IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND STAY DISCOVERY

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Plaintiff Louisiana Municipal Police Employees' Retirement System ("Plaintiff"), respectfully submits this opposition to the motion to dismiss (the "Motion") the Class Action and Derivative Complaint ("Complaint" or "Compl.") filed by Tilman Fertitta, the Chairman, CEO and – by virtue of the events challenged in the Complaint – the controlling shareholder of Landry's Restaurants Inc. ("Landry's" or "the Company"), two acquisition entities created by Fertitta as part of a planned takeover of the Company, and the Company's board of directors (the "Landry's Board" or "Board").

I. PRELIMINARY STATEMENT

In June 2008, Landry's Chairman and CEO, Fertitta, agreed to pay a large premium to purchase the 60% of the Company's shares that he did not already own. Three months later in September 2008, Hurricane Ike made landfall in Texas, causing nominal damage to the Company's facilities and the global credit crisis, which began in August 2007, continued to affect the markets. The merger agreement between the CEO and the Company did not provide the buyer with any right to walk away from the deal without at least paying a reverse termination fee and expressly provided that any "Act of God" or general economic conditions would ***not*** constitute a "Material Adverse Event" ("MAE") justifying abandonment of the deal. The hurricane and credit crisis should have been non-events in the weeks leading to closing of the deal.

The CEO, however, turned these events into an opportunity to repudiate the June 2008 merger agreement to his own personal benefit. As a result of the CEO's heavy-handed tactics in driving the agreed-upon merger price down and his purchases of Landry's stock at depressed prices, the CEO improperly took control of the Company without paying any control premium. Meanwhile, the Special Committee charged with protecting Landry's shareholders' interests from an inherently conflicted buyer not only stood by idly as his scheme took place, but they became his chief enabler.

Among other things, the CEO:

- Contacted his and the Company's banks immediately following the hurricane, even before the banks commenced any investigation into Landry's condition, to explore their views on how these events could affect the deal (Compl. ¶¶ 5, 34);

- Told the Special Committee that he and the banks would "likely" determine that Hurricane Ike and the credit crisis were MAEs, even though the Debt Commitment Letter, just like the Merger Agreement, excluded "natural disasters or act of god" and "any change in . . . economic conditions" as MAEs (Compl. ¶ 29);

- When the Committee expressed doubt that the hurricane could conceivably excuse Fertitta's obligations under the merger agreement, he raised the stakes by "suggesting" that any pushback by the Special Committee would result in the Company's banks refusing to refinance its upcoming $400 million debt repayment unless they agreed to slash the previously agreed upon merger price (Compl. ¶¶ 35, 48);

- Forced a drastic downward revision of the deal price that caused the stock price to plummet, and then purchased enough shares on the open market to gain economic control of the Company without ever having to close the deal (Compl. ¶¶1, 7, 8, 55-58); and

- Used a routine SEC information request – which sought an amended version of a debt commitment letter that had previously been disclosed to the public – as a basis to avoid closing even the drastically renegotiated transaction (Compl. ¶¶ 1, 8).

The Special Committee was not just supine in the face of the CEO's self-interested conduct. They facilitated his result. The Special Committee invited mischief by giving the conflicted CEO exclusive domain over negotiations with the Company's lenders. When they heard the CEO express his supposed concern that the hurricane and credit crisis constituted an "MAE" for the Company, the Special Committee also knew that the CEO had recently purchased 400,000 Landry's shares in the open market. The Special Committee recognized the problem, since they asked Fertitta to stop buying shares in the open market, but the CEO refused, and the Special Committee simply dropped the issue without lifting a finger to protect the shareholders from the obvious threat of a creeping takeover. When the Committee asked why the banks would conceivably be willing to refinance the debt if the deal happened at a lower price but would refuse to refinance the debt if no deal ever happened, they dropped the issue with no response.

On January 5, 2009, the Company issued a revised proxy statement (the "Revised Proxy"), which includes a "Background of the Merger" discussion that is exceptional, and if one is willing to "read between the lines," serves as a harsh indictment of the CEO. The Revised Proxy confirms that "the special committee had not received any information that would lead it to believe that a material adverse effect under the original merger agreement had occurred." Instead, in an evident effort to exculpate themselves from the harms suffered by Landry's shareholders, the Special Committee asserted in the Revised Proxy that it was prepared to pursue litigation to enforce the merger agreement, but concluded that litigation between the Company, on the one hand, and the Company's CEO and chief financing sources, on the other, would be destabilizing.

Rather than opposing the CEO's heavy-handed tactics, the Board meekly accepted a revised merger agreement at a dramatically lower price. After the Company's stock price plummeted on the news that the deal was being renegotiated and with no standstill agreement or poison pill constraining the CEO's actions, he proceeded promptly to buy enough shares on the open market so that by early December 2008, he owned majority control of the Company while the deal remained pending. At this point, closing the merger and paying a control premium to the shareholders became not only superfluous, but would raise needless problems for Fertitta, because the transaction would plainly be subject to the entire fairness standard as a result of the CEO's most recent share purchases.

Fortunately for the CEO, a routine information request by the SEC provided just the pretext to not close the deal while still enjoying his newfound control position. When the original merger agreement was disclosed, so too was the original Debt Commitment Letter from the Company's and CEO's financing sources. As Defendants' brief ("Def. Br.") highlights, "the revised proxy also contains a detailed explanation of the Amended Debt Commitment Letter…" (Def. Br. at 13.) Despite extensive prior disclosure relating to the debt commitment, the Company's banks (who had already played along with Fertitta's plan) purportedly asserted that the SEC's request violated the confidentiality terms of the amended debt commitment.

At this point, the Board went from abdicating its duties to making a decision that is on its face inexplicable. Even if the banks chose not to finance the transaction, the amended merger agreement required the CEO to pay a reverse termination fee. The Board, however, absolved the CEO of even this minimal obligation by causing the Company itself to terminate the merger agreement. Landry's stock again plummeted after this gift and has languished ever since.

