IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

Record No. 120208

ONLINE RESOURCES CORP.,
Appellant,

v.

MATTHEW P. LAWLOR,
Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. There was no "change in control" (Assign. Err. 1, 6).

A. Lawlor cannot say *when* the alleged change in control occurred.

Lawlor never says *when* the alleged change in control occurred. He suggests that the question is too "intensely factual" (Lawlor Br. at 19) to make him pinpoint the event, and that the jury could properly have found a change in control somewhere along the way. But allowing a $5 million verdict to stand without requiring that showing would ignore the contract language and flout fundamental principles of corporate governance.

B. Lawlor failed to prove that ORC was "required" to report a change in control to the SEC on Form 8-K (Counts 2 & 3).

The 1999 Stock Plan (Count 2) and 2009 Severance Agreement (Count 3) — but not the 2005 Stock Plan (Count 1) — said that a change in control would be deemed to occur if it was of a nature that was "required" to be reported to the Securities and Exchange Commission, under the Securities Exchange Act of 1934, on Form 8-K. (JA 4957, 4963; ORC Br. at 26-27 & Table 1.) Form 8-K must be filed within "four business days" of the event. (ORC Br. at Tab 3, Form 8-K at 2.) Lawlor complains that Form 8-K was not in the record. But the form was promulgated by the SEC pursuant to federal law and is a legal document of which the Court may take judicial notice. See Rule 2:202. Lawlor forgets that *he* had the burden

to prove that the Company was "required" to file this form. His failure to introduce the form, let alone to identify what change-in-control event should have been reported, reflects his own failure of proof, not the Company's.

Lawlor argues that the change in control occurred sometime between when TCP acquired its interest in 2006 and when Lawlor departed in 2010. But that is too vague to satisfy his burden of proof. Lawlor was entitled to change-in-control benefits only if his employment was terminated during the "Protected Period," which was "twelve months after the date of such Change in Control." (JA 4958.) So the relevant period was February 19, 2010, Lawlor's termination date (JA 1381), to February 19, 2009, twelve months earlier. That eliminates any argument for an *earlier* change-in-control event, such as in 2006, when TCP first acquired a 14% voting interest in the Company (JA 1388), or in December 2008, when TCP increased its voting power to 22% and asserted that the Company would need its consent to adopt a shareholders' rights plan (JA 4976-77).

Focusing on the relevant "Protected Period," there was no change-in-control event as a matter of law. First, there was no change in control when TCP won the proxy fight in May 2009, resulting in the election of three new directors to the 10-member Board, because the remaining seven directors continued in office. Lawlor is forced to concede this, given that a

staggered Board like ORC's "prevent[s] an insurgent from obtaining control of the board in one election." *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 604 (Del. 2010). Lawlor now says that he "did not contend below that the election of three TCP directors in the proxy contest was a change in control," only that it was "one of several actions by which TCP asserted control . . . ." (Lawlor Br. at 20-21.) But Lawlor cannot have it both ways; he cannot both admit that the election of the three TCP nominees was *not* a change in control while maintaining that it somehow evidenced one.

Second, Lawlor incorrectly argues that a change in control occurred when TCP acquired additional stock, in December 2009, that marginally increased its voting power to 24% (JA 4530), up from 22% the previous year (JA 4976). (Lawlor Br. at 8-9, 20.) Lawlor does not point to *any* consequence of that small increase, let alone cite any authority that the Company was "required" to file a Form 8-K telling the SEC that the incremental stock acquisition now gave TCP "control" of the Company. And Lawlor just ignores that the contract documents — which he admits "control[]" whether a change in control occurred (Lawlor Br. at 18) — make clear that acquiring 24% voting power is *not* a change-in-control event. Under the 2009 Severance Agreement, signed when TCP *already* had 22% voting power, stock ownership did not change control unless the

shareholder acquired "50% or more" of the voting power. (JA 4957.) The 2005 Stock Plan used the same 50% trigger (JA 5045), while the 1999 Stock Plan used a 25% figure (JA 4963), which was still higher than TCP's 24%. These facts clearly distinguish this case from the three federal cases on which Lawlor relies, as shown in our opening brief. (ORC Br. at 30-33.)

