



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

R. JAY TEJERA, individually and on behalf of )  
all others similarly situated, )  
 )  
Plaintiff, )  
 ) C.A. No. \_\_\_\_\_  
v. )  
 )  
NTS REALTY HOLDINGS LIMITED )  
PARTNERSHIP, NTS REALTY CAPITAL, )  
INC., NTS MERGER PARENT, LLC, JACK )  
DALE NICHOLS, BRIAN F. LAVIN, MARK )  
D. ANDERSON, JOHN P. DALY, and JOHN )  
S. LENIHAN, )  
 )  
Defendants. )

**VERIFIED CLASS ACTION COMPLAINT**

Plaintiff R. Jay Tejera (“Plaintiff”) alleges upon personal knowledge with respect to himself, and upon information and belief based, *inter alia*, upon the investigation of counsel as to all other allegations, as follows:

**NATURE OF THE ACTION**

1. This is a class action on behalf of the minority public unitholders (the “Minority Unitholders”) of NTS Realty Holdings Limited Partnership (“NTS” or the “Partnership”) that challenges the entire fairness of a proposed going-private squeeze-out merger (the “Proposed Merger”) by NTS’s controlling unitholder and Chairman, Defendant Jack Dale Nichols (“Nichols”).

2. Pursuant to an Agreement and Plan of Merger dated as of December 27, 2012 (the “Merger Agreement”) among NTS, its managing general partner, NTS Realty

Capital, Inc. (“NTS Capital” or the “General Partner”), and acquisition entities formed by Nichols, the Proposed Merger would pay the Minority Unitholders \$7.50 per unit in cash (the “Proposed Merger Price”). The true per-unit fair value of NTS is between double and triple the Proposed Merger Price.

3. NTS owns a portfolio of multifamily and commercial property. The value of its public float before receipt of Nichols’ buyout offer was \$13 million, and its units were very thinly traded. NTS was formed in 2004 from a group of predecessor partnerships operated by Nichols and his long-time associate, Defendant Brian F. Lavin (“Lavin”), the President and CEO of NTS, as part of a settlement of class action litigation against Nichols and Lavin. The litigation charged Nichols and Lavin with extracting excessive management fees and other payments and exploiting their control to engineer a below-market buyout of investors in the predecessor partnerships. Nichols and Lavin are now attempting the same strategy with NTS.

4. Between 2005 and 2012, the Partnership’s revenues increased 91%. Despite this substantial growth, Nichols and Lavin reduced distributions to unitholders over the period by more than half, from \$0.50 per unit in 2005 and 2006 to just \$0.20 per unit in 2009-2012. As a result, NTS’s unit price (which is heavily dependent on the amount of distributions) declined by one-third between early 2010 and August 31, 2012, the date when Nichols and Lavin presented their initial offer (the “Offer”) to acquire the Minority Unitholders’ publicly-traded units. Over the same period, a leading index of public companies in the same industry, real estate investment trusts (“REITs”), increased by almost half.

5. The Partnership's financial statements reveal that the cause of the sharply reduced distributions was massive payments to entities controlled by Nichols and Lavin. The peer companies selected by the financial advisor retained to opine on the Proposed Merger's fairness, a firm named Centerboard Securities, LLC ("Centerboard"), illustrate the contrast. The three primarily-multifamily peers selected by Centerboard have expense ratios (expressed as a percentage of revenue) within a narrow band of 50.6% to 51.3%. NTS's expense ratio is more than 20% higher – 62.7%. More than one-third of NTS's total operating expenses were payments to entities owned and controlled by Nichols and Lavin, and these payments totaled nearly five times the distributions made to unitholders.

6. The Partnership's financial statements also show that Nichols and Lavin have further depressed both revenue and cash flow by diverting Partnership assets to off-balance sheet entities that have almost exclusively benefitted companies controlled by Nichols and Lavin, to the direct detriment of NTS and its unitholders, as detailed in paragraphs 70 to 74 below.

7. The gross undervaluation of NTS's units in the Proposed Merger is demonstrated by both asset-based and income-based analysis. The total cost of NTS's real estate portfolio is reported in its public filings and establishes a net asset value ("NAV") of \$13.34 per unit. This measure is highly conservative – it fails to reflect the increase in real property values since the properties were placed in service, mostly in the 1980's and 1990's, despite the very substantial appreciation in multifamily and commercial property values since that time.

8. An income-based approach, based on the portfolio's current revenues and adjusting the Partnership's inflated expenses to reflect the peer averages, indicates an even higher valuation, in the range of \$16.00 per unit.

9. As a result of Defendants' breaches of fiduciary duty, and as further set forth below, Plaintiff seeks an award of damages to compensate him and the other Minority Unitholders for the loss of the fair value of their NTS units that will occur as a result of the Proposed Merger.

### **PARTIES**

10. Plaintiff is, and was at all times relevant, a holder of NTS units. Between April 2008 and July 2010, Plaintiff acquired 13,836 units and continues to hold them.

11. Defendant NTS was organized as a Delaware limited partnership in 2003 and has its principal executive offices at 600 North Hurstbourne Parkway, Suite 300, Louisville, Kentucky, 40222. NTS's limited partnership units began trading on the American Stock Exchange in December 2004, and currently trade on its successor exchange, the NYSE MKT, under the ticker symbol "NLP." NTS has no employees and its operations are conducted by entities controlled by Nichols and Lavin.