The above actions and events are more than sufficient to state claims for breach of fiduciary duty by the CEO as well as the Board. The Defendants' arguments for dismissal are remarkable in what they do not say. In particular, Defendants ***never*** assert that the CEO's conduct is or ever could be appropriate by a fiduciary against his shareholders. Instead, Defendants assert that any faithless conduct is excused because the CEO was acting in his capacity as a shareholder and this Court should ignore his fiduciary hat. Defendants' own cases undermine their argument. *See* Section III.B.1 below. The fact of the matter is that no simple shareholder is in a position to manipulate the availability of corporate financing. Also, as shown by recent lawsuits by boards against third party bidders who wrongfully refused to perform their takeover related contracts, the Company's Board was cowed from pursuing clear corporate rights primarily because of Fertitta's corporate position and domination.

Next, Defendants argue that because the CEO was not a controlling shareholder at the time he pressed the Board to renegotiate the original merger agreement, the CEO's and the Board's actions are protected by the business judgment rule. Defendants ignore that the protection of the business judgment rule disappears when disloyal conduct by one fiduciary undermines, taints, or co-opts the actions of other fiduciaries. *See* Section III.C below.

Defendants change the subject by dedicating six pages of their brief to refuting an insider trading claim that was never really made. (Def. Br. at 24-29.) The CEO's purchase of shares, at a time he knew about the Company's strong progress in resolving any residual harm from the hurricane and at a time he knew that the Company would soon be a controlled one, does in fact constitute improper securities trading by a fiduciary. But Plaintiff does not allege these facts as a standalone insider trading claim. Rather, these purchases are part and parcel with the CEO's overall scheme to wrest control of the Company from unknowing and unprotected shareholders.

For its part, the rest of the Board walks a fine line in its dismissal arguments. The Board argues that it was not self-interested and that it was independent of the CEO, and therefore its "judgments" warrant judicial protection. In the Revised Proxy, however, the Board strongly suggests that the only judgment it made in allowing the renegotiation of the agreement was that suing the CEO was unappetizing. As to terminating the agreement such that the CEO could avoid paying a penny to shareholders or the Company, the Committee throws up its hands, asserting that doing so "was the *only* rational decision the Special Committee was in a position to make." (Def. Br. at 41.) Waiving millions of dollars in fees owed by the CEO constitutes corporate waste, and is not a rational business judgment.

When all is said and done, this Court can and should require discovery and force these fiduciaries to explain their actions. It may ultimately turn out that the Special Committee's conduct is, as they may well suggest, understandable considering the strong-arm tactics to which the CEO subjected them. But that is not a matter that can be decided today or on this record. Defendants' motion to dismiss should be denied.

II. STATEMENT OF FACTS

A. PARTIES

Landry's is a national restaurant, hospitality and entertainment company that owns and operates 179 full-service, casual dining restaurant dispersed in 28 states. (Compl. ¶ 24.) Landry's also owns and operates select hospitality businesses, including the Golden Nugget Hotels and Casinos in Las Vegas and Laughlin, Nevada. *Id.* Fertitta has served as Landry's Chairman, CEO and President since founding the Company in 1987. (Compl. ¶¶ 1, 15.) Fertitta owned 39% of Landry's stock prior to making his takeover offer in January 2008. (Compl. ¶ 1.) The other members of Landry's Board include, Steven L. Scheinthal, Kenneth Brimmer, Michael S. Chadwick, Michael Richmond, and Joe Max Taylor (referred to collectively as the "Landry's Directors" or the "Director Defendants"). (Compl. ¶¶ 16-20.)

Fertitta Holdings, Inc. ("FHI") is a Delaware corporation wholly owned by Fertitta. (Compl. ¶ 23.) FHI wholly owns its subsidiary, Fertitta Acquisition Co. ("FAC"), a Delaware corporation formed to be the acquiring entity in Fertitta's buyout plan. *Id.*

B. FERTITTA'S INITIAL OFFER TO ACQUIRE LANDRY'S

On January 27, 2008, Landry's issued a press release disclosing that Fertitta had provided the Landry's Board with a letter (the "Proposal Letter") offering to acquire all of the Landry's common stock he did not already own for $23.50 per share (the "Initial Offer"). (Compl. ¶ 25.)[1] The Initial Offer represented a 41% premium over the closing

[1] *See* Landry's Restaurants, Inc's Press Release dated January 27, 2008 (attached as Exhibit A to the accompanying Declaration of Mark Lebovitch ("Lebovitch Decl.")).

price of Landry's common stock on January 25, 2008. *Id*. The press release also stated that "[a]ccording to the Proposal Letter, Mr. Fertitta is confident that he can obtain all the required financing to fund the transaction given that he will be contributing all of his approximately 39% equity ownership of the Company, as well as additional substantial cash equity." *Id.*

Landry's Board formed a special committee (the "Special Committee"), comprised of Messrs. Brimmer, Chadwick, and Richmond, to assess the Initial Offer and consider any alternate proposals. (Compl. ¶ 26.) The Special Committee, however, waited until April 2, 2008, nearly three months after Fertitta made his Initial Offer, before retaining its financial and M&A advisor, Cowen & Company LLC ("Cowen"). *Id.*

C. THE BOARD AGREES TO SELL LANDRY'S FOR $21 PER SHARE

Rather than accepting Fertitta's Initial Offer of $23.50 per share or negotiating an increase, on June 16, 2008, Landry's Board agreed to sell the Company for $21 a share (the "Merger Agreement"). (Compl. ¶ 27.)[2] The total consideration to be paid to Landry's public shareholders amounted to approximately $220 million, representing a 37% premium over the Landry's share price just prior to the disclosure of the Initial Offer. *Id.* The Merger Agreement, which was filed with the SEC, contained a "two-way termination fee" pursuant to which: (a) 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 (b) FAC would be required to pay the Company a $24 million reverse termination fee if FAC failed to close

[2] *See* Merger Agreement between Landry's Restaurants, Inc., Fertitta Holdings, Inc., and Fertitta Acquisition Co., dated June 16, 2008 (Lebovitch Decl. Ex. B).

the deal (the "Reverse Termination Fee"). (Compl. ¶ 28.) Fertitta personally guaranteed the payment of the Reverse Termination Fee and expense reimbursement obligations of FAC. Notably, FAC and Fertitta had obtained a committed debt financing package, and Fertitta and FAC were fully responsible to pay the Reverse Termination Fee in the event the financing fell through for any reason. (Compl. ¶ 28.)

