IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 120208

ONLINE RESOURCES CORP.,
Appellant,

v.

MATTHEW P. LAWLOR,
Appellee,

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The former CEO and Chairman of the Board of Online Resources Corp. ("ORC"), Matthew P. Lawlor, convinced the jury that he was entitled to a golden parachute worth nearly $5 million because his employment was terminated following a contractually-defined "change in control" of the Company. Lawlor claimed, among other things, that *he* caused the change in control when he resigned early from the 10-member board of directors, reducing the incumbent-majority from 6-3 to 5-3, with two empty seats. Although the incumbents outnumbered the non-incumbents and still controlled the Company, Lawlor argued that his resignation triggered a change in control because 5 is not a "majority" of 10.

The trial court should have dismissed Lawlor's claims because, as a matter of law, there was no "change in control." As a result of this and other significant legal errors below, Lawlor enjoyed a massive windfall to which he was not entitled.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

In April 2010, Lawlor sued ORC in Fairfax County Circuit Court, claiming damages for unpaid severance benefits, unjust enrichment, and wrongful termination. He amended the complaint twice before trial. (JA 1-54, 55-56, 74-128, 139-40, 198-412.) The Second Amended Complaint on

which he went to trial contained eight counts.[1]

The trial court, the Hon. Michael F. Devine presiding, denied cross-motions for summary judgment. (JA 413, 1154-56.) Judge Devine took under advisement (JA 1258-65) ORC's motion in limine to exclude the testimony of Lawlor's damages expert, James Reda, after Reda admitted that he was unqualified to value the stock of ORC, a necessary input into his damages calculation. (JA 146-47.)

Judge Devine then conducted an 11-day jury trial. (JA 1300-4261.) At trial, Lawlor non-suited his breach-of-implied contract claim in Count 4 (JA 2611-12), and Judge Devine reserved, and later dismissed, Lawlor's declaratory and injunctive relief claims in Counts 7 and 8. (JA 630.)

Judge Devine permitted Reda to testify to his damages model over ORC's objections (JA 1968, 1971, 1975, 1995-96). The court then denied ORC's motions to strike at the close of Lawlor's case-in-chief (JA 3223-61) and again at the close of evidence (JA 4080-87).

The jury found that ORC had not wrongfully terminated Lawlor's employment (Count 6). (JA 435, 4278.) But the jury found for Lawlor on

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[1] Count 1 (Breach of the 2005 Stock Plan); Count 2 (Breach of the 1999 Stock Plan); Count 3 (Breach of the 2009 Severance Agreement); Count 4 (Breach of Implied-in-Fact Contract); Count 5 (Unjust Enrichment/Quantum Meruit); Count 6 (Wrongful Termination); Count 7 (Declaratory Judgment); and Count 8 (Injunctive Relief). (*See* JA 212-217.)

the four remaining counts. Because the damages in Count 3 overlapped with the damages in Counts 1 and 2 (JA 2982-84), the jury fixed the total award at $5,295,619, allocated among the four counts 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 2009 Severance Agreement and Severance Policy	$4,935,619
Count 5: Unjust enrichment	$360,000
Total Award	**$5,295,619**

(JA 435, 4278-79.)

ORC moved to set aside the verdict (JA 657) and Lawlor moved for attorneys' fees (JA 692). On June 28, 2011, the court denied both motions. (JA 576-77, 578-79, 4318, 4338-39.) The court denied the fee request because Lawlor's complaint failed to plead the basis for fees under Rule 3:25. (JA 4338-39.) Lawlor's motion to reconsider was denied. (JA 575.)

But nearly a month after that post-trial ruling, and three months after the jury's verdict, the court granted Lawlor leave to file a Third Amended Complaint. (JA 582-83, 4379-82.) The court subsequently awarded Lawlor legal fees for the entire case, without requiring him to apportion fees to Count 3, the only count with a contractual fee-shifting provision. (JA 625-26, 4388-99.) The resulting fee award totaled $2,131,034.75. (JA 630.)

The Final Order was entered November 8, 2011, awarding Lawlor damages in the total amount of $5,265,619, plus prejudgment interest from

February 19, 2010, and attorney's fees in the amount of $2,131,034.75. (JA 629-30.) To suspend execution pending appeal, ORC posted an irrevocable letter of credit in the amount of $8,446,143.

ASSIGNMENTS OF ERROR

1. The trial court erred by refusing to hold, as a matter of law, that the Company underwent no "change in control" that would entitle Lawlor to the mandatory severance benefits that he claimed.[2]

2. The trial court erred by instructing the jury to construe any ambiguity in the contracts against the drafter; that rule of last resort was unnecessary to interpret the contract language and did not apply because Lawlor, the CEO and Chairman of the Board, directed and oversaw the drafting of the very documents he sought to enforce against the Company.[3]

3. The trial court erred by failing to reject Lawlor's alternative theory that he was entitled to mandatory severance benefits, even absent a change in control, because the plain language of the Severance Agreement did not alter the discretionary terms of the Company's severance policy.[4]

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[2] **Court rulings** at: JA 413, 1154-56 (summ. j. denied); JA 3258-59, 3261 (mot. strike denied); JA 4087 (renewed mot. strike denied); JA 576, 4318 (mot. set aside denied). **Objections preserved** at: JA 131-36 (Mot. Summ. J.); JA 140A-140E (Reply Supp. Mot. Summ. J.); JA 413, 1126-38, 1141-48 (summ. j. hr'g); JA 3223-28 (mot. strike); JA 4080-85 (renewed mot. strike); JA 672-82 (Mot. Set Aside Verdict); JA 4297-307, 4316-17 (mot. set aside verdict h'ng); JA 630 (Final Order).

[3] **Court rulings** at: JA 3840, 4038 (charging conference); JA 434 (Instr. N); JA 4117 (Instr. N read to jury). **Objections preserved** at: JA 3839-40, 4038 (charging conference); JA 630 (Final Order).

[4] **Court rulings** at: JA 413, 1155-56 (summ. j. denied); JA 3259 (mot. strike denied); JA 4087 (renewed mot. strike denied); 4106-07 (verdict form discussion); JA 576, 4318 (mot. set aside denied). **Objections preserved** at: JA 136 (Mot. Summ. J.); JA 140D-140E (Reply Supp. Mot. Summ. J.); JA 413, 1111-14, 1116 (summ. j. hr'g); JA 3223, 3228-29 (mot. strike);

4. The trial court erred by failing to exclude the testimony of Lawlor's damages expert when he admitted he was unqualified to determine the value of the Company's stock, yet proceeded to choose speculative, high-end stock valuations to compute Lawlor's damages.[5]

5. The trial court erred in ruling the evidence sufficient to support Lawlor's unjust enrichment claim because there was no evidence that ORC should reasonably have understood it was obligated to compensate Lawlor for the company-wide pay cut Lawlor instituted when he was Chairman and CEO.[6]

6. Because Lawlor should not have recovered for breach of the Severance Agreement in Count 3 — the only Count involving a fee-shifting provision — the trial court erred by awarding him attorneys' fees and expenses.[7]

7. The trial court erred in holding that the Severance Agreement at issue in Count 3 entitled Lawlor to recover his legal fees for the entire case, including unsuccessful and unrelated counts.[8]

JA 4077-78 (request for jury interrogatory); JA 4080 (renewed mot. strike); JA 682-85 (Mot. Set Aside Verdict); JA 630 (Final Order).

[5] **Court rulings** at: JA 1265 (mot. in limine hn'g); JA 1968, 1971-72, 1975, 1995-96 (Reda direct); JA 576, 4318 (mot. set aside verdict denied). **Objections preserved** at: JA 146-47 (Mot. in Limine); JA 1258-70 (mot. in limine hn'g); JA 1968, 1971, 1975, 1995-96 (Reda direct); JA 685-87 (Mot. Set Aside Verdict); JA 630 (Final Order).

[6] **Court rulings** at: JA 4087 (mot. strike denied); JA 576, JA 4318 (mot. set aside verdict denied). **Objections preserved** at: JA 3235-38 (mot. strike); JA 4080 (renewed mot. strike); JA 687-90 (Mot. Set Aside Verdict); JA 4292-97 (mot. set aside verdict h'ng); JA 630 (Final Order).

[7] **Court rulings** at: JA 625, 627, 630 (orders granting attorneys' fees). **Objections preserved** at JA 626, 628, 630 (objections to orders); JA 884 n.1, 890-92 (ORC Opp. Mot. Att'ys Fees).

[8] **Court rulings** at: JA 625, 627, 630 (orders granting att'ys fees); JA 4388-99 (post-trial ruling). **Objections preserved** at JA 890-96 (ORC Opp. Mot. Atts' Fees); JA 439-40 (ORC Not. Supp. Auth.); JA 587-89 (ORC Opp. Plfs' Mot. Recons.); JA 626, 628, 630 (objections to orders).

8. The trial court erred in permitting Lawlor to amend his complaint, post-verdict, to plead the basis for recovering attorneys' fees under Rule 3:25.[9]

STATEMENT OF FACTS

With regard to the four counts at issue on this appeal, the facts must be taken "in the light most favorable" to Lawlor. *Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 293, 585 S.E.2d 545, 547 (2003).

A. Online Resources Corp.

ORC is a Delaware corporation. (JA 4497.) Lawlor founded it in 1989 to provide on-line home-banking services. (JA 2400-01.) After taking the Company public in 1999 (JA 1519, 2409), Lawlor continued to serve as its CEO and as the Chairman of the Board of Directors. (JA 1120.) Because Lawlor was employed by the Company, he was the only director who was not considered "independent." (JA 1549-50, 4472.)

ORC's Certificate of Incorporation does not fix the number of directors; the Board determines its own size. (*See* JA 4468 [Bd. Manual], 4502 [Cert. of Inc., Art. 6], 4517 [By-Laws, Art. 2, § 2].) The Board

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[9] **Court rulings** at: JA 582-83, 4379-81 (mot. leave am. granted). **Objections preserved** at JA 563-68 (ORC Opp. to Plf's Mot. Leave to Amend); JA 4368-79 (mot. leave am. hn'g); JA 583, 626, 628, 630 (objections to orders); JA 563-68 (Defs' Opp. to Plf's Mot. Leave to Amend); JA 4368-79 (mot. amend hn'g).

increased its size from 8 directors (in 1999), to 9 (in 2006), and to 10 (in 2008). (*See* Table 2.)

Board elections are "staggered," with directors divided into three classes. Thus, no more than a third of the directors can be unseated in any annual shareholder election. (JA 4465 [Cert. of Inc., Art. 6(E)].)

Table 2 is a timeline that shows the directors at issue in this litigation and whether they were "incumbent" directors for purposes of the change-in-control provisions at issue in Counts 1-3.

B. The 1999 and 2005 Stock Plans.

In 1999, the Company adopted an employee stock plan. (JA 4963 [PX 262], 5015 [DX 2].) It provided that unexercised stock options would terminate upon separation from the Company, but if such separation occurred after a "Change in Control," the options would vest on such termination. (*Id.* at ¶¶ 1(e) (JA 5015), 6(d) (JA 5020); Table 1.) Lawlor held two options under this plan (JA 3872), at issue in Counts 2 and 3.

In 2005, the Company adopted a new stock plan (amended in 2009). (JA 5027 [DX 3].) That plan also provided that unexercised options would vest if the employee were terminated after a defined "Change in Control." (*Id.* at 5044-46; *see* Table 1.) Most of Lawlor's stock options were issued under this plan (JA 2870-71), and those were at issue in Counts 1 and 3.

C. TCP invests in ORC and obtains the right to elect one director.

In 2006, in return for investing $75 million in ORC, Tennenbaum Capital Partners ("TCP") became a Class A-1 preferred shareholder with the right to elect one director to the ORC Board. (JA 1383, 2467, 5003.) TCP initially chose Michael Chang. (JA 1389, 1525.) After Chang resigned, TCP proposed two candidates to replace him. (JA 1389, 1525.) The ORC directors interviewed both of them and picked Michael Leitner (JA 1526-27), unanimously electing him to fill the seat. (JA 1573, 5160, 5165.) Lawlor testified that he voted for Leitner, the more experienced candidate, but claimed he had little choice in the matter because TCP's general counsel had told him to choose Leitner. (JA 2802-04.)

D. Leitner complains about the Company's deteriorating performance and TCP launches a proxy fight.

ORC's financial performance deteriorated between 2006 and 2008. (*E.g.*, JA 2834, 3705-06.) Among other things, the Company's stock price dropped from $12.98 in 2006 (JA 3724-25) to $5.50 a share by December 2008 (JA 2999). Disappointed by ORC's performance, Leitner and TCP initiated a proxy contest in 2009, proposing a slate of three new directors — John Dorman, Bruce Jaffe, and Ed Horowitz — to replace incumbent directors Janey Place, Michael Heath, and Heidi Roizen. (JA 1412-14.)

E. Lawlor institutes across-the-board pay cuts and a Severance Policy for employee lay-offs.

In February 2009, with the proxy contest underway, the Board accepted Lawlor's cost-cutting recommendation to reduce pay by 5% for all employees and to cut benefits for senior management, including himself. (JA 1581-82, 1929, 3759-60.) The Company also laid off about 25 employees and adopted a severance policy to give management discretion to pay severance benefits to ease their departure. (JA 1704-05, 1844-45, 2353-55, 3039-40, 3058, 3766-67.) Several copies of the Severance Policy were admitted into evidence. (JA 4532 [PX 72], 4676 [PX 166], 5200 [DX 106A].) The Severance Policy should not be confused with the May 2009 Change-in-Control Severance Agreement, discussed below.

F. The Board approves a May 2009 Change-in-Control Severance Agreement and TCP wins the proxy fight.

On May 6, 2009, the Board approved the form of a Change-in-Control Severance Agreement for select executives, including Lawlor. (JA 1459-60, 3768-69.) The general counsel, Michael Bisignano, prepared the draft under Lawlor's direction. (JA 1742-45, 1751, 3876, 4462, 4744.) The text of the change-in-control provision is shown in Table 1, which also shows the text of the comparable provisions in the 1999 and 2005 Stock Plans.

At the annual meeting, also on May 6, the shareholders voted over-

whelmingly (66%) for the three directors nominated by TCP. (JA 1531.) Lawlor admitted that ORC's "low" stock price "[v]ery much" influenced the election. (JA 2813:17-19.)

On May 13, 2009, ORC's senior management team, including Lawlor, signed their severance agreements. (JA 3768-69, 4957.) On May 15, the election results were certified, the three new directors took office, and the incumbent majority shifted from 10-0 to 7-3. (JA 1422-23; *see* Table 2.)

G. By December 2009, the directors lose confidence in Lawlor's leadership.

Over the next six months, all of the directors (except Lawlor) became increasingly dissatisfied with the Company's performance. (JA 2245, 3613-14.) Lawlor conceded that the 70% drop in ORC's stock value had been "particularly challenging for shareholders . . . ." (JA 2918.)

Events came to a head at the December 9, 2009, Board meeting. The directors met in closed session, without Lawlor, as was their custom after every meeting. (JA 2256, 3468.) They agreed they were dissatisfied with the Company's direction, had lost confidence in Lawlor's leadership, and believed it was time for him to step down as CEO. (JA 1716-17, 3031-33 [Shames]; JA 1942-43, 1949-51 [Coles]; JA 2182, 2257-58 [Dorman]; JA 3391 [Wessler]; JA 3477-78 [Horowitz]; JA 3566-67, 3607 [Jaffe].) They were unanimous. (JA 2258, 2742, 3390-91.)

On December 14, 2009, the Board voted to remove Lawlor immediately as the CEO but, if he agreed, to retain him both as Chairman of the Board and as an employee until February 15, 2010. (JA 2415-16, 2447, 5178-80.) Lawlor agreed to that arrangement to "take the high road." (JA 2447.) It did not affect his status as a shareholder or director. He still owned more than 5% of the Company's stock (JA 5066), and his term as a director continued through May 2010 (JA 2747).

H. In January 2010, Lawlor refuses a severance package, resigns early as a director, and claims a "change in control" has occurred.

ORC offered Lawlor a severance package that was more generous than the Severance Policy recommended. (JA 2764-65, 3034-35.) Consistent with the Severance Policy, it required Lawlor to release any claims against the Company. (JA 1576, 4536.) Lawlor testified that he rejected the severance package because, among other reasons, "it would have taken away any rights to claim for a change in control. . . ." (JA 2765.)

On January 20, 2010, Director Spalluto resigned, reducing the majority of incumbent directors from 7-3 to 6-3. (JA 2221, 5183; Table 2.) At the Board meeting later that day, in light of Lawlor's rejection of the severance package, the Directors voted without dissent to replace Lawlor immediately as Chairman of the Board. (JA 5183.) (Lawlor retained his

seat as a director and remained an employee of the Company.)

But at 11:44 p.m., Lawlor unexpectedly resigned as a director, despite that his term ran for another four months. (JA 1840, 2746-47, 4442-43.) He told none of the other directors of his plans to resign early. (JA 2192, 2747.) His resignation reduced the majority of incumbents on the Board from 6-3 to 5-3, with two seats now vacant. (See Table 2, *infra*.)

Lawlor admitted at trial that, when he prematurely resigned his director's seat, on the heels of Spalluto's resignation, he intended to claim that there was now a change in control of the Company. (JA 2750.) He also knew that, if a change in control in fact had occurred, it would expose the Company to $15 million in potential liabilities to employees, like himself, who were covered by change-in-control provisions. (JA 2709.)

