

Orchard Enterprises, Inc.  
Form DEFM14A  
June 18, 2010

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

**SCHEDULE 14A**

**Proxy Statement Pursuant to Section 14(a) of the  
Securities Exchange Act of 1934**

Filed by the Registrant  x  
Filed by a Party other than the Registrant  o  
Check the appropriate box:

- o Preliminary Proxy Statement
- o **Confidential, for Use of the Commission Only (as Permitted by Rule 14a-6(e)(2))**
- x Definitive Proxy Statement
- o Definitive Additional Materials
- o Soliciting Material under Rule 14a-12

**THE ORCHARD ENTERPRISES, INC.**

(Name of Registrant as Specified in Its Charter)

**N/A**

(Name of Person(s) Filing Proxy Statement, if other than the Registrant)

Payment of Filing Fee (Check the appropriate box):

- o No fee required.
  - x Fee computed on table below per Exchange Act Rules 14a-6(i)(1) and 0-11
- (1) Title of each class of securities to which transaction applies:  
Common Stock, par value \$0.01 per share, of The Orchard Enterprises, Inc. ( Common Stock )
- (2) Aggregate number of securities to which transaction applies:  
3,645,888 shares of Common Stock<sup>(1)</sup>

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(3) Per unit price or other underlying value of transaction computed pursuant to Exchange Act Rule 0-11 (set forth the amount on which the filing fee is calculated and state how it was determined):

The maximum aggregate value of the transaction was determined by multiplying 3,645,882 shares of Common Stock by \$2.05 per share, the per share cash merger consideration.<sup>(2)</sup> In accordance with Exchange Act Rule 0-11(c), the filing fee was determined by multiplying 0.00007130 by the amount of the preceding sentence.

(4) Proposed maximum aggregate value of transaction:  
\$7,474,070

(5) Total fee paid:  
\$532.90

x Fee paid previously with preliminary materials.

Check box if any part of the fee is offset as provided by Exchange Act Rule 0-11(a)(2) and identify the filing for which the offsetting fee was paid previously. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

(1) Amount Previously Paid:

(2) Form, Schedule or Registration Statement No.:

(3) Filing Party:

(4) Date Filed:

(1) Includes 5,963 shares of Common Stock that are issuable upon conversion of 1,789 shares of The Orchard Enterprises, Inc.'s Series A convertible preferred stock held by non-affiliates of Dimensional Associates, LLC. Each outstanding and unexercised stock option and stock appreciation right has an exercise price per share greater than \$2.05 and, consequently, holders thereof will not receive any cash merger consideration at the effective time of the merger. Nonetheless, pre-merger option and stock appreciation rights holders will receive a contingent right to their portion, if any, of any additional consideration in the event of a resale transaction, as described more fully herein. Because the amount of such additional consideration, if any, is not determinable at this time, it has not been included in the calculation of the maximum aggregate value of the transaction.

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**THE ORCHARD ENTERPRISES, INC.  
23 East 4<sup>th</sup> Street, 3<sup>rd</sup> Floor  
New York, New York 10003**

To Our Stockholders:

On July 29, 2010, The Orchard Enterprises, Inc. will hold its 2010 Annual Meeting of Stockholders at the offices of Chadbourne & Parke LLP, 30 Rockefeller Plaza, New York, New York 10112. The meeting will begin at 10:00 a.m., Eastern Daylight Time. The Board of Directors has fixed the close of business on June 11, 2010 as the record date for the purpose of determining the stockholders entitled to receive notice of and vote at the annual meeting and any adjournment or postponement of the annual meeting.

At the annual meeting, you will be asked to consider and vote upon a proposal to approve and adopt the Agreement and Plan of Merger dated as of March 15, 2010, as amended, among The Orchard Enterprises, Inc., a Delaware corporation, Dimensional Associates, LLC, a New York limited liability company, and Orchard Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Dimensional Associates, and the transactions contemplated thereby. Dimensional Associates is The Orchard's majority stockholder and held, along with its affiliates, approximately 54% of the voting power of The Orchard's voting stock as of the record date for the annual meeting.

If the merger is completed, our stockholders, other than Dimensional Associates and its affiliates and stockholders who properly exercise and perfect their appraisal rights under Delaware law, will have the right to receive, for each share of our common stock they hold at the time of the merger, \$2.05 in cash. In addition, each stockholder, other than Dimensional Associates and its affiliates and stockholders who properly exercise and perfect their appraisal rights under Delaware law, will receive a contingent right to receive additional consideration, under certain circumstances if Dimensional Associates or The Orchard or any of their affiliates enters into a commitment to sell at least 80% of The Orchard's voting securities or assets within six months of the consummation of the merger.