Third, given that the Board of Directors, not the CEO, controls the corporation (ORC Br. at 14-16), Lawlor now concedes that his removal as CEO was not "itself a change in control." (Lawlor Br. at 21.) Yet he maintains that it is still "evidence" that TCP had acquired control. (*Id.*) But as shown above, TCP's winning the proxy contest was insufficient to change control under *Versata*. So Lawlor is forced to fall back on the same argument he invoked to defeat the motion to strike below — that a change-in-control event occurred when the TCP directors succeeded in "persuading" the other directors to remove him as CEO. (JA 3248-49.)

Putting aside that the directors uniformly testified, without contradiction, that they voted to remove Lawlor because of the Company's poor financial performance (ORC Br. at 10), Lawlor has come forward with no authority that a reportable change-in-control event occurs when minority directors *persuade* the majority to pursue unanimous action. Nor does he

dispute that such a rule would wreak havoc on publicly traded companies that must report change-in-control events to the SEC within four days.

Lawlor also ignores that, if any of these circumstances really amounted to a change in control, Lawlor himself had the duty to report it to the SEC, since all of these event occurred while he was the Chairman of the Board. (ORC Br. at 29.) He never did.

C. Lawlor's resignation did not deprive the incumbents of majority control (Counts 1-3).

1. Leitner was an incumbent as a matter of law.

Lawlor wrongly argues that "there was a factual dispute as to Leitner's status as an Incumbent Board member which the jury could reasonably have resolved in Lawlor's favor." (Lawlor Br. at 28.) Under the 2009 Severance Agreement, Leitner was a member of the "Incumbent Board" — not because he liked or supported Lawlor (he didn't) — but because Leitner, by definition, was a director "as of the date" of that agreement. (JA 4957.) Similarly, under the plain language of the 1999 and 2005 Stock Plans (JA 4963, 5045), Leitner became a member of the "Incumbent Board" for purpose of those agreements because his election in 2006 was approved by a vote of the requisite number of directors comprising the then-Incumbent Board (ORC Br. at 33-34); Leitner was "elected to the Board unanimously" by the other directors (JA 1573:2-3,

5160, 5165, 5168). Lawlor testified that one of TCP's agents told him to choose "somebody internal" to TCP and "recommend[ed]" Leitner. (2483-84). But that does not change the fact that *all* of the directors unanimously elected Leitner to fill the seat, triggering his incumbent status.

2. The incumbent directors continued to control the Board by a 5-3 majority.

Lawlor does not dispute that he resigned early from the Board intending to claim that his own resignation triggered a "change in control." (ORC Br. at 12.) Nor can he dispute that the incumbent directors (counting Leitner) continued to exercise *actual* control over the company by a 5-3 majority, with two empty seats. But he argues that the Incumbent Board nonetheless lost "majority" control because 5 is not a majority of 10. He insists that the term *Board* in "majority of the Board" means the *Whole Board*, including vacant seats. (Lawlor Br. at 24.)

Lawlor's argument is wrong because it requires defining *Board* differently for two provisions in the same paragraph. For purposes of *Incumbent Board,* Lawlor claims that empty seats are omitted and only actual individuals are counted. But for purposes of *majority of the Board,* Lawlor insists that empty seats are now counted and individuals ignored, as if *Board* there were read to mean *Whole Board.* The text does not support his asymmetrical construction.

Lawlor relies on the definition of "Board" as the "Board of Directors of the Company" (JA 4957, 4963, 5027), but that definition does not show that *majority of the Board* means majority of the *Whole Board* either. The definition does not refer to the *Whole Board,* let alone inject that concept into the phrases *Incumbent Board* or *majority of the Board.* As the Certificate of Incorporation and Bylaws show — tracking the Delaware General Corporation Law — when the Company intended to define *Board* for voting purposes by reference to the *Whole Board,* including empty seats, it said so expressly. (ORC Br. at 21-22.)