12. Defendant NTS Capital is a Delaware corporation and the managing general partner of NTS.

13. Defendant NTS Merger Parent, LLC ("Merger Parent") is a Delaware limited liability company controlled by Nichols and Lavin that was formed in connection with the Proposed Merger. Merger Parent is a party to the Merger Agreement and upon consummation of the Proposed Merger will wholly own the Partnership.

14. Defendant Nichols is Chairman of the board of directors of NTS Capital (the “Board”) and has held that position since its formation in 2004. As of December 27, 2012, Defendant Nichols and his affiliates owned 6,847,887 NTS units, representing 61.7% of the total outstanding.

15. Defendant Lavin is President and Chief Executive Officer of NTS Capital and is a member of its Board, positions he has held since its formation in 2004. As of December 27, 2012, Lavin owned 17,966 NTS units through an affiliate.

16. Defendant Mark D. Anderson (“Anderson”) is and has been a member of the Board since December 2004. He is one of three outside directors on the Board and was a member of the special committee (the “Special Committee”) formed to negotiate the Proposed Merger. Anderson is the managing member of Anderson Real Estate Capital, LLC, a mortgage banking firm organized by him in March 2010. Anderson was previously Senior Vice President and Region Manager for Integra Bank, and managed its Louisville, Lexington and Indianapolis commercial real estate lending operations. Integra Bank failed and was closed by the Comptroller of the Currency in 2011. Anderson has business ties to Lavin dating to their work in the Midwest Division of Paragon Group during the 1990’s.

17. Defendant John P. Daly (“Daly”) is and has been a member of the Board since December 2004. He is one of three outside directors on the Board and was a member of the Special Committee. Daly is Vice President, Associate General Counsel and Assistant Secretary of YUM! Brands, Inc. He was previously First Vice President,

Counsel and Assistant Secretary for First Chicago NBD Corporation, the parent of the First National Bank of Chicago.

18. Defendant John S. Lenihan (“Lenihan”) is and has been a member of the Board since December 2004. He is one of three outside directors on the Board and was a member of the Special Committee. Lenihan founded Lenihan/Sotheby’s International Realty, a residential brokerage firm based in Louisville, in 2010. He is the founder and managing partner of Lenihan Commercial Properties, which develops and manages industrial warehouse properties around the Louisville International Airport. Lenihan’s involvement with the airport overlaps with Nichols’, who has played a prominent role in the airport’s management.

19. The Defendants identified in paragraphs 13 to 15 are referred to collectively as the “Control Defendants.” By reason of their controlling interest in the Partnership, the Control Defendants owe fiduciary duties to the Minority Unitholders.

20. The Defendants identified in paragraphs 14 to 18 are referred to collectively as the “Director Defendants.” As members of the Board of the General Partner, the Director Defendants owe fiduciary duties to the Minority Unitholders.

## **SUBSTANTIVE ALLEGATIONS**

### **A. The Business and History of NTS**

#### **1. The Business of NTS**

21. NTS is in the business of owning, operating and developing real estate. Its portfolio currently consists of whole or partial interests in 24 properties, comprised of seven office properties, two retail properties and fifteen multifamily properties, located in

Kentucky, Florida, Indiana, Tennessee, Virginia and Georgia. Its portfolio collectively generated \$54.6 million in revenue in 2011.

22. NTS has no employees; entities owned and controlled by Nichols and Lavin, NTS Development Company and NTS Management Company oversee and manage the day-to-day operations of NTS's properties pursuant to various management agreements.

**2. The Formation of NTS**

23. NTS was established in December 2004 through the merger of five predecessor limited partnerships controlled by Nichols and Lavin, together with a related entity owned and controlled by them (the "2004 Mergers"). NTS's units began trading on the American Stock Exchange on December 29, 2004.

24. The 2004 Mergers occurred as part of a settlement of class action litigation against Nichols and Lavin by investors in the predecessor limited partnerships. As explained in the registration statement on Form S-4 filed for the 2004 Mergers (Amendment No. 5, filed October 27, 2004, the "S-4"), at vii, "[t]he merger is part of a court approved settlement negotiated and agreed to among your general partner, its affiliates and plaintiffs' counsel for the class action litigation."

25. The stated purpose for establishing NTS was to achieve liquidity and improve the marketability for the predecessor partnerships' limited partners. As the "Questions and Answers" section of the S-4 (at vii) explained:

**Q: Why is the merger being proposed?**

A: Your general partner and Plaintiffs' counsel have negotiated a settlement of the class action litigation which, among other things,

contemplates the merger. Your general partner believes that the merger is the best way for you and the other limited partners to achieve liquidity and to increase the value of your investment. We have applied to list the Partnership Units on the American Stock Exchange. We believe listing the Units will increase the liquidity of each limited partner's investment. . . .

26. The only recipients of publicly-traded units of the Partnership at its inception were investors in the predecessor partnerships, together with Nichols, Lavin, and entities controlled by them. There was no underwritten initial public offering, and NTS has not subsequently sold any additional units, in public offerings or otherwise.

27. The class action litigation leading to the formation of NTS and the 2004 Mergers arose out of self-dealing by Nichols and Lavin very similar to the breaches of fiduciary duty here.

28. As detailed in an appeal of challenges by objectors to the settlement that resulted in the 2004 Mergers, *Buchanan v. NTS Properties Associates*, No. A106880, 2005 WL 1798407 (Cal. Ct. App. July 28, 2005), the class actions brought on behalf of investors in the predecessor partnerships alleged two principal forms of wrongdoing.

