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. TILMAN J. FERTITTA, STEVEN L. SCHEINTHAL, KENNETH BRIMMER, MICHAEL S. CHADWICK, MICHAEL RICHMOND, JOE MAX TAYLOR, FERTITTA HOLDINGS, INC., FERTITTA ACQUISITION CO., RICHARD LIEM, FERTITTA GROUP, INC. and FERTITTA MERGER CO. Defendants, and LANDRY'S RESTAURANTS, INC., Nominal Defendant.	C.A. No. 4339-VCL

BRIEF IN SUPPORT OF CLASS PLAINTIFF'S MOTION FOR FINAL APPROVAL OF PROPOSED SETTLEMENTS, PLAN OF ALLOCATION, AND REQUESTED AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES

BERNSTEIN LITOWITZ BERGER & GROSSMANN, LLP

Mark Lebovitch
Amy Miller
Jeroen van Kwawegen
1285 Avenue of the Americas
New York, NY 10019
212-554-1400

Co-Counsel for Plaintiff

GRANT & EISENHOFER P.A.

Stuart M. Grant (Del. I.D. No. 2526)
John C. Kairis (Del. I.D. No. 2752)
Mary S. Thomas (Del. I.D. No. 5072)
Christian Keeney (Del. I.D. No. 5197)
1201 North Market Street
Wilmington, DE 19801
(302) 622-7000

Co-Counsel for Plaintiff

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Plaintiff and Court-appointed Class Representative, Louisiana Municipal Police Employees' Retirement System ("Plaintiff"), on behalf of itself and the public shareholders of Landry's Restaurants, Inc. ("Landry's" or the "Company"), respectfully submits this memorandum in support of: (1) final approval of two proposed partial settlements, as set forth in the June 22, 2010 Stipulation of Partial Settlement (the "2009 Settlement") and the July 23, 2010 Stipulation of Partial Settlement (the "2008 Settlement") (collectively, the "Settlements"), that together will fully resolve the above-captioned action (the "Action" or "Litigation"); (2) final approval of the proposed plan of allocation of the proceeds of the 2008 Settlement; (3) certification, for settlement purposes, of the 2008 and 2009 Settlement Classes;[1] and (4) awards of attorneys' fees and costs in connection with the Settlements. A hearing is scheduled for October 6, 2010 at 10:00 a.m. for the Court to consider these matters.

PRELIMINARY STATEMENT

This Action involves novel factual and legal issues concerning, among other things, shareholders' ability to recover for a pretextual termination of a merger agreement, the interplay between corporate governance and securities laws, and the

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[1] "Settlement Classes" or the "Classes" (sometimes referred to as "the Class") refers collectively to the 2008 Class and the 2009 Class. The 2008 Class, known interchangeably as the "2008 Transaction Subclass," includes all persons and entities who held Landry's common stock at any point between September 17, 2008 and January 11, 2009, inclusive. The 2009 Class, known interchangeably as the "2009 Transaction Subclass," includes all persons and entities who held shares of Landry's common stock at any point between the November 3, 2009 announcement of the $14.75 Buyout and the closing of a sale/merger transaction to Fertitta or a third party. The Settlement Classes exclude Defendants; members of the immediate families of each of the Individual Defendants; all directors, officers, parents, subsidiaries and affiliates of Landry's and the Fertitta Entities; any person, firm, trust, corporation or entity in which any Defendant has or had a controlling interest or which is related to or affiliated with any of the Defendants; and the legal representatives, heirs, successors-in-interest or assigns of any such excluded party.

measure of damages for shareholders who sell stock in response to breaches of fiduciary duty. These issues are novel largely because the underlying facts are atypical in shareholder litigation. Notwithstanding the facial novelty of this case, Plaintiff challenged Defendants'[2] actions and sought to vindicate the rights of Landry's public shareholders. Plaintiff respectfully submits that the proposed Settlements, through which Defendants are paying $14.5 million in cash to the 2008 Class and a takeover price increased by $65 million conditioned on a settlement, is an outstanding result for the Classes.

The underlying Litigation stems from Plaintiff's challenge to Defendants' conduct in connection with two terminated buyouts of the Company by Landry's CEO, Chairman, and largest shareholder, Tilman J. Fertitta ("Fertitta"). In this regard, on January 12, 2009, the Landry's Board of Directors (the "Board") shocked its shareholders by announcing that it agreed to terminate a proposed transaction with Fertitta, which in turn allowed Fertitta out of the deal without requiring him to pay a termination fee. This came after a nearly year-long process where Fertitta repeatedly used his position as CEO and Chairman to force the Board to lower the deal price from $23.50 to $13.50 per share.

When Plaintiff's counsel learned that the deal collapsed, it began investigating this case, recognizing that shareholders typically challenge a pending or closed deal instead of trying to enforce a cancelled deal. No other shareholder came forward to

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[2] "Defendants" means Tilman J. Fertitta, Steven L. Scheinthal, Kenneth Brimmer, Michael S. Chadwick, Michael Richmond, Joe Max Taylor, Fertitta Holdings, Inc., Fertitta Acquisition Co., Richard Liem, Fertitta Group, Inc., Fertitta Merger Co., and nominal Defendant, Landry's Restaurants, Inc.

prosecute this action, presumably because of the perceived difficulty in litigating a breach of fiduciary duty action arising from a failed deal.

Plaintiff and its counsel assumed the risk of litigating under these novel circumstances without any roadmap for doing so because they believed Landry's shareholders suffered a wrong. As discovery proceeded, the facts supporting Plaintiff's case mounted. For instance, Plaintiff learned that, throughout negotiations, Fertitta misled the Special Committee[3] and that the special committee process itself was tainted both by Fertitta's tactics and by the Special Committee's own breaches of protocol. Plaintiff uncovered these and other facts over Defendants' fierce resistance.

Defendants strongly contested the merits of Plaintiff's case. For instance, though Defendants ultimately agreed to provisional class certification, Defendants initially mounted vigorous opposition to Plaintiff's motion for class certification. Defendants renewed and refined many of those arguments in a second (post-discovery) motion to dismiss, which was briefed and pending when the second of the two Settlements was negotiated.

The Settlements themselves – clearly the product of arms-length negotiations – required significant effort. Plaintiff engaged in countless informal negotiation sessions, multiple days of formal mediation with a retired Federal judge, and weeks of discussions with Defendants in order to finalize each settlement. Ultimately, this effort paid off – Plaintiff is pleased to present this Court with Settlements that greatly benefit the Classes,

[3] The "Special Committee" means the committee composed of Defendants Chadwick, Brimmer, and Richmond, formed by Landry's to consider strategic alternatives to maximize shareholder value, including a going-private transaction.

through vastly improved deal terms for the 2009 Class and substantial monetary compensation for the 2008 Class.

STATEMENT OF FACTS

I. FERTITTA'S FIRST FAILED $21 BUYOUT

On January 27, 2008, Fertitta first offered to buy Landry's publicly-held shares for $23.50 per share. In response, Landry's Board formed the Special Committee to evaluate the offer and review other strategic alternatives. The Special Committee retained King & Spalding ("K&S") as its legal advisor and Cowen & Co. ("Cowen") as its financial advisor. On April, 4, 2008, Fertitta lowered his offer from $23.50 to $21 per share (the "$21 Buyout"), citing the difficult economic environment and the ongoing global credit crisis. In early June 2008, Fertitta received a full, no-outs commitment letter (the "Debt Commitment Letter") from Jefferies & Company, Inc. ("Jefferies") and Wells Fargo Foothill, LLC ("Wells Fargo") (collectively, the "Lenders"). On June 16, 2008, the Board executed an agreement (the "$21 Merger Agreement") formalizing the $21 Buyout. This agreement contained a $24 million reverse termination fee personally guaranteed by Fertitta (the "$24 Million Termination Fee") if Fertitta's wholly-owned subsidiary refused to close the deal for any legitimate reason other than the occurrence of a material adverse effect ("MAE") as the $21 Merger Agreement defined that term. The Debt Commitment Letter included a substantively identical MAE clause. By late August and into early September, the $21 Buyout appeared set to close by early October.

On September 13, 2008, Hurricane Ike struck Galveston, Texas, causing the closure of and damage to certain of the Company's properties. The Lenders promptly

recognized that the short-term damage caused by Hurricane Ike was no basis to assert an MAE. As such, the Lenders continued to work toward closing the $21 Buyout. None of the Lenders ever declared an MAE, nor did they ever provide documentation showing that they considered doing so. Fertitta also quickly realized that, despite the short-term damage, the Company's long-term prospects remained positive. Fertitta decided, however, to use the hurricane as an opportunity to lower his offer price.

On September 15, 2008, the Board met with Fertitta, Landry's CFO Richard H. Liem, and Landry's General Counsel Steven L. Scheinthal to discuss the hurricane's impact. During this meeting, the Board apparently authorized a share repurchase program purportedly to support Landry's stock price, but for some reason approved Fertitta to effectuate those purchases in lieu of the Company itself (the "Share Repurchase Program"). The Special Committee chose not to disclose the Share Repurchase Program to K&S, who expressed serious concerns for the $21 Buyout in light of Fertitta's share purchases.