Lawlor tacitly concedes that measuring a majority vote by reference to the *Whole Board* is the exception, not the rule, when he says "*Some* Board actions require votes by majorities of all seats." (Lawlor Br. at 27 (emphasis added).) Exactly right; *some* do, but most do not. The Delaware Code and ORC's charter documents spell out those few instances when a majority vote of the *Whole Board* was required. And it was not required for determining a *majority of the Board* in any of the change-in-control agreements at issue here.

Lawlor's efforts to distinguish *Fischbein* are unpersuasive. *Fischbein v. First Chicago NBD Corp.*, 161 F.3d 1104 (7th Cir. 1998). It is true that *Fischbein* did not expressly address whether a *majority of the board* should

be measured by reference to the *Whole Board.* But *Fischbein* establishes the baseline principle that answers that question: "[a] change of corporate control takes place when a majority of the corporation's *existing directors* are replaced." *Id.* at 1105 (emphasis added). "That did not happen" in *Fischbein*, *id.*, and it did not happen here either.[1]

Because the change-in-control provisions do not measure *majority of the Board* by reference to the *Whole Board,* there is no ambiguity requiring resort to extrinsic evidence. And even if there were, the extrinsic evidence supported only the Company's interpretation, even excluding the evidence post-dating the 2009 Severance Agreement. (ORC Br. at 23-24.) Lawlor implies that the Company's General Counsel, Michael Bisignano, testified that he intended to draft the definition of *Board* in the 2009 Severance Agreement to refer to the *Whole Board*. (Lawlor Br. at 26 (citing JA 1771-73).) But that is not what he said. Bisignano simply repeated in response to counsel's questions the definition of *Board* as the *Board of Directors of the Company*. (JA 1771.) Lawlor cited no extrinsic evidence that *majority*

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[1] Lawlor found one change-in-control provision in dictum in another case that defined majority control by reference to a "majority of the number of *authorized directors* of the Company." *CalPERS v. Coulter*, 2005 Del. Ch. LEXIS 54, at *4 (2005) (emphasis added). But that simply confirms that when a corporation wants to define a majority vote requirement by reference to the *Whole Board,* it says so expressly.

of the Board really meant *majority of the Whole Board*.[2]

D. The argument was not waived below.

Lawlor is wrong that ORC's counsel "disclaimed any argument as to the 'issue of is it seats or is it people,' and stated, 'I think reasonable people can disagree on that and I won't argue that.'" (Lawlor Br. at 23 (quoting JA 4084).) Lawlor has spliced five lines together and omitted the key text in between: "there certainly is disagreement about what the contractual (unintelligible)." (JA 4084:3-5.) The "that" which counsel said he "won't argue" was not transcribed by the court reporter. (*See* ORC Br. at 25-26.)

This is not the "clear and unmistakable proof" that Lawlor must show to prove that ORC waived the objection below. *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 622-23, 499 S.E.2d 829, 833 (1998). Far from conceding the point, the Company argued, before and after the alleged waiver, that *no* change in control occurred as a matter of law. (JA 4081:7-18 (motion to strike), 672-82 (motion to set aside the verdict).) Had Lawlor believed that the passage he cited shows a waiver, he should have sought clarification of the unintelligible portion. Rule 5:11(d), (g). It was not ORC's burden to anticipate a waiver claim that Lawlor never raised below.

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[2] Lawlor's counsel emphasized in closing that "there's *no evidence* that anybody, when they were drafting these agreements, thought about what

II. It was wrong to instruct on *contra proferentem* (Assign. Err. 2).

Assuming for argument's sake that it was proper to let the jury decide whether *majority of the Board* included empty seats, instructing the jury to construe ambiguities against the draftsman was reversible error because Lawlor was on both sides of the transaction; he was the CEO and Chairman of the Board who presided over the drafting of each of the three agreements in question. And contrary to Lawlor's waiver argument, ORC raised this objection at the charging conference. (JA 3839:7 to 3940:10.)

