

BEFORE THE NORTH CAROLINA  
OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION  
RALEIGH, NORTH CAROLINA



COMMISSIONER OF LABOR FOR THE )  
STATE OF NORTH CAROLINA, )  
COMPLAINANT, )

v. )

FLATIRON-LANE, A JOINT VENTURE, )  
*and its successors.* )  
RESPONDENT. )

INSPECTION NO. 315968730

CSHO ID. L1173

OSHANC: 2011-5263

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**ORDER**

These matters came on to be heard and were heard before Administrative Law Judge Ellen R. Gelbin on March 13, 2013, in Winston-Salem, North Carolina. Complainant was represented by Jill F. Cramer and Linda Kimbell, Assistant Attorney Generals, Labor Section, North Carolina Department of Justice. Also present for complainant were: Ted Hendrix, Safety and Health Compliance Officer (CO) and Paul Sullivan, North Carolina Department of Labor (NCDOL), OSHA Division (NCOSH). Respondent was represented by Phillip Van Hoy of Van Hoy, Reutlinger, Adams & Dunn in Charlotte, North Carolina. Also present for respondent were employees Nick Kakasenko, Steve DiMuro, William Vee, Jesus Rivera, and Clayton Heitz.

**AFTER REVIEWING** the record file, after hearing the evidence and judging the credibility of witnesses, after hearing the arguments of counsel, and, after reviewing relevant legal authorities, the undersigned makes the following:

**FINDINGS OF FACT**

1. Respondent, Flatiron-Lane, is a joint venture between Flatiron Construction Corporation (Flatiron) and The Lane Construction Corporation (Lane).
2. Flatiron is a Delaware corporation which was authorized to do business in North Carolina on February 7, 2002. It is active and current.
3. Lane is a Connecticut corporation, which was authorized to do business in North Carolina on June 27, 1975. It is active and current.
4. Respondent Flatiron-Lane maintains a place of business in Salisbury, North Carolina.

DATABASE

5. Respondent is a general contractor engaged, in part, in the business of constructing bridges.
6. Respondent is an "employer," and, respondent's workers are "employees," within the meaning of N.C.G.S. §95-127(9-10)
7. Flatiron and Lane each employ in excess of 1,000 (one-thousand) workers; and, the Joint Venture employed about 100 workers at the job-site at issue.
8. The Venture moves some employees to new job sites, where it acquires new-hires.
9. Respondent signed a safety partnership with the NCDOL on August 16, 2011.

### **Background and Inspection**

10. Between August 25<sup>th</sup> and September 12<sup>th</sup>, 2011, a qualified North Carolina Department of Labor Health and Safety Compliance Officer (CO) Ted Hendrix, inspected respondent's work site located at 105 Jacobs Lambe Lane, Salisbury, North Carolina.
11. The job site was the construction of new 1-85 bridges over the Yadkin River.
12. CO Hendrix properly entered onto respondent's site and properly conducted the inspection pursuant to a non-fatality catastrophe report. The CO held an opening conference with safety manager Clayton Heights and project manager Adam Mathews in which the CO presented his credentials. Mr. Mathews consented to the inspection.
13. The CO interviewed employees on a site at the time of the accident, including:
  - a. William "Willy" Vee - foreman and licensed crane operator;
  - b. William Robert "Bobby" Woolwine, licensed crane operator;
  - c. Edwin Lopez, laborer;
  - d. Tomas Reith, night-shift carpenter;
  - e. Cecil "Scott" Chelette - carpenter;
  - f. Clarence Evans- licensed crane operator; and, by telephone,
  - g. Feliciano Moran-Moran (Moran) - working as foreman, certified crane signaler, and injured worker.
14. The trestle bridge and the side-platform (half-finger #4), on which the hazard existed, constituted staging areas for construction of the new bridge built above.
15. The trestle bridge consisted of a "main-line," 36 feet wide, which ran parallel to the new interstate bridge being built. (C#1, center of photo looking northbound; R#2, trestle bridge main line, red-striped horizontal image)

