



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LVI Group Investments, LLC	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	C.A. No. _____
NCM Group Holdings, LLC and Subhas	:	
Khara,	:	PUBLIC VERSION
	:	FILED: March 8, 2016
Defendants.	:	

**VERIFIED COMPLAINT**

Plaintiff LVI Group Investments, LLC (“LVI” or “LVI Holdings”), for its complaint against Defendants, NCM Group Holdings, LLC (“NCM” or “NCM Holdings”) and Subhas “Sage” Khara (“Khara”), alleges:

**Nature of the Action**

1. This action arises out of misrepresentations made by Defendants when LVI Holdings was considering a merger with NCM Holdings to form NorthStar Group Holdings, LLC (“NorthStar”). The two demolition and environmental remediation companies merged in 2014, pursuant to their Contribution Agreement (along with excerpts of pertinent Schedules, Ex. A hereto), and divided the equity in NorthStar based on their respective Earnings Before Interest, Taxation, Depreciation and Amortization (“EBITDA”). However, Defendants—NCM and its CEO, Khara—lied and concealed material facts. They artificially inflated NCM’s

EBITDA, both to persuade LVI to engage in a merger it would otherwise have rejected and to secure a greater share of the merged entity. They also falsely informed LVI that there had been no material claims asserted by third parties, including claims that NCM had defaulted under, or materially breached, certain major contracts. This deceptively-induced merger also secured for Khara a lucrative position as the President of NorthStar and substantially increased the value of his equity interest in NCM Holdings.

2. Contrary to the picture portrayed by its manipulated financials, NCM's value as a going concern was less than its debt at the time of the merger. NCM and Khara manipulated NCM's financials prior to NCM's merger discussions with LVI because NCM needed to refinance its debt to maintain operations. Without misrepresenting its financial condition, it is unlikely that NCM could have secured the financing that allowed it to continue in operation until its merger discussions with LVI. Thereafter, NCM continued to fraudulently inflate its financial results to induce LVI to go forward with the merger.

3. Absent NCM's misrepresentations about its financial condition, LVI would never have entered into the merger and certainly would not have given up a portion of the equity in its profitable business in consideration for equity in an entity—NCM—that was essentially worthless. LVI did not receive the benefit from

the merger that it reasonably expected based upon NCM's financials, while NCM Holdings received what it was promised from the merger. To this point, NCM's fraud has allowed it to successfully evade any consequences from its actual pre-merger insolvency and gain a valuable stake in LVI's business.

4. NCM and Khara are liable to LVI for fraud and fraudulent inducement, and NCM is further liable for contractual indemnification and unjust enrichment under Delaware law.

### **Parties**

5. Plaintiff LVI Holdings is a Delaware limited liability company. LVI Holdings owns 62.5% of the merged entity, NorthStar (also a Delaware limited liability company).

6. Defendant NCM Holdings is a Delaware limited liability company. NCM Holdings owns 37.5% of NorthStar. NCM is principally owned by Evergreen Pacific Partners ("EPP") or a related entity.

7. Defendant Khara is the former President and CEO, and a member of the Board of Managers, of NCM Holdings, and was also the President of various NCM Holdings Delaware subsidiaries (*e.g.*, NCM Contracting Group GP, Inc., NCM Contracting Group, LP, NCM Demolition and Remediation GP, Inc., and NCM Demolition and Remediation, LP). (Ex. A, Schedule 2.1.) Prior to the mer-

ger, Khara owned approximately 5% of NCM Holdings. According to the Contribution Agreement, Khara's personal knowledge formed part of the basis for NCM Holdings's contractual representations. (Ex. A, p. 46.) Following the merger, Khara served as the President of NorthStar until he was put on administrative leave by NorthStar's Board of Managers. He has been a member of the Board of NorthStar since the merger. Upon information and belief, Khara resides in California.

### **Jurisdiction**

8. This Court has subject matter jurisdiction pursuant to: (i) 6 Del. C. § 18-111, providing jurisdiction over any action to interpret "any provision of this chapter, or any other instrument, document, agreement or certificate contemplated by any provision of this chapter," such as the Contribution Agreement here; and (ii) 10 Del. C. § 341, which gives this Court jurisdiction "to hear and determine all matters and causes in equity."

9. This Court has personal jurisdiction over NCM Holdings because it is a Delaware limited liability company and consented to the jurisdiction of this Court in Section 6.5 of the Contribution Agreement.

10. This Court has personal jurisdiction over Khara because he has consented by statute to jurisdiction in connection with his position as a manager of both NCM Holdings and NorthStar, each a Delaware limited liability company,

and has caused tortious injury in Delaware. As President, CEO and a member of the Board of Managers of NCM Holdings, Khara caused NCM Holdings to merge with LVI Holdings, another Delaware limited liability company, to form NorthStar, all to his direct personal benefit. In connection with that merger, Khara conspired with his colleagues to, and did, commit fraud as set forth herein. Moreover, as part of that merger, and in furtherance of his fraudulent scheme, Khara signed certain documents and, upon information and belief, caused the same to be filed with the Delaware Secretary of State, including certain amendments to certificates of partnership. Khara executed and continued his fraudulent scheme as a member of the Boards of Managers of both NCM Holdings and NorthStar. Khara also served as President of several other Delaware entities that participated in the merger. (Ex. A, Schedule 2.1.) Finally, Khara signed numerous documents, in both his individual and representative capacities, consenting to jurisdiction before this Court.

