



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY D. VOIGT, Individually and on
Behalf of All Others Similarly Situated
and Derivatively on Behalf of Nominal
Defendant NCI BUILDING SYSTEMS,
INC.,

Plaintiff,

v.

C.A. No. 2018-0828-JTL

JAMES S. METCALF, DONALD R. "RWDNIE 'XGTUKQP 'HNGF <
RILEY, NATHAN K. SLEEPER, "P qxgo dgt'3; .'423:
WILLIAM R. VANARSDALE,
JONATHAN L. ZREBIEC, KATHLEEN
J. AFFELDT, JAMES G. BERGES,
CLAYTON, DUBILIER & RICE FUND
VIII, L.P., and CLAYTON, DUBILIER
& RICE, LLC,

Defendants,

and

NCI BUILDING SYSTEMS, INC., a
Delaware corporation,

Nominal Defendant.

**VERIFIED STOCKHOLDER CLASS ACTION AND
DERIVATIVE COMPLAINT**

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I. NATURE OF THE ACTION

Gary D. Voigt (“Plaintiff”), on behalf of himself and all other similarly situated stockholders of NCI Building Systems, Inc. (“NCI” or the “Company”), and for the benefit of nominal defendant NCI, brings the following Verified Stockholder Class Action and Derivative Complaint (the “Complaint”) against (i) James S. Metcalf (“Metcalf”), Donald R. Riley (“Riley”), Nathan K. Sleeper (“Sleeper”), William R. VanArsdale (“VanArsdale”), Jonathan L. Zrebiec (“Zrebiec”), Kathleen J. Affeldt (“Affeldt”), and James G. Berges (“Berges”) (collectively the “Director Defendants”) for breaching their fiduciary duties as directors and/or officers of NCI; (ii) Clayton, Dubilier & Rice Fund VIII, L.P. (“CD&R VIII LP”) and Clayton Dubilier & Rice, LLC (“CD&R LLC,” and together with CD&R VIII LP, “CD&R”) for breaching their fiduciary duties as the Company’s controlling stockholder; and (iii) CD&R for unjust enrichment. The allegations of the Complaint are based on the knowledge of Plaintiff as to himself, including the investigation of counsel, the review of publicly-available information, and the review of certain books and records produced by the Company in response to Plaintiff’s demand made under 8 *Del. C.* § 220 (the “Section 220 Demand”), as to all other matters.

II. INTRODUCTION

1. This case arises from CD&R's abuse of its status as NCI's controlling stockholder. As detailed *infra*, CD&R caused the Company to merge with another CD&R portfolio company, Ply Gem Parent, LLC, on terms that are grossly unfair to NCI and its non-CD&R stockholders.

2. After a competitive process, in April 2018, CD&R consummated its acquisition of Ply Gem Holdings Inc. ("Ply Gem") (the "CD&R-Ply Gem Merger"), a manufacturer of building products used in residential construction. Concurrently with the closing of the CD&R-Ply Gem Merger, CD&R combined Ply Gem with Atrium Windows & Doors ("Atrium") (the "Ply Gem-Atrium Combination"), a provider of windows and doors to the residential construction, repair and remodel markets. Upon closing of the CD&R-Ply Gem Merger and the Ply Gem-Atrium Combination, CD&R owned approximately 70% of the newly-private company ("New Ply Gem").

3. New Ply Gem was highly leveraged and the residential construction industry was facing headwinds. Thus, almost immediately after the closing of the CD&R-Ply Gem Merger and the Ply Gem-Atrium Combination, CD&R sought to combine New Ply Gem with NCI, a well-performing and modestly-levered CD&R portfolio company that manufactures and markets metal products for the commercial construction industry.

4. NCI has been a CD&R portfolio company since CD&R acquired a majority equity stake in the Company pursuant to a 2009 distressed investment. Although CD&R's NCI ownership interest has dropped below 50% in recent years, CD&R still owns 34% of the Company's outstanding equity and, as detailed *infra*, at least half of the NCI Board is comprised of CD&R partners, advisors, loyalists and/or Company executives who were hired and handsomely compensated while CD&R held a majority equity stake in NCI.

5. In early May 2018, the NCI board of directors (the "Board" or "NCI Board") formed a special committee (the "Special Committee" or "Committee") to evaluate a potential transaction between NCI and New Ply Gem, but the Committee's process was defective. Among other things, (i) the Committee's mandate was unreasonably narrow, as it was prohibited from exploring alternatives to a NCI/New Ply Gem combination; (ii) Evercore Inc. ("Evercore"), the Committee's financial advisor, was advising CD&R portfolio company David's Bridal at the same time Evercore was supposed to be negotiating aggressively on behalf of the Special Committee against CD&R; and (iii) one of the Committee members was promised the role of chief executive officer ("CEO") of the combined company of NCI and New Ply Gem but failed to recuse himself from the process despite this obvious conflict.

6. On July 17, 2018, the Special Committee and the Board approved a merger of NCI and New Ply Gem in which NCI stockholders and New Ply Gem stockholders will own 53% and 47% of the combined company's equity, respectively (the "Challenged Transaction").¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

7. Since the public announcement of the Challenged Transaction, NCI's stock price has plummeted by **39%**. Additionally, market analysts have questioned the Challenged Transaction's "underwhelming synergy potential," "elevated leverage profile," and questionable strategic rationale. [REDACTED]

[REDACTED]

[REDACTED]

¹ Additionally, the Challenged Transaction will provide CD&R just under 50% of the combined company's common equity and the ability to designate five directors to the combined company's board.

8. Through this action, Plaintiff seeks to hold CD&R and the Director Defendants accountable for the harm inflicted upon NCI and its non-CD&R stockholders.

III. THE PARTIES

9. Plaintiff is and has been, at all relevant times, a beneficial owner of shares of NCI common stock.

10. Nominal defendant NCI is a manufacturer and marketer of metal products for the commercial construction industry. NCI is incorporated in the State of Delaware and has its corporate headquarters at 10943 North Sam Houston Parkway West, Houston, Texas 77064. NCI's common stock trades on the New York Stock Exchange ("NYSE") under the ticker symbol "NCS."

11. Defendant CD&R LLC is a New York City-based private equity firm that was founded in 1978. CD&R LLC specializes in buyouts, acquisitions and growth capital financings. CD&R LLC is incorporated in Delaware and is structured as a limited liability company.

12. Defendant CD&R VIII LP is a Cayman exempted limited partnership controlled by CD&R LLC and through which CD&R LLC beneficially owned its NCI stock.

13. Defendant Metcalf has served as the Chairman of the NCI Board since January 2018 and has been a member of the Board since May 2017.

14. Defendant Riley has been NCI's CEO since July 2017 and has served as the Company's President since January 2016. Riley has been a member of NCI's Board and the Executive Committee since July 2017. Before becoming NCI's CEO and President, Riley was President of NCI's Group Business Segment from December 2014 until January 2016. [REDACTED]

[REDACTED] and Riley has received and continues to receive from NCI substantial compensation that is material to him. For the years 2015, 2016 and 2017, Riley has received total compensation of \$2,153,961, \$2,299,276 and \$2,511,814, respectively.² In the Company's Schedule 14A filed with the SEC on January 26, 2018, the Board publicly acknowledged that Riley is not "independent" as "defined by the listing standards of the NYSE."³

15. Defendant Sleeper has been a director of NCI since October 2009. He also is a partner at CD&R, which he joined in 2000, and on CD&R's management committee. Sleeper serves on the boards of directors of several CD&R portfolio companies (other than NCI), including Ply Gem, Atkore International Group, Inc. ("Atkore") and SunSource Holdings, Inc. ("SunSource").