The Merger Agreement excused FAC (and thereby, Fertitta) from paying the Reverse Termination Fee, however, if a ***material adverse effect*** ("MAE") occurred prior to the date on upon which the buyout closed. (Compl. ¶ 29.) The Merger Agreement's definition of MAE specifically excluded certain occurrences, meaning that such occurrences would ***not*** excuse Fertitta from his Reverse Termination Fee obligations:

> [A]ny Effect resulting from, arising out of or relating to any of the following, either alone or in combination: … (B) any change in interest rates or general economic conditions (i) in the industries or markets in which the Company or any of its subsidiaries operates, (ii) affecting the United States or foreign economies in general or (iii) in the United States or foreign financial, banking or securities markets, in each case which changes do not affect the Company and its subsidiaries to a materially disproportionate degree; (C) any natural disaster or act of God…. *Id.*

The debt commitment letter (the "Debt Commitment Letter")[3] between the banks financing the buyout[4] and Fertitta also included an MAE clause that could have excused the Lending Banks from funding Fertitta's buyout under certain conditions. (Compl. ¶ 30.) The Debt Commitment Letter's MAE clause contained an identical exception for a

[3] *See* Initial Debt Commitment Letter issued by Jefferies Funding LLC, Jefferies Finance LLC, and Wells Fargo Foothill, LLC attached to a Schedule 13D filed on June 17, 2008 (Lebovitch Decl. Ex. C).

[4] The Lending Banks consisted of three entities affiliated with Jefferies & Co., Inc. ("Jefferies") and Wells Fargo Foothill.

"natural disaster or act of God" and a virtually identical exception for "***any change in interest rates or general economic conditions in the industries or markets in which the Company or any of its subsidiaries operates*** or affecting the United States or foreign economies in general or in the United States or foreign financial, banking or securities markets (which changes do not affect the Company and its subsidiaries to a materially disproportionate degree)." *Id.*

D. FERTITTA USES HURRICANE IKE AS A PRETEXT FOR FORCING A DRASTIC REDUCTION IN THE BUYOUT PRICE

On September 13, 2008, Hurricane Ike hit Galveston, Texas, causing limited damage to certain of the Company's restaurants and other properties in three cities (Galveston, Kemah, and Houston). (Compl. ¶ 31.) On September 17, 2008, Landry's issued a press release[5] portraying the damage caused by Hurricane Ike as geographically limited and temporary, and explaining that insurance largely covered the Company's losses. (Compl. ¶ 32.) In the press release, Fertitta stated: "I am committed to reopening our operations in both Kemah and Galveston as soon as possible. After our rebuilding, we will have even newer and better facilities than before . . . ." *Id.*

Although the price of Landry's stock fell briefly in response to the news, it quickly recovered so that, within days after the press release, it traded ***above*** the pre-Merger announcement price. (Compl. ¶ 33.) Notwithstanding his publicly optimistic comments, Fertitta initiated contact with the Lending Banks immediately after Hurricane Ike. (Compl. ¶ 34.)

[5] *See* Landry's Restaurants, Inc.'s Press Release dated September 17, 2008 (Lebovitch Decl. Ex. D).

On September 15, 2008, Fertitta contacted the Lending Banks to notify them of the damages to the Company's properties by Hurricane Ike.[6] On September 18, 2008 – five days ***before*** the Lending Banks commenced any investigation into the damage Landry's incurred from Hurricane Ike – Fertitta then sent a letter to the Special Committee that was not made public but is described in the Revised Proxy as stating that:

> due to (a) the damage to our properties in Galveston, Kemah and Houston arising out of Hurricane Ike, (b) the turmoil in the credit markets and (c) continued worsening of general economic conditions, [Fertitta] ***believed*** that [the Lending Banks] ***would likely*** determine that a material adverse effect, as defined in [the] debt commitment letter issued to Mr. Fertitta, had occurred, which would result in [the Lending Banks] withdrawing the debt commitment letter for the acquisition financing for the merger. (Compl. ¶ 35 (emphasis added).)

Fertitta warned that if the Lending Banks "withdrew their debt commitment letter because of a material adverse effect, Fertitta may have no choice but to exercise his right to terminate the original merger agreement." *Id.* Fertitta concluded the letter by expressing his purported: (i) "concern about the willingness of the [Lending Banks] to provide any financing absent a reduction in the leverage in the debt financing," and (ii) belief that he could "persuade the Lending Banks to move forward with debt financing if [he] revised his offer to reflect [Landry's] reduced value, which he believed at such time was ***$17.00*** per share." *Id.* Notably, Fertitta's letter, as described in the Revised Proxy, does not state that the Lending Banks had actually determined or were even taking the position that an MAE had occurred. Instead, the Revised Proxy emphasized that Fertitta ***believed*** that they may do so. (Compl. ¶ 36.) While sending his September 18, 2008

[6] *See* Landry's Restaurants, Inc.'s Schedule 14A dated January 5, 2009 (Lebovitch Decl. Ex. E, at 38).

letter to the Special Committee that suggested that an MAE event had been triggered under the Merger Agreement, Fertitta purchased 400,000 shares of Landry's stock on the open market on September 17, 18, and 19, 2008 at prices ranging from $11.83 to $14.11. (Compl. ¶ 37.)

