought a claim for violation of federal proxy rules, alleging that the defendant had failed to disclose a change in control. The company that had allegedly seized control held a 34% stock interest and had elected four members to a ten-seat Board. 512 F.2d at 327-28. The Seventh Circuit affirmed the trial court's ruling that summary judgment on the disclosure claim was inappropriate because "the issue of control [wa]s a factual issue presently in dispute." *Id.* at 329. The facts that

the alleged controlling interest did not own 50% of the stock or hold a majority of the seats on the Board did not defeat the plaintiff's claim that a change in control had occurred of a nature that the defendant would have been required to report to the SEC. Instead, there was a "bona fide dispute" as to "the control issue." *Id.*

The same is true here. Lawlor presented substantial evidence of an actual change in control, which TCP accomplished by a sequence of actions that meet the express terms of the SEC regulation, including:

- exercising and threatening to exercise the contractual rights it had been awarded in its purchase of preferred stock;
- making repeated purchases of stock over the Board's objection and becoming ORC's largest shareholder "by far," JA 3438-39;
- prevailing in a proxy contest that saw three of its nominees join its designee, Leitner, on the ORC Board;
- threatening another proxy contest in 2010 and successfully opposing the Board's efforts to put all directorships up for a vote in that year;
- threatening to sue the other directors if it didn't get its way; and
- ultimately, successfully pressuring the Board to remove Lawlor from his positions as CEO and Chair of the Board, leading to its own nominee being placed in charge and the Company pursuing a sale soon after.

ORC's argument that the evidence was insufficient is a combination of red herrings and mischaracterizations of Lawlor's arguments. Lawlor did not contend below that the election of three TCP directors in the proxy contest was a change in control. He argued that it was one of several

actions by which TCP asserted control and caused the Company to change its direction. Lawlor likewise relied on evidence of Leitner's statements to the effect that Lawlor did not realize that he was losing control, not to prove that the proxy contest was a change in control but to show that Leitner and TCP were focused on getting control over the management and direction of the Company and viewed Lawlor as standing in their way.

Nor did Lawlor argue that his removal as the Chairman and CEO was itself a change in control. He did argue, however, that with his removal, TCP had succeeded in obtaining control over the direction of the Company's management and policies and thereafter was able to cause the Company to seek a purchaser or merger that would trigger benefits to TCP under its preferred stock. The evidence supported that argument.

ORC argues that there was no Change in Control because it did not report one to the SEC. But the contracts do not provide that ORC had to report a Change in Control for Lawlor to receive benefits. The issue was whether a Change in Control "of a nature that would be required to be reported" had occurred. ORC's CFO conceded that it did not always comply with its SEC reporting requirements. JA 3963-65. To hold, as ORC argues, that a change in control occurs only if the Company actually files a Form 8-K would allow the Company to avoid its contractual obligations by

simply failing intentionally or inadvertently to file a required report.

ORC attaches a Form 8-K to its brief and argues that the Change in Control section of the Form 8-K speaks in terms of stock acquisitions. Br. at 27. That form was not in evidence below and is not properly considered on this appeal. Even if it were considered, the form neither states the legal requirements for reporting a change in control nor defines "control." Instead, the Form 8-K advises readers that the definitions in Rule 12b-2 – which include the "control" definition set forth above – should be "especially noted" by filers. *See* ORC Br., Tab 3 at 2 (§ C.2). And as *Northway* shows, whether a change in control has occurred as defined by SEC rules is a factual question that does not depend solely on a particular stock transaction or level of stock ownership. The jury had ample evidence on which to decide that such a change occurred at ORC.[5]

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[5] ORC dismisses *Kahn v. Lynch Communications Systems, Inc.*, 638 A.2d 1110 (Del. 1994), and *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962), as factually inapposite. Br. at 31-33. But those cases – like *Northway* – demonstrate that "actual control" is not measured by simple percentages of ownership or possession of an outright majority of the seats on a Board, as ORC would have it. (ORC overlooks that in *Essex*, Judge Clark agreed with Chief Judge Lumbard that 28.3% of corporate shares normally provides "working control." 305 F.2d at 580. *See also id.* at 581 (Friendly, J., concurring) ("interests thought to 'control' a corporation although owning less than a majority").)

B. Substantial evidence also supported the verdict on Counts 1, 2, and 3 on the ground that the Incumbent Board members ceased to constitute a majority of the Board.

The 2005 and 1999 Stock Plans and the Severance Agreement each provided that a Change in Control would occur when the Incumbent Board members ceased to hold a majority. JA 4957-58, 4963 (§ 1(e)(ii)(B)), 5045 (§ 6.9(d)(ii)). After Lawlor and Spalluto resigned, only five Incumbent members – at most – remained on the ten-seat Board. The remaining Incumbent members did not occupy at least six seats (a majority), and a Change in Control occurred as defined by the contracts. The Court should reject ORC's arguments to the contrary, for three reasons.