During discovery, Fertitta openly testified that he had buyer's remorse and, as a result, wanted to renegotiate the $21 Buyout. From September 17-29, 2008, Fertitta attempted to lower the $21 Buyout price to $17 per share by claiming he feared the Lenders would declare an MAE. The Special Committee's counsel refused to renegotiate, asserting that no basis existed to declare an MAE.

K&S advised the Special Committee about possibly suing Fertitta to seek specific performance. Unbeknownst to K&S, however, on September 30, 2008, the Special

Committee's Chairman undermined the integrity of the Special Committee process by immediately forwarding K&S's legal analysis concerning MAEs to Fertitta's team.

On October 6, 2008, Fertitta cited weakness in Landry's stock price and stated that unless the Committee acted promptly to accept his $17 offer, even that offer would be "jeopardized." Impatient, Fertitta took matters into his own hands, causing Landry's to announce on October 7, 2008 that the Lenders might pull out of their debt commitments, jeopardizing the $21 Buyout's financing. This press release, not reviewed by the Special Committee or its counsel, was silent about Fertitta's outstanding $17 per share offer. The October 7 press release, after which Landry's stock price fell 35% to $8.44 per share, begins the 2008 Class Period.[4]

Fertitta kept the pressure on during an October 10, 2008 meeting with the Special Committee. With the Special Committee evidently prepared to accept Fertitta's $17 offer, Fertitta abruptly withdrew that offer, stating that he would only pay $13 per share. When the Special Committee's advisors expressed their frustration with Fertitta's tactics and pointed out that Fertitta had not used his best efforts to close the $21 Buyout, Fertitta again used his fiduciary position to serve his personal interests, threatening to cause the Company to sue K&S and Cowen and to fire the Special Committee.

The Special Committee promptly negotiated – without any advisors present – a revised deal with Fertitta at $13.50 per share (the "$13.50 Buyout"). The renegotiation profited Fertitta tremendously at the expense of Landry's public shareholders, lowering

[4] The "2008 Class Period" means the period between September 17, 2008 and January 11, 2009, inclusive.

his total payment to the shareholders from approximately $220 million to about $136 million.

On October 18, 2008, Landry's publicly announced the $13.50 Buyout. The press release justified the $13.50 Buyout on the grounds that Fertitta told the Company that financing for the $21 Buyout could be in jeopardy. The Special Committee's principal public justification for lowering the $21 Buyout price to $13.50, rather than enforcing the original $21 Buyout or calling off the deal altogether, was its concern about Landry's ability to refinance almost $400 million of notes that would be due in 2014 (the "Notes") – a concern that rested on false information provided by Fertitta's team.

Even after negotiating the price down to $13.50 per share, Fertitta undermined the go-shop provision in the $13.50 Merger Agreement (the agreement governing the $13.50 Buyout) by purchasing Landry's shares on the open market (starting on the day after the revised agreement was signed). By November 14, 2008, Fertitta's open-market purchases made him a majority owner of Landry's stock, allowing him to block any competing bid.

The Special Committee refused to take concrete steps to protect shareholders from Fertitta's creeping takeover. K&S tried to object to Fertitta's open-market purchases, but Fertitta refused to sign a standstill agreement, and the Special Committee did not enact a poison pill or any comparable action. By December 2, 2008, Fertitta owned nearly 57% of all outstanding Landry's shares (compared with his roughly 39% ownership as of the June 16, 2008 announcement of the $21 Buyout).

Following the announcement of the $13.50 Buyout, the SEC made a routine request to Landry's to disclose certain information from the Amended Debt Commitment Letter.[5] Fertitta and Jefferies used this request to further pressure the Special Committee by refusing to make the requested disclosures. In early January 2009, Capers learned firsthand that, yet again, risk to the deal was coming from Fertitta and Jefferies, as his inquiries confirmed that the SEC "did not want to blow up the transaction."

On January 8, 2009, the Special Committee called a meeting to discuss terminating the $13.50 Buyout, failing to inform K&S about this meeting. On January 10, 2009, with the $13.50 Buyout again facing a contrived crisis, Fertitta's counsel informed Capers that he believed the deal could be salvaged, ***provided the Special Committee agreed to lower the price of the deal to $8.50 per share.*** On January 11, 2009, the Special Committee met again to discuss terminating the $13.50 Buyout. Capers announced that K&S was resigning from serving as the Committee's counsel, effective immediately.

On January 12, 2009, Landry's shocked the market by announcing that it had terminated the $13.50 Buyout. The announcement caused Landry's share price to plunge another 37.65% or $4.65, opening at $7.70 per share the following morning, and hovering around $10 per share through the first three quarters of 2009.

II. FERTITTA'S SECOND BUYOUT ATTEMPT

On September 4, 2009, Fertitta proposed another going-private transaction and a related tax-free spin-off of Landry's wholly-owned subsidiary, Saltgrass, Inc. The

[5] "Amended Debt Commitment Letter" means the debt commitment letter provided by the Lenders for the $13.50 Buyout.

Special Committee (consisting of Brimmer and Chadwick), rejected this offer on October 21, 2009. Fertitta then proposed an all-cash transaction at $13.00 per share for all the remaining public shares of Landry's common stock on October 22, 2009. After limited negotiations, the Special Committee[6] unanimously approved a proposal for Fertitta to take Landry's private at $14.75 per share (the "$14.75 Buyout"). The $14.75 Buyout did not contain any terms to "neutralize" Fertitta's improper open-market purchases of Landry's stock. The $14.75 Buyout also included a waivable majority of the minority clause that left unfettered Fertitta's ability to use his majority ownership to veto any competing proposals, rendering the go-shop period illusory. The deal did, however, provide expansive indemnification to the Board, including with respect to the prior terminated deals.

III. BACKGROUND OF THE LITIGATION

Plaintiff's counsel began investigating this case after reviewing a New York Times article entitled, "Next Deal From Hell Award Winner: Landry's," dated January 13, 2009 – one day after the Board announced the termination of the $21 Buyout. *See* Exhibit A to the Declaration of Mary S. Thomas in Support of Class Plaintiff's Motion for Final Approval of Proposed Settlements, Plan of Allocation, and Requested Award of Attorneys' Fees and Reimbursement of Expenses (hereinafter referred to as "Thomas Decl."). Further investigation included a review of Landry's proxy statement, which further aroused Plaintiff's suspicions. *See* Thomas Decl., Ex. B, Landry's SEC Schedule 14A, Preliminary Proxy Statement filed Jan. 1, 2009. Plaintiff filed its class action and

[6] The Special Committee for the $14.75 Buyout included only Defendants Chadwick and Brimmer.

derivative complaint (the "Complaint") on February 5, 2009. Defendants moved to dismiss the Complaint on April 2, 2009. After oral argument on June 9, 2009, this Court denied Defendants' motion to dismiss in its entirety on July 28, 2009, finding that the Complaint adequately alleged claims for breaches of duty of loyalty.

The parties then embarked upon nearly a year of extensive and extremely contentious discovery proceedings. During this period, the parties negotiated a stipulation concerning the exchange of confidential information, which this Court ordered on August 19, 2009. The parties negotiated two scheduling stipulations, which this Court ordered on September 17, 2009 and February 29, 2010. The parties also negotiated an amendment to the February 29, 2010 Scheduling Order, but failed to reach an agreement, which resulted in this Court ordering a schedule during a May 14, 2010 case management office hearing.

The discovery proceedings included:

- multiple document discovery demands on Defendants and various third parties, and review of over 600,000 pages of documents produced by Defendants and third parties;

- twelve depositions, three of which spanned multiple days (including depositions of senior officers and directors of Landry's, members of the Special Committee, the Special Committee's legal and financial advisors, the Lenders, and Plaintiff);

- expert discovery, including three opening and one rebuttal expert reports, and the negotiation of an expert discovery stipulation, which the Court ordered on March 3, 2010;

- serving and responding to interrogatories by the parties;

- meeting and conferring, and corresponding on numerous occasions over the production of certain documents and the extensive assertions of privilege by Defendants and third parties;

Plaintiff also filed two key discovery motions that sought to compel critical information over which Defendants asserted privilege. First, on December 2, 2009, Plaintiff moved to compel or in the alternative to preclude the Special Committee Defendants from asserting reliance upon legal advice with respect to the $21 Buyout after the Special Committee improperly asserted privilege at the Special Committee's counsel's deposition. After oral argument on January 11, 2010, the Court determined that the Special Committee improperly asserted privilege, and ordered that the witness (Jack Capers) be redeposed. Winning this motion provided a valuable tactical benefit. Plaintiff perceived Capers was fundamentally truthful during his initial deposition, but Plaintiff was still uncovering the full significance of his role (as his was the first deposition in the case). Plaintiff's ability to revisit with Capers after hearing from Defendants significantly enhanced Plaintiff's ability to uncover the truth through discovery.