The Special Committee held a teleconference on September 19, 2008 where they discussed, among other things, whether Hurricane Ike or the potential difficulties in the credit markets constituted a "material adverse effect," as well as Fertitta's purchases of Landry's shares on the open market. (Compl. ¶ 38.) The Special Committee did not attempt to verify whether, as Fertitta claimed, the Lending Banks considered any of the events to be "material adverse effects." (Compl. ¶ 42.) Moreover, the Special Committee focused its concern during this meeting on whether these developments would affect the Company's ability to refinance up to $400 million of its debt that could become due at the end of February 2009 if certain note holders exercised their right to redeem such notes. (Lebovitch Decl. Ex. E, at 40.)[7] In fact, the Special Committee, rather than conducting the negotiations itself, told its counsel to emphasize to Fertitta and his counsel the importance of a plan to refinance the $400 million of indebtedness in the event that the merger did not close as part of the terms of the buyout. *Id.* The Special Committee, therefore, encouraged Fertitta to act in his role as a CEO while negotiating with the Lending Banks to secure financing, not only for Fertitta's buyout transaction, but also for the Company's financing in the event that the buyout did not occur.

[7] Plaintiffs agree with Defendants' assertion that in deciding a motion to dismiss, a court may consider any document that is integral to a plaintiff's complaint and incorporated by reference. Def. Br. at 3, n. 1. *See also Orman v. Cullman*, 794 A.2d 5, 15-16 (Del. Ch. 2002).

The Special Committee also discussed Fertitta's "best efforts" obligation to close the going private financing under the Debt Commitment Letter, and instructed its independent counsel to send a letter to Fertitta's counsel requesting information concerning Fertitta's financing efforts. (Compl. ¶¶ 38-39.) In a letter dated September 25, 2008, Fertitta responded to the Special Committee's request by asserting that he had "spoken to a number of financial institutions" and that "no financial institution [outside of Jefferies and Wells Fargo Foothill] that he approached expressed any significant interest" in financing the proposed acquisition. (Compl. ¶ 40.) The Special Committee again failed to verify any of Fertitta's claims. (Compl. ¶ 42.)

E. THE SPECIAL COMMITTEE SUCCUMBS TO FERTITTA'S TACTICS

As subsequently disclosed in the Revised Proxy, the Special Committee feared that if it sought to enforce the original Merger Agreement on its terms, the Company would find itself in litigation against Fertitta and the Lending Banks, which could ultimately impact the Company's business and its ability to refinance up to $400 million of its debt that would potentially mature in February 2009. (Lebovitch Decl. Ex. E, at 46, 48.) The Company proposed a $19 per share counteroffer to Fertitta's $17 per share offer "for negotiation purposes" only. (Compl. ¶ 43.) In response, on October 6, 2008, Fertitta informed the Special Committee that he ***believed*** the Lending Banks would declare that an MAE had occurred despite his purported best efforts to compel the Lending Banks to move forward. (Compl. ¶ 44.) Again, the Special Committee took no efforts to confirm the information supplied by Fertitta concerning the Lending Banks' position. *Id.*

Instead, on October 7, 2008, the Company issued a press release[8] informing investors for the first time that Fertitta had informed the Special Committee "that in view of the closure of the Company's Kemah and Galveston properties, the instability in the credit markets, and the deterioration in the casual dining and gaming industries, the debt financing required to complete the pending transaction is ***in jeopardy*** at the current $21.00 per share price." (Compl. ¶ 45.) At the same time, the press release noted that the damage from Hurricane Ike was being repaired at a rapid pace, with the last of the damaged properties expected to be fully reopened by spring 2009. (Compl. ¶ 46.) The press release did not, however, disclose that Fertitta had proposed a revised $17 per share price, or that the Committee had countered at $19 per share, leaving shareholders with no framework for assessing the severity of the problem. After the announcement of the possible renegotiation of the Merger without any disclosure of a floor to the possible renegotiated price, Landry's stock declined more than 35%, to $8.44 per share in the three following trading days. (Compl. ¶ 47.)

Fertitta quickly took advantage of the plummeting stock price, lowering his offer from the previously reduced price of $17.00 per share to $13.00 per share on October 10, 2008, which represented a 40% discount from the Initial Offer. (Compl. ¶ 49.) Fertitta and his advisors spoke that day with the Special Committee about possible modifications to the Merger Agreement's terms, as well as the Lending Banks' willingness to refinance the Company's debt. *Id.*

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[8] *See* Landry's Restaurants, Inc.'s Press Release dated October 7, 2008 (Lebovitch Decl. Ex. F).

On October 18, 2008, the Company issued a press release[9] announcing that Fertitta and Landry's reached an amended merger agreement (the "Amended Agreement"), reducing the previously agreed upon sale price, from $21 per share to $13.50 per share. (Compl. ¶ 50.) The press release attributed the Company's decision to Fertitta's assertions that financing the buyout could be in jeopardy. (Compl. ¶ 51.) According to the press release, as consideration for the 40% discount to the previously agreed upon price, shareholders would receive a commitment from the Lending Banks and Fertitta not to assert an MAE. *Id.*

This purported consideration for Landry's shareholders, however, was completely illusory, as neither Fertitta nor the Lending Banks had any legitimate claim that an MAE had occurred under the Merger Agreement or the Debt Commitment Letter. (Compl. ¶ 52.) Indeed, as later disclosed in the Revised Proxy, "the special committee had not received any information that would lead it to believe that a material effect under the original merger agreement had occurred." (Compl. ¶ 53.) The Revised Proxy went so far as to suggest the following reason for the Special Committee's agreement to modify an ***existing, binding agreement*** in the absence of any legal obligation to do so: the failure to modify the agreement would almost assuredly result in litigation against the Company's own CEO, and the Lending Banks, which potentially could jeopardize the Company's ability to refinance the $400 million of debt that could become due in February 2009. *Id.* Also, a lawsuit against Fertitta and the Lending Banks to enforce the original agreement

[9] *See* Landry's Restaurants, Inc.'s Press Release dated October 18, 2008 (Lebovitch Decl. Ex. G).

would have exposed the Board's failure to take any real steps to protect the shareholders from Fertitta's conduct. (Compl. ¶ 54.)[10]