### **Factual Background**

11. Prior to their merger, LVI and NCM were two of the largest providers of demolition and environmental remediation services in the United States. In October 2013, LVI and NCM negotiated and executed a non-disclosure agreement to initiate merger discussions. The parties began exchanging information, including

financial statements, forecasts, and lists of significant liabilities.

12. Those preliminary negotiations resulted in a letter of intent, which set a merger price based on each party's representation of its EBITDA. The parties hired FTI Consulting, Inc. to conduct due diligence examinations and, in particular, perform quality of earnings analyses for the parties and their lenders. The parties also conducted their own due diligence. EBITDA was critical to the parties and would form the basis of their division of NorthStar's equity. The final equity split valued NCM Holdings's equity at approximately 7.5 times NCM's trailing twelve month ("TTM") EBITDA, less its pre-closing debt—resulting in NCM Holdings receiving 37.5% of the equity in NorthStar. The parties worked on deal structure and conducted significant due diligence throughout the final months of 2013 and in 2014 until the transaction closed in April.

### **NCM's Fraud**

13. Unbeknownst to LVI, and not discernable via reasonable due diligence, NCM intentionally overstated its EBITDA to induce LVI to complete the merger and give NCM Holdings a larger-than-warranted piece of NorthStar. To disguise the fact that NCM was reporting EBITDA that did not actually exist, NCM and Khara manipulated NCM's construction accounting, in violation of Generally Accepted Accounting Principles ("GAAP"), in ways that an auditor or

purchaser would not likely detect. For example, NCM's and Khara's practices included:

a. Bidding projects at prices that would not allow NCM to achieve its own standard profit margins or, in some cases, any profit at all. NCM would book the projects initially as if it expected to achieve its standard profit margin (roughly 20%) even though it knew actual project costs would negate much (or all) of those projected profits. As older projects ultimately saw their profits "fade," NCM could disguise the problem by winning new jobs where it could project new inflated profits. In this fashion—essentially a construction accounting kiting scheme—NCM could show its lenders and investors that it was "having successful quarters" when, in reality, it was booking profits that it knew it would never realize when the books on a given project closed.

b. Booking profits using a "percentage of completion" methodology that was premised on estimates of total project costs that NCM knew were understated. Under standard percentage-of-completion accounting under GAAP, a company calculates its percentage of completion based on the ratio of its actual costs incurred to date to its total anticipated costs for the entire project (including appropriate change orders), and books any associat-

ed profits accordingly. For example, if 95% of a job's projected costs have been incurred, the job is presumed 95% complete, and the company books 95% of the ultimate profits it expects to receive when the project is complete. However, because NCM often deliberately understated its total projected costs, a project could be significantly less than 95% complete when 95% of the ostensibly "projected" costs had been incurred. Thus, NCM would frequently overstate both the total potential profits on the job (*i.e.*, NCM's eventual profit margin was too large) and the profits actually booked at any given time (*i.e.*, NCM's (overstated) profits were recognized too quickly). Ultimately, as the project wound down, and actual costs began to exceed projected costs, NCM would have to reduce projected profits—and, in many instances, reverse profits that it had already booked. This phenomenon was commonly referred to at NCM as "fade."

c. Delaying recognition of any increase in projected costs. As projects wound down and costs continued to mount, NCM would "feather" its "fade" adjustments in small increments over several months, rather than making the full corrections immediately. This violation of GAAP allowed NCM to keep profits on its books longer and helped to disguise the nature of the misconduct that led to the need for profit reversals (*e.g.*, by moving loss-



es and reversals farther in time from their underlying causes).

d. Further concealing the “fade” in its projects by booking yet more unrealistic profits on new projects, which NCM knew it would not achieve. For example, in August 2013, NCM’s Senior Vice President in charge of its Washington and National Divisions sent an email to NCM’s CFO, complaining about management’s booking of “margin, especially without discussing it” first, because “it usually results in fade.” He complained that the false entries “often bite[] us in the ass” and are “creating friction.”

e. Creating fictional revenues and profits by manipulating projected sales of “scrap.” NCM’s contracts often gave it the right to sell the scrap that resulted from its demolition and remediation efforts, the proceeds of which were not included as revenues projected to be received from its customer. Rather than relying on good-faith estimates to book scrap revenues, NCM would periodically increase its estimated amount of scrap, or its estimate of the price at which it could sell the same, without any basis, at least in part to present a false appearance of financial strength to LVI in the months leading up to the merger.

f. Manufacturing claims against customers. While it is appropri-

ate in certain circumstances for a contractor to book amounts that a customer may dispute, NCM would invent baseless claims as a way of delaying the day of reckoning as to the amount it would receive on a project, further delaying the booking of inevitable losses and reversals.