On February 19, 2012, ORC terminated Lawlor's employment. (JA 1381, 2415, 4439.) Lawlor filed this action two months later.[10]

I. Lawlor's unsuccessful "wrongful termination" claim.

Lawlor claimed in Count 6 of his Second Amendment Complaint that the Board wrongfully terminated him as CEO. He said the Board forced

[10] ORC commenced an action in the Delaware Chancery Court seeking a declaratory judgment that there had been no change in control, but that case was stayed in favor of Lawlor's action. (JA 1079.) At trial, Judge Devine sustained ORC's relevance objection to testimony elicited by Lawlor's counsel that ORC was the first to file. (JA 1476-80.)

him to step down from that position, not because of the Company's poor financial performance, but because Lawlor had directed an investigation of alleged insider trading by TCP and Leitner. (JA 208-10, 215.) TCP denied any improper trading (JA 1673, 1811, 2782-83, 3994-95), and the Company's investigation found no violation of the securities laws (JA 2788). Much of the litigation related to this count.[11]

As noted above, the jury rejected Lawlor's wrongful termination claim. (JA 4278.[12]) Lawlor has not assigned error to that determination.

ARGUMENT

I. The Court should reverse the judgment on Counts 1-3 because there was no "change in control" entitling Lawlor to the massive benefits he was awarded (Assignment of Errors 1-3).

A. Standard of Review.

Contract interpretation presents a question of law reviewed *de novo* in this Court. *Cappo Mgmt. V, Inc. v. Britt*, 282 Va. 33, 37, 711 S.E.2d 209, 210-11 (2011). Although the contracts at issue in Counts 1-3 are

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[11] At trial, the Company's general counsel testified that he knew of no evidence that the Board's decision to remove Lawlor as CEO was based on his insider-trading allegations. (JA 1871-72.) Various directors testified that they were unaware of those accusations when they decided Lawlor should step down as CEO. (JA 1948-49 (Cole), 3111 (Dorman), 3567-68 (Jaffe).) Others said their decision had nothing to do with Lawlor's charges. (JA 3033 (Shames); JA 3397 (Wessler); JA 3620-21 (Washeka).)

governed by Delaware law,[13] the Delaware standard is the same. *ConAgra Foods, Inc. v. Lexington Ins. Co.*, 21 A.3d 62, 68 (Del. 2011).

B. First principles: corporate control is vested in the Board of Directors, not the CEO.

Before evaluating whether there was a "change in control" of ORC under any of the agreements at issue in Counts 1-3, it is important to step back and appreciate an overarching, first principle of corporate governance — corporate control is vested in the corporation's Board of Directors, not in the Chief Executive Officer hired by the Board.

"One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation." *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998). It is the board of directors — not the CEO — that controls "the business and affairs" of the corporation. 8 Del. Code Ann. § 141(a) (2011). The officers, by contrast, have only "such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors." *Id.* § 142(a). The same is true under Virginia law. *See* Va.

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[12] When Count 6 was submitted to the jury, it was re-numbered as "Count V" owing to the gap created when Lawlor nonsuited the breach-of-implied-contract claim in Count 4.

[13] *See* 1999 Stock Plan, ¶ 19 (JA 4974) (Count 2); Amended 2005 Stock Plan, § 9.10 (JA 5051) (Count 1); 2009 Severance Agreement, ¶ 14 (JA 4962) (Count 3).

Code Ann. § 13.1-673(B) (2011) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . . ."); *id.* § 13.1-694 (2011) (officers' duties prescribed in bylaws or "by the board of directors").

Thus, the CEO works for the board of directors, and the board "retains the ultimate freedom to direct the strategy and affairs of the Company." *Grimes v. Donald,* 673 A.2d 1207, 1215 (Del. 1996), *overruled in part on other grounds*, *Brehm v. Eisner*, 746 A.2d 244, 253 n.13 (Del. 2000). Delaware law echoes what this Court recognized a century ago: that "[t]he affairs of corporate bodies are within the exclusive control of their board of directors, from whom authority to dispose of their estates must be derived." *Clement v. Adams Bros.-Paynes Co.,* 113 Va. 547, 549, 75 S.E. 294, 295 (1912) (citation and quotation omitted). The corporation's chief executive officer enjoys only such power as the board confers upon him. *Id.*

In the trial court, Lawlor's theory of the case ran counter to this principle. His counsel focused on the optics that, before the proxy contest, which replaced 3 of the 10 incumbent board members, the Company was perceived as "Matt's company," and afterwards, "now suddenly everyone is independent and it's no longer Matt's company." (JA 3245-46.) But resorting to that mushy impression ignored that the Company was not

"Matt's" company. The shareholders own the corporation and its board of directors controls it. Thus, ORC's Board of Directors was free to hire or fire Lawlor, and its decision to do so did not amount to a change of control of the corporation. As Judge Posner said in applying Delaware corporate law, "[a] change of corporate control takes place when *a majority* of the corporation's *existing directors* are replaced. That did not happen here." *Fischbein v. First Chicago NBD Corp.*, 161 F.3d 1104, 1105 (7th Cir. 1998).

C. As a matter of law, there was no change in control under the 2009 Severance Agreement (Count 3) (Assignment of Error 1).

The 2009 Severance Agreement defined three ways in which a change in control could occur. None happened here.

1. TCP did not obtain a voting-control interest in ORC.

Under the 2009 Severance Agreement and 2005 Stock Plan, a "change in control" would be deemed to occur if a third person obtained *50% or more* of ORC's equity voting power. (JA 4957, 5045; Table 1.) The 1999 Stock Plan used 25%. (JA 4957, 5045; Table 1.)

TCP did not cross either threshold. It held 22% voting equity in December 2008, increasing it to 24% by December 2009. (JA 1545, 2570, 4530.) Lawlor's counsel conceded when obtaining leave to file the Second

Amended Complaint that Lawlor was not claiming a change in control by virtue of TCP's surpassing any voting power threshold. (JA 1086:2-9.)

2. The incumbent directors continued to control the Board.

A change in control would also occur if the incumbent directors on the Board, "as of the date" of the agreement, ceased to constitute a "majority of the Board." (JA 4957; Table 1.) But directors coming on board thereafter could be deemed "incumbent directors" if they were approved by a vote of the existing, incumbent directors. Under the 1999 and 2005 Stock Plans, a vote of "a majority" of the incumbent directors was sufficient to deem a new director an "incumbent" director. (JA 4963, 5015 (1999 Plan); JA 5045 (2005 Plan); *see* Table 1.) Under the 2009 Change-in-Control Severance Agreement, a vote of "three-quarters" of the incumbent directors was needed. (JA 4957-58; Table 1.) An incumbent Board could thus be "self-perpetuating." (JA 3894:19.)

Lawlor argued alternative theories for why his resignation deprived the Board of a 5-3 incumbent majority. (JA 4152-53.) None was valid.

(a) Leitner was an "incumbent director" as a matter of law, notwithstanding the antipathy between him and Lawlor.

Lawlor argued that Leitner should not have been counted as an incumbent director in view of Leitner's persistent efforts to oust him and the

personal antipathy between them. (JA 1301-02, 1332-33 (Lawlor opening statement); JA 4122-23 (Lawlor closing argument).) But the plain language of the 2009 Severance Agreement precluded that argument.

The term "Incumbent Board" included *all* directors on the Board "as of the date" it was signed — May 13, 2009. (JA 4957-58; Table 2.) Because Leitner had been on the Board since December 2006 (DX 90), he was an "incumbent" director as a matter of law. Lawlor thus improperly argued that a "change in control" had occurred by wrongly focusing on Leitner's dislike of Lawlor and desire to see him ousted, ignoring the contract language establishing Leitner as a member of the incumbent majority. The jury was swayed by Lawlor's appeal to the personal drama, ignoring the contract.

(b) The 5-3 incumbent majority controlled the Board as a matter of law.

Lawlor also argued that the 5-3 incumbent majority was not a "majority of the Board" because 5 is not a majority of 10. (JA 4152.) The trial judge should have rejected this claim because the 5 remaining incumbents, as a matter of law, continued to control the Company.

(i) The 5-3 majority retained all control.

What Judge Posner said in *Fishbein* bears repeating: "[a] change of corporate control takes place when a majority of the corporation's *existing directors* are replaced. That did not happen here." *Fischbein*, 161 F.3d at

1105 (emphasis added). In *Fishbein,* the employees, like Lawlor, claimed that they had been terminated after a change in control of the company, entitling them to exercise their unexercised stock options. Their company, First Chicago, merged with another company, NBD Bancorp, and the company name was changed. Yet First Chicago's shareholders owned 51% of the new entity, and First Chicago's directors became the directors of the new entity. *Id.* at 1104-05. The plaintiffs argued that a change in control occurred because the term "Board," as used in the change-in-control agreement, necessarily referred to the Board of Directors of First Chicago, which no longer existed. *Id.* at 1105.

Writing for the court, Judge Posner said the plaintiffs' argument made "very little sense." *Id.* In particular, he focused on the practical aspects of corporate control. "The same people who controlled the assets, the business, of First Chicago before the merger controlled those assets, that business, after the merger." *Id.* Accordingly, the Seventh Circuit ruled as a matter of law that there had been no change in control. *Id.*

The same is true in this case. Even after Lawlor resigned his directorship (intending to claim that he triggered a change in control), the 5-3 incumbent majority retained control over ORC. The majority could:

- determine matters by majority vote (JA 4517 [Bylaws, Art. 2, § 7]);

- fill the two vacant director seats (JA 4502 [Cert. of Inc., Art. 6(A)], JA 4516-17 [By-Laws, Art. 2, § 1]; and
- change the number of Board seats, or even *eliminate the vacant seats altogether* (JA 4502 [Cert. of Inc., Art. 6]; JA 4517 [By-Laws, Art. 2, § 2]).

Thus, just as in *Fishbein*, the majority retained control of the Company.

(ii) Lawlor's theory that empty seats should be counted to conclude that 5 is not a majority of 10 was contrary to Delaware law, the plain language of the contract, and the extrinsic evidence.

Lawlor argued that the jury should decide whether *majority of the Board* included empty seats because the contract was ambiguous. But the "parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous." *Estate of Osborn v. Kemp*, 991 A.2d 1153, 1160 (Del. 2010). "A contract is ambiguous only when the provisions in controversy are *reasonably* or fairly susceptible of different interpretations or may have two or more different meanings." *Matulich v. Aegis Commc'ns Group, Inc.*, 942 A.2d 596, 600 (Del. 2008) (quotation & citation omitted).

As in *Fishbein,* the phrase *majority of the Board* is not ambiguous. A theoretical alternative interpretation is not enough to render the language ambiguous, where, as here, it "produces an absurd result" or "one that no reasonable person would have accepted when entering the contract." *Estate of Osborn*, 991 A.2d at 1160. Under Lawlor's theory:

- a change in control would occur despite that the 5 incumbents retained actual control over the Company;
- if the 5 incumbents voted to eliminate the two vacant seats, thereby cementing their 5-3 advantage, a change in control would *still* have occurred;[14] and
- even if the minority directors were all killed in a plane crash, leaving the 5 incumbents in charge, a change in control *still* would have occurred because, Lawlor insists, 5 is not a majority of 10.

As in *Fischbein*, his theory makes "very little sense" and ignores the practical reality of corporate control. 161 F.3d at 1105.

Lawlor's interpretation also contradicts the default meaning of the phrase *majority of the Board,* both under the Delaware General Corporation Law and under ORC's Certificate of Incorporation and Bylaws. The default meaning of the phrase "a majority of the Board" does not include empty seats. Thus, under the Delaware Code, the "vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number." 8 Del. Code Ann. § 141(b) (2011). By contrast, the Code uses the term "whole board" only in very limited instances when referring to both filled and unfilled seats. *See id.* § 141(c) (requiring vote by "majority of the whole board" with regard to

[14] In fact, the remaining directors unanimously elected replacements for the two empty seats. (JA 2231-32, 3887-88, 5204-22 [PX 124, 126].)

corporate governance votes concerning committee formation); *see also id.* §§ 223(c); 275(a). The term "whole board" is a term of art used only when intended to refer to and include vacant seats.

ORC applied the same distinction in its own Certificate of Incorporation and Bylaws. In the few instances when ORC intended *Board of Directors* to include vacant seats, it used the same phrase *Whole Board*:

> The term "Whole Board" shall mean the total number of authorized directorships (whether or not there exist any vacancies in previously authorized directorships at the time) . . . . (JA 4502 [Cert. of Inc., Art. 5(D)].)

The Bylaws similarly said that *Whole Board* means "the total number of Directors which the Corporation would have if there were no vacancies on the Board of Directors." (JA 4513 [Art. 1, § 2].) So in the exceptional case requiring a majority vote of the *Whole Board*, the corporation said so expressly. (JA 4502 [Cert. of Inc., Art. 5(D) (calling special shareholder's meeting]; JA 4503 [*id.* Art. 7 (amending or repealing Bylaws)].)

In light of the default rule under both the Delaware Code and ORC's governing charter, it was unreasonable to read *Whole Board* into the Severance Agreement when the parties chose not to use it there. The trial judge, therefore, should have decided this question as a matter of law.

Lawlor is incorrect that ORC's charter was "extrinsic evidence" admissible only if the contract were found ambiguous. (JA 1119-20.) The

charter does no more than the Delaware Code, using “Whole Board” only when intended to count empty seats. What is more, because the Certificate and the Bylaws form the foundational law of the corporation, they qualify as “undisputed background facts to place the contractual provision in its historical setting,” *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 n.7 (Del. 1997).

But even assuming the phrase *majority of the Board* were ambiguous, and treating the Incorporation Certificate and Bylaws as extrinsic evidence, they provided compelling support for ORC’s position. As just shown, ORC was careful to use *Whole Board* when it wanted to count empty seats, and doing so was the exception, not the rule.

Moreover, resorting to extrinsic evidence does not mean that the case should have been submitted to the jury. When the meaning of a provision “depends on extrinsic evidence, a question of interpretation *is not left to the trier of fact* where the evidence is so clear that no reasonable person would determine the issue in any way but one.” Restatement (Second) of Contracts, § 212 cmt. (e) (1981) (emphasis added).

That standard was satisfied here because Lawlor claimed there was *no evidence* of the parties’ intent with regard to whether *majority of the*

Board included empty seats. (JA 4247:14-19.) By contrast, the Company pointed to other extrinsic evidence to support its position. For example:

- the CFO testified that she never heard Lawlor claim, before his employment was terminated, that the Company should count "empty seats" in determining the composition of the board of directors (JA 3897); she further understood that a "majority of incumbents" remained on the Board after Lawlor's resignation reduced the incumbent majority to 5-3 (JA 1596, 3898);
- the CFO testified to another occasion when the Company did not count empty seats. (JA 3897.) In July 2008, the Board created a new directorship and elected Roizen to fill it. Lawlor, acting as Chairman of the Board, recorded the vote as "unanimous," despite that one seat was vacant. (JA 3897-98, 5177.) If the directors had understood *Board* to mean *Whole Board,* the decision could not have been "unanimous" (JA 3897); and
- after Lawlor resigned, the 5 remaining incumbents wanted the replacement vote to be unanimous to ensure that the new directors were deemed "incumbent directors" (JA 2230-32).

So even assuming that the phrase *majority of the Board* were ambiguous and warranted extrinsic evidence, that evidence supported only the Company's interpretation.

(c) ORC did not waive its argument that the 5-3 incumbent majority continued to control the Company as a matter of law.

Lawlor has claimed on two occasions that ORC waived its argument that the 5-3 incumbent majority continued to control the Company as a matter of law. Lawlor has the burden to prove any such waiver by "clear

and unmistakable proof." *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 622-23, 499 S.E.2d 829, 833 (1998). He did not come close to doing so.

Lawlor argued below that ORC waived its claim by offering and acquiescing in jury instructions on contract interpretation after losing its motion to strike. (R. 2396-97.) Lawlor ignored *King v. Commonwealth*, where this Court, overruling earlier cases, held the *invited error* doctrine inapplicable when, as here, "the record shows that a party clearly objected to a specific ruling of the trial court to which error is assigned on appeal, even if the party failed to object to instructions applying or implementing the trial court's prior ruling." 264 Va. 576, 582, 570 S.E.2d 863, 866 (2002). Judge Devine, moreover, specifically found no waiver, and Lawlor assigned no cross-error to that determination. (JA 4317-18.)

Next, Lawlor argued — for the first time, on appeal — that the Company waived its argument during its renewed motion to strike at the close of evidence; Lawlor claims the Company's counsel said, on the "issue of is it seats or is it people," that "reasonable people can disagree." (Br. Opp. Pet. App. at 9 (citing JA 4084).) But the transcript cited for the alleged waiver shows that the key language connecting those phrases was "(unintelligible)." (JA 4084:5.) Moreover, ORC's counsel made clear just two pages earlier that the trial court should decide this issue as a matter of

law and not send the case to the jury. (JA 4081:7-18.) And ORC raised that argument, again, in its motion to set aside the verdict. (JA 672-82.)

So there was no "clear and unmistakable proof" of waiver here, let alone evidence of waiver. *Chawla,* 255 Va. 622-23, 499 S.E.2d at 833.