16. Additional staging areas (fingers) were constructed perpendicular to and jutting out from the main-line. These fingers were 26 feet wide and 70 feet long.
17. Each finger was constructed as two halves, tied together in the middle. (C#3)
18. During the course of the project, respondent employees would construct and tear-down 20 fingers on each side of the main trestle.
19. When the bridge support above is complete, the end of a finger is removed; and the remaining half-finger becomes the staging area for the bridge supports above it.
20. The main-line and fingers were generally protected by appropriate cable guardrails.
21. Respondent tied onto the cable strips of yellow "caution tape" (like that used by police at crime scenes) to enhance visibility of the cable lines. (C#1-4, 7-8)
22. The exposed end of the remaining "half-finger" must have the guardrails replaced, or signalers must wear personal protective equipment (PPE) as a guard against a fall from a height of over 6 feet. (C#4 and 5, circled portions)
23. The main-line, with the fingers jutting out from the side, looked like a sharks "saw-tooth," where each tooth represents a finger.
24. The new bridge stood free from the main-line and its fingers. It was being constructed between the fingers by cranes positioned on the fingers to work in tandem. (C#3, 6, 9) For reference, as shown in Exhibit C#3:
  - a. The main-line traveled north-bound, vertically down the right side of the photograph;
  - b. One bright red crane was on finger #5 (center of the photograph); and, its tandem-partner, a faded red crane, was parked on the previous sequential half-finger #4 (in the right center portion of the picture, sporting new, post-accident, wooden guard rails);
  - c. Respondent moved the cranes into these positions to allow the night crew to: (1) work on the north bound highway above; (2) to dismantle the fingers and half-fingers no longer necessary as staging areas; and (3) to rebuild the fingers further along the main-line to enable continuing work on the span; and
  - d. The free-standing concrete columns, caps, and, 3 of 7 eventual steel girders (I-beams) supported the north-bound lanes of the new bridge being built parallel to the main-line and, in the direction of and toward, the viewer.

**Inspection**

25. During the period between August 25, 2011, and September 12, 2011, the CO inspected respondent's work site located at 105 Jacobs Lambe Lane, Salisbury, North Carolina.
26. In response to a call about a non-fatality catastrophe report, the CO properly entered onto respondent's work-site to conduct the inspection.
27. The night crew had removed the end of finger #4 northbound, creating half-finger #4;
28. Night-shift carpenter, Mr. Reith, informed the night-crew superintendent, Mr. Chris Downey, and the day-shift superintendent, Mr. Anthony Cruz, that the night-shift did not have time to reconstruct the cable guardrails or fashion any fall protection on the edges and end of half-finger #4. Mr. Reith told them that:
  - a. In order to caution employees of the hazards on the half-finger, he had wrapped two rows of sturdy red and black nylon mesh "warning tape" between two construction barrels at the intersection of the main line trestle and half-finger #4(barrel-tape assembly); and
  - b. The night-shift parked the crane on the half-finger behind the tape (R#5).
29. Mr. Downey also alerted construction manager, Mr. Jim Barton, to the hazard.
30. Without constructing guard rails on half-finger #4, Mr. Vee removed the barrel-tape assembly so that the crane could be moved to another location on the work site.
31. Mr. Woolwine walked onto the half-finger and backed off the crane.
32. Mr. Vee replaced the barrel-tape assembly, which remained throughout the work shift.
33. Respondent did not place guard rails nor provide other fall protection on half-finger #4.
34. Toward the end of the day-shift, Mr. Vee, Mr. Chelette, and Mr. Woolwine were tasked with moving the cranes back to half-finger #4 and finger #5 to be used by the night crew.
35. Recognizing the unsafe condition, Mr. Vee generated a WAP calling for Mr. Vee to stand "in the middle of half finger to turn the crane." Once turned, "walk onto the main line, and finish walking crane into place." (C#12)
36. Mr. Vee discussed with his crew the method for parking the crane on the half-finger. (C#13)

37. Mr. Vee and Mr. Chelette used two-way radios to communicate with the crane operators from the main-line (i.e., behind the crane and out of danger).
38. Around 4:30 p.m. Mr. Vee removed the barrel-tape assembly.
39. From the main-line Mr. Vee signaled the crane to turn from the main-line to half-finger #4.
40. In mid-turn Mr. Vee learned that Mr. Chelette needed assistance at finger #5. (C#9)
41. Mr. Vee "alerted" Bobby Woolwine to stop movement onto half-finger #4.
42. Leaving finger #4 as it was, Mr. Vee walked to finger #5, where he instructed Mr. Chelette to finish signaling the tandem crane at half-finger #4.