14. One significant example of these manipulations is NCM's Apple project in California. NCM obtained the contract for this project in March 2013. At the time NCM bid for the project, NCM internally calculated its gross profit percentage (based on its expected costs and revenues) to be less than 18%, and perhaps as low as 5%. Nevertheless, NCM accounted for the project as if it expected radically higher profits.

15. Contrary to its pre-deal estimates, NCM's work-in-progress report ("WIP") initially—and baselessly—reflected NCM's standard 20% anticipated gross profit. NCM's "expected" gross profit percentage rose to 33% in April 2013, and skyrocketed to 55% in June 2013, for no reason other than a desire to manipulate NCM financials to make the company appear more profitable than it really was. To accomplish this result, NCM's financial statements were manipulated to reflect both increases in the purported "contract" price (*i.e.*, expected revenues) and decreases in estimated expenses, neither of which was supported by any actual favorable changes in revenues or costs for the project.

16. Shortly before the merger was to close, NCM's financials—*i.e.*, those it provided to LVI Holdings and to banks to induce and support the merger, respectively—estimated net profits from its Apple project of over \$7 million. Because NCM reported completion based on actual costs incurred, it already had recognized more than \$6.44 million in profit from the Apple project in its February 2014 EBITDA (based on 92% completion). Indeed, its profit recognition on Apple would reach \$6.84 million in its March 2014 EBITDA (based on a claim of 97% completion), the month before the merger. But NCM's internal reports—*i.e.*, those not shared with banks or LVI Holdings—reflected that the Apple project was far less complete (85%, not 97%) and that its expected revenues were far less than reported (\$16.5 to \$17 million, not \$20 million).

17. Correspondence reveals that, months before the merger, an NCM Vice President and Regional Manager highlighted to Khara the “huge increase” in the Apple cost of completion and urged a restatement of NCM's financials. When the impact of these cost increases was later revealed after the merger, that same Vice President noted that he had “been trying to take this hit for months” and that “[Khara] is fully aware of the WIP fade.”

18. NCM's and Khara's misrepresentations and intentional omissions regarding the Apple project alone—setting aside NCM's fraudulent accounting on

other projects—were material to the merger. Given the Apple project’s actual percentage of completion and expected profitability, NCM should not have recognized any more than \$1.7 million in profits from Apple at the time of the merger. Per the merger methodology valuing NCM’s equity at 7.5 times its EBITDA (less debt), the fraudulent and unjustified recognition of gross profits inflated NCM’s value by more than \$35 million, and drastically increased NCM’s share in NorthStar. Defendants NCM and Khara intentionally presented LVI with false information on Apple to increase their ownership interest in NorthStar.

19. NCM similarly booked improper profits in connection with its Pepco project. NCM overstated the amount of scrap it would recover, and inflated the anticipated price for that scrap, in order to reflect a higher profit margin. As early as November 2013, the Program Manager in charge of weekly Pepco finances noted that NCM needed “to come to terms on” its Pepco accounting because of NCM’s overstatements of scrap volume and value.

20. The overstatement on NCM’s financial statements for Pepco was never corrected. Just two weeks before the merger, Khara speculated that a potential change order unrelated to scrap might give NCM an opportunity “to cover any shortfall” on Pepco and asked for clarification as to the extent of NCM’s fraudulent accounting.

21. When the Pepco Program Manager was asked to review the WIP for Pepco shortly after the merger, he explained: “I have no idea where the contract value or cost at completion came from as it does not match any records (bid price, estimate, etc, etc) that I have.” His estimates of contract value and cost demonstrated NCM should have recognized only about half of the profits from Pepco reflected in the summary financial statements attached to the Contribution Agreement.

22. Despite knowing that NCM’s profits on Apple and Pepco were already overstated, just before the merger, Khara asked his senior staff to further increase the profit margins for both projects (as well as at least three others) to “help at closing.”

23. NCM also overstated its TTM EBITDA from other projects, including Perrine DuPont, Bart-Daytona International Speedway, Hensel-Dallas Love Field, KMC Bingham Parking, Block 69/Texas Tower, Building 9, and Plant 64. Only after the merger, and after these projects failed to meet NCM’s projections, did LVI’s owners discover that NCM’s pre-merger EBITDA from these projects had been fraudulently overstated.

24. On March 11, 2014, just a month before the merger, an NCM Senior Vice President described the entirety of NCM’s ongoing scheme: first, NCM’s “fi-

nancials get overstated to make the lending go smooth,” and second, the process of overstatements “continues at the end of the year for the merger” with LVI.