Similarly, on March 22, 2010, Plaintiff moved to compel Fertitta, Scheinthal, and Liem (i.e., the "Fertitta Defendants")[7] to produce all shared communications regarding the $21 and $13.50 Buyouts, over which they asserted privilege. Shortly before a hearing scheduled for March 29, 2010, the Fertitta Defendants agreed to produce the vast majority of the documents sought. This production contained several critical documents that supported Plaintiff's claims, including a memorandum from Fertitta's outside counsel, showing that the Fertitta Defendants misled the Special Committee and its advisors about the availability of certain funds to repurchase the Notes.

[7] The only other "Fertitta Defendants" were shell companies established by Fertitta for the sole purpose of acquiring Landry's.

Plaintiff also took other steps to advance its case as the evidentiary record developed and current events affected this litigation. Specifically, after the Company announced the $14.75 Buyout on November 3, 2009, Plaintiff filed a November 13, 2009 supplement to the Complaint challenging that proposed transaction. Plaintiff then filed an amended complaint on January 29, 2010 and a second amended complaint ("Amended Complaint") on May 21, 2010, incorporating the evidence Plaintiff developed during the discovery proceedings. Defendants moved to dismiss the Amended Complaint on May 28, 2010, and Plaintiff opposed that motion on June 28, 2010. The litigation settled shortly before the Court was scheduled to hear oral argument on the fully-briefed motion.

Defendants challenged Plaintiff on every aspect of this litigation, including class certification. Indeed, even after the Court suggested that the parties stipulate to class certification during a May 14, 2010 office conference, Defendants still forced Plaintiff to move for class certification on May 28, 2010 before ultimately agreeing to "provisionally" stipulate to class certification on June 22, 2010 (after Defendants briefed their opposition to class certification on June 11, 2010).

IV. NEGOTIATION AND SETTLEMENT

With litigation proceeding, an arms-length and months-long settlement negotiation process developed on a separate track. On December 31, 2009, Plaintiff sent a letter to the Special Committee's counsel demanding that the Special Committee members rectify their prior and ongoing breaches of fiduciary duties regarding the $14.75 Buyout. The Special Committee's counsel met with Plaintiff's counsel in early January 2010. After the January 2010 meeting, Plaintiff and Defendants began working on a term

sheet reflecting amendments to the $14.75 Buyout. Defendants also requested that Plaintiff's counsel communicate with Landry's second largest shareholder, Pershing Square Group ("Pershing Square"), which openly opposed the $14.75 Buyout and had enough shares to block the deal due to the majority of the minority clause in the $14.75 Merger Agreement. The parties then agreed to mediate Plaintiff's remaining claims related to the $21 Buyout. The parties retained retired United States District Court Judge Nicholas Politan as their mediator, drafting detailed mediation statements for his consideration (along with other documents) prior to the mediation session. On March 12, 2010, the parties conducted a full-day mediation session with Judge Politan, but failed to reach a settlement for the $21 Buyout. As Fertitta was unwilling to buy the Company absent resolution of the Action, negotiations came to a halt.

The settlement negotiations resumed in full force after Fertitta's April 15-16, 2010 deposition. As part of the negotiating process, and after Plaintiff's Counsel received defense counsel's express authorization, Defendants Fertitta and Scheinthal themselves became directly engaged in negotiating the terms of a settlement related to the $14.75 Buyout. By April 26, 2010, Plaintiff and the Fertitta Defendants believed they had reached a settlement concerning the $14.75 Buyout and so informed the Court. The next day, however, the Special Committee did not recommend the revised deal to the Board. The parties, therefore, engaged in further negotiations for several more weeks.

On May 23, 2010, after additional and extensive arms-length negotiations, the parties finally reached a comprehensive partial settlement related to the $14.75 Buyout, and informed the Court about its terms. Fertitta agreed to increase his offering price from

$14.75 to $24 per share to acquire Landry's, and agreed to shareholder protections for the revised deal, including: (a) a new 45 day go-shop period; (b) waiver of all standstills, except for hostile offers, during the go-shop period; (c) the elimination of a termination fee to Fertitta and the inclusion of a provision that he could only seek reimbursement of his actual expenses; (d) cost reimbursement incentives up to $500,000 for the two highest bidders' due diligence costs if Landry's reached a deal with Fertitta instead of those bidders; (e) Fertitta's agreement to vote any of his shares purchased on the open-market after June 16, 2008 in proportion to how the minority actually votes on any alternative transaction; and (f) allowing Plaintiff's counsel to monitor the go-shop process and to provide comments on proxy disclosures.

After announcing the partial settlement, Defendants reached out to Pershing Square, which agreed to enter into a voting agreement to support the $14.75 Buyout after Fertitta agreed to raise his offer price to $24.50 per share. On June 22, 2010, the parties filed a Stipulation of Partial Settlement related to Plaintiff's claims challenging the $14.75 Buyout. The parties later re-engaged in discussions to settle Plaintiff's claims related to the failed $21 Buyout.

On July 7, 2010, the parties attended another full-day mediation session with Judge Politan, which resulted in an agreement in principle to settle Plaintiff's claims related to the $21 Buyout. On July 14, 2010, after more negotiations, the parties memorialized a term sheet for the 2008 Class Settlement. On July 23, 2010, the parties submitted a long-form stipulation for the 2008 Class Settlement, which provided a fund of $14.5 million for Landry's shareholders. On July 26, 2010, this Court entered a

Scheduling Order,[8] preliminarily approving the 2008 Settlement, certifying the 2008 Settlement Class, directing Notice to be sent to the 2008 Class members, preliminarily approving the Plan of Allocation set forth in the Notice, and scheduling a settlement hearing to hear objections, if any, to Plaintiff's motion for final approval of the Settlements.

ARGUMENT

I. THE SETTLEMENTS SHOULD BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE

A. LEGAL CRITERIA

Delaware has long favored the voluntary settlement of contested claims. *See, e.g., In re Triarc Cos., Inc. Class & Deriv. Litig.*, 791 A.2d 872, 876 (Del. Ch. 2001) ("Delaware law favors the voluntary settlement of corporate disputes"); *In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 265-66 (Del. 1990) ("Delaware law favors settlement of issues which have been voluntarily agreed upon by the parties"); *Nottingham Partners v. Dana*, 564 A.2d 1089, 1102 (Del. 1989) ("Delaware law favors the voluntary settlement of contested issues"); *Polk v. Good*, 507 A.2d 531, 535 (Del. 1986) (same).

In reviewing a class action settlement, this Court "consider[s] the nature of the claim, the possible defenses thereto, the legal and factual circumstances of the case, and then . . . appl[ies] its own business judgment in deciding whether the settlement is reasonable in light of these factors." *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1284 (Del. 1989) (quoting *Polk*, 507 A.2d at 535). The "facts and circumstances" considered

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[8] *See* Thomas Decl., Ex. C.

by the Court in assessing the overall fairness of a proposed settlement include: (1) the probable validity of the claims; (2) the apparent difficulties in enforcing the claims through the courts; (3) the delay, expense and trouble of litigation; (4) the amount of the compromise as compared with the amount of any collectable judgment; and (5) the views of the parties involved. *Polk*, 507 A.2d at 536.

A review of these factors shows that the terms of Settlements are fair, reasonable, adequate, and in the best interests of the Classes.

B. ANALYSIS OF THE CLAIMS AND THE BENEFITS ACHIEVED IN THE 2009 SETTLEMENT

Under the terms of the 2009 Settlement, Fertitta agreed to increase the merger consideration from $14.75 to $24 per share – a 62% increase for Landry's shareholders (*i.e.*, over $65 million in additional consideration). Additionally, Defendants agreed to implement comprehensive shareholder protection provisions improving the $14.75 Buyout by: (1) instituting a new 45 day go-shop period, requiring Landry's to consider all offers whether or not Fertitta remained with the Company; (2) waiving all standstills, except for hostile offers, during the go-shop process; (3) replacing the termination fee to Fertitta with a provision for reimbursement of his actual expenses only; (4) cost-reimbursement up to $500,000 for the two highest bidders' due diligence costs if Landry's chose Fertitta's deal over theirs; (5) requiring Fertitta to vote any shares he purchased on the open market after June 16, 2008 in proportion to how the minority votes on any alternative transaction; and (6) allowing Plaintiff's counsel to monitor the go-shop process and to provide meaningful input into any proxy disclosures.

The increased merger consideration and the shareholder protection measures included in the Deal Settlement represent significant and valuable changes to the $14.75 Merger Agreement. Plaintiff is unaware of any prior example of a litigation settlement including such extensive structural changes or a comparable percentage increase in deal price. These improvements followed extensive factual, legal, and economic analysis of Plaintiff's claims. Plaintiff's negotiating position in settlement discussions with Defendants reflected its informed and considered judgment regarding the strength of these claims and defenses, the probabilities of success at trial, the damages and equitable relief likely to be recovered if successful, and the benefits to the 2009 Class from the certainty of achieving a substantial increase in the merger consideration and shareholder protection measures under the Deal Settlement. Plaintiff and its counsel also considered the near certainty of an appeal in the event Plaintiff succeeded at trial. In evaluating these factors, Plaintiff and its counsel concluded that obtaining a significant increase in merger consideration and comprehensive shareholder protection measures through intense settlement negotiations was in the 2009 Class' best interests.