² NCI Schedule 14A, filed with the U.S. Securities and Exchange Commission ("SEC") on Jan. 26, 2018, at 37.

³ *Id.* at 51.

16. Defendant VanArsdale has been a director of NCI since April 2017. He also serves as a consultant and “Operating Advisor”⁴ to certain CD&R funds, one of which relates to CD&R’s controlling stake in SunSource. According to CD&R’s website, VanArsdale serves as “Lead Director” on the SunSource board of directors.⁵ He also is a director of Atkore, another CD&R portfolio company.

17. Defendant Zrebiec has been a director of NCI since November 2009. He also is a partner at CD&R, which he joined in 2004. Zrebiec serves on the boards of directors of a number of CD&R portfolio companies (other than NCI), including Ply Gem.

18. Defendant Affeldt has been a director of NCI since November 2009. Affeldt began her 27-year career with CD&R in 1991 when CD&R (i) acquired IBM’s printer and supplies business and created Lexmark International Group, Inc. (“Lexmark”) and (ii) hired Affeldt to work in Lexmark’s human resources department. In July 1996, Affeldt was promoted to vice president and headed the human resources department at Lexmark until her retirement in February 2003. Since February 2003, Affeldt’s full-time employment has consisted of serving on boards of directors, most of which are CD&R portfolio company boards. In

⁴ William VanArsdale, LinkedIn Profile, <https://www.linkedin.com/in/william-vanarsdale-b40a0575/> (last visited Nov. 9, 2018).

⁵ CD&R, Portfolio Investments, <https://www.cdr-inc.com/investments#portfolio> (last visited Nov. 5, 2018).

September 2002, CD&R appointed Affeldt to the board of directors of CD&R portfolio company SIRVA, Inc. (“SIRVA”). Affeldt served on SIRVA’s board until May 2007. In connection with CD&R’s acquisition of Sally Beauty Holdings, Inc. (“Sally Beauty”) in 2006, CD&R appointed Affeldt to the board of directors of Sally Beauty. Then, in 2009, CD&R appointed Affeldt to the NCI Board. Since ending her full-time employment at Lexmark in 2003, Affeldt has received at least \$2.45 million in compensation from CD&R in exchange for her board service at CD&R-controlled companies, an amount that is material to her.

19. Defendant Berges has been a director of NCI since October 2009. He also is a partner at CD&R, which he joined in 2006.

20. The defendants identified *supra* in paragraphs 13 through 19 are referred to collectively herein as the “Director Defendants.”

21. The defendants identified *supra* in paragraphs 11 through 19 are referred to collectively herein as the “Defendants.”

IV. RELEVANT NON-PARTIES

22. Lawrence J. Kremer (“Kremer”) has been a director of NCI since October 2009.

23. George Martinez (“Martinez”) has been a director of NCI since March 2003.

24. George L. Ball (“Ball”) has been a director of NCI since February 2014.
25. Gary L. Forbes (“Forbes”) has been a director of NCI since December 1991.
26. John J. Holland (“Holland”) has been a director of NCI since November 2009.
27. The Director Defendants, together with Kremer, Martinez, Ball, Forbes and Holland, are referred to collectively as the “Board,” the “NCI Board” or the “Demand Board.”

V. SUBSTANTIVE ALLEGATIONS

A. **CD&R’s History With NCI**

28. NCI is one of North America’s largest manufacturers and marketers of metal products for the commercial construction industry.

29. NCI was founded in 1984 and has been a publicly traded company since April 1992.

30. In the wake of the 2008 financial crisis, NCI faced capital and liquidity issues resulting from a slowdown in the demand for commercial metal structures.

As CD&R’s 2017/2018 Annual Review states:

[NCI’s] earnings fell dramatically in the first quarter of 2009, *NCI also had to confront the prospect of potential bankruptcy* due to the looming threat of a convertible bond NCI needed fresh capital.⁶

⁶ CD&R, Annual Review 2017/2018, at 136, <http://www.cdr->

31. CD&R provided NCI the capital that the Company needed to stave off bankruptcy and, in return, NCI handed over control of the Company to CD&R. On August 14, 2009, NCI announced that it had entered into an investment agreement (the “Investment Agreement”) with CD&R pursuant to which CD&R invested \$250 million in the Company (the “Equity Investment”) through the purchase of 250,000 shares of newly-issued Convertible Participating Preferred Shares, representing roughly 68.4% of NCI’s total voting power.

32. Norman C. Chambers (“Chambers”)—NCI’s then-Chairman, President and CEO—praised the Equity Investment, stating:

As a result of this transaction, we will resolve our capital structure issues and gain the flexibility to ride out the current economic crisis and benefit from improved market conditions over the next several years. . . .⁷

33. On October 20, 2009, NCI and CD&R consummated the Equity Investment and CD&R became the Company’s controlling stockholder, holding approximately 68.5% of NCI’s total voting power.

34. After obtaining majority equity control, CD&R stocked the Board with CD&R executives and loyalists. In an October 20, 2009 press release, the Company

inc.com/annualreview2017-18/cdr-annual-review-2017-18.pdf (last visited Nov. 7, 2018) (emphasis added).

⁷ CD&R August 14, 2009 press release, <https://www.cdr-inc.com/news/press-release/nci-building-systems-announces-agreement-clayton-dubilier-rice> (last visited Nov. 9, 2018).

reported that “NCI’s Board of Directors will be reconfigured”⁸ and pursuant to the Investment Agreement, CD&R required a majority of the then-existing NCI board to resign. In NCI’s Information Statement issued in connection with the Equity Investment, the Company stated that:

The Investment Agreement required us to cause *all directors serving on our Board immediately prior to the closing of the Equity Investment (other than our Chief Executive Officer and two other directors) to resign from our Board*, effective as of the closing of the Equity Investment, and to cause vacancies on our Board to be filled by persons nominated or designated by the CD&R Funds. Accordingly, on the Closing Date, William D. Breedlove, Philip J. Hawk, Larry D. Edwards, Ed L. Phipps, W. Bernard Pieper, John K. Sterling and Max L. Lukens resigned from the Board⁹

35. In conjunction with the above-described resignations, Sleeper, the CD&R partner who led CD&R’s entry into the Investment Agreement, and Berges, another CD&R partner, both joined the NCI Board. Thereafter, CD&R appointed three additional directors to the Board: Zrebiec, Affeldt and Kremer.

36. After appointing Zrebiec, Affeldt and Kremer to the Board, NCI publicly acknowledged CD&R’s control over the Board:

Following the appointment of the additional CD&R Funds’ designees to the Board effective on or after the eleventh day following the mailing by us of this Information Statement, *the CD&R Funds will have the*

⁸ NCI Form 8-K, filed with SEC on Oct. 26, 2009, Ex. 99.1.

⁹ NCI Schedule 14F-1, filed with the SEC on Oct. 30, 2009, at 2 <https://www.sec.gov/Archives/edgar/data/883902/000095012309055703/y80026sc14f1.htm> (emphasis added).

ability, subject to the fiduciary duties of the individual directors, ***to control the decisions of the Board***.¹⁰

37. On May 14, 2013, NCI announced that CD&R had delivered its formal notice to convert its NCI preferred stock into 54,136,817 shares of NCI common stock.¹¹ Following that conversion, CD&R beneficially owned approximately 72% of NCI's outstanding common stock.