25. Separate from its financials, NCM concealed its fraud when, in connection with merger financing, it had an opportunity to disclose any projects where it had concerns about its ultimate ability to achieve profits. LVI had negotiated with the lender for a basket of projects where aggregate losses were expected, with such losses not counted against current EBITDA for compliance purposes under the loan. NCM added three projects to this list (none of which is at issue in this lawsuit), but NCM and Khara failed to disclose that Apple, Pepco and other substantial projects had previously-reported profits that needed to be reversed, or that losses were expected or reasonably likely in conjunction with projects that had been falsely reported and projected as profitable.

26. LVI performed significant due diligence on NCM, including accounting and tax diligence, background checks, reviews of certain projects, and other diligence. LVI’s reasonable due diligence did not reveal that NCM’s pre-merger financials were fraudulent and false.

27. On April 23, 2014, LVI Holdings and NCM Holdings executed the Contribution Agreement, forming NorthStar, the merged entity. In connection with the merger, Defendant Khara became President of NorthStar, with a lucrative

package of salary and other compensation.

28. After the merger, the “fade” from NCM’s projects put NorthStar in serious financial difficulty. For LVI, this represented not only evaporation of the expected profitability of the merged entity, but the loss of the 37.5% of its own valuable business that was effectively “paid” to NCM (in the form of NorthStar equity) as consideration for the merger.

29. Unable to understand why so many NCM projects were not meeting NCM’s projections, LVI engaged in an extensive post-merger investigation of the anomalous “fade” in former NCM projects, and discovered that Defendants had intentionally falsified NCM’s pre-merger financials. LVI’s investigation distinguished between those NCM legacy projects experiencing losses as a result of events occurring after the merger and those projects where NCM and Khara knowingly and intentionally inflated NCM’s pre-merger EBITDA.

30. Had NCM and Khara honestly disclosed the true state of NCM’s finances prior to the merger, LVI never would have entered into the letter of intent, executed the Contribution Agreement, closed the merger, or contributed its equity to NorthStar. Likewise, LVI would never have given personnel associated with NCM senior positions within NorthStar, including not only Khara as President but also EPP’s Tim Bernandez as Chairman of the Board.

**The Contribution Agreement Required NCM Holdings to Provide  
Accurate Financials Prepared in Conformity with GAAP**

31. In the Contribution Agreement, NCM Holdings represented and warranted, *inter alia*, that: (a) its financial statements were “in conformity with GAAP consistently applied throughout the periods” (§ 2.4(b)), and (b) it had not experienced any “Material Adverse Effect” since December 31, 2013 (§ 2.15).

32. Contrary to those representations, NCM Holdings manipulated the percentage-of-completion accounting it used to recognize revenue. Among other things, and in direct contravention of GAAP, NCM (a) recognized revenue and profits that would never exist; (b) recognized revenue before it was permitted to do so under GAAP; (c) hid the fact that its “estimated” expenses on projects were understated, sometimes to the extent that true expense estimates were in excess of the revenues it reasonably expected to earn; and (d) delayed recognition of costs in excess of its initial projections.

33. The result of NCM Holdings’s manipulations were reflected on the financial statements attached as Schedule 2.4(a) to the Contribution Agreement, attached as part of Exhibit A hereto.

34. The Contribution Agreement provides for indemnification arising out of, relating to, or resulting from any failure of any surviving representation or the breach by NCM Holdings of any covenant or agreement (§ 5.2(a)). The Contribu-



tion Agreement also explicitly carves out fraud claims from any contractual limitations on claims or remedies. (Ex. A, § 5.4(e).)

35. The following schedules to the Contribution Agreement were false and misleading:

a. Schedule 2.4(a) included the unaudited statements of operations, members' equity and cash flows of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the two-month period ending February 28, 2014. This information did not accurately or fairly state Revenue, Gross Margin, Gross Margin %, EBITDA, and EBITDA Margin of NCM Holdings and its subsidiaries.

b. Schedule 2.4(a) included the unaudited balance sheet of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the two-month period ending February 28, 2014. This information did not accurately or fairly represent the Assets and Liabilities of NCM Holdings and its subsidiaries as of February 28, 2014, including (i) Costs & Earnings in Excess of Billings, and (ii) Billings in excess of costs & earnings.

c. Schedule 2.4(a) included the unaudited statements of operations, members' equity and cash flows of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the fiscal year ending December 31,

2013. This information did not accurately or fairly state the Revenue, Gross Margin, Gross Margin %, EBITDA, and EBITDA Margin of NCM Holdings and its subsidiaries.

d. Schedule 2.4(a) included the unaudited balance sheet of NCM Holdings and each NCM Subsidiary, on a consolidated basis, as of December 31, 2013. This information did not accurately or fairly represent the Assets and Liabilities of NCM Holdings and its subsidiaries as of December 31, 2013, including (i) Costs & Earnings in Excess of Billings, and (ii) Billings in Excess of Costs & Earnings.

e. Schedule 2.4(a) included the audited statements of operations, members' equity and cash flows of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the fiscal year ending December 31, 2012 (the "NCM Holdings 2012 Statements"). This information did not accurately or fairly state the Contract Revenues and Gross Profit of NCM Holdings and its subsidiaries.

