IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE EMPLOYEES' RETIREMENT SYSTEM, on behalf of itself and all other similarly situated shareholders of Landry's Restaurants, Inc., and derivatively on behalf of nominal defendant Landry's Restaurants, Inc.,	)	
Plaintiff,	)	
v.	)	C.A. No. 4339-VCL
TILMAN J. FERTITTA, STEVEN L. SCHEINTHAL, KENNETH BRIMMER, MICHAEL S. CHADWICK, MICHAEL RICHMOND, JOE MAX TAYLOR, FERTITTA HOLDINGS, INC., and FERTITTA ACQUISITION CO.,	)	
Defendants, and	)	
LANDRY'S RESTAURANTS, INC.,	)	
Nominal Defendant.	)	

PUBLIC VERSION UNREDACTED
MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL OR, ALTERNATIVELY, TO PRECLUDE THE SPECIAL COMMITTEE DEFENDANTS FROM ASSERTING RELIANCE UPON LEGAL ADVICE WITH RESPECT TO THE 2008 FERTITTA BUYOUTS

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Plaintiff Louisiana Municipal Police Employees' Retirement System ("Plaintiff"), through its counsel, submits this memorandum in support of its motion for an order either (1) compelling Michael Chadwick, Michael Richmond, and Kenneth Brimmer (collectively, "the Special Committee Defendants" or "Special Committee") to testify concerning the legal advice they received related to the failed $21 per share and $13.50 per share buyouts (collectively, the "2008 Fertitta Buyouts") of Landry's Restaurants, Inc. ("Landry's" or the "Company") by Landry's CEO, Chairman and largest shareholder, Tilman J. Fertitta ("Fertitta"), Fertitta Acquisition, Co., and Fertitta Holdings, Inc. (the "Fertitta Entities" or when referred to collectively with Fertitta, the "Fertitta Defendants"), or (2) precluding the Special Committee from referring to or submitting evidence concerning legal advice received from King & Spalding ("K&S") with respect to the 2008 Fertitta Buyouts while drawing a negative inference with respect to the concealed legal advice.

I. PRELIMINARY STATEMENT

A special committee director defendant must choose between disclosing the legal advice on which he or she purportedly relied or asserting the attorney-client privilege consistently, without selectively disclosing privileged communications for use as the proverbial "sword." Here, Plaintiff did not try to force any particular choice on the Landry's Special Committee. Plaintiff was ready to respect a consistent assertion of the privilege and was equally willing to explore that legal advice, even if that evidence would show reasonable conduct and good faith. But this motion is required because the Special Committee wants to have it both ways, partially disclosing legal advice from its former counsel when it is convenient while blocking Plaintiff's discovery into that legal advice when it is not. If permitted, the Special Committee's use of the

privilege as both a "sword" and a "shield" severely prejudices Plaintiff, as well as the former and current Landry's shareholders who lost millions of dollars because of Fertitta's disloyalty, which the Special Committee allowed with open eyes.

On November 19, 2009, Plaintiff deposed Jack Capers, a senior partner with K&S.[1] Capers represented the Special Committee from Fertitta's January 2008, $23.50 per share buyout offer until K&S abruptly resigned on the same day that the Special Committee decided to terminate the revised $13.50 agreement in a way that absolved Fertitta of all his contractual obligations, including paying a reverse termination fee that would be owed if Fertitta's financing for the deal fell through for even the most innocent of reasons. During Capers' deposition, the Special Committee's counsel used the attorney-client privilege to prevent Capers from responding to Plaintiff's inquiries about any communication with the Special Committee Defendants, even communications that were partially disclosed in the Company's January 5, 2009 proxy statement.

As further explained below, Capers' deposition highlighted the importance of five events at the center of this action: (1) an October 7, 2008 Landry's press release, sent without the Special Committee's review or approval, announcing the possibility of a reduced price for the transaction, which led to a precipitous decline in Landry's market price; (2) a key October 10, 2008 meeting where Fertitta personally threatened Capers, the Special Committee's financial advisor, and the Special Committee members themselves, followed shortly thereafter by a remarkable turnaround by the Special Committee, which went from refusing to acknowledge any

[1] While Plaintiff provides page citations as appropriate, the entire manuscript of the Capers deposition is attached as Exhibit B to the Kairis Decl.

basis to withdraw from the $21 per share deal to executing the amended $13.50 deal; (3) Fertitta's "creeping takeover" of Landry's, which the Special Committee allowed by accepting his refusal to sign a standstill agreement, and then failing to adopt a poison pill when he refused the Special Committee's request; (4) the Special Committee's decision to terminate the $13.50 merger agreement upon Fertitta's demand that they do so, even though the U.S. Securities and Exchange Commission ("SEC") made clear to Capers directly that it had absolutely no desire to "blow up" the transaction, and Capers' understanding that a reasonable willingness among Fertitta and his financial advisor to work with the SEC could resolve any disclosure issues; and (5) the resignation of K&S on the same day that the Special Committee decided to terminate the $13.50 merger agreement.[2] For each of these topics, Capers testified in his deposition about his conversations with third parties, but the Special Committee's counsel objected before Capers could explain the substance of any of his communications with the Special Committee or his personal analysis of the relevant issues. In an effort to advance discovery in this action, Plaintiff carefully made a record about the scope of the privilege asserted, but reserved its rights without forcing an irreconcilable dispute during Capers' deposition.