¹⁰ *Id.* at 3 (emphasis added). The Company continued to concede in subsequent SEC filings that due to these director designations, CD&R controlled NCI's board. See NCI Schedule 14A, filed with the SEC on Jan. 14, 2010, at 7 ("Pursuant to the Stockholders Agreement, effective as of the closing of the Equity Investment on October 20, 2009, William D. Breedlove, Philip J. Hawk, Larry D. Edwards, Ed L. Phipps, W. Bernard Pieper, John K. Sterling and Max L. Lukens resigned from our board of directors. Gary L. Forbes and George Martinez have remained on the board. Also on October 20, 2009, the board of directors appointed three individuals designated by the Investors, James G. Berges, Lawrence J. Kremer and Nathan K. Sleeper, as directors. Effective as of November 10, 2009, the board of directors appointed John J. Holland as a director unaffiliated with both the Investors and the Company and appointed two directors designated by the Investors, Kathleen J. Affeldt and Jonathan L. Zrebiec, as directors. ***As a result, the Investors have the ability, subject to the fiduciary duties of the individual directors, to control the decisions of the board of directors.***" (emphasis added)).

¹¹ NCI Building Systems, "NCI Building Systems Announces Conversion Of Preferred Stock, Plan To Refinance Existing Term Loan And Preliminary Results For Fiscal 2013 Second Quarter," PR NEWswire, May 14, 2013, <https://www.prnewswire.com/news-releases/nci-building-systems-announces-conversion-of-preferred-stock-plan-to-refinance-existing-term-loan-and-preliminary-results-for-fiscal-2013-second-quarter-207424071.html> (last accessed Nov. 9, 2018); NCI Building Systems, Inc., Form 8-K, May 14, 2013, https://www.sec.gov/Archives/edgar/data/883902/000114420413028693/v344964_8k.htm (last accessed Nov. 9, 2018).

38. CD&R continued to own a majority of NCI's outstanding equity until July 25, 2016, when CD&R's NCI stock ownership dropped to 42% as a result of a secondary offering.

39. On December 11, 2017, CD&R sold additional NCI shares through a secondary offering, which reduced CD&R's NCI stock ownership to 34.7% of the Company's outstanding shares. NCI, however, continued to warn stockholders that CD&R will still "be able to significantly influence matters submitted to stockholders for vote" ¹²

40. While CD&R no longer owns a majority of NCI's outstanding stock, as explained below, CD&R has maintained *de facto* control over the Company.

B. CD&R Controls NCI

41. CD&R has maintained control over NCI through the combination of its current 34.7% equity stake in NCI, and its control and domination over the members of the NCI Board.

42. Since 2009, NCI's Board composition has remained virtually unchanged. Directors affiliated and associated with CD&R continue to dominate the Board. As explained more fully in paragraphs 118-126, *infra*, at least six of the twelve directors currently on the NCI Board are CD&R partners, advisors, loyalists

¹² NCI Schedule 14A, filed with the SEC on Jan. 26, 2018, at 63.

and/or Company executives hired—and handsomely compensated—while CD&R held a majority equity stake in NCI.

43. The fact that NCI’s Board has remained virtually unchanged is not coincidental. In its 2017-2018 Annual Review, CD&R explains that in the building products industry, CD&R has “Involvement in building the business ***through board representation.***”¹³ Further, when asked what drives CD&R’s “value creation,” CD&R partner Thomas Franco expressly stated:

Number one is people; number two is people; and, number three is people. We are very committed to the proposition that people drive business performance. ***We spend a lot of time making sure that the right people are sitting in the right seats in our portfolio company organizations,*** and to do this we spend a lot of time on talent assessment.¹⁴

44. Additionally, even after CD&R’s ownership stake fell below 50%, the Company has repeatedly acknowledged that “[CD&R] will [continue to be] able to ***significantly influence*** matters submitted to stockholders for vote.”¹⁵

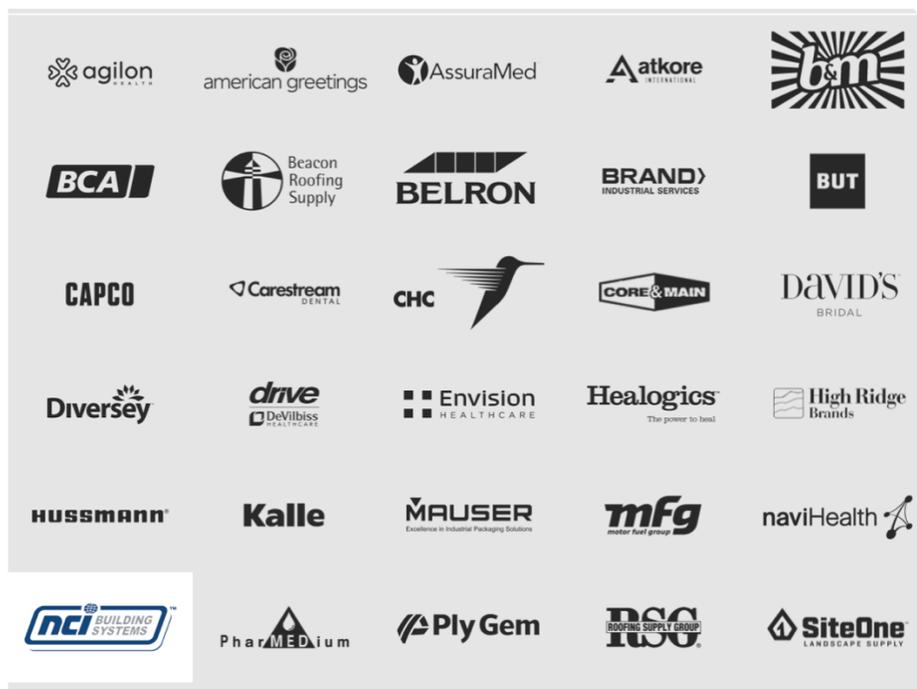
45. Furthermore, CD&R continues to expressly identify NCI as one of its portfolio companies:¹⁶

¹³ Clayton Dubilier & Rice, LLC, Annual Review 2017/2018 at 53, <http://www.cdr-inc.com/annualreview2017-18/cdr-annual-review-2017-18.pdf> (Nov. 7, 2018) (emphasis added).

¹⁴ *Id.* (emphasis added).

¹⁵ NCI Schedule 14A, filed with the SEC on Jan. 26, 2018, at 62 (emphasis added); NCI Schedule 14A, filed with the SEC on Jan. 25, 2017, at 46.

¹⁶ CD&R, Portfolio Investments, <https://www.cdr-inc.com/investments#portfolio>



C. Following A Robust Process, CD&R Acquires Ply Gem And Atrium

46. In 2004, private equity firm CI Capital Partners (“CI Capital”) purchased building products manufacturer Ply Gem Industries, Inc., later known as Ply Gem Holdings, Inc. (previously defined as “Ply Gem”).

47. In 2013, CI Capital conducted an initial public offering (“IPO”) of Ply Gem. Following the IPO, CI Capital retained majority control of Ply Gem and continued to own a majority of Ply Gem’s equity until the company was sold to CD&R in 2018.¹⁷

(last visited Nov. 9, 2018) (CD&R also notes on its website that “CD&R Operating Partner Jim Berges serves as Lead Director of the [NCI] Board.”).