f. Schedule 2.4(a) included Note 1 to the NCM Holdings 2012 Statements and the NCM Holdings 2012 Balance Sheet (relating to "Revenue and cost recognition"). This information did not accurately or fairly describe the practices of NCM Holdings and its subsidiaries. Among other in-

accuracies, (i) “the percentage of completion method” for revenue recognition was not “measured on the basis of cost incurred to date to total estimated cost for each contract,” particularly given the description of “contract costs,” and (ii) “[c]hanges in job performance, job conditions, and estimated profitability” were not “recognized in the period in which the revisions [were] determined.”

g. Schedule 2.4(a) included the audited balance sheet of NCM Holdings and each NCM Subsidiary, on a consolidated basis, as of December 31, 2012 (the “NCM Holdings 2012 Balance Sheet”). This information did not accurately or fairly represent the Assets and Liabilities of NCM Holdings and its subsidiaries as of December 31, 2012, including (i) Costs and estimated earnings in excess of billings on uncompleted contracts, and (ii) Billings in excess of costs and estimated earnings on uncompleted contracts.

h. Schedule 2.6 did not contain all claims pending or threatened against NCM Holdings. NCM also falsely represented that “no NCM Subsidiary is and, to NCM’s Knowledge, no other party thereto is in material breach of or default under such NCM Major Contract and no party thereto has given to any other party thereto notice alleging that such a material

breach or default occurred.” (Ex. A, § 2.8(b)(iii).) Likewise, NCM represented that “[n]either NCM Holdings nor any NCM Subsidiary has received any communication indicating that any” customer listed in Schedule 2.20 “is terminating or materially reducing or making any materially adverse change in any aspect of its or any of its Affiliates’ business relationship with any NCM subsidiary.” (Ex. A, § 2.20; Schedule 2.20.) These representations and disclosures were false as, for example, Apple had delivered such notice to NCM prior to the merger.

36. On April 22, 2015, in satisfaction of Section 5.5(a) of the Contribution Agreement, LVI Holdings sent NCM Holdings a Notice of Claim, identifying false representations and warranties made by NCM in the Contribution Agreement. (Ex. A, § 5.5(a).) LVI Holdings listed NCM Holdings’s fraudulent accounting practices and complained of NCM Holdings’s “improper and undisclosed pattern and practice of understating estimated contract costs, overstating estimated profit, overstating job completion percentage, overstating earned profit, and overstating earned revenues – and in certain cases, overstating anticipated contract revenues.”

37. Pursuant to Section 5.2(a) of the Contribution Agreement, NCM Holdings is obligated to provide indemnification for all losses arising out of “any failure of any Surviving NCM Representation to be true or ... any breach of any

covenant or agreement of NCM Holdings herein.”

38. As part of the contractual “Indemnification Procedure,” Section 5.5(b) of the Contribution Agreement gives LVI Holdings (as a Claiming Party) the right to commence a proceeding in Delaware Court of Chancery and “pursue any and all legal remedies.”

## **COUNT I**

### **Fraud**

#### **(Against NCM Holdings and Khara)**

39. LVI incorporates the allegations of paragraphs 1 through 38 as if fully set forth herein.

40. NCM and Khara had a duty to truthfully and accurately disclose material facts to LVI and to disclose subsequently acquired information they knew would make previous representations untrue or misleading.

41. NCM and Khara made (or caused to be made) false representations and concealed material facts that they had a duty to disclose, including as to the Revenue, Gross Margin, Gross Margin percentage, EBITDA, EBITDA Margin, costs and earnings in excess of billings, billings in excess of costs and earnings, contract revenues, and gross profits of NCM and its subsidiaries with respect to the fiscal years ending December 31, 2012 and December 31, 2013, and with respect to the stub period in 2014 prior to the merger for which financial information was

provided. Further, NCM and Khara did not disclose all known claims threatened against NCM, or that NCM had received one or more notices of a material breach or default of a major contract.

42. NCM and Khara knew at the time they made (or caused to be made) the representations and concealed (or caused to be concealed) certain information that the representations were false and the information was required to be disclosed.

43. NCM and Khara made (or caused to be made) the misrepresentations and omissions of material fact with the intent to, among other things, defraud LVI and induce LVI to enter into the Contribution Agreement.

44. LVI was unaware of the falsity of NCM's and Khara's representations when they were made and through the time that LVI Holdings signed the Contribution Agreement. LVI Holdings was unaware of NCM's and Khara's intentional omissions of material fact at all relevant times.

45. NCM and Khara knew that LVI Holdings would rely on their representations in evaluating whether to proceed with the transaction. They similarly knew that LVI would not have entered into the Contribution Agreement or subsequently closed the merger had they made truthful representations and disclosed the material facts they intentionally omitted before the merger. Further, NCM Hold-

ings and Khara knew that, absent their fraudulent misrepresentations and intentional omissions, LVI would not have agreed that NCM would receive 32.5% of NorthStar (to NCM's and Khara's direct benefit), nor would LVI have agreed that Khara would become the President of NorthStar and receive the financial remuneration he was provided in connection with that position.