Having heard the Special Committee's aggressive assertions of privilege, Plaintiff's counsel was stunned when the Special Committee began its own questioning of Capers. After Plaintiff finished questioning Capers, the Special Committee's counsel asked a series of questions cutting right to the heart of Capers' legal opinions and his discussions with the Special

[2] *See generally* Kairis Decl. Ex. B at 188-191 (Fertitta's refusal to sign a standstill agreement and the Special Committee Defendants' failure to put in place a poison pill), 279-290 (October 7, 2008 press release), 299-307 (October 10, 2008 meeting), 328-350 (Special Committee January 11, 2008 decision to terminate the $13.50 merger agreement), and 351-368 (January 11, 2008 resignation of K&S).

Committee. As soon as it became clear that the Special Committee Defendants were asking questions that inquired into, or were based on, conversations between Capers and the Special Committee, Plaintiff's counsel repeatedly stated on the record that the Special Committee was waiving the privilege and was unfairly attempting to use it as a sword and a shield. Undeterred, the Special Committee's counsel continued to ask questions that required the disclosure of selected portions of Capers' legal opinions and his communications with the Special Committee.[3]

Accordingly, Plaintiff respectfully requests that this Court find that the Special Committee waived the attorney-client privilege regarding communications with K&S about the 2008 Fertitta Buyouts. Plaintiff further requests that this Court compel the Special Committee to provide full disclosure regarding its communications with K&S.[4] Alternatively, Plaintiff respectfully requests that this Court preclude the Special Committee Defendants from referring to or submitting any evidence concerning legal advice received from K&S regarding the 2008 Fertitta Buyouts while drawing a negative inference with respect to the concealed legal advice.

[3] *See generally* Kairis Decl. Ex. B at 368-395.

[4] Plaintiff reserves its rights with respect to seeking to re-depose Mr. Capers until after the depositions of the Special Committee Defendants. However, as discussed below, Plaintiff respectfully requests that the Court permit the re-deposition of Mr. Capers via telephone or other convenient means with respect to the limited but critical issue of King & Spalding's abrupt resignation on January 11, 2009.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Status of Discovery in this Action

After Vice Chancellor Lamb denied Defendants' motion to dismiss in its entirety on July 28, 2009, the parties began discovery proceedings. Despite an October 9, 2009 deadline to complete their document productions, the Special Committee has still not completed its document productions or provided all privilege logs. Additionally, the Special Committee has broadly asserted the attorney-client privilege to withhold thousands of documents from production, broadly redacted additional documents, and refused to produce any witnesses for depositions before November 19, 2009, despite the fact that the Scheduling Order called for depositions to commence on October 12, 2009.

When discovery started, Plaintiff did not know whether the Special Committee would assert the attorney-client privilege regarding their communications with K&S. As noted above, the Landry's proxy statements regarding the 2008 Fertitta Buyouts partially disclosed K&S's advice to the Special Committee. Moreover, certain decisions of the Special Committee, including the decision to renegotiate the $21 per share deal, to allow Fertitta to purchase Landry's shares on the open market, and to terminate the $13.50 per share merger agreement, are so central to the claims and defenses in this case that disclosure of the basis for the Special Committee's actions seemed a reasonable, if not likely, course of action.

Capers, a senior partner at K&S and transaction counsel to the Special Committee, was the first witness made available for a deposition on November 19, 2009.[5] In the weeks leading to Capers' deposition, litigation counsel for the Special Committee made clear through a series of letters and telephone conversation that the Special Committee intended to assert the attorney-client privilege, and that Plaintiff's counsel would not be allowed discovery into the substance of the advice provided. In an attempt to advance discovery, while still reserving its right to claim that the Special Committee waived any otherwise applicable privileges, Plaintiff agreed to respect the Special Committee's assertion of the attorney-client privilege during Capers' deposition.[6]

Plaintiff's counsel specifically informed the Special Committee's counsel, however, of Plaintiff's firm position that the reasons for K&S's resignation cannot themselves be privileged legal advice, and even if they could be considered privileged, those reasons were so central to the underlying claims in this action that shareholders were entitled to know them notwithstanding any otherwise applicable privilege. Plaintiff's counsel specifically instructed the Special Committee to decide in advance whether they intended to block testimony about K&S's resignation so that, if necessary, Plaintiff's counsel could contact the Court to resolve that issue before Capers' deposition.