For example, during its meeting on September 19, 2008, the Special Committee had discussed that Fertitta had purchased an aggregate of 400,000 shares on the open market between September 17-19, 2008, and the potential impact of such purchases on the Merger. (Lebovitch Decl. Ex. E, at 41.) The Special Committee then proposed a term requiring Fertitta to refrain from purchasing shares of Landry's common stock in the open market during the pendency of the Amended Agreement. (*Id*. at 52.) Fertitta's counsel told the Special Committee that Fertitta would not agree to refrain from purchasing shares of Landry's common stock in the open market, but the Revised Proxy does not provide any explanation why Fertitta refused to do so or why the Board simply accepted Fertitta's refusal to agree to a standstill. (*Id*. at 53.) Nor does the Revised Proxy contain any evidence that the Board discussed implementing a poison pill to protect shareholders from the obvious problem that Fertitta's open market purchases of Landry's common stock posed, or any other way to prevent Fertitta from seizing control of the Company on the cheap while the buyout was pending. (Compl. ¶ 59.) Any lawsuit against Fertitta would have brought to light this egregious failure to act. A lawsuit against Fertitta would also have further exposed the Special Committee's encouragement

[10] Defendants assert that Plaintiff ignores the press release's explanation of additional consideration that the Landry's shareholders purportedly received under the Amended Agreement. In this regard, the press release states that "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". (Def. Br. at 11-12.) Instead of showing that Landry's shareholders received additional consideration under the Amended Agreement, this statement highlights that Fertitta acted inappropriately by appearing on both sides of the transaction with the Special Committee's improper authorization.

of Fertitta to act in his role as CEO while negotiating the terms of the Merger with respect to the Company's ability to refinance its $400 million in debt, which potentially would become due in February 2009. (Lebovitch Decl. Ex. E, at 50.) Indeed, at the Special Committee's request, Fertitta had acted as CEO and part of Landry's "management" when he negotiated terms with the Lending Banks to ensure that the Company had a plan to refinance its potentially $400 million in indebtedness in the event that the going-private transaction was not consummated. *Id*. The Special Committee placed Fertitta in position to control the flow of information between the Lending Banks and the Company. As a result, Fertitta was able to manipulate the information provided to the Company, set the terms of the Merger Agreement and the debt refinancing, and bend the Special Committee to his will in drastically lowering the Merger price.

F. FERTITTA ACQUIRES CONTROL OF THE COMPANY ON THE OPEN MARKET TO DEPRIVE PAYING LANDRY'S SHAREHOLDERS A CONTROL PREMIUM

With the Amended Agreement in hand, between October 20, 2008 and December 2, 2008, Fertitta immediately took advantage of Landry's discounted stock price by making 22 purchases of Landry's stock on the opening market – many at under $11 a share. (Compl. ¶ 55.) In fact, Fertitta never paid more than $11.72 per share – a steep discount to even the Amended Agreement's price of $13.50 per share. *Id.* Moreover, at that time Fertitta possessed material inside information about the Company's progress in dealing with the effects of Hurricane Ike, his own manipulation of his powers as CEO, the Special Committee's deliberations, and conversations with the Lending Banks, which he used in breach of his fiduciary duties. (Compl. ¶ 58.)

As a result of his illicit purchases of Landry's shares on the open market and his breach of his fiduciary obligations, Fertitta obtained control of the Company without having to pay a control premium to shareholders. (Compl. ¶ 57.) Specifically, by December 2, 2008, Fertitta (and his affiliated entities) owned 9.66 million Landry's shares (including restricted stock and options), which constituted 56.7% of all outstanding shares of Company stock, in contrast to the 6.63 million Landry's shares that he owned (or 39% of all outstanding shares) as of June 16, 2008 when he proposed the Initial Offer. (Compl. ¶ 56.)

By December 2, 2008, Fertitta had accomplished his goal of obtaining control of Landry's without paying a control premium to Landry's shareholders. He then sought to manufacture a means to kill the deal, saddle Landry's shareholders with substantial unreimbursed transaction expenses, and avoid paying his termination fee obligations to the Company. (Compl. ¶ 61.)

G. LANDRY'S BOARD ALLOWS FERTITTA TO ESCAPE HIS OBLIGATIONS UNDER THE MERGER AGREEMENT

Since Fertitta clearly was a majority shareholder by the end of 2008, had he closed the Amended Merger, the transaction would plainly be subject to the "entire fairness" standard, which the Revised Proxy made clear Fertitta could not satisfy. Accordingly, the Revised Proxy combined with his economic controlling status created an additional incentive for Fertitta to cancel the transaction, which he promptly did within the week.

On January 11, 2009, Landry's shocked the market by announcing that the Company had terminated the previously announced buyout and agreed to release Fertitta from his obligations under the Amended Agreement under the guise that the SEC requested that the Company disclose "certain information" available from the debt commitment letter, which the Lending Banks were not willing to make available. (Compl. ¶ 64.) Notably, even where debt commitment letters include a confidentiality clause, they routinely allow for disclosure required by law, including SEC requests. *Id*. In fact, the original Debt Commitment Letter had already been made public. (Compl. ¶¶ 8, 69.) This announcement caused Landry's share price to tumble by 37.65%, or $4.65, to open at $7.70 in trading the following morning. (Compl. ¶ 65.)

The Company then sought to justify its decision to terminate the going-private transaction by claiming that the Lending Banks' "refusal" to disclose the secret terms of the financing left it with "no choice" but to terminate the acquisition in order to preserve the Company's alternative financing in a press release[11] dated January 12, 2009. (Compl. ¶ 66.) Michael Chadwick, Chairman of the Special Committee asserted that: "While this must be extremely disappointing to our shareholders, the special committee recognizes that the financial markets are in crisis and respects the position of our lenders. Given our need to refinance approximately $400 million in senior notes, and the existing world-wide credit crisis, we felt it was in the best interests of our stockholders to terminate the Merger Agreement in order to maintain the alternative financing." *Id.* Mr. Chadwick provided no rationale for the Company serving as the terminating party, rather than compelling Fertitta to terminate and at least pay the Reverse Termination Fee.

[11] Landry's Restaurants, Inc.'s Press Release dated January 12, 2009 (Lebovitch Decl. Ex. H).