29. First, they alleged that Nichols and Lavin failed to market the predecessor partnerships' properties as promised, and then sought to buy out investors at a deep discount based on the threat that "limited partners who do not tender their interests may not be able to realize any return on or any distribution relating to their investment in the partnership in the foreseeable future." *Id.* at \*1 (internal quotations omitted).

30. Second, one of the class actions alleged that Nichols and Lavin extracted excessive management fees through inflated payments for operating expenses to affiliates. *Id.* at \*7-8.



31. As further detailed below, the claims leading to the formation of the Partnership thus mirror the claims here: the wrongful extraction of excessive fees and other payments through related-party transactions, and the exploitation of control and value-depressive acts of self-dealing to coerce a sale at a deep discount to fair value.

**B. Ownership, Control and Governance of the Partnership**

**1. Ownership and Control of the Partnership**

32. At all times since the formation of NTS, Nichols has directly or indirectly owned and controlled a majority of NTS's units, thus enabling him to control the Partnership. As reflected in the following table, Nichols' ownership has increased over time, as a result of open market purchases by him and unit repurchases by the Partnership:

	As of 12/29/04		As of 12/27/12	
	# Units	%	# Units	%
Nichols	6,719,249	57.2%	6,847,887	61.7%
Total Units Outstanding	11,751,959		11,095,274	

33. According to the Partnership's annual proxy statement issued on April 27, 2012, Lavin indirectly owns 17,966 units. Defendants Anderson, Daly and Lenihan collectively own just 1,000 NTS units and have received deferred director compensation of an additional 66,411 units.

34. The balance of the Partnership's units, 4,227,421, are held by the Minority Unitholders comprising the Class.

35. Based on publicly available information, the Partnership's publicly-traded units are overwhelmingly held by individual investors and there is no active market for

them. A compilation of NTS unitholders by Thomson Financial based on public proxy and Form 13F filings does not identify any current unaffiliated holder with as many as 2,000 units. In the year preceding Lavin and Nichols' Offer, the total trading volume in NTS was just 212,020 units, or 1.9% of units outstanding; average daily trading volume was just 1,317 units, and NTS units did not trade at all on 62 trading days in the year, more than a quarter of all such days.

## 2. Governance

36. NTS is managed by the General Partner, NTS Capital, which in turn is governed by the five-member Board. As set forth in paragraphs 14 to 18, the directors of NTS Capital are Defendants Nichols, Lavin, Anderson, Daly and Lenihan.

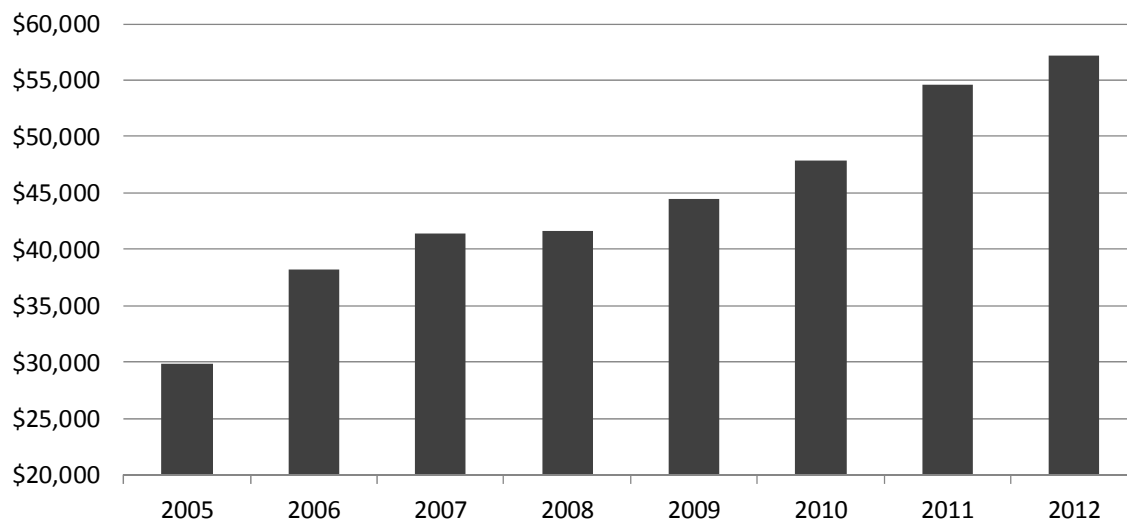
37. As explained above, all of the directors joined the board of directors at NTS's inception in 2004, and the three outside directors have therefore acquiesced in the overcharging of expenses and other self-dealing set forth here.

38. The Partnership is governed by an Amended and Restated Agreement of Limited Partnership dated as of December 29, 2005 (the "LPA"). The LPA contains no waiver or limitation on fiduciary duties and confirms, with a limited exception relating to business opportunities, that NTS Capital owes a "general fiduciary duty to the Limited Partners." LPA § 15.6(c).

39. Accordingly, under Delaware law, the Proposed Merger is subject to review for entire fairness, as stated in *Gelfman v. Weeden Investors, L.P.*, Del. Ch., 859 A.2d 89, 121 (2004) (reviewing limited partnership self-dealing transaction for entire fairness where "default standards of fiduciary duty" applied).