First, ORC waived the argument that the term "Board" unambiguously meant only the then-sitting directors when its counsel said, in support of its motion to strike at the close of evidence, that he disclaimed any argument as to the "issue of is it seats or is it people," and stated, "I think reasonable people can disagree on that and I won't argue that." JA 4083-84. ORC's waiver is fatal to its assignment of error. Va. S.Ct. Rule 5:25; *see*, *e.g.*, *Latham v. Commonwealth*, 184 Va. 934, 936-37, 37 S.E.2d 36, 37 (1946). ORC asserts that "key language" is missing from this portion of the transcript (Br. at 25); but it was ORC's obligation to supplement the record to correct or identify those words, to the extent they are necessary for the

Court to take up its argument. *See* Va. S.Ct. Rules 5:11(a)(1), 5:11(g).

Second, the plain meaning of the term "Board" in the Incumbent Board provisions is that the Board is an entity made up of directorships, not a group of individuals from which vacancies are omitted. The language of the Severance Agreement itself demonstrates its plain meaning. When the agreement refers to the *individuals* occupying Board seats, it does so explicitly: The "Incumbent Board" is "individuals who … constitute the Board." "Board," on the other hand, is not defined as individuals but as "the Board of Directors of the Company." JA 4957 (§§ 2(e)(ii), 2(c)). The plain meaning is that "Board" means all the seats on the Board, occupied or not, and "Incumbent Board" means the "individuals" who occupy those seats.

ORC attempts to avoid this plain meaning on the ground that it is commercially unreasonable or leads to absurd results, Br. at 20, but it has not shown that no reasonable person could read the contract in this fashion. Indeed, courts have approved of change in control agreements that define a change in control as occurring when existing directors "cease … to constitute at least a majority of the number of authorized directors …." *See*, *e.g.*, *CalPERS v. Coulter*, 2005 WL 1074354, *1, 2005 Del. Ch. LEXIS 54, *4 (Del. Ch. 2005).

ORC's interpretation also leads to absurd results. Under ORC's

reading, nine directors could have resigned from the Board under pressure from TCP, leaving only Leitner, and there would not have been a Change in Control: Leitner, an Incumbent Board member (according to ORC), would have constituted a "majority" of the one-person "Board." But perhaps the most telling rebuttal to ORC's argument is that the plain meaning of the Incumbent Board provision did not lead to absurd results. TCP wanted to seize control of ORC and force Lawlor off the board "asap," JA 4646; and it achieved those ends, as the jury found when it concluded that there was an "actual" change in control as defined by the contract and SEC regulations.

ORC's reliance on *Fischbein v. First Chicago NBD Corp.*, 161 F.3d 1104, 1105 (7th Cir. 1998), is misplaced. *Fischbein* involved a change of control claim made after a merger that changed the name of a company but did not alter the composition of its board. It did not involve the departure of board members or raise any question whether the term "Board" meant seats or people. The decision turned entirely on the provisions of the stock incentive plan at issue, which were unlike any at issue here. *Fischbein* does not support rewriting the contracts between Lawlor and ORC based on ORC's "practical reality" views, Br. at 21.

Third, although ORC does not mention it, extrinsic evidence confirms Lawlor's interpretation. Michael Bisignano, the Company's general counsel

and the principal drafter of the provisions at issue, testified that unlike the term “Incumbent Board,” the term “Board” did not refer to individuals, although he could have drafted the Agreement to so provide. JA 1771-73. Lawlor also introduced ORC’s Board of Directors Manual, which repeatedly used the term “Board of Directors” to refer to all seats. JA 4465, 4468.

Meanwhile, none of the Company’s evidence from outside the four corners of the contract showed that the term “Board,” even if ambiguous, excluded vacancies. ORC mischaracterizes the phrase “majority of the Board” as a term of art under Delaware law and claims that the Company’s Articles of Incorporation and Bylaws have a “default meaning” that excludes vacant seats. But ORC presented no evidence that the drafters of the agreements considered or knew of this supposed “default meaning” – or that they even considered Delaware law or the Articles or Bylaws at all – when they drafted the contracts. On the contrary, Bisignano testified that he drafted the Severance Agreement’s Change in Control definitions using a draft change in control plan from *another company*. JA 1753, 1763-65. He also testified that he never had a conversation with anyone in management or on the Board regarding the definition of “Board.” JA 1774. Extrinsic evidence of matters that were not in fact considered by the drafters of a contract is irrelevant to the interpretation and construction of

its terms and is not made relevant by attaching labels like "default meaning" or "term of art." *Cf*. *Virginia Power v. Westmoreland-LG & E Partners*, 259 Va. 319, 324, 526 S.E.2d 750, 754 (2000) ("identical provisions in successive contracts may or may not carry the same meaning in each instance").

Even if the term "Board" had a "default meaning" that should be considered here, the outcome would support Lawlor's position, not ORC's. Delaware law provides that a Board is the governing body of a corporation with a fixed number of directors. 8 Del. Code §§ 141(a)-(b). Vacancies may be filled by only a "majority of the directors then in office," *id.* § 223(a)(1), but that does not mean that vacant seats are not counted as part of the "Board" or in defining a "majority of the Board." Indeed, under Delaware law vacancies on the Board do count, in important ways. Some Board actions require votes by majorities of all seats. *See id.* §§ 141(c) (committee designation), 275(a) (dissolution).[6] A board majority – including all authorized directorships, whether vacant or filled – must be present to conduct a vote on corporate business at all. *See id.* § 141(b) (quorum requirement); *see also* JA 4517 (ORC Bylaws); *Bruch v. National*

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[6] Likewise – contrary to ORC's assertion, Br. at 20 – ORC's Articles of Incorporation require a vote of the majority of the total number of authorized directorships to change the number of seats on the Board. *See* JA 4502 (§§ "Fifth" (D), "Sixth" (A)).

