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.,	)	
Plaintiffs,	)	
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.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS AND MOTION TO STAY DISCOVERY

OF COUNSEL:

David D. Sterling
Danny David
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229-1234

Thomas A. Beck (No. 2086)
Daniel A. Dreisbach (No. 2583)
Meredith M. Stewart (No. 4960)
Scott W. Perkins (No. 5049)
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. Market Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Defendants

Dated: April 2, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATUTES

PRELIMINARY STATEMENT

Plaintiff Louisiana Municipal Police Employees' Retirement System ("LMPERS" or "Plaintiff") seeks, in essence, specific performance of a terminated arms-length transaction (the "Merger") between Defendants Landry's Restaurants, Inc. ("Landry's" or the "Company") and Tillman J. Fertitta ("Fertitta"), a significant stockholder as well as the Chairman, President and Chief Executive Officer of the Company, and his affiliated entities. Additionally or in the alternative, Plaintiff seeks certain damages allegedly incurred in connection with the terminated transaction.

The Verified Complaint (the "Complaint" or "Compl.") includes both putative class action claims against Fertitta, the entities he allegedly controls and the Landry's board of directors, and a derivative claim against the directors. Specifically, Count I of the Complaint asserts that Fertitta breached his fiduciary duties of care, good faith and loyalty by allegedly putting his personal interests ahead of the interests of the Company and its stockholders in acquiring shares of the Company's stock on the open market and later using Hurricane Ike and the pending credit crisis as pretexts to force the Company to terminate his pending acquisition proposal. Count II of the Complaint alleges that two entities allegedly controlled by Fertitta aided and abetted his breaches of fiduciary duties. Count III of the Complaint alleges that the Landry's board members breached their fiduciary duties by allowing Fertitta to use the pretexts of the hurricane and the credit crisis to force the renegotiation and ultimate termination of the proposed Merger, and by failing to stop Fertitta from acquiring shares on the open market despite the fact that his acquisitions presented a known threat to the Company and the other

stockholders. Count IV purports to assert a derivative claim to force the Company to seek payment of the termination fee pursuant to the terms of the amended Merger agreement.

All four of these Counts fail to state a claim upon which relief can be granted, and the Complaint should therefore be dismissed. In short, this case involves an arms-length transaction that was carefully considered by a special committee of directors whose independence and process in negotiating the original agreement, the amended agreement and in ultimately deciding to terminate the agreement, remains unchallenged. In his capacity as a fiduciary, Fertitta played no role in the negotiation of any of the foregoing. In his capacity as a stockholder, Fertitta's actions were entirely proper.

In light of Plaintiff's complete failure to plead any facts from which the Court could reasonably infer any breach of fiduciary duty by Fertitta or the Board, and in light of the fact that the Complaint's conclusory allegations set forth no legal basis from which Plaintiff could obtain any of the requested relief, Defendants respectfully request that the Court dismiss the Complaint in its entirety and with prejudice pursuant to Court of Chancery Rule 12(b)(6).

STATEMENT OF FACTS AND NATURE AND STAGE OF PROCEEDINGS

A. Parties

Landry's is a Delaware corporation engaged primarily in the restaurant, hospitality and entertainment business. Compl. ¶ 24; Revised Proxy at 1.[1] Landry's operates 180 full-service restaurants and several limited-service restaurants in 28 states. Compl. ¶ 24. Landry's also operates hospitality and entertainment businesses including the Golden Nugget Casino & Hotel in downtown Las Vegas, Nevada. *Id.* Plaintiff is an alleged stockholder of Landry's. *Id.* at ¶ 14.

Fertitta is Landry's Chairman, President and Chief Executive Officer, as well as a substantial equity owner[2] of the Company. Compl. ¶ 15. The Company's affairs are managed

[1] The Revised Proxy (attached to the Transmittal Affidavit of Scott W. Perkins as Exhibit A) is integral to Plaintiff's claims and incorporated by reference into the Complaint. Accordingly, the Court should consider its full and complete contents. *See, e.g.*, *American Int'l Group, Inc. v. Greenberg*, 2009 Del. Ch. LEXIS 15, at *n.4 (Del. Ch. Feb. 10, 2009) (finding that two of AIG's press releases, cited in the complaint, were expressly incorporated by reference therein and that the Company's 8-K was also incorporated by reference). Moreover, it is clear that Plaintiff utilized the Revised Proxy as a source for a number of the facts pleaded in the Complaint. For example, the Complaint lists the compensation paid to each member of the Special Committee (¶¶ 17-19) and Defendants are unaware of any source, other than the Revised Proxy, which discusses the compensation received by the members of the Special Committee. (Revised Proxy at 99); *see also* Compl. ¶¶ 34 (indicating that Plaintiff's knowledge concerning Fertitta's contacts with the Lending Banks came from the Revised Proxy), 36 (describing the contents of a letter from Fertitta, as described in the Revised Proxy), 53 (quoting the Revised Proxy), 98 (indicating that the claims for this Complaint came from Plaintiff's exploration of the Company's proxy statements and press releases). The Revised Proxy can therefore be used, at a minimum, to assist the Court in developing a factual narrative for purposes of the Motion to Dismiss. *RGC Int'l Investors, LDC v. Greka Energy Corp.*, 2000 Del. Ch. LEXIS 157, at *33 n.36 (Del. Ch. Nov. 6, 2000) ("I have also used the Proxy Statement as an aid to developing a coherent factual narrative, *as the complaint's drafters themselves obviously also did.*") (emphasis added); *Orman v. Cullman*, 794 A.2d 5, 16 (Del. Ch. 2002) (a document is integral to the claim "as it is the source for the merger-related facts as pled in the complaint"); *but see In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 724 n.1 (Del. Ch. 1999) (court would refer to the proxy statement, which was attached to the Complaint, not as proof of matters reported therein but only to determine what was, in fact, disclosed and would refer to the merger agreement only "to establish formal uncontested matters") (quotation omitted).

[2] As of June 16, 2008, Fertitta owned 5,731,481 shares of Landry's common stock, including 775,000 shares of restricted stock that had not yet vested. Revised Proxy at 1; Compl. ¶ 1. As of December 2008, Fertitta had acquired approximately 3,027,374 additional shares of Landry's common stock. *Id.*

by a six-member board of directors (the "Board"). Compl. ¶¶ 15-20. Its members include: Fertitta; Steven L. Scheinthal, Landry's Executive Vice President ("Scheinthal"); Kenneth Brimmer ("Brimmer"); Michael S. Chadwick ("Chadwick"); Michael Richmond ("Richmond"); and Joe Max Taylor ("Taylor"). *Id.* Only two of the six members of the Board are officers of the Company; the remaining four members are outside, independent directors.[3] Three of these outside, independent directors (Brimmer, Chadwick and Richmond) were selected to serve on the Special Committee formed to respond to Fertitta's first offer to purchase the Company and to evaluate the Company's strategic options. Fertitta Holdings, Inc. ("FHI") is a Delaware corporation that is wholly owned by Fertitta. Compl. ¶ 23. Fertitta Acquisition Co. ("FAC") is a Delaware corporation and a wholly owned subsidiary of FHI. *Id.* Both FHI and FAC were formed for the purpose of engaging in a potential transaction with Landry's. *Id.*

B. Background of the Transaction

Since the beginning of 2008, the restaurant and gaming industries in the United States have faced a number of challenges, including increased fuel and energy prices, increased competition, increases in the prices of key commodities and certain food supplies, pending minimum wage increases and reduced consumer spending resulting from a severe economic downturn. Revised Proxy at 19. The Company's financial performance was adversely affected by these developments. *Id.* The Board began to discuss, in early January 2008, whether the increased costs of operating as a public company rendered it necessary to explore the possibility of a "going-private" transaction. *Id.*

[3] *See Grobow v. Perot*, 539 A.2d 180, 184 (Del. 1988) (if the Complaint does not otherwise state, the Court will presume that directors who are not members of management are outside, independent directors.).

Additionally, the Company faced the looming requirement that it find a way to refinance approximately $400 million of indebtedness that would potentially come due in February 2009. Compl. ¶¶ 48, 66, 67. Specifically, in August 2007, in settling a dispute with certain holders of its $400 million 7.5% senior notes and U.S. Bank, National Association, the trustee under the indenture covering those notes, Landry's exchanged the notes in dispute for 9.5% senior exchange notes, with an option for the note holders to require the Company to redeem the notes at 1% above par from February 28, 2009 to December 15, 2011. Revised Proxy at 19. Beginning on February 28, 2009, therefore, holders of the notes would have the option to require Landry's to redeem the notes (potentially all $400 million worth) at 1% above par. *Id.*

On January 27, 2008, the Company issued a press release stating that the Board had received a letter from Fertitta proposing to acquire all of the Company's outstanding stock for $23.50 per share in cash, which proposed price represented a premium of 41% over the closing price of the Company's common stock on January 25, 2008. Compl. ¶ 25. The total value for the proposed transaction was approximately $1.3 billion. *Id.* At the time of the January 27, 2008 offer, Fertitta owned approximately 39% of the Company's equity. *Id.*

In response to the offer from Fertitta, the Landry's Board formed a Special Committee of three independent directors (the "Special Committee") to assess the offer and consider any alternative proposals. Chadwick (who chaired the Special Committee), Brimmer and Richmond comprised the Special Committee. The Special Committee retained Cowen & Company LLC ("Cowen") as its financial advisor, and King & Spalding, LLP ("King & Spalding") as its independent legal counsel. Compl. ¶¶ 26, 39.

On March 28, 2008, Cowen began its financial due diligence investigation of the Company. Revised Proxy at 25. On April 4, 2008, Fertitta submitted to the Special Committee a revised proposal letter in which he reduced his per share offer price from $23.50 to $21.00 per share. *Id.* Fertitta's April 4 letter to the Special Committee indicated that the reduced per share offer price was a result of: (i) worsening conditions in the credit market, which made it more costly to obtain the debt financing required to consummate the proposed transaction; (ii) a continuing downward trend in the economy generally; (iii) a risk of continued deterioration in the credit markets; and (iv) a decline of the Company's results of operations and stock price. *Id.* The Company issued a press release the same day describing Fertitta's revised proposal. *Id.*

C. The Original Merger Agreement.

Following the Special Committee's unanimous recommendation, which was arrived at after consideration of Fertitta's offer and review of the Fairness Opinion issued by Cowen, on June 16, 2008, the Landry's Board entered into an agreement (the "Merger Agreement") to sell the Company to FAC for $21 per share. Compl. ¶ 27; Revised Proxy at 37. This price represented a 37% premium over the Landry's share price on the last trading day before the disclosure of Fertitta's revised offer to buy the Company. Compl. ¶ 27. The total consideration to be paid to Landry's public shareholders was approximately $220 million. *Id.* Importantly, the Merger Agreement would also allow the Company to avoid having to find a way to refinance the approximately $400 million of debt coming due in early 2009, during a time when the economy was experiencing a significant downturn and access to credit was becoming increasingly restricted. Revised Proxy at 58.