On January 26, 2009, just two weeks after the Company announced the termination of the Amended Agreement, the Company issued another press release,[12] this time announcing that "[s]ubstantially all of the Company's operations in Galveston and Kemah [which had been damaged by Hurricane Ike] are reopened with the final businesses expected to be opened before Valentine's Day." (Compl. ¶ 68.) In sum, by their collective actions and inactions, Fertitta and the Board disregarded their respective obligations to Landry's shareholders and the Company, devalued the Company, stripped public shareholders of their controlling interest therein, conveyed control to Fertitta at a discounted price; and abandoned a termination fee for no purpose other than to further enrich Fertitta. (Compl. ¶ 71.)

III. ARGUMENT

A. LEGAL STANDARD

"A court should deny a motion to dismiss pursuant to Court of Chancery Rule 12(b)(6) 'unless it can be determined with reasonable certainty that the plaintiff could not prevail on any set of facts reasonably inferable' from the pleadings." In re Primedia Inc. Derivative Litig., 910 A.2d 248, 256 (Del. Ch. 2006) (quoting Superwire.com, Inc. v. Hampton, 805 A.2d 904, 908 (Del. Ch. 2002) (internal citation omitted)). The Court must accept the allegations in the Complaint as true and give the non-moving party "the benefit of all reasonable inferences." Id. (quoting Solomon v. Pathe Commc'ns Corp., 672 A.2d 35, 38 (Del. 1996) (internal citation omitted)). "What this effectively means is that the court must consider the various factual permutations reasonably possible within

[12] Landry's Restaurants, Inc.'s Press Release dated January 26, 2009 (Lebovitch Decl. Ex. I).

the framework of the plaintiff's allegations and conclude whether any one conceivable set of facts could possibly merit granting [the] plaintiff relief. If so, the claim cannot be dismissed.'" Id. (quoting In re New Valley Corp. Deriv. Litig., 2001 WL 50212, at *4 (Del. Ch. Jan. 11, 2001) (emphasis added)). Additionally, with respect to allegations following Fertitta's acquisition of control of a majority of the shares, "[a]llegations of control over the particular transaction at issue are enough" in pleading that a defendant is a "controlling stockholder." Primedia, 910 A.2d at 257. See also Williamson v. Cox Commc'ns, Inc., 2006 WL 1586375, at * 4 (Del. Ch. June 5, 2006) (citing In re W. Nat'l Corp. S'holders Litig., 2000 WL 710192, at *20 (Del. Ch. May 22, 2000).

B. THE COMPLAINT PROPERLY ALLEGES THAT FERTITTA BREACHED HIS FIDUCIARY OBLIGATIONS TO LANDRY'S SHAREHOLDERS

1. Fertitta's Position and Powers As Landry's Chairman and CEO Were Essential To Effectuating the Challenged Actions

Defendants largely premise their motion on the erroneous contention that Fertitta's efforts to acquire control of the entire Company only implicated his capacity as a Landry's shareholder and not as Landry's Chairman and CEO. *See, e.g.,* (Def. Br. at 19-20). This ignores the fact that Fertitta's entire effort to wrest control of the Landry's without actually closing the proposed Merger Agreement would not have been possible ***but for*** his role as the Company's senior officer and chairman. Perhaps more important, Defendants never assert that Fertitta's behavior was appropriate if it implicated his role as Landry's Chairman and CEO. Instead, Defendants assert Fertitta acted only as a shareholder, which thereby allowed him to act in a self-interested and faithless manner without regard to any duties to the shareholders. Delaware law contradicts Defendants' position.

Defendants rely on *Lacos Land Co. v. Arden Group, Inc.*, 517 A.2d 271, 277 (Del. Ch. 1986) to argue that Fertitta did not breach his fiduciary duties because "the only actions Fertitta is accused of were taken solely in his capacity as a stockholder and potential acquirer of the Company." Def. Br. at 20. The ruling in *Lacos Land* proves Plaintiff's point. The plaintiff shareholder alleged that the CEO, who held 21% of the company's stock, improperly threatened to block transactions beneficial for the company unless shareholders approved a recapitalization plan. 517 A.2d at 273. Chancellor Allen held that the CEO's threat could be interpreted as involving the exercise of his power as an officer or director. *Id*. at 276. The Court then determined that the CEO "did not limit, and could not be understood to have limited, himself to exercising only stockholder power." *Id*. at 277.

Here, as in *Lacos Land*, Fertitta's challenged actions involved the exercise of his power as Landry's Chairman and CEO. Tying the refinancing to his renegotiation of the Merger Agreement was a critical component to the success of Fertitta's maneuver, since Fertitta's threat to renege on the Merger Agreement may not have been sufficient, alone, to force the Special Committee to succumb to releasing Fertitta from his obligations. Indeed, notwithstanding the obvious self-interest he faced when dealing with the Company's financing sources, the Special Committee requested that Fertitta act in his management role when negotiating the refinancing of Landry's $400 million in notes. (Lebovitch Decl. Ex. E, at 50.) An ordinary Landry's shareholder, even one holding 40%

of the shares, is never in a position to manipulate the Company's ability to refinance $400 million of long-term debt. The hammer that Fertitta held over the Special Committee came from using his position as Chairman and CEO to negotiate with the Lending Banks and to convince those banks to link the refinancing of Landry's debt to handing Fertitta control of the Company at a dramatically lower price. *See, e.g.*, *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *5 (Del. Ch. May 31, 2000) (citation omitted) ("[T]he duty of loyalty of a director is…a special obligation upon a director in ***any*** of his relationships with the corporation…A director *qua* director owes a duty to the corporation to so conduct himself in all of his capacities so as not to inflict an intentional, wrongful injury upon the corporation. [This] proposition is axiomatic and subsumed within the director's broader duty of loyalty.") Defendants' assertion that Fertitta acted solely as a shareholder during the negotiations and termination of the buyout transaction cannot withstand scrutiny.[13]

Next, Defendants argue that Fertitta could only owe fiduciary duties to shareholders if he held a controlling stake and exercised that control.[14] (Def. Br. at 20-21.) Defendants ignore that all directors and officers owe fiduciary obligations to their shareholders. "Corporate officers and directors are not permitted to use their position of

[13] None of Defendants' authority supports their contention that Fertitta acted solely as a shareholder during the negotiations of the Merger. For example, Defendants cite to *In re Anderson, Clayton S'holders Litig.*, 519 A.2d 680, 687 (Del. Ch. 1986), which is inapposite because the court held as an initial matter that the shareholder-directors were disinterested and the board was "not infected by a conflicting financial interest" with respect to the transaction that it then recommended to the shareholders.