Although Plaintiff hoped to prevail at trial, the risk of loss, contrasted with the certainty of achieving a very substantial settlement that included additional merger consideration of $9.25 per share and therapeutic relief related to Landry's sales process, was extremely compelling.

1. The Probable Validity of the 2009 Class Claims

The outcome at trial may well have turned on whether the Court applied the "entire fairness" doctrine or the "business judgment" rule to the $14.75 Buyout, an issue

hotly contested by both sides. Plaintiff would have argued that because Fertitta controlled Landry's and its Board, the "entire fairness" standard – requiring a showing of "fair dealing" and "fair price" – should apply and Defendants would bear the burden of proof. *See Bomarko Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1179 (Del. Ch. 1999) ("When the entire fairness test applies, the burden of persuasion initially lies with the defendant . . . [T]he burden remains with Haan and the corporate defendants . . . because Haan's misconduct interfered with or corrupted the proper functioning of the Special Committee"). Plaintiff would also have argued that, although in limited circumstances this burden may be shifted to the plaintiff through the use of a well functioning committee of independent directors, the burden here remained with Defendants because their "misconduct interfered with or corrupted the proper functioning of the special committee," *id.,* and defendants could not establish "to the satisfaction of a carefully scrutinizing court that the special committee was fully informed." *In re Emerging Commc'ns, Inc.,* 2004 WL 1305745, at *31 (Del. Ch. June 4, 2004).

Defendants would have countered that they did not need to prove the entire fairness of the $14.75 Buyout and that the burden was on Plaintiff to overcome the business judgment rule. Defendants would have argued that Plaintiff could not rebut this presumption because the $14.75 Buyout was not the result of any conflict as the Special Committee was independent of Fertitta, and Fertitta abstained as a director from voting on the $14.75 Buyout. Accordingly, Defendants would have argued that the business judgment rule still applied. *See Orman v. Cullman*, 794 A.2d 5, 21-22 n.36 (Del. Ch. 2002).

Even under an entire fairness standard, Plaintiff expected Defendants to argue at trial that the process and price were entirely fair. With respect to process, Defendants would have argued that: (1) the Board delegated full authority to a disinterested and independent Special Committee; (2) the Committee relied upon independent legal and financial advisors to assist it in evaluating and negotiating the transaction; (3) the Committee engaged in hard-fought, arms-length negotiations with Fertitta, which resulted in a majority of the minority provision in the merger agreement; and (4) the Committee performed a market check that was appropriate under the circumstances. With respect to price, Defendants would have argued that Landry's was still suffering from the effects of the financial crisis; therefore, the $14.75 per share price was fair.

Plaintiff would have argued that the transaction was not a result of "fair dealing" because: (a) the transaction's structure unfairly favored Fertitta's interests over those of Landry's shareholders; (b) Fertitta controlled the initiation and timing of the $14.75 Buyout; and (c) no meaningful negotiations over the terms of the $14.75 Buyout occurred because Fertitta controlled the Special Committee (and the rest of the Board). Plaintiff would have argued against "fair price" at trial by showing, for example, that Fertitta manufactured crises to lower the price from $23.50 to $14.75 per share (made in January 2008 at the onset of the financial crisis).

With the outcome uncertain, all parties risked losing on the 2009 Class claims at trial.

2. Additional Issues That Could Have Impacted the Resolution of the 2009 Class Claims at Trial

In addition to the issues addressed above, the parties would have briefed and argued at trial other issues that likely would have impacted the Court's determination of whether specific parties were liable to the 2009 Class for their actions in connection with the $14.75 Buyout, and if so, what was the measure of damages for such parties. These would have included: (a) whether the Special Committee members are protected from liability by their reliance on financial and legal advisors; and (b) whether Section 102(B)(7) of the D.G.C.L. protects the Special Committee from personal liability.

C. ANALYSIS OF THE CLAIMS AND THE BENEFITS ACHIEVED IN THE 2008 SETTLEMENT

Defendants agreed to pay $14.5 million dollars to settle Plaintiff's claims concerning the $21 Buyout – a significant recovery considering Landry's only has around 8 million outstanding publicly-held shares. The 2008 Settlement further represents a substantial achievement because these claims involve unique and untested legal theories. The 2008 Settlement followed extensive factual, legal, and economic analysis of Plaintiff's claims, and a neutral mediator's assessment of the merits of those claims and possible defenses thereto.

Under these circumstances, Plaintiff concluded that the 2008 Settlement was in the 2008 Class' best interests. After months of arms-length negotiations and two mediation sessions, the parties settled when Plaintiff's leverage over Defendants was at its highest. This was because discovery was nearly complete, Defendants' second motion

to dismiss was fully briefed, trial preparations had just begun, and the Defendants wanted to resolve Plaintiff's claims and obtain complete peace before closing the $14.75 Buyout.

Based on a thorough and informed analysis of the law governing the claims and defenses presented by the parties, Plaintiff concluded that the ultimate likelihood of success of its claims and the amount of potentially recoverable damages depended upon the resolution of complex, unsettled legal issues. These issues included:

(a) whether Fertitta breached his fiduciary duties when he:

- negotiated the $21 Buyout down to $13.50 per share without additional consideration by using Hurricane Ike as a pretext,
- gained control of Landry's without paying shareholders a fair price or a control premium, and
- caused the Board to agree to terminate the $13.50 Buyout to avoid paying a $15 million reverse termination fee;

(b) whether the Director Defendants[9] breached their fiduciary duty by:

- affirmatively facilitating Fertitta's renegotiation of the $21 Merger Agreement at the expense of the public Landry's shareholders,
- failing to take any steps to preclude Fertitta from gaining a controlling interest in Landry's through his open-market stock purchases,
- allowing Fertitta terminate the $21 Buyout and $13.50 Buyout without paying any reverse termination fee; and

(c) whether the claims involving breaches of fiduciary duties implicated the business judgment rule or the entire fairness standard.

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[9] "Director Defendants" means Defendants Scheinthal, Brimmer, Chadwick, Richmond, and Taylor.

1. The Probable Validity of the 2008 Class Claims

Although Plaintiff hoped to prevail at trial and overcome the defenses raised to these claims, the risk of loss, contrasted with the certainty of achieving a very substantial settlement, was compelling. While Plaintiff argued that Fertitta and the Director Defendants breached their fiduciary duties in connection with the $21 Buyout, causing damages to Landry's and its public shareholders, Defendants argued that they complied with their fiduciary duties, and their actions were protected under the business judgment rule. Defendants argued that Delaware law does not even recognize a fiduciary duty in connection with a proposed transaction. These complex issues, which were argued at length in the motions to dismiss and the motion for class certification, would have been presented to the Court at trial and, ultimately, to the Supreme Court, no matter how this Court determined the issues.

a. Fertitta's Breaches of Fiduciary Duty

Plaintiff's claims as to whether Fertitta breached his fiduciary duties in connection with the $21 Buyout raised a new legal theory, which would have been the focal point of a trial with high risk for both sides. At trial, Plaintiff would have to establish that Fertitta owed and breached fiduciary duties to the Landry's shareholders in connection with the $21 Buyout. As highlighted in Defendants' multiple motions to dismiss, Defendants would have argued that Fertitta had limited fiduciary duties regarding the $21 Buyout. Specifically, Defendants would have argued that Fertitta only owed contractual obligations to the Company for the $21 Buyout, which he did not breach. *See, e.g., Lazard Debt Recovery GP, LLC v. Weinstock*, 864 A.2d 955, 970 (Del.

Ch. 2004) (dismissing plaintiffs' attempt to "transform" a contractual employment claim into a fiduciary duty claim).

Plaintiff would have countered with the argument that contractual obligations do not relieve officers and directors of their fiduciary obligations.[10] Plaintiff would have relied on, among other authority, *In re Emerging Communications, Inc.*, 2004 WL 1305745, at *5, where the court found that the company's controlling shareholder breached his duty of loyalty in ways that parallel Fertitta's actions. Plaintiff also would have relied on *Bomarko*, 794 A.2d 1161, where the controlling shareholder who sabotaged a negotiation process was found to have breached his duty of loyalty. *Id.* at 1172.

b. The Director Defendants' Breaches of Fiduciary Duty

Another main focus at trial would have been on whether the Director Defendants breached their fiduciary duties, which would have turned on the question of whether Plaintiff's claims against the Director Defendants were subject to the business judgment rule or the entire fairness standard. Defendants would argue that the business judgment rule applied to and protected all of the Director Defendants' decisions. *See, e.g., Orman,* 794 A.2d at 20. Plaintiff would argue that if the business judgment rule applied, it would be rebutted by showing either that: (1) the Board's and the Special Committee's deliberative process with respect to the $21 Buyout was tainted by Fertitta's disloyalties

[10] *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994) ("[A] shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.") (quoting *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987)); *Technicorp Int'l II, Inc.*, v. *Johnston*, 2000 WL 713750, at *5 (Del. Ch. May 31, 2000) ("The duty of loyalty of a director is . . . a special obligation upon a director in ***any*** of his relationships with the corporation[.]").

as an interested director or (2) the majority of the Director Defendants abdicated their duty to act in the best interests of the Company. *See, e.g.*, *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 371 (Del. 1993). The determination of this issue would have been fact intensive at trial with high risk to each side.