¹⁷ According to Ply Gem’s notice of written consent and appraisal rights and information statement (the “Ply Gem Information Statement”), filed with the SEC

48. Beginning in the winter of 2016, Ply Gem, with the assistance of its financial advisor Credit Suisse Securities (USA) LLC (“Credit Suisse”), embarked on an auction process for the potential sale of Ply Gem. Between December 2016 and March 2017, Ply Gem and/or Credit Suisse contacted 39 potential acquirers, ten parties entered into confidentiality agreements with Ply Gem and eight parties attended management meetings with Ply Gem. During this time, Ply Gem and Credit Suisse also had discussions with a competitor of the company and potential strategic acquirer, identified in the Ply Gem Information Statement as “Party A,” concerning a potential transaction with Ply Gem.

49. As a result of this initial outreach, Ply Gem received two proposals. One proposal was submitted by a financial sponsor identified in the Ply Gem Information Statement as “Party B” for a potential acquisition of Ply Gem for \$19.00 per share. The other proposal was submitted by a strategic acquirer for a potential acquisition of Ply Gym for between \$19.50 and \$20.50 per share, but was withdrawn after the strategic acquirer completed preliminary due diligence and determined that an acquisition of Ply Gem would yield limited synergies.

on March 23, 2018, as of March 14, 2018, CI Capital beneficially owned approximately 67% of Ply Gem.

50. On March 14, 2017, Ply Gem terminated its active strategic review process. However, the Ply Gem board instructed Ply Gem's management to maintain contact with the various potential acquirers that had expressed interest in a potential strategic transaction with Ply Gem during the earlier process.

51. From April 2017 through August 2017, Ply Gem fielded a number of inquiries from various parties regarding a potential transaction with Ply Gem.

52. In early August 2017, CD&R partner Sleeper communicated CD&R's interest in potentially acquiring Ply Gem. At that point, the Ply Gem auction process gained momentum. In September 2017, both CD&R and Party B indicated interest in acquiring all outstanding shares of Ply Gem for \$20.00 per share.¹⁸ Ply Gem, however, deemed \$20.00 per share to be insufficient consideration.

53. On October 16, 2017, Sleeper communicated to Timothy Hall ("Hall"), a member of the Ply Gem board and a managing director at CI Capital, CD&R's continued interest in acquiring the company, but at an increased value of \$21.00 per share. Hall indicated that an offer at \$21.00 per share would still be insufficient.

¹⁸ Also in September 2017, Sleeper expressed interest in CD&R acquiring Ply Gem and combining it with Atrium, which was a provider of windows and doors to the new construction and repair and remodel markets, and which CD&R was also interested in acquiring.

54. On December 15, 2017, Sleeper and Hall held a telephonic meeting to discuss CD&R's proposed offer price. During the meeting, the parties discussed an acquisition of Ply Gem by CD&R at an offer price of \$21.64 per share. Hall indicated that CI Capital would likely find \$21.64 per share for Ply Gem to be acceptable and would be willing to submit that proposal to the Ply Gem board for its consideration.

55. In late December 2017 and early January 2018, Ply Gem management and Hall had further discussions with Party A concerning a potential acquisition of Ply Gem. However, the parties acknowledged that any such transaction "would involve and implicate certain critical commercial relationships and that the parties would need to reach an agreement with respect to those critical commercial relationships before pursuing a transaction."¹⁹

56. To help ensure that Ply Gem received full value in a sale, in early January 2018, Credit Suisse also contacted certain other potential acquirers about a possible acquisition of Ply Gem.

57. On January 18, 2018, Party A delivered an acquisition proposal at a price within a range of \$21.00 to \$23.00 per share, and on January 30, 2018, Party

¹⁹ Ply Gem Information Statement at 18.

A sent a letter to Ply Gem offering to acquire all outstanding shares of the company for \$23.00 per share.

58. Ply Gem attempted to use Party A's \$23.00 per share acquisition proposal as a lever to cause CD&R to increase its bid. However, Sleeper communicated to Hall that \$21.64 was CD&R's highest and best offer and that CD&R would not increase its offer price.

59. During the evening of January 30, 2018, the Ply Gem board and its advisors convened for a meeting and determined that Party A's offer included significantly more execution risk than the proposed transaction with CD&R.²⁰ After discussion, the Ply Gem board directed management and its legal counsel to finalize a merger agreement and other transaction documents with CD&R.

60. On January 31, 2018, Ply Gem and CD&R entered into a merger agreement pursuant to which CD&R agreed to acquire all outstanding shares of Ply Gem common stock for \$21.64 per share in cash (previously defined herein as the

²⁰ In particular, the Ply Gem board was concerned that (i) Party A still had significant due diligence to complete; (ii) Party A had not yet provided debt financing commitments to the Company; (iii) a transaction with Party A would likely involve greater regulatory risk as well as risk related to the acquisition financing to be obtained by Party A; and (iv) a transaction with Party A would involve various complexities regarding confidential information because Party A was a competitor of Ply Gem.

“CD&R-Ply Gem Merger”). The price represented an approximately 20% premium to Ply Gem’s closing stock price on January 30, 2018.

61. Following the execution of the merger agreement, CI Capital delivered a written consent to CD&R adopting and approving the merger agreement and the transaction contemplated thereby.

62. Prior to the commencement of trading on January 31, 2018, Ply Gem and CD&R issued a joint press release announcing (i) the CD&R-Ply Gem Merger and (ii) that CD&R had entered into a definitive agreement to acquire Atrium and combine it with Ply Gem (previously defined herein as the “Ply Gem-Atrium Combination”).

63. The January 31, 2018 press release noted that “CD&R had obtained committed financing from Bank of America Merrill Lynch; Barclays; Deutsche Bank Securities, Inc.; GS Bank USA; J.P. Morgan; Jefferies Finance, LLC; MUFG; Natixis, New York Branch; RBC Capital Markets, LLC; Societe Generale and UBS Investment Bank” to finance the CD&R-Ply Gem Merger.²¹

64. On or about April 12, 2018, CD&R closed the CD&R-Ply Gem Merger and effectuated the Ply Gem-Atrium Combination. Upon closing, CD&R owned

²¹ CD&R Jan. 31, 2018 press release, <https://www.cdr-inc.com/news/press-release/ply-gem-holdings-inc.-enters-definitive-agreement-be-acquired-clayton-dubilier> (last visited November 9, 2018).

approximately 70% of the newly-private company (previously defined herein as “New Ply Gem”) and Atrium’s former shareholders, which included funds managed by Golden Gate Capital (“Golden Gate”), held approximately 30% of New Ply Gem.

65. Concurrently with the closing of the CD&R-Ply Gem Merger, (i) all of Ply Gem’s directors other than Gary Robinette, Ply Gem’s CEO and Chairman, resigned from the board; and (ii) CD&R executives Sleeper, Zrebiec, John Krenicki and Tyler Young, as well as Golden Gate managing director Rajeev Amara, were elected as directors of New Ply Gem.