Guarantee Credit Corp., 116 A. 738, 740 (Del. Ch. 1922) ("the board was incapable of acting, because … for the purpose of doing business the quorum must be reckoned by calculating the majority of the board as constituted when all the vacancies are filled"). Thus, if Delaware law has any "default meaning" as to what a "Board" is, that "default meaning" includes all seats, whether vacant or filled.

The remainder of ORC's "extrinsic evidence" does not compel the result it seeks. ORC's reliance on its own conduct *after entering into the contract* – and even after the dispute arose (Br. at 24) – is not evidence of the parties' contemporaneous intent. *See Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1233 n.11 (Del. 1997). Nor are minutes signed by Lawlor calling a vote "unanimous," which merely indicated that there was no dissenting vote and had nothing to do with the terms at issue.

Finally, even if "Board" unequivocally meant people, not seats, there was a factual dispute as to Leitner's status as an Incumbent Board member which the jury could reasonably have resolved in Lawlor's favor. The terms of the preferred stock indisputably gave TCP the right to designate a member of the Board. Lawlor testified without contradiction that TCP's general counsel informed him that ORC had no choice but to "choose somebody internal to [TCP]" and recommended Leitner. JA 2483. ORC

introduced evidence intended to show that Leitner was elected and therefore an "Incumbent," but other evidence showed that ORC did not consider Leitner to be an elected director. *See* JA 3911-13, 4981. Indeed, note 14 to Table 2 of ORC's own brief refers to TCP's prior designee, Steven Chang, as "designate[d]" rather than elected. If Leitner is not counted, then only four Incumbent Board members remained, and there was a Change in Control even under ORC's interpretation.

II. The trial court properly instructed the jury that ambiguities are construed against the drafter (Assignment of Error 2).

The court instructed the jury that "[i]n interpreting a contract you should resolve any doubts about the meaning of a word or phrase against the party who drafted or prepared the contract." JA 4117. At trial, ORC's only opposition to this instruction was its position that "Lawlor participated in the drafting" and "both sides drafted this agreement." JA 3839-40.

So long as there was "'more than a scintilla'" of evidence to support the proposition that Lawlor was not the drafter of the terms in question, Lawlor was entitled to the instruction. *See Radvany v. Davis*, 262 Va. 308, 311, 551 S.E.2d 347, 348 (2001). The undisputed evidence was that Bisignano, ORC's general counsel, was the principal drafter of the Severance Agreement and that Lawlor never negotiated, reviewed or made any changes to it. *See* JA 2374. The jury was entitled to reject ORC's

argument that Lawlor's status as CEO and the fact that he forwarded some sample change in control plans to Bisignano, without review or recommendation, proved that he was the drafter.

ORC now raises for the first time on appeal an argument, based on a patchwork standard that it assembled from various Delaware authorities, that a party must show that it "lacked the opportunity to make any changes" to ambiguous language to benefit from a *contra proferentem* instruction. Br. at 35. It did not object to the instruction on that basis at trial. It may not raise the argument for the first time on appeal. Va. S.Ct. Rule 5:25; *Baker v. Commonwealth*, 278 Va. 656, 660 n.2, 685 S.E.2d 661, 663 n.2 (2009).

Even if ORC had preserved the argument below, it is incorrect as to the governing law, as *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 72 (Del. 2011), shows. *ConAgra* involved a coverage claim by a peanut butter manufacturer against its insurer, in which the meaning of a "Lot or Batch Provision" in ConAgra's multi-million dollar policy was in dispute. Even though extrinsic evidence "reveal[ed] that the Lot or Batch Provision was negotiated," *id.* at 72, the Delaware Supreme Court remanded with an instruction that "if the extrinsic evidence does not reveal the parties' intent as to the Lot or Batch Provision, then the Superior Court should apply the 'last resort' rule of *contra proferentem* and interpret it in

favor of ConAgra." *Id*. If, under Delaware law, a multinational corporation can benefit from the *contra proferentem* instruction in connection with its purchase of a multi-million dollar insurance policy in which the ambiguous term was actually negotiated, there is no credible argument that the trial court here erred as a matter of law when it gave this instruction in Lawlor's case. *See also SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 42-43 (Del. 1998) (applying doctrine in favor of investors because general partner appeared to be responsible for drafting of terms in the contract); *National Union Fire Ins. Co. v. Rhone-Poulenc Basic Chems. Co.*, 1992 WL 22690, *8, 1992 Del. Super. LEXIS 45, *32 (Del. Super. 1992) ("[a]pplication of the doctrine turns not on the size or sophistication of the insured, but rather on the fact that the policy language at issue is drafted by the insurer and is not negotiated").[7]

The trial court also properly would have rejected ORC's new argument, if ORC had made it below, that the extrinsic evidence so clearly