**C. Operation of the Partnership Between Inception in December 2004 and the August 31, 2012 Offer**

40. Between its inception at the end of 2004 and the Offer in August 2012, the Partnership’s business expanded significantly. NTS’s revenues continued to grow even through the parlous real estate market of 2008-2010:



Note: Revenues in \$thousands. 2012 revenue reflects annualized Q1-Q3 2012

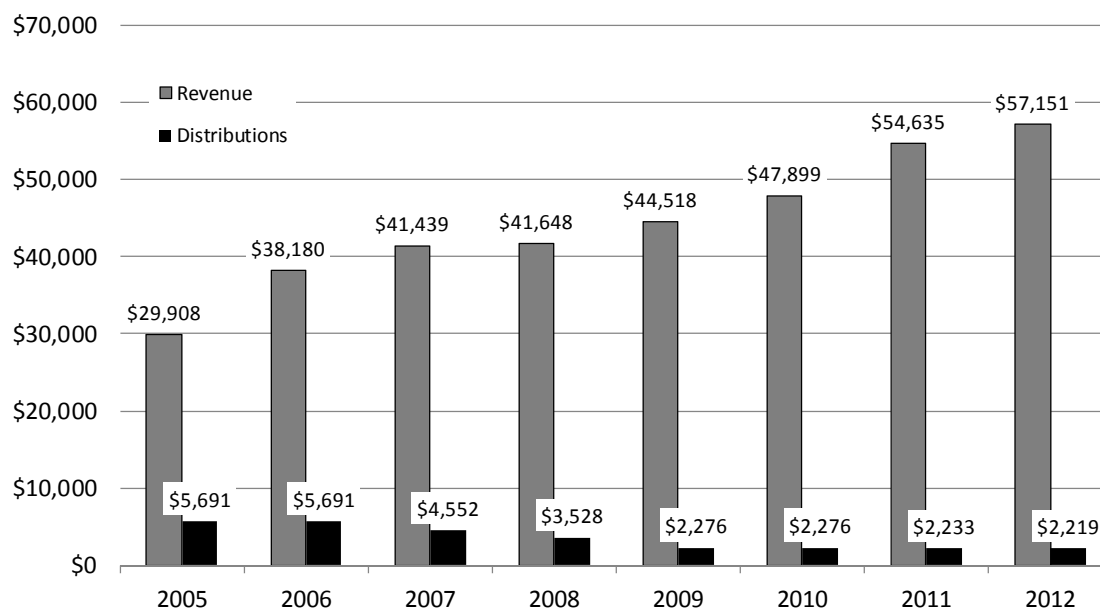
41. As reflected in this chart, NTS’s revenue grew by more than 91% between 2005 and 2012.

42. Over this period, NTS engaged in a number of sales and purchases, shifting its portfolio asset mix from predominantly commercial and retail properties to predominantly multifamily residential properties, as reflected in the following table:

	2005		2011	
	Revenue (\$Thousands)	%	Revenue (\$Thousands)	%
Multifamily	\$9,920.9	35.4%	\$46,499.4	85.1%
Commercial	16,703.0	59.7%	7527.4	13.8%
Retail	1,368.7	4.9%	641.7	1.2%
<b>Total (Listed Segments)</b>	<b>\$27,992.6</b>		<b>\$54,668.5</b>	

43. The shift to a concentration on multifamily properties further enhanced the value of the Partnership, as such properties now sell at higher multiples than commercial or retail properties and have experienced significant appreciation since the 2008 real estate trough.

44. Despite this highly successful investment strategy, NTS management has reduced the Partnership’s distributions to unitholders by more than half over the same period, from \$0.50 per unit in 2005 to \$0.20 per unit in 2012. The disparity between revenue growth and distributions to investors is reflected in the following chart:



Note: Amounts in \$thousands. 2012 revenue reflects annualized Q1-Q3 2012 results; 2012 distributions reflect announced full-year results.

45. NTS’s limited public disclosures do not offer an explanation for this sharp divergence between top-line and bottom-line performance.

46. The Partnership’s financial statements, however, supply an answer: NTS’s operating expenses – comprised in large part of payments to affiliates controlled by

Nichols and Lavin – far exceed those of peer companies operating comparable properties – using the peers selected by the Special Committee’s financial advisor, Centerboard. As reflected in the following table, the Partnership’s 2011 operating expenses in its multifamily reporting segment (representing roughly five-sixths of its total revenues) were 62.7% of revenue. By contrast, the three multifamily peers selected by Centerboard had much lower expense ratios, all within a very tight range of 50.6% to 51.3%<sup>1</sup>:

	<u>NLP</u>	<u>AEC<sup>1</sup></u>	<u>CLP<sup>1</sup></u>	<u>MAA<sup>1</sup></u>	<u>HIW<sup>2</sup></u>	<u>UDR<sup>3</sup></u>	<u>BRE<sup>3</sup></u>	<u>HME<sup>3</sup></u>
Revenue	\$46.5	\$159.1	\$336.0	\$449.0	\$482.9	\$367.2	\$371.4	\$580.0
Expenses	\$29.1	\$80.5	\$170.6	\$230.3	\$211.9	\$156.5	\$141.4	\$256.9
Expense %	62.7%	50.6%	50.8%	51.3%	43.9%	42.6%	38.1%	44.3%
Peer Median		50.9%						

Notes

<sup>1</sup> Primarily-multifamily real estate companies identified as peers by Special Committee financial advisor.

<sup>2</sup> Primarily-commercial real estate company identified as a peer by Special Committee financial advisor.