66. Following the closing of the CD&R-Ply Gem Merger and the Ply Gem-Atrium Combination, New Ply Gem was a highly-levered company. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Almost Immediately After The Closing Of The CD&R-Ply Gem Merger and The Ply Gem-Atrium Combination, CD&R Begins The Process Of Combining NCI And Ply Gem

67. With the CD&R-Ply Gem Merger and Ply Gem-Atrium Combination now closed—and recognizing that New Ply Gem had an unacceptably high degree of leverage in an industry facing strong headwinds²⁵—

68. On April 24, 2018, less than two weeks after the CD&R-Ply Gem Merger and the Ply-Gem-Atrium Combination were completed, Metcalf and Riley met with “several senior [CD&R] executives” as well as their NCI co-director colleagues Sleeper, Berges and Zrebiec. (NCI Schedule 14A (the “Proxy”), filed with SEC on Oct. 17, 2018, at 48). During their meeting, Metcalf and Riley presented to CD&R regarding the “possibility of combining NCI and [New] Ply

²⁵ According to S&P’s CapitalIQ Database, New Ply Gem’s peer group was down approximately 7% in mid-April 2018.

Gem, and informed [CD&R] representatives that NCI intended to explore the combination further, including by retaining a financial advisor to assist NCI” (*Id.*). Unsurprisingly, the meeting concluded with CD&R expressing that they were willing “to consider, and would not discourage NCI from considering, a potential combination of NCI and Ply Gem.” (*Id.*).

E. The NCI Board Forms A Special Committee With An Extremely Narrow Mandate

69. On May 1, 2018, the NCI Board resolved to form a special committee (previously defined herein as the “Special Committee” or “Committee”) consisting of directors Ball (as Chairman), Forbes, Holland, Martinez, Kremer and Director Defendant Metcalf who were “selected solely from among NCI’s independent directors who were not and continue not to be affiliated with [CD&R]” (Proxy at 49). Notably, Director Defendants Sleeper, VanArsdale, Zrebiec, Berges, Riley and Affeldt were not selected to sit on the Special Committee.

70. The Special Committee had an extremely limited mandate. [REDACTED]

[REDACTED]

[REDACTED]

71. In addition to its narrow mandate, the Special Committee’s ability to meaningfully engage in the transaction process was further comprised because its

[REDACTED]

financial advisor, Evercore, was preselected by NCI management. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

F. The Special Committee Fails To Properly Vet Evercore For Conflicts

72. On May 3, 2018, the Special Committee convened for its first meeting. At the meeting, the Special Committee “confirmed [its] intention to engage Evercore to act as independent financial advisor” (Proxy at 49) and [REDACTED]

[REDACTED] [REDACTED] The Special Committee then [REDACTED]

[REDACTED]

73. Nothing produced in response to the Section 220 Demand [REDACTED]

[REDACTED] Had the Special Committee done so, the Committee would have learned that Evercore was already in discussions with CD&R concerning Evercore potentially providing restructuring advice to CD&R portfolio company David's Bridal.²⁹ Around May 18, 2018, about two weeks after the May 3, 2018 Special Committee meeting, Evercore was officially retained by CD&R to represent David's Bridal.³⁰ Due to Evercore's omission of its concurrent representation of a CD&R portfolio company and the Committee's failure to vet Evercore for potential conflicts, the Special Committee did not act on an informed basis when retaining Evercore. Accordingly, the Special Committee failed to take necessary corrective action including, but not limited to, retaining a second financial advisor that, unlike Evercore, did not have conflicts with CD&R.

²⁹ Andrew Berlin and Jessica DiNapoli, "David's Bridal In Talks To Tap Evercore For Debt Restructuring," Reuters, Mar. 28, 2018, <https://www.reuters.com/article/us-davidsbridal-evercore/davids-bridal-in-talks-to-tap-evercore-for-debt-restructuring-sources-idUSKBN1H42TU> (last visited Nov. 12, 2018).

³⁰ Eliza Ronalds-Hannon and Katherine Doherty, "David's Bridal Hires Evercore For Debt Advice," Bloomberg, May 18, 2018, <https://www.bloomberg.com/news/articles/2018-05-18/david-s-bridal-hires-evercore-for-debt-advice-as-weddings-wane> (last visited Nov. 7, 2018).

74. During the May 3, 2018 meeting, the Special Committee further learned that Company management was already barreling forward toward consummation of a NCI/New Ply Gem deal. As demonstrated by the [REDACTED] circulated by CEO Riley, NCI management had already marked several [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

G. CD&R Pushes For An Unfairly High Valuation Of New Ply Gem, And The Special Committee Caves

75. On May 10, 2018, Evercore contacted CD&R to initiate business discussions and to request that CD&R provide NCI (and Evercore) business and financial information concerning New Ply Gem, including New Ply Gem’s business plan and financial projections.

76. On May 14, 2018, the Special Committee convened for a telephonic meeting to receive an update and observations from NCI management and Evercore, and to discuss the potential combination transaction with New Ply Gem. At the meeting, Evercore delivered a presentation that contemplated a stock-for-stock merger of NCI and New Ply Gem whereby NCI’s equity would be valued at current

market prices and CD&R and Golden Gate would receive the same value as they contributed to the recently consummated CD&R-Ply Gem Merger and Ply Gem-Atrium Combination. In other words, CD&R would not be entitled to any premium for immediately flipping New Ply Gem to another CD&R portfolio company (*i.e.*, NCI), which was logical in light of the fact that, [REDACTED]

[REDACTED], and (ii) as detailed above, Ply Gem was actively shopped and sold to an unaffiliated third party after substantial arm's-length negotiations, strongly suggesting that CD&R paid fair value to acquire Ply Gem.³¹

77. The transaction contemplated by Evercore's May 14, 2018 presentation would involve [REDACTED]
[REDACTED] Further, upon consummation of the transaction, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

78. On May 17, 2018, Evercore met telephonically with CD&R partners (and NCI Board members) Sleeper and Zrebiec to discuss the potential merger of NCI and New Ply Gem. At the meeting, [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].³³

[REDACTED]

³³ “Panther” refers to New Ply Gem and the “Panther/Astro Deal” refers collectively to the CD&R-Ply Gem Merger and Ply Gem-Atrium Combination.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

79. On May 21, 2018, the NCI Special Committee convened for a meeting to determine whether to recommend to the Board that the Company continue to pursue a combination with New Ply Gem. In advance of the meeting, CEO Riley sent the members of the Special Committee a presentation providing management's

[REDACTED]

[REDACTED]

80. At the May 21, 2018 meeting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Instead, in its May 21, 2018 presentation, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].³⁴

[REDACTED]

³⁴ The “CD&R/Golden Gate Transaction” refers collectively to the CD&R-Ply Gem Merger and Ply Gem-Atrium Combination.

81. On May 22, 2018, the NCI Special Committee reconvened to determine whether to continue to pursue a transaction with New Ply Gem. During that May 22 meeting, the Special Committee directed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Only minutes later, however, Metcalf's [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

82. Later on May 22, 2018, the full NCI Board convened for a meeting at which [REDACTED]

[REDACTED] To pressure the Special Committee

into (i) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

83. CD&R's veiled threat had its intended effect. On May 25, 2018, the Special Committee authorized Evercore to propose significantly more generous terms. Instead of seeking to retain 66% of the combined company, the Special Committee now only sought a sharing ratio of 57% to NCI's current stockholders and 43% to Ply Gem's current owners.

84. On May 29, 2019, Evercore met with representatives of CD&R to discuss valuation. CD&R stated that 43% ownership of the combined company was insufficient to interest CD&R in a potential combination, and that CD&R would purportedly be better off not engaging in the transaction at that ownership level.