[5] Mr. Capers' deposition was the first and thus far only deposition to take place in this action, and only occurred after months of protracted discussions and delay, and after Plaintiff agreed to limit its questions in an effort to move discovery forward in this action.

[6] Copies of the Special Committee's letters are attached as Kairis Decl. Exs. C and D, while Plaintiff's responsive letter and email are attached as Exs. E and F, respectively.

B. The Special Committee Broadly Asserted The Attorney-Client Privilege During Capers' Deposition And Precluded Any Meaningful Inquiry Into Critical Areas of the Case

As soon as the deposition began, counsel for the Special Committee instructed Capers about the attorney-client privilege by stating, "the special committee is asserting the attorney-client privilege on any communications that [Capers] had with the special committee, among other things . . . I do not want you to be divulging any communications that you may have had with the special committee."[7] Moreover, the Special Committee asserted a blanket objection regarding any discussions involving Cowen & Co. ("Cowen"), the Special Committee's financial advisor.[8] The Special Committee further asserted privilege over conversations involving business issues by taking the position that Capers formed mental impressions that he shared with the Special Committee based on those discussions.[9] Nevertheless, throughout Capers' deposition, Plaintiff respected the Special Committee's privilege assertions.[10]

Prior to the deposition, it was apparent that the $21 per share transaction first announced in June 2008 was ready to close in the fall of 2008. Then Hurricane Ike struck Texas in mid-September 2008. Suffering buyer's remorse as the stock market continued to plummet in the summer of 2008, Fertitta decided to use Hurricane Ike as an excuse to renegotiate the deal.

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[7] Kairis Decl. Ex. B: Capers. Tr. at 21.

[8] Kairis Decl. Ex. B: Capers Tr. at 114-16.

[9] Kairis Decl. Ex. B: Capers Tr. at 168-73.

[10] *See, e.g.*, Kairis Decl. Ex. B: Capers Tr. at 21-22, 27, 90, 95, 123, 171, 188, 222, 230, 245, 285, 287-288, 313, 333, 340, 368.

Capers' deposition testimony, however, brought home to Plaintiff the critical importance of five events showing Fertitta's improper conduct to obtain majority control of the Company without paying even the $13.50 he agreed to in the revised deal or paying the reverse-termination fee in either the original or the amended merger agreements.

First, Capers explained that Fertitta had already used the weak credit markets as an excuse to lower the price he was offering for Landry's in the Spring of 2008.[11] Capers explained that shortly after Fertitta lowered his $23.50 bid to $21 per share, Landry's issued a press release, dated April 4, 2008, announcing the revised bid and describing certain actions taken by the Special Committee without seeking the Special Committee's prior approval of the press release.[12] Capers informed the Company's outside counsel Arthur S. Berner of Haynes and Boone LLP that he objected to the issuance of the April 4 press release and that he expected to have the opportunity to review any press releases purporting to describe the Special Committee's actions, decisions, or work prior to its release in the future.[13]

Almost immediately after Hurricane Ike hit, Fertitta asserted that the "material adverse effect" condition ("MAE") in the merger agreement and the related debt commitment letter may have been triggered, thus allowing Fertitta and his lenders, led by Jefferies & Co. ("Jefferies"), to

[11] Kairis Decl. Ex. B: Capers Tr. at 49.

[12] Kairis Decl. Ex. B: Capers Tr. at 50. A copy of the April 4, 2008 press release is attached to the Kairis Decl. as Ex. G.

[13] Kairis Decl. Ex. B: Capers Tr. at 53-54.

abandon their contractual obligations.[14] Fertitta also promptly stated his belief that by renegotiating the deal downward to $17 per share, he could "salvage" the transaction for the public shareholders. Capers responded in letters sent to Fertitta on the Special Committee's behalf and made clear in his deposition testimony that he did not agree with Fertitta's suggestion that he and his lenders may not be required to comply with their contractual obligations.[15] To the contrary, Capers testified that the Special Committee never received a legal opinion that an MAE occurred, and that the Special Committee believed that Landry's contract with Fertitta at $21 per share remained valid and binding after Hurricane Ike hit Texas.[16]

Capers' deposition further established that Fertitta took matters in his own hands in early October, by causing Landry's to issue a press release on October 7, 2008 announcing that the $21 per share going-private transaction was in jeopardy. The press release was sent for review and comments to Jefferies before it was issued.[17] However, despite Mr. Capers' earlier request, it was not sent to the Special Committee for review or approval.[18] Fertitta, who stood to personally benefit if Landry's stock went into a tailspin, omitted material facts from the press

[14] The June 16, 2008 merger agreement is attached as Kairis Decl. Ex. H, and the Debt Commitment Letter dated June 12, 2008 is attached to the Kairis Decl. as Ex. I. A copy of the September 18, 2008 letter from Fertitta suggesting that an MAE may have occurred is attached to the Kairis Decl. as Ex. J.