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[7] At most, the cases cited by ORC stand only for the proposition that a factfinder should not apply *contra proferentem* when the evidence shows that the agreements were actually negotiated between experienced drafters, each represented by counsel. *See E.I. du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1114 (Del. 1985); *Tenneco Auto. Inc. v. El Paso Corp.*, 2004 WL 3217795, *8, 2004 Del. Ch. LEXIS 202, *35 (Del. Ch. 2004); *Wilmington Firefighters Ass'n , Local 1590 v. City of Wilmington*, 2002 WL 418032, *10, 2002 Del. Ch. LEXIS 29, *35, 169 L.R.R.M. 3136 (Del. Ch. 2002). That was not the case here.

favored ORC that the jury could not apply the doctrine (Br. at 36 & 37 n.20). ORC's argument shows only that the agreements were "created under Lawlor's watch," "under his direction and … under his authority." *Id.* at 36. It made a similar argument to the jury. JA 4227. The jury properly rejected it, as the evidence proved without contradiction that Bisignano was the principal drafter and that Lawlor played no role at all. *See supra* at 29-30.

III. The court did not err in submitting Lawlor's alternative "severance benefits" theory to the jury; but even if it did err, the theory did not affect the outcome (Assignment of Error 3).

Lawlor contended at trial that ¶ 1 of the Severance Agreement would be a separate basis for awarding severance benefits, if the jury determined that there was no Change in Control. That paragraph provided that for a termination *prior to* a Change in Control, the "severance benefits that *are payable*" to Lawlor are as set forth in ORC's discretionary Severance Pay Policy ("SPP") as of the date of the Severance Agreement. JA 4957 (emphasis added).

ORC argues that the separate basis should not have gone to the jury because the agreement provided unambiguously that SPP benefits were payable entirely at ORC's discretion. It concludes that it is unclear on what basis the jury based its verdict and therefore that the entire judgment entered on the verdict must be reversed.

That is wrong on two grounds. First, the jury awarded $4,935,619, the precise amount of damages the evidence showed and Lawlor's counsel argued he was entitled to on a Change in Control, demonstrating that the verdict was based on a finding that a Change in Control had occurred. The benefits to which Lawlor was entitled if there was a termination without a Change in Control were less. *See* JA 1987, 5009 (damages $3,269,893 if no Change in Control). The verdict therefore should be upheld even if the Court agrees that the SPP benefits were entirely at ORC's discretion.[8] *See* Va. Code §§ 8.01-678 ("When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed … [f]or any other defect, imperfection, or omission in the record, or for any error committed on the trial"), 8.01-681 ("A civil case shall not be remanded for a trial de novo except when the ends of justice require it").

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[8] After the Court provided its verdict form, the only special interrogatory that ORC requested was one on the Company's breach of ¶ 1 of the Severance Agreement. But even that request was equivocal: "I like the Court's format, although count 3 there's an issue because the two components of breach of contract is the change in control and then there's the severance part of that agreement. So I think there are two parts to count 3 and I think it does make sense for clarity to split those causes of action. On the other hand, the Plaintiff can recover for both. So I do see the value. I'm fine with the verdict form, but I do think I would submit an interrogatory." JA 4077-78.

Second, the trial court did not err by rejecting ORC's argument that as a matter of law the SPP benefits payable under the Severance Agreement were entirely at ORC's discretion, if there was a termination without a change in control. To the contrary, ¶ 1 of the Agreement promised unambiguously that the severance benefits to which Lawlor would be entitled, if he were terminated before a change in control, were mandatory. ORC's reading would render the reference to SPP benefits in the Severance Agreement meaningless; the discretionary SPP already applied to Lawlor, and there was no reason to include the "are payable" language in the Severance Agreement unless it was to make the SPP payments mandatory. *See Sonitrol Holding Co. v. Marceau Investissements*, 607 A.2d 1177, 1183 (Del. 1992) ("a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless"). Further, the only portion of the SPP that the Severance Agreement referenced was the "severance benefits," such that it could not be deemed to have incorporated all of the other provisions of the SPP, such as management's discretion to make awards. *See State ex rel Hirst v. Black*, 83 A.2d 678, 681 (Del. Super. 1951) ("an agreement will not be deemed to incorporate matter in some other instrument or writing except to the extent that the same is specifically set forth or identified by reference").

The extrinsic evidence, moreover, overwhelmingly supported a finding for Lawlor. The words in ¶ 1 were changed from "may be payable" to "are payable" specifically to guarantee benefits. ORC's CFO objected to "may be payable" because it "implie[d] that severance benefits are discretionary … when they are supposed to be contractually guaranteed." JA 4707. Bisignano and ORC's head of human resources responded by adopting the "are payable" language. JA 2322-27, 2329-30, 4681.

IV. The trial court acted within its discretion in admitting the testimony of Lawlor's damages expert (Assignment of Error 4).

Lawlor called James Reda as an expert to testify about the damages from ORC's denial of the restricted stock and option awards that Lawlor should have received in the event of a Change in Control. Reda is an executive compensation expert, and major companies frequently ask him to value stock rights and severance benefits. JA 1960-63.