46. LVI justifiably relied upon the information provided by NCM Holdings and Khara by, among other things, entering into the Contribution Agreement, closing the merger, and contributing equity to NorthStar.

47. Following the merger, Khara continued to conceal these material facts, offering misleading and false explanations for the apparently worsening financial condition of legacy NCM projects.

48. As a direct and proximate result of NCM's and Khara's misrepresentations and intentional omissions of material fact, LVI has been damaged, including, but not limited to, by giving up valuable equity in LVI without appropriate compensation, incurring transaction and closing costs in connection with an unfavorable transaction, foregoing or precluding opportunities for expanding LVI's profitable business, allowing the NorthStar business to assume pre-merger loan obligations of NCM through a refinancing that impaired NorthStar's liquidity and financial strength, sharing synergies of a larger merged business with NCM rather

than with a merger partner that might have provided reasonable consideration for the merger, and being deprived of the benefits of the bargain for which LVI negotiated and contracted.

49. Because it is no longer practicable for the merger to be rescinded, LVI therefore requests that this Court enter judgment for damages, including without limitation rescissory, consequential, and expectation damages as a result of NCM's and Khara's fraudulent conduct described herein, in an amount to be determined at trial. LVI further requests that this Court enter judgment awarding LVI restitution, including costs and attorneys' fees, and grant LVI such other and further relief as this Court deems just and equitable.

## **COUNT II**

### **Fraudulent Inducement**

#### **(Against NCM Holdings and Khara)**

50. LVI incorporates the allegations of paragraphs 1 through 49 as if fully set forth herein.

51. NCM and Khara had a duty to truthfully and accurately disclose material facts to LVI and to disclose subsequently acquired information that they knew would make previous representations untrue or misleading.

52. This included the duty to truthfully, accurately, and completely disclose all material facts relating to NCM's financial condition, including the true



value of NCM's work-in-progress. NCM and Khara also subjected themselves to additional duties when they chose to make false affirmative statements.

53. NCM and Khara made (or caused to be made) misrepresentations and intentional omissions of material fact in order to induce LVI to, among other things, (a) enter into a letter of intent, (b) enter into the Contribution Agreement, (c) close the merger, and (d) contribute equity to NorthStar.

54. NCM and Khara made (or caused to be made) false representations and intentionally concealed material facts that they had a duty to disclose, including as to the Revenue, Gross Margin, Gross Margin percentage, EBITDA, EBITDA Margin, costs and earnings in excess of billings, billings in excess of costs and earnings, contract revenues, and gross profits of NCM and its subsidiaries with respect to the fiscal years ending December 31, 2012 and December 31, 2013, and the stub period in 2014 prior to the merger for which financial information was provided. Further, NCM and Khara did not disclose all known claims threatened against NCM Holdings, or that NCM had received one or more notices of a material breach or default of a major contract.

55. NCM and Khara knowingly, and with intent to defraud, manipulated NCM's financial statements, failed to inform LVI of NCM's true financial condition, and intentionally failed to disclose threatened claims and notices of material

breach or default.

56. NCM and Khara knew these representations and intentional omissions to be false and misleading at the time they were made.

57. NCM and Khara made these misrepresentations and intentional omissions of material fact with the knowledge that they were false and misleading and knowing that LVI would rely on them in determining whether to enter into the letter of intent, enter into the Contribution agreement, close the merger, and contribute equity to NorthStar.

58. LVI reasonably relied on NCM's and Khara's false representations and warranties in deciding to move forward with the letter of intent, Contribution Agreement, closing, and contribution of equity to NorthStar.

59. NCMs and Khara's fraudulent misrepresentations and intentional omissions of material fact were material to LVI's assessment of NCM's value and its decision to close the merger. As a direct and proximate result of NCM's and Khara's misrepresentations and intentional omissions of material fact, Defendants fraudulently induced LVI to enter into and complete the merger transaction. NCM and Khara knew this when they made their misrepresentations and intentionally omitted material facts.

60. As a direct and proximate result of NCM's and Khara's misrepresentations

tations and intentional omissions of material fact, LVI has been damaged, including, but not limited to, by giving up valuable equity in LVI without appropriate compensation, incurring transaction and closing costs in connection with an unfavorable transaction, foregoing or precluding opportunities for expanding LVI's profitable business, allowing the NorthStar business to assume pre-merger loan obligations of NCM through a refinancing that impaired NorthStar's liquidity and financial strength, sharing synergies of a larger merged business with NCM, rather than with a merger partner that might have provided reasonable consideration for the merger, and being deprived of the benefits of the bargain for which LVI negotiated and contracted.

61. LVI Holdings requests that this Court enter judgment for damages including, without limitation, rescissory, consequential, and expectation damages as a result of NCM's and Khara's fraudulent conduct described herein, in an amount to be determined at trial. LVI further requests that this Court enter judgment awarding LVI restitution, including costs and attorneys' fees, and grant LVI such other and further relief as this Court deems just and equitable.