[15] Certain of the Special Committee's responses to Fertitta's letters are attached as Kairis Ex K.

[16] Kairis Decl. Ex. B: Capers Tr. at 136-38.

[17] Kairis Decl. Ex. B: Capers Tr. at 282-83.

[18] A copy of the October 7 press release is attached as Kairis Ex. L.

release, including his then-current $17 bid and the Special Committee's then-current $19 counteroffer in any renegotiated deal.[19] Unsurprisingly, Landry's stock plummeted.

When Plaintiff asked Capers if he had any discussions as to whether the October 7, 2008 press release could constitute securities fraud by Fertitta because it omitted material facts, the Special Committee asserted the attorney-client privilege.[20] Similarly, the Special Committee asserted the privilege to block testimony regarding discussions with Capers about the October 7, 2008 press release:

> Q. Is it fair to say that it's your view that the press release should have had, if it was going to disclose that there were renegotiations, should have disclosed the fact that Fertitta had offered $17?
>
> [Counsel for Special Committee] Gerald Pecht: Object to the form of the question.
>
> A. We discussed the issue of the content of the press release with the special committee.
>
> Q. And did you have a discussion about whether the failure of the press release to disclose the bid-and-ask potentially had a downward effect on Landry's stock price?
>
> Mr. Pecht: I'm going to object and instruct him not to answer with regard to communications with the special committee.[21]

Second, Capers testified that he was present at an October 10, 2008 meeting where Fertitta suddenly announced that he (a) lowered his offer from $17 to $13 per share,[22] and (b) threatened to sue Capers and Cowen and to fire the Special Committee if his going-private

[19] Kairis Decl. Ex. B: Capers Tr. at 280-81.

[20] Kairis Decl. Ex. B: Capers Tr. at 287-92.

[21] Kairis Decl. Ex. B: Capers Tr. at 285:6-22.

[22] Kairis Decl. Ex. B: Capers Tr. at 294.

transaction failed to close.[23] Shortly thereafter, the Special Committee agreed to a price of $13.50 per share.[24] Once again, when Plaintiff's counsel attempted to inquire into the discussions between Capers and the Special Committee that caused their about-face – they had not accepted that Hurricane Ike constituted an MAE allowing Fertitta to cancel the signed merger agreement at $21 per share and, until then, had demanded $19 per share while not accepting Fertitta's reduced $17 offer – the Special Committee blocked the questioning about the impact of Fertitta's threats on the Special Committee's decision to accept a renegotiation and a dramatically reduced share price.[25]

Third, Capers testified that he was concerned that Fertitta's open-market purchases of Landry's shares would jeopardize the going-private transaction, and that the Special Committee therefore requested that Fertitta agree to a standstill agreement.[26] According to Capers, Fertitta's counsel represented in response to this request that "Mr. Fertitta had no intention of going back in the market," and that Fertitta would therefore not agree to a standstill agreement.[27] Capers testified that, notwithstanding the representation from Fertitta's counsel, Fertitta continued to buy Landry's shares in the open market until he gained majority control of the Company in December 2008.[28] But the Special Committee objected to any substantive answers from Mr.

[23] Kairis Decl. Ex. B. Capers Tr. at 299-300.

[24] Kairis Decl. Ex. B: Capers Tr. at 306.

[25] Kairis Decl. Ex. B: Capers Tr. at 304:19-305:9.

[26] Kairis Decl. Ex. B: Capers Tr. at 189-90.

[27] Kairis Decl. Ex. B: Capers Tr. at 190-91.

[28] Kairis Decl. Ex. B: Capers Tr. at 319.