85. On May 31, 2018, Evercore met with CD&R to further discuss valuation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

86. Despite the gross unfairness of the counterproposal and the lack of any legitimate exigency, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

87. On June 2, 2018, the full NCI Board met to discuss the Special Committee's recommendation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

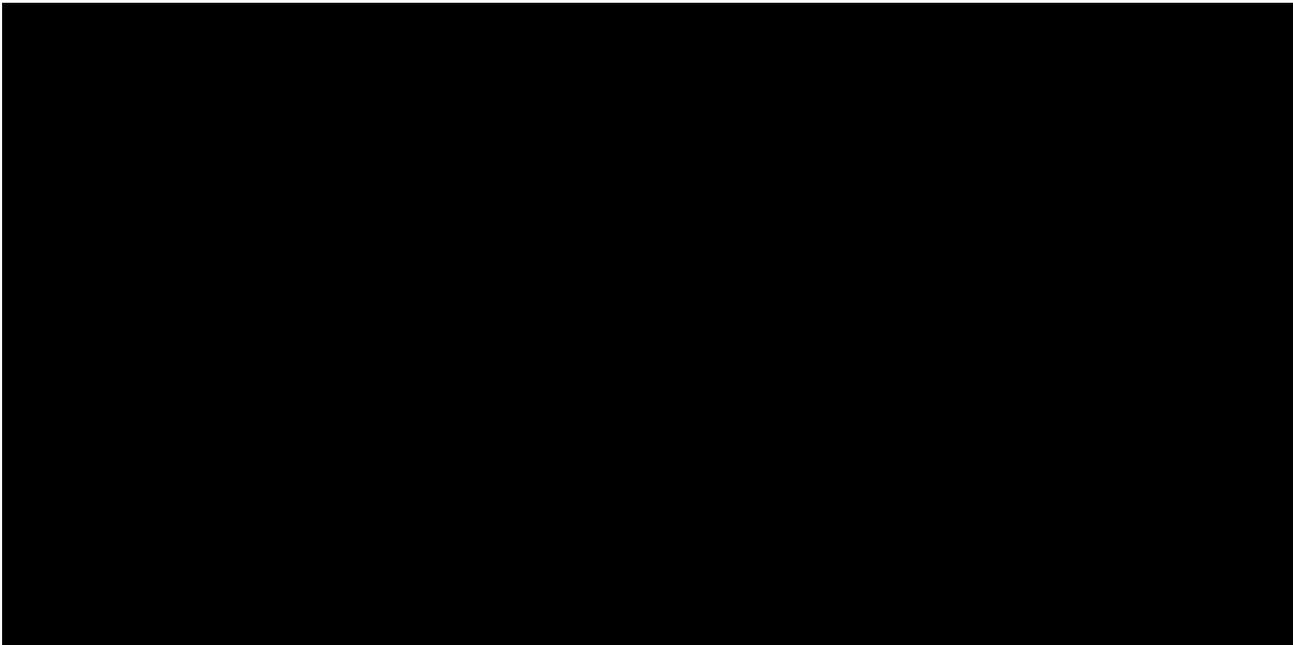
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



88. At the end of the June 2, 2018 meeting, 



89. Thereafter, from early June through mid-July 2018, NCI, New Ply Gem and CD&R engaged in due diligence, negotiated the non-financial terms of the transaction, and negotiated the merger agreement and other transaction documentation.

90. On July 17, 2018, the Special Committee met for the final time. At the meeting, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

91. [REDACTED]

[REDACTED]

[REDACTED]

92. As detailed *supra*, at CD&R's insistence, Evercore abandoned its original view that New Ply Gem should be valued at the sum of the separate valuations of Ply Gem and Atrium from their combination in April 2018. Instead, in arriving at its \$1.236 billion equity value for New Ply Gem, conflicted Evercore relied almost exclusively on the initial case projections prepared by CD&R, which significantly inflated Ply Gem's expected cash flows.

[REDACTED]

93. In addition to this blatant error, Evercore also employed a number of other unreasonable assumptions [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Transaction, NCI stockholders will own 53% of the Company's common equity, with New Ply Gem stockholders owning 47%.

96. Additionally, CD&R will own just under 50% of the Company's common equity and will designate five directors to the Company's 12-member Board. Metcalf will become Chairman and CEO of the combined company and Riley will serve as CEO of the combined company's NCI Division.

97. The Challenged Transaction was publicly announced on July 18, 2018, and was poorly received by the market. NCI's stock price dropped from \$20.70 on July 17, 2018 to \$15.75 by July 24, 2018. NCI's stock price has since continued its free fall, closing at \$12.53 per share on November 9, 2018, a **39%** collapse relative to NCI's stock price immediately prior to announcement of the Challenged Transaction. By contrast, during this same period, the Russell 3000, of which NCI is a constituent, lost just 1.6%.

H. Market Analysts And [REDACTED] Are Highly Critical Of The Challenged Transaction

98. On July 18, 2018, Stephens Inc. issued the following "Investment Conclusion" regarding the Challenged Transaction:

Following this morning's conference call, shares of [NCI] are selling off on what we believe to be *underwhelming synergy potential* from the combined businesses . . . coupled with a *high pre-synergy multiple paid and elevated leverage profile*. While the combined businesses

will diversify end market and raw materials exposure, *we struggle to find meaningful top-line synergies via cross-sell opportunities.*³⁸

99. Similarly, on July 20, 2018, Barclays downgraded NCI's shares and cut its price target for the stock from \$24 per share to \$19 per share. Barclays questioned the strategic rationale for the Challenged Transaction in light of the disparate end markets and customers of the standalone companies (*i.e.*, NCI is 95% commercial and New Ply Gem is 100% residential) and the product portfolio and raw material baskets for the companies have seemingly minimal overlap. Barclays also stated that it expected incremental synergies from the Challenged Transaction of \$30 to \$45 million, which represents less than 1% of combined revenues. Barclays further noted that the \$150 million of disclosed synergies includes cost-out initiatives at legacy NCI and New Ply Gem that already were underway.

100. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁸ Trey Grooms, "First Look At Merger Of NCS & Ply Gem," STEPHENS, INC., Jul. 18, 2018 (emphasis added).

[Redacted]

[Redacted]

[Redacted]

[Redacted]

101. [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[REDACTED]

[REDACTED]

I. The Proxy Fails To Disclose Material Information To NCI Stockholders

102. The Proxy is materially misleading and/or omissive, thus preventing NCI stockholders from casting a fully-informed vote on the Challenged Transaction.

103. *First*, the Proxy fails to disclose the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

104. *Second*, the Proxy compounds the disclosure problem by labeling the Challenged Transaction as a “merger of equals” (Proxy at 49), giving stockholders the false impression that NCI and New Ply Gem have equity values that are approximately equal. As detailed above, that is far from true. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

105. *Third*, the Proxy fails to disclose that Evercore was advising CD&R portfolio company David’s Bridal at the exact same time it was advising the NCI Special Committee in negotiations against CD&R. Disclosure of this information would be material to NCI stockholders, including in the stockholders’ assessment of how much weight to put on Evercore’s fairness opinion.

VI. CLASS ACTION ALLEGATIONS

106. Plaintiff brings this action pursuant to Rule 23 of the Rules of the Court of Chancery, individually and on behalf of all other holders of NCI common stock (except any Defendants herein and any persons, firm, trust, corporation or other entity related to or affiliated with them and/or their successors in interest) who were injured because of Defendants’ wrongful actions, as more fully described herein (the “Class”).