The Merger Agreement, as filed with the United States Securities and Exchange Commission (the "SEC"), contained a two-way termination fee, that provided the Company would be required to pay FAC $3 million if Landry's terminated the transaction during a 45-day "Go-Shop" period and $24 million upon termination after the end of the Go-Shop Period; and that FAC would be required to pay the Company a $24 million reverse termination fee (the "Reverse Termination Fee") if it failed to close the deal. Compl. ¶ 28. Fertitta personally guaranteed the payment of the Reverse Termination Fee. *Id.* The Merger Agreement also contained a "Material Adverse Effect" ("MAE") clause, which excused the parties from performance (and Fertitta from the obligation to pay the Reverse Termination Fee) if, after December 31, 2007, an event constituting a MAE occurred. The MAE clause contained standard exceptions for general market conditions, natural disasters or "acts of God." Compl. ¶ 29. The Debt Commitment Letter received from the banks that were financing the transaction (the "Lending Banks") contained a similar MAE clause. *Id.*

D. Events Following Entry Into the Merger Agreement

The Merger Agreement also provided for a 45 day go-shop period, which ended on July 31, 2008. Revised Proxy at 37. During the go-shop period, Cowen contacted on behalf of the Special Committee a total of 47 parties (38 financial sponsors and 9 potential strategic acquirers). *Id.* Of the 9 potential acquirers, six parties executed a confidentiality agreement with the Company in order to obtain a confidential information memorandum prepared by the Company. *Id.* Prior to the end of the go-shop period, all six parties that received the confidential information memorandum from the Company withdrew their interest in the Company and terminated discussions with the Special Committee. *Id.* at 38.

On September 13, 2008, Hurricane Ike struck Texas, causing substantial damage to, and the temporary closure of, several Landry's properties. Compl. ¶ 32. Within days, the Company issued a press release announcing its interim financial results and discussing the impact of Hurricane Ike. *Id.* The press release described the extent of the damage, and disclosed that all Houston and Kemah area restaurants remained closed, including the Kemah Boardwalk. *Id.* The Company estimated that the majority of its Galveston restaurants would re-open once power and water were restored to Galveston, and further stated that some of the restaurants at the Kemah Boardwalk "may reopen within the next 45 to 60 days, with additional restaurants and some amusement rides opening months thereafter." *Id.* In the press release, Rick Liem (the Executive Vice President and CFO of Landry's) stated that the financial effects of the hurricane had not yet been determined but that Landry's remained confident that the majority of the Company's losses would be covered by insurance. *Id.* Allegedly as a result of the press release, the Company's stock price fell that day, but recovered a few days later and soon returned to levels above the pre-announcement price. Compl. ¶ 33.

On September 18, 2008, Fertitta sent a letter to the Special Committee. As described in the Revised Proxy, the letter advised that, due to the property damage and worsening conditions in the credit market and the general economy, Fertitta believed that the Lending Banks could determine that a material adverse effect had occurred, thus allowing the Lending Banks to withdraw the acquisition financing for the Merger. *Id.* Fertitta expressed concern that, should the Lending Banks withdraw their financing commitment, he would not be able to complete the Merger. *Id.* He further indicated that he believed the Lending Banks would move forward if the Special Committee agreed to lower the transaction price to $17.00 per share. *Id.*

On September 17, 18 and 19, 2008, Fertitta purchased 400,000 shares of Landry's stock on the open market at prices ranging from approximately $11.00 to approximately $14.00 per share. Compl. ¶ 37. On September 19, 2008, the Special Committee held a telephonic meeting to discuss the status of the Merger, including the question of whether the damage to the Company's properties from Hurricane Ike constituted an MAE and the issue of Fertitta's share purchases. Compl. ¶ 38. The Special Committee also discussed the importance of the Company's need to refinance the $400 million of indebtedness that was scheduled to come due in February 2009, and the effect that the uncertainty surrounding the Lending Banks' willingness to finance the merger would have on the Company's ability to achieve this refinancing. Revised Proxy at 40. On September 24, 2008, the Special Committee's independent counsel, King & Spalding, sent a letter to Fertitta's counsel to inquire about Fertitta's financing efforts. Compl. ¶ 39. In his response the next day, Fertitta stated that he had spoken to a number of financial institutions and that "no financial institution [outside of the Lending Banks] . . . had expressed any 'significant interest' in financing the proposed acquisition." Compl. ¶ 40. Fertitta also attached a letter from Jefferies, one of the Lending Banks, in which Jefferies advised Fertitta that, in light of the effects of Hurricane Ike, the Lending Banks believed that the Fertitta entities might not be able to satisfy the conditions precedent in the Debt Commitment Letter. *Id.*

On September 25, 2008, King & Spalding responded to Fertitta's letter. Compl. ¶ 41. King & Spalding advised Fertitta that the Special Committee did not view the correspondence between Jefferies and Fertitta as a termination of the Debt Commitment Letter and advised that the Special Committee required further information so that it could properly evaluate the situation. *Id.* Later that day, Fertitta's counsel informed the Special Committee that Fertitta had

spoken with a number of other prominent financial institutions, none of which expressed any interest in providing the necessary debt financing for the Merger. Compl. ¶ 42. The letter further stated that, in light of the potential financing problems, the Merger price should be lowered to $17.00 per share. *Id.*

On October 1, 2008, the Special Committee responded to Fertitta's proposal by proposing, for "negotiation purposes," a reduced price of $19.00 per share. Compl. ¶ 43. On October 6, 2008, Fertitta responded to the Special Committee and voiced his belief that the Lending Banks would declare that a MAE had occurred. Compl. ¶ 44. On October 7, 2008, the Company issued a press release stating that the proposed merger was "in jeopardy" at the $21.00 per share price in light of the instability in the credit markets, the deterioration in the casual dining and gaming industries, and other conditions. Compl. ¶ 45. The press release further stated that all of its Houston area restaurants had reopened and that one restaurant on the Kemah Boardwalk would reopen within a few weeks. Compl. ¶ 46. In the three-day period following this announcement, and allegedly as a result of the announcement,[4] the price of Landry's stock fell 35 percent, to $8.44 per share. Compl. ¶ 47.

[4] Plaintiff makes a number of unsubstantiated allegations in the Complaint, but the allegation that the Company's stock price fell precipitously as a result of the announcement that the Merger was "in jeopardy" is perhaps the most farfetched because it fails to account for general market conditions, which the Court can account for in deciding a motion to dismiss. *See, e.g.*, *In re Lear Corp. S'holder Litig*. 2008 Del. Ch. LEXIS 121, at *47 (Del. Ch. Sept. 2, 2008) (holding that "judicial notice can be taken of the fast moving developments in the financial markets in the summer of 2007, when the Lear Merger was rejected" and citing cases for the general proposition that the Court can take judicial notice of an individual stock price on a given date); *see also In re Tele-Communications, Inc. S'holder Litig.*, 2005 WL 3642727, at *13 (Del. Ch. Dec. 21, 2005) (recognizing the effect of general market trends on merger consideration). The entire U.S. stock market fell substantially in the time period from September 30, 2008 to October 10, 2008. The Dow Jones Industrial Average dropped from its close of 10,850.66 on September 30 to a close of 8451.19 on October 10 (a drop of 2399.47, more than 22%), and the New York Stock Exchange (where Landry's is listed) dropped from a close of 7532.80 on September 30 to 5704.13 on October 10 (a drop of 1828.67, more than 24%). *See* Reports, Landry's Seafood Restaurants,

E. The Amended Agreement

On October 10, 2008, Fertitta revised his offer to $13.00 per share. Compl. ¶ 49. Later that day, the Special Committee met to discuss the willingness of the Lending Banks to refinance the Company's indebtedness and the possibility of revising the Merger Agreement. *Id.* On October 17, 2008, the Special Committee agreed to a revised transaction with Fertitta. Compl. ¶ 50. The following day, the Company issued a press release[5] (the "October 18 Press Release") announcing that it had entered into an amended merger agreement (the "Amended Agreement") with Fertitta. *Id.* The Amended Agreement reduced the price of the transaction to $13.50 per share and proportionally reduced the Reverse Termination Fee from $24 million to $15 million. Compl. ¶ 50.

The October 18 Press Release is selectively quoted in the Complaint as follows:

> [a]s part of a compromise that was reached among the Company, Fertitta and [the Lending Banks], the [Lending Banks] agreed under their amended debt financing commitment and Fertita agreed under the amended merger agreement that they would not claim that a material adverse effect had occurred as a result of the occurrence of any event known to them through the date of execution of the amended financing commitment and the amended merger agreement, respectively.

Compl. ¶ 51 (quoting press release). The next sentences of the October 18 Press Release, which were omitted from the Complaint, describe significant *additional* consideration (above and

---

Dow Jones Industrial Average, NYSE Composite Index New, *available at* http://money.cnn.com (Perkins Aff. Exs. B-D). The price of Landry's common stock dropped from a close of $15.55 on September 30 to $9.18 on October 10th (a drop of $6.37, about 40%). In fact, Landry's stock dropped almost 10% on October 6, the day *before* the Company announced the problems with the merger. While Landry's stock dropped more than the indexes during this 10-day period, that fact is not surprising for a cyclical business like Landry's, which will be hurt more than the average by a drop in consumers' disposable incomes.

[5] *See* Press Release, Landry's Restaurants, Inc., Landry's Restaurants Inc.'s Board Approves Amendment to Merger Agreement with Tilman J. Fertitta (October 18, 2008), *available at* http://www.landrysrestaurants.com/pdf/pressreleases/press_20081018.pdf. The October 18, 2008 press release (Perkins Aff. Ex. E) is integral to the facts as pleaded in the Complaint, is cited in the Complaint (¶ 51) and is therefore incorporated by reference therein.

beyond the Lending Banks' agreement not to assert that a material adverse effect had occurred) that the Company received in exchange for lowering the price of the Merger and Termination Fee:

> [D]ue to the credit market crisis, and the substantial increase in the cost of capital as well as the limited availability of capital, the Lenders agreed under the amended debt financing commitment to provide Fertitta with only $500.0 million in funded debt financing for the acquisition on terms reflecting the current credit market disruption. As part of the compromise reached among the parties, ***Fertitta negotiated and obtained on behalf of the Company an alternative financing commitment from the Lenders to provide the Company with alternative financing on terms similar to the terms for the transaction financing in the event the acquisition is not consummated and certain other conditions are satisfied. The alternative financing would be sufficient to repay the Company's existing indebtedness which is subject to acceleration and redemption starting in December of this year. Fertitta's negotiations therefore allow stockholders to vote on the transaction knowing that alternative financing is available to the Company.***

Ex. E (emphasis added). Fertitta thus was able to obtain for the Company an Amended Debt Commitment Letter in which the Lending Banks committed to refinance the Company's existing debt obligations coming due in February 2009 in the event that the Merger did not close. Revised Proxy at 55-56. Pursuant to the Amended Agreement, the Special Committee conducted a second go-shop period from October 20, 2008 to November 17, 2008. *Id.* at 56. The Special Committee followed the same procedure and contacted the same parties it had identified and contacted during the first go-shop period, and received no expression of interest from the parties it contacted or from any other potential acquirer.[6]

[6] Similarly, no party approached either the Special Committee or the Company in the time period between the termination of the second go-shop period on November 17, 2008 and the issuance of the Revised Proxy in December 2008.