**Mr. Feliciano Moran-Moran (Mr. Moran) - Injured Worker**

43. Mr. Moran signed the attendance sheets for all relevant safety meetings (R#6-14).
44. Those assigned to Mr. Vee's work-group on the day of the accident were: Mr. Lopez, Mr. Chelette, Mr. Jose Tapia Rojas, and Mr. Vee (R#15).
45. Respondent had never assigned Mr. Moran to Mr. Vee's group.
46. Mr. Moran was assigned to the crew working on top of the new bridge, several fingers, and approximately 100 feet further down the line (Finger #6 or 7). At no time during the day should his assigned work have taken him to half-finger #4;
47. Without respondent's invitation or assignment, and without notice to anyone, working-foreman and certified crane signaler, Mr. Moran, entered onto half-finger #4 and began signaling the crane.
48. Mr. Moran had the benefit of respondent's superior safety and health plan.
49. In the past Mr. Moran had written-up other employees for fall-protection violations.
50. On the morning of the accident, Mr. Moran complained to Mr. Woolwine about the night shift not replacing the cable guard rails after removing the extreme end of finger #4.
51. Mr. Moran was not wearing fall protection.
52. Mr. Moran stood on half-finger #4:

- a. Facing the crane;
  - b. With his back to the unprotected edges and end;
  - c. Began walking backwards; and,
  - d. Began signaling the crane to complete the turn and enter the half-finger (C#9).
53. Despite actual knowledge that the guardrails were down and that Mr. Vee had signaled him to stop the crane, Mr. Woolwine responded to Mr. Moran's signals.
54. Since Mr. Moran did not have a radio, he and Mr. Woolwine kept eye-to-eye contact.
55. Mr. Woolwine watched Mr. Moran walk from edge-to-edge repeatedly checking the sides of the crane: (1) to ensure approximately 1½ feet of clearance from the finger's edges; and (2) to ensure that the crane treads were set over the steel support beams.
56. Mr. Woolwine watched Mr. Moran walk backwards off the end of half-finger #4, where he fell 12 feet to the wetlands below.
57. The signaler was taken by ambulance to the hospital where he was admitted for fractures and multiple-system trauma requiring immobilization and hospitalization, among other things;
58. After the accident - and to abate the hazard immediately - respondent did the following:
- a. It immediately shut down work on the three-mile job and sent its laborers home;
  - b. It's management immediately viewed the scene, reviewed safety protocols, and, begin an internal investigation;
  - c. Carpenters, wearing fall protection, built guardrails around half-finger #4 (C#3);
  - d. It moved the crane onto half-finger #4 only after guardrails were built;
  - e. It changed policy so that "for all future half-fingers, the guardrails will be replaced immediately after the end of the finger is removed" (R#1, p. 6);
  - f. It terminated Mr. Moran for violating a safety absolute: "knowingly and willingly entering onto a walking/working surface which is 6' or more without fall protection;"
  - g. It suspended Mr. Woolwine for one week, without pay, for allowing Mr. Moran to "stay in significant harm's way resulting in injury"(R#4); and,

- h. It disciplined two other men (who no longer work there) for violating safety protocols.

**Violation of the Act**

59. Unprotected half-finger #4 constituted a hazard on the work site.
60. The hazard created the possibility of an accident, to wit: a fall from a height 6' or more.
61. The substantial probable result of an accident would be broken bones and multiple system trauma requiring hospital admission.
62. There was a feasible means of abatement, for example, rebuilding the guardrails or requiring crane signalers to wear fall-protection.
63. Under the Act and regulations, vinyl-mesh red and black "tape" wound around two barrels at the entrance to half-finger #3 was legally insufficient to meet the standard.
64. On November 17, 2011, the CO held a closing telephone conference with safety manager Clayton Heights and project manager Adam Mathews.
65. On November 22, 2011, as a result of the inspection, complainant, by and through Paul Sullivan, issued one citation carrying the following proposed penalties:

Citation 1, Item 1, Serious: 29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems, to wit: trestle half-finger #4 north bound - "where on August 25, 2011 a cable guardrail system was removed, exposing employees to a fall of 12 feet."