Upon completion of the proposed merger, we will cease to be a publicly traded company and Dimensional Associates will own more than 99% of our outstanding securities, assuming that none of the current Series A convertible preferred stock holders convert their shares into common stock. As a result, you will no longer have any direct or indirect equity interest in The Orchard or any interest in The Orchard's future earnings or growth, if any. Following completion of the merger, the registration of our common stock and our reporting obligations with respect to our common stock under the Securities Exchange Act of 1934 are expected to be terminated. In addition, upon completion of the merger, shares of our common stock will no longer be listed on the Nasdaq Stock Market.

After careful consideration, our Board of Directors has determined that the merger is advisable and that the terms of the merger are fair to, and in the best interest of, The Orchard and its stockholders and, therefore, has approved the merger agreement and the transactions contemplated thereby, including the merger, and recommends that you vote **FOR** approval of the merger agreement and the transactions contemplated thereby. This recommendation is based upon the unanimous recommendation of a special committee of the Board of Directors consisting of five independent and disinterested directors.

In addition, you are being asked at the annual meeting (1) to approve an amendment to the Certificate of Designations of our Series A convertible preferred stock, necessary to permit the transactions contemplated by the merger

agreement to be effected, (2) to elect seven (7) directors, each for a one (1) year term, until his successor is duly elected and qualified, (3) to ratify the appointment of Marcum LLP as our independent registered public accounting firm for fiscal year 2010 and (4) to approve the adjournment of the annual meeting, if necessary, to permit further solicitation and vote of proxies if there are insufficient votes at the time of the annual meeting to approve the merger and to approve and adopt the merger agreement. The proposal to

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amend our Certificate of Designations is conditioned upon and subject to the approval of the merger agreement and the transactions contemplated thereby. If the merger agreement proposal is not approved, the Certificate of Designations proposal will not be presented at the meeting. Our Board of Directors unanimously recommends that you vote (1) FOR the amendment to our Certificate of Designations, (2) FOR the election of each nominee for director as proposed, (3) FOR the ratification of our independent registered public accounting firm for fiscal year 2010 and (4) FOR the adjournment of the annual meeting, if necessary, to permit further solicitation and vote of proxies if there are insufficient votes at the time of the annual meeting to approve the merger and to approve and adopt the merger agreement. The accompanying notice of annual meeting and proxy statement provide information regarding the matters to be acted on at the annual meeting, including any adjournment or postponement of the annual meeting.

Please read these materials carefully.

YOUR VOTE IS VERY IMPORTANT, regardless of the number of shares you own. We cannot complete the merger unless the holders of a majority of all the outstanding shares of our voting securities entitled to vote on the matter, other than voting securities held by Dimensional Associates and its affiliates, vote to approve the merger and to approve and adopt the merger agreement. Once you have read the accompanying materials, please take the time to vote on the matters submitted to stockholders at the annual meeting, whether or not you plan to attend the annual meeting. I urge you to vote your shares promptly by using the telephone or Internet or by signing and returning the enclosed proxy card. Voting by proxy will not prevent you from voting your shares in person if you subsequently choose to attend the annual meeting in person. Your vote in person will revoke any proxy previously submitted.

If your shares are held in street name by your broker, bank or other nominee, your broker, bank or other nominee will be unable to vote your shares on the merger proposal or any of the other proposals, other than the ratification of the appointment of our independent registered public accounting firm, without instructions from you. You should instruct your broker, bank or other nominee to vote your shares by following the procedures provided by your broker, bank or other nominee.

Our Board of Directors and management urge you to vote FOR all of the proposals.

Sincerely,

Michael J. Donahue  
*Chair of the Special Committee and  
Chairman of the Board of Directors*

**Neither the Securities and Exchange Commission nor any state securities regulatory agency has approved or disapproved the merger, passed upon the merits or fairness of the merger or passed upon the adequacy or accuracy of the disclosure in this document. Any representation to the contrary is a criminal offense.**

The proxy statement is dated June 18, 2010, and is first being mailed to stockholders on or about June 21, 2010.

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# THE ORCHARD ENTERPRISES, INC.

**23 East 4th Street, 3rd Floor  
New York, New York 10003**

## **NOTICE OF ANNUAL MEETING OF STOCKHOLDERS To Be Held July 29, 2010**

To Our Stockholders:

On July 29, 2010, The Orchard Enterprises, Inc., a Delaware corporation (the Company or The Orchard ), will hold its 2010 Annual Meeting of Stockholders at the offices of Chadbourne & Parke LLP, 30 Rockefeller Plaza, New York, New York 10112. The meeting will begin at 10:00 a.m., Eastern Daylight Time, for the following purposes:

To consider and vote on a proposal to approve and adopt the Agreement and Plan of Merger dated as of March 15, 2010, as amended, among The Orchard Enterprises, Inc., a Delaware corporation, Dimensional Associates, LLC, a New York limited liability company, and Orchard Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Dimensional Associates, and to approve the merger and the other transactions contemplated thereby (the Merger Proposal ).