In fact, Vice Chancellor Lamb grappled with this issue when he upheld these claims against the Director Defendants in his July 28, 2009 decision. Specifically, he struggled with whether the claims against the Board rose to a breach of the duty of loyalty. Supporting Plaintiff's theory that they did, Vice Chancellor Lamb noted: (1) Fertitta's negotiation (and the board's acquiescence to his taking that role) of the refinancing commitment on behalf of the Company as part of the Amended Debt Commitment Letter, (2) the Board's apparent and "inexplicable impotence" in response to Fertitta's creeping takeover, and (3) the Board allowing Fertitta to avoid paying the $15 million reverse termination fee. *LMPERS v. Fertitta, et al.*, 2009 WL 2263406, at *7 (Del. Ch. July 28, 2009).

Even after developing a full record with respect to the Director Defendants' actions during the $21 Buyout, each side would still argue that they should win based on the same evidence. For example, at trial, Plaintiff would have argued that the Director Defendants breached their fiduciary duties by, among other things:

- Failing to sue Fertitta to enforce the $21 Merger Agreement;
- Forwarding e-mails containing legal advice to the Special Committee to Fertitta, Scheinthal and Liem; and
- Terminating the $13.50 Buyout without requiring Fertitta to pay a reverse termination fee.

Although Plaintiff believes that this evidence and more demonstrates that the Director Defendants breached their duty of loyalty under the entire fairness standard, the Director Defendants would have argued that the same actions were reasonable and protected under the business judgment rule. In fact, the Director Defendants would have argued that ultimately Landry's shareholders suffered no harm from their actions, and their actions potentially saved Landry's from bankruptcy. Because the Delaware courts have never decided a case involving breaches of fiduciary duty related to a failed transaction such as this one, both sides faced significant risk at trial. In addition, due to the new legal theories raised in this case, it was a certainty that no matter who won at trial, the other side would have appealed.

2. Additional Issues That Could Have Impacted the Resolution of the 2008 Class Claims at Trial

In addition to the issues addressed above, the parties briefed and would have argued at trial (if they were not decided beforehand) other issues that likely would have impacted the Court's determination of whether specific parties were liable to the 2008 Class for their actions in connection with the $21 Buyout. These would have included: (a) whether the Director Defendants' reliance on their advisors protected them from liability; (b) whether Section 102(B)(7) of the D.G.C.L. protects the Director Defendants from personal liability; (c) whether the claims related to the $21 Buyout were derivative or direct; and (d) whether the Securities Litigation Uniform Standards Act ("SLUSA") preempted Plaintiff's breach of fiduciary duty claims.

3. The Range of Reasonableness of the Settlement in Light of the Best Possible Recovery and in Light of the Risks of Litigation

Given the obstacles and uncertainties in this Litigation, the 2008 Class Settlement is warranted because the benefits of $14,500,000 in hand from the 2008 Class Settlement outweighs the risks of continued litigation and the distinct possibility of the 2008 Class receiving nothing. *Frazer v. Worldwide Energy Corp.*, 1991 WL 74041, at *4 (Del. Ch. May 2, 1991) (settlement that guarantees substantial recovery is fair and reasonable when weighed against the "quite plausible risk that the class might recover far less or even nothing."). *See also In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1396, 1405 (E.D.N.Y. 1985) ("much of the value of a settlement lies in the ability to make funds available promptly"), *modified on other grounds*, 808 F.2d 179 (2d Cir. 1987).

D. PLAINTIFF HAS APPROVED THE 2009 AND 2008 SETTLEMENTS

Plaintiff's active participation in this Action and sponsorship for the 2009 and 2008 Settlements strongly supports the Court's finding that the Settlements are fair, reasonable, and adequate. A class plaintiff serves as a fiduciary to the class in its court-appointed role. Here, Plaintiff fulfilled its duties through active participation in the prosecution and resolution of this Action. In particular, Plaintiff was well informed regarding the progress of this Action, was thoroughly involved in strategic decision-making, and was an active participant in the settlement process and negotiations. Plaintiff has concluded that the Settlements represent fair, reasonable, and adequate result for the Classes. *See* Affidavit of R. Randall Roche in Support of Settlement and Requested Award of Attorneys' Fees.

E. THE REACTION OF THE CLASSES

The reaction of the Classes to the Settlements has been overwhelmingly positive. Although the deadline for objections has not yet passed, no objections have been filed to date. *See* Thomas Decl., ¶2. A positive reaction of the Class is a factor favoring its approval by a court. *Rome v. Archer*, 197 A.2d 49, 58 (Del. 1964) (approving settlement agreement that was ratified by a very large majority of the stockholders); *Chiulli v. Hardwicke Cos.*, 1985 WL 11532, at *1 (Del. Ch. Feb. 11, 1985) (in the absence of objection, approval of settlement "would be almost perfunctory").

F. THE SETTLEMENTS WERE REACHED THROUGH ARMS-LENGTH NEGOTIATIONS

As the Settlements are the result of informed and arms-length negotiations between Plaintiff and its counsel and Defendants and their counsel, it is presumptively fair.[11] Additionally, the 2008 Settlement also benefitted from the assistance of a nationally recognized mediator. The active involvement of an experienced, independent mediator adds support to the presumption of reasonableness. *In re Independent Energy Holdings PLC Sec. Litig.*, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) (settlement reached after assistance of neutral mediator supports reasonableness of settlement); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 329-32 (S.D.N.Y. 2005). Where, as here, [t]he process by which the parties reached the Proposed Settlement[] was arms-length and hard fought by skilled advocates, the Settlement is

[11] Moreover, after the announcement of the 2009 Settlement, an article in the New York Times noted that "the plaintiffs' lawyers here are doing a better job than the Landry's board. For that, they deserve substantial credit." Steven M. Davidoff, "Landry's: Still a Deal from Hell" dated 5/25/10. *See* Thomas Decl., Ex. E.

deserving of the Court's approval. *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998).

G. THE EXPERIENCE AND OPINION OF COUNSEL AND ITS CLIENT WEIGH IN FAVOR OF APPROVING THE SETTLEMENTS

The opinion of experienced counsel is weighed in determining a settlement's fairness. *See generally Rome*, 197 A.2d at 53. Here, Plaintiff's counsel have extensive experience in Delaware transactional and corporate governance litigation. *See* Thomas Decl., Ex. I and Ex. K. The Plaintiff and its counsel negotiated the Settlements; and they believe that they are fair and, indeed, highly favorable.

At the time these Settlements were reached, Plaintiff and its counsel had already conducted extensive fact and expert discovery, and fully analyzed the law governing its claims. Plaintiff was thus fully familiar with the relative strengths and weaknesses of its claims and the potential defenses. In requesting that the Court approve the 2009 and 2008 Class Settlements as fair and reasonable, Plaintiff and its counsel thus act on the basis of their extensive review of the documentary record and examination of the key participants in the Fertitta's attempts buyouts. *See Neponsit Inv. v. Abramson*, 405 A.2d 97 (Del. 1979) (approving settlement and noting that plaintiff's counsel concluded the purchase price was fair and that the deal was in the best interests of the company after considerable pre-trial discovery).

II. CLASS CERTIFICATION IS PROPER

Delaware courts liberally interpret Rule 23's requirements to favor class certification. *See Parker v. Univ. of Del.*, 75 A.2d 225, 227 (Del. 1950). This is especially so in shareholder litigation. As this Court explained in *Shapiro v. Nu-West*

Indus., Inc., 2000 WL 1478536 (Del. Ch. Sept. 29, 2000), "class certification . . . serves judicial efficiency since it allows a single court to determine claims involving one set of actions by defendants that have a uniform effect upon a class of identically situated shareholders." *Id.* at *4.

On June 23, 2010, this Court provisionally certified the 2008 Class to include all persons or entities who held shares of Landry's common stock from October 7, 2008 through October 17, 2008 and those who purchased Landry's common stock between October 17, 2008 and January 11, 2009 and certified Plaintiff as Class Representative.[12] In this Court's July 26, 2010 Scheduling Order, the 2008 Class definition was refined to include all persons or entities who held shares of Landry's common stock at any point between September 17, 2008 and January 11, 2009, inclusive. This definition is essentially the same as the one included in the Court's June 23 order, expanding the class period by less than a month and eliminating the distinction between holders and buyers. For the reasons set forth below, the 2008 Class, as defined in this Court's July 26 Scheduling Order, and the 2009 Class, should be certified.