### **COUNT III**

#### **Unjust Enrichment**

#### **(Against NCM Holdings and Khara)**

62. LVI incorporates the allegations of paragraphs 1 through 61 as if fully

set forth herein.

63. As alleged herein, NCM and Khara fraudulently induced LVI to enter into and complete the merger and provide NCM with greater compensation for its contribution to NorthStar than (a) was reasonable, or (b) LVI would have agreed to provide were it not for NCM's and Khara's misconduct and deceptive practices.

64. NCM's TTM EBITDA was far lower than represented and its financial prospects were far worse. In the context of its substantial debt and limited EBITDA, NCM was therefore not a worthwhile merger partner for LVI. NCM's and Khara's fraud, and NCM's breaches of representations and warranties, as described herein, caused LVI to merge with NCM, and caused LVI to pay too much in the form of equity in NorthStar.

65. Had LVI known the true state of NCM's financial condition, LVI would not have signed the letter of intent or Contribution Agreement, consummated the merger, or contributed equity to NorthStar.

66. NCM and Khara received the benefit of the unfair and highly inflated purchase price LVI paid in the form of equity in NorthStar, and other compensation.

67. NCM and Khara have therefore been unjustly enriched, and in equity and good conscience should be required to reimburse LVI for the NorthStar equity

and other benefits received in excess of the true and fair value of NCM at the time the merger closed.

68. LVI therefore requests that this Court enter a judgment for restitution, as a result of the conduct described herein, in an amount to be determined at trial. LVI further requests that this Court grant LVI such other and further relief as this Court deems just and equitable.

#### **COUNT IV**

##### **Indemnification**

##### **(Against NCM Holdings)**

69. LVI Holdings incorporates the allegations of paragraphs 1 through 68 as if fully set forth herein.

70. NCM Holdings breached its representations and warranties contained in Section 2.4 of the Contribution Agreement.

71. NCM Holdings represented and warranted in the Contribution Agreement, *inter alia*, that its financial statements “fairly present, in all material respects, the consolidated financial position of NCM Holdings” and were “in conformity with GAAP consistently applied throughout the periods.” (Ex. A, § 2.4(b).)

72. Contrary to those representations, NCM Holdings had manipulated its percentage-of-completion accounting to recognize revenue and its financial statements neither fairly present NCM Holdings’s consolidated financial position nor

conformed with GAAP.

73. The Contribution Agreement provides for indemnification arising out of, relating to, or resulting from any failure of any surviving representation, or the breach by NCM Holdings of any covenant or agreement. (Ex. A, § 5.2(a).)

74. The following representations and schedules to the Contribution Agreement were false and misleading:

a. The unaudited statements of operations, members' equity and cash flows of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the two-month period ending February 28, 2014, included in Schedule 2.4(a) of the Contribution Agreement, did not accurately or fairly state Revenue, Gross Margin, Gross Margin %, EBITDA, and EBITDA Margin of NCM Holdings and its subsidiaries.

b. The unaudited balance sheet of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the two-month period ending February 28, 2014, included in Schedule 2.4(a) of the Contribution Agreement, did not accurately or fairly represent the Assets and Liabilities of NCM Holdings and its subsidiaries as of February 28, 2014, including (i) Costs & Earnings in Excess of Billings, and (ii) Billings in excess of costs & earnings.

c. The unaudited statements of operations, members' equity and

cash flows of NCM Holdings and each NCM Subsidiary, on a consolidated basis, for the fiscal year ending December 31, 2013, included in Schedule 2.4(a) of the Contribution Agreement, did not accurately or fairly state the Revenue, Gross Margin, Gross Margin %, EBITDA, and EBITDA Margin of NCM Holdings and its subsidiaries.

d. The unaudited balance sheet of NCM Holdings and each NCM Subsidiary, on a consolidated basis, as of December 31, 2013, included in Schedule 2.4(a) of the Contribution Agreement, did not accurately or fairly represent the Assets and Liabilities of NCM Holdings and its subsidiaries as of December 31, 2013, including (i) Costs & Earnings in Excess of Billings, and (ii) Billings in Excess of Costs & Earnings.

e. The NCM Holdings 2012 Statements, included in Schedule 2.4(a) of the Contribution Agreement, did not accurately or fairly state the Contract Revenues and Gross Profit of NCM Holdings and its subsidiaries.

f. Note 1 to the NCM Holdings 2012 Statements and the NCM Holdings 2012 Balance Sheet (relating to “Revenue and cost recognition”), included in Schedule 2.4(a), did not accurately or fairly describe the practices of NCM Holdings and its subsidiaries. Among other inaccuracies, (i) “the percentage of completion method” for revenue recognition was not “measured on the basis of

cost incurred to date to total estimated cost for each contract,” particularly given the description of “contract costs,” and (ii) “[c]hanges in job performance, job conditions, and estimated profitability” were not “recognized in the period in which the revisions [were] determined.”

g. The NCM Holdings 2012 Balance Sheet, included in Schedule 2.4(a) of the Contribution Agreement, did not accurately or fairly represent the Assets and Liabilities of NCM Holdings and its subsidiaries as of December 31, 2012, including (i) Costs and estimated earnings in excess of billings on uncompleted contracts, and (ii) Billings in excess of costs and estimated earnings on uncompleted contracts.