Capers about the decision not to insist on a standstill agreement.[29] Moreover, when the Special Committee learned of Fertitta's continued open-market purchases, Capers discussed with the Special Committee whether they could implement a poison pill.[30] But again the Special Committee objected to any substantive answers from Capers about why it did not implement a poison pill to stop Fertitta's open market purchases:

> Q. Why didn't the special committee put in place a poison pill?
>
> Mr. Pecht: And I'm going to assert an objection and instruct him not to answer. . . .
>
> [Counsel for Plaintiff], Mr. Lebovitch: Okay. And you would do so, you would give the same instruction for any question I have about the discussions Mr. Capers had, the actual discussions he had with the special committee about the pros and cons of adopting a pill?
>
> Mr. Pecht: Yeah.[31]

Fourth, Capers testified about the true circumstances surrounding the SEC's request of disclosure of certain interest rates from Jefferies' amended debt commitment letter, which was the publicly stated reason for the termination of the 2008 Fertitta Buyouts. Capers explained that the SEC expressed a "willingness to work with us to try to find some way to avoid the disclosure of the commitment letter" and that they "expressly indicated that they did not want to blow up the transaction."[32] Capers further explained that although he believed a compromise could readily be reached, he was unable to persuade Fertitta or Jefferies' counsel to continue to engage

[29] Kairis Decl. Ex. B: Capers Tr. at 190:22-191:16

[30] Kairis Decl. Ex. B: Capers Tr. at 185.

[31] Kairis Decl. Ex. B: Capers Tr. at 188:3-15.

[32] Kairis Decl. Ex. B: Capers Tr. at 329, 338.

with the SEC to look for alternatives that would work for both of them, and that shortly after Landry's released its January 5, 2009 proxy statement, Jefferies' and Landry's counsel determined that such efforts were futile.[33] Capers testified that he did not believe that it was futile for Jefferies to continue working with the SEC.[34] But again the Special Committee prohibited Capers from testifying about why the Special Committee nevertheless decided to terminate the revised merger agreement:

> Q. Why did the special committee terminate the agreement rather than require Fertitta to terminate the agreement?
>
> Mr. Pecht: Objection and instruct not to answer because it involves communications between him and the special committee.[35]

Finally, near the end of Plaintiff's questioning of Mr. Capers, Plaintiff inquired into the circumstances surrounding K&S's resignation on the day that the Special Committee decided to terminate the 2008 Fertitta Buyouts without requiring Fertitta to pay any termination fee. Before the deposition, Plaintiff notified counsel for the Special Committee that this would be a critical part of the deposition and that there appeared to be no legitimate reason for asserting the attorney-client privilege concerning the reasons for K&S's resignation. But at Capers' deposition, the Special Committee prevented Capers from testifying about the reasons for K&S's resignation.[36] The Special Committee's refusal to permit Capers to testify about the reasons for K&S's resignation surprised Plaintiff in light of counsels' prior specific discussions on this

[33] Kairis Decl. Ex. B: Capers Tr. at 329-31.

[34] Kairis Decl. Ex. B: Capers Tr. at 332, 338.

[35] Kairis Decl. Ex. B: Capers Tr. at 349:20-350:2.

[36] Kairis Decl. Ex. B: Capers Tr. at 367:15-368:8.

issue.[37] The Special Committee has still not adequately explained the basis for its instruction to Capers not to answer questions about K&S's resignation. Regardless of any other rulings, Plaintiff therefore respectfully requests that this Court permit a deposition of Capers via telephone or other convenient means concerning this discrete topic.

After reserving its rights, counsel for Plaintiff stopped its examination of Capers. The deposition continued with questions by the Special Committee's counsel.

C. The Special Committee Intentionally Elicited Patently Privileged Testimony from Mr. Capers Over Plaintiff's Objections

After the Special Committee precluded Plaintiff from inquiring into any communications involving the Special Committee and Capers, the Special Committee's counsel then brazenly proceeded to ask Capers questions that involved both his legal opinions and his specific discussions with the Special Committee concerning the 2008 Fertitta Buyouts. For example, the Special Committee's counsel asked Capers to give his legal opinion concerning the independence of the Special Committee Defendants for purposes of the 2008 Fertitta Buyouts based on his conversation with them.[38] Counsel for Plaintiff immediately objected, warning the Special Committee's counsel that he was "asking for conclusions based on communications with the committee that are exactly like the questions that you've been blocking me all day" and that Plaintiff would request a ruling from this Court that this was an improper use of the attorney-client privilege as a sword and a shield.[39]

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[37] Kairis Decl. Ex. B: Capers Tr. at 358-62.

[38] Kairis Decl. Ex. B: Capers Tr. at 368-69.

[39] Kairis Decl. Ex. B: Capers Tr. at 369:12-371:7.

Similarly, the Special Committee's counsel asked about a Special Committee meeting where a litigation partner from K&S discussed "the litigation risks of these conditions not being satisfied"[40] and about the Special Committee's discussions with Cowen to inquire into alternative financing for a going-private transaction.[41] Moreover, in response to questions from the Special Committee's counsel, Capers testified extensively about his conversations with the Special Committee regarding Cowen's investigation about the possibility of certain Landry's note holders redeeming their notes at 101% of par value in February 2009.[42]

Because of the Special Committee's decision to use the attorney-client privilege as a sword and a shield, Plaintiff requests that this Court find that the Special Committee waived the attorney-client privilege regarding K&S's advice about the 2008 Fertitta Buyouts, and that this Court compel the Special Committee to provide full disclosure and testimony regarding such advice. Alternatively, this Court should preclude the Special Committee from referring to or submitting evidence in this matter concerning legal advice received from K&S regarding the 2008 Fertitta Buyouts.