Lawlor cites no Delaware authority holding that the chief executive of the company should personally benefit from an ambiguity in a document that fell under his management responsibility to prepare. The cases Lawlor cites involved insurance policies and security offerings that constitute the traditional case for *contra proferentem.*[3] Lawlor's CEO position, by

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the term 'board' meant other than the evidence in the contract itself which says board means board of directors." (JA 4247:14-18 (emphasis added).)

[3] *SI Mgmt. L.P. v. Charlebois,* 707 A.2d 37, 42 (Del. 1998) ("The policy behind this principle is that the insurer or the issuer . . . is . . . in control of the process of articulating the terms. The other party, whether it be the ordinary insured or the investor, usually has very little say about those terms except to take them or leave them or to select from limited options offered by the insurer or issuer. Therefore, it is incumbent upon the dominant party to make terms clear.") (quoting *Penn Mut. Life Ins. Co. v. Oglesby*, 695 A.2d 1146, 1149-50 (Del. Super. Ct. 1997)); *ConAgra Foods, Inc. v. Lexington Ins. Co.,* 21 A.3d 62, 72 & nn. 43-44 (Del. 2011) (stating that ambiguous insurance contract, even if negotiated, could be construed against the insurer as a last resort); *Nat'l Union Fire Ins. Co. v. Rhone-*

contrast, gave him ample opportunity to shape the text.

This is not a situation where "more than a scintilla" of evidence was presented to warrant the jury instruction (Lawlor Br. at 29), because Delaware law makes clear that *contra proferentem* is a doctrine of "last resort," "not a mechanistic device to be deployed whenever ambiguity arises." *Wilmington Firefighters Ass'n, Local 1590 v. City of Wilmington*, No. 19035, 2002 Del. Ch. LEXIS 29, at *34 (Mar. 12, 2002). "Rather, the doctrine's utility hinges upon the extent to which it is helpful in divining the intent of the contracting parties." *Id.* Lawlor also has no answer to the problem that allowing him to invoke the doctrine here would lead to the perverse result that the CEO would benefit personally from an ambiguity in documents he was charged with preparing for the Company's benefit.

III. Lawlor's expert should have been excluded (Assign. Err. 4).

Lawlor does not mention *CNH America LLC v. Smith*, 281 Va. 60, 704 S.E.2d 372 (2011), but it controls the outcome here. Lawlor does not dispute that the critical input to James Reda's damages calculation was the value of ORC's stock, and that Reda admitted that "I'm not a valuation

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Poulenc Basic Chems. Co., 1992 WL 22690, at *8 (Del. Super. Jan. 16 1992) ("the contra proferentem doctrine applies to the interpretation of ambiguous language included in the insurance policies . . . where such language is standardized policy language drafted by the insurance industry and there is no evidence that the language in question was negotiated").

expert." (JA 193:12-13; ORC Br. at 39-40.) That admission should have rendered Reda's opinion inadmissible, just like the expert's opinion was inadmissible in *CNH America* once the hydraulics expert admitted he was not an expert in lawn-mower hydraulics. 281 Va. at 68, 704 S.E.2d at 376.

Lawlor's defense of Reda's use of the $10.53 valuation, from a forward-looking Raymond-James appraisal, lacks merit. Lawlor ignores *SunTrust Bank v. Farrar*, 277 Va. 546, 554-55, 675 S.E.2d 187, 190-91 (2009), which invalidated reliance on such speculative appraisals. His argument that it was harmless error because the jury relied on the $7.01 figure instead is likewise incorrect. The jury saw three stock values, the $7.01 and $10.53 figures offered by Reda, and a $3.80 figure that the Company's expert, Kristen Kucsma, testified was the highest appropriate figure. (JA 3195, 3200-01, 3273-74.) Because there is no way to know if eliminating the high number would have influenced the jury's award of damages based on the middle number, the error was not harmless, particularly "given the substantial amount of the verdict." *Greater Richmond Transit Co. v. Wilkerson*, 242 Va. 65, 72, 406 S.E.2d 28, 33 (1991).