Because Plaintiff meets the requirements of Chancery Court Rule 23(a) and 23(b), the Classes should be certified for settlement purposes.

A. THE ACTION SATISFIES CHANCERY COURT RULE 23(A)'S REQUIREMENTS

Chancery Court Rule 23(a) sets forth the threshold requirements that must be met for a class to be certified: (1) the class is so numerous that joinder of all members is

[12] The provisionally-certified 2008 Class excluded the Defendants and any person, firm, trust, corporation, or other entity related to or affiliated with any of the Defendants.

impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the class' interests. (Ch. Ct. R. 23(a).)

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." (Ch. Ct. R. 23(a)(1).) As of August 16, 2010, Landry's had over 16 million shares of common stock outstanding. *See* Thomas Decl., Ex. F, Landry's SEC Form 10-K/A, Annual Report filed Sept. 3, 2010. Excluding the approximately 65% of Landry's shares owned by Company insiders, there are still over 7 million shares of publicly-held Landry's common stock. As with any publicly-traded company, these shares are likely held by stockholders geographically dispersed throughout the United States and the world, rendering joinder of all class members impractical. *See In re Countrywide Corp. S'holders Litig.*, 2009 WL 846019, at *13 (Del. Ch. Mar. 31, 2009) ("The test of numerosity under Rule 23(a)(1) is whether joinder of all class members would be impractical, not impossible."). Accordingly, the Classes satisfy Rule 23(a)(1)'s "numerosity" requirement.

2. Commonality

Rule 23(a)(2) requires common questions of law or fact to exist among individuals before a class may be certified. Commonality exists "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated." *Leon N. Weiner & Assocs., Inc.*

v. Krapf, 584 A.2d 1220, 1225 (Del. 1991). Here, questions of law or fact common to all plaintiffs in the Classes include:

- Whether Fertitta breached his fiduciary duties of good faith and loyalty to Plaintiff and the Classes in connection with the renegotiation and termination of the proposed buyouts;

- Whether the Board and the Special Committee breached their fiduciary duties by facilitating Fertitta's breaches;

- Whether Fertitta unjustly enriched himself at the expense of the Classes.

These questions of law and fact are common to all Class members. If Defendants committed the breaches alleged, then they are liable to all Class members. Likewise, if Defendants did not commit the breaches alleged, then Defendants are liable to no Class members. Moreover, Delaware courts consistently find that breach of fiduciary duty allegations are sufficiently common to warrant class certification. *See, e.g., Nottingham Partners v. Dana*, 564 A.2d at 1089; *Zirn v. VLI Corp.*, 1991 WL 20378 (Del. Ch. Feb. 15, 1991). As such, this Action satisfies Rule 23(a)(2)'s "commonality" requirement.

3. Typicality

Rule 23(a)(3) requires a class representative's claims to be typical of – but not identical to – those of the class. Typicality exists where a class representative's legal and factual position is "not . . . markedly different from that of the members of the class[.]" *Singer v. Magnavox Co.*, 1978 WL 4651, at *2 (Del. Ch. Dec. 14, 1978). Or as this Court explained in *In re Talley Industries, Inc. Shareholder Litigation*, 1998 WL 191939, typicality exists where "all Class members face the same injury flowing from the defendants' conduct[.]" *Id.* at *9 (Del. Ch. Apr. 13, 1998). Here, Plaintiff meets this

requirement since Plaintiff is affected in the same way as the Classes by Defendants' misconduct. Thus, Rule 23(a)(3)'s typicality requirement is met.

4. Adequacy of Class Representative

Rule 23(a)(4) requires a lead plaintiff to be an adequate class representative. In *Oliver v. Boston University*, 2002 WL 385553, this Court explained that "a representative plaintiff must not hold interests antagonistic to the class, retain competent and experienced counsel to act on behalf of the class and, finally, possess a basic familiarity with the facts and issues involved in the lawsuit." *Id.* at *7 (Del. Ch. Feb. 28, 2002). Plaintiff meets these requirements.

First, Plaintiff's interests are identical to those of the Classes. Plaintiff has owned Landry's common stock throughout the Class Period. And there is no suggestion of any conflict between Plaintiff and any member of the Classes. Second, Plaintiff has retained competent counsel that is highly experienced in shareholder litigation. Plaintiff's counsel have successfully prosecuted shareholder and corporate governance class actions in this Court and others.

Because Plaintiff's interests are identical to the interests of the Classes and because Plaintiff is represented by competent and experienced counsel, Plaintiff is an adequate representative for the Classes under Rule 23(a)(4).

B. THIS ACTION SATISFIES CHANCERY COURT RULES 23(B)(1) AND 23(B)(2)'S REQUIREMENTS

In addition to satisfying Rule 23(a), the action must also satisfy at least one of Rule 23(b)'s three subsections before this Court will certify a class. This Action meets the requirements of both Rules 23(b)(1) and 23(b)(2).

Rule 23(b)(1) is satisfied where, as here, the prosecution of separate actions creates a risk of inconsistent or varying adjudications, or where an individual adjudication would be dispositive of the class' interests. (Ch. Ct. R. 23(b)(1)); *In re Wm. Wrigley Jr. Co. S'holders Litig.*, 2009 WL 154380, at *3 (Del. Ch. Jan. 22, 2009) ("Subsection (b)(1) applies to class actions that are necessary to protect the party opposing the class or members of the class from inconsistent adjudications in separate actions.").

Class certification is also proper under Rule 23(b)(2). Rule 23(b)(2) permits certification of class actions seeking class-wide declaratory or injunctive relief. Here, the Complaint sought declaratory and injunctive relief by: (1) ordering consummation of the $21 Buyout; (2) ordering Fertitta to pay the $24 Million Reverse Termination Fee; (3) declaring this action properly maintainable as a class action; (4) enjoining consummation of the $14.75 Buyout unless curative disclosures were made; (5) placing Landry's shares that Fertitta purchased on the open market after June 2008 in a constructive trust to be voted in favor of the transaction that provides the highest offer to maximize Landry's value for public shareholders; and (6) appointing a trustee to conduct the sale of Landry's. Thus, certification is proper under Rule 23(b)(2).

III. THE PLAN OF ALLOCATION IS FAIR AND SHOULD BE APPROVED

Plaintiff has submitted to the Court and presented to the 2008 Class a proposed Plan of Allocation to allocate to those Class members the Net Settlement Fund[13] created as part of the 2008 Settlement. Plaintiff respectfully submits that the Plan of Allocation is "fair, reasonable, and adequate" and should be approved. *Officers for Justice v. Civil Serv. Commc'ns*, 688 F.2d 615, 625 (9th Cir. 1982) (citations omitted).

It is well settled that a plan of allocation of settlement proceeds in a class action needs to be "fair, reasonable and adequate" and "does not need to compensate Class members equally to be acceptable." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009); *See also In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. Jun. 18, 1994) (*citing Class Plaintiffs v City of Seattle*, 955 F.2d 1268, 1284-85 (9th Cir 1992)). "A reasonable plan may consider the relative values of competing claims." *Schultz*, 965 A.2d at 667.

In making this determination, courts give great weight in determining the fairness, reasonableness, and adequacy of a proposed plan of allocation to the opinion of class counsel. *See In re NASDAQ Market-Makers Antitrust Litig.*, 2000 WL 37992, at *2 (S.D.N.Y. Jan. 18, 2000) ("An allocation formula need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' Class Counsel"); *See also CME Group, Inc. v. Chicago Bd. Options Exch., Inc.,* 2009 WL 1547510, at *10

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[13] As provided in the Notice, the "Net Settlement Fund" means the $14,500,000 cash fund, plus interest earned thereon, less taxes, fees, costs and expenses incurred in connection with notice and administration, and less attorneys' fees and expenses awarded in connection with the 2008 Settlement. *See* Thomas Decl., Ex. G, Notice of Proposed Settlements of Shareholder Litigation, Settlement Fairness Hearing, and Applications for Attorneys' Fees and Reimbursement of Litigation Expenses, at 7.

(Del. Ch. June 3, 2009) ("Class counsel, in the Court's judgment, came to a fair and reasonable balancing of the various interests of all class members.").

As explained in the Notice, the Plan of Allocation is designed to equitably distribute the Net Settlement Fund among 2008 Class members with cognizable claims of harm arising from the alleged breaches of fiduciary duty.

Plaintiff's counsel designed the Plan of Allocation based on their belief that 2008 Class members who sold their Landry's shares on or after September 17, 2008 but before October 7, 2008 did so based on limited public notice of the alleged breaches of fiduciary duty, and such sales are accordingly less likely to have been made in response to the breaches. Thus, these transactions will receive a credit for 25% of the difference between the expected $21 Buyout price and the actual sale price for purposes of allocating the Net Settlement Fund. In Plaintiff's counsel's judgment, those Class members who held as of October 7, 2008 and then sold for a price less than $21 per share can most clearly tie their damages to alleged breaches of fiduciary duty and, therefore, should receive a non-discounted allocation from the Net Settlement Fund based on the difference between the expected $21 Buyout price and the actual sale price. *See* Notice, at 9.