3. Lawlor failed to prove any change in control that ORC was "required" to report to the SEC.

The third trigger for a "change in control" was if the Company was "required" to report a change in control to the SEC on Form 8-K.[15] (JA 4957 [PX 261]; Table 1.) Lawlor failed to prove that the Company was "required" to report any such event to the Federal Government.

Section 13 of the Securities Exchange Act of 1934 requires securities issuers like ORC to file disclosure reports as required by regulations issued by the Securities and Exchange Commission. 15 U.S.C. § 78m(a). The SEC requires "current reports" to be filed on Form 8-K for various types of events. *See* 17 C.F.R. §§ 240.13a-1, 240.13a-11, 249.308 (2012). The current Form 8-K is found at http://www.sec.gov/about/forms/form8-k.pdf, and a copy is included for the Court's convenience at Tab 3. If any of the events listed in Form 8-K occurs, the company is required to report it within "four business days." (Tab 3, Form 8-K at 2.)

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[15] The document reads "10-K" but it was undisputed that this was a typographical error and should have been "8-K." (JA 1764.)

The instructions for when to report a “change in control” event are found in Item 5.01. (*Id.* at 14.) The required disclosures relate to such things as “the percentage of voting securities” owned by the person “who acquired control,” the “transaction(s) which resulted in the change in control,” and “the basis of the control, including the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control.” (*Id.*)

At trial, Lawlor’s change-in-control theory was a moving target as to *when* the change in control supposedly occurred. In closing, Lawlor said the change in control occurred in May 2009, when TCP’s three directors won the proxy fight, reducing the incumbent majority to 7-3. He cited an email from Leitner, right after the proxy contest, saying that Lawlor did not “fully appreciate the significant governance change that has taken place,” that Lawlor was “no longer in control,” and that he “just doesn’t get he is one election away from losing his job.” (JA 4132-33, 4634 [PX 108].)

Judge Devine found this email [PX 108] to be the most important evidence that justified sending the case to the jury. (JA 3259, 4304.)

But that finding was erroneous for two reasons. First, as noted above, the Board of Directors, not the CEO, controls the corporation.

Accordingly, the CEO's loss of stature with the directors does not translate into a change in control over the company.

And second, as a matter of law, replacing three directors could not change control over the Company because the incumbents continued to out-number the non-incumbents 7-3. The Delaware Supreme Court has explained that having a staggered board of directors like ORC's is a powerful anti-takeover defense because it prevents "an insurgent from obtaining control of the board in one election." *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 604 (Del. 2010). A "determined acquiror" must wage successful proxy fights two years running. *Id.*

Versata shows that no change in control could have occurred after the proxy contest replaced only three directors. Indeed, Leitner's comment that Lawlor was "one election away" from losing his job (JA 4634) — referring to the need for *another* proxy fight the following year — showed that the new directors did not *yet* have control. (JA 2168.)

Lawlor argued, alternatively, that the change in control occurred in December 2009, when the directors voted to remove him as CEO. (JA 4123, 4149.) But again, the directors control "the business and affairs" of the corporation, not the CEO. 8 Del. Code Ann. § 141(a); *supra* at 14. And although a company must report the "departure" of a company's "principal

executive officer" (Ex. C, Form 8-K, Item 5.02 at 16), that is not a "change in control" event under Item 5.01.

Lawlor also claimed that a "change of control" occurred when the three new directors, in December 2009, succeeded in "persuading" the others to join them in voting to remove him. (JA 3248-49.) This is a breathtakingly radical theory of corporate governance. No authority whatever supports the argument that a change in control occurs whenever minority directors persuade the majority incumbents to agree on something. Such a ruling would wreak havoc on publicly-traded corporations that are required to file a Form 8-K within four days of a change-in-control event.

It bears mention that if Lawlor believed that a change in control had occurred, he was legally required to ensure that the SEC was notified. Form 8-K must be filed whenever the change in control is known to an "authorized officer" of the company. (Tab 3, Form 8-K, Item 5.01(a) at 14.) The CEO and Chairman of the Board are both "officers" of ORC. (JA 4519-20 [Bylaws, Art. 4].) Since Lawlor remained the Chairman until January 20, 2010, he should have filed Form 8-K (or caused it to be filed) if he really thought that a change in control had occurred.

In any event, Lawlor offers no legal authority to show that the Company was "required" to report a change-in-control event to the SEC on

Form 8-K. Accordingly, that trigger was not satisfied either.

4. Lawlor's authorities are inapposite.

Lawlor has cited three cases for the notion that whether a change in control occurred is a purely factual inquiry for the trier of fact. (Br. Opp. Pet. App. at 6.) He has misread them, and none involved contracts, as in this case, that specified when a change-in-control event occurs.

In *Northway v. TSC Industries, Inc.*, 512 F.2d 324 (7th Cir. 1975), *rev'd in part,* 426 U.S. 438 (1976), National Industries had acquired 34% of the voting power in TSC, enabling National's nominees to fill 5 of the 10 seats on TSC's board. *Id.* at 333. National told the SEC that it could be deemed the "parent" of TSC because it acquired more than 33% voting power. *Id.* at 333 n.14. And National's nominees controlled the chairmanships of TSC's board of directors and its executive committee. *Id.* at 333.

TSC issued a proxy solicitation seeking shareholder approval to liquidate its assets by selling them to National, but TSC did not disclose that a change in control had occurred. The shareholder-plaintiffs moved for summary judgment, claiming that a change in control occurred as a matter of law that required disclosure in the proxy solicitation. But the trial court denied their motion because TSC's directors testified that they were not

controlled by National. *Northway v. TSC Indus., Inc.*, 361 F. Supp. 108, 111 (N.D. Ill. 1973). The Court of Appeals affirmed that portion of the trial court's ruling. 512 F.2d at 329.

If anything, *Northway* shows how *difficult* it is to prove that change in control has happened. It does not stand for the proposition, urged by Lawlor, that whether a change in control has occurred is *always* a question for the trier of fact. The facts are also easily distinguished. TCP's voting interest in ORC (24%) did not come close to National's share (34%). And National was able to use its 34% voting share to replace *half* of the directors on TSC's Board. TCP did not have that power. Even after it won its proxy fight in May 2009, there was still a 7-3 incumbent majority on the Board. What is more, the contracts in this case had no counterpart in *Northway*. The parties' contracts here specified the events that would constitute a change in control, and none of them occurred.

In *Kahn v. Lynch Commc'n Sys., Inc.,* 638 A.2d 1110, 1113-14 (Del. 1994), the issue was not whether a change in control occurred, but whether the defendant was a "controlling" shareholder who owed fiduciary duties to fellow shareholders. The court said that a shareholder owning less than 50% of the company's stock would not be deemed a controlling shareholder absent evidence of actual control. *Id.* at 1114. The court

affirmed the trial court's ruling that the defendant *was* a controlling shareholder because it held 43% of the voting power, appointed 5 of 11 directors, and exerted actual control over the company's affairs. *Id.*

Lawlor never argued that TCP was a "controlling" shareholder that owed fiduciary duties to other shareholders. It is also unclear whether, under Delaware law, the principles governing that situation are the same as when a corporation has undergone a change in control. But this Court does not need to reach that question because the 43% shareholder control exercised by the defendant in *Kahn* dwarfs the 24% interest held by TCP in this case. And unlike in *Kahn*, the contracts at issue here, again, specified when a change in control would happen, and those events did not occur.

In the third case he cited, Lawlor has taken dictum out of context from the portion of the opinion in which the judge expressed his "individual views." *Essex Universal Corp. v. Yates*, 305 F.2d 572, 573, 579 (2d Cir. 1962) (Opinion by Lumbard, C.J.). Chief Judge Lumbard said that it was not *per se* illegal under New York law for the President and CEO of a corporation to contract to sell his 28.3% shareholder interest to a purchaser on the condition that a majority of the corporation's directors would resign to enable the purchaser to replace them. *Id.* at 573. The judge discussed the CEO's ability to deliver on that promise, stating in dictum that the

CEO's 28.3% voting control in a company traded on the New York Stock Exchange was "almost certain to have share control as a practical matter." *Id.* at 575. Given that assumption, he said, "there is no reason why the contract should not similarly be legal." *Id.*

Essex is far removed from this case, not only because it applied New York law, but because the CEO there had both a 28.3% voting interest and the ability to remove a majority of the directors. In this case, by contrast, there is no comparable evidence that TCP's 24% voting interest enabled it to remove any of ORC's directors, let alone a majority of them.

By compressing these cases into short parenthetical summaries (Br. Opp. Pet. App. at 6), Lawlor ignored their facts and holdings. Thus, this Court's long-standing admonition applies here:

> The statements contained in an opinion must be considered and interpreted in the light of the facts present in the particular case. In none of the cases cited are the facts similar to those in the case under consideration, but are entirely different. We do not consider those cases as applicable or controlling here.

Spence v. Am. Oil Co. Inc, 171 Va. 62, 77, 197 S.E. 468, 474 (1938).

D. No change in control occurred under the 1995 or 2005 stock plans (Counts 1 & 2) because Leitner became an incumbent director for those plans as a matter of law (Assignment of Error 1).

The 1999 and 2005 Stock Plans (Counts 1-2) contained change-in-

control provisions similar to the 2009 Severance Agreement. (*See* Table 1.) The only different question presented was whether Leitner, who joined the Board in 2006, was considered an "incumbent" director for the earlier plans. (*See* Table 2.) He was. Both plans provided for a new director to become an "incumbent" if his "election was approved by a vote of at least" three quarters (1999 plan), or a majority (2005 plan), of the directors comprising the Incumbent Board. (JA 4963, 5045; Table 1.)

Leitner became an incumbent for those plans because it was undisputed that he was "elected to the Board unanimously" by an all-incumbent board. (JA 1573:2-3, 5160, 5165, 5168; Table 2.) Lawlor's quibble that he personally felt no choice in voting for Leitner, rather than the other candidate (JA 2803-04), does not change that the incumbent directors unanimously elected him.

E. Even if the trial court properly submitted the case to the jury, it was reversible error to instruct the jury to construe ambiguities against the drafter (Assignment of Error 2).

Assuming for the sake of argument (1) that the 1999, 2005, and 2009 agreements were ambiguous, and (2) that the extrinsic evidence about their meaning was conflicting, thereby requiring the factual dispute to be submitted to the jury, the trial judge nonetheless erred by giving Instruction N, that the jury should "resolve any doubts about the meaning of a word or

phrase against the party who drafted or prepared the contract." (JA 434, 4117.) Because Lawlor was on both sides of the transaction, this instruction served no useful purpose and could only have confused the jury.

Under Delaware law, the doctrine of *contra proferentem* is a rule of "last resort." *ConAgra Foods,* 21 A.3d at 72; *E.I. du Pont de Nemours & Co. v. Shell Oil Co.,* 498 A.2d 1108, 1114 (Del. 1985). It applies only if:

> (1) one party alone drafted the contract and the other lacked the "opportunity to make amendments or otherwise modify its terms";[16]
>
> (2) "the extrinsic evidence does not reveal the parties' intent";[17] and
>
> (3) the non-drafting party was unsophisticated and lacked bargaining power.[18]

The first prerequisite here was not met. Lawlor could not be considered a non-drafting party who lacked the opportunity to make any

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[16] *Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, No. 19035, 2002 Del. Ch. LEXIS 29, at *35 (Mar. 12, 2002); see *Tenneco Auto. Inc. v. El Paso Corp.*, No. 18810, 2004 Del. Ch. LEXIS 202, at *35 (Aug. 26, 2004) (declining to apply *contra proferentem* where non-drafting party could have negotiated terms "if it had taken the time or had the inclination").

[17] *ConAgra Foods*, 21 A.3d at 72; *see also Shell Oil*, 498 A.2d at 1114 ("a court will not apply it if a problem in construction can be resolved by applying more favored rules of construction").

[18] *Shell Oil,* 498 A.2d at 1114 ("Where all parties to a contract are knowledgeable, there is no reason for imposing sanctions against the party who drafted the final provision."); *Tenneco Auto.*, 204 Del. Ch. Lexis at 36 ("typically applied in cases involving an adhesion or otherwise standardized

changes to the documents or who had to accept the agreement on a take-it-or-leave-it basis, like someone accepting an insurance policy.[19] All three of the stock agreements were created under Lawlor's watch as CEO and Chairman of the Board. Indeed, Lawlor was involved in creating the 2009 agreement from the "very beginning" (JA 3876:10-11), taking three sample agreements from the compensation consultant he hired, providing them to Company's lawyer, and directing him to pick one, tailor it, and implement it. (JA 4547.) Although Lawlor "never made any actual changes" himself (JA 2705:10), the text was prepared under his direction and presented to the Board under his authority (JA 4462 (stating "Management has prepared" the drafts)). Lawlor even acted on the Company's behalf in signing the agreement with other senior executives. (JA 3768.) So he clearly had ample opportunity to make changes if he wished.

Allowing a CEO to claim that the documents that he was responsible for preparing for the Company should be construed in his own favor would create a perverse incentive. It would encourage a CEO like Lawlor to *create* ambiguities in the company's contracts to benefit himself. That incentive runs counter to the very purpose of the doctrine, which is to

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contract where the non-drafting party had little or no chance to provide input as to the language") (citation and quotation omitted).

[19] *SI Mgmt. L.P. v. Charlebois*, 707 A.2d 37, 42-43 (Del. 1998).

encourage clarity on the part of the person, like Lawlor, who is in the best position to avoid the ambiguity in first place. *SI Mgmt.*, 707 A.2d at 42.[20]

"[I]f an issue is erroneously submitted to a jury, [this Court] presume[s] that the jury decided the case upon that issue." *Stuarts Draft Shopping Ctr., LP v. S-D Assocs.*, 251 Va. 483, 489, 468 S.E.2d 885, 889 (1996). Indeed, Lawlor's counsel went on at length in closing argument that the jury should find against the Company *based* on this instruction. (JA 4155-57.) Accordingly, giving the instruction was reversible error.

F. The trial court also erred in failing to dismiss Lawlor's alternative theory that the Severance Agreement eliminated the Company's discretion whether to pay benefits under the Severance Policy (Assignment of Error 3).

Lawlor had a fall-back theory in Count 3 that, even absent any change in control, severance benefits were mandatory under ORC's general Severance Policy. It was undisputed that sections 2.0, 4.0, and 5.0 of the Severance Policy gave the Company discretion to determine whether to offer any severance benefits to terminated employees. (*See* JA 4533, 4536 [PX 72]; JA 1704-05, 1844-45, 2353-55, 3039-40, 3058, 3766-67.)

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[20] Although *contra proferentem* should have been rejected for this reason alone, the other prerequisites were also not met. The extrinsic evidence was not insufficient to resolve any ambiguity; as shown above, the extrinsic evidence supported only ORC's interpretation. And as the founder, CEO, and Chairman of the Board of Directors, Lawlor could hardly be considered "unsophisticated" or lacking in bargaining power.

Lawlor agreed it was good policy to have such discretion. (JA 2712.)

Nonetheless, Lawlor claimed that Paragraph 1 of his May 2009 Severance Agreement implicitly overrode those sections of the Severance Policy and made severance benefits mandatory. Paragraph 1 said:

> 1. PURPOSE AND SCOPE OF COMPANY OBLIGATIONS. The purpose of this Agreement is to document the severance benefits payable to the Participant in the event the Participant's employment with the Company (as defined below) is terminated as described herein. *For terminations prior to the Protected Period, 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 [PX 261] (emphasis added).)

Claiming the italicized language was ambiguous, Lawlor proceeded to offer extrinsic evidence to show that it was really intended to make severance benefits mandatory, even without a change in control. (JA 4161-64.) Various witnesses disputed his interpretation and said they did not understand the Severance Agreement to change the discretionary nature of the Severance Policy for non change-in-control terminations. (JA 1453-54, 1464, 2353-55, 2360-63, 3039-40, 3049, 3051, 3763, 3766, 3770.)

The extrinsic evidence was irrelevant, however, because the italicized sentence was not ambiguous and parol evidence was inadmissible. *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991). The plain meaning of the sentence was to make clear that the Severance Agreement

did not supersede the Severance Policy for an employee who was terminated "prior to the Protected Period" following a change in control. No reasonable person could read it to alter sections 2.0, 4.0, and 5.0 of the Severance Policy, provisions that were not even mentioned.

Since Lawlor's alternative theory was defective, the verdict on Count 3 ought to be vacated even if the change-in-control theory properly were submitted to the jury. *Stuarts Draft Shopping Ctr.*, 251 Va. at 489, 468 S.E.2d at 889. Unfortunately, the trial judge denied ORC's request to include a question in the verdict form to identify the basis for the award (JA 4077-78, 4107), making it difficult to know which theory the jury used. Accordingly, the judgment must be reversed. *Raytheon Technical Servs. Co. v. Hyland*, 273 Va. 292, 306, 641 S.E.2d 84, 92 (2007).

II. The trial court erred in admitting the testimony of Lawlor's damages expert (Assignment of Error 4).

This Court applies "an abuse of discretion standard when reviewing a trial court's decision to admit expert opinion testimony." *CNH America LLC v. Smith*, 281 Va. 60, 66, 704 S.E.2d 372, 375 (2011).