To approve an amendment to the Certificate of Designations of the Series A convertible preferred stock (the Certificate Amendment Proposal ) that would permit The Orchard to consummate the merger as contemplated by the merger agreement, without which amendment the merger consideration that our common stockholders would otherwise receive in the merger would be required to be allocated first to holders of our Series A convertible preferred stock, primarily Dimensional Associates, to satisfy their right to a liquidation preference. The Certificate Amendment Proposal is conditioned upon and subject to the approval of the Merger Proposal. If the Merger Proposal is not adopted, the Certificate Amendment Proposal will not be presented at the meeting.

To elect the seven (7) nominees named in the attached proxy statement to our Board of Directors to serve a one (1) year term.

4. To ratify the appointment of our independent registered public accounting firm for fiscal year 2010.

To approve the adjournment of the annual meeting, if necessary, to permit further solicitation and vote of

5. proxies if there are insufficient votes at the time of the annual meeting to approve the merger and to approve and adopt the merger agreement (the Adjournment Proposal ).

To transact such other business as may properly come before the meeting or any adjournment or postponement of the meeting.

Only stockholders who owned shares of our common stock or our Series A convertible preferred stock at the close of business on June 11, 2010 will be entitled to notice of, and to vote at, this meeting or any adjournments or postponements of the meeting. A complete list of stockholders entitled to vote at the meeting will be available for examination by any stockholder, for any purpose relating to the meeting, during ordinary business hours at our principal offices located at 23 East 4<sup>th</sup> Street, 3<sup>rd</sup> Floor, New York, New York 10003, at least ten days before the

meeting.

We urge you to read the accompanying proxy statement carefully as it sets forth details of each proposal to be voted on, including the proposed merger and other important information related to the merger.

Under Delaware law, if the merger is completed, holders of our common stock who do not vote in favor of approval and adoption of the merger agreement will have the right to seek appraisal of the fair value of their shares as determined by the Delaware Court of Chancery. In order to exercise your appraisal rights, you

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must (i) submit a written demand for an appraisal prior to the stockholder vote on the merger agreement, (ii) not vote in favor of approval and adoption of the merger agreement and (iii) comply with other Delaware law procedures explained in the proxy statement.

Your vote is important and we urge you to submit your proxy for voting at the annual meeting on the Internet, by telephone or by completing, signing, dating and returning your proxy card as promptly as possible by mail, whether or not you expect to attend the annual meeting. If you are unable to attend in person and you return your properly executed proxy card in time for the annual meeting, your shares will be voted at the annual meeting in accordance with your instructions as reflected on your proxy. Properly executed proxies that do not contain voting instructions will be voted FOR the approval of the Merger Proposal, FOR the approval of the Certificate Amendment Proposal, FOR each director nominee, FOR the ratification of our independent registered public accounting firm and FOR approval of the Adjournment Proposal. If your shares are held in street name by your broker, bank or other nominee, only that holder can vote your shares unless you obtain a valid legal proxy from such broker, bank or nominee. You should follow the directions provided by your broker, bank or nominee regarding how to instruct such broker, bank or nominee to vote your shares.

The merger is described in the accompanying proxy statement, which we urge you to read carefully. A copy of the merger agreement and the amendments to the merger agreement are attached as Appendices A, A-1 and A-2 to the proxy statement.

**Important Notice Regarding the Availability of Proxy Materials for the Annual Meeting of Stockholders to be Held on July 29, 2010. Our proxy statement is attached. Financial and other information concerning The Orchard is contained in (1) our Annual Report on Form 10-K for the fiscal year ended December 31, 2009 filed with the Securities and Exchange Commission (SEC) on March 25, 2010, as amended on April 30, 2010, a copy of which is enclosed with this proxy statement as part of our 2009 Annual Report to Stockholders and (2) our Quarterly Report on Form 10-Q for the quarter ended March 31, 2010 filed with the SEC on May 14, 2010, a copy of which is enclosed with this proxy statement. This proxy statement, our fiscal 2009 Annual Report and our Quarterly Report on Form 10-Q are available on our website at [www.theorchard.com/about/investor-relations](http://www.theorchard.com/about/investor-relations). Additionally, and in accordance with SEC rules, registered stockholders may access our proxy materials at [www.envisionreports.com/ORCD](http://www.envisionreports.com/ORCD) and beneficial stockholders may access our proxy materials at [www.edocumentview.com/ORCD](http://www.edocumentview.com/ORCD).**

Your Board of Directors recommends that you vote in favor of the five proposals outlined in the proxy statement. Please refer to the proxy statement for detailed information on each of the proposals.