[14] Defendants' focus on controlling shareholders is also a red herring. The crux of Plaintiff's breach of fiduciary duty claim against Fertitta is that he breached his duty of loyalty, as Chairman and CEO, ***in a ploy to gain a controlling stake*** in Landry's by using Hurricane Ike and the credit crisis as a pretext to subvert the buyout process.

trust and confidence to further their private interests…The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939); *see also Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1345 (Del. 1987) ("Th[e] duty of loyalty…embodies not only an affirmative duty to protect the interests of the corporation, but also an obligation to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage. In short, directors must eschew any conflict between duty and self-interest.").[15]

Indeed, the Delaware Supreme Court recently expressly held that "officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors." *Gantler v. Stephens*, 965 A.2d 695, 708-709 (Del. 2009) (finding that the complaint sufficiently alleged that certain corporate officers breached their fiduciary duties). Consequently, Fertitta had to honor his fiduciary obligations when he revisited the terms of the Merger with both the Lending Banks and the Company.

Defendants also ignore the allegations in the Complaint when they assert that it "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

[15] *See also In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275 (Del. Ch. 2003) (quoting *Belcom, Inc. v. Robb*, 1998 WL 229527 at *3 (Del. Ch. Apr. 28. 1998) ("As this Court previously stated, the 'duty of loyalty…imposes an affirmative obligation to protect and advance the interests of the corporation and mandates that [a director] absolutely refrain from any conduct that would harm the corporation. This duty has been consistently defined as 'broad and encompassing,' demanding of a director 'the most scrupulous observance.' To that end, a director may not allow his self-interest to jeopardize his unyielding obligations to the corporation and its shareholders.").

demands.'" (Def. Br. at 22.) Putting aside that this argument ignores the pleading standards of Court of Chancery Rule 8, the allegations are very much substantiated.[16] The Revised Proxy alone illustrates the strong-arm tactics that Fertitta brought to bear. For example, in the Revised Proxy, the Special Committee makes absolutely clear that it considered suing Fertitta because it did not agree with his tactics or with his "interpretation" of the rights under the Merger Agreement. (Lebovitch Decl. Ex. E, at 44). The Special Committee only refrained from suing Fertitta to enforce the terms of the Merger Agreement due to his position as Landry's CEO and its fear that litigation among the Company, its CEO and its chief financiers would destabilize the Company's market position. (*Id*. at 46, 47-48.) While Plaintiff does not accept the Special Committee's efforts to exculpate itself through the Revised Proxy, that document supports an inference that Fertitta's serious breaches of his fiduciary obligations nullified the Special Committee's independent judgment.

Further, contrary to Defendants' arguments, the Complaint particularizes facts showing how Fertitta breached his fiduciary duties. Among other things, he: (1) contacted the banks who were financing his bid, and who were also committed to refinancing the Company's principal outstanding debt, to "inquire" whether they believed the deal could be derailed based on the hurricane and other recent events; (2) told the

[16] Contrary to Defendants' contention (Def. Br. at 22), under Delaware law, a Plaintiff must sufficiently plead, its claims pursuant to a liberal pleading standard. *See Rabkin v. Philip A. Hunt Chem. Corp*., 498 A.2d 1099, 1104 (Del. 1985) ("On a motion to dismiss for failure to state a claim it must appear with a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action. A complaint need only give general notice of the claim asserted and will not be dismissed unless it is clearly without merit, either as a matter of law or fact.") (citations omitted). Nevertheless, as set forth above, the Complaint sets forth detailed facts in support of the claims against Fertitta, and those against the other Defendants.

Board that he "believed" the Lending Banks "may" seek to renegotiate the deal; (3) controlled any communications the Board had with the banks; (4) acted as the Company's sole spokesperson in "negotiating" the terms of the refinancing of the Company's debt; (5) ensured that the Lending Banks linked the refinancing of the Company's upcoming debt repayment to drastically lowering the deal price (and to refuse to refinance the debt if no deal went through); (6) obtained majority control of the Company without paying a control premium to Landry's shareholders by making multiple purchases of the Company's shares on the open market at a substantial discount to the amended deal price; and (7) pressured the Board to free him from his obligation to close on the merger, or alternatively, to pay the Reverse Termination Fee, under the guise of the SEC's routine request for information about the Amended Debt Commitment.

Delaware courts readily find that defendants breached their duty of loyalty based on conduct similar to the allegations pled here. For example, in *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989), the Delaware Supreme Court upheld the Chancery Court's determination that a CEO acted improperly by serving his self-interest to interfere with the sale of the company. Specifically, in *Mills*, the CEO "tipped" the bidder that intended to preserve the CEO's position and provide him a substantial ownership interest in the new company. 559 A.2d at 1272-73. The CEO then deliberately concealed information from the board to further his significant self-interest to ensure the success of such bidder at the expense of the shareholders' interests. *Id*. at 1279-80.

Similarly, in *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243, 1245 (Del. 1999), a CEO interfered with a merger process by allegedly informing all potential acquirors that his consent would be required for any business combination with the company, and that, to obtain his consent, the acquiror would be required to pay the CEO substantial sums of money and transfer to him valuable company assets. The CEO breached his fiduciary duty of loyalty by preferring himself over the company's shareholders' interests. 722 A.2d at 1246.