ARGUMENT

A. The Special Committee Waived The Attorney-Client Privilege Concerning The 2008 Fertitta Buyouts

In Delaware, "[i]t is axiomatic that a party may not make bare factual assertions, the veracity of which are central to resolution of the parties' dispute, and then assert the attorney-

[40] Kairis Decl. Ex. B: Capers Tr. at 382:6-383:5.

[41] Kairis Decl. Ex. B: Capers Tr. at 386:8-387:24.

[42] Kairis Decl. Ex. B: Capers Tr. at 386-91.

client privilege as a barrier to prevent a full understanding of the facts disclosed." *In re: Kent County Adequate Public Facilities Ordinances Litig.*, 2008 WL 1851790, C.A. No. 2921-VCN, at *5 (Del. Ch. Apr. 18, 2008) (*citing Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 259 (Del. 1995)). Indeed, a party waives the attorney-client privilege if that party either "injects the communications themselves into the litigation" or "injects an issue into the litigation, the truthful resolution of which requires an examination of the confidential communications." *Tenneco Automotive Inc. v. El Paso Corp.*, 2001 WL 1456487, at *3 (Del. Ch. Nov. 7, 2001) (citations omitted.) "In other words, the at-issue exception prevents a party from using the attorney-client privilege both offensively and defensively." *Amirsaleh v. Board of Trade of the City of New York*, 2008 WL 241616, at *3 (Del. Ch. Jan. 17, 2008) (citations and quotation marks omitted). *See also Baxter Int'l., Inc. v. Rhône-Poulenc Rorer, Inc.*, 2004 WL 2158051, at *3 (Del. Ch. Sept. 17, 2004) ("The 'at issue' exception is based on the principles of waiver and of fairness, so that the party [ ] cannot use it as both a sword and a shield.").

The January 5, 2009 proxy statement issued by Landry's and Capers' deposition testimony placed K&S's advice to the Special Committee at issue in this case. The proxy statement partially reveals K&S's legal advice regarding the Special Committee Defendants' fiduciary duties in negotiating the 2008 Fertitta Buyouts. Similarly, the January 5, 2009 proxy statement partially reveals K&S's advice regarding the Special Committee's October 10, 2008 decision to renegotiate the $21 per share merger agreement with Fertitta, while "[i]n doing so, the special committee took into account its duty with respect to the price per share to be paid for [Landry's] and discussed the process by which it would negotiate with Mr. Fertitta to increase

his offer price."[43] The proxy statement also partially reveals K&S's advice during an October 18, 2008 meeting during which the Special Committee accepted a revised offer of $13.50 per share. After Cowen representatives left the meeting, the Special Committee Defendants discussed, with K&S present, "the options considered by the special committee in connection with the discussions with Mr. Fertitta about the original merger agreement and his proposal to revise its terms, including: (i) the option of seeking to enforce the original merger agreement; (ii) the option of revising the terms of the original merger agreement with Mr. Fertitta as discussed to provide for a merger at $13.50 per share; and (iii) the option of postponing further consideration of a going private transaction until conditions for a sale of us may be more favorable" before concluding, "taking into account all factors considered by the special committee," to recommend accepting a merger at $13.50 to the board.[44] The veracity of these factual assertions cannot be resolved without examining the communications between K&S and the Special Committee, and among the Special Committee Defendants while K&S was present.

During Capers' deposition, communications between the Special Committee and K&S were again placed at issue, as were other critical facts about the 2008 Fertitta Buyouts, the truthful resolution of which requires an examination of the purportedly confidential communications. For example, after Plaintiff's counsel stopped questioning Capers, counsel for the Special Committee asked Capers for his "understanding" of the effects of an MAE on the closing conditions for the signed $21 per share merger agreement:

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[43] Kairis Decl. Ex. A, at 53.

[44] Kairis Decl. Ex. A, at 55.