<i>Item</i>	<i>Standard</i>	<i>Abatement Date</i>	<i>Penalty</i>
1	29 CFR 1926.501(b)(1)	Immediate	\$2,700

66. The violation was alleged to be serious in that it was possible that an accident could occur and that there was a substantial probability that death or serious physical harm could result from such an accident.
67. One or more of respondent's employees was exposed to the hazard, to wit: Mr. Moran and Mr. Woolwine.
68. Respondent had actual knowledge of this hazardous condition.

69. According to the North Carolina DOL Operations Manual, the CO properly determined the Gravity Based Penalty for this violation to be \$3,000.00.
70. The CO assigned a severity rating of medium and a probability rating of low, because:
  - a. Only Mr. Moran was physically and proximately exposed to the danger point; and
  - b. Because the barrel-tape assembly had been placed across the opening to the half-finger and was in place for the entire shift, except for a few minutes:
    - i. In the morning while moving the crane;
    - ii. In the afternoon, while moving the crane back; and,
    - iii. In the afternoon while Mr. Vee walked up to finger #5.
  - c. Mr. Moran fell off the ledge in the few minutes after Mr. Vee walked up to finger #5.
71. The adjusted penalty of \$2,700.00 was properly proposed for this violation, after a 10% reduction was applied to the GBP for respondent's cooperation.
72. Respondent responsibly and immediately abated the violation.
73. Complainant properly calculated the proposed penalties pursuant to Chapter VI, Section B, of the Operations Manual.
74. Complainant properly applied the following adjustment factors to the gravity-based penalty to calculate the proposed adjusted penalty:
  - a. 0% credit for size;
  - b. 0% credit for safety and health programs;
  - c. 10% credit for cooperation; and,
  - d. 0% credit for history, for a total 10% adjustment;
75. The CO gave no credit for safety and health programs because, in accordance with the Operations Manual, no credit may be given if the accident and injury was causally related to the violations issued. Otherwise, respondent would have earned a 40% credit on this factor.
76. The CO gave no credit for history because one of the partners in the joint venture, Lane Construction Corporation, received a serious violation in 2010 related to the same North Carolina standard. (R#1, p. 7, Inspection #314374182)



**Respondent's Affirmative Defense**  
**Isolated Incident of Employee Misconduct**

77. Respondent submitted a timely Notice of Contest, dated December 20, 2011.
78. On or about January 3, 2012, complainant received "Respondent's/Employer's Statement of Position," which requested that formal pleadings be served.
79. Respondent filed formal pleadings which included numerous affirmative defenses.
80. Respondent presented evidence at the hearing regarding only one affirmative defense: to wit: "[t]he instant citation is based on conditions that, in whole or in part, resulted from isolated and unpreventable employee misconduct."
81. Respondent's safety and health program is superior, with "full management commitment," and, the following:
  - a. Respondent has written policies, procedures, and training programs for, among other things: powered industrial trucks, fall protection, CPR/First Aid, lockout/tagout, excavation, ladders, marine operations, overhead power lines, and, hazmat;
  - b. Respondent retains two full-time safety professionals, one of which speaks Spanish, who are dedicated to the project and are on site daily;
  - c. Safety professionals from the parent company conduct regular inspections;
  - d. Each time it moves to a new project, the Venture begins safety training anew for both long-term employees and new hires;
  - e. Respondent's Don't Walk By policy requires employees who recognize a hazard, a safety violation, or someone at risk to immediately report it to a foreman or supervisor, or, if he can do so safely, intercede to stop it;
  - f. Respondent provides "Level One" training to all employees including training videos on trestles, fall protection, crossing barriers, and body harnesses. The "Don't Walk By" policy is discussed (C#7 and 9);
  - g. Respondent provides "Level Two" training around the 45<sup>th</sup> day of a new hire's employment which includes fall protection, walking/working surfaces, rigging, hoisting, signs/flags, barriers, and the Don't Walk By policy;
  - h. After 90 days, new-hires receive "Level Three" reinforcement of their training.