Reda performed two calculations of the value of Lawlor's lost awards. In the first, he used the highest value the stock reached prior to trial, $7.01, to calculate the value that Lawlor could have obtained for his options and restricted stock if he had not been denied those rights; for options not "in the money" at $7.01 (*i.e.*, priced above that level to Lawlor), he performed a "Black-Scholes" analysis to estimate the value of the options at the time of

trial. JA 1977-78, 2020.[9] In the second calculation, he used a stock price of $10.53, which was based on a valuation prepared by the Company's own investment bankers based on its future growth strategy. JA 1993-96. To both calculations, he added $2,116,333, a lump sum payment due under the Severance Agreement that was not in dispute. JA 1983. The jury accepted Reda's calculation based on the $7.01 stock value. *See* JA 1984 (Reda testimony that damages under Severance Agreement using $7.01 price were $4,935,619), JA 435 (verdict for $4,935,619).

ORC argues that the Court erred in admitting Reda's testimony because he did not independently value its stock. The standard of review is deferential: "Whether a witness is qualified to testify as an expert is a matter within the sound discretion of the trial court and the trial court's decision will not be set aside on appeal unless the record clearly shows that the witness is unqualified." *Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc.*, 259 Va. 92, 111, 524 S.E.2d 420, 430 (2000). ORC does not come close to meeting that standard.

Reda was plainly qualified to testify about the damages resulting from the Company's breach, and in fact ORC objected only to "his testimony as

[9] The Black-Scholes analysis is a widely-accepted method of determining the present value of stock options and is commonly used in the field of executive compensation. JA 1978, 1979. *See also* JA 2009-11, 3186-90.

to the valuation of the stock." *See* JA 1957-67, 1974-75. ORC's contention that Reda was not qualified because he did not perform an independent valuation of the stock is a red herring. He offered no opinions on that issue, and his methodology did not require him to perform an independent valuation. He relied on reasonable assumptions about the stock value, which he drew from identifiable sources, and calculated Lawlor's damages from the forfeiture of his unvested options and stock rights.

Reda's first source was the actual price of $7.01 that the Company's stock reached prior to trial. The use of an actual publicly-traded stock price does not require an independent valuation. ORC contends that this calculation "assum[ed] that Lawlor would have had the clairvoyance to sell" at that price. Br. at 41. But it did not object to Reda's testimony on that ground at trial and has waived the argument on appeal. Va. S.Ct. Rule 5:25; *Baker v. Commonwealth*, 278 Va. at 660 n.2, 685 S.E.2d at 663 n.2.

The argument is incorrect in any event. The risk of any uncertainty about what Lawlor might have done with the stock rights that ORC wrongfully deprived him of is appropriately borne by ORC, not Lawlor. *See*, *e.g.*, *Kiser v. Amalgamated Clothing Workers of Am.*, 169 Va. 574, 588, 194 S.E. 727, 733 (1938) ("While the actual amount of damages from the breach of a contract may not be susceptible of exact proof, the law does

not permit one whose act has resulted in loss to another to escape liability on this account"). This is especially so here, where the period before the expiration of the options was in many cases significantly longer than the one-year period (some would have expired in 2016) from which Reda drew the highest intermediate price. Had ORC not breached its contracts, Lawlor would have had the options and stock grants for a much longer period, during which the price may well rise even higher than the $7.01 price that was the basis for the jury's award. In light of the extended duration of the stock rights, the use of the highest intermediate sale price that Lawlor could have obtained over a one-year period was a conservative basis from which to estimate the damages he suffered from ORC's breach and consistent with settled law. *See Morison v. Dominion Nat'l Bank*, 172 Va. 293, 298, 1 S.E.2d 292, 293 (1939) (calculation of damages from lost stock ascertained using highest market value of stock between date of conversion and a reasonable time after owner has notice of it); *Gray v. Kemp*, 88 Va. 201, 204, 16 S.E. 225, 226 (1891) (same rule applied to a breach of contract to sell stock); *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 20 (Del. Ch. 2003) (assessing damages from lost stock rights by using "reasonable period" for determining the "highest intermediate value").

ORC also complains that Reda used a $10.53 stock price in his

alternative calculation. That price was derived from a report by Raymond James, an expert investment advisor retained by the Company to assist it in seeking a buyer or merger partner. Reda was entitled to base the calculation of Lawlor's damages on evidence from the Company's own files. *See Lockheed*, 259 Va. at 111, 524 S.E.2d at 430 (expert could rely on others' calculations when determining potential profits). ORC's own expert admitted that it was not unreasonable for a damages expert to rely on the investment bankers' valuation. JA 3336. But of course the jury did not base its verdict on the $10.53 calculation in any event.

The testimony of ORC's expert also shows that ORC's other criticisms went to the weight of Reda's testimony, not his qualifications. Like Reda, ORC's expert did not perform an independent valuation of the Company. Instead, she selected the actual stock price from an even later date, just before trial; assumed that Lawlor would not have sold any stock or exercised any options at any higher prices; and provided a damages figure using lower calculations. JA 3376-79. The jury heard that evidence and rejected it.