By Order of the Board of Directors,

Alexis H. Shapiro  
*Senior Vice President, General Counsel and Secretary*  
New York, New York  
June 18, 2010



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## Summary Term Sheet

*References to The Orchard, the Company, we, our or us in this proxy statement refer to The Orchard Enterprises, Inc. and its subsidiaries unless otherwise indicated by context. The following summary, together with Questions and Answers About the Merger and the Annual Meeting of Stockholders highlights selected information contained in this proxy statement. You should carefully read this entire proxy statement and the other documents to which this proxy statement refers you for a more complete understanding of the matters being considered at the annual meeting. In addition, this proxy statement incorporates by reference important business and financial information about The Orchard. You may obtain the information incorporated by reference into this proxy statement without charge by following the instructions under Where You Can Find More Information.*

### **The Parties to the Merger (Page 62)**

The Orchard Enterprises, Inc., a Delaware corporation, controls and distributes more than 2.1 million music and audio recordings and approximately 5,000 titles of video programming through digital stores, such as Amazon, eMusic, Hulu, iTunes, Rhapsody and YouTube, and mobile carriers, such as Orange, Telefonica, Verizon and 3, worldwide.

Dimensional Associates, LLC, a New York limited liability company, is a private equity investment fund sponsored by JDS Capital, L.P.

Orchard Merger Sub, Inc., a Delaware corporation, which we refer to as Merger Sub, is a wholly owned subsidiary of Dimensional Associates. Merger Sub was formed solely for the purpose of entering into the merger agreement and consummating the transactions contemplated by the merger agreement. Merger Sub has not engaged in any business except for activities incident to its incorporation and in connection with the transactions contemplated by the merger agreement.

### **The Merger and its Effects (Page 64)**

You are being asked to vote to approve and adopt the agreement and plan of merger dated as of March 15, 2010, as amended, among The Orchard, Dimensional Associates and Merger Sub, and to approve the merger and the other transactions contemplated by the merger agreement, which proposal we refer to as the Merger Proposal. Pursuant to the merger agreement, Merger Sub will merge with and into The Orchard. The Orchard will be the surviving corporation in the merger, and will continue to do business as The Orchard Enterprises, Inc. following the merger. Upon completion of the proposed merger, The Orchard will cease to be a publicly traded company and Dimensional Associates will own more than 99% of the outstanding securities of the Company, assuming that none of the current Series A convertible preferred stock holders convert their shares into common stock. As a result, you will no longer have any direct or indirect equity interest in The Orchard or any interest in our future earnings or growth, if any. Following completion of the merger, the registration of our common stock and our reporting obligations with respect to our common stock under the Securities Exchange Act of 1934, as amended, are expected to be terminated. In addition, upon completion of the proposed merger, our shares of common stock will no longer be listed on the Nasdaq Stock Market.

### **Merger Consideration (Page 64)**

Each share of our common stock issued and outstanding immediately prior to the effective time of the merger (other than shares of common stock held by Dimensional Associates, its affiliates or Merger Sub) will be automatically cancelled and converted at the effective time of the merger into the right to receive the following merger consideration: (1) \$2.05 in cash, which we refer to as the cash merger consideration, and (2) a contingent right to

receive a share of additional merger consideration, which we refer to as the additional consideration . The additional consideration will be paid, if on or prior to the six-month anniversary of the consummation of the merger, we, Dimensional Associates or any of our respective affiliates enter into a commitment, which we refer to as a resale transaction , to sell at least 80% of our outstanding voting securities or at least 80% of our assets. The additional consideration will be an amount equal to 15% of the difference between our enterprise value in the resale transaction and our enterprise value immediately

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prior to the consummation of the merger, as calculated in accordance with the terms of the merger agreement. The portion of any additional consideration payable to a holder of our shares and, if applicable, our stock options, restricted stock and stock appreciation rights, will be calculated in accordance with the terms of the merger agreement.

## **Treatment of Options, Restricted Stock, Stock Appreciation Rights and Warrants (Page 66)**

Immediately prior to the effective time of the merger and in accordance with the Amended and Restated Orchard Enterprises, Inc. 2008 Stock Plan, which we refer to as the Company Stock Plan, we will provide that each share that is subject to a restricted share award that is outstanding immediately prior to the effective time of the merger will vest and become free of all restrictions at the effective time of the merger, and the holder of the restricted stock award will be entitled to receive the per share cash merger consideration and the per share additional consideration, if any, from us in exchange for each restricted share, less any required withholding taxes.

Each outstanding and unexercised stock option and stock appreciation right under the Company Stock Plan has an exercise price greater than \$2.05 and, consequently, holders thereof will not receive any cash merger consideration at the effective time of the merger.

Each warrant that is outstanding and unexercised at the effective time of the merger will remain outstanding, subject to its terms.