Fertitta's interference with the Company's financing options are very much analogous to the actions of the disloyal CEO in *Bomarko, Inc. v. International Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999). Specifically, in order to further his scheme to gain complete ownership of the company, the Chairman and CEO used his position as CEO to interfere with the company's ability to obtain desperately needed financing. 794 A.2d at 1173. By exacerbating the corporation's liquidity crisis, he forced an otherwise seemingly independent board to turn to the CEO for financing and to enter a merger agreement that allowed the CEO to buy out the public shareholders at a severely discounted price. *Id.* at 1171-72. This Court found that the CEO breached his duty of loyalty to shareholders and that the supposed independence of the special committee that attempted to negotiate with the CEO was no barrier to application of the entire fairness standard, which the CEO had no hope of satisfying. *Id.* at 1177.[17]

[17] *See also Julian v. E. States Constr. Serv., Inc.*, 2008 WL 2673300 (Del. Ch. July 8, 2008) (directors breached their duty of loyalty in granting themselves an improper $1.3 million bonus); *Belcom, Inc. v. Robb*, 1998 WL 229527, at *4 (Del. Ch. Apr. 28, 1998) (director and corporate secretary breached his duty of loyalty by "initiat[ing] a broad and well orchestrated campaign of harassment as a means of coercing payment" from the corporation and by "seeking to effectuate a transaction between the company and an

Here, for the reasons discussed in the bullet points above, Fertitta, like the CEOs in *Mills*, *Parnes* and *Bomarko* used his position as CEO to put his personal economic interests ahead of his obligations to Landry's shareholders, and thereby breached his fiduciary duty of loyalty.[18]

2. The Complaint Properly Alleges that Fertitta Improperly Purchased Landry's Common Shares On the Open Market

Defendants' argument for dismissal of Plaintiff's so-called "insider trading claims" misses the mark. (Def. Br. at 24-29.) Plaintiff is not asserting a standalone insider trading claim against Fertitta, and Defendants have crafted an elaborate straw man argument to refute the so-called "claim" of insider trading in an attempt to divert the Court's attention from the true focus of Plaintiff's claims. Fertitta traded in Company stock as part of a broader scheme to take control of the Company. That he did so on material inside information just exacerbates the nature of his disloyalty.

In any event, Defendants misstate the allegations when they argue the Complaint failed to "adequately allege that Fertitta consciously acted to exploit material nonpublic information." (Def. Br. at 27.) It is hard to doubt that Fertitta possessed and exploited material non-public information regarding, among other things, the Company's progress is remediating any hurricane-related problems, the substance of his discussions with the Lending Banks and his plan not to consummate the Merger pursuant to the Amended

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entity in which [he] had a substantial economic interest when he knew that the terms of the transaction were not fair to the corporation").

[18] In addition, Defendants' citation to *McPadden v. Sidhu*, 964 A.2d 1262, 1266 (Del. Ch. Aug. 29, 2008) is, at the very least, a direct indictment of Fertitta's wrongdoing here. (Def. Br. at 35.) Specifically, in *McPadden*, Chancellor Chandler upheld a breach of fiduciary duty claim against a corporate subsidiary's vice president who was in charge of the efforts to sell the subsidiary, while he simultaneously led the negotiations for another company (that he partially owned) that purchased the subsidiary. *Id.*

Agreement so that he could gain the benefit of control without paying any control premium. The purchases were part of a knowing scheme for a broader purpose than simply profiting on the information itself.[19]

Defendants attempt to give the Special Committee credit for "sterilize[ing] the shares purchased by Fertitta so they would not be counted in any vote" to approve the takeover. (Def. Br. at 23.) This argument makes no sense. The original Merger Agreement was struck while Fertitta owned 40% of the shares, and he retained the full ability to vote those shares in favor of the deal. In other words, the deal was never made subject to a "majority of the minority" provision. As set forth below, when the Board learned of Fertitta's stock purchases (including 400,000 shares purchased at the very time he was asserting that the hurricane constituted an MAE, they were obliged to require him to sign a standstill or to put in place a poison pill to prevent him from achieving economic control of the Company without closing the deal. Instead, they "sterilized" his vote on the newly purchased shares. This was a futile act, considering that once Fertitta had majority control, no vote would be necessary, and it was the public shareholders whose votes were sterilized.

[19] Along these lines, Defendants' insistence that Fertitta's purchases were made at "inflated" prices in light of the stock price decline when the deal was cancelled is misplaced. The stock price declined ***because*** Landry's had become a controlled company and shareholders could no longer anticipate any control premium. Fertitta profited by not having to pay that premium.

C. THE COMPLAINT SUFFICIENTLY ALLEGES THAT THE MEMBERS OF THE BOARD AND SPECIAL COMMITTEE BREACHED THEIR FIDUCIARY DUTIES

1. The Complaint's Allegations Rebut The Business Judgment Rule

In general, corporate directors and officers are entitled to a presumption that their conduct was loyal to the corporation and in good faith. Orman, 794 A.2d at 19-20. However, even when the majority of directors approving a transaction are independent, the presumption (i.e., the "business judgment rule") may be rebutted by facts demonstrating that: (i) the board's deliberative process with respect to the transaction in question is tainted with the disloyalties of an interested director; or (ii) the majority of the board abdicated its duty to act in the best interests of the company. See Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 371 (Del. 1993); Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963 (Del. Ch. 2000). Put another way, to paraphrase Defendants' own citation, "the judgment of a properly functioning board will not be second-guessed…." (Def. Br. at 32) (quoting Orman v. Cullman, 794 A.2d 5, 19 (Del. Ch. 2002)). Here, as set forth below, contrary to Defendants' contention (Def. Br. at 32-36), the Complaint alleges with specificity more than sufficient facts to rebut the presumption that the Landry's board was "properly functioning."[20]

[20] A plaintiff may also rebut the business judgment rule by showing that a materially interested officer or director dominated or controlled the company's board. *See Orman*, 794 A.2d at 19-20. *See also Zimmerman v. Braddock*, 2002 WL 31926608, at *8 (Del. Ch. Dec. 20, 2002) ("a director's independence may be called into