V. ORC has waived its challenge to the sufficiency of the evidence on the unjust enrichment claim, but the evidence is sufficient nevertheless (Assignment of Error 5).

ORC contends that there was no evidence to support an element of

Lawlor's unjust enrichment claim – that it knew of the benefit that he conferred when he accepted a temporary pay cut and "should reasonably have expected to repay [him]." Br. at 43 (citation omitted).

ORC waived that argument at the trial. The Circuit Court instructed the jury, without objection, to find its verdict for the Plaintiff (Lawlor) on the claim of unjust enrichment

> if he has proved by the greater weight of the evidence that (1) the Plaintiff conferred a benefit on the Defendant; and (2) the Defendant knew that the Plaintiff was conferring the benefit; and (3) the Defendant accepted or retained the benefit under circumstances which would make it inequitable for the Defendant to retain the benefit without paying for its value.

JA 4118. *See* JA 4044 (no objections).

"It is well settled that instructions given without objection become the law of the case and thereby bind the parties in the trial court and this Court on review." *Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.*, 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989). *See also*, *e.g.*, Va. S.Ct. Rule 5:25. ORC did not request a "should reasonably have expected to repay" instruction and therefore cannot be heard to complain that the evidence was insufficient to satisfy it.

The evidence was sufficient in any event. The issue is not ORC's actual, subjective expectation, but whether it reasonably should have expected to repay Lawlor for the temporary pay cut. The jury heard

evidence showing exactly that, including the following:

- In 2009, Lawlor worked for a substantially reduced salary and performed well. JA 1929, 2935-39, 4444-55.
- Lawlor testified that ORC had an expectation of paying him back. JA 2925-29.
- Steven Cole, who was on the Board at the time, testified that when Lawlor took a pay cut and ORC accepted it, there was no expectation that Lawlor would be fired in that year. JA 1898.

That evidence is more than sufficient to support a finding by the jury that ORC was unjustly enriched. It should not be disturbed.

VI. The trial court's order requiring ORC to reimburse Lawlor's attorneys' fees and expenses is required by the plain language of the Severance Agreement (Assignment of Error 7).

ORC argues that the trial court erred by awarding Lawlor the fees he incurred "for the entire case," on the ground that the Severance Agreement did not permit the award of fees for causes of action that were unrelated or unsuccessful. Br. at 45-46. It also contends that Lawlor "did not reveal" before trial that he "planned to ask for *all* of his fees for the entire case" and "refused to apportion the fees claimed to Count 3." Br. at 44, 48. ORC is wrong on all counts.

ORC was on notice before trial that Lawlor would seek reimbursement of his fees for the entire case if he prevailed. Lawlor's complaints alone provided notice; and Lawlor filed a pretrial motion, which ORC did not oppose, stating that "Plaintiff has alleged a claim against defendant for

attorneys' fees and costs incurred by plaintiff *in connection with this matter*" and seeking to defer the claim for post-trial briefing. JA 141 (emphasis added). ORC did not object to that description, and it agreed to an order deferring the claim, which the trial court entered. JA 432. Before trial, Lawlor's and ORC's attorneys discussed the fact that if Lawlor prevailed on any of his claims related to the Severance Agreement, he would be entitled to recover his fees and expenses under ¶ 13 of that Agreement. JA 518. ORC was fully aware of the basis for the fee claim, and indeed it took full advantage of its opportunity to explore the merits of Lawlor's motion for fees in post-trial discovery and by submitting an expert report in opposition. It also reserved a total of $7.7 million for the claim immediately after the verdict, enough to cover both the $5.3 million compensatory award and the pending claim for fees. JA 499, 502.

The trial court did not err in awarding Lawlor the fees he incurred "for the entire case," for several reasons.

First, as the trial court concluded, applying the controlling Delaware rules of contract interpretation, the plain meaning of ¶ 13 of the Severance Agreement required the Company to reimburse Lawlor in full for all reasonable attorneys' fees and expenses incurred with respect to this action. Paragraph 13 provides:

> If [Lawlor] commences *a legal action* to enforce any of the obligations of the Company under this Agreement and it is ultimately determined that [Lawlor] is entitled to any payments or benefits under this Agreement, *the Company shall pay [Lawlor] the amount necessary to reimburse [him] in full for all reasonable expenses* (including reasonable attorneys' fees and legal expenses incurred by [Lawlor] *with respect to such action*.

JA 4962 (emphasis added). ORC asks this Court to redraft the agreement by replacing the term "legal action" with ORC's term, "cause of action." Br. at 46. Delaware law does not permit such redrafting. *See*, *e.g.*, *Northwestern Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 44 (Del. 1996) (declining to adopt as "untenable" an interpretation of a contract that would involve "add[ing] a limitation not found in the contract language).