<sup>3</sup> Other primarily-multifamily real estate companies identified as peers by Plaintiff's financial advisor.

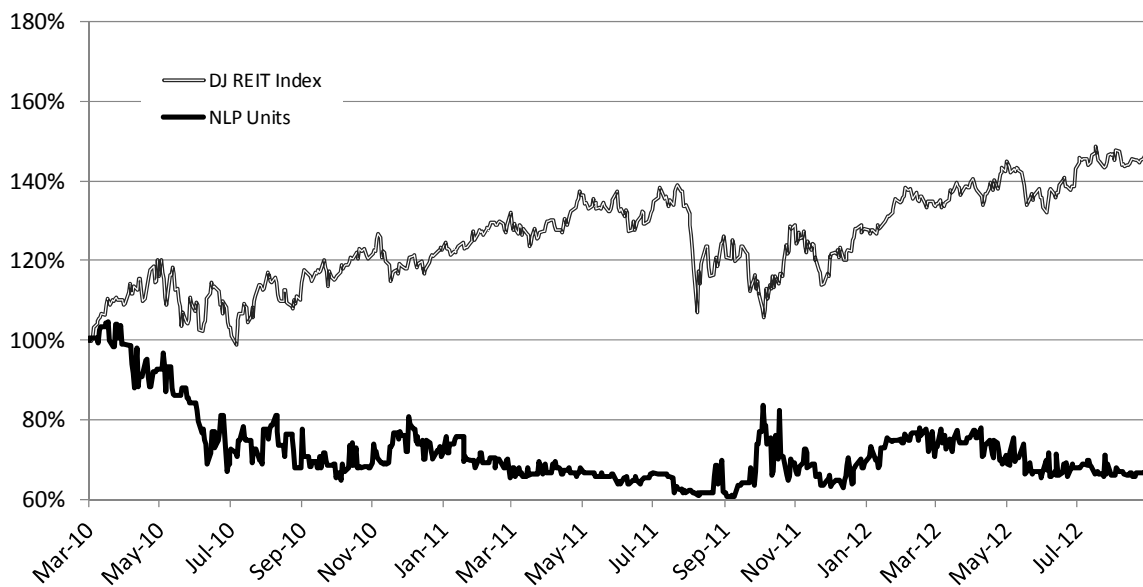
47. As indicated above, other peer companies identified by Plaintiff’s financial advisor have even lower expense ratios, and the expense ratios for the Centerboard peers reflect the higher costs associated with their active real estate development programs. By contrast, NTS’s development activities are very limited.

48. Of the \$29,134,000 in NTS’s reported multifamily segment operating expenses in 2011, \$10,605,000 – more than one-third – are payments to entities owned and controlled by Nichols and Lavin for management fees and expense reimbursements.

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<sup>1</sup> The fourth company cited as a peer by Centerboard, Highwoods Properties, Inc. (NYSE: HIW), primarily owns office properties and is therefore not comparable to NTS. Were it included in the peer median calculation, however, the contrast between NTS and the comparables selected by Centerboard would be even greater.

49. While the trading price of NTS’s units had generally tracked the Dow Jones REIT index prior to 2009, the failure to increase distributions from recessionary levels in 2010-2012 – at a time when the multifamily real estate market was experiencing a major recovery in property values and revenue – resulted in NTS’s unit price declining a further 33% during the period March 1, 2010 through the Offer date, August 31, 2012. Over the same period, by contrast, the Dow Jones REIT index increased 46%:



50. In addition to diverting income from the Partnership through related-party arrangements, the Control Defendants have also impaired transparency by restricting public disclosures to the minimum required for public companies.

51. The Control Defendants conduct no conference calls with investors or analysts – not even an annual call to report on yearly results. See NTS Form 8-K, filed March 12, 2008 (reporting annual results, and stating that “[c]onsistent with its past practice, the Company will not conduct an earnings conference call to discuss the

aforementioned results.”). By contrast, quarterly earnings calls are routine in the real estate industry; each of the four peers identified by Centerboard conducts such calls.

52. Management also does not report Funds from Operations (“FFO”) – a key, basic metric in the real estate industry needed to allow comparability to investments in other real estate companies. Each of the four companies cited as peers by Centerboard reports FFO and cites it prominently as an important metric for evaluating the company’s performance.

**D. The Offer and Events Leading to the Proposed Merger**

53. On August 31, 2012, NTS filed a Form 8-K and issued a press release announcing receipt of the Offer, by which Nichols and Lavin proposed to acquire the units not owned by them for \$5.25 per unit. The units’ closing price prior to the announcement was \$3.07. The Offer expressly advised the other directors that “[i]n considering our proposal, you should be aware that we are interested only in pursuing the proposed transaction and that we are not interested in selling our stake in the Company or considering any strategic transaction involving the Company.” The Control Defendants thereby foreclosed any strategic alternative other than a sale to them.

54. On September 13, 2012, NTS filed a Form 8-K announcing that the Board had formed the Special Committee, comprised of Anderson, Daly and Lenihan, for purposes of considering the Offer.

55. On November 1, 2012, NTS filed a Form 8-K stating that the Special Committee had retained Centerboard as its financial advisor and Stites & Harbison, PLLC as its legal counsel.

56. On November 20, 2012, NTS filed a Form 8-K stating that the Special Committee had rejected the \$5.25 purchase price set forth in the Offer and that in response, Nichols and Lavin had increased their offer to \$7.30 per unit.