F. The Revised Proxy Statement

On January 5, 2009, the Company issued a Revised Preliminary Proxy, approximately 250 pages in length, which describes the terms of the Amended Agreement as well as the Special Committee's process in negotiating the Amended Agreement. As described in the Complaint, the Revised Proxy discusses the alternative financing consideration provided in the Amended Agreement and states that the Special Committee agreed to the terms of the Amended Agreement at least in part to avoid litigation with Fertitta and the Lending Banks over whether a material adverse effect had occurred, which would excuse their obligation to provide funding pursuant to the debt commitment letters. Compl. ¶ 53.

The Revised Proxy also contains a detailed explanation of the Amended Debt Commitment Letter and the financing obligations of the Company. Revised Proxy at 102. It explains that while the closing of the Merger was not conditioned upon the Company's receipt of financing, the Lending Banks' obligations to fund the debt commitments were conditioned upon the satisfaction of three principal conditions, as outlined in the Amended Debt Commitment Letter: (i) a "No Material Adverse Effect Condition", which was essentially that, since December 31, 2007, no "Material Adverse Effect" had occurred, except for any material adverse effect resulting from facts actually known to the Lending Banks on October 17, 2008; (ii) a "Financial Performance Condition", which required that the Company's gaming division and the Company's restaurant division each achieve a minimum amount in pro forma consolidated adjusted EBITDA for the twelve-month periods ended September 30, 2008 and November 30, 2008, respectively; and (iii) the satisfactory completion of due diligence by the Lending Banks. *Id.* at 102-03.

The Revised Proxy also contains summary financial projections as of March 26, 2008 and as of September 21, 2008, and explains that on October 6, 2008, the Company again revised its projections downward based on the preliminary results for September 2008 and the first weekend in October to reflect (i) the general downturn in the restaurant industry and declining results of Landry's restaurant division; (ii) lower than expected results of operations at the Golden Nugget; (iii) the continued downturn in the restaurant and gaming industries generally; (iv) the worsening general economic conditions and anticipated recession; and (v) the expected increase in competition in Las Vegas in late 2009 and early 2010 due to "aggressive discounting of room rates." Revised Proxy at 112-13.

G. Fertitta's Stock Purchases

Fertitta made various purchases of Landry's stock on the open market between October 20, 2008 and December 2, 2008. Compl. ¶ 55. During that time period, he purchased approximately 2.6 million shares at prices ranging from $10.28 to $11.72 per share. *Id.*; Revised Proxy at 150. Fertitta acquired a total of approximately 3,027,374 additional shares in the time period between June 16, 2008 and December 2, 2008. *Id.* By December 2, 2008, Fertitta and his affiliated entities owned approximately 9.66 million of the Company's shares (including restricted stock and options), or approximately 56.7% of all outstanding shares. Compl. ¶ 56. Fertitta was not, however, permitted to vote any of the shares he acquired after June 16, 2008 in favor of either the original Merger Agreement or the Amended Agreement.[7] Revised Proxy at 150.

[7] Indeed, the limitations placed on Fertitta's ability to vote the 3,027,374 shares he acquired after June 16, 2008 made it more difficult for Fertitta to obtain shareholder approval of the Merger. Approval of the Merger prior to Fertitta's purchases required approximately 23% of the shares not owned by

H. Termination of the Merger Agreement

Following the Company's announcement of the Amended Agreement, the SEC issued a request to Landry's to publicly disclose certain information from the Amended Debt Commitment Letter. Compl. ¶ 62. The Lending Banks were not willing to disclose this information due to concerns over confidentiality provisions in the debt commitment letters. Compl. ¶¶ 63-64. On January 11, 2009, Landry's announced that it had terminated the transaction with Fertitta. Compl. ¶ 64. Following the Company's announcement, the price of Landry's shares fell an additional 37.65%, or $4.65, to an opening price of $7.70 on the morning of January 12, 2009. Compl. ¶ 65.

On January 12, 2009, the Company issued a press release[8] (the "January 12 Press Release") outlining the reasons for the Special Committee's decision to terminate the Amended Agreement, including the fact that "[t]he commitment letter issued by the [Lending Banks] required that such information not be disclosed and be kept confidential." Compl. ¶ 66. In response to this request, which Plaintiff characterizes as a "simple SEC disclosure request" (Compl. ¶ 64), the January 12 Press Release states that "[a]lthough the Company informed the SEC of the foregoing and requested confidential treatment of the information, ***the SEC insisted upon disclosure of the confidential terms.***" (emphasis added). The press release explains that "[w]hen the [Lending Banks] were informed of the SEC's position, the [Lending Banks] advised both Fertitta and the Company that the [Lending Banks[] would not agree to disclosure of the

---

Fertitta; following his purchases, 32% of the shares not owned by Fertitta had to vote in favor of the Merger in order for it to be approved.

[8] Press Release, Landry's Restaurants, Inc., Landry's Restaurants, Inc. Announces Termination of Merger Agreement and Will Pursue Alternative Financing (January 12, 2009), *available at* http://www.landrysrestaurants.com/pdf/pressreleases/press_20090112.pdf. This Press Release (Perkins Aff. Ex. F) is integral to the facts as pleaded in the Complaint, is cited in the Complaint (¶ 66) and is therefore incorporated by reference therein.

confidential information and that ***any disclosure by the Company or Fertitta would be in violation of the terms of the commitment letter and result in the [Lending Banks] terminating their commitments for both the going private and alternative financing transactions***." *Id.* (emphasis added).

The next paragraph of the January 12 Press Release, which is (predictably) absent from the Complaint, further explains the Special Committee's decision to terminate the Amended Agreement:

> In the event [the Lending Banks] pulled their commitments, there would have been no financing available for the proposed going private transaction, and the Company would have lost its alternative financing commitment. If the going private transaction was terminated, no proxy statement would be required to be distributed to shareholders, therefore preserving the confidentiality of the terms of the alternative financing until the final terms are decided. Given the current economic environment and the Company's need to refinance its existing approximately $400 million in senior notes, the Company informed Fertitta that the Company was not prepared to risk losing its alternative financing commitment and was therefore unable to comply with a condition of the merger agreement which required distribution of an SEC approved proxy statement to Company shareholders to vote on the adoption of the merger proposal. As a result of the Company's inability to provide a proxy statement to the Company's shareholders, the Company informed Fertitta that it would be unable to consummate the merger transaction.

Perkins Aff. Ex. F. For the aforementioned reasons, the Landry's Board and the Special Committee decided that it was "in the best interests of the Company and its shareholders to terminate the proposed merger agreement ...." *Id.*

I. Nature And Stage Of The Proceedings In This Litigation.

On February 5, 2009, Plaintiff filed the putative class and derivative Complaint in this action, naming Landry's, Fertitta, Scheinthal, Brimmer, Chadwick, Richmond, and Taylor as defendants, as well as FHI and FAC. The Complaint asserts three claims against Fertitta and the

other members of the Board (the "Director Defendants") for breach of fiduciary duties and a class claim against FHI and FAC for aiding and abetting Fertitta's fiduciary duty breaches.

On April 2, 2009, Defendants filed a Motion to Dismiss the Complaint pursuant to Court of Chancery Rules 12(b)(6) and 23.1 for failure to state a claim upon which relief could be granted and for failure adequately to plead demand futility, and also filed a Motion to Stay Discovery pursuant to Court of Chancery Rule 26. This is Defendants' Opening Brief in Support of Their Motion to Dismiss and Motion to Stay Discovery.

ARGUMENT

To survive a motion to dismiss brought pursuant to Court of Chancery Rule 12(b)(6), "a plaintiff must allege facts that, taken as true, establish each and every element of a claim upon which relief could be granted." *Lewis v. Austen*, 1999 WL 378125, at *4 (Del. Ch. June 2, 1999) (citation omitted). In determining whether a plaintiff has met this standard, "[a] trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *In re Lukens*, 757 A.2d at 737 (quoting *Grobow*, 539 A.2d at 187 n.6). Allegations that are merely conclusory and lack factual support will not defeat a motion to dismiss. *See Criden v. Steinberg*, 2000 WL 354390, at *1 (Del. Ch. Mar. 23, 2000); *In re Dean Witter P'ship Litig.*, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998) ("Conclusions asserted in the complaint … will only be accepted as true if there are specific allegations of fact to support them") (internal citations omitted). Finally, while the Court will accept as true all well-pled factual allegations in the Complaint, "the Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegation that flows from it," and when a complaint mischaracterizes a document, it is "nevertheless proper for the Court to examine documents outside the complaint in deciding the motion to dismiss" because "[w]ithout the ability to consider the document at issue, complaints that mischaracterize the document could not be dismissed on a 12(b)(6) motion even though they were doomed to failure." *Peter Schoenfeld Asset Mgmt LLC v. Shaw*, 2003 Del. Ch. LEXIS 79, at *7-8 (Del. Ch. July 10, 2003) (citations omitted).

I. COUNT I FAILS TO STATE A CLAIM AGAINST FERTITTA FOR BREACH OF FIDUCIARY DUTY.

Count I alleges that Fertitta breached his fiduciary duties to the Company and its stockholders by: (1) using Hurricane Ike and the credit crisis as pretexts to force the Board to renegotiate the terms of the Buyout and agree to the Amended Agreement with no additional consideration for the Company's shareholders; (2) purchasing Landry's shares on the open market at the expense of the Class, using his knowledge as CEO to trade on non-public information to circumvent the Amended Agreement and gain control without paying a control premium; (3) forcing termination of the Amended Agreement once he acquired control to avoid paying the agreed-upon fair price to the minority shareholders; and (4) causing the Board to agree to be the party "terminating" the Amended Agreement to avoid his obligations to pay a Reverse Termination Fee. Compl. ¶ 81. These allegations can be broken down into two categories. The first category includes the allegations against Fertitta related to his participation in the negotiation of the proposed merger (claims 1, 3 and 4) (the "Merger Claims"). The second category is Plaintiff's allegation that Fertitta traded on material non-public information, and is therefore liable for insider trading (claim 2) (the "Insider Trading Claim"). Neither the Merger Claims nor the Insider Trading Claim has merit.