107. This action is properly maintainable as a class action.

108. The Class is so numerous that joinder of all members is impracticable. As of October 11, 2018, there were 66,203,841 shares of NCI stock issued and outstanding. Thus, upon information and belief, there were hundreds or thousands of NCI stockholders scattered throughout the United States.

109. There are questions of law and fact common to the Class, including, *inter alia*, whether:

- a. The Director Defendants breached their fiduciary duties;
- b. CD&R breached its fiduciary duties as the controlling stockholder of NCI; and
- c. Plaintiff and the other members of the Class were injured by the wrongful conduct alleged herein and, if so, what is the proper measure of damages.

110. Plaintiff is committed to prosecuting the action and has retained competent counsel experienced in litigation of this nature. Plaintiff's claims are typical of the claims of the other members of the Class, and Plaintiff has the same interests as the other members of the Class. Plaintiff is an adequate representative of the Class.

111. Further, the prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class. Such inconsistent or varying adjudications would establish incompatible standards of conduct for Defendants and/or with respect to individual members of the Class, that would as a practical matter be disjunctive of the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests.

VII. DERIVATIVE ALLEGATIONS

112. Plaintiff also brings this action derivatively to redress injuries suffered by the Company as a result of breaches of fiduciary duties by the Director Defendants and CD&R.

113. Plaintiff currently is a beneficial owner of NCI common stock and has owned NCI common stock continuously during the relevant time period.

114. Plaintiff will adequately and fairly represent the interests of NCI and its stockholders in enforcing and prosecuting their rights, and has retained counsel competent and experienced in stockholder derivative litigation.

VIII. THE DEMAND BOARD CANNOT DISINTERESTEDLY AND/OR INDEPENDENTLY CONSIDER A DEMAND

115. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

116. Plaintiff has not made a demand on NCI's current twelve-member Demand Board³⁹ to investigate or initiate the claims asserted herein because demand is excused as futile.

³⁹ As alleged and defined *supra* in paragraph 27, the Demand Board consists of all of the Director Defendants as well as directors Martinez, Ball, Forbes, Holland and Kremer.

117. Such demand would be futile and useless, and is thereby excused, because a majority of the Demand Board is either interested in the Challenged Transaction and/or lacks independence from CD&R.

Sleeper, Zrebiec And Berges

118. Sleeper, Zrebiec and Berges cannot disinterestedly and independently consider a demand because each is beholden to, and not independent of, CD&R. Sleeper, Zrebiec and Berges are each senior partners at CD&R, which stands on both sides of the Challenged Transaction. Pursuing the claims alleged herein would contravene Sleeper, Zrebiec and Berges' economic interests, and would imperil their lucrative roles at CD&R.

VanArsdale

119. VanArsdale cannot disinterestedly and independently consider a demand to initiate the claims alleged herein because he is beholden to, and not independent of, CD&R. As VanArsdale's LinkedIn Profile indicates, his primary occupation is an "Operating Advisor" to CD&R and he continues to rely on CD&R's support for his livelihood.⁴⁰ VanArsdale also serves as "Lead Director" of SunSource, a privately-held portfolio company controlled by CD&R. Additionally, VanArsdale sits on the board of directors of Atkore, another portfolio company

⁴⁰ See *supra* note 4; [REDACTED]

controlled by CD&R. Recognizing these relationships, the NCI Board determined that “[f]rom and after May 22, 2018, Mr. William R. VanArsdale . . . was recused from all future NCI board discussions concerning the proposed merger.” Taking actions against CD&R’s interests, including by agreeing to prosecute the claims alleged herein, would jeopardize his position as a CD&R “Operating Advisor” and his relationship with CD&R in general.

120. As explained *supra* in paragraphs 15-17, 19 and 118, because of Sleeper, Zrebiec, Berges and VanArsdale’s disabling conflicts, they were each excluded from the Special Committee because they all “have certain interests, including financial interests, in the merger that may be different from, or in addition to, the interests of NCI stockholders generally.” (Proxy at 70).

Riley

121. Riley cannot disinterestedly and independently consider a demand because he is beholden to and works at the behest of CD&R. Riley’s professional relationship with CD&R dates back at least to December 2014 when CD&R—which at that time owned 57% of NCI’s outstanding common stock—hired Riley to serve as President of NCI’s Group Business Segments. As the Company’s CEO and President, NCI is Riley’s sole employer,⁴¹ from which he has received compensation

⁴¹ [REDACTED] Donald Riley, LinkedIn Profile, <https://www.linkedin.com/in/donrileynci/> (last accessed Nov. 9, 2018).

that is material to him.⁴² Riley also secured for himself continued employment as NCI's CEO in the combined entity post-close. As recently as January 2018, NCI's public filings recognize that Riley is not "independent" under the NYSE listing rules.⁴³ In addition to the NYSE listing rules, NCI's Proxy issued in connection with the Challenged Transaction concedes that Riley is not disinterested and independent because his "Continued Service" with NCI causes him to have "certain interests, including financial interests, in the merger that may be different from, or in addition to, the interests of NCI stockholders generally." (Proxy at 70-71, 73). As a senior officer of NCI who has been promised post-transaction employment, Riley could not objectively consider a demand to investigate or prosecute claims adverse to CD&R's interests, such as the claims asserted herein.

Metcalf

122. Metcalf cannot disinterestedly and independently consider a demand to investigate and prosecute the claims alleged herein because he (i) will be CEO of the post-closing combined company and (ii) is expected to receive certain "equity award grants" for an amount to be determined. [REDACTED]

⁴² For the years 2015, 2016 and 2017, Riley has received total compensation of \$2,153,961, \$2,299,276 and \$2,511,814, respectively. *See supra* note 2.

⁴³ *See supra* note 3.

Given

Metcalf's interests, NCI's Proxy identifies Metcalf as a director that "NCI stockholders should be aware that . . . [has] certain interests, including financial interests, in the merger that may be different from, or in addition to, the interests of NCI stockholders generally." (Proxy at 70-73). As the expected CEO of the post-closing combined company and the recipient of new equity award grants, Metcalf could not objectively consider a demand to investigate or prosecute claims as the assertion of such claims would contravene his own personal financial interests.

Affeldt

123. Affeldt cannot disinterestedly and independently consider a demand because Affeldt's **27-year** professional relationship with CD&R renders her beholden to CD&R. Affeldt's nearly three-decade long relationship with CD&R began in 1991 when CD&R hired her in the Human Resources department of then-CD&R-controlled Lexmark. In 1996, Affeldt was promoted to vice president of Lexmark's human resources department and led that division until she left in February 2003. As alleged *supra* in paragraph 18, from February 2003 until the present, Affeldt's full time occupation is serving on certain boards of directors, most of which have been CD&R controlled or affiliated companies. Since leaving Lexmark in 2003, Affeldt has received over \$2.45 million in compensation in

exchange for her service on CD&R affiliated or controlled companies. Because she has no other employment, this compensation is material to her.

124. Affeldt's loyalty to CD&R helped facilitate her purchase of several multi-million dollar beach homes in Hilton Head, South Carolina.⁴⁴

125. If Affeldt were to act against the interests of CD&R, she could lose not only her NCI directorship (which constitutes a material portion of her income), but also the opportunity to be placed on the boards of CD&R portfolio companies in the future.