Lawlor's argument that Reda correctly chose the $7.01 share price — the highest stock price between the time Lawlor was terminated and the date of trial — is also incorrect and misses the point. It is legally wrong

because Delaware law does not allow the shareholder to "cherry-pick" when "the share price was highest to maximize damages." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1023 n.8 (Del. 2001).[4] And it misses the point that, once Reda admitted he was not a valuation expert, he should not have been permitted to choose a particular stock valuation for his key input, despite counsel's after-the-fact claim that he chose correctly.

IV. Lawlor failed to prove unjust enrichment (Assign. Err. 5).

ORC did not waive its argument that Lawlor's unjust enrichment claim failed for lack of evidence on the second element — that the Company should "reasonably have expected to repay" Lawlor for the company-wide pay cut that he instituted. (ORC Br. at 42-43.) ORC argued that point on its motions to strike, before the claim was submitted to the jury. (JA 3235-38, 4080.) It was error to deny the motion. What is more, the jury instruction was consistent with this principle, not a waiver of it. The instruction required proof that "the Defendant accepted or retained the benefit *under circumstances which would make it inequitable for the Defendant to retain the benefit* without paying for its value." (JA 4118 (emphasis added).) It would be inequitable to undo a pay cut Lawlor himself instituted absent

[4] *See id.* at 1021-29 (calculating damages for breach of stock-sale agreement by difference between (1) highest intermediate share price

proof that the Company should reasonably have expected to repay him.

But there was no such evidence to support the verdict here. Lawlor did *not* "testif[y] that ORC had an expectation of paying him back." (Lawlor Br. at 41 (citing JA 2925-29).) His testimony concerned his *own* expectations. (*E.g.,* JA 2926:6-7 ("I had the understanding"), 2927:6-7 ("I had every reason to believe").) Lawlor forgets his own trial testimony that the Company had "no legal obligation" to repay the pay cut. (JA 2930-32.) That admission should have been dispositive.

V. The attorneys' fees award was improper (Assign. Err. 7-8).

It was unprecedented to permit an amended complaint to be filed, adding a new "Count IX" (JA 470, 582), three months after the jury verdict and a month after the trial court denied Lawlor's post-trial fee petition for failure to plead the basis for fees under Rule 3:25. This issue is not governed by the abuse-of-discretion standard because nothing in Rules 3:25 or 1:8 permits post-verdict amendments. *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 468, 344 S.E.2d 916, 918 (1986). What happened below not only gutted the purpose of Rule 3:25 — to require plaintiffs to state the specific basis of their fee claim — but operated as a "gotcha," since the

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during reasonable period following the breach and (2) average market price during a reasonable period when the shares were permitted to be sold).

Company had no understanding that Lawlor would be seeking his fees for claims beyond the 2009 Severance Agreement. (ORC Br. at 48-49.)

Even if the fee claim were not barred under Rule 3:25, Lawlor has failed to show that the Delaware cases on which he relies permit a contractual fee-shifting provision to justify fees on claims that are *unrelated* to the contract in question, like the unjust enrichment and wrongful termination claims in this case. (*See* ORC Br. at 47-48.) Lawlor has also failed to distinguish *Ulloa v. QSP, Inc.*, 271 Va. 72, 81-83, 624 S.E.2d 43, 49-50 (2006), where the fee-shifting provision, just as in this case, warranted fees in relation only to the "action" to enforce the contract, not other causes of action in the same case, no matter how "intertwined."

Assuming he has to apportion fees to Count 3, Lawlor urges only a 2.3% fee deduction — $49,160 from a $2.13 million fee award. But that paltry discount is based on only *three* pleadings in the whole case. (JA 717). Lawlor never apportioned fees for the lion's share of the work, including the 11-day trial, as the Company complained below. (JA 890-91.) Lawlor waived his fee claim by refusing to apportion, and it was plain error for the trial court to rule that no apportionment was necessary.

CONCLUSION

The Court should reverse and enter final judgment.

Respectfully submitted,

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2. On August 24, 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 15 pages.

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