A. The Merger Claims Should be Dismissed.

In Count I, Plaintiff points to Fertitta's conduct during the negotiation process, and alleges that he breached his fiduciary duties to Landry's stockholders. This claim fails because Fertitta was entitled to act in his own interest *qua* stockholder and did not participate in the Board's discussions or deliberations regarding his proposed buyout.

Recognizing this problem, Plaintiff attempts to dress up the claims against Fertitta as being brought against him in his capacity as a Director or Officer of Landry's. *See*, *e.g.*, Compl. ¶ 80 ("Defendant Fertitta, as Landry's Chief Executive Officer and Chairman, owes the Class and the Company the utmost fiduciary duties...."). But the only actions Fertitta is accused of were taken solely in his capacity as a stockholder and potential acquiror of the Company. *See, e.g.*, *Lacos Land Co. v. Arden Group, Inc.*, 517 A.2d 271, 277 (Del. Ch. 1986) (a stockholder acting solely as a stockholder is entitled to act in his own best interest, but a stockholder acting *qua* director would not be entitled to act in his own best interest); *In re Anderson, Clayton S'holders Litig.*, 519 A.2d 680, 687 (Del. Ch. 1986) (a directors' receipt of substantial benefits from a transaction "*qua* shareholder does not establish a disabling conflict for such persons *qua* directors in a transaction that will treat all shareholders equally."). Absent any allegation of domination over or control of the Board, Fertitta was free to act in his own interest as a stockholder and did not owe any fiduciary duties to the stockholders; thus the Merger Claims fail.

1. Plaintiff Fails To Allege That Fertitta Was A "Controlling" Shareholder.

At the outset, the claims against Fertitta fail to distinguish between his role as a stockholder and his roles as a director, President and CEO of the Company. Under Delaware law, only a *controlling* stockholder owes fiduciary duties to the corporation and its minority stockholders.

In the Complaint, Plaintiff fails to allege that Fertitta was a controlling shareholder at the time of the conduct attached in the Merger Claims. A stockholder achieves controlling stockholder status when that person or entity either (1) owns more than 50% of a company's

common stock; or (2) otherwise dominates or controls the company's affairs. *Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1113 (Del. 1994); *see also Ivanhoe Pr's v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987) ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."). Only the actual exercise of control, and not the simple potential for control, will create the special duty; thus when a controlling stockholder takes no action with respect to a transaction involving the corporation, his status as a controlling stockholder alone will not create any special fiduciary duty. *See Citron v. Steego Corp.*, 1988 WL 94738, at *6 (Del. Ch. Sept. 9, 1988); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *29 (Del. Ch. May 22, 2000) (a 46% stockholder was not a controlling stockholder, even when that stockholder had the ability to purchase an additional 20% of the company's stock, where the stockholder had not played an active role in the challenged transaction).

The fact that Fertitta was the owner of approximately 39% of the Company's equity at the time the Board was considering whether to enter into a transaction with him is not sufficient to support an inference of control, particularly where there are no *facts* in the Complaint suggesting that Fertitta exercised actual control over the Board's decision-making process regarding the original Merger Agreement, the Amended Agreement or the decision to terminate the transaction. To the contrary, Fertitta abstained from participating in *any* of the Board's decision-making process regarding a possible transaction with him or his affiliated entities, and the task of considering the Merger was delegated entirely to the independent Special Committee, which was established via a unanimous resolutions of the Board on January 27, 2008. Revised

Proxy at 20. The Special Committee was delegated the exclusive power and authority to, among other things: (1) perform a strategic alternatives analysis for the Company to determine the best strategy to enhance value for its stockholders; (2) review and evaluate any strategic alternatives resulting from the analysis; (3) receive, review, evaluate and study Fertitta's proposal and any other alternative proposals or strategic alternative; (4) negotiate on the Board's behalf, if appropriate, the terms and conditions of Fertitta's proposal or any alternative proposal; and (5) make a recommendation to the Board as to Fertitta's proposal or any alternative. Revised Proxy at 20-21.

The Complaint does not allege that the Special Committee acted without legal advice, blindly acquiesced to Fertitta, or disregarded its legal and financial advisors. *See In re Tele-Communications*, 2005 WL 3642727, at *10 ("The effectiveness of a Special Committee often lies in the quality of the advice its members receive from their legal and financial advisors.") (footnote omitted). The Complaint rests solely on unsubstantiated and conclusory allegations that Fertitta somehow forced the Special Committee to simply "back down in the face of Fertitta's self-interested demands." Compl. ¶ 43. Of course, conclusory allegations will neither support Plaintiff's hoped-for inferences nor deny dismissal of the Complaint. *See Gantler v. Stephens*, 2009 Del. LEXIS 33, at *16 (Del. Jan. 27, 2009) ("We do not, however, blindly accept conclusory allegations unsupported by specific facts, nor do we draw unreasonable inferences in the plaintiff's favor.") (footnote omitted).

Likewise, the Complaint does not allege that Fertitta owned a majority position in the Company until some point in December 2008. Even at that point, the Complaint does not allege that Fertitta exercised actual control or otherwise participated in the board's decisions. Instead,

the Complaint merely disagrees with the decisions of the Special Committee not to stop Fertitta's open market purchases and to terminate the Merger. Compl. ¶¶ 64-67. But, as conveniently omitted from the Complaint, but as described in the Proxy, the Board sterilized the shares purchased by Fertitta so they would not be counted in any vote by the stockholders to approve a merger with FAC. Revised Proxy at 65. Hence there should be no dispute that Fertitta acted qua stockholder, relinquished his director decision-making authority to the Special Committee, and did not participate in or influence the Board's consideration of whether to terminate the Merger. *See Citron*, 1988 WL 94738, at *8 ("[A] shareholder without control, even if he is a director, and thus owes a duty of loyalty to the corporation and its shareholders, may *qua* shareholder negotiate the sale of his stock on whatever terms he is able to arrange.").

2. The Complaint Does Not Allege That Fertitta Took Any Action In His Role As A Director Or Officer Of Landry's.

The Complaint alleges that "[a]s Chairman and CEO of the Company, Fertitta was obligated to refrain from circumventing the terms of the [Merger Agreement] by illicitly purchasing Landry's shares to obtain control of the Company." (¶ 57). This allegation again fails to recognize the difference between Fertitta's actions as a stockholder and potential acquiror of the Company and his fiduciary duties as Chairman and CEO. Plaintiff explicitly recognizes this distinction, alleging that Fertitta, "as Landry's Chief Executive Officer and Chairman," (but *not* as a stockholder) owed the utmost due care, good faith and loyalty to the Company and the other stockholders. Compl. ¶ 80. The Complaint does not, however, identify any actions taken by Fertitta in a fiduciary capacity and the only reasonable inference is that actions about which Plaintiff complains were actions Fertitta took as a stockholder and potential acquiror. Plaintiff can only allege the unsupported conclusion that Fertitta "abus[ed] his position as CEO" to (1) use

the hurricane and the credit crisis as pretext to force the Board to agree to the Amended Agreement; (2) purchase[ed] shares on the open market at the expense of the class and trade on non-public information; and (3) force[ed] termination of the Amended Agreement and avoid his obligation to pay a termination fee. Plaintiff does not plead any specific facts establishing that Fertitta acted as CEO to influence the Special Committee. Accordingly, the Complaint does not state a proper claim.

B. The Insider Trading Claims Should Be Dismissed.

1. Fertitta Did Not Violate Any Fiduciary Duty By Purchasing Stock.

Even assuming that the Complaint alleged facts from which the Court could reasonably infer that Fertitta had become a "controlling" stockholder (*i.e.*, in December 2008 when his total equity ownership exceeded 50%), his simple acts of purchasing stock did not constitute a breach of any fiduciary duty. A logical and recognized corollary to the well-established legal principles that a stockholder, even a controlling stockholder, has a right to sell shares[9], is that a stockholder has a similar right to *buy* shares--even control shares--on the open market, as long as he is not acting on inside information (as further discussed *infra* Section B(3)), contrary to the Company's Charter or Bylaws, or otherwise in violation of applicable law. *See generally*, *In re Oracle Corp.*, 867 A.2d 904, 930 (Del. Ch. 2004) ("For legitimate reasons, directors and officers who own options and stock will at times have to, or find it useful to, sell or buy shares."); *Ivanhoe Pr's*, 535 A.2d at 1344 (noting that it is "well established law" that nothing precludes a stockholder "from acting in its own self-interest," and holding that neither the target corporation,

[9] *See Thorpe v. CERBCO*, 676 A.2d 436, 442 (Del. 1996) (agreeing with the Court of Chancery that a basic precept of corporate law is "that controlling shareholders have a right to sell their shares, and in doing so capture and retain a control premium").

nor its largest stockholder, violated their fiduciary duties of loyalty, and that *Revlon* duties were not implicated, when the board facilitated the stockholder's "street sweep" of shares on the open market). There is no provision in the Landry's Charter or Bylaws requiring Board approval for open market stock purchases by shareholders with a significant percentage of stock, and there is no allegation in the Complaint that Fertitta acted contrary to any such provision.

2. Insider Trading Is A Derivative Claim and Plaintiff Did Not Comply With Rule 23.1.

It is well settled in Delaware that inside information is a corporate asset, the misuse of which gives rise to a derivative, rather than a class claim. *See, e.g., Brophy v. Cities Serv. Co.,* 70 A.2d 5 (Del. Ch. 1949); *Cooke v. Oolie*, 2000 Del. Ch. LEXIS 89, at *60 (Del. Ch. May 24, 2000); *see also Oracle*, 867 A.2d at 926-29 (discussing continued viability of *Brophy* under Delaware law). The authority to commence litigation on the corporation's behalf is vested with the board of directors; thus, a stockholder seeking to bring a lawsuit derivatively must make a pre-suit demand on the board for its approval. *Id.* In the absence of such a demand, a stockholder bringing a derivative suit must demonstrate that pre-suit demand would have been futile. To do so, the complaint must "contain particularized allegations of fact sufficient to create a reasonable doubt (1) regarding the directors' disinterest and independence; or (2) that the transaction resulted from the directors' valid business judgment." *Cooke*, 2000 Del. Ch. LEXIS 89, at *60. As discussed more fully with respect to Count IV, below, Plaintiff neither made demand upon the board, nor pled any particularized facts evidencing demand futility *See infra* Section IV. As Plaintiff failed to comply with Court of Chancery Rule 23.1, the insider trading claim should be dismissed.