> Mr. Pecht: And what is – and what effect would failure to satisfy the EBITDA condition or if there was an MAE have on the merger agreement?
>
> Mr. Lebovitch: Objection to the form. Vague and ambiguous and asking for expert testimony and legal opinion and waives the privilege.
>
> Mr. Pecht: You may answer.
>
> A. The occurrence of an MAE under the merger agreement would give Mr. Fertitta the right to refuse to close, and the failure of the financing to be available because of a failure to satisfy the EBITDA condition would give Mr. Fertitta the right to refuse to close.[45]

The Special Committee similarly asked (i) whether Capers determined "based upon your years of experience and whatever communications you may have had, whether or not the members [of the Special Committee] were independent and disinterested;"[46] (ii) whether Capers discussed with the Special Committee "the possibility that the damage to Landry's properties and business arising out of Hurricane Ike or the turmoil in the financial and credit markets might constitute a material adverse effect under the original merger agreement;"[47] (iii) what Cowen reported to the Special Committee with respect to a purported investigation into alternative financing for the 2008 Fertitta Buyouts;[48] and (iv) discussions between Mr. Capers and the Chair of the Special Committee regarding efforts to arrange for alternative financing for senior notes that would become due in February 2009.[49]

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[45] Kairis Decl. Ex. B: Capers Tr. at 377:17- 378:9.

[46] Kairis Decl. Ex. B: Capers Tr. at 369-71.

[47] Kairis Decl. Ex. B: Capers Tr. at 379-81.

[48] Kairis Decl. Ex. B: Capers Tr. at 386-87.

[49] Kairis Decl. Ex. B: Capers Tr. at 389-91.

By injecting K&S's communications, determinations, and understanding regarding these critical facts into the case, the Special Committee put K&S's knowledge and advice to the Special Committee at issue and waived the attorney-client privilege. *See Tenneco,* 2001 WL 1456487, at *3 (finding that a party waived the attorney-client privilege when it "injected the issue of its knowledge into this litigation."). Moreover, because the Special Committee broadly asserted the privilege to withhold thousands of documents and to redact additional documents, Plaintiff is disadvantaged by its inability to view the concealed information, which it cannot obtain from another reliable source. *See Tenneco,* 2001 WL 1456487, at *4. As the Supreme Court explained in *Tackett*, "[d]isclosure is thus required in order to promote the rationale which underlies waiver: 'fairness and discouraging use of the attorney-client privilege as a litigation weapon.'" 653 A.2d at 260 (*citing Citadel Holding Corp. v. Roven,* 603 A.2d 818, 825 (Del. 1992)). The same is true here.

B. Barring Full Disclosure, The Special Committee Should Be Precluded From Presenting Any Evidence Concerning The Special Committee's Legal Bases For Renegotiating and Terminating The 2008 Fertitta Buyouts

1. The Special Committee Defendants Cannot Partially Waive The Privilege When It Suits Them

Under Delaware law, "a party cannot take a position in litigation and then erect the attorney-client privilege in order to shield itself from discovery by an adverse party who challenges that position." *Pfizer Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at * 1 (Del. Ch. Dec. 8, 1999) (citation and internal quotation marks omitted). As explained in *Chesapeake v. Shore,* the Special Committee cannot have it both ways – if it is not deemed to have waived

privilege and continues to assert privilege, it must accept the consequences of this tactical decision:

> By blocking discovery into these subjects, the defendants have, as a legal and evidentiary matter, thereby precluded themselves from arguing or placing into evidence the content of the legal advice they received or of the collective deliberations into which discovery was blocked. It must be emphasized that under *Unocal* and *Unitrin* the defendants have the burden of showing the reasonableness of their investigation, the reasonableness of their process and also of the result that they reached. One would think that a board having that burden would want to expose their deliberative process to full view, but they are not legally required to do so.
>
> The defendants are the masters of the evidence they will present in their defense, but they must accept the consequences of their tactical choice. Here the defendants' tactical decision to bar on privileg[e] grounds discovery into what the board was advised was their fiduciary duty and into the content of the board's deliberations will in turn preclude them from proving those deliberations at trial to defend their position that their decision was reasonable and made with due care.

771 A.2d 293, 301 n. 8 (Del. Ch. 2000) (quoting *Mentor Graphics Corp. v. Quickturn Design Sys.*, C.A. No. 16584, Tr. at 505, Jacobs, V.C. (Del. Ch. Oct. 1998)). Indeed, "this court has refused to allow boards to tout their reliance on advice of counsel as evidence of their good faith and prudence while shielding the back-and-forth they had with counsel." *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 996 n.23 (Del. Ch. 2005).

Moreover, the Special Committee should not be allowed to engage in gamesmanship by changing its litigation posture and (partially) waive privilege when it is convenient to do so in the future. As this Court explained in *Ashmore v. Metrica*, "[p]rinciples of waiver and fairness, metaphorically expressed as preventing a party from using the privilege as both a sword and a shield, require the Court to disregard attempts by [a party] to invoke the privilege, only to change

their mind at the eve of trial." 2007 WL 1464541, at *1 (Del. Ch. May 11, 2007). This Court should enforce the same rule here.