Plaintiff's counsel further believes that 2008 Class members who purchased Landry's shares after the October 7, 2008 press release but before the October 18 renegotiation of the $21 Buyout and sold for a price less than $21 per share are eligible to participate in the 2008 Settlement because they were entitled to expect Defendants to adhere to their fiduciary duties (notwithstanding the October 7 press release). However, they were on notice that the $21 Buyout was in jeopardy. Thus, under the Plan of

Allocation, they will receive a credit for 50% of the difference between the expected $21 Buyout price and the actual sale price for purposes of allocating the Net Settlement Fund. *Id*.

Finally, Plaintiff's counsel believe that 2008 Class members who purchased after the October 18 announcement of the renegotiation of the $21 Buyout to $13.50 and who then sold for less than $13.50 per share can tie their economic harm to Defendants' breaches of fiduciary duty, although they still only had a cognizable expectation of receiving $13.50 per share. Accordingly, for such transactions, the Plan of Allocation provides full credit for the difference between $13.50 and the price at which those Class members subsequently sold their shares. *Id*.

In sum, the Plan of Allocation provides for a payment of a "Recognized Loss Amount" for each Landry's share that is based upon when and under what circumstances members of the 2008 Class bought and sold their Landry's shares.[14] As is typical of such plans of allocation in other cases in this Court, if the sum total of Recognized Claims (for Authorized Claimants entitled to distributions) exceeds the Net Settlement Fund, then each Authorized Claimant shall receive a *pro rata* share of the Net Settlement Fund.[15]

In short, Plaintiff's counsel's judgments regarding the effects of various public statements and alleged breaches of fiduciary duty on 2008 Class members (and other decisions to buy, hold or sell their shares) are reasonable. The judgments made to

[14] *See* the Plan of Allocation included in the Notice, which is Exhibit G, in the Thomas Decl. annexed hereto.

[15] For a complete definition of "Recognized Claims" and "Authorized Claimants," see the Notice attached as Exhibit G to the Thomas Decl.

establish the Plan of Allocation are also reasonable and the Plan of Allocation should be approved, particularly since to date no Class Member has objected to it. *In the Matter of Philadelphia Stock Exchange, Inc.,* 945 A.2d 1123 (Del. 2008).

IV. THE FEE AWARDS PROVIDED FOR IN THE SETTLEMENTS ARE REASONABLE AND SHOULD BE APPROVED IN FULL

As set forth in detail above, Plaintiff's Counsel obtained for the Classes in the common funds totaling $79.5 million in the Settlements, comprised of $14.5 million paid by or on behalf of Defendants under the 2008 Settlement, and an additional $65 million in increased consideration to be paid to Landry's shareholders from consummation of the $24.50 Buyout under the 2009 Settlement. Plaintiff's Counsel also obtained other significant non-monetary corporate benefits, such as a new (and improved) go-shop process, waiver of pre-existing standstill agreements, elimination of the termination fee to be paid to Fertitta, restrictions on how Fertitta could vote the shares he acquired through open-market purchases or through the exercise of options, additional disclosures, and other benefits.

For prosecuting this action on a fully contingent basis and obtaining these substantial monetary and non-monetary benefits for the Classes, Plaintiff's counsel respectfully requests that they be awarded attorneys' fees in the amount of $8 million in connection with the 2009 Settlement, plus an additional $3,625,000 in attorneys' fees (constituting 25% of the $14.5 million Settlement Fund) and $599,503.71 in litigation

expenses in connection with the 2008 Settlement.[16] Plaintiff's counsel respectfully submits that their requests are fair and reasonable under the precedents of this Court and in light of the substantial benefits for the Classes flowing from the Settlements.

A. LEGAL STANDARD GOVERNING ATTORNEYS' FEE AND COST APPLICATIONS

Plaintiff's counsel are entitled to their requested attorneys' fees and litigation expenses under the common fund and corporate benefit doctrines. Under the common fund doctrine, a litigant who has conferred a monetary benefit on a class may properly recover fees and expenses from the fund that the litigant has created. *See In re First Interstate Bancorp Consol. S'holder Litig.,* 756 A.2d 353, 357 (Del. Ch. 1999) (quoting *In re Dunkin' Donuts S'holders Litig.,* 1990 WL 189120, at *3 (Del. Ch. Nov. 27, 1990)) ("Under the common fund doctrine, a litigant who confers a common monetary benefit upon an ascertainable class is entitled to an allowance for fees and expenses to be paid from the fund or property which his efforts have created"). The common fund doctrine is based "on the equitable principle that those who have profited from litigation should share its costs." *Goodrich v. E.F. Hutton Group, Inc.,* 681 A.2d 1039, 1044 (Del. 1996).

Under the corporate benefit doctrine, a litigant who confers a corporate benefit upon a class "is entitled to an award of counsel fees and expenses for its efforts in creating the benefit." *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *see also In re First Interstate Bancorp,* 756 A. 2d at 357 (quoting *In re Dunkin' Donuts,* 1990 WL 189120, at *3 ("[T]he corporate benefit doctrine comes into

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[16] *See* the Stipulation of Partial Settlement, filed June 22, 2010 (Tr. No. 31767556); Addendum to Stipulation of Partial Settlement, filed June 23, 2010 (Tr. No. 32306573); Stipulation of Settlement of Remaining Claims, filed July 23, 2010 (Tr. No. 32306573).

play when . . . some other valuable benefit is realized by the corporate enterprise or the stockholders as a group")).

Under both the common fund and the corporate benefit doctrines, the amount of the fee and expense award is committed to the sound discretion of the Court. *In re Abercrombie & Fitch Co. S'holders Deriv. Litig.,* 886 A.2d 1271, 1273 (Del. 2005); *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1165-66 (Del. 1989). In exercising its discretion, this Court should consider: (1) the benefits achieved in the action; (2) the efforts of counsel and the time spent in connection with the case; (3) the contingent nature of the fee; (4) the difficulty of the litigation; and (5) the standing and ability of counsel. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980); *In re Plains Resources,* 2005 WL 332811, at *3 (Del. Ch. Feb. 4, 2005). These factors fully support the requested attorneys' fees and expenses.

B. THE LITIGATION CONFERRED SUBSTANTIAL BENEFITS ON THE CLASSES

The benefit achieved through litigation is the factor accorded the greatest weight in determining an appropriate fee award. *See Seinfeld v. Coker*, 847 A.2d 330, 336 (Del. Ch. 2000) ("*Sugarland*'s first factor is indeed its most important – the results accomplished for the benefit of the shareholders"). Here, the most obvious and easily-measured benefits to the Classes are the substantial monetary benefits obtained by Plaintiff's counsel. Plaintiff's counsel obtained two common funds consisting of a payment of $14.5 million (from the 2008 Settlement) and $65 million of increased consideration to be paid to shareholders (as a result of the 2009 Settlement). A fee award of 14.6% of the total ($79.5 million) of these common funds ($11,625,000 in fees) is well

within the range of fees awarded by this Court on a percentage of the benefit basis. *See, e.g.*, *In re Intek Global Corp. S'holders Litig.*, Cons. C.A. No. 17207 (Del. Ch. Apr. 24, 2000) (33% of quantifiable portion of benefit) (cited in *Seinfeld*, 847 A.2d at 337 n.31). *See also Marie Raymond Revocable Trust v. MAT Five, LLC*, 980 A.2d 388, 410 n. 71 (Del Ch. 2008) (citing multiple cases where the Court has approved fee requests of 30% or more of the benefits of a settlement, including *In Re Home Shopping Network, Inc. S'holders Litig.*, Cons. C.A. No. 12868 (Del. Ch. Jan. 24, 1995); *In Re Corporate Software Inc. S'holders Litig.*, C.A. No. 13209 (Del. Ch. Nov. 15, 1994); *In Re USACafes, L.P. Litig.*, Cons. C.A. No. 11146, (Del. Ch. June 22, 1994); *Wiegand v. Berry Petroleum Corp.*, C.A. No. 9316 (Del. Ch. Nov. 25, 1991)).

Additionally, the total dollar amount of the attorneys' fees requested ($11,650,000) is within the range of fees awarded by courts under similar circumstances. For example, in *In re Daimler Chrysler AG Securities Litigation,* C.A. No. 1:00-cv-00993-KAJ (D. Del. Feb. 4, 2004), Judge Kent Jordan awarded attorneys' fees of $66.8 million (or 22.5% of the $300 million settlement), in a case arising out of a misleading so-called "merger-of-equals" between Daimler-Benz AG and Chrysler Corp. *See also In re Comverse Sec. Litig.*, 2010 WL 2653354, at *6 (E.D.N.Y. June 24, 2010) (awarding $56.25 million or 25% of a $225 million settlement, observing, "an improperly calibrated fee would provide a disincentive to future counsel to take risks and pursue large class settlements that the SEC cannot"); *In re Telecorp PCS, Inc. S'holders Litig.,* C.A. No. 19260-VCS, Order and Final Judgment (Del. Ch. Aug. 20, 2003) ($14.2 million attorneys' fee award on settlement reported at $47.5 million).