57. On December 28, 2012, NTS filed a Form 8-K announcing that it had entered into the Merger Agreement, which provided for a payment per unit to the Minority Unitholders of \$7.50, the Proposed Merger Price.

58. According to the December 28, 2012 Form 8-K filing, the Proposed Merger is expected to be completed in the first half of 2013 and is subject to a majority-of-the-minority voting condition and financing contingency.

59. On February 4, 2013, NTS issued a preliminary proxy statement on Schedule 14A for the Proposed Merger (the "Preliminary Proxy"), and also issued a Schedule 13E-3 (the "13E-3") for the Proposed Merger on the same date.

**E. The Proposed Merger Price Significantly Undervalues the NTS Units**

60. Preliminary asset-based and income-based analysis, using the original cost of NTS's real estate portfolio and current financial data, indicates that the Proposed Merger Price undervalues NTS's units by between one-half and two-thirds.

**1. Asset-Based Analysis**

61. The value of the Partnership's real estate properties, calculated on the basis of their total cost, establishes a highly conservative value for the NTS units of nearly double the Proposed Merger Price.

62. The total cost of NTS's real estate portfolio is reported in its annual filings on Form 10-K. *See* NTS Form 10-K, filed March 23, 2012 ("2011 10-K"), at 64; *see also*



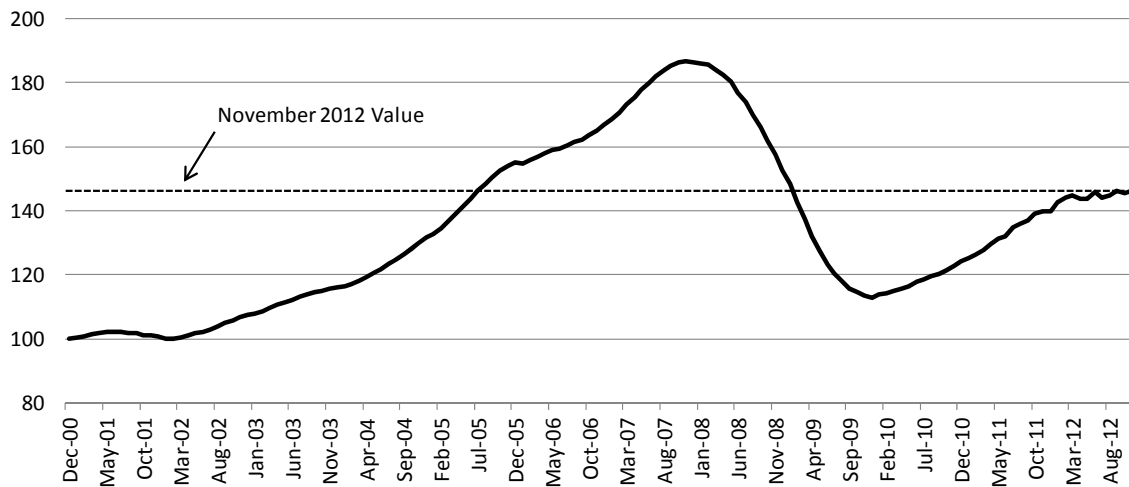
NTS Form 10-Q, filed November 9, 2012 (“3Q11 10-Q”) (reflecting 2012 aggregate additions). As set forth there, the total cost of the properties owned by the Partnership as of September 30, 2012, was \$397,606,358. In addition, the cost of NTS’s investment in joint ventures was \$5,074,000 (see 3Q11 10-Q, at 11), and the cost of its investment in tenant in common interests was \$10,300,000 (see Forms 8-K filed March 14, 2007 and August 15, 2007). Inserting these values into the Partnership’s most recent balance sheet, as of September 30, 2012 (see 3Q11 10-Q, at 4), indicates a per-unit value of \$13.34:

	<b>As Reported</b>	<b>Cost Basis</b>
	<b>9/30/2012</b>	<b>9/30/2012</b>
<b>ASSETS:</b>		
Cash and equivalents	\$1,518,042	\$1,518,042
Cash and equivalents - restricted	4,188,457	4,188,457
Accounts receivable	1,676,713	1,676,713
Land, buildings and amenities, net	289,185,521	<b>397,096,729</b>
Investment in and advances to joint venture	4,903,709	<b>5,074,000</b>
Investment in and advances to tenant in common	95,402	<b>10,300,000</b>
Other assets	4,103,674	4,103,674
<b>Total assets</b>	<b>\$305,671,518</b>	<b>\$423,957,615</b>
<b>LIABILITIES:</b>		
Mortgages and notes payable	264,164,254	264,164,254
Accounts payable and accrued expenses	4,199,066	4,199,066
Accounts payable and accrued expenses due to affili	356,966	356,966
Distributions payable	554,764	554,764
Security deposits	961,192	961,192
Other liabilities	5,725,850	5,725,850
Investment in and advances to tenant in common	1,623,864	
<b>Total liabilities</b>	<b>\$277,585,956</b>	<b>\$275,962,092</b>
Net Assets	\$28,085,562	\$147,995,523
LP Units Outstanding		11,095,074
<b>Value per LP Unit</b>		<b>\$13.34</b>

63. This valuation is highly conservative – it omits any of the increase in real property values since the properties were placed in service, generally in the 1980’s and

1990's, despite the very substantial appreciation in multifamily and commercial property values since that time.