3. Even If Plaintiff Had Complied With Rule 23.1, The Complaint Fails To State A Cognizable Insider Trading Claim Against Fertitta.

Even if Plaintiff had complied with Rule 23.1, the insider trading claim should be dismissed because the Complaint does not contain the particularized allegations that are necessary to establish an insider trading claim. *See Rattner v. Bidzos*, 2003 WL 22284323, at *10 (Del. Ch. Sept. 30, 2003). Specifically, a plaintiff seeking to prevail on an insider trading claim must show that: "1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." *Oracle*, 867 A.2d at 934. "For information to be material, there must be a 'substantial likelihood' that the nonpublic fact 'would have assumed actual significance in the deliberations' of a person deciding whether to buy, sell, vote, or tender stock. In other words, the nonpublic information must be of a magnitude that it would, upon disclosure, have 'significantly altered the total mix of information in the marketplace.'" *Id.* (*quoting Rosenblatt v. Getty Oil. Co.*, 493 A.2d 929, 944 (Del. 1985)). Here, other than the conclusory assertion that Fertitta "unquestionably possessed material inside information about his own intentions," (which, as detailed below, is not a viable basis for an insider trading claim) the Complaint fails even to allege that Fertitta possessed any material nonpublic information. *See* Compl. ¶ 58.

To the extent that it is possible to state a claim for insider trading under Delaware law,[10] Plaintiff must plead facts sufficient to establish that Fertitta used information improperly and based his open market purchases of additional shares in whole or in part on the substance of the

[10] There is doubt as to whether Delaware law even recognizes a derivative claim for insider trading in light of the pervasive federal regulation of insider trading. *See Oracle*, 867 A.2d at 927-929.

alleged insider information. At bottom, the Plaintiff must establish that Fertitta acted with scienter. *Id.* at 955; *see also Guttman v. Huang*, 823 A.2d 492, 505 (Del. Ch. 2003). To establish scienter, Plaintiff must plead particularized facts from which the Court could infer that every transaction by Fertitta was entered into and completed on the basis of, and because of, material non-public information. *Stepak v. Ross*, 1985 WL 21137, at *5 (Del. Ch. Sept. 5, 1985). Further, scienter must be pled with particularity under Court of Chancery Rule 9(b). *See In re Cendant Corp. Deriv. Action Litig.*, 189 F.R.D. 117, 131 (D.N.J. 1999) (applying Fed. R. Civ. P. 9(b) to a derivative claim for insider trading under Delaware law); *Dollens v. Zionts*, 2002 WL 1632261, at *8 (N.D. Ill. July 22, 2002) (same). As shown below, the Complaint does not allege any particularized facts sufficient to establish that Fertitta acted with scienter, or that his acquisition of additional shares was based on any type of inside information. Instead, the Complaint merely states that

> Fertitta, as Chairman and CEO, was undoubtedly acting on information not immediately available to public shareholders as he purchased shares during the transaction process. Among other things, he unquestionably possessed material inside information about his own intentions, the Board's deliberations, conversations with the Lending Banks, and about Landry's progress in dealing with the effects of Hurricane Ike.

Compl. ¶ 58. Plaintiff must allege that Fertitta acquired the additional stock with the intent of acting on non-public information. The allegations that Fertitta "undoubtedly" or "unquestionably" utilized information obtained in his role as Chairman and Chief Executive Officer, including the reconstruction process and impact of Hurricane Ike, all of which was known by or disclosed to Landry's stockholders, are insufficient to constitute a viable claim. Compl. ¶¶ 58, 81. These conclusory allegations fail adequately and particularly to allege that Fertitta consciously acted to exploit material nonpublic information. *See Guttman*, 823 A.2d at

503 (rejecting insider trading claim that lacked particularized allegations such as the roles directors played at the company or the information that would have come to their attention).

Moreover, the allegation that Fertitta "unquestionably possessed material inside information about his own intentions" is both illogical and legally untenable. It is illogical because Fertitta undoubtedly knew the price of Landry's stock would be adversely affected upon the announcement of the termination of the proposed transaction; yet he continued to purchase shares priced at a level that incorporated the planned successful completion of the transaction. Indeed, upon the Company's announcement of the termination of the Amended Agreement, the Company's share price fell well below the prices paid by Fertitta. Compl. ¶¶ 64-66. In other words, if Plaintiff's allegations were correct -- that Fertitta bought stock with knowledge that the merger would not be completed -- the shares Fertitta acquired on the open market were purchased at an *inflated* price, not an artificially discounted price.

This aspect of Count I also is legally untenable because an insider trading claim only arises when a fiduciary possesses material nonpublic *company* information, *Rattner*, 2003 WL 22284323, at *10, and Fertitta's information about his own personal intentions does not constitute company information. We are unaware of any authority to the contrary.[11]

[11] Moreover, Fertitta's obligation (if any) to disclose information about his "own intentions" during his discussions with the Lending Banks and the Special Committee would only arise if the so-called "disclose-or-abstain" rule was invoked. *See Oracle*, 867 A.2d at 936-37. The "disclose or abstain" rule, which is utilized by federal courts and has been applied by this Court, arises when a company or insider, having no official obligation to disclose information or update company disclosures (e.g. in the middle of a reporting period in between required disclosures), engages in market activity. The rule recognizes that the insider "inherently" has some information which is not publicly available and requires the insider to either disclose such "new" information or to abstain from market transactions in the company's shares. *Id.* at 936-37. The "disclose or abstain" rule is however, "far from" a bright line rule which sidesteps the traditional materiality and scienter requirements to always require disclosure or abstention from trading in these situations. *Id.* As the Court in *Oracle* acknowledged, "[r]easonable investors understand that businesses fluctuate.... There is always some risk that the quarter in progress at

Additionally, through SEC filings, including the Revised Proxy, and press releases, the Company disseminated a substantial amount of information to the public regarding the Company's financial status (including its need to refinance its debt by February 2009), its negotiations about the proposed transaction with Fertitta and entry into the Amended Agreement, its progress in dealing with the effects of Hurricane Ike and its potential difficulties with the Lending Banks, including the possibility of litigation over the MAE clause. The Complaint lacks any allegations from which the Court could even begin to infer that Fertitta's information about his "own intentions" would substantially alter the "total mix" of information available in the substantial disclosures already available to Landry's shareholders.

Accordingly, as the Complaint is devoid of any factual allegations showing that Fertitta possessed and was motivated by any material, nonpublic company information in acquiring additional shares on the open market, Count I should be dismissed.

II. COUNT II FAILS TO STATE A CLAIM FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY.

In Count II, Plaintiff alleges that FAC and FHI, the shell entities formed by Fertitta for the purposes of effectuating the Merger, have aided and abetted the breaches of fiduciary duty committed by Fertitta. Compl. ¶¶ 84-86.

Under Delaware law, "the test for stating an aiding and abetting claim is a stringent one, turning on proof of scienter." *Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020,

---

the time of an investment will turn out for the issuer to be worse than anticipated." *Id.* Accordingly, the duty to disclose or abstain arises only when an insider (or issuer) is in possession of nonpublic "intra-quarter" information that will represent an "***extreme departure*** from publicly known trends and uncertainties." *Id.* (citations omitted). Only information that constitutes an "extreme departure" will be deemed material in this context. *Id.* It would be difficult, if not impossible, for Plaintiff to meet the "extreme departure" requirement in light of the Company's myriad disclosures.

1039 (Del. Ch. 2006). To state a claim for aiding and abetting a breach of fiduciary duty, Plaintiff must adequately allege (i) a fiduciary relationship, (ii) a breach of that relationship, (iii) that the alleged aider and abettor knowingly participated in the fiduciary's breach of duty, and (iv) damages proximately caused by the breach. *Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007).

As an initial matter, because Plaintiff has failed to state a claim against Fertitta for breach of fiduciary duty (*supra* Section I), so too must the aiding and abetting claims fail. *Manzo v. Rite Aid Corp.*, 2002 Del. Ch. LEXIS 147, at *21 (Del. Ch. Dec. 19, 2002) (dismissing a claim of aiding and abetting because the underlying breach of fiduciary duty claim was dismissed); *Crescent/Mach I Pr's, L.P. v. Turner*, 846 A.2d 963, 990 (Del. Ch. Sept. 29, 2000) ("[A] court may infer a non-fiduciary's knowing participation ... only if a fiduciary breaches its duty in an inherently wrongful manner, and the plaintiff alleges *specific* facts from which that court could reasonably infer knowledge of the breach.") (emphasis added).

Even if there were an underlying breach of fiduciary duty (which there is not), Plaintiff still fails to state a claim for aiding and abetting. The entirety of Plaintiff's allegation with respect to the "knowingly participated" element is as follows:

> FAC and FHI are deemed to have knowledge of the fiduciary duties Fertitta owes the Class because Fertitta is a control person of FAC and FHI and in fact does control FAC and FHI.
>
> FAC and FHI knowingly participated in the breaches of fiduciary duty by Fertitta and benefited from those breaches.

Compl. ¶¶ 84-85.

These allegations should be dismissed because they are completely conclusory and do not come close to meeting the stringent test for stating an aiding and abetting claim. *See, e.g., In re*

Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 72 (Del. 1995) (finding that mere allegations that a defendant "had knowledge of" the director defendants' fiduciary duties and "knowingly and substantially participated and assisted" in the alleged breaches, is insufficient to state a cause of action); *Lukens*, 757 A.2d at 734-35 (allegation that acquiror "approved and urged" the target's directors to approve the merger is inadequate to support knowing participation requirement). Count II fails as a matter of law and should be dismissed with prejudice.

III. COUNT III FAILS TO STATE A CLAIM AGAINST THE BOARD OR THE SPECIAL COMMITTEE FOR BREACH OF FIDUCIARY DUTY.

Plaintiff's allegations in Count III can be broken into two general categories. First, Plaintiff argues that the Director Defendants' conduct in connection with renegotiating the Merger Agreement and eventually terminating the Amended Agreement constituted a breach of their fiduciary duties to Landry's and its stockholders. Second, Plaintiff suggests that the Board further breached its fiduciary duties by failing to take defensive steps to prevent Fertitta from purchasing shares of Landry's stock on the open market.