Lawlor's "executive compensation" expert, James Reda, computed damages for Lawlor's canceled stock options in Counts 1-3 by using a model that required choosing a particular stock value. After Reda admitted he was not a valuation expert, ORC moved in limine to exclude his testi-

mony. (JA 146-57.) The trial judge took the motion under advisement (JA 1265) but ultimately permitted Reda to testify over ORC's objection (JA 1968, 1975, 1995-96).

At trial, Reda used two different stock values to compute damages. First, he chose $7.01, the highest price of ORC's stock between the time Lawlor was terminated (February 2010) and trial (April 2011). (JA 1977-78, 2006.) That zenith occurred in February 2011, on news of possible acquisition interest in ORC, but the price tumbled after the Company announced there were no buyers. (JA 2007-09, 3358-59.) By the April 2011 trial date, the price had declined to $3.90. (JA 2006.) Reda nonetheless assumed that Lawlor would have sold *all* of his shares at the market-peak. (JA 2023-24.) Reda also used a second, higher value of $10.53 — one of the rosiest of 14 scenarios from a Raymond-James forecast of what ORC's stock might be worth in a couple years if ORC pursued an aggressive growth and merger strategy resulting in profitable "synergies." (JA 1993-95, 3279-81.)

That Reda used such indefensible valuation assumptions shows why his testimony should have been excluded once he admitted he was unqualified to value ORC's stock. In *CNH America*, this Court ruled that the trial judge abused his discretion in a product liability case by admitting

the testimony of the plaintiff's hydraulics expert after the witness admitted he was not an expert in lawn-mower hydraulics. 281 Va. at 68, 704 S.E.2d at 376. "The fact that a person is a qualified expert in one field does not make him an expert in another field, even if they are closely related." *Id.* Like the expert in *CNH America,* Reda admitted he was not an expert on one of the key inputs to his model, stock valuation, and that he did no independent analysis to validate the $10.53 stock price that he picked from the Raymond-James report. (JA 2092-93.) Indeed, choosing a stock price based on an appraisal is unreliable as a matter of law in the absence of testimony that a "willing buyer" would have paid that amount. *SunTrust Bank v. Farrar*, 277 Va. 546, 554, 675 S.E.2d 187, 191 (2009). And Reda picked the other stock price, $7.01, assuming that Lawlor would have had the clairvoyance to sell at the market high. (JA 3369-70, 3341-42.) Reda ignored that Lawlor retained 900,000 other shares of ORC stock that he did not sell at the peak. (JA 2735.) *Cf. Vasquez v. Mabini,* 269 Va. 155, 160, 609 S.E.2d 809, 811 (2005) (setting aside jury verdict for lost wages where expert relied on baseless assumption that decedent would have obtained clerical work, with benefits, one day after being killed by bus).

These assumptions required independent validation by a qualified expert before Reda could just plug the numbers into his damages model. The error in letting him testify also requires reversal on Counts 1-3.

III. Lawlor should not have recovered unjust enrichment damages in Count 5 for the company-wide pay cut he himself instituted (Assignment of Error 5).

Lawlor won $360,000 in damages on Count 5 on the theory that ORC was unjustly enriched when it terminated his employment without restoring his share of the company-wide pay cut that Lawlor had instituted in 2009. A judgment should be reversed for insufficient evidence only if it is "plainly wrong or without evidence to support it," *Atrium*, 266 Va. at 293, 585 S.E.2d at 548 (quoting Code § 8.01-680), but that standard is met here.

Despite that the pay-cut was his idea, Lawlor testified that he took it "with the understanding that it was going to pay off down the road with the company coming back, rectifying that kind of a thing." (JA 2926:2-4.) He admitted no one ever told him the pay reduction would be "coming back." (JA 2929.) He conceded that the Company had "no legal obligation" to repay him but insisted it was a "moral" obligation. (JA 2931-32.) Those admissions alone required his claim to be dismissed.

To establish unjust enrichment, Lawlor was required to prove that:

> (1) he conferred a benefit on [ORC];

> (2) [ORC] knew of the benefit and should reasonably have expected to repay [him]; and
>
> (3) [ORC] accepted or retained the benefit without paying for its value. *Schmidt v. Household Fin. Corp.*, 276 Va. 108, 116, 661 S.E.2d 834, 838 (2008).

Lawlor failed to prove the second element. He pointed only to his *own* expectations, introducing no evidence that *the Company* should reasonably have expected to pay him for the pay cut that Lawlor himself had initiated. Indeed:

- Director Shames, who chaired the Compensation Committee, testified that ORC did not promise Lawlor anything in exchange for the pay cut (JA 3011);
- if ORC had been obligated to compensate Lawlor for the pay cut, it had to report the obligation to the SEC (JA 3011, 3761); but despite that requirement, *Lawlor himself* signed an SEC filing that described his own compensation and said *nothing* about any such obligation (JA 5054, 5090-94 [DX 9]); and
- the CFO, who both shared in the pay cut and was part of Lawlor's team that initiated it, testified that management never anticipated repaying anyone (JA 3760).

Thus, the verdict on the unjust-enrichment count was plainly wrong and without evidence to support it.

IV. The trial court erred in awarding attorneys' fees.

The original and amended complaints asked for attorneys' fees generally but failed to set forth any legal basis upon which they could be recovered. Lawlor's counsel mentioned to ORC's counsel, before trial, that

Lawlor planned to seek his fees to enforce the Severance Agreement in Count 3 (JA 533). Shortly before trial, Lawlor requested, and ORC agreed, "that Plaintiff's claim for attorneys' fees and costs will be addressed in post-trial briefing." (JA 432.) Lawlor's counsel did not reveal, however, that Lawlor planned to ask for *all* of his fees for the entire case. (JA 4377.)

After the jury verdict, Lawlor's counsel filed a post-trial motion for *all* of his attorneys' fees and expenses, not just fees under Count 3. (JA 698.) ORC opposed the motion on various grounds, including failure to comply with Rule 3:25, failure to apportion fees to Count 3, and unreasonable hourly rates of up to $850. (JA 880-912.)

Judge Devine denied the fee petition on June 28, 2011, for failure to comply with Rule 3:25. (JA 578-79, 4338-39.) On July 19, 2011, the court also denied Lawlor's motion to reconsider. (JA 575.)

But on July 22, 2011, over ORC's objection, the court granted Lawlor's motion for leave to file a Third Amended Complaint. (JA 442-524, 582-83, 4379-82.) The new complaint added "Count IX," seeking counsel fees for the entire case based on the 2009 Severance Agreement at issue in Count 3. (JA 493.) Relying on the original briefing before the first fee petition was denied, the court awarded Lawlor his fees for the entire case, without requiring any apportionment to Count 3. (JA 625-26, 4388-99.)

More fees were awarded for Lawlor's post-trial efforts. (JA 627-28, 4424-27.) The total fee award exceeded $2.13 million. (JA 630.)

A. The fee award should be vacated if the Court reverses the judgment on Count 3 (Assignment of Error 6).

The 2009 Severance Agreement at issue in Count 3 provided the only basis for fee-shifting. So if this Court reverses the judgment on that count, the fee award should also be vacated. *Syed v. ZH Techs., Inc.*, 280 Va. 58, 73, 694 S.E.2d 625, 633 (2010).

B. The 2009 Severance Agreement in Count 3 did not entitle Lawlor to recover legal fees for the entire case (Assignment of Error 7).

Much of the litigation addressed claims unrelated to the Severance Agreement in Count 3, such as Lawlor's unsuccessful claim for wrongful termination. *See supra* at 12-13 & n.11. Whether the Severance Agreement in Count 3 entitled Lawlor to fees for unrelated counts and claims is a pure issue of law subject to de novo review. *See supra* at 13.

The trial court erred in reading the fee-shifting provision in the Severance Agreement so broadly. Paragraph 13 provided:

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

> attorneys' fees and legal expenses) incurred by the Participant *with respect to such action*. (JA 4962 (emphasis added).)

The concluding phrase "with respect to such action" refers to "a legal action to enforce any of the obligations of the Company under *this Agreement*." Nothing in this language suggests that the parties intended the employee to recover all of his attorneys' fees for causes of action unrelated to the Severance Agreement, let alone fees for unrelated and unsuccessful claims.

This Court addressed nearly the identical issue in *Ulloa v. QSP, Inc.*, 271 Va. 72, 624 S.E.2d 43 (2006), where the agreement provided that, in the event of breach, the company was entitled to attorneys' fees incurred "by reason of *any action relating to this Agreement*." *Id.* at 76, 624 S.E.2d at 46 (emphasis added). Despite that all three counts were factually "intertwined," the Court limited the fee award to the breach-of-contract count alone and denied fees for the other two counts — a trade secrets claim on which the company prevailed, and a business-conspiracy claim on which the verdict was set aside. *Id.* at 81-82, 624 S.E.2d at 49. The Court said that the parties' contract "expressly limits 'any action' to one 'relating' to their agreement and thereby excludes an independent action such as one under the [Trade Secrets] Act." *Id.* at 82, 624 S.E.2d at 49. The Court

added that "under contractual provisions such as these a party is not entitled to recover fees for work performed on unsuccessful claims." *Id.*

Although Lawlor's fee recovery beyond Count 3 was barred under *Ulloa,* the trial court mistakenly ruled that Delaware law entitled him to fees for *all* counts on an "all or nothing" basis. (JA 4390-91.) But the authorities it cited concerned whether fees could be recovered for pursuing different claims or remedies for breach of *the same contract. West Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, No. 2742, 2009 Del. Ch. LEXIS 23, *2, *33 (Feb. 23, 2009), *aff'd,* 2009 Del. LEXIS 606 (Nov. 24, 2009); *Comrie v. Enterasys Networks, Inc.*, No. 19254, 2004 Del. Ch. LEXIS 53, *3, *10 (Apr. 27, 2004), *aff'd,* 864 A.2d 929 (Del. 2004); *Brandin v. Gottlieb*, No. 14819, 2000 Del. Ch. LEXIS 97, *85-90 (July 13, 2000). For instance, in *West Willow-Bay*, the plaintiff recovered all fees for its breach-of-contract action, despite that it won on a damages-for-breach theory and was denied specific performance. 2009 Del. Ch. LEXIS 23, at *33. None of these cases involved a party, like Lawlor, who sued to enforce a contract with a fee-shifting provision and then tried to use it to recover fees for *unrelated* claims. In other Delaware cases where that situation arose, the courts, as in *Ulloa,* limited the prevailing party to fees on the contract claim alone. *Barker Capital LLC v. Rebus LLC*, No. 04C-

10-269, 2006 WL 246572, *1, *10 (Del. Super. Ct. Jan. 12, 2006); *Del. Express Shuttle, Inc. v. Older*, No. 19596, 2002 Del. Ch. LEXIS 124, at *94 (Oct. 23, 2002).

Thus, *Ulloa* provides the correct analysis. Because Lawlor refused to apportion the fees claimed to Count 3, his claim should have been denied.

C. The trial court erred by permitting Lawlor to amend his complaint, post-verdict, to add a new Count 9 seeking attorneys' fees for the entire case (Assignment of Error 8).

Although a trial court's decision denying leave to amend is ordinarily reviewed for an abuse of discretion, in this case, the question is whether Rules 3:25 and 1:8 permitted the trial court to allow a post-verdict amendment at all. That is a pure question of law reviewed de novo on appeal. *Funkhouser v. Ford Motor Co.*, No. 111207, 2012 Va. Lexis 132, at *15-16 (Va. June 7, 2012).

Rule 3:25 states that a party seeking attorneys' fees not only must demand them in the complaint but "must identify the basis" to recover them. Rule 3:25(B). The claim is waived "unless leave to file an amended pleading . . . is granted under Rule 1:8." Rule 3:25(C).

The trial court erred in allowing the Third Amended Complaint because Rule 1:8 does not authorize "post-verdict amendments." *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 468, 344 S.E.2d 916, 918 (1986); *see*

also Smith v. Smith, 254 Va. 99, 106, 487 S.E.2d 212, 216 (1997) (disallowing post-verdict amendments under Code § 8.01-377). At the hearing on Lawlor's motion to amend (July 22, 2011), the trial court reasoned that the restriction on post-verdict amendments did not apply because "we're not post-verdict on attorney fees." (JA 4372.) That was incorrect. The trial court had *already* considered the post-trial briefing and denied Lawlor's motion for attorneys' fees; that happened on June 28, 2011, nearly a month before. (JA 578, 4338-39.) The court had even denied Lawlor's motion to reconsider that ruling. (JA 575.) So granting leave to amend on July 22 was certainly "post-verdict," even under the fiction that the relevant "verdict" was not the jury verdict on April 27, but the trial court's post-trial ruling on fees on June 28.

This operated as a "gotcha." For while Lawlor's counsel had disclosed before trial that he planned to seek fees under Count 3 (JA 533), he failed to disclose that he would seek fees for all of the other counts, even if he lost them (JA 4377). As a result, Lawlor was allowed to recover $2.1 million in attorneys' fees for the entire case, despite never having claimed or disclosed the basis for such an entitlement before submitting his post-trial fee petition.

CONCLUSION

What happened in the trial court will give serious pause to any corporation considering whether to be headquartered in Virginia. The trial court permitted Lawlor:

- to ignore the fundamental principle of corporate governance that the Board of Directors, not the CEO, controls the corporation;
- to argue that a "change in control" occurred without reference to the contractual documents that defined it;
- to claim that an incumbent director was not really an incumbent because he disagreed with the CEO and wanted to oust him;
- to enjoy a windfall based on his own strategic decision to resign early from the Board of Directors so he could claim that his resignation triggered the change in control;
- to argue that the jury should construe in Lawlor's favor the contractual documents that were within his responsibility to prepare for the company's benefit;
- to recover a pay cut that Lawlor instituted without proving that the Company had any expectation of having to pay it; and
- to recover attorneys' fees for unsuccessful and unrelated claims based on a significant misreading of a common fee-shifting provision.

These errors saddled ORC with a judgment that now exceeds $8.3 million.

The Court should reverse and enter final judgment.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

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2. On July 18, 2012, an electronic copy of this brief was submitted to scvbriefs@courts.state.va.us, and 15 copies were sent by third-party commercial carrier for next-day delivery to this Court.

3. This brief, as measured by Rule 5:26(b), does not exceed 50 pages.

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Table 1: Text of Change-in-Control Provisions at Issue

1999 Stock Plan [JA 4963, 5015 (PX 262, DX 2); Count 2]	**2005 Stock Plan, as Amended** [JA 5045-46 (DX 3); Count 1]	**2009 CIC Severance Agreement** [JA 4957-58 (PX 261), Count 3]
1(e) "Change in Control" means a change in control of the Company of a nature that; (i) would be required to be reported in response to Item 1 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; or (ii) without limitation such a Change in Control shall be deemed to have occurred at such time as (A) any "person" (as the term is used in Sections 13(d) and 14(d) of the Exchange Act) is or becomes the "beneficial owner" (as defined in Rule 13d-3 under the Exchange Act), directly or indirectly, of securities of the Company representing 25% or more of the Company's outstanding securities except for any securities of the Company purchased by any tax qualified employee benefit plan of the Company; or	6.9(d) Definition of "Change in Control." For purposes of this Plan, "Change in Control" shall be defined as: (i) When any "person" as defined in Section 3(a)(9) of the Exchange Act and as used in Sections 13(d) and 14(d) thereof (including a "group" as defined in Section 13(d) of the Exchange Act, but excluding the Company, any Subsidiary or any employee benefit plan sponsored or maintained by the Company or any Subsidiary (including any trustee of such plan acting as trustee)), directly or indirectly, becomes the "beneficial owner" (as defined in Rule 13d-3 under the Exchange Act, as amended from time to time), of securities of the Company representing 50% or more of the combined voting power of the Company's then outstanding securities. (ii) The individuals who, as of January 1, 2005, constitute the Board (the "Incumbent Board"), cease for any reason to constitute at least a majority of the Board; provided however, that	2(e) A "Change in Control" shall mean any change in control of the Company of a nature that would be required to be reported in response to Item l(a) of the Current Report on Form 10-K, as in effect on the Effective Date, pursuant to Section 13 or 15(d) of the Act; provided that, without limitation, such a Change in Control shall be deemed to have occurred if: (i) a third person, including a “group” as such term is used in Section 13(d)(3) of the Act, becomes the beneficial owner, directly or indirectly, of 50% or more of the combined voting power of the Company's outstanding voting securities ordinarily having the right to vote for the election of directors of the Company, unless such acquisition of beneficial ownership is approved by a majority of the Incumbent Board (as such term is defined in clause (ii) below); or (ii) individuals who, as of the date hereof, constitute the Board (the "Incumbent Board") cease for any

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(B) individuals who constitute the Board of Directors of the Company on the date hereof (the "Incumbent Board") cease for any reason to constitute at least a majority thereof, provided that any person becoming a director subsequent to the date hereof whose election was approved by a vote of at least three quarters of the directors comprising the Incumbent Board, or whose nomination for election by the Company's stockholders was approved by a Nominating Committee serving under an Incumbent Board, shall be, for purposes of this clause (B), considered as though he were a member of the Incumbent Board; or (C) a plan of reorganization, merger, consolidation, sale of all or substantially all the assets of the Company or similar transaction occurs in which the Company is not the resulting entity.	any individual becoming a director subsequent to such date, whose election, or nomination for election by the Company's stockholders, was approved by a vote of at least a majority of the directors then comprising the Incumbent Board shall, for purposes of this section, be counted as a member of the Incumbent Board in determining whether the Incumbent Board constitutes a majority of the Board. (iii) Consummation of a reorganization, merger or consolidation or sale or other disposition of all or substantially all of the assets of the Company or the acquisition of assets of another corporation (a "Business Combination")	reason to constitute at least a majority of the Board, provided that any person becoming a director subsequent to the date hereof whose election, or nomination for election by the Company's shareholders, was approved by a vote of at least three-quarters of the directors comprising the Incumbent Board (other than an election or nomination of an individual whose initial assumption of office is in connection with an actual or threatened election contest relating to the election of the Directors of the Company, as such terms are used in Rule 14a-11 of Regulation 14A promulgated under the Act) shall be, for purposes of this provision, considered as though such person were a member of the Incumbent Board.