## **Interests of Certain Persons in the Merger (Page 50)**

In considering the recommendation of the special committee and our board of directors with respect to the merger agreement, you should be aware that some of our directors and executive officers have interests in the merger that are different from, or in addition to, the interests of our stockholders generally. These interests include, among others:

Mr. Stein's employment with Dimensional Associates and its affiliates and his continued ownership of an equity interest in The Orchard after the consummation of the merger;

the acceleration of and payment for outstanding restricted stock awards held by our officers and directors as a result of the merger, which have a pre-tax value of:

\$12,532 for Bradley Navin;

\$17,091 for Nathan Fong;

\$10,826 for Steve Haase;

\$37,103 for Michael Donahue; and

\$26,502 for each of David Altschul, Viet Dinh, Nathan Peck, Daniel Stein and Joel Straka;

the continued indemnification and directors' and officers' liability insurance coverage to be provided by the surviving corporation to The Orchard's current and former officers and directors;

compensation in the amount of \$80,000 paid to Michael Donahue for his service as chairman for both the special committee and the search committee of the board of directors and compensation in the amount of \$15,000 paid to each of Messrs. Altschul, Dinh, Peck and Straka for their service on the special committee; and

a retention arrangement for our senior vice president, general counsel and secretary providing for continued employment at her current annual salary until December 31, 2010.

The special committee and our board of directors were aware of these interests and considered them, among other matters, in reaching their decision to approve the merger agreement and recommend that The Orchard's stockholders vote in favor of approving and adopting the merger agreement.



## **Required Vote for Merger Proposal (Page 62)**

The approval of the Merger Proposal will require the affirmative vote of:

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- (i) the holders of a majority of all of The Orchard's outstanding shares of voting stock as of the record date for the meeting, which vote we refer to as the Company Stockholder Approval ; and
- (ii) the holders of a majority of The Orchard's outstanding shares of voting stock as of the record date for the annual meeting, other than shares of voting stock held by Dimensional Associates and its affiliates, which vote we refer to as the Minority Stockholder Approval .

Pursuant to the terms of the merger agreement, Dimensional Associates and its affiliates have agreed to vote their shares in favor of the Merger Proposal. Because Dimensional Associates and its affiliates held approximately 54% of the voting power of our voting stock as of the record date for the annual meeting, we expect that the Company Stockholder Approval will be obtained.

Abstentions and broker non-votes in the case of both the Company Stockholder Approval and the Minority Stockholder Approval will have the same effect as votes against the Merger Proposal.

### **Recommendation of the Special Committee and the Board of Directors (Page 23)**

The special committee is a committee of our board of directors that was formed on October 19, 2009. The special committee has authority to establish, monitor and direct the process and procedures related to the review and evaluation of one or more proposals made to The Orchard by Dimensional Associates and any alternative transaction. The special committee unanimously determined that the merger, the consideration to be paid in the merger, and the other terms and provisions of the merger agreement are fair to, advisable and in the best interests of The Orchard and its unaffiliated stockholders.

Our board of directors, acting upon the unanimous recommendation of the special committee and without the participation (either in the deliberations or voting) of Daniel Stein, a director of ours who is also an executive officer and a director of Dimensional Associates, recommends that our stockholders vote FOR the Merger Proposal.

### **Opinion of Fesnak and Associates, LLP (Page 29 and Appendix C)**

Fesnak and Associates, LLP, the special committee's financial advisors, delivered a written opinion, dated March 15, 2010, to the special committee that, as of March 15, 2010 and based upon the assumptions and limitations set forth therein, the merger consideration to be offered in the merger to the holders of our common stock (other than shares held by Dimensional Associates and its affiliates) was fair from a financial point of view to such holders.

The full text of the written opinion of Fesnak, dated March 15, 2010, is attached as Appendix C to this proxy statement. The written opinion of Fesnak sets forth, among other things, the assumptions made, procedures followed, matters considered and limitations on the reviews undertaken in connection with rendering the opinion. Fesnak provided its opinion for the information and assistance of the special committee in connection with its consideration of the merger agreement. The Fesnak opinion is not a recommendation as to how any holder of our common stock should vote with respect to the merger or any other matter.

### **Restrictions on Solicitation of Other Offers (Page 72)**

Until 12:01 a.m., Eastern Daylight Time, on April 22, 2010, we and our subsidiaries and representatives were permitted to:

initiate, solicit and encourage any Acquisition Proposals (as defined under The Merger Agreement Restrictions on Solicitations of Other Offers ), including providing access to non-public information pursuant to confidentiality agreements; and

enter into or otherwise participate in any discussions or negotiations with respect to Acquisition Proposals.

From April 22, 2010 until the earlier of the effective time of the merger and the termination of the merger agreement, we and our subsidiaries and representatives are required not to, directly or indirectly: solicit, initiate, induce or take any action for the purpose of encouraging any proposal that constitutes or could reasonably be expected to lead to an Acquisition Proposal;

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engage in negotiations or discussions with any person with respect to an Acquisition Proposal; furnish any non-public information to any person or afford access to our business, properties, assets, books and records in connection with any proposal that constitutes or could reasonably be expected to lead to an Acquisition Proposal;

approve, endorse or recommend any Acquisition Proposal;

approve or enter into any contract or arrangement contemplating or otherwise relating to an Acquisition Proposal, or which would require us to terminate the merger agreement or any further discussions or negotiations between us and Dimensional Associates; or

terminate, amend, release or waive any rights under any standstill or other similar agreement between us or any of our subsidiaries and any person, other than Dimensional Associates.