126. NCI's actions and public disclosures further confirm Affeldt's lack of independence from CD&R. For example, in November 2009, CD&R designated Affeldt as one of five CD&R appointees to NCI's then-existing board of directors.⁴⁵

⁴⁴ According to the Beaufort County, South Carolina Register of Deeds, in September 2006, Affeldt purchased a home in the Palmetto Dunes development for \$3.61 million and recently built a new home in the Sea Pines development. *See* Beaufort County, Register of Deeds, Title To Real Estate, BK 02460 PGS 2475-2477, Oct. 18, 2006, <http://rodweb.bcgov.net/BrowserView/viewer.aspx?docID=6697584> (last accessed Nov. 9, 2018); Beaufort County, Register of Deeds, Mortgage, BK 02556 PGS 0789-0802, April 19, 2007, <http://rodweb.bcgov.net/BrowserView/viewer.aspx?docID=7021187> (last accessed Nov. 9, 2018); Beaufort County, Register of Deeds, Title To Real Estate, BK 03163 PGS 2290-2293, <http://rodweb.bcgov.net/BrowserView/viewer.aspx?docID=7497430> (last accessed Nov. 9, 2018); Beaufort County, Register of Deeds, Mortgage, BK 3382, PGS 77-81, <http://rodweb.bcgov.net/BrowserView/viewer.aspx?docID=7785911> (last accessed Nov. 9, 2018).

⁴⁵ NCI Schedule 14F-1, filed with the SEC on Oct. 30, 2009, at 2. The five directors

Tellingly, at the time of Affeldt’s appointment, NCI disclosed that “[f]ollowing the appointment of the additional CD&R Funds’ designees to the Board effective on or after the eleventh day following the mailing by us of this Information Statement, ***the CD&R Funds will have the ability***, subject to the fiduciary duties of the individual directors, ***to control the decisions of the Board.***”⁴⁶ Moreover, presumably in recognition of her longstanding service on CD&R-controlled boards, NCI determined not to place Affeldt on the Special Committee responsible for the Challenged Transaction, which was composed of “directors who are independent and not affiliated with [CD&R].” (Proxy at 7-8). Similarly, Affeldt is also not a member of NCI’s Affiliate Transactions Committee, which is “responsible for reviewing, considering and approving certain transactions between NCI and its controlled affiliates, on the one hand, and [CD&R] and its affiliates, on the other hand.”⁴⁷

127. Thus, demand on the Demand Board is excused as futile.

designated to NCI’s then-existing board consisted of (i) Berges, (ii) Sleeper, (iii) Kremer, (iv) Holland, and (v) Affeldt. *Id.*

⁴⁶ *Id.*

⁴⁷ NCI Schedule 14A, filed with the SEC on Jan. 26, 2018, at 56.

COUNT I

DIRECT AND DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST CD&R AS CONTROLLING STOCKHOLDER

128. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

129. As explained herein, CD&R is NCI's controlling stockholder. As a controlling stockholder, CD&R owed and owes the Company and the Class the utmost fiduciary duties of due care, good faith and loyalty.

130. In breach of its fiduciary duties, CD&R devised and orchestrated the unfair and self-dealing Challenged Transaction. Among other things, CD&R exploited its control over the Board to steer the Company into a single-party process with a conflicted Special Committee, which resulted in the grossly unfair Challenged Transaction.

131. As a result of CD&R's breaches of fiduciary duty and the unfair issuance of NCI equity to New Ply Gem in connection with the Challenged Transaction, CD&R, the Company's controlling stockholder, will experience an increase in its economic and voting stake of NCI while the members of the Class will have their economic and voting power in the Company unfairly reduced.

132. Moreover, as a result of CD&R's breaches of fiduciary duty, NCI and its public stockholders have been harmed as a result of the overpayment to New Ply Gem (*i.e.*, CD&R).

133. Plaintiff and the Class have no adequate remedy at law.

COUNT II

DIRECT AND DERIVATIVE CLAIM FOR BREACH OF FIDUCIARY DUTY AGAINST THE DIRECTOR DEFENDANTS

134. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

135. The Director Defendants, as NCI directors and officers, owe the Company and the Class the utmost fiduciary duties of due care, good faith, loyalty and disclosure. Under Delaware law, the Director Defendants must, but cannot, show that the Challenged Transaction is entirely fair to NCI and its public stockholders.

136. The Director Defendants failed to fulfill their fiduciary duties in connection with the Challenged Transaction by, among other things, (i) conducting a single-party acquisition process with a conflicted Special Committee and predetermined, conflicted financial advisor; (ii) failing to equip the Special Committee with a sufficiently broad mandate to explore alternatives other than the

Challenged Transaction; and (iii) agreeing to the Challenged Transaction on terms unfair to the Company and its public stockholders.

137. As a result of the Director Defendants' breaches of fiduciary duty in connection with the Challenged Transaction, NCI issued an excessive number of shares of NCI common stock to CD&R, the Company's controlling stockholder, and the members of the Class have experienced a reduction in their economic and voting power in the Company.

138. The Company has further been harmed by the overpayment to New Ply Gem and CD&R in connection with the Challenged Transaction.

139. CD&R controlled NCI at the time of the Challenged Transaction. But to the extent the Court finds otherwise, Plaintiff alleges in the alternative that the Challenged Transaction resulted in a change-of-control at NCI, which required the Director Defendants to act reasonably under enhanced scrutiny review. The Director Defendants breached their fiduciary duties under enhanced scrutiny because, *inter alia*, they allowed CD&R to acquire control of NCI without CD&R paying a control premium, thus causing harm to Plaintiff and NCI's public stockholders.

140. Plaintiff and the Class have no adequate remedy at law.

COUNT III

DERIVATIVE CLAIM FOR UNJUST ENRICHMENT AGAINST CD&R

141. Plaintiff repeats and realleges each and every allegation above as if set forth in full herein.

142. As detailed herein, the Challenged Transaction is unfair to the Company and the Class and is the product of breaches of fiduciary duty by CD&R and the Director Defendants.

143. The terms of the Challenged Transaction are unfair to NCI and provide improper and valuable benefits to CD&R.

144. CD&R was—and continues to be—the direct recipient of the improper and valuable benefits flowing from the Challenged Transaction. Those benefits were derived by unlawful means.

145. Under these circumstances, it would be unconscionable to permit CD&R to retain the improper benefits received pursuant to the Challenged Transaction.

IX. RELIEF REQUESTED

WHEREFORE, Plaintiff, on behalf of himself, the Class and NCI, requests judgment as follows:

A. Declaring that this action is properly maintainable as a class action;

B. Finding the Director Defendants liable for breaching their fiduciary duties owed to the Class and the Company;

C. Finding that demand on the NCI Board is excused as futile;

D. Finding that CD&R breached its fiduciary duties in its capacity as the controlling stockholder of NCI;

E. Finding CD&R liable for unjust enrichment;

F. Awarding Plaintiff and the other members of the Class damages in an amount which may be proven at trial;

G. Awarding Plaintiff and the other members of the Class pre-judgment and post-judgment interest, as well as their reasonable attorneys' and experts' witness fees and other costs;

H. Awarding NCI the amount of damages it sustained as a result of Defendants' breaches of fiduciary duties to the Company; and

I. Awarding such other and further relief as this Court may deem just and proper.

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