Table 2: ORC Director Timeline

Director	1999	2000	2002	2004	2005	2006	2007	3/7/2008	7/30/2008	5/13/2009	5/15/2009	1/20/2010
1	Matt Lawlor (1)											Resigns (2)
2		Barry Wessler (3)										
3		Erv Shames (4)										
4				William Washecka (5)								
5					Stephen Cole (6)							
6	Joe Spalluto (7)											Resigns (8)
7							Debra Janssen (9)	Resigns (10)	Janey Place (11)		John Dorman (12)	
8	Michael Heath (13)										Bruce Jaffe (12)	
9 Class A-1 Preferred (14)						Steven Chang (14)	Michael Leitner (15)					
10 Added 7/30/2008 (16)									Heidl Roizen (16)		Ed Horowitz (12)	
Incumbent v. Non-Incumbent	**8-0**	**8-0**	**8-0**	**8-0**	**8-0**	**9-0**	**9-0**	**8-0**	**10-0**	**10-0**	**7-3**	**6-3, 5-3**
Total Seats	**8**	**8**	**8**	**8**	**8**	**9**	**9**	**9**	**10**	**10**	**10**	**10**

CIC Provisions	**1999 Stock Plan**	**2005 Stock Plan**	**2009 CIC Severance Agrmt**
Trial Ex.	PX 262/DX2	DX 3	PX 261
JA	4963/5015	5027	4957
Count	**Count 2**	**Count 1**	**Count 3**

Notes:

1 JA 3900-01 (admissions that Lawlor was incumbent under agreements at issue)

2 JA 4442 [PX 26] (Lawlor resignation); JA 2221 (Lawlor resigns after Spalluto on 1/20/2009); JA 2747 (Lawlor's term ran through May 2010)

3 JA 3388-89 (became director in 2000); JA 3903-04 (admissions that Wessler was incumbent under agreements at issue)

cont'd…..

Table 2: ORC Director Timeline

4	JA 3006 (became a director in 2000); JA 3902 (admissions that Shames was incumbent under agreements at issue)
5	JA 3608-09 (became a director in 2004); JA 3902-03 (admissions that Washeka was incumbent under agreements at issue)
6	JA 1894 (director since 2005); JA 3901-02 (admissions that Cole was incumbent under agreements at issue)
7	JA 3904-05 (admissions that Spalluto was incumbent under agreements at issue)
8	JA 2221(Spalluto resigns 1/20/2010, before Lawlor)
9	JA 5175 [DX 93] (Janssen became director 5/15/2007)
10	JA 5175 [DX 93] (Janssen resigned 3/7/2008)
11	JA 5177 [DX 94] (Place elected to replace Janssen); JA 3906-07 (admissions that Place was incumbent under agreeements at issue)
12	JA 1422-23 (proxy vote certifed on 5/15/2009; Dorman, Jaffe, and Horowitz defeat Place, Heath, and Roizen)
13	JA 3905-06 (admissions that Heath was incumbent under agreements at issue)
14	JA 1389, 1524-25 (in 2006, TCP invests in ORC, becomes Class A-1 Preferred shareholder, and designates Chang as director)
15	JA 3880, 5160 (Leitner elected unanimously by the Board on 12/6/2006, subject to reference checks); JA 5165, 5168 (election announced 2/16/2007)
16	JA 5177 (10th seat created 7/30/2008 and filled by Roizen); JA 3907 (admissions that Roizen was incumbent under agreements at issue)

TAB 3 -- Form 8-K

OMB APPROVAL
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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 OR 15(d) of The Securities Exchange Act of 1934

Date of Report (Date of earliest event reported) _____

_____
(Exact name of registrant as specified in its charter)

_____

(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

_____
(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code _____

_____
(Former name or former address, if changed since last report.)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

[ ] Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

[ ] Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

[ ] Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

[ ] Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

GENERAL INSTRUCTIONS

A. Rule as to Use of Form 8-K.

1. Form 8-K shall be used for current reports under Section 13 or 15(d) of the Securities Exchange Act of 1934, filed pursuant to Rule 13a-11 or Rule 15d-11 and for reports of nonpublic information required to be disclosed by Regulation FD (17 CFR 243.100 and 243.101).

2. Form 8-K may be used by a registrant to satisfy its filing obligations pursuant to Rule 425 under the Securities Act, regarding written communications related to business combination transactions, or Rules 14a-12(b) or Rule 14d-2(b) under the Exchange Act, relating to soliciting materials and pre-commencement communications pursuant to tender offers, respectively, provided that the Form 8-K filing satisfies all the substantive requirements of those rules (other than the Rule 425(c) requirement to include certain specified information in any prospectus filed pursuant to such rule). Such filing is also deemed to be filed pursuant to any rule for which the box is checked. A registrant is not required to check the box in connection with Rule 14a-12(b) or Rule 14d-2(b) if the communication is filed pursuant to Rule 425. Communications filed pursuant to Rule 425 are deemed filed under the other applicable sections. See Note 2 to Rule 425, Rule 14a-12(b) and Instruction 2 to Rule 14d-2(b)(2).

Potential persons who are to respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB control number.

B. Events to be Reported and Time for Filing of Reports.

1. A report on this form is required to be filed or furnished, as applicable, upon the occurrence of any one or more of the events specified in the items in Sections 1 - 6 and 9 of this form. Unless otherwise specified, a report is to be filed or furnished within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include, the first business day thereafter. A registrant either furnishing a report on this form under Item 7.01 (Regulation FD Disclosure) or electing to file a report on this form under Item 8.01 (Other Events) solely to satisfy its obligations under Regulation FD (17 CFR 243.100 and 243.101) must furnish such report or make such filing, as applicable, in accordance with the requirements of Rule 100(a) of Regulation FD (17 CFR 243.100(a)), including the deadline for furnishing or filing such report. A report pursuant to Item 5.08 is to be filed within four business days after the registrant determines the anticipated meeting date.

2. The information in a report furnished pursuant to Item 2.02 (Results of Operations and Financial Condition) or Item 7.01 (Regulation FD Disclosure) shall not be deemed to be "filed" for purposes of Section 18 of the Exchange Act or otherwise subject to the liabilities of that section, unless the registrant specifically states that the information is to be considered "filed" under the Exchange Act or incorporates it by reference into a filing under the Securities Act or the Exchange Act. If a report on Form 8-K contains disclosures under Item 2.02 or Item 7.01, whether or not the report contains disclosures regarding other items, all exhibits to such report relating to Item 2.02 or Item 7.01 will be deemed furnished, and not filed, unless the registrant specifies, under Item 9.01 (Financial Statements and Exhibits), which exhibits, or portions of exhibits, are intended to be deemed filed rather than furnished pursuant to this instruction.

3. If the registrant previously has reported substantially the same information as required by this form, the registrant need not make an additional report of the information on this form. To the extent that an item calls for disclosure of developments concerning a previously reported event or transaction, any information required in the new report or amendment about the previously reported event or transaction may be provided by incorporation by reference to the previously filed report. The term previously reported is defined in Rule 12b-2 (17 CFR 240.12b-2).

4. Copies of agreements, amendments or other documents or instruments required to be filed pursuant to Form 8-K are not required to be filed or furnished as exhibits to the Form 8-K unless specifically required to be filed or furnished by the applicable Item. This instruction does not affect the requirement to otherwise file such agreements, amendments or other documents or instruments, including as exhibits to registration statements and periodic reports pursuant to the requirements of Item 601 of Regulation S-K.

5. When considering current reporting on this form, particularly of other events of material importance pursuant to Item 7.01 (Regulation FD Disclosure) and Item 8.01(Other Events), registrants should have due regard for the accuracy, completeness and currency of the information in registration statements filed under the Securities Act which incorporate by reference information in reports filed pursuant to the Exchange Act, including reports on this form.

6. A registrant's report under Item 7.01 (Regulation FD Disclosure) or Item 8.01 (Other Events) will not be deemed an admission as to the materiality of any information in the report that is required to be disclosed solely by Regulation FD.

C. Application of General Rules and Regulations.

1. The General Rules and Regulations under the Act (17 CFR Part 240) contain certain general requirements which are applicable to reports on any form. These general requirements should be carefully read and observed in the preparation and filing of reports on this form.

2. Particular attention is directed to Regulation 12B (17 CFR 240.12b-1 et seq.) which contains general requirements regarding matters such as the kind and size of paper to be used, the legibility of the report, the information to be given whenever the title of securities is required to be stated, and the filing of the report. The definitions contained in Rule 12b-2 should be especially noted. See also Regulations 13A (17 CFR 240.13a-1 et seq.) and 15D (17 CFR 240.1 5d-1 et seq.).

D. Preparation of Report.

This form is not to be used as a blank form to be filled in, but only as a guide in the preparation of the report on paper meeting the requirements of Rule 12b-12 (17 CFR 240.12b-12). The report shall contain the number and caption of the applicable item, but the text of such item may be omitted, provided the answers thereto are prepared in the manner specified in Rule 12b-13 (17 CFR 240.12b-13). To the extent that Item 1.01 and one or more other items of the form are applicable, registrants need not provide the number and caption of Item 1.01 so long as the substantive disclosure required by Item 1.01 is disclosed in the report and the number and caption of the other applicable item(s) are provided. All items that are not required to be answered in a particular report may be omitted and no reference thereto need be made in the report. All instructions should also be omitted.

E. Signature and Filing of Report.

Three complete copies of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, and five additional copies which need not include exhibits, shall be filed with the Commission. At least one complete copy of the report, including any financial statements, exhibits or other papers or documents filed as a part thereof, shall be filed, with each exchange on which any class of securities of the registrant is registered. At least one complete copy of the report filed with the Commission and one such copy filed with each exchange shall be manually signed. Copies not manually signed shall bear typed or printed signatures.

F. Incorporation by Reference.

If the registrant makes available to its stockholders or otherwise publishes, within the period prescribed for filing the report, a press release or other document or statement containing information meeting some or all of the requirements of this form, the information called for may be incorporated by reference to such published document or statement, in answer or partial answer to any item or items of this form, provided copies thereof are filed as an exhibit to the report on this form.

G. Use of this Form by Asset-Backed Issuers.

The following applies to registrants that are asset-backed issuers. Terms used in this General Instruction G. have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

1. *Reportable Events That May Be Omitted*.

The registrant need not file a report on this Form upon the occurrence of any one or more of the events specified in the following:

(a) Item 2.01, Completion of Acquisition or Disposition of Assets;

(b) Item 2.02, Results of Operations and Financial Condition;

(c) Item 2.03, Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant;

(d) Item 2.05, Costs Associated with Exit or Disposal Activities;

(e) Item 2.06, Material Impairments;

(f) Item 3.01, Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing;

(g) Item 3.02, Unregistered Sales of Equity Securities;

(h) Item 4.01, Changes in Registrant's Certifying Accountant;

(i) Item 4.02, Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review;

(j) Item 5.01, Changes in Control of Registrant;

(k) Item 5.02, Departure of Directors or Principal Officers; Election of Directors; Appointment of Principal Officers;

(*l*) Item 5.04, Temporary Suspension of Trading Under Registrant's Employee Benefit Plans; and

(m) Item 5.05, Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

2. *Additional Disclosure for the Form 8-K Cover Page*.

Immediately after the name of the issuing entity on the cover page of the Form 8-K, as separate line items, identify the exact name of the depositor as specified in its charter and the exact name of the sponsor as specified in its charter.

3. *Signatures*.

The Form 8-K must be signed by the depositor. In the alternative, the Form 8-K may be signed on behalf of the issuing entity by a duly authorized representative of the servicer. If multiple servicers are involved in servicing the pool assets, a duly authorized representative of the master servicer (or entity performing the equivalent function) must sign if a representative of the servicer is to sign the report on behalf of the issuing entity.

INFORMATION TO BE INCLUDED IN THE REPORT

Section 1 - Registrant's Business and Operations

Item 1.01 Entry into a Material Definitive Agreement.

(a) If the registrant has entered into a material definitive agreement not made in the ordinary course of business of the registrant, or into any amendment of such agreement that is material to the registrant, disclose the following information:

(1) the date on which the agreement was entered into or amended, the identity of the parties to the agreement or amendment and a brief description of any material relationship between the registrant or its affiliates and any of the parties, other than in respect of the material definitive agreement or amendment; and

(2) a brief description of the terms and conditions of the agreement or amendment that are material to the registrant.

(b) For purposes of this Item 1.01, a <u>material definitive agreement</u> means an agreement that provides for obligations that are material to and enforceable against the registrant, or rights that are material to the registrant and enforceable by the registrant against one or more other parties to the agreement, in each case whether or not subject to conditions.

<u>Instructions</u>.

1. Any material definitive agreement of the registrant not made in the ordinary course of the registrant's business must be disclosed under this Item 1.01. An agreement is deemed to be not made in the ordinary course of a registrant's business even if the agreement is such as ordinarily accompanies the kind of business conducted by the registrant if it involves the subject matter identified in Item 601(b)(10)(ii)(A) - (D) of Regulation S-K (17 CFR 229.601(b)(10)(ii)(A) - (D)). An agreement involving the subject matter identified in Item 601(b)(10)(iii)(A) or (B) need not be disclosed under this Item.

2. A registrant must provide disclosure under this Item 1.01 if the registrant succeeds as a party to the agreement or amendment to the agreement by assumption or assignment (other than in connection with a merger or acquisition or similar transaction).

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.01 regarding the entry into or an amendment to a definitive agreement that is material to the asset-backed securities transaction, even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

Item 1.02 Termination of a Material Definitive Agreement.

(a) If a material definitive agreement which was not made in the ordinary course of business of the registrant and to which the registrant is a party is terminated otherwise than by expiration of the agreement on its stated termination date, or as a result of all parties completing their obligations under such agreement, and such termination of the agreement is material to the registrant, disclose the following information:

(1) the date of the termination of the material definitive agreement, the identity of the parties to the agreement and a brief description of any material relationship between the registrant or its affiliates and any of the parties other than in respect of the material definitive agreement;

(2) a brief description of the terms and conditions of the agreement that are material to the registrant;

(3) a brief description of the material circumstances surrounding the termination; and

(4) any material early termination penalties incurred by the registrant.

(b) For purposes of this Item 1.02, the term material definitive agreement shall have the same meaning as set forth in Item 1.01(b).

Instructions.

1. No disclosure is required solely by reason of this Item 1.02 during negotiations or discussions regarding termination of a material definitive agreement unless and until the agreement has been terminated.

2. No disclosure is required solely by reason of this Item 1.02 if the registrant believes in good faith that the material definitive agreement has not been terminated, unless the registrant has received a notice of termination pursuant to the terms of agreement.

3. With respect to asset-backed securities, as defined in Item 1101 of Regulation AB (17 CFR 229.1101), disclosure is required under this Item 1.02 regarding the termination of a definitive agreement that is material to the asset-backed securities transaction (otherwise than by expiration of the agreement on its stated termination date or as a result of all parties completing their obligations under such agreement), even if the registrant is not a party to such agreement (*e.g.*, a servicing agreement with a servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)).

Item 1.03 Bankruptcy or Receivership.

(a) If a receiver, fiscal agent or similar officer has been appointed for a registrant or its parent, in a proceeding under the U.S. Bankruptcy Code or in any other proceeding under state or federal law in which a court or governmental authority has assumed jurisdiction over substantially all of the assets or business of the registrant or its parent, or if such jurisdiction has been assumed by leaving the existing directors and officers in possession but subject to the supervision and orders of a court or governmental authority, disclose the following information:

(1) the name or other identification of the proceeding;

(2) the identity of the court or governmental authority;

(3) the date that jurisdiction was assumed; and

(4) the identity of the receiver, fiscal agent or similar officer and the date of his or her appointment.

(b) If an order confirming a plan of reorganization, arrangement or liquidation has been entered by a court or governmental authority having supervision or jurisdiction over substantially all of the assets or business of the registrant or its parent, disclose the following;

(1) the identity of the court or governmental authority;

(2) the date that the order confirming the plan was entered by the court or governmental authority;

(3) a summary of the material features of the plan and, pursuant to Item 9.01 (Financial Statements and Exhibits), a copy of the plan as confirmed;

(4) the number of shares or other units of the registrant or its parent issued and outstanding, the number reserved for future issuance in respect of claims and interests filed and allowed under the plan, and the aggregate total of such numbers; and

(5) information as to the assets and liabilities of the registrant or its parent as of the date that the order confirming the plan was entered, or a date as close thereto as practicable.

Instructions.

1. The information called for in paragraph (b)(5) of this Item 1.03 may be presented in the form in which it was furnished to the court

or governmental authority.