Notwithstanding the restrictions described above, we may:

engage or participate in discussions or negotiations with any person that has made a bona fide Acquisition Proposal that the special committee reasonably determines in good faith constitutes or is reasonably likely to lead to a Superior Proposal (as defined under The Merger Agreement Restrictions on Solicitations of Other Offers ); and furnish to any person that has made a bona fide Acquisition Proposal that the special committee reasonably determines in good faith constitutes or is reasonably likely to lead to a Superior Proposal any non-public information relating to us or any of our subsidiaries pursuant to a confidentiality agreement with terms which are no less favorable to us than those contained in the confidentiality agreement with Dimensional Associates;

provided that, among other things, (1) we have not breached or violated certain provisions in the merger agreement regarding the restrictions on our ability to solicit proposals or offers and the ability of our board of directors to change its recommendation, (2) our board of directors or the special committee determines in good faith that failure to take such action would reasonably be expected to be inconsistent with its fiduciary duties under applicable law and (3) we have not entered into any agreement restricting our ability to negotiate, enter into and consummate a transaction with a third party other than such person.

## **Conditions to the Completion of the Merger (Page 77)**

The obligations of The Orchard, Dimensional Associates and Merger Sub to complete the merger depend on a number of conditions being met. These conditions include:

receipt of the Company Stockholder Approval;

receipt of the Minority Stockholder Approval;

the approval of the holders of a majority of all of The Orchard's outstanding shares of voting stock as of the record date for the annual meeting with respect to the proposal to amend the Certificate of Designations of the Series A convertible preferred stock, which we refer to as the Certificate Amendment Proposal ;

the approval of the holders of a majority of all of The Orchard's outstanding shares of Series A convertible preferred stock as of the record date for the annual meeting with respect to the Certificate Amendment Proposal;

the absence of any governmental orders that have the effect of making the merger illegal or otherwise preventing the consummation of the merger;

each party's respective representations and warranties in the merger agreement being true and correct as of the closing date of the merger in the manner described in The Merger Agreement Conditions to the Completion of the Merger ;

each party's performance in all material respects of its obligations required to be performed under the merger agreement on or prior to the closing date of the merger;

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the absence of a Company Material Adverse Change (as defined under The Merger Agreement Definition of Company Material Adverse Change ) since the date of the merger agreement; and

holders of 4% or more of our shares of common stock outstanding as of the record date not having properly exercised their dissenter s rights under Section 262 of the General Corporation Law of the State of Delaware, which we refer to as the DGCL .

Where the law permits, the parties to the merger agreement could choose to waive a condition to its obligation to complete the merger (other than the stockholder approval conditions in the first and second bullets above), although that condition has not been satisfied. We cannot be certain when, or if, the conditions to the merger will be satisfied or waived, or that the merger will be completed.

## **Termination of the Merger Agreement (Page 78)**

The merger agreement may be terminated at any time prior to the effective time of the merger, whether before or after stockholder approval has been obtained:

by mutual written consent of The Orchard (at the direction of the special committee) and Dimensional Associates; by either us (at the direction of the special committee) or Dimensional Associates, unless the failure of the merger to be consummated by such date was due to the party seeking to terminate breaching in any material respect its obligations under the merger agreement in any manner that causes or results in the failure of the condition to the consummation of the merger:

- (1) if the merger has not been consummated by the termination date of September 15, 2010 (or, under certain circumstances, by October 15, 2010);
- (2) if the approval of the Merger Proposal by the requisite votes of the stockholders has not been obtained at the stockholders meeting or at any adjournment or postponement thereof; or
- (3) if a governmental entity issues a final, non-appealable order or takes action that permanently restrains, enjoins or otherwise prohibits consummation of the merger;

by us (at the direction the special committee), if:

- Dimensional Associates or Merger Sub has breached or failed to perform any of its representations, warranties, covenants or agreements made in the merger agreement, or any such representation and warranty has become
- (1) untrue after the date of the merger agreement, which breach or failure would cause certain conditions to our obligation to effect the merger not to be satisfied and which cannot be cured by the earlier of September 15, 2010 or within 30 calendar days after receipt of our written notice to Dimensional Associates of such breach;
  - (2) the special committee approves The Orchard entering into an agreement constituting a superior proposal provided such approval is in accordance with the terms of the merger agreement; or
  - (3) Dimensional Associates and Merger Sub fail to consummate the merger under certain circumstances; or

by Dimensional Associates, if:

- we have breached or failed to perform any of our representations, warranties, covenants or agreements made in the merger agreement, or any such representation and warranty has become untrue after the date of the merger agreement, which breach or failure would cause certain conditions to Dimensional Associates obligation to effect the merger not to be satisfied and which cannot be cured by the earlier of September 15, 2010 or within 30 calendar days after receipt of Dimensional Associates written notice to us of such breach;
- (1)
  - (2) our board of directors (or special committee) withdraws, modifies or changes its recommendation to our stockholders that they approve the merger and approve and adopt the merger agreement;

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- (3) we have failed to comply in any material respect with the restrictions on solicitations of other offers contained in the merger agreement;
- (4) we have failed to include in this proxy statement our board of directors' recommendation to our stockholders that they approve the merger and approve and adopt the merger agreement; or
- (5) we fail to consummate the merger under certain circumstances.

### **Expense Reimbursement (Page 79)**

Upon termination of the merger agreement under specified circumstances, including failure to obtain the requisite stockholder votes in favor of the Merger Proposal, we may be required to reimburse Dimensional Associates for their documented out-of-pocket expenses in connection with the proposed merger up to \$350,000.

### **Share Ownership of Directors and Executive Officers (Page 59)**

As of June 11, 2010, the record date for the annual meeting, our directors (other than Mr. Stein) and executive officers had the right to vote, in the aggregate, 271,554 shares of our common stock, which represented approximately 3.5% of the voting power of our voting stock on the record date for the meeting. These directors and executive officers have informed us that they intend to vote all of their shares of common stock FOR the approval of the Merger Proposal, FOR the Certificate Amendment Proposal and FOR the Adjournment Proposal.

### **Rights of Appraisal (Page 66)**

Holders of our common stock who object to the merger may elect to pursue their appraisal rights to receive the judicially determined fair value of their shares, which could be more or less than, or the same as, the per share merger consideration for the common stock, but only if they comply with the procedures required under Delaware law. In order to qualify for these rights, you must (1) not vote in favor of approval and adoption of the merger agreement, nor consent thereto in writing, (2) make a written demand for appraisal prior to the taking of the vote on the approval and adoption of the merger agreement at the annual meeting, (3) continue to hold your shares until the consummation of the merger and (4) otherwise comply with the Delaware law procedures for exercising appraisal rights. For a summary of these Delaware law procedures, see Appraisal Rights. A copy of Section 262 of the DGCL is also attached as Appendix D to this proxy statement. Failure to follow the procedures set forth in Section 262 of the DGCL will result in the loss of appraisal rights.

An executed proxy that is not marked AGAINST or ABSTAIN will be voted for approval of the Merger Proposal and will disqualify the stockholder submitting that proxy from demanding appraisal rights.

### **Market Price of Our Common Stock (Page 83)**

On October 14, 2009, the last trading day before Dimensional Associates first presented its acquisition proposal to The Orchard's board of directors, the high and low sales prices of our common stock were \$1.50 and \$1.35, respectively. The cash merger consideration of \$2.05 per share represents a premium of approximately 52% over the closing trading price of \$1.35 per share on October 14, 2009. On March 15, 2010, the last trading day before we announced the execution of the merger agreement, the high and low reported sales price of our common stock was \$1.66. The cash merger consideration of \$2.05 per share represents a premium of approximately 23% over the closing trading price of \$1.66 per share on March 15, 2010, and approximately 19% over the average closing prices of our common stock for the 30-trading day period ending on March 15, 2010. On June 15, 2010, the most recent practicable date that our common stock traded before the printing of this proxy statement, the high and low reported sales prices of our common stock were \$2.04 and \$2.04, respectively. You are urged to obtain a current market price quotation for our common stock.

## **Material United States Federal Income Tax Consequences (Page 52)**

The receipt of the per share merger consideration and the per share additional consideration, as applicable, by a U.S. holder of shares of our common stock will be a taxable transaction for U.S. federal income

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tax purposes. The amount of gain or loss a U.S. holder recognizes, and the timing and potentially the character of a portion of such gain or loss, depends on the U.S. federal income tax treatment of the right to receive the per share additional consideration, with respect to which there is substantial uncertainty. Any gain realized by a non-U.S. holder as a result of the receipt of the per share merger consideration and the per share additional consideration will generally not be subject to U.S. federal income tax, except in certain situations. The merger is not expected to have any material U.S. federal income tax consequences to The Orchard, Dimensional Associates, Merger Sub, JDS Capital, L.P., JDS Capital Management, LLC, Joseph D. Samberg or Daniel C. Stein. Please see the section entitled Material United States Federal Income Tax Consequences of the Merger below for a more detailed discussion. **Stockholders should consult their tax advisors regarding the U.S. federal income tax considerations relevant to the merger, as well as the effects of state, local, and foreign tax laws.**