- i. Respondent provides OSHA 10-hour training (R#12);
  - j. Respondent disciplines violations of the Don't Walk By policy with progressive steps which may result in termination of employment (R#7);
  - k. Respondent provides its training in English with Spanish interpretations;
  - l. Employees sign forms indicating their presence at training sessions;
  - m. For each new task, the foreman completes a Work Activity Plan (WAP);
  - n. Starting a new task, foremen discuss WAP hazards/safety protocols with their crew;
  - o. Respondent conducts accident investigations as needed;
  - p. Respondent enforces its job-site safety rules;
  - q. Respondent evinces superior hazard recognition and abatement;
  - r. Respondent properly places safety communication (signs, banners, etc.), first-aid equipment, and fire extinguishers throughout the job site; and,
  - s. Respondent observes strict provision and use of personal protective equipment.
82. Respondent proffered four WAPs generated by Mr. Vee, for tasks to be done on the day of the accident. (R#15) Mr. Moran's name did not appear on those four WAPs.
83. Respondent did not proffer WAPs for the tasks of building guardrails around half-finger #4, backing the crane off of half-finger #4, or reversing that process at the end of the shift.

### DISCUSSION

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the Commissioner to prove each element of the contested citation by the greater weight of the evidence." Rule .0514(a) of the NCOSH Rules of Procedure.

In order to prove that the respondent committed a serious violation of a specific standard, the Commissioner of Labor must prove by a preponderance of the evidence the following elements:

- (1) A hazard existed;
- (2) Employees were exposed;

- (3) The hazard created the possibility of an accident;
- (4) The substantial probable result of an accident would be death or serious physical injury; and,
- (5) The employer knew or should have known (applying the reasonable man test developed by the Court of Appeals in Daniel Construction Co., 2 OSHANC 311, 73 N.C. App. 426 (Ct. of Appeals 1984)) of the condition or conduct that created the hazard.

As outlined in paragraphs 1-83, above, complainant successfully presented a *prima facie* case on each element necessary to affirm Citation 1, Item 1.

### **Defense of Isolated Incident of Employee Misconduct**

The elements of the affirmative defense of "isolated incident of employee misconduct" are as follows:

- (1) the employer has work rules designated to prevent the violation;
- (2) the employer has adequately communicated those rules to employees;
- (3) the employer has taken steps to discover violations; and,
- (4) the employer has effectively enforced the rules when violations have been discovered.

The North Carolina Operations Manual, Chapter V, Section E. Respondent's evidence showed:

- (1) Respondent has a superior written safety program which includes fall protection;
- (2) Respondent's work rules are adequately communicated to employees through required attendance at safety meetings conducted bi-lingually;
- (3) Respondent has a "Don't Walk By - Take Action" policy which requires employees who recognize a hazard, a safety violation, or someone at risk to immediately report it to a foreman or supervisor; or if he can do so safely, intercede to stop it; and
- (4) Prior to the accident in this case, respondent, and, specifically the injured signaler Mr. Moran, had effectively enforced safety rules.

Respondent presented a *prima facie* case supporting each of the four prongs outlined in the operations manual necessary to establish a defense of isolated incident of employee misconduct. However, the North Carolina Court of Appeals has interpreted the defense to require employers to show, "that it had taken all feasible steps to prevent an accident from occurring ... ; and, that the employer had neither actual nor constructive knowledge of the violation." O.S. Steel Erectors v. Brooks, 84 N.C. App. 630, 635, 353 S.E.2d 869, 873 (1987)(emphasis added). Some degree of employee negligence or carelessness must be expected. Brooks v. Budd Piper Roofing Company, Inc., OSHANC 80 1039 (RB 1985).

Complainant carried its burden of proving by a preponderance of the evidence that: (1) respondent did not take all feasible steps to prevent an accident; and, (2) respondent had actual knowledge of the hazard for over 8 hours prior to the accident.