While the allegations of the Complaint and the specific claims being made therein are often difficult to discern, the import of Plaintiff's contentions is clear. In effect, Plaintiff asks this Court to ignore one of the most fundamental precepts of Delaware's corporate law: Absent well-pled allegations that a majority of the Board suffered from a disabling conflict of interest or lack of independence, or failed to exercise due care in coming to its decision, Delaware courts will not substitute their judgment for that of the Board so long as the Board's decision is rational. As will be described in more detail below, Plaintiff has failed adequately to allege facts which, if true, would demonstrate that the Director Defendants are not entitled to the presumptions

associated with the business judgment rule. Accordingly, Count III should be dismissed for failure to state a claim upon which relief can be granted.

A. The Conduct Challenged In Count III Is Properly Analyzed Under The Rubric Of The Business Judgment Rule.

The business judgment rule flows from the oft-reiterated tenet of Delaware's corporate law that "[t]he business and affairs of every corporation ... shall be managed by or under the direction of a board of directors." 8 *Del. C.* § 141(a); *see also Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." The business judgment rule is a recognition of that statutory precept.). Given the "large reservoir of authority" that this provision grants a board of directors, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953 (Del. 1985), Delaware courts "acknowledge ... the managerial prerogatives of Delaware directors" by presuming that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson*, 473 A.2d at 812. "Therefore, the judgment of a properly functioning board will not be second-guessed and '[a]bsent an abuse of discretion, that judgment will be respected by the courts.'" *Orman v. Cullman*, 794 A.2d 5, 19 (Del. Ch. 2002) (internal citation omitted).

In Count III, Plaintiff challenges two alleged decisions of the Board (the decisions to renegotiate the Merger Agreement and later terminate the Amended Agreement), and one allegedly conscious decision to refrain from acting (the decision not to enact any defensive measures in response to Fertitta's purchases of Landry's stock on the open market). *See* Compl. ¶¶ 88 (challenging the decision to renegotiate), 89-90 (alleging that the Board knew of Fertitta's

stock purchases but did not enact defensive measures), 91 (challenging the decision to terminate the Amended Merger Agreement).[12] The business judgment rule operates to protect a board from liability "in instances of action by the board of directors or a conscious decision to refrain from acting." *Rattner*, 2003 WL 22284323, at *7; *see also Gantler*, 2009 Del. LEXIS 33, at *23 ("A board's decision not to pursue a merger opportunity is normally reviewed within the traditional business judgment framework."); *Day v. Quotron Sys., Inc.*, 1989 Del. Ch. LEXIS 164, at *15 (Del. Ch. Nov. 20, 1989) (analyzing a board's decision not to enact defensive measures under the business judgment rule). Accordingly, the proper starting point for analyzing the Director Defendants' conduct in this motion to dismiss is the operation of the business judgment rule.

B. Because Plaintiff Does Not Even Allege That A Majority Of The Board (Or The Special Committee) Is Not Disinterested Or Independent, The Board Decisions At Issue Will Be Upheld If They Can Be Attributed To Any Rational Business Purpose.

In order to survive this motion to dismiss, Plaintiff must overcome the presumptions associated with the business judgment rule. *Orman*, 794 A.2d at 20. To do so, Plaintiff must allege facts which, if accepted as true, would establish that the Director Defendants breached their duty of loyalty (*i.e.*, facts indicating that a majority of the Board or Special Committee was interested or lacked independence) or care. *See, e.g., In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 780 (Del. Ch. 1988) ("[O]rdinarily the policy of the [business judgment] rule prevents substantive review of the merits of a business decision made in good faith and with due care."). Absent well-pled allegations of a breach of fiduciary duty, the Court will not

[12] For ease of reference, this section refers to both categories of challenged conduct as the "challenged decisions."

interfere with the Board's decision making process unless the "decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." *Id.* at 780-81.

Plaintiff's ability to rebut the presumptions of the business judgment rule – and its ability to survive this motion to dismiss – hinges entirely on this third potential showing. Plaintiff makes no allegation, well-pleaded or otherwise, that a majority of the Board was interested or lacked independence. To the contrary, Plaintiff appears to concede that the Board consisted of a majority of independent directors, and that the Special Committee consisted entirely of independent directors. *See* Compl. ¶ 26 ("In response to the offer, the Landry's Board formed a Special Committee of Independent Directors....").[13] Plaintiff does not allege that a majority of the Board had any financial interest in the challenged decisions, nor does it allege any facts that demonstrate that the Board was dominated or controlled by Fertitta. Indeed, the only facts cited in the Complaint that could even begin to support a claim of this nature is Plaintiff's recitation of the fees that the independent directors receive for their service on the Board and/or Special Committee. Compl. ¶¶ 17-20. This Court has held for decades, however, that receipt of customary fees for service on a board of directors, without more, is insufficient to establish a director's interest or lack of independence. *See, e.g., In re Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *4 & n.27 (Del. Ch. Mar. 27, 2002).

Moreover, Plaintiff has not alleged (because it cannot allege) that the Board or the Special Committee failed to inform themselves with respect to the challenged decisions.

[13] Tellingly, and as discussed in more detail below, Plaintiff's attempt to plead demand futility in Count IV does not include an allegation that demand would have been futile because a majority of the Board was interested or lacked independence. *See* Compl. ¶¶ 93-101.

Plaintiff concedes that the Special Committee was advised by a separate financial advisor (Cowen), and retained independent counsel (King & Spalding). Compl. ¶¶ 26, 39. The Complaint does not dispute that the negotiation process was conducted at arms' length, over an extended period of time, and was not rushed or entered into without proper reflection. Nor would any such allegations assist Plaintiff in these circumstances, since Landry's Certificate of Incorporation contains a provision exculpating its directors from personal liability for violations of their duty of care. *See Lyondell Chemical Co. v. Ryan*, 2009 WL 790477, at *3 (Del. Mar. 25, 2009) ("Lyondell's charter includes an exculpatory provision ... protecting the directors from personal liability for breaches of the duty of care. Thus, this case turns on whether any arguable shortcomings on the part of the Lyondell directors also implicate their duty of loyalty, a breach of which is not exculpated."); *McPadden v. Sidhu*, 2008 Del. Ch. LEXIS 123, at *42 (Del. Ch. Aug. 29, 2008) ("Though this board acted 'badly' – with gross negligence – ... this board did not act in bad faith. Therefore, with the benefit of the protections of the Company's exculpatory provision, the motion to dismiss Count I (breach of fiduciary duty) pursuant to Rule 12(b)(6) is granted....").

Accepting the well-pleaded and non-conclusory allegations in the Complaint as true (as is required in resolving this motion), the Complaint inescapably leads to one conclusion: The challenged decisions were made by a majority of disinterested and independent directors, upon the recommendation of a Special Committee consisting of concededly disinterested and independent directors and who had received the advice of independent financial advisors and legal counsel. Accordingly, unless the challenged decisions fall so far outside the bounds of rational decision-making that they rise to the level of bad faith conduct, the motion to dismiss

should be granted. *See In re J.P. Stevens*, 542 A.2d at 780-81; *In re Encore Computer Corp. S'holders Litig.*, 2000 Del. Ch. LEXIS 93, at *21 (Del. Ch. June 16, 2000) (dismissing a claim for breach of fiduciary duty because the plaintiff had not adequately pleaded a breach of fiduciary duty and "the decision to approve the [challenged] [t]ransaction was a rational business judgment that must be respected").[14] As shown below, the actions of the Special Committee and the Board were not only rational, but were considered necessary to Landry's continued viability.

1. The Decisions To Renegotiate The Merger Agreement And Terminate The Amended Agreement Were Rational And Are Therefore Protected By The Business Judgment Rule.

Critical to the Board's decisions to renegotiate the Merger Agreement and later terminate the Amended Agreement is the precarious position in which Landry's found itself. The Complaint alludes at various points to the Company's need to refinance approximately $400 million in senior notes in the early part of 2009. *See, e.g.,* Compl. ¶ 67 (referring to Chadwick's statements regarding the "need to refinance approximately $400 million in senior notes"); *id.* at ¶

[14] Twelve years ago, Chancellor Allen ably demonstrated the high burden that Plaintiff must meet:

> Do these allegations of Count IV state a claim upon which relief may be granted? In addressing that question, I start with what I take to be an elementary precept of corporation law: in the absence of facts showing self-dealing or improper motive, a corporate officer or director is not legally responsible to the corporation for losses that may be suffered as a result of a decision that an officer made or that directors authorized in good faith. There is a theoretical exception to this general statement that holds that some decisions may be so 'egregious' that liability for losses they cause may follow even in the absence of proof of conflict of interest or improper motivation. The exception, however, has resulted in no awards of money judgments against corporate officers or directors in this jurisdiction and, to my knowledge only the dubious holding in this Court of *Gimbel v. Signal Companies* ... seems to grant equitable relief in the absence of a claimed conflict or improper motivation. Thus, to allege that a corporation has suffered a loss as a result of a lawful transaction, within the corporation's powers, authorized by a corporate fiduciary *acting in a good faith pursuit of corporate purposes*, does not state a claim for relief against that fiduciary no matter how foolish the investment may appear in retrospect.

Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051-52 (Del. Ch. 1996) (footnotes omitted).

48 (discussing "the prospect of Landry's inability to refinance its long-term debt"); *id.* at ¶ 66 (Landry's was forced "to terminate the acquisition in order to preserve the Company's alternative financing"). As is discussed above, this need arose in connection with the Company's settlement of an unrelated dispute with certain holders of its senior notes and U.S. Bank, National Association, the trustee under the indenture covering those notes. *Supra* p.9. Pursuant to that settlement, beginning on February 28, 2009, holders of the notes had the option to require Landry's to redeem the notes (all $400 million worth) at 1% above par. *Id.*

Accordingly, a critical factor the Special Committee had to consider in deciding whether to renegotiate the Merger Agreement was the difficulty that the Company would face if it continued as a public, stand-alone entity and was required to refinance the notes in the current economic environment. Revised Proxy at 29, 58. When the Lending Banks implied that an MAE might have occurred and that they might, therefore, no longer be obligated to comply with the Debt Commitment Letter, the Special Committee (along with its independent advisors) had to consider the pros and cons of litigating that issue in a market where refinancing the debt would be, at best, exceedingly difficult. *Supra* pp. 8-12; *see* Compl. ¶¶ 38 - 51 (discussing the Special Committee's actions and deliberations in this time period); Revised Proxy at 38-56 (same).