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# QUESTIONS AND ANSWERS ABOUT THE MERGER AND THE ANNUAL MEETING OF STOCKHOLDERS

*The following questions and answers are intended to address briefly some commonly asked questions regarding the merger, the merger agreement and the 2010 annual meeting. These questions and answers may not address all questions that may be important to you as an Orchard stockholder. Please refer to the Summary Term Sheet and the more detailed information contained elsewhere in this proxy statement, the annexes to this proxy statement and the documents referred to or incorporated by reference in this proxy statement, which you should read carefully.*

## **Q: When and where is the annual meeting?**

A: The annual meeting of stockholders will be held on July 29, 2010, 10:00 a.m., Eastern Daylight Time, at Chadbourne & Parke LLP, 30 Rockefeller Plaza, New York, New York 10112. The approximate date on which this proxy statement and the accompanying proxy card will first be sent or given to stockholders is June 21, 2010.

## **Q: What matters will be voted on at the annual meeting?**

A: At the annual meeting of stockholders, and any postponements or adjournments thereof, you will be asked to consider and vote on the following proposals:

To approve the Merger Proposal;

To approve the Certificate Amendment Proposal. The Certificate Amendment Proposal is conditioned upon and subject to the approval of the Merger Proposal. If the Merger Proposal is not adopted, the Certificate Amendment Proposal will not be presented at the meeting.

To elect the seven (7) nominees named in the attached proxy statement to our board of directors to serve a one (1) year term;

To ratify the appointment of our independent registered public accounting firm for fiscal year 2010;

To approve the adjournment of the annual meeting, if necessary, to permit further solicitation and vote of proxies if there are insufficient votes at the time of the annual meeting to approve the Merger Proposal, which we refer to as the Adjournment Proposal ; and

To transact such other business as may properly come before the meeting or any adjournment or postponement of the meeting.

Our board of directors recommends that you vote FOR each of the proposals.

## **Q: Who is entitled to attend and vote at the annual meeting?**

A: Stockholders of record holding The Orchard's voting securities as of the close of business on June 11, 2010, the record date for the annual meeting, are entitled to vote at the annual meeting. As of the record date, there were 6,378,252 shares of The Orchard's common stock outstanding and 448,707 shares of Series A convertible preferred stock outstanding. Every holder of The Orchard's common stock is entitled to one vote for each such share the stockholder held as of the record date and every holder of The Orchard's Series A convertible preferred stock outstanding is entitled to three and one-third (3 1/3) votes per share of our Series A convertible preferred stock held as of the record date.

If you want to attend the annual meeting and your shares are held in street name by your broker, bank or other nominee, you must bring to the annual meeting a proxy from the record holder (your broker, bank or nominee) of the shares authorizing you to vote at the annual meeting.

## **Q: What constitutes a quorum for the annual meeting?**

A: The required quorum for the transaction of business at the annual meeting is a majority of the votes eligible to be cast by holders of shares of our common stock and Series A convertible preferred stock issued and outstanding on the record date voting together as a single class. Shares that are voted FOR , WITHHOLD , ABSTAIN or AGAINST matter are treated as being present at the annual meeting for

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purposes of establishing a quorum. In the event that there are not sufficient votes for a quorum, the annual meeting may be adjourned in order to permit further solicitation of proxies. However, the presence in person or by proxy of Dimensional Associates, our majority stockholder, will assure that a quorum is present at the meeting.

**Q: What vote is required to approve the Certificate Amendment Proposal?**

A: The affirmative vote of the holders of a majority of our voting stock and the affirmative vote of the holders of a majority of our Series A convertible preferred stock, voting as a separate class, is required for the approval of the Certificate Amendment Proposal. The Certificate Amendment Proposal is conditioned upon and subject to the approval of the Merger Proposal. If the Merger Proposal is not adopted, the Certificate Amendment Proposal will not be presented at the meeting. Management of the Company anticipates that Dimensional Associates will vote all of its shares of common stock and Series A convertible preferred stock in favor of this proposal, and in such an event, the approval of the Certificate Amendment Proposal will be assured.

**Q: What vote is required for the election of directors?**

A: The seven (7) nominees for director receiving the highest number of affirmative votes cast at the annual meeting will be elected as a director.

**Q: What vote is required to ratify the appointment of the Company's independent registered public accounting firm for the year ending December 31, 2010?**

A: The affirmative vote of a majority of the votes cast on the proposal at the annual meeting is necessary for the ratification of our independent registered public accounting firm for the year ending December 31, 2010.

**Q: What vote is required to approve the Adjournment Proposal?**

A: Approval of the Adjournment Proposal requires the affirmative vote of the holders of a majority of The Orchard's shares of voting stock voting on the matter.

**Q: Who is soliciting my vote?**

A: The enclosed proxy is being solicited on behalf of our board of directors for use in voting at the annual meeting