75. These misrepresentations and intentional concealments of material fact caused NCM Holdings’s disclosures in the Contribution Agreement to substantially overstate revenues and understate costs associated with work-in-progress. Based on these misrepresentations and intentional concealments of material fact, NCM Holdings’s financial statements did not “fairly present, in all material respects, the consolidated financial position of NCM Holdings and the NCM Subsidiaries as of their respective dates.” (Ex. A, § 2.4(b).) Nor did the financial statements attached to the Contribution Agreement present the consolidated financial position of NCM Holdings “in conformity with GAAP consistently applied



throughout the periods covered thereby.” (*Id.*)

76. On April 22, 2015, in satisfaction of Section 5.5(a) of the Contribution Agreement, LVI Holdings sent NCM Holdings a Notice of Claim, identifying false representations and warranties made by NCM Holdings in the Contribution Agreement. (Ex. A, § 5.5(a).) LVI Holdings listed NCM Holdings’s fraudulent accounting practices and complained of NCM Holdings’s “improper and undisclosed pattern and practice of understating estimated contract costs, overstating estimated profit, overstating job completion percentage, overstating earned profit, and overstating earned revenues – and in certain cases, overstating anticipated contract revenues.”

77. Pursuant to Sections 5.5(a) and 5.5(b), LVI Holdings is authorized to bring this action for indemnification against NCM Holdings. Pursuant to Section 5.2(a) of the Contribution Agreement, NCM Holdings is obligated to indemnify NorthStar for all losses arising out of “any failure of any Surviving NCM Representation to be true or ... any breach of any covenant or agreement of NCM Holdings herein.”

78. LVI Holdings therefore seeks indemnification for all losses resulting from the failure of NCM Holdings’s representations and warranties to be true, as alleged herein.

79. As LVI Holdings's injuries exceed the cap established in the Contribution Agreement, LVI Holdings requests that this Court enter judgment for damages in the amount of \$15 million, in the form permitted by the Contribution Agreement, and grant LVI Holdings such other and further relief as this Court deems just and equitable.

## **COUNT V**

### **Declaratory Judgment**

#### **(Against NCM Holdings and Khara)**

80. LVI incorporates the allegations of paragraphs 1 through 79 as if fully set forth herein.

81. Pursuant to Court of Chancery Rule 57 and 10 Del. C. § 6501, this Court has authority to declare the rights, status, or other legal relations of the parties before it.

82. The merger proceeds provided to NCM were in the form of assuming and paying off NCM's pre-merger debts and giving NCM equity in NorthStar.

83. As alleged above, NCM and Khara engaged in fraudulent conduct, and NCM breached the representations and warranties contained in the Contribution Agreement.

84. LVI requests a declaratory judgment that NCM Holdings and Khara, as a result of the wrongful and fraudulent conduct alleged herein, have no right or

entitlement to, and should not receive or retain, any merger proceeds, in whatever form held, and that any such merger proceeds being held in whatever form by any individual or entity—including dividends or other payments on account of ownership of equity in NorthStar—should be paid or retained by LVI Holdings. LVI further requests a declaratory judgment ordering NCM and Khara to immediately surrender any stock to LVI or, in the alternative, ordering that such stock be cancelled with no recourse, relief or other entitlement owed to NCM or Khara.

### **Request for Relief**

WHEREFORE, LVI Holdings respectfully requests that:

- A. Judgment be entered that NCM Holdings and Khara defrauded Plaintiff;
- B. Judgment be entered that NCM Holdings and Khara fraudulently induced LVI Holdings to enter into the Contribution Agreement and to consummate the transactions pursuant thereto, and engaged in fraudulent conduct;
- C. Judgment be entered awarding LVI Holdings its damages, in an amount to be determined at trial, for its monetary losses due to NCM Holdings's and Khara's fraud alleged herein;
- D. Judgment be entered that LVI Holdings is entitled to indemnification, in the maximum amount and form permitted by the Contribution Agreement;

E. Judgment be entered that NCM Holdings and Khara are not entitled to retain or receive any merger proceeds, and that any such merger proceeds being held in whatever form by any individual or entity, whether party to this action or not, should be paid to or retained by LVI Holdings;

F. Judgment be entered equitably reforming the Contribution Agreement to provide that NCM Holdings be allocated equity in NorthStar consistent with the relative value of NCM Holdings to LVI Holdings at the time of the merger;

G. Judgment be entered awarding LVI Holdings its attorneys' fees and costs, disbursements, and pre- and post-judgment interest; and

H. Judgment be entered awarding LVI Holdings such other and further relief as this Court deems just and proper.

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DATED: March 3, 2016

/s/ Rudolf Koch

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