Deciding to recommend that the Board approve the Amended Agreement, the Special Committee explicitly considered whether Fertitta had satisfied his obligation to use best efforts to close the financing with the Lending Banks, and whether the Lending Banks' potential MAE claim had a chance of success. *See* Revised Proxy at 49-50. These considerations, along with the overriding need to have alternative financing in place for the Notes when they came due in February 2009, informed the negotiation process. On September 30, 2008, after taking into

consideration (among other things) the turmoil in the financial credit markets, the credit "freeze" and the worsening general economic climate, the Special Committee decided that finding alternative refinancing for the notes would be difficult at best, and litigation over the failure of the Merger Agreement would make the refinancing process even more challenging (by alienating the Lending Banks). *Id.* at 48. The Special Committee, therefore, decided to enter into negotiations with Fertitta and the Lending Banks over a revised merger agreement that would decrease the Lending Banks' exposure but would provide Landry's with more certainty that it would be able to refinance its existing indebtedness. *Id.*

Accordingly, on October 10, 2008, after meeting and conferring with its advisors, the Special Committee determined that it would be in the best interests of Landry's and its stockholders to amend the Merger Agreement. *Id.*; Revised Proxy at 50-53; Compl. ¶ 49. On October 18, 2009, the Special Committee unanimously determined to recommend that the Board enter the Amended Agreement. Revised Proxy at 55. Later that day, the Board (with Fertitta abstaining from the discussion and vote), unanimously approved the Amended Agreement. Proxy at 56; Compl. ¶ 50.

Through artful drafting, Plaintiff has attempted to sustain its burden of establishing the "egregious" nature of this transaction by arguing that the Special Committee did not receive anything of value as consideration for agreeing to the Amended Agreement. After citing to what it deems to be the "relevant part" of Landry's October 18, 2008 Press Release announcing the Amended Agreement, Plaintiff contends that "[t]he *only* consideration to shareholders through the Amended Agreement was the Lending Banks and Fertitta agreeing to refrain from asserting a material adverse effect." Compl. ¶ 51-52 (emphasis added). Plaintiff's allegations are, charitably

stated, mistaken. Indeed, Plaintiff conveniently omits the Press Release's discussion of an exceedingly important benefit that accrued to Landry's and its stockholders due to the Special Committee's decision to renegotiate:

> As part of the compromise reached among the parties, Fertitta negotiated and ***obtained on behalf of the Company an alternative financing commitment from the Lenders to provide the Company with alternative financing on terms similar to the terms for the transaction financing in the event the acquisition is not consummated*** and certain other conditions are satisfied. The alternative financing would be sufficient to repay the Company's existing indebtedness which is subject to acceleration and redemption starting in December of this year. Fertitta's negotiations ***therefore allow stockholders to vote on the transaction knowing that alternative financing is available to the Company***.

Perkins Aff. Ex. E (Oct. 18 Press Release) (emphasis added). Thus, the Special Committee's decision to recommend that the Company agree to amend the Merger Agreement, and the Board's decision to follow the Special Committee's recommendation, were not irrational nor "egregious" on their face; to the contrary, these actions ensured that if the Revised Merger Agreement was not consummated, the Lending Banks would provide backstop financing so that Landry's could refinance the $400 million of notes that were potentially coming due in February 2009. It also provided the Landry's stockholders with the unfettered right to reject a merger with Fertitta knowing that the Company's debt would be refinanced.

Similarly, the ultimate decision to terminate the Amended Agreement was designed to make sure this backstop financing remained in place. After the Company filed its preliminary proxy in connection with the Amended Agreement, the SEC demanded that Landry's disclose certain information from the debt commitment letter. Compl. ¶ 62; *id.* at ¶ 66 (summarizing January 12, 2009 Press Release); Perkins Aff. Ex. F at 1 (January 12, 2009 Press Release). The

debt commitment letter, however, required that such information be kept confidential. Compl. ¶ 63-64. While the Company attempted to negotiate a confidentiality agreement with the SEC, the SEC insisted on disclosure of the requested information. Perkins Aff. Ex. F at 1 (January 12, 2009 Press Release). The Lending Banks, in turn, indicated that they would not agree to disclose the information, and would exercise their right to terminate the debt commitment letter if the information was disclosed. *Id.*; Compl. ¶¶ 63-64.

This turn of events left the Special Committee in a difficult situation. Stockholder approval was a condition precedent to either party's obligation to close the merger. Merger Agr. § 8.01 (Revised Proxy at A-40). In order to comply with its obligations under the Amended Agreement, the Company was required to submit a final proxy to Landry's stockholders after making a commercially reasonable effort to make any revisions to the preliminary proxy requested by the SEC. Merger Agr. § 7.01(a) (Revised Proxy at A-29). Stockholder approval would not be possible without a valid proxy statement, and the SEC would not approve the proxy without the additional disclosures it had demanded. If the Company chose to disclose the information demanded, the Lending Banks would terminate the debt commitment letter, which would relieve them of their obligation to fund the Merger *and* would leave the Company without a valid means of refinancing the Notes when the Merger failed for lack of financing. The Special Committee was therefore presented with a Hobson's Choice: It could push for a vote by filing the proxy statement with the SEC's proposed revisions (which would violate the debt commitment letter and cause the Lending Banks to pull the financing commitment for the merger and the alternative financing commitment, thus leaving Landry's with nothing) or it could seek to terminate the Amended Agreement and thereby retain the alternative financing commitment

from the Lending Banks. In these circumstances, the Special Committee's decision was not only a rational decision, it was the *only* rational decision the Special Committee was in a position to make.

* * *

The task presented to the Special Committee was not an easy one. It was asked to consider Landry's strategic options and determine the best path forward for the Company and its stockholders amidst staggering drops in the financial markets and a global freeze in the credit industry. In addition to this financial chaos, the Special Committee had to take into consideration the looming requirement that Landry's find a way to refinance approximately $400 million of indebtedness within a few short months – a daunting prospect in the best of times that had become exceedingly difficult due to the implosion in the credit markets. Faced with this reality, the independent and wholly disinterested Special Committee acted in good faith to place the Landry's stockholders in the best position reasonably available. By agreeing to renegotiate the Merger Agreement and, later, to terminate the Amended Agreement, the Special Committee (and the Board that adopted its recommendations) ensured that the Company would continue as a viable entity.

When considered in their proper context, Plaintiff's allegations ring hollow. Both the Special Committee and the entire Board were informed of the relevant considerations, did not suffer from a disabling conflict of interest, and acted in a good faith belief that their actions were taken in the best interests of Landry's stockholders. In such circumstances, this Court should not second guess the decisions they made. *Orman*, 794 A.2d at 19; *see also In re Citigroup, Inc. S'holder Deriv. Litig*, 964 A.2d 106, 126 (Del. Ch. 2009) (the Court will not second guess a

board's business decisions, even when based on "real world" factors such as "imperfect information, limited resources and an uncertain future," when taken in good faith). Plaintiff's allegations to the contrary should be dismissed.

2. The Board Was Under No Duty To Prevent Fertitta From Acquiring Additional Shares Of Landry's Stock On The Open Market.

Plaintiff's other argument in Count III, that the Board breached its fiduciary duties by failing to enact defensive measures in response to Fertitta's acquisition of Landry's stock on the open market, fares no better than its previous arguments and should also be dismissed.

A board's decision not to enact defensive measures in response to an alleged threat is analyzed under the presumptions of the business judgment rule. *Day*, 1989 Del. Ch. LEXIS 164, at *15. As set forth above, the Board's disinterestedness and independence is unchallenged. *Supra* Section III(B). Accordingly, these allegations will be dismissed unless the decision not to act is so egregious on its face that it rises to a level of bad faith conduct. *In re J.P. Stevens,* 542 A.2d at 780-81.

In *Stone v. Ritter*, the Delaware Supreme Court confirmed that a finding of bad faith can issue if a fiduciary "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." 911 A.2d 362, 369 (Del. 2006) (citations omitted); *see also Lyondell*, 2009 WL 790477, at *4 ("*Stone* also clarified any possible ambiguity about the directors' mental state ...."). But no Delaware court has *ever* held that a board of directors has a *per se* duty to enact specific defensive measures in response to a stockholder's purchase of additional shares.[15] To the contrary, Delaware law clearly provides a great deal of leeway to

[15] In *Ivanhoe Partners*, the Court found that the board had the power and duty to oppose a hostile, partial tender offer because it was, in the board's business judgment, "a reasonable threat to corporate

directors in responding (or choosing not to respond) to perceived threats, and analyzes a decision to enact defensive measures according to the standards set forth in *Unocal*, and analyzes a decision *not* to enact defensive measures under the business judgment rule. *See Unocal*, 493 A.2d at 954-55; *Day*, 1989 Del. Ch. LEXIS 164, at *15.

Because Delaware law does not affirmatively require a Board to adopt defensive measures, their decision not to act cannot constitute a violation of the duty of good faith sufficient to strip them of the presumptions of the business judgment rule. *In re J.P. Stevens & Co.,* 542 A.2d at 780-81. At best, Plaintiff has pled that the Board may have committed a violation of its duty of care. Even if the Board were required to act, although the Landry's Board was *not*, the Board sterilized all shares purchased by Fertitta and Fertitta did not participate in, nor did he influence, the Special Committee or the Board's decisions. Such allegations are insufficient to survive a motion to dismiss where, as here, the directors are protected by a charter provision adopted pursuant to 8 *Del. C.* § 102(b)(7). *See McPadden*, 2008 Del. Ch. LEXIS 123, at *36.

Moreover, to the extent that the remedy that Plaintiff seeks in connection with Count III is an order against Landry's compelling specific performance of the Merger at the $21 per share price provided in the original Merger Agreement, *see* Compl. ¶¶ 33-34, Plaintiff lacks standing to seek this remedy on behalf of a class of stockholders. It is a principle of well-settled Delaware law that "only parties to a contract and intended third-party beneficiaries may enforce an agreement's provisions." *Nama Holdings, LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 434 (Del. Ch. 2007). Additionally, a party is not automatically entitled to specific performance,

---

policy and effectiveness," but *Ivanhoe Partners* does not establish a rigid per-se rule. *Ivanhoe Pr's*, 535 A.2d at 1337.

Marvel v. Conte, 1978 Del. Ch. LEXIS 618, at *10 (Del. Ch. Oct. 23, 1978), and where, as here, specific performance is impossible or impracticable, the Court of Chancery will not order it. *See W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *13 (Del. Ch. Nov. 2, 2007) ("[E]quity will not grant specific performance of a contract if it cannot . . . carry out enforcement of the order), *cert. denied*, 2007 WL 4357667 (Del. Ch. Dec. 6, 2007) (citation omitted); *Marvel*, 1978 Del. Ch. LEXIS 618, at *10 (holding that where a condition precedent to the enforcement of the contract — in this case SEC approval — has not been met, specific performance may not be granted). Landry's cannot force the SEC, an independent third party, to accept a revised proxy without disclosure of the Amended Debt Commitment Letter and the Company cannot force the Lending Banks, also independent third parties, to disclose the contents of the letter to the SEC. *See W. Willow-Bay Court,* 2007 WL 3317551, at *13 (specific performance is inappropriate where it requires the Court to force a third party to act when the third party is not otherwise obligated to do so). Moreover, as stated previously, there is no financing available to complete a $21 per share transaction. Specific performance is therefore an impracticable remedy in this case.