Only when an employee's conduct is so extraordinary that it cannot be conceivably considered ordinary conduct on the job and must be considered intentionally dangerous can the defense succeed. Brooks v. Rebarco, Inc., OSHANC 83-1039 (RB 1985)

Mr. Moran's activities were reasonably foreseeable given that:

- a. Respondent hired him as a certified crane signaler on the job-site;
- b. The task he was performing when he fell was a task which comes within respondent employee's job descriptions;
- c. The temporary barrier placed at the entrance to the half-finger was gone;
- d. No one verbally or physically prevented Mr. Moran from walking onto half-finger #4 nor reported the violation to respondent's management;
- e. Mr. Moran knew that it was critical that the crane properly be centered on the half-finger, such that: (1) the treads rested on the supporting steel girders; and (2) the clearance between the sides of the tractor and the edges of the platform were approximately 1 ½ feet; and,
- f. Had the guardrail at the end of the half-finger been in place, Mr. Moran would have been standing in an acceptable position to signal the crane.

The Act provides that guarding is required where employee exposure to a fall from a height over 6' is "possible." This includes the possibility of occasional, casual, or even inadvertent exposure. Budd-Piper Roofing, 216 NCOSH at 327 The access test is predicated on the recognition that "[s]ome carelessness and negligence is anticipated and expected." Id.

Most folks would not attempt to signal a crane forward while walking backward on an unprotected surface. However, it is conceivable that Mr. Moran and Mr. Woolwine - not privy to the WAP and wanting to jump in to assist their employer to finish up for the day - simply forgot about the unprotected sides and edges.

### CONCLUSIONS OF LAW

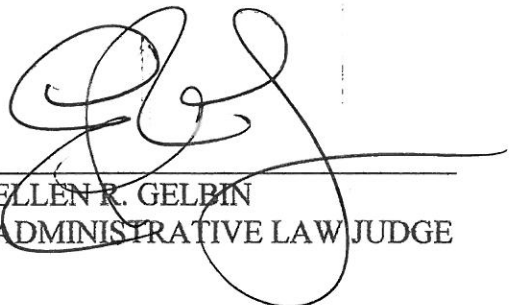
1. The foregoing Findings of Fact and Discussion are incorporated herein by reference, as Conclusions of Law, to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions of the Act.
3. Complainant met its burden of proof that respondent violated 29 CFR 1926.501(b)(1).

4. The CO properly found a serious violation, because there existed a substantial probability that death or serious physical harm could result from the failure of fall protection.
5. Respondent presented *a prima facie* case supporting the four prongs contained in the operations manual related to a defense of isolated incident of employee misconduct.
6. Complainant carried its burden of proving by a preponderance of the evidence that: (1) respondent did not take all feasible steps to prevent an accident; and (2) respondent had actual knowledge of the hazard for over 8 hours prior to the accident.
7. Complainant properly calculated the proposed penalty.

**BASED UPON** the foregoing **FINDINGS OF FACT, DISCUSSION,** and **CONCLUSIONS OF LAW, IT IS HEREBY ORDERED** as follows:

1. Citation 1, Item 1, is hereby **AFFIRMED**;
2. Respondent shall pay the penalties set forth therein; and
3. The penalties shall be paid within ten (10) days of the filing of this Order.

This the 11<sup>th</sup> day of April 2013



ELLEN R. GELBIN  
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER upon:

PHILLIP M VAN HOY  
VAN HOY REUTLINGER ADAMS & DUNN PLLC  
737 EAST BOULEVARD  
CHARLOTTE NC 28203

JILL CRAMER  
NC DEPARTMENT OF JUSTICE  
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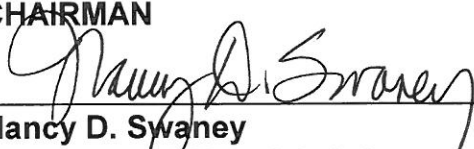
by depositing a copy of the same in the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR  
LEGAL AFFAIRS DIVISION  
1101 MAIL SERVICE CENTER  
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 18<sup>th</sup> DAY OF April 2013.

OSCAR A. KELLER, JR.  
CHAIRMAN

  
\_\_\_\_\_  
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