2. With respect to asset-backed securities, disclosure also is required under this Item 1.03 if the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware of any instances described in paragraph (a) or (b) of this Item with respect to the sponsor, depositor, servicer contemplated by Item 1108(a)(3) of Regulation AB (17 CFR 229.1108(a)(3)), trustee, significant obligor, enhancement or support provider contemplated by Items 1114(b) or 1115 of Regulation AB (17 CFR 229.1114(b) or 229.1115) or other material party contemplated by Item 1101(d)(1) of Regulation AB (17 CFR 1101(d)(1)). Terms used in this Instruction 2 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

Section 2 - Financial Information

Item 2.01 Completion of Acquisition or Disposition of Assets.

If the registrant or any of its majority-owned subsidiaries has completed the acquisition or disposition of a significant amount of assets, otherwise than in the ordinary course of business, disclose the following information:

(a) the date of completion of the transaction;

(b) a brief description of the assets involved;

(c) the identity of the person(s) from whom the assets were acquired or to whom they were sold and the nature of any material relationship, other than in respect of the transaction, between such person(s) and the registrant or any of its affiliates, or any director or officer of the registrant, or any associate of any such director or officer;

(d) the nature and amount of consideration given or received for the assets and, if any material relationship is disclosed pursuant to paragraph (c) of this Item 2.01, the formula or principle followed in determining the amount of such consideration;

(e) if the transaction being reported is an acquisition and if a material relationship exists between the registrant or any of its affiliates and the source(s) of the funds used in the acquisition, the identity of the source(s) of the funds unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the registrant:

(1) has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Act; and

(2) states in the report that the identity of the bank has been so omitted and filed separately with the Commission;and

(f) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the transaction, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 2.01(f) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

Instructions.

1. No information need be given as to:

(i) any transaction between any person and any wholly-owned subsidiary of such person;

(ii) any transaction between two or more wholly-owned subsidiaries of any person; or

(iii) the redemption or other acquisition of securities from the public, or the sale or other disposition of securities to the public, by the issuer of such securities or by a wholly-owned subsidiary of that issuer.

2. The term acquisition includes every purchase, acquisition by lease, exchange, merger, consolidation, succession or other acquisition, except that the term does not include the construction or development of property by or for the registrant or its subsidiaries or the acquisition of materials for such purpose. The term disposition includes every sale, disposition by lease, exchange, merger, consolidation, mortgage, assignment or hypothecation of assets, whether for the benefit of creditors or otherwise, abandonment, destruction, or other disposition.

3. The information called for by this Item 2.01 is to be given as to each transaction or series of related transactions of the size indicated. The acquisition or disposition of securities is deemed the indirect acquisition or disposition of the assets represented

by such securities if it results in the acquisition or disposition of control of such assets.

4. An acquisition or disposition shall be deemed to involve a significant amount of assets:

(i) if the registrant's and its other subsidiaries' equity in the net book value of such assets or the amount paid or received for the assets upon such acquisition or disposition exceeded 10% of the total assets of the registrant and its consolidated subsidiaries; or

(ii) if it involved a business (see 17 CFR 210.11-01(d)) that is significant (see 17 CFR 210.11-01(b)).

Acquisitions of individually insignificant businesses are not required to be reported pursuant to this Item 2.01 unless they are related businesses (see 17 CFR 210.3-05(a)(3)) and are significant in the aggregate.

5. Attention is directed to the requirements in Item 9.01 (Financial Statements and Exhibits) with respect to the filing of:

(i) financial statements of businesses acquired;

(ii) pro forma financial information; and

(iii) copies of the plans of acquisition or disposition as exhibits to the report.

Item 2.02 Results of Operations and Financial Condition.

(a) If a registrant, or any person acting on its behalf, makes any public announcement or release (including any update of an earlier announcement or release) disclosing material non-public information regarding the registrant's results of operations or financial condition for a completed quarterly or annual fiscal period, the registrant shall disclose the date of the announcement or release, briefly identify the announcement or release and include the text of that announcement or release as an exhibit.

(b) A Form 8-K is not required to be furnished to the Commission under this Item 2.02 in the case of disclosure of material non-public information that is disclosed orally, telephonically, by webcast, by broadcast, or by similar means if:

(1) the information is provided as part of a presentation that is complementary to, and initially occurs within 48 hours after, a related, written announcement or release that has been furnished on Form 8-K pursuant to this Item 2.02 prior to the presentation;

(2) the presentation is broadly accessible to the public by dial-in conference call, by webcast, by broadcast or by similar means;

(3) the financial and other statistical information contained in the presentation is provided on the registrant's website, together with any information that would be required under 17 CFR 244.100; and

(4) the presentation was announced by a widely disseminated press release, that included instructions as to when and how to access the presentation and the location on the registrant's website where the information would be available.

Instructions.

1. The requirements of this Item 2.02 are triggered by the disclosure of material non-public information regarding a completed fiscal year or quarter. Release of additional or updated material non-public information regarding a completed fiscal year or quarter would trigger an additional Item 2.02 requirement.

2. The requirements of paragraph (e)(1)(i) of Item 10 of Regulation S-K (17 CFR 229.10(e)(1)(i)) shall apply to disclosures under this Item 2.02.

3. Issuers that make earnings announcements or other disclosures of material non-public information regarding a completed fiscal year or quarter in an interim or annual report to shareholders are permitted to specify which portion of the report contains the information required to be furnished under this Item 2.02.

4. This Item 2.02 does not apply in the case of a disclosure that is made in a quarterly report filed with the Commission on Form 10-Q (17 CFR 249.308a) or an annual report filed with the Commission on Form 10-K (17 CFR 249.310).

Item 2.03 Creation of a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement of a Registrant.

(a) If the registrant becomes obligated on a direct financial obligation that is material to the registrant, disclose the following information:

(1) the date on which the registrant becomes obligated on the direct financial obligation and a brief description of the transaction or agreement creating the obligation;

(2) the amount of the obligation, including the terms of its payment and, if applicable, a brief description of the material terms under which it may be accelerated or increased and the nature of any recourse provisions that would enable the registrant to recover from third parties; and

(3) a brief description of the other terms and conditions of the transaction or agreement that are material to the registrant.

(b) If the registrant becomes directly or contingently liable for an obligation that is material to the registrant arising out of an off-balance sheet arrangement, disclose the following information:

(1) the date on which the registrant becomes directly or contingently liable on the obligation and a brief description of the transaction or agreement creating the arrangement and obligation;

(2) a brief description of the nature and amount of the obligation of the registrant under the arrangement, including the material terms whereby it may become a direct obligation, if applicable, or may be accelerated or increased and the nature of any recourse provisions that would enable the registrant to recover from third parties;

(3) the maximum potential amount of future payments (undiscounted) that the registrant may be required to make, if different; and

(4) a brief description of the other terms and conditions of the obligation or arrangement that are material to the registrant.

(c) For purposes of this Item 2.03, direct financial obligation means any of the following:

(1) a long-term debt obligation, as defined in Item 303(a)(5)(ii)(A) of Regulation S-K (17 CFR 229.303(a)(5)(ii)(A));

(2) a capital lease obligation, as defined in Item 303(a)(5)(ii)(B) of Regulation S-K (17 CFR 229.303(a)(5)(ii)(B));

(3) an operating lease obligation, as defined in Item 303(a)(5)(ii)(C) of Regulation S-K (17 CFR 229.303(a)(5)(ii)(C)); or

(4) a short-term debt obligation that arises other than in the ordinary course of business.

(d) For purposes of this Item 2.03, off-balance sheet arrangement has the meaning set forth in Item 303(a)(4)(ii) of Regulation S-K (17 CFR 229.303(a)(4)(ii)).

(e) For purposes of this Item 2.03, short-term debt obligation means a payment obligation under a borrowing arrangement that is scheduled to mature within one year, or, for those registrants that use the operating cycle concept of working capital, within a registrant's operating cycle that is longer than one year, as discussed in Accounting Research Bulletin No. 43, Chapter 3A, Working Capital.

Instructions.

1. A registrant has no obligation to disclose information under this Item 2.03 until the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the direct financial obligation will arise or be created or issued. If there is no such agreement, the registrant must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the direct financial obligation arises or is created.

2. A registrant must provide the disclosure required by paragraph (b) of this Item 2.03 whether or not the registrant is also a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement. In the event that neither the registrant nor any affiliate of the registrant is also a party to the transaction or agreement creating the contingent obligation arising under the off-balance sheet arrangement in question, the four business day period for reporting the event under this Item 2.03 shall begin on the earlier of (i) the fourth business day after the contingent obligation is created or arises, and (ii) the day on which an executive officer, as defined in 17 CFR 240.3b-7, of the registrant becomes aware of the contingent obligation.

3. In the event that an agreement, transaction or arrangement requiring disclosure under this Item 2.03 comprises a facility, program or similar arrangement that creates or may give rise to direct financial obligations of the registrant in connection with multiple transactions, the registrant shall:

(i) disclose the entering into of the facility, program or similar arrangement if the entering into of the facility is material to the registrant; and

(ii) as direct financial obligations arise or are created under the facility or program, disclose the required information under this Item 2.03 to the extent that the obligations are material to the registrant (including when a series of previously undisclosed individually immaterial obligations become material in the aggregate).

4. For purposes of Item 2.03(b)(3), the maximum amount of future payments shall not be reduced by the effect of any amounts that may possibly be recovered by the registrant under recourse or collateralization provisions in any guarantee agreement, transaction or arrangement.

5. If the obligation required to be disclosed under this Item 2.03 is a security, or a term of a security, that has been or will be sold pursuant to an effective registration statement of the registrant, the registrant is not required to file a Form 8-K pursuant to this Item 2.03, provided that the prospectus relating to that sale contains the information required by this Item 2.03 and is filed within the required time period under Securities Act Rule 424 (§230.424 of this chapter).

Item 2.04 Triggering Events That Accelerate or Increase a Direct Financial Obligation or an Obligation under an Off-Balance Sheet Arrangement.

(a) If a triggering event causing the increase or acceleration of a direct financial obligation of the registrant occurs and the consequences of the event, taking into account those described in paragraph (a)(4) of this Item 2.04, are material to the registrant, disclose the following information:

(1) the date of the triggering event and a brief description of the agreement or transaction under which the direct financial obligation was created and is increased or accelerated;

(2) a brief description of the triggering event;

(3) the amount of the direct financial obligation, as increased if applicable, and the terms of payment or acceleration that apply; and

(4) any other material obligations of the registrant that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the direct financial obligation.

(b) If a triggering event occurs causing an obligation of the registrant under an off-balance sheet arrangement to increase or be accelerated, or causing a contingent obligation of the registrant under an off-balance sheet arrangement to become a direct financial obligation of the registrant, and the consequences of the event, taking into account those described in paragraph (b)(4) of this Item 2.04, are material to the registrant, disclose the following information:

(1) the date of the triggering event and a brief description of the off-balance sheet arrangement;

(2) a brief description of the triggering event;

(3) the nature and amount of the obligation, as increased if applicable, and the terms of payment or acceleration that apply; and

(4) any other material obligations of the registrant that may arise, increase, be accelerated or become direct financial obligations as a result of the triggering event or the increase or acceleration of the obligation under the off-balance sheet arrangement or its becoming a direct financial obligation of the registrant.

(c) For purposes of this Item 2.04, the term direct financial obligation has the meaning provided in Item 2.03 of this form, but shall also include an obligation arising out of an off-balance sheet arrangement that is accrued under FASB Statement of Financial Accounting Standards No. 5 Accounting for Contingencies (SFAS No. 5) as a probable loss contingency.

(d) For purposes of this Item 2.04, the term off-balance sheet arrangement has the meaning provided in Item 2.03 of this form.

(e) For purposes of this Item 2.04, a triggering event is an event, including an event of default, event of acceleration or similar event, as a result of which a direct financial obligation of the registrant or an obligation of the registrant arising under an off-balance sheet arrangement is increased or becomes accelerated or as a result of which a contingent obligation of the registrant arising out of an off-balance sheet arrangement becomes a direct financial obligation of the registrant.

Instructions.

1. Disclosure is required if a triggering event occurs in respect of an obligation of the registrant under an off-balance sheet arrangement and the consequences are material to the registrant, whether or not the registrant is also a party to the transaction or agreement under which the triggering event occurs.

2. No disclosure is required under this Item 2.04 unless and until a triggering event has occurred in accordance with the terms of the relevant agreement, transaction or arrangement, including, if required, the sending to the registrant of notice of the occurrence of a triggering event pursuant to the terms of the agreement, transaction or arrangement and the satisfaction of all conditions to such occurrence, except the passage of time.

3. No disclosure is required solely by reason of this Item 2.04 if the registrant believes in good faith that no triggering event has occurred, unless the registrant has received a notice described in Instruction 2 to this Item 2.04.

4. Where a registrant is subject to an obligation arising out of an off-balance sheet arrangement, whether or not disclosed pursuant to Item 2.03 of this form, if a triggering event occurs as a result of which under that obligation an accrual for a probable loss is required under SFAS No. 5, the obligation arising out of the off-balance sheet arrangement becomes a direct financial obligation as defined in this Item 2.04. In that situation, if the consequences as determined under Item 2.04(b) are material to the registrant, disclosure is required under this Item 2.04.

5. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure also is required under this Item 2.04 if an early amortization, performance trigger or other event, including an event of default, has occurred under the transaction agreements for the asset-backed securities that would materially alter the payment priority or distribution of cash flows regarding the asset-backed securities or the amortization schedule for the asset-backed securities. In providing the disclosure required by this Item, identify the changes to the payment priorities, flow of funds or asset-backed securities as a result. Disclosure is required under this Item whether or not the registrant is a party to the transaction agreement that results in the occurrence identified.

Item 2.05 Costs Associated with Exit or Disposal Activities.

If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, commits the registrant to an exit or disposal plan, or otherwise disposes of a long-lived asset or terminates employees under a plan of termination described in paragraph 8 of FASB Statement of Financial Accounting Standards No. 146 Accounting for Costs Associated with Exit or Disposal Activities (SFAS No. 146), under which material charges will be incurred under generally accepted accounting principles applicable to the registrant, disclose the following information:

(a) the date of the commitment to the course of action and a description of the course of action, including the facts and circumstances leading to the expected action and the expected completion date;

(b) for each major type of cost associated with the course of action (for example, one-time termination benefits, contract termination costs and other associated costs), an estimate of the total amount or range of amounts expected to be incurred in connection with the action;

(c) an estimate of the total amount or range of amounts expected to be incurred in connection with the action; and

(d) the registrant's estimate of the amount or range of amounts of the charge that will result in future cash expenditures, provided, however, that if the registrant determines that at the time of filing it is unable in good faith to make a determination of an estimate required by paragraphs (b), (c) or (d) of this Item 2.05, no disclosure of such estimate shall be required; provided further, however, that in any such event, the registrant shall file an amended report on Form 8-K under this Item 2.05 within four business days after it makes a determination of such an estimate or range of estimates.

Item 2.06 Material Impairments.

If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, concludes that a material charge for impairment to one or more of its assets, including, without limitation, impairments of securities or goodwill, is required under generally accepted accounting principles applicable to the registrant, disclose the following information:

(a) the date of the conclusion that a material charge is required and a description of the impaired asset or assets and the

facts and circumstances leading to the conclusion that the charge for impairment is required;

(b) the registrant's estimate of the amount or range of amounts of the impairment charge; and

(c) the registrant's estimate of the amount or range of amounts of the impairment charge that will result in future cash expenditures, provided, however, that if the registrant determines that at the time of filing it is unable in good faith to make a determination of an estimate required by paragraphs (b) or (c) of this Item 2.06, no disclosure of such estimate shall be required; provided further, however, that in any such event, the registrant shall file an amended report on Form 8-K under this Item 2.06 within four business days after it makes a determination of such an estimate or range of estimates.

Instruction.

No filing is required under this Item 2.06 if the conclusion is made in connection with the preparation, review or audit of financial statements required to be included in the next periodic report due to be filed under the Exchange Act, the periodic report is filed on a timely basis and such conclusion is disclosed in the report.

Section 3 - Securities and Trading Markets

Item 3.01 Notice of Delisting or Failure to Satisfy a Continued Listing Rule or Standard; Transfer of Listing.

(a) If the registrant has received notice from the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2)) that:

- the registrant or such class of the registrant's securities does not satisfy a rule or standard for continued listing on the exchange or association;
- the exchange has submitted an application under Exchange Act Rule 12d2-2 (17 CFR 240.12d2-2) to the Commission to delist such class of the registrant's securities; or
- the association has taken all necessary steps under its rules to delist the security from its automated inter-dealer quotation system,

the registrant must disclose:

(i) the date that the registrant received the notice;

(ii) the a rule or standard for continued listing on the national securities exchange or national securities association that the registrant fails, or has failed to, satisfy; and

(iii) any action or response that, at the time of filing, the registrant has determined to take in response to the notice.

(b) If the registrant has notified the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2) that the registrant is aware of any material noncompliance with a rule or standard for continued listing on the exchange or association, the registrant must disclose:

(i) the date that the registrant provided such notice to the exchange or association;

(ii) the rule or standard for continued listing on the exchange or association that the registrant fails, or has failed, to satisfy; and

(iii) any action or response that, at the time of filing, the registrant has determined to take regarding its noncompliance.