64. While multifamily and commercial property values declined substantially during the recession of 2008-2010, they have recovered much of their value, and property values today are substantially higher than in 2003 or earlier, when all of the properties in NTS's portfolio were constructed. This recent increase in value is reflected by a leading multifamily, commercial and retail property index, the Moody's/RCA Commercial Property Price Indices – National All-Property Composite Index:



65. The Centerboard valuation analysis provided to the Special Committee ignores property cost and does not rely on individual property appraisals. See 13E-3, Exhs. (c)(2) and (c)(3). Instead, it relies on an income-based approach, which yields a valuation that is artificially depressed by the overstatement of expenses discussed above, and by other flaws discussed below.

## **2. Income-Based Analysis**

66. An income-based approach, based on the NTS portfolio's current revenues and adjusting the Partnership's inflated expenses to reflect the peer averages, indicates a value in the range of \$16.00 per unit, using conservative assumptions.

67. NTS's financial results for the nine months ended September 30, 2012, presented on an annualized basis, are set forth below for each of its three reporting segments, both as-reported and as adjusted to reflect the expense ratio of the Centerboard multifamily peers (in the case of the multifamily segment, as set forth in paragraph 46 above) or industry-standard ratios (in the case of the commercial and retail segments). The resulting cash flows are then capitalized using capitalization rates appropriate for each class of property:

	<u>As reported</u>		<u>As adjusted</u>	
	<u>3,705 Units</u>	<u>%</u>	<u>3,705 Units</u>	<u>%</u>
<b>Apartment Portfolio</b>	<b>Multifamily</b>	<b>Rev.</b>	<b>Multifamily</b>	<b>Rev.</b>
Revenue	49,102,477		49,102,477	
Expenses	30,404,297	61.9%	24,984,814	50.9%
Net Operating Income	18,698,180		24,117,664	
Capex reserve (\$350/unit)	(1,296,750)		(1,296,750)	
Cash Flow	17,401,430		22,820,914	
Overall Capitalization Rate	6.0%		6.0%	
Valuation	<u>\$290,023,833</u>		<u>\$380,348,563</u>	
	<u>As reported</u>		<u>As adjusted</u>	
	<u>607,000 Sq Ft</u>		<u>607,000 Sq Ft</u>	
	<u>Commercial</u>		<u>Commercial</u>	
Revenue	7,454,345		7,454,345	
Expenses	4,102,357		3,995,347	
Net Operating income	3,351,988		3,458,998	
Capex Reserve (\$0.25/s.f.)	(151,750)		(151,750)	
Cash Flow	3,200,238		3,307,248	
Overall Capitalization Rate	8.7%		8.7%	
Valuation	<u>\$36,996,971</u>		<u>\$38,234,080</u>	
	<u>As reported</u>		<u>As adjusted</u>	
	<u>47,000 Sq Ft</u>		<u>47,000 Sq Ft</u>	
	<u>Retail</u>		<u>Retail</u>	
Revenue	617,096		617,096	
Expenses	190,312		181,963	
Net Operating income	426,784		435,133	
Cash Flow	426,784		435,133	
Overall Capitalization Rate	8.0%		8.0%	
Valuation	<u>\$5,334,798</u>		<u>\$5,439,161</u>	

68. Inserting these values into the Partnership's balance sheet as of September 30, 2012 indicates a per-unit value of \$15.77:

	<b>As Reported</b>	<b>Income</b>
	<b>9/30/2012</b>	<b>Approach</b>
	<b>9/30/2012</b>	<b>9/30/2012</b>
<b>ASSETS:</b>		
Cash and equivalents	\$1,518,042	\$1,518,042
Cash and equivalents - restricted	4,188,457	4,188,457
Accounts receivable	1,676,713	1,676,713
Land, buildings and amenities, net	289,185,521	<b>424,021,804</b>
Investment in and advances to joint venture	4,903,709	<b>5,074,000</b>
Investment in and advances to tenant in common	95,402	<b>10,300,000</b>
Other assets	4,103,674	4,103,674
<b>Total assets</b>	<b>\$305,671,518</b>	<b>\$450,882,690</b>
<b>LIABILITIES:</b>		
Mortgages and notes payable	264,164,254	264,164,254
Accounts payable and accrued expenses	4,199,066	4,199,066
Accounts payable and accrued expenses due to affili	356,966	356,966
Distributions payable	554,764	554,764
Security deposits	961,192	961,192
Other liabilities	5,725,850	5,725,850
Investment in and advances to tenant in common	1,623,864	
<b>Total liabilities</b>	<b>\$277,585,956</b>	<b>\$275,962,092</b>
Net Assets	\$28,085,562	\$174,920,598
LP Units Outstanding		11,095,074
<b>Value per LP Unit</b>		<b>\$15.77</b>

69. Centerboard reaches far lower per-property valuations by failing to appropriately adjust for overstated expenses and by using capitalization rates that do not reflect current market conditions. *See* 13E-3, Exh. 99(c)(3), at 17.

### **3. The Partnership's Value Has Been Further Depressed by Diversion of Assets to Off-Balance Sheet Entities Benefitting Nichols and Lavin**

70. Nichols and Lavin have further depressed the Partnership's income by diverting assets to off-balance sheet entities that have paid a management company they control very substantial fees while yielding almost no income to NTS.

71. During 2007, NTS purchased tenant in common interests in two properties for a total investment of \$10.3 million (the “TIC interests”). Both properties are managed by NTS Development Company, an entity owned and controlled by Nichols and Lavin.