Second, Delaware law squarely supports the trial court's plain reading of ¶ 13 – or, as the trial court put it, its holding that "action is not a count, and all means all," and the "court is not at liberty to redraft the parties' agreement." JA 4392-93. Delaware courts honor the plain meaning of contractual fee-shifting provisions so that, when the parties agree to the terms "in full," and "all," the courts do not have discretion to apportion fees to particular causes of action or claims. In *West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2009 WL 458779, *8-9, 2009 Del. Ch. LEXIS 23, *31-33 (Del. Ch. 2009), an agreement provided that "'[i]n the event legal action is instituted … the prevailing party will be

entitled to … reasonable attorney's fees.'" The court found that the plaintiff was entitled to its fees for the entire case: "[a]bsent any qualifying language that fees are to be awarded claim-by-claim or on some other partial basis, a contractual provision entitling the prevailing party to fees will usually be applied in an all-or-nothing manner." *Accord*, *e.g.*, *Brandin v. Gottlieb*, 2000 WL 1005954, *28, 2000 Del. Ch. LEXIS 97, *90 (Del. Ch. 2000) ("the parties eschewed a claim-by-claim approach by failing to insert any language in the contract that would authorize the court to exercise discretion to award less than 'all' the prevailing party's fees"); *Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, *2-3, 2004 Del. Ch. LEXIS 53, *7 (Del. Ch. 2004) (parties adopted "all-or-nothing" approach by providing that "'in any action or suit to enforce any right or remedy under this Agreement … the prevailing party shall be entitled to recover its costs, including reasonable attorneys' fees").

ORC attempts to distinguish these controlling cases on the ground that they "concerned whether fees could be recovered for pursuing different claims or remedies for breach of *the same contract.*" Br. at 47. That is not an accurate reading of the cases; but even if it were, it would not change the fact that Delaware courts honor the plain meaning of contractual fee-shifting provisions. ORC's argument notwithstanding, it is not evident from

the court's opinion in *West Willow-Bay* that the plaintiff had claims only for breach of contract or was seeking only the reimbursement of fees incurred in connection with those claims. In *Brandin*, the plaintiff had breach of fiduciary duty claims in addition to her contract claims, and the court awarded her "*all* of her reasonable attorneys' fees and expense incurred *in connection with this action.*" 2000 WL 1005954, *1, *28, 2000 Del. Ch. LEXIS 97, *92 (emphasis added). In *Comrie*, the plaintiff claimed breach of the implied covenant of good faith and fair dealing in addition to claims for breach of contract (*see Comrie v. Entrasys*, *supra*, 837 A.2d at 12), but the court did not limit its award of fees to the fees incurred for the contract claims. *Comrie*, 2004 WL 936505, *2-3, 2004 Del. Ch. LEXIS 53, *7.[10]

Third, ORC's heavy reliance on *Ulloa v. QSP, Inc.*, 271 Va. 72, 624 S.E.2d 43 (2006) (a 4-3 decision), is misplaced. Br. at 46-48. *Ulloa* does not apply Delaware law and therefore it does not apply here. But it would not require reversal if it did apply. In *Ulloa*, the jury returned a verdict for

[10] The two Delaware cases that ORC cites (Br. at 47-48) do not support its argument. In both cases, the courts found that the plaintiffs were entitled under contractual fee-shifting provisions to be reimbursed for their fees and invited the plaintiffs to produce evidence of the fees they incurred. There is no indication that the plaintiffs were seeking to be reimbursed for fees incurred in connection with other claims *or* that the courts would not have allowed that if they had. *Barker Capital LLC v. Rebus LLC*, 2006 WL 246572, *10 (Del. Super. 2006); *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, 2002 Del. Ch. LEXIS 124 (Del. Ch. 2002).

the plaintiff, QSP, against Ulloa, its former employee, for breach of an employment contract and misappropriation of trade secrets, but it did not award damages. 271 Va. at 78, 624 S.E.2d at 47. QSP sought reimbursement for its attorneys' fees under a fee-shifting provision in the contract. *Id*. at 76, 624 S.E.2d at 46. Ulloa argued on appeal that under the circumstances – where QSP did not recover any damages – the trial court erred in awarding fees. *Id*. at 79, 624 S.E.2d at 48. The Court construed the language in the contract at issue in that case (which is different from the language in the Severance Agreement here) and noted that the Uniform Trade Secrets Act provides a remedy for misappropriation of trade secrets, including attorneys' fees for "'willful and malicious'" misappropriations. It concluded that the trade secrets claim was not an "action relating to" the employment contract under the contractual fee-shifting provision and therefore that QSP was not entitled to reimbursement for its fees for the trade secrets claim. *Id*. at 81-82, 624 S.E.2d at 49. Here, by contrast, no statutory fee-shifting provision could be invoked, Lawlor was awarded substantial damages, and ¶ 13 of the Severance Agreement expressly provides for reimbursement "in full" for "all" of Lawlor's reasonable legal expenses incurred with respect to a "legal action," such as this one, to enforce the Severance Agreement.

If the Court were to limit reimbursement of Lawlor's legal expenses to those incurred for claims relating to the Severance Agreement, however, the impact would be minimal. In support of his motions for an award of attorneys' fees and expenses, Lawlor submitted bills and affidavits from his lead counsel establishing that he had actually incurred some $2.1 million in legal expenses and that those expenses would have been "substantially the same" with or without the non-contractual claims. JA 716. This is because the non-contractual claims were not "unrelated" to the contractual claims, as ORC contends. Almost all of the facts demonstrating a "Change in Control" were also relevant to Lawlor's non-contractual claims. For example, the facts supporting Lawlor's claim that he was wrongfully terminated for reporting insider trading by TCP – including the facts that the Board did not fully investigate TCP's trades or take corrective measures against TCP upon receiving Lawlor's report – also supported a finding of a Change in Control. Accordingly, while the jury rendered a verdict for ORC on the wrongful termination count, the work done on it was necessary and "related" to the Severance Agreement claims in Count 3. Likewise, the Severance Agreement claims involved options and stock awards that were granted under the 1999 and 2005 stock plans, and the work done on the claims under those plans for Counts 1 and 2 was directly related to the

Severance Agreement claims in Count 3.