(c) If the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2)), in lieu of suspending trading in or delisting such class of the registrant's securities, issues a public reprimand letter or similar communication indicating that the registrant has violated a rule or standard for continued listing on the exchange or association, the registrant must state the date, and summarize the contents of the letter or communication.

(d) If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, has taken definitive action to cause the listing of a class of its common equity to be withdrawn from the national securities exchange, or terminated from the automated inter-dealer quotation system of a registered national securities association, where such exchange or association maintains the principal listing for such class of securities, including by reason of a transfer of the listing or quotation to another securities exchange or quotation system, describe the action taken and state the date of the action.

Instructions.

1. The registrant is not required to disclose any information required by paragraph (a) of this Item 3.01 where the delisting is a result of one of the following:

- the entire class of the security has been called for redemption, maturity or retirement; appropriate notice thereof has been given; if required by the terms of the securities, funds sufficient for the payment of all such securities have been deposited with an agency authorized to make such payments; and such funds have been made available to security holders;
- the entire class of the security has been redeemed or paid at maturity or retirement;
- the instruments representing the entire class of securities have come to evidence, by operation of law or otherwise, other securities in substitution therefor and represent no other right, except, if true, the right to receive an immediate cash payment (the right of dissenters to receive the appraised or fair value of their holdings shall not prevent the application of this provision); or
- all rights pertaining to the entire class of the security have been extinguished; provided, however, that where such an event occurs as the result of an order of a court or other governmental authority, the order shall be final, all applicable appeal periods shall have expired and no appeals shall be pending.

2. A registrant must provide the disclosure required by paragraph (a) or (b) of this Item 3.01, as applicable, regarding any failure to satisfy a rule or standard for continued listing on the national securities exchange or national securities association (or a facility thereof) that maintains the principal listing for any class of the registrant's common equity (as defined in Exchange Act Rule 12b-2 (17 CFR 240.12b-2)) even if the registrant has the benefit of a grace period or similar extension period during which it may cure the deficiency that triggers the disclosure requirement.

3. Notices or other communications subsequent to an initial notice sent to, or by, a registrant under Item 3.01(a), (b) or (c) that continue to indicate that the registrant does not comply with the same rule or standard for continued listing that was the subject of the initial notice are not required to be filed, but may be filed voluntarily.

4. Registrants whose securities are quoted exclusively (i.e., the securities are not otherwise listed on an exchange or association) on automated inter-dealer quotation systems are not subject to this Item 3.01 and such registrants are thus not required to file a Form 8-K pursuant to this Item 3.01 if the securities are no longer quoted on such quotation system. If a security is listed on an exchange or association and is also quoted on an automated inter-dealer quotation system, the registrant is subject to the disclosure obligations of Item 3.01 if any of the events specified in Item 3.01 occur.

Item 3.02 Unregistered Sales of Equity Securities.

(a) If the registrant sells equity securities in a transaction that is not registered under the Securities Act, furnish the information set forth in paragraphs (a) and (c) through (e) of Item 701 of Regulation S-K (17 CFR 229.701(a) and (c) through (e). For purposes of determining the required filing date for the Form 8-K under this Item 3.02(a), the registrant has no obligation to disclose information under this Item 3.02 until the registrant enters into an agreement enforceable against the registrant, whether or not subject to conditions, under which the equity securities are to be sold. If there is no such agreement, the registrant must provide the disclosure within four business days after the occurrence of the closing or settlement of the transaction or arrangement under which the equity securities are to be sold.

(b) No report need be filed under this Item 3.02 if the equity securities sold, in the aggregate since its last report filed under this Item 3.02 or its last periodic report, whichever is more recent, constitute less than 1% of the number of shares outstanding of the class of equity securities sold. In the case of a smaller reporting company, no report need be filed if the equity securities sold, in the aggregate since its last report filed under this Item 3.02 or its last periodic report, whichever is more recent, constitute less than 5% of the number of shares outstanding of the class of equity securities sold.

Instructions.

1. For purposes of this Item 3.02, "the number of shares outstanding" refers to the actual number of shares of equity securities of the class outstanding and does not include outstanding securities convertible into or exchangeable for such equity securities.

2. A smaller reporting company is defined under Item 10(f)(1) of Regulation S-K (17 CFR 229.10(f)(1)).

Item 3.03 Material Modification to Rights of Security Holders.

(a) If the constituent instruments defining the rights of the holders of any class of registered securities of the registrant have been materially modified, disclose the date of the modification, the title of the class of securities involved and briefly describe the general effect of such modification upon the rights of holders of such securities.

(b) If the rights evidenced by any class of registered securities have been materially limited or qualified by the issuance or modification of any other class of securities by the registrant, briefly disclose the date of the issuance or modification, the general effect of the issuance or modification of such other class of securities upon the rights of the holders of the registered securities.

Instruction.

Working capital restrictions and other limitations upon the payment of dividends must be reported pursuant to this Item 3.03.

Section 4 - Matters Related to Accountants and Financial Statements

Item 4.01 Changes in Registrant's Certifying Accountant.

(a) If an independent accountant who was previously engaged as the principal accountant to audit the registrant's financial statements, or an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary, resigns (or indicates that it declines to stand for re-appointment after completion of the current audit) or is dismissed, disclose the information required by Item 304(a)(1) of Regulation S-K (17 CFR 229.304(a)(1) of this chapter), including compliance with Item 304(a)(3) of Regulation S-K (17 CFR 229.304(a)(3) of this chapter) .

(b) If a new independent accountant has been engaged as either the principal accountant to audit the registrant's financial statements or as an independent accountant on whom the principal accountant is expected to express reliance in its report regarding a significant subsidiary, the registrant must disclose the information required by Item 304(a)(2) of Regulation S-K (17 CFR 229.304(a)(2)).

Instruction.

The resignation or dismissal of an independent accountant, or its refusal to stand for re-appointment, is a reportable event separate from the engagement of a new independent accountant. On some occasions, two reports on Form 8-K are required for a single change in accountants, the first on the resignation (or refusal to stand for re-appointment) or dismissal of the former accountant and the second when the new accountant is engaged. Information required in the second Form 8-K in such situations need not be provided to the extent that it has been reported previously in the first Form 8-K.

Item 4.02 Non-Reliance on Previously Issued Financial Statements or a Related Audit Report or Completed Interim Review.

(a) If the registrant's board of directors, a committee of the board of directors or the officer or officers of the registrant authorized to take such action if board action is not required, concludes that any previously issued financial statements, covering one or more years or interim periods for which the registrant is required to provide financial statements under Regulation S-X (17 CFR 210) should no longer be relied upon because of an error in such financial statements as addressed in Accounting Principles Board Opinion No. 20, as may be modified, supplemented or succeeded, disclose the following information:

(1) the date of the conclusion regarding the non-reliance and an identification of the financial statements and years or periods covered that should no longer be relied upon;

(2) a brief description of the facts underlying the conclusion to the extent known to the registrant at the time of filing; and

(3) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the registrant's independent accountant the matters disclosed in the filing pursuant to this Item 4.02(a).

(b) If the registrant is advised by, or receives notice from, its independent accountant that disclosure should be made or action should be taken to prevent future reliance on a previously issued audit report or completed interim review related to previously issued financial statements, disclose the following information:

(1) the date on which the registrant was so advised or notified;

(2) identification of the financial statements that should no longer be relied upon;

(3) a brief description of the information provided by the accountant; and

(4) a statement of whether the audit committee, or the board of directors in the absence of an audit committee, or authorized officer or officers, discussed with the independent accountant the matters disclosed in the filing pursuant to this Item 4.02(b).

(c) If the registrant receives advisement or notice from its independent accountant requiring disclosure under paragraph (b) of this Item 4.02, the registrant must:

(1) provide the independent accountant with a copy of the disclosures it is making in response to this Item 4.02 that the independent accountant shall receive no later than the day that the disclosures are filed with the Commission;

(2) request the independent accountant to furnish to the registrant as promptly as possible a letter addressed to the Commission stating whether the independent accountant agrees with the statements made by the registrant in response to this Item 4.02 and, if not, stating the respects in which it does not agree; and

(3) amend the registrant's previously filed Form 8-K by filing the independent accountant's letter as an exhibit to the filed Form 8-K no later than two business days after the registrant's receipt of the letter.

Section 5 - Corporate Governance and Management

Item 5.01 Changes in Control of Registrant.

(a) If, to the knowledge of the registrant's board of directors, a committee of the board of directors or authorized officer or officers of the registrant, a change in control of the registrant has occurred, furnish the following information:

(1) the identity of the person(s) who acquired such control;

(2) the date and a description of the transaction(s) which resulted in the change in control;

(3) the basis of the control, including the percentage of voting securities of the registrant now beneficially owned directly or indirectly by the person(s) who acquired control;

(4) the amount of the consideration used by such person(s);

(5) the source(s) of funds used by the person(s), unless all or any part of the consideration used is a loan made in the ordinary course of business by a bank as defined by Section 3(a)(6) of the Act, in which case the identity of such bank may be omitted provided the person who acquired control:

(i) has made a request for confidentiality pursuant to Section 13(d)(1)(B) of the Act; and

(ii) states in the report that the identity of the bank has been so omitted and filed separately with the Commission.

(6) the identity of the person(s) from whom control was assumed;

(7) any arrangements or understandings among members of both the former and new control groups and their associates with respect to election of directors or other matters; and

(8) if the registrant was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before the change in control, the information that would be required if the registrant were filing a general form for registration of securities on Form 10 under the Exchange Act reflecting all classes of the registrant's securities subject to the reporting requirements of Section 13 (15 U.S.C. 78m) or Section 15(d) (15 U.S.C. 78o(d)) of such Act upon consummation of the change in control, with such information reflecting the registrant and its securities upon consummation of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 5.01(a)(8) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

(b) Furnish the information required by Item 403(c) of Regulation S-K (17 CFR 229.403(c)).

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

(a)(1) If a director has resigned or refuses to stand for re-election to the board of directors since the date of the last annual meeting of shareholders because of a disagreement with the registrant, known to an executive officer of the registrant, as defined in 17 CFR 240.3b-7, on any matter relating to the registrant's operations, policies or practices, or if a director has been removed for cause from the board of directors, disclose the following information:

(i) the date of such resignation, refusal to stand for re-election or removal;

(ii) any positions held by the director on any committee of the board of directors at the time of the director's resignation, refusal to stand for re-election or removal; and

(iii) a brief description of the circumstances representing the disagreement that the registrant believes caused, in whole or in part, the director's resignation, refusal to stand for re-election or removal.

(2) If the director has furnished the registrant with any written correspondence concerning the circumstances surrounding his or her resignation, refusal or removal, the registrant shall file a copy of the document as an exhibit to the report on Form 8-K.

(3) The registrant also must:

(i) provide the director with a copy of the disclosures it is making in response to this Item 5.02 no later than the day the registrant file the disclosures with the Commission;

(ii) provide the director with the opportunity to furnish the registrant as promptly as possible with a letter addressed to the registrant stating whether he or she agrees with the statements made by the registrant in response to this Item 5.02 and, if not, stating the respects in which he or she does not agree; and

(iii) file any letter received by the registrant from the director with the Commission as an exhibit by an amendment to the previously filed Form 8-K within two business days after receipt by the registrant.

(b) If the registrant's principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, or any named executive officer, retires, resigns or is terminated from that position, or if a director retires, resigns, is removed, or refuses to stand for re-election (except in circumstances described in paragraph (a) of this Item 5.02), disclose the fact that the event has occurred and the date of the event.

(c) If the registrant appoints a new principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or person performing similar functions, disclose the following information with respect to the newly appointed officer:

(1) the name and position of the newly appointed officer and the date of the appointment;

(2) the information required by Items 401(b), (d), (e) and Item 404(a) of Regulation S-K (17 CFR 229.401(b), (d), (e) and 229.404(a)); and

(3) a brief description of any material plan, contract or arrangement (whether or not written) to which a covered officer is a party or in which he or she participates that is entered into or material amendment in connection with the triggering event or any grant or award to any such covered person or modification thereto, under any such plan, contract or arrangement in connection with any such event.

Instruction to paragraph (c).

If the registrant intends to make a public announcement of the appointment other than by means of a report on Form 8-K, the registrant may delay filing the Form 8-K containing the disclosures required by this Item 5.02(c) until the day on which the registrant otherwise makes public announcement of the appointment of such officer.

(d) If the registrant elects a new director, except by a vote of security holders at an annual meeting or special meeting convened for such purpose, disclose the following information:

(1) the name of the newly elected director and the date of election;

(2) a brief description of any arrangement or understanding between the new director and any other persons, naming such persons, pursuant to which such director was selected as a director;

(3) the committees of the board of directors to which the new director has been, or at the time of this disclosure is expected to be, named; and

(4) the information required by Item 404(a) of Regulation S-K (17 CFR 229.404(a)).

(5) a brief description of any material plan, contract or arrangement (whether or not written) to which the director is a party or in which he or she participates that is entered into or material amendment in connection with the triggering event or any grant or award to any such covered person or modification thereto, under any such plan, contract or arrangement in connection with any such event.

(e) If the registrant enters into, adopts, or otherwise commences a material compensatory plan, contract or arrangement (whether or not written), as to which the registrant's principal executive officer, principal financial officer, or a named executive officer participates or is a party, or such compensatory plan, contract or arrangement is materially amended or modified, or a material grant or award under any such plan, contract or arrangement to any such person is made or materially modified, then the registrant shall provide a brief description of the terms and conditions of the plan, contract or arrangement and the amounts payable to the officer thereunder.

Instructions to paragraph (e).

1. Disclosure under this Item 5.02(e) shall be required whether or not the specified event is in connection with events otherwise triggering disclosure pursuant to this Item 5.02.

2. Grants or awards (or modifications thereto) made pursuant to a plan, contract or arrangement (whether involving cash or equity), that are materially consistent with the previously disclosed terms of such plan, contract or arrangement, need not be disclosed under this Item 5.02(e), provided the registrant has previously disclosed such terms and the grant, award or modification is disclosed when Item 402 of Regulation S-K (17 CFR 229.402) requires such disclosure.

(f) If the salary or bonus of a named executive officer cannot be calculated as of the most recent practicable date and is omitted from the Summary Compensation Table as specified in Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K, disclose the appropriate information under this Item 5.02(f) when there is a payment, grant, award, decision or other occurrence as a result of which such amounts become calculable in whole or part. Disclosure under this Item 5.02(f) shall include a new total compensation figure for the named executive officer, using the new salary or bonus information to recalculate the information that was previously provided with respect to the named executive officer in the registrant's Summary Compensation Table for which the salary and bonus information was omitted in reliance on Instruction 1 to Item 402(c)(2)(iii) and (iv) of Regulation S-K (17 CFR 229.402(c)(2)(iii) and (iv)).

Instructions to Item 5.02.

1. The disclosure requirements of this Item 5.02 do not apply to a registrant that is a wholly-owned subsidiary of an issuer with a class of securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)).

2. To the extent that any information called for in Item 5.02(c)(3) or Item 5.02(d)(3) or Item 5.02(d)(4) is not determined or is unavailable at the time of the required filing, the registrant shall include a statement this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 5.02 containing such information within four business days after the information is determined or becomes available.

3. The registrant need not provide information with respect to plans, contracts, and arrangements to the extent they do not discriminate in scope, terms or operation, in favor of executive officers or directors of the registrant and that are available generally to all salaried employees.

4. For purposes of this Item, the term "named executive officer" shall refer to those executive officers for whom disclosure was required in the registrant's most recent filing with the Commission under the Securities Act (15 U.S.C. 77a et seq.) or Exchange Act (15 U.S.C. 78a et seq.) that required disclosure pursuant to Item 402(c) of Regulation S-K (17 CFR 229.402(c)).

Item 5.03 Amendments to Articles of Incorporation or Bylaws; Change in Fiscal Year.

(a) If a registrant with a class of equity securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l) amends its articles of incorporation or bylaws and a proposal for the amendment was not disclosed in a proxy statement or information statement filed by the registrant, disclose the following information:

(1) the effective date of the amendment; and

(2) a description of the provision adopted or changed by amendment and, if applicable, the previous provision.

(b) If the registrant determines to change the fiscal year from that used in its most recent filing with the Commission other than by means of:

(1) a submission to a vote of security holders through the solicitation of proxies or otherwise; or

(2) an amendment to its articles of incorporation or bylaws,

disclose the date of such determination, the date of the new fiscal year end and the form (for example, Form 10-K or Form 10-Q) on which the report covering the transition period will be filed.

Instructions to Item 5.03.

1. Refer to Item 601(b)(3) of Regulation S-K (17 CFR 229.601(b)(3) regarding the filing of exhibits to this Item 5.03.

2. With respect to asset-backed securities, as defined in 17 CFR 229.1101, disclosure is required under this Item 5.03 regarding any amendment to the governing documents of the issuing entity, regardless of whether the class of asset-backed securities is reporting under Section 13 or 15(d) of the Exchange Act.

Item 5.04 Temporary Suspension of Trading Under Registrant's Employee Benefit Plans.