If the Special Committee is not deemed to have waived the privilege regarding the 2008 Fertitta Buyouts, it should be precluded from offering any evidence concerning the legal bases or motivations behind its decisions regarding that transaction into evidence. Otherwise, the Special Committee could suddenly and unfairly assert new reasons for decisions that lie at the heart of this action and that Plaintiff has never had an opportunity to test or question. *See id*.

2. The Court Should Infer That The Concealed Advice From K&S Would Be Adverse to The Special Committee

Because of the purpose and role of special committees in negotiating transactions between Delaware corporations and dominant shareholders and senior executives such as Fertitta, this Court has expressed concern about the broad assertion of the privilege by special committees in an attempt to conceal critical facts from disclosure and judicial review. *See In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 431 n.8 (Del. Ch. 2002) (noting that "in general it seems unwise for a special committee to hide behind the privilege" because "the very nature of the special committee process as an integrity ensuring device requires judicial access to communications with advisors, especially when such committees rely so heavily on these advisors to negotiate and provide expertise in the absence of the unconflicted assistance of management."). These concerns are further heightened where, as here, the Special Committee refuses to disclose critical information despite its continuing "obligation of complete candor and openness" to Landry's and its shareholders in this *derivative* action. *See Lee v. Engle*, 1995 WL 761222, at *4 (Del Ch. Dec. 15, 1995).

Further, the Special Committee asserted in this litigation and in the January 5 proxy statement that it retained K&S as the Special Committee's independent legal counsel to assist with arms-length negotiations with Landry's CEO and largest shareholder, thereby suggesting that the renegotiation and termination of the Fertitta 2008 Buyouts were the result of a fair process and not attributable to Fertitta's improper conduct. Plaintiff can only challenge those allegations with a full showing of K&S's advice to the Special Committee regarding the 2008 Fertitta Buyouts. Without full disclosure of K&S's advice, the Special Committee will gain the improper inference that K&S's advice during the 2008 Fertitta Buyouts was routine and unremarkable. *See Tackett*, 653 A.2d at 260 (ordering disclosure of privilege information because "[t]o rule otherwise would permit [the party asserting privilege] to gain the inference that, not only was the claim handled routinely, but the routine analysis of the claim supported delay in payment"). Under Delaware law, such a neutral or positive inference based on concealing K&S's advice behind a claim of the attorney-client privilege would be inappropriate. As the Delaware Supreme Court explained in *Kahn v. Lynch Communications Sys., Inc.*, "[t]he production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse." 638 A.2d 1110, 1119 n.7 (Del. 1994). Similarly, in *Chesapeake*, this Court discounted evidence that a board hired legal and financial advisors as suggesting a fair process when the board invoked privileges to bar examination of the advice given by those advisors. 771 A.2d at 301.

The same result should follow here. Throughout the 2008 Fertitta Buyouts, the Special Committee was confronted with many critical events, including Fertitta's demand to renegotiate the merger agreement following Hurricane Ike, Fertitta's issuance of a press release announcing

that the $21 per share going-private transaction was in jeopardy, thereby sending Landry's share price in a tailspin, Fertitta's open-market purchases of Landry's shares despite earlier representations that he would not do so, and the decision about whether to terminate the renegotiated merger agreement without insisting that Fertitta pay a reduced termination fee. The Special Committee received K&S's advice regarding these events. Notably, the very day that the Special Committee decided to terminate the renegotiated merger agreement, K&S abruptly resigned. This Court should not allow the Special Committee's nondisclosure of this advice to create an inference that the suppressed information would have supported a finding that the 2008 Fertitta Buyouts were conducted pursuant to a fair process. Rather, the natural inference from these events and the Special Committee's decision to insist on concealing K&S's advice from judicial review is the opposite.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order that either: (1) the Special Committee waived the attorney-client privilege regarding legal advice received from their transaction counsel at K&S, or (2) precludes the Special Committee from referring to or submitting evidence concerning advice received from K&S regarding the 2008 Fertitta Buyouts while drawing a negative inference with respect to the concealed legal advice. Additionally, Plaintiff respectfully requests that this Court enter an Order permitting the deposition of Capers concerning the resignation of K&S as counsel to the Special Committee.

Respectfully submitted,

Dated: December 2, 2009

/s/ John C. Kairis

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CERTIFICATE OF SERVICE

I, John C. Kairis, certify that on December 10, 2009, I caused the foregoing Public Version Unredacted Memorandum of Law in Support of Motion To Compel Or, Alternatively, To Preclude The Special Committee Defendants From Asserting Reliance Upon Legal Advice With Respect To The 2008 Fertitta Buyouts, Memorandum of Law in Support, Declaration of John C. Kairis, and Proposed Order to be served upon the following counsel via LexisNexis File & Serve:

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