* * *

Because Plaintiff is unable to rebut the presumptions of the business judgment rule, and because Plaintiff seeks an impracticable specific performance remedy, Count III should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

IV. COUNT IV FAILS TO COMPLY WITH RULE 23.1 AND FAILS TO STATE A DERIVATIVE CLAIM.

In Count IV, Plaintiff seeks to assert an alternative derivative claim against the Board for failure to seek a reverse termination fee. Compl. ¶¶ 93-101. While the claims in Count IV are

vaguely worded, Plaintiff appears to allege that the Board's failure to seek or insist on the payment of Reverse Termination Fee constituted waste.

A. Plaintiff Failed To Make Demand Or Plead Demand Futility In Accordance With Rule 23.1

The board of directors of a corporation manages the business and affairs of the corporation. 8 *Del. C.* § 141(a). "The decision to bring a law suit or to refrain from litigating a claim on behalf of a corporation is a decision concerning the management of the corporation." *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990). Accordingly, Delaware law imposes certain prerequisites on a putative stockholder plaintiff's right to sue derivatively on behalf of the corporation. *Spiegel*, 571 A.2d at 773. Thus, Chancery Court Rule 23.1 ("Rule 23.1") requires such plaintiffs to allege in their complaint, with particularity, either that they have demanded that the board of directors pursue the corporate claim and that demand has been wrongfully refused, or that the making of such a demand would be futile. Ct. Ch. R. 23.1; *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993). Plaintiff concedes that it did not make demand on the Board, (Compl. ¶ 95), and therefore cannot proceed with its derivative claims unless the Complaint pleads with particularity allegations of fact demonstrating that such a demand would have been futile. *See Rales*, 634 A.2d at 935.

1. The Complaint Fails To Plead Particularized Facts Sufficient To Create A Reasonable Doubt That A Majority Of The Board Was Independent And Disinterested.

When a plaintiff challenges an act of the board of directors and asserts that demand is futile, the Court applies the two-part test as adopted under *Aronson v. Lewis*. "Under the familiar *Aronson* test, to show demand futility, plaintiffs must provide particularized factual allegations that raise a reasonable doubt that '(1) the directors are disinterested and independent [or] (2) the

challenged transaction was otherwise the product of a valid exercise of business judgment.'" *Citigroup*, 964 A.2d at 119 (*quoting Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000)).[16] Plaintiff does not allege (*see* Compl. ¶¶ 12-20) that demand should be excused under the first prong of *Aronson*, and demand therefore cannot be excused under that test.

2. The Complaint Fails To Plead Particularized Facts Sufficient To Create A Reasonable Doubt That Terminating The Merger Agreement Was Not A Valid Exercise Of Business Judgment.

Plaintiff's demand futility argument relies solely on the second prong of *Aronson*; specifically alleging, "acts forming the basis of Plaintiff's derivative claim are so egregious on their face that the Board's conduct cannot meet the test of valid business judgment; thus, a substantial likelihood of liability exists." Compl. ¶ 5.[17] As the business judgment rule is "a presumption that directors making a business decision, not involving self-interest, act on an informed basis, in good faith and in the honest belief that their actions are in the corporation's best interest," *Grobow*, 539 A.2d at 187 the Court may not "assume that the transaction was a wrong to the corporation requiring corrective measures by the board." *Pogostin v. Rice*, 480

[16] The pleading requirement of Rule 23.1 is "an exception to the general notice pleading standard," and a plaintiff's pleading burden is thus "more onerous than that required to withstand a Rule 12(b)(6) motion to dismiss." *Levine v. Smith*, 591 A.2d 194, 207, 210 (Del. 1991).

[17] One of the difficulties in analyzing the claims set forth in the Complaint is that Plaintiff's claims for relief are not set forth clearly. For example, Plaintiff appears simultaneously to argue that (i) demand should be excused under the second prong of *Aronson* (the test for analyzing demand futility when a Board's affirmative actions are challenged), and (ii) demand should be excused under the analysis set forth in *Rales v. Blasband* (the test for analyzing demand futility when a Board is challenged for its *inaction*). The analysis set forth below assumes that the Complaint is challenging the Board's decision to terminate the Merger Agreement. Even if *Rales* were the proper standard, however, the conclusions set forth herein with respect to the merits of Plaintiff's claim would remain largely the same.

Similarly, it is difficult to ascertain whether Count IV is a straightforward claim for corporate waste, or is seeking relief on a bad faith theory. The standards utilized by a Court in analyzing a bad faith claim are similar to those that relate to a claim for corporate waste. *White v. Panic*, 783 A.2d 543, 554 n.36 (Del. 2001). Accordingly, the conclusions reached below would apply regardless of which theory was advanced by Plaintiff.

A.2d 619, 724 (Del. 1984). Instead, Rule 23.1 requires Plaintiffs to "plead particularized facts creating a reasonable doubt as to the 'soundness' of the challenged transactions sufficient to rebut the presumption that the business judgment rule attaches to the transaction." *Levine*, 591 A.2d at 206. This is a substantial burden since the second prong of *Aronson* is "directed to extreme cases in which despite the appearance of independence and disinterest a decision is so extreme or curious as to itself raise a legitimate ground to justify further inquiry and judicial review. The test for this second stage is thus necessarily high, similar to the legal test for waste." *Kahn v. Tremont Corp*., 1994 WL 162613, at *6 (Del. Ch. Apr. 21, 1994, *revised* Apr. 22, 1994); *Glazer v. Zapata Corp*., 658 A.2d 176, 183 (Del. Ch. 1993) ("Directors are guilty of corporate waste, only when they authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.").

Here, the Complaint alleges that the Landry's Board "abandoned a termination fee for no other purpose other than to further enrich Fertitta." Compl. ¶ 71 The Complaint concedes, however, that the decision to terminate the Merger Agreement was due to pressure from the Lending Banks. Compl. ¶ 64. As demonstrated above, the Company had no choice but to terminate the transaction in order to preserve the Company's alternative financing. *Supra* pp. 8-12. Revised Proxy at 64-66. The decision to terminate the agreement was made in good faith and was required to ensure the Company's continued viability. The Board entered into this decision after forming, and being advised by, a Special Committee of independent directors which retained independent financial and legal counsel. Compl. ¶¶ 26, 39. This Court has stated that to excuse demand on grounds of waste, "the complaint must allege particularized facts showing that the corporation, in essence, gave away assets for no consideration." *Green v.*

Phillips, 1996 WL 342093, at *5 (Del. Ch. June 19, 1996). The Complaint, quite simply, does not plead sufficient particularized facts to conclude that the Director Defendants failed to exercise due care, nor do the allegations in the Complaint raise a reasonable doubt that the Board's exercised valid business judgments in terminating the Merger Agreement.

If a "legitimate business purpose[]" is apparent from a derivative complaint, the allegations cannot meet the second prong of *Aronson* and thus, demand is not excused. *See Grobow*, 539 A.2d at 189-90; *Unocal* 493 A.2d at 954; *Levine*, 591 A.2d at 207. Here, not only did terminating the Merger Agreement have a valid business purpose, but that purpose is evident on the face of the Complaint. *See* Compl. ¶ 5.[18]

Because a valid business purpose for the termination of the Merger Agreement is evident from the face of the Complaint, and the Company received appropriate consideration for its decision to terminate, Plaintiff's claims do not raise a reasonable doubt that the Board's decision to terminate the agreement was not a valid exercise of the director defendants' business judgment.

V. DISCOVERY IN THIS CASE SHOULD BE STAYED PENDING RESOLUTION OF THIS MOTION TO DISMISS.

Plaintiff filed this action on February 5, 2009, and has since filed a request for production of documents. "Ordinarily, where a motion to dismiss is made a Court will direct that discovery be held in abeyance in the absence of a showing of a need that the discovery continue because it is always desirable to avoid the cost and inconvenience of unnecessary discovery." *Weinberger*

[18] In addition, to the extent that Plaintiff's attempts at artful pleading have obfuscated the additional consideration received by Landry's in renegotiating the Merger Agreement and terminating the Amended Agreement, the valid business purpose is clearly described in the omitted portions of the January 12 Press Release and the Revised Proxy. *See supra* pp. 15-16.

v. Amstar Corp., 1984 WL 19474, at *1 (Del. Ch. Jan. 16, 1984). The basis of the Court's authority to enter such an order is found in Court of Chancery Rule 26(c). *Weiss v. LeeWards Creative Crafts*, 1992 WL 65410, at *1 (Del. Ch. Mar. 30, 1992) ("Under Chancery Court Rule 26(c), I clearly have the authority to grant a motion to stay discovery.").

"The burden on the party seeking such a stay is only to establish 'some practical reason' why discovery should be stayed." *TravelCenters of Am. LLC v. Brog*, 2008 Del. Ch. LEXIS 172, at *3 (Del. Ch. Nov. 21, 2008) (footnote omitted). With respect to the "practical reason" standard, this Court has held that "[a] desire to avoid the onus of even ordinary types of discovery may be sufficient." *Skubick v. New Castle County*, 1998 WL 118199, at *2 (Del. Ch. Mar. 5, 1998).

A balance of the hardship and expense to all parties if discovery were to proceed unnecessarily, against the absence of any injury to Plaintiff were the stay to be granted and the motion to dismiss denied, weighs heavily in favor of granting the stay. *See Corp. Prop. v. AmerSig Graphics, Inc.*, 1993 WL 534986, at *1 (Del. Ch. Dec. 9, 1993). Granting the motion to dismiss would obviate the need for all or a significant portion of required discovery. This Court's "policy of staying discovery in order to prevent unnecessary burden and expense" should be upheld, and the motion to stay discovery pending resolution of the motion to dismiss should be granted. *TravelCenters*, 2008 Del. Ch. LEXIS 172, at *11.

CONCLUSION

For the aforementioned reasons, Defendants respectfully request that the Court grant the Motion to Dismiss in its entirety and with prejudice and grant a stay of discovery pending its resolution of the Motion to Dismiss.

/s/ Scott W. Perkins
Thomas A. Beck (No. 2086)
Daniel A. Dreisbach (No. 2583)
Meredith M. Stewart (No. 4960)
Scott W. Perkins (No. 5049)
Richards, Layton & Finger, P.A.
One Rodney Square
920 N. Market Street
Wilmington, DE 19801
(302) 651-7700

Attorneys for Defendants.

OF COUNSEL:

David D. Sterling
Danny David
Baker Botts L.L.P.
One Shell Plaza
910 Louisiana Street
Houston, Texas 77002-4995
(713) 229-1234

Dated: April 2, 2009