Lawlor allocated the fraction of the fees incurred – $49,160 – that were unrelated to claims under the Severance Agreement. JA 716-17. ORC never challenged or disputed this evidence. If the Court holds that Lawlor is not entitled to fees for work that was not necessary for the Severance Agreement claims, therefore, it should simply reduce the judgment by $49,160 and not remand for a do-over on the fee issues. *Cf.*, *e.g.*, *Clinchfield Coal Corp. v. Couch*, 127 Va. 634, 639, 104 S.E. 802, 803 (1920) (amending and affirming judgment by crediting the amount of a previous compromise).

VII. The trial court's ruling permitting Lawlor to amend his complaint was not an abuse of discretion, and it should be upheld (Assignment of Error 8).

Lawlor demanded attorneys' fees in his complaints and attached the Severance Agreement, thus making it, including the fee-shifting provision in ¶ 13, "a part of the pleading." Va. S.Ct. Rule 1:4(i). ORC was both on notice and well aware that Lawlor intended to seek reimbursement of his legal expenses pursuant to the Severance Agreement if he prevailed. ORC even submitted a proposed jury instruction on attorneys' fees before the parties agreed to defer the issue for later proceedings. JA 514.

After trial, Lawlor moved for an award of his fees and expenses.

ORC opposed his motion and argued for the first time that the complaint did not sufficiently plead such a claim. The trial court denied Lawlor's motion on the ground that his demand for fees did not comply with Rule 3:25, even though the basis for the fee request was in the agreement attached to the complaint, which is incorporated into the complaint. Va. S.Ct. Rule 1.4(i). But it later granted Lawlor's motion for leave to amend to state the basis for his demand for fees in greater detail. JA 582.

Contrary to ORC's argument (Br. at 48), the trial court's decision to allow amendment is not subject to *de novo* review. "Whether to grant an amendment is a matter resting within the sound discretion of the trial court." *Kole v. City of Chesapeake*, 247 Va. 51, 57, 439 S.E.2d 405, 409 (1994). Permitting the amendment furthered the ends of justice by allowing Lawlor "to be compensated fully for any damages caused by [ORC's] acts or omissions." *Peterson v. Castano*, 260 Va. 299, 303, 534 S.E.2d 736, 738 (2000). ORC was neither prejudiced nor surprised by the fee claim, as discussed above. It had every opportunity to contest the issue of Lawlor's demand for attorneys' fees; and it took full advantage, obtaining documents in discovery, submitting an expert's report challenging the reasonableness of the fees, JA 901-12, and fully briefing and arguing the issue.

ORC's argument that the court should not have permitted a "post-

verdict" amendment, Br. at 48-49, is wrong. Rule 3:25(C) allows grants of "leave to file an amended pleading seeking attorney's fees … under Rule 1:8," in the discretion of the court, *see* Advisory Committee Report on Draft Rule 3:25, JA 561. Rule 1:8 does not prohibit post-verdict amendments.[11]

Even if Rule 1:8 did prohibit post-verdict amendments, however, Lawlor's amendment was appropriate. The case was bifurcated, with Lawlor's fee claim left for decision by the judge after the trial. There was no error in permitting amendment of Lawlor's claim for attorneys' fee during the second, attorneys'-fees phase of the bifurcated proceedings.[12]

CONCLUSION

The Court should affirm the judgment in all respects.

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[11] Nothing in *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 344 S.E.2d 916 (1986), cited at page 48 of ORC's brief, is to the contrary. In *Powell*, the Court prohibited a post-trial attempt to increase an *ad damnum* after the jury had reached a verdict on damages because the defendant, having no notice of the potential for increased liability and no opportunity to seek a postponement or continuance, would have been prejudiced.

[12] The court did not render a "verdict" when it denied the initial motion for attorneys' fees. It denied the motion because, in its view, the fee demand was insufficiently pleaded. If that were a "verdict," as ORC would have it (Br. at 49), then every order granting a demurrer would effectively render a verdict and preclude amendment. That is not the law. *See*, *e.g.*, *Bibber v. McCreary*, 194 Va. 394, 397, 73 S.E. 382, 384 (1952) ("[t]he trial court erroneously held that the order sustaining the demurrer was final, and that it was without jurisdiction to entertain the motion for leave to amend").

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of August, 2012, pursuant to Va. S.Ct. Rule 5:26:

Electronic copies of this brief, in PDF format, are being transmitted to the Clerk of this Court, on CD-ROM, and served on counsel for appellee at the email addresses stated below.

Fifteen copies of this brief are being transmitted by hand for filing in the office of the Clerk of this Court.

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