72. The Partnership’s annual return on its \$10.3 million investment has been extremely small, ranging from \$120,000 (1.2% of capital invested) in 2009 and 2012, to a high of \$240,000 (2.3% of capital invested) in 2011.

73. By contrast, the Partnership’s Forms 10-K disclose that NTS Development Company received annual payments of between \$1,235,000 and \$1,308,000 annually in 2009-2012 – amounts between five and ten times as large as the return to NTS.

74. The adjusted balance sheets set forth above in paragraphs 62 and 68 reflect the amount paid by the Partnership for the TIC interests of \$10.3 million; the fair value of such interests today is at least \$6 million higher, based on a 14% increase in rental income since the dates of acquisition and the partial amortization of the mortgages encumbering such properties.

**F. The Special Committee Members’ Acquiescence in Nichols and Lavin’s Self-Dealing and the Coercive Nature of the Proposed Merger Warrants Placing the Burden of Showing Entire Fairness on Defendants**

75. Anderson, Daly and Lenihan’s acquiescence in Nichols and Lavin’s overcharging of expenses and other self-dealing since the Partnership’s inception in 2004 and the coercive nature of the Proposed Merger both warrant placing the burden of showing entire fairness on Defendants.

76. With respect to the Special Committee, because its members have failed to challenge Nichols and Lavin’s diversion of income from the Partnership and the decision

to reduce unitholder distributions by 60% in the years leading up to the Proposed Merger, even as revenue nearly doubled, they have demonstrated their lack of independence and further face potential unitholder derivative action liability. Accordingly, the Special Committee's recommendation of the Proposed Merger does not warrant shifting the burden of proving entire fairness to Plaintiff.

77. In addition, the majority-of-the-minority voting condition provided by the Merger Agreement is not an effective mechanism for assuring the fairness of the Proposed Merger. Because the Proposed Merger Price represents a large premium to the pre-announcement trading price of the NTS units and the alternative to the Proposed Merger is the continued operation of the Partnership as an entity controlled by the same board of directors and management engaged in the same self-dealing, a rational unitholder would support the Proposed Merger, despite the fact that it grossly undervalues NTS's units.

78. Accordingly, the entire fairness review mandated by *Kahn v. Lynch Communication Systems, Inc.*, Del. Supr., 638 A.2d 1110, 1117 (1994), is well justified in the present circumstances, with the burden of showing entire fairness placed on Defendants.

### **CLASS ACTION ALLEGATIONS**

79. Plaintiff brings this action as a class action pursuant to Court of Chancery Rule 23 on behalf of himself and all other Minority Unitholders who hold units of the Partnership as of the closing of the Proposed Merger (the "Class"). Excluded from the

Class are Defendants and any person or entity related to or affiliated with any of the Defendants.

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

81. The Class is so numerous that joinder of all members is impracticable. The number of units of NTS held by the members of the Class as of December 27, 2012 – the day the Merger Agreement was entered into – was 4,227,421. Members of the Class are scattered throughout the United States and are so numerous that it is impracticable to bring them all before this Court.

82. Questions of law and fact exist that are common to the Class and which predominate over questions affecting any individual Class member including, among others:

- (a) Whether the Control Defendants and the Director Defendants breached the fiduciary duties they owe to Plaintiff and the Class in connection with the Proposed Merger; and
- (b) Whether the Proposed Merger is entirely fair to the Class.

83. Plaintiff is committed to prosecuting this 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. Accordingly, Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class.

84. 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, which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not party to the adjudications or substantially impair or impede their ability to protect their interests. Plaintiff anticipates that there will be no difficulty in the management of this litigation as a class action.

### **COUNT I**

#### **For Breach of Fiduciary Duty (Against the Control Defendants)**

85. Plaintiff repeats and realleges the allegations in paragraphs 1 through 84. As controlling unitholder of the Partnership, the Control Defendants owe fiduciary duties to Plaintiff and the other Minority Unitholders.

86. The Control Defendants have breached and continue to breach their fiduciary duties to the Minority Unitholders by, *inter alia*, seeking to effect a squeeze-out merger at an unfair and inadequate price, facilitated by prior self-dealing by them.

87. The Control Defendants' breaches of fiduciary duty have damaged the Minority Unitholders.

### **COUNT II**

#### **For Breach of Fiduciary Duty (Against the Director Defendants)**

88. Plaintiff repeats and realleges the allegations in paragraphs 1 through 87.

89. As directors of NTS's managing general partner, NTS Capital, the Director Defendants stand in a fiduciary relationship to Plaintiff and the other Minority Unitholders and therefore owe them the fiduciary duties.

90. The Director Defendants have breached and continue to breach their fiduciary duties to NTS Minority Unitholders by negotiating and entering into the Merger Agreement at an unfair and inadequate price and by engaging and acquiescing in self-dealing acts that have impaired the value of the Partnership limited partner units.

91. The Director Defendants' breaches of fiduciary duty have damaged the Minority Unitholders.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of himself and the Class, requests that this Court enter an order:

- A. That this action may be maintained as a class action and certifying Plaintiff as Class representative and his counsel as Class counsel;
- B. Directing Defendants, jointly and severally, to account to Plaintiff and the Class for all damages suffered and to be suffered by them as a result of the wrongs complained of, including an award of rescissory damages;
- C. Awarding Plaintiff the costs and disbursements of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and
- D. Granting Plaintiff and the other members of the class such other and further relief as is just and equitable.

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