While the requested fee is warranted based solely on the $79.5 million monetary benefits conferred through the Settlement Fund and increased merger consideration, it is further supported by the numerous and significant non-monetary benefits secured for the Classes. The non-monetary benefits Plaintiff's counsel achieved on behalf of the Classes include:

- a new go-shop process, in which the Special Committee sent letters (reviewed in advance by Plaintiff's counsel) to all prior participants in the sales process, explaining that all offers will be considered, whether or not Fertitta is asked to remain with the Company; and the Special Committee made this new process public (through an 8-K filing) and agreed to keep it open for 45 days with an option for an additional 15 days or more for due diligence if needed;

- waiver of all standstill agreements executed by prior potential bidders;

- rescission of all termination fee provisions executed by third parties; instead, Fertitta would only be reimbursed for his expenses, and he would not receive a "last look" opportunity to match competing offers (and if the Special Committee provided Fertitta with an opportunity to top superior proposals, other bidders would receive the same opportunity);

- Landry's would reimburse up to $500,000 in actual out-of-pocket due diligence costs for each of up to the two highest bidders bidding over $24 per share (as long as the Special Committee concluded such bidder was reasonably capable of closing);

- Fertitta agreed that the 3,162,674 shares he purchased on the open-market after June 16, 2008, plus up to the next 500,000 shares required upon exercise of outstanding options, would be voted in proportion to how the minority actually votes on any proposed transaction; and

- additional proxy disclosures.

These non-monetary benefits, in and of themselves, warrant a fee award[17] and further support the fairness of the requested fee.

C. THE REQUESTED FEE IS REASONABLE CONSIDERING THE TIME AND EFFORTS OF PLAINTIFF'S COUNSEL

While "the hourly rate represented by a fee award is a secondary consideration, the first issue being the size of the benefit created," *In re AXA Fin., Inc.*, 2002 WL 1283674, at *7 (Del. Ch. May 22, 2002), Delaware Courts look to attorney lodestar as a "backstop check" when assessing reasonableness. *Abercrombie & Fitch*, 886 A.2d at 1274. Here, the requested fee is entirely reasonable in light of the hours Plaintiff's counsel devoted to the matter and their lodestar amount.

At their normal hourly billing rates, the time expended by Plaintiff's counsel equates to a combined lodestar of $5,061,799.50.[18] The fee requested is approximately 2.3 times that lodestar of all Plaintiff's counsel, representing an average hourly rate of approximately $960. These amounts are comparable to, or below, those in other cases and are reasonable, especially given the substantial and multiple benefits, the complexity of the issues presented, and the time constraints to which this case was subject. *Compare Franklin Balance Sheet Inv. Fund v. Crowley*, 2007 WL 2495018, at *14 (Del. Ch. Aug. 30, 2007) (fee represented an hourly rate of $4,023 per hour); *In re Fox Entm't Group,*

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[17] Courts have awarded attorneys' fees for non-monetary benefits, such as implementation of a majority-of-the-minority provision and other non-monetary benefits. *See e.g., In Re Yahoo! S'holders Litig.,* C.A. No. 3561-CC (Del. Ch. Mar. 6, 2009) (awarding fees of $8.4 million for creation of: "a substantial benefit to Yahoo's shareholders because the key terms of the settlement made it less expensive to sell Yahoo, making the company a more attractive target to potential suitors").

[18] The lodestar and expense details are provided in Exhibits H through J to the Thomas Declaration. Plaintiff's counsel devoted over 12,000 hours to prosecuting this case.

Inc. S'holders Litig., Cons. C.A. No. 1033-N, Tr. at 70 (Del. Ch. Sept. 19, 2005) (fee represented hourly rate of $3,000 per hour); *In re NCS Healthcare S'holders Litig.*, 2003 WL 21384633, at *3 (Del. Ch. May 28, 2003) (fee represented an hourly rate of approximately $3,030 per hour); *Dragon v. Perelman*, C.A. No. 15101, Tr. at 48-51 (Del. Ch. Aug. 29, 1997) (fee represented an hourly rate of approximately $3,500); *In re Digex, Inc. S'holder Litig.*, C.A. No. 18336, Tr. at 141-47 (Del. Ch. Apr. 6, 2001) (lodestar multiplier of 9).

D. THE CONTINGENT NATURE OF COUNSEL'S WORK, THE COMPLEXITY OF THIS CASE, AND COUNSEL'S EXPERIENCE ALL SUPPORT AWARDING THE REQUESTED FEE

As discussed above, the novelty and complexity of the issues presented by the facts at bar created a meaningful risk that Plaintiff would not prevail, and that Plaintiff's counsel – who accepted this case on a fully contingent fee basis – would not recover their expenses or the value of their time. Delaware Courts have recognized that where, as here, counsel's compensation is contingent on recovery, a premium over counsel's hourly rate is appropriate. *See Seinfeld,* 847 A.2d at 333-334 ("If the fee is large enough to cover both their lost opportunity costs and the risks associated with bringing the suit, as well as provide a premium, it should induce monitoring behavior" which should produce two incentives – meritorious lawsuits and efficient litigation); *Ryan v. Gifford*, 2009 WL 18143, at *13 (Del. Ch. Jan. 2, 2009) ("This Court has recognized that an attorney may be entitled to a much larger fee when the compensation is contingent than when it is fixed on an hourly or contractual basis"); *Franklin,* 2007 WL 2495018, at *12 ("Fee awards should encourage future meritorious lawsuits by compensating the plaintiffs' attorneys

for their lost opportunity costs (typically their hourly rate), the risks associated with the litigation, and a premium"); *In re Plains Resources Inc.*, 2005 WL 332811, at *6 ("[T]he plaintiffs' counsel were all retained on a contingent fee basis, and stood to gain nothing unless the litigation was successful. It is consistent with the public policy of Delaware to reward this risk-taking in the interests of shareholders").

Additionally, the fact that $8 million of the fee is being paid directly by Defendants further supports the reasonableness of the fee request. As the Court reasoned in *Fox Entertainment*:

> I can do the math and division and come up with an hourly fee and say is $3,000 an hour. A pretty sizable fee? Yes, it is. But it's not out of the range of other fees that we have awarded in comparable cases where there has been hard fought litigation and where there has been a significant benefit achieved for the class.
>
> Does it take into account the fact that there were lawsuits filed where there were no fees awarded? Probably. Is that fair? Probably again.
>
> It is not an easy process, but again I think my colleague has it right that if, at arm's length, other people, strong adversaries of equal caliber and capability and tenaciousness, and those are tenacious folks over there too, have bargained and decided that this is the value that is reasonable, and a company has agreed to pay that, then I think there is going to have to be other circumstances that cause me to backtrack from that conclusion.

Fox Entm't, Tr. at 70.

Finally, the standing of Plaintiff's counsel is well known to the Court, as is the standing of Defendants' counsel. It was only through the perseverance and skill of Plaintiff's counsel that the substantial benefits of the Settlements were attained for the Classes.

E. THE REQUESTED EXPENSES ARE REASONABLE

Plaintiff's counsel also request reimbursement for the expenses necessarily incurred in the prosecution of this Action totaling $599,503.71. *See* Thomas Decl., Ex. H through Ex. J. The expenses include considerable costs for experts and consultants retained by Plaintiff's counsel and mediator's fees for the two mediations in this Litigation. Other expenses were incurred for travelling and related expenses for depositions and hearings in California, Texas, Georgia, New York, and Delaware (including stenographers and videographers), legal research, and photocopying services. Plaintiff's counsel respectfully submit that the expenses were necessary, appropriate, fair and reasonable and warrant reimbursement.

Given the excellent result obtained, the complexity of the case, and the risks undertaken by Plaintiff's counsel, it is respectfully submitted that Plaintiff's request for an attorneys' fee award in the amount of $11,625,000 and reimbursement of $599,503.71 in expenses is reasonable and should be approved.

CONCLUSION

Plaintiff respectfully submits that its motion for final approval of the proposed Settlements, the Plan of Allocation, certification of the Settlement Classes, and an award of attorneys' fees and reimbursement of expenses be granted in its entirety.

Dated: September 17, 2010

<u>/s/ Stuart M. Grant</u>
Stuart M. Grant (Del. Bar ID No. 2526)
John C. Kairis (Del. Bar ID No. 2752)
Mary S. Thomas (Del. Bar ID No. 5072)
Christian Keeney (Del. Bar ID No. 5197)
GRANT & EISENHOFER P.A.
1201 N. Market St.
Wilmington, DE 19801
(302) 622-7000
(302) 622-7100 (facsimile)

Counsel for Plaintiff

OF COUNSEL:
Mark Lebovitch
Amy Miller
Jeroen van Kwawegen
BERNSTEIN LITOWITZ BERGER
& GROSSMANN LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 554-1400

Counsel for Plaintiff