

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., FERTITTA §  
ACQUISITION CO., §

Defendants, and §

LANDRY'S RESTAURANTS, INC., §

Nominal Defendant. §

**MOTION TO DISMISS OF DEFENDANTS KENNETH BRIMMER, MICHAEL S.  
CHADWICK, MICHAEL RICHMOND, AND JOE MAX TAYLOR**

Defendants Kenneth Brimmer, Michael S. Chadwick, Michael Richmond, and Joe Max Taylor (the "Director Defendants") hereby move to dismiss Counts III and VII-VIII of Plaintiff's Second Amended Verified Class Action and Derivative Complaint (the "Second Amended Complaint"). The grounds for this motion are as follows:

**INTRODUCTION**

On May 23, 2010, Plaintiff and Defendants entered into a Memorandum of Understanding for Partial Settlement ("MOU") that will resolve Counts IV through VIII of the Second Amended Complaint if approved by the Court. As part of the MOU, the Parties negotiated a revised 2009 Transaction in which Defendant Tilman Fertitta ("Fertitta") will

acquire Landry's Restaurants, Inc. ("Landry's" or the "Company") at \$24 per share, subject to approval by Landry's shareholders (the "\$24 Transaction").

As set forth below, Plaintiff's sole non-settled claim against the Director Defendants – Count III – is plainly a shareholder derivative claim under Delaware law. Upon consummation of the \$24 Transaction contemplated by the MOU (the "Proposed Settlement"), Plaintiff and the proposed class will no longer be stockholders of the Company and will no longer have standing to pursue derivative claims on the Company's behalf.

Accordingly, upon the Court's approval of the Proposed Settlement and consummation of the \$24 Transaction provided for therein, the Court should enter an Order granting dismissal of all claims asserted against the Director Defendants (Counts III, VII and VIII) in the Second Amended Complaint.

## **GROUND FOR DISMISSAL**

### **I. COUNT III SOLELY ALLEGES A DERIVATIVE CLAIM.**

Delaware courts look to the nature of the wrong alleged, not the plaintiff's characterization of the claim, in deciding whether a claim is direct or derivative. *In re NYMEX Shareholder Litigation*, C.A. Nos. 3621-VCN, 3835-VCN, 2009 WL 3206051, at \*9 (Del. Ch. Sept. 30, 2009). As set forth in *Tooley*, "a court should look to the nature of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1039 (Del. 2004). In addition, the shareholder must prove that it is individually entitled to recover. *In re NYMEX*, 2009 WL 3206051, at \*9 (citing *Tooley*, 845 A.2d at 1033).

The allegations set forth in Count III against the Director Defendants state a derivative claim under any reasonable construction of *Tooley*. The gravamen of this claim is that the Director Defendants failed to enforce the \$21 Merger Agreement by not seeking to enforce *Landry's* rights under that agreement: *i.e.*, by not suing Fertitta *on behalf of Landry's* to force him to close the transaction *with Landry's* or to pay *Landry's* the \$24 million termination fee. *See, e.g.*, Second Amended Complaint ¶ 14 (“[W]hy didn’t the Special Committee simply sue [Fertitta] and force him to either close or pay the \$24 million? Surely *the Company* would have sued a third party playing Fertitta’s game.”) (emphasis added). Count III also encompasses similar allegations that the Director Defendants failed to protect *the Company's* rights under the \$13.50 Merger Agreement. *See, e.g., id.* ¶¶ 18-21 (accusing Director Defendants of undermining go-shop provision in \$13.50 Merger Agreement and allowing Fertitta to terminate agreement).

Plaintiff cannot colorably assert that Count III is “independent of any alleged injury to the corporation.” The whole point of this claim is to hold the Director Defendants liable for allegedly not enforcing rights belonging to the Company under the \$21 Merger Agreement and the \$13.50 Merger Agreement. The numbered paragraphs under the “Count III” heading further confirm that the “nature of the [alleged] wrong” is that the Director Defendants failed to enforce rights belonging to the Company under these two agreements. *Id.* ¶¶ 253-57. The agreements were entered into between Fertitta and the Company, not the individual shareholders. Neither agreement provides Landry’s shareholders with a right to proceed directly against Fertitta. The agreements “inure solely to the benefit of each party hereto, and nothing . . . is intended to or shall confer upon any other person any right, benefit or remedy of any nature . . . .”<sup>1</sup> Plaintiff is thus seeking to vindicate rights belonging to Landry’s.

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<sup>1</sup> *See* Ex. C to the Fertitta Defendants’ Motion in Opposition to Class Certification With Respect To Counts I, II, and VIII of Plaintiff’s Amended Complaint, p.A-48, §10.05.

Accordingly, Count III is a derivative claim and should be dismissed upon the Court's approval of Partial Settlement and consummation of the \$24 Transaction.

## **II. COUNTS VII AND VIII WILL BE RELEASED ON APPROVAL OF THE PROPOSED SETTLEMENT**

The only remaining claims against the Director Defendants (Counts VII and VIII) are resolved by the MOU and will likewise be released upon consummation and final approval of the Proposed Settlement.

## **CONCLUSION**

For all the foregoing reasons, the Director Defendants respectfully request that the Court enter an order providing that, upon the Court's approval of the Proposed Settlement and consummation of the \$24 Transaction provided for therein, all claims asserted against the Director Defendants (Counts III, VII and VIII) in the Second Amended Complaint are dismissed with prejudice.

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May 28, 2010

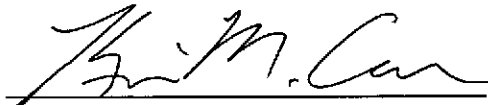
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on April 22, 2010, he caused to be served by electronic filing a copy of the MOTION TO DISMISS OF DEFENDANTS KENNETH BRIMMER, MICHAEL S. CHADWICK, MICHAEL RICHMOND, AND JOE MAX TAYLOR on the following counsel of record:

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