(a) No later than the fourth business day after which the registrant receives the notice required by section 101(i)(2)(E) of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(2)(E)), or, if such notice is not received by the registrant, on the same date by which the registrant transmits a timely notice to an affected officer or director within the time period prescribed by Rule 104(b)(2)(i)(B) or 104(b)(2)(ii) of Regulation BTR (17 CFR 245.104(b)(2)(i)(B) or 17 CFR 245.104(b)(2)(ii)), provide the information specified in Rule 104(b) (17 CFR 245.104(b)) and the date the registrant received the notice required by section 101(i)(2)(E) of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(2)(E)), if applicable.

(b) On the same date by which the registrant transmits a timely updated notice to an affected officer or director, as required by the time period under Rule 104(b)(2)(iii) of Regulation BTR (17 CFR 245.104(b)(2)(iii)), provide the information specified in Rule 104(b)(3)(iii) (17 CFR 245.104(b)(2)(iii)).

Item 5.05 Amendments to the Registrant's Code of Ethics, or Waiver of a Provision of the Code of Ethics.

(a) Briefly describe the date and nature of any amendment to a provision of the registrant's code of ethics that applies to the registrant's principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions and that relates to any element of the code of ethics definition enumerated in Item 406(b) of Regulations S-K (17 CFR 228.406(b)).

(b) If the registrant has granted a waiver, including an implicit waiver, from a provision of the code of ethics to an officer or person described in paragraph (a) of this Item 5.05, and the waiver relates to one or more of the elements of the code of ethics definition referred to in paragraph (a) of this Item 5.05, briefly describe the nature of the waiver, the name of the person to whom the waiver was granted, and the date of the waiver.

(c) The registrant does not need to provide any information pursuant to this Item 5.05 if it discloses the required information on its Internet website within four business days following the date of the amendment or waiver and the registrant has disclosed in its most recently filed annual report its Internet address and intention to provide disclosure in this manner. If the registrant elects to disclose the information required by this Item 5.05 through its website, such information must remain available on the website for at least a 12-month period. Following the 12-month period, the registrant must retain the information for a period of not less than five years. Upon request, the registrant must furnish to the Commission or its staff a copy of any or all information retained pursuant to this requirement.

Instructions.

1. The registrant does not need to disclose technical, administrative or other non-substantive amendments to its code of ethics.

2. For purposes of this Item 5.05:

(i) The term waiver means the approval by the registrant of a material departure from a provision of the code of ethics; and

(ii) The term implicit waiver means the registrant's failure to take action within a reasonable period of time regarding a material departure from a provision of the code of ethics that has been made known to an executive officer, as defined in Rule 3b-7 (17 CFR 240.3b-7) of the registrant.

Section 5.06 -Change in Shell Company Status.

If a registrant that was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), has completed a transaction that has the effect of causing it to cease being a shell company, as defined in Rule 12b-2, disclose the material terms of the transaction. Notwithstanding General Instruction B.3. to Form 8-K, if any disclosure required by this Item 5.06 is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in this report.

Item 5.07 Submission of Matters to a Vote of Security Holders.

If any matter was submitted to a vote of security holders, through the solicitation of proxies or otherwise, provide the following information:

(a) The date of the meeting and whether it was an annual or special meeting. This information must be provided only if a meeting of security holders was held.

(b) If the meeting involved the election of directors, the name of each director elected at the meeting, as well as a brief description of each other matter voted upon at the meeting; and state the number of votes cast for, against or withheld, as well as the number of abstentions and broker non-votes as to each such matter, including a separate tabulation with respect to each nominee for office. For the vote on the frequency of shareholder advisory votes on executive compensation required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1) and §240.14a-21(b), state the number of votes cast for each of 1 year, 2 years, and 3 years, as well as the number of abstentions.

(c) A description of the terms of any settlement between the registrant and any other participant (as defined in Instruction 3 to Item 4 of Schedule 14A (17 CFR 240.14a-101)) terminating any solicitation subject to Rule 14a-12(c), including the cost or anticipated cost to the registrant.

(d) No later than one hundred fifty calendar days after the end of the annual or other meeting of shareholders at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1), but in no event later than sixty calendar days prior to the deadline for submission of shareholder proposals under §240.14a-8, as disclosed in the registrant's most recent proxy statement for an annual or other meeting of shareholders relating to the election of directors at which shareholders voted on the frequency of shareholder votes on the compensation of executives as required by section 14A(a)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78n-1(a)(2)), by amendment to the most recent Form 8-K filed pursuant to (b) of this Item, disclose the company's decision in light of such vote as to how frequently the company will include a shareholder vote on the compensation of executives in its proxy materials until the next required vote on the frequency of shareholder votes on the compensation of executives.

Instruction 1 to Item 5.07. The four business day period for reporting the event under this Item 5.07, other than with respect to Item 5.07(d), shall begin to run on the day on which the meeting ended. The registrant shall disclose on Form 8-K under this Item 5.07 the preliminary voting results. The registrant shall file an amended report on Form 8-K under this Item 5.07 to disclose the final voting results within four business days after the final voting results are known. However, no preliminary voting results need be disclosed under this Item 5.07 if the registrant has disclosed final voting results on Form 8-K under this Item.

Instruction 2 to Item 5.07. If any matter has been submitted to a vote of security holders otherwise than at a meeting of such security holders, corresponding information with respect to such submission shall be provided. The solicitation of any authorization or consent (other than a proxy to vote at a stockholders' meeting) with respect to any matter shall be deemed a submission of such matter to a vote of security holders within the meaning of this item.

Instruction 3 to Item 5.07. If the registrant did not solicit proxies and the board of directors as previously reported to the Commission was re-elected in its entirety, a statement to that effect in answer to paragraph (b) will suffice as an answer thereto regarding the election of directors.

Instruction 4 to Item 5.07. If the registrant has furnished to its security holders proxy soliciting material containing the information called for by paragraph (c), the paragraph may be answered by reference to the information contained in such

material.

Instruction 5 to Item 5.07. A registrant may omit the information called for by this Item 5.07 if, on the date of the filing of its report on Form 8-K, the registrant meets the following conditions:

1. All of the registrant's equity securities are owned, either directly or indirectly, by a single person which is a reporting company under the Exchange Act and which has filed all the material required to be filed pursuant to Section 13, 14 or 15(d) thereof, as applicable; and

2. During the preceding thirty-six calendar months and any subsequent period of days, there has not been any material default in the payment of principal, interest, a sinking or purchase fund installment, or any other material default not cured within thirty days, with respect to any indebtedness of the registrant or its subsidiaries, and there has not been any material default in the payment of rentals under material long-term leases.

Item 5.08 Shareholder Director Nominations

(a) If the registrant did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 calendar days from the date of the previous year's meeting, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N (§ 240.14n–101) required pursuant to § 240.14a–11(b)(10), which date shall be a reasonable time before the registrant mails its proxy materials for the meeting. Where a registrant is required to include shareholder director nominees in the registrant's proxy materials pursuant to either an applicable state or foreign law provision, or a provision in the registrant's governing documents, then the registrant is required to disclose the date by which a nominating shareholder or nominating shareholder group must submit the notice on Schedule 14N required pursuant to § 240.14a–18.

(b) If the registrant is a series company as defined in Rule 18f–2(a) under the Investment Company Act of 1940 (§ 270.18f–2 of this chapter), then the registrant is required to disclose in connection with the election of directors at an annual meeting of shareholders (or, in lieu of such an annual meeting, a special meeting of shareholders) the total number of shares of the registrant outstanding and entitled to be voted (or if the votes are to be cast on a basis other than one vote per share, then the total number of votes entitled to be voted and the basis for allocating such votes) on the election of directors at such meeting of shareholders as of the end of the most recent calendar quarter.

Section 6 -Asset-Backed Securities

The Items in this Section 6 apply only to asset-backed securities. Terms used in this Section 6 have the same meaning as in Item 1101 of Regulation AB (17 CFR 229.1101).

Item 6.01 ABS Informational and Computational Material.

Report under this Item any ABS informational and computational material filed in, or as an exhibit to, this report.

Item 6.02 Change of Servicer or Trustee.

If a servicer contemplated by Item 1108(a)(2) of Regulation AB (17 CFR 229.1108(a)(2)) or a trustee has resigned or has been removed, replaced or substituted, or if a new servicer contemplated by Item 1108(a)(2) of Regulation AB or trustee has been appointed, state the date the event occurred and the circumstances surrounding the change. In addition, provide the disclosure required by Item 1108(d) of Regulation AB (17 CFR 229.1108(c)), as applicable, regarding the servicer or trustee change. If a new servicer contemplated by Item 1108(a)(3) of this Regulation AB or a new trustee has been appointed, provide the information required by Item 1108(b) through (d) of Regulation AB regarding such servicer or Item 1109 of Regulation AB (17 CFR 229.1109) regarding such trustee, as applicable.

Instruction.

To the extent that any information called for by this Item regarding such servicer or trustee is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 6.02 containing such information within four business days after the information is determined or becomes available.

Item 6.03 Change in Credit Enhancement or Other External Support.

(a) *Loss of existing enhancement or support*. If the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement or support specified in Item 1114(a)(1) through (3) of Regulation

AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) that was previously applicable regarding one or more classes of the asset-backed securities has terminated other than by expiration of the contract on its stated termination date or as a result of all parties completing their obligations under such agreement, then disclose:

(1) the date of the termination of the enhancement;

(2) the identity of the parties to the agreement relating to the enhancement or support;

(3) a brief description of the terms and conditions of the enhancement or support that are material to security holders;

(4) a brief description of the material circumstances surrounding the termination; and

(5) any material early termination penalties paid or to be paid out of the cash flows backing the asset-backed securities.

(b) *Addition of new enhancement or support*. If the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware that any material enhancement specified in Item 1114(a)(1) through (3) of Regulation AB (17 CFR 229.1114(a)(1) through (3)) or Item 1115 of Regulation AB (17 CFR 229.1115) has been added with respect to one or more classes of the asset-backed securities, then provide the date of addition of the new enhancement or support and the disclosure required by Items 1114 or 1115 of Regulation AB, as applicable, with respect to such new enhancement or support.

(c) *Material change to enhancement or support*. If the depositor (or servicer if the servicer signs the report on Form 10-K (17 CFR 249.310) of the issuing entity) becomes aware that any existing material enhancement or support specified in Item 1114(a)(1) through (3) of Regulation AB or Item 1115 of Regulation AB with respect to one or more classes of the asset-backed securities has been materially amended or modified, disclose:

(1) the date on which the agreement or agreements relating to the enhancement or support was amended or modified;

(2) the identity of the parties to the agreement or agreements relating to the amendment or modification; and

(3) a brief description of the material terms and conditions of the amendment or modification.

Instructions.

1. Disclosure is required under this Item whether or not the registrant is a party to any agreement regarding the enhancement or support if the loss, addition or modification of such enhancement or support materially affects, directly or indirectly, the asset-backed securities, the pool assets or the cash flow underlying the asset-backed securities.

2. To the extent that any information called for by this Item regarding the enhancement or support is not determined or is unavailable at the time of the required filing, the registrant shall include a statement to this effect in the filing and then must file an amendment to its Form 8-K filing under this Item 6.03 containing such information within four business days after the information is determined or becomes available.

3. The instructions to Items 1.01 and 1.02 of this Form apply to this Item.

4. Notwithstanding Items 1.01 and 1.02 of this Form, disclosure regarding changes to material enhancement or support is to be reported under this Item 6.03 in lieu of those Items.

Item 6.04 Failure to Make a Required Distribution.

If a required distribution to holders of the asset-backed securities is not made as of the required distribution date under the transaction documents, and such failure is material, identify the failure and state the nature of the failure to make the timely distribution.

Item 6.05 Securities Act Updating Disclosure.

Regarding an offering of asset-backed securities registered on Form S-3 (17 CFR 239.13), if any material pool characteristic of the actual asset pool at the time of issuance of the asset-backed securities differs by 5% or more (other than as a result of the pool assets converting into cash in accordance with their terms) from the description of the asset pool in the prospectus filed for the offering pursuant to Securities Act Rule 424 (17 CFR 230.424), disclose the information required by Items 1111 and 1112 of Regulation AB (17 CFR 229.1111 and 17 CFR 229.1112) regarding the characteristics of the actual asset pool. If applicable, also provide information required by Items 1108 and 1110 of Regulation AB (17 CFR 229.1108 and 17 CFR 229.1110) regarding any new servicers or originators that would be required to be disclosed under those items regarding the pool assets.

Instruction.

No report is required under this Item if substantially the same information is provided in a post-effective amendment to the Securities Act registration statement or in a subsequent prospectus filed pursuant to Securities Act Rule 424 (17 CFR 230.424).

Section 7 - Regulation FD

Item 7.01 Regulation FD Disclosure.

Unless filed under Item 8.01, disclose under this item only information that the registrant elects to disclose through Form 8-K pursuant to Regulation FD (17 CFR 243.100 through 243.103).

Section 8 - Other Events

Item 8.01 Other Events.

The registrant may, at its option, disclose under this Item 8.01 any events, with respect to which information is not otherwise called for by this form, that the registrant deems of importance to security holders. The registrant may, at its option, file a report under this Item 8.01 disclosing the nonpublic information required to be disclosed by Regulation FD (17 CFR 243.100 through 243.103).

Section 9 - Financial Statements and Exhibits

Item 9.01 Financial Statements and Exhibits.

List below the financial statements, pro forma financial information and exhibits, if any, filed as a part of this report.

(a) Financial statements of businesses acquired.

(1) For any business acquisition required to be described in answer to Item 2.01 of this form, financial statements of the business acquired shall be filed for the periods specified in Rule 3-05(b) of Regulation S-X (17 CFR 210.3-05(b)) or Rule 8-04(b) of Regulation S-X (17 CFR 210.8-04(b)) for smaller reporting companies.

(2) The financial statements shall be prepared pursuant to Regulation S-X except that supporting schedules need not be filed. A manually signed accountant's report should be provided pursuant to Rule 2-02 of Regulation S-X (17 CFR 210.2-02).

(3) With regard to the acquisition of one or more real estate properties, the financial statements and any additional information specified by Rule 3-14 of Regulation S-X (17 CFR 210.3-14) or Rule 8-06 of Regulation S-X (17 CFR 210.8-06) for smaller reporting companies.

(4) Financial statements required by this item may be filed with the initial report, or by amendment not later than 71 calendar days after the date that the initial report on Form 8-K must be filed. If the financial statements are not included in the initial report, the registrant should so indicate in the Form 8-K report and state when the required financial statements will be filed. The registrant may, at its option, include unaudited financial statements in the initial report on Form 8-K.

(b) Pro forma financial information.

(1) For any transaction required to be described in answer to Item 2.01 of this form, furnish any pro forma financial information that would be required pursuant to Article 11 of Regulation S-X (17 CFR 210) or Rule 8-05 of Regulation S-X (17 CFR 210.8-05) for smaller reporting companies.

(2) The provisions of paragraph (a)(4) of this Item 9.01 shall also apply to pro forma financial information relative to the acquired business.

(c) Shell company transactions. The provisions of paragraph (a)(4) and (b)(2) of this Item shall not apply to the financial statements or pro forma financial information required to be filed under this Item with regard to any transaction required to be described in answer to Item 2.01 of this Form by a registrant that was a shell company, other than a business combination related shell company, as those terms are defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), immediately before

that transaction. Accordingly, with regard to any transaction required to be described in answer to Item 2.01 of this Form by a registrant that was a shell company, other than a business combination related shell company, immediately before that transaction, the financial statements and pro forma financial information required by this Item must be filed in the initial report. Notwithstanding General Instruction B.3. to Form 8-K, if any financial statement or any financial information required to be filed in the initial report by this Item 9.01(c) is previously reported, as that term is defined in Rule 12b-2 under the Exchange Act (17 CFR 240.12b-2), the registrant may identify the filing in which that disclosure is included instead of including that disclosure in the initial report.

(d) Exhibits. The exhibits shall be deemed to be filed or furnished, depending on the relevant item requiring such exhibit, in accordance with the provisions of Item 601 of Regulation S-K (17 CFR 229.601)and Instruction B.2 to this form.

Instruction.

During the period after a registrant has reported a business combination pursuant to Item 2.01 of this form, until the date on which the financial statements specified by this Item 9.01 must be filed, the registrant will be deemed current for purposes of its reporting obligations under Section 13(a) or 15(d) of the Exchange Act (15 U.S.C. 78m or 78o(d)). With respect to filings under the Securities Act, however, registration statements will not be declared effective and post-effective amendments to registrations statements will not be declared effective unless financial statements meeting the requirements of Rule 3-05 of Regulation S-X (17 CFR 210.3-05) are provided. In addition, offerings should not be made pursuant to effective registration statements, or pursuant to Rules 505 and 506 of Regulation D (17 CFR 230.505 and 230.506) where any purchasers are not accredited investors under Rule 501(a) of that Regulation, until the audited financial statements required by Rule 3-05 of Regulation S-X (17 CFR 210.3-05) are filed; provided, however, that the following offerings or sales of securities may proceed notwithstanding that financial statements of the acquired business have not been filed:

(a) offerings or sales of securities upon the conversion of outstanding convertible securities or upon the exercise of outstanding warrants or rights;

(b) dividend or interest reinvestment plans;

(c) employee benefit plans;

(d) transactions involving secondary offerings; or

(e) sales of securities pursuant to Rule 144 (17 CFR 230.144).

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

_____
(Registrant)

Date _____

_____
(Signature)*

*Print name and title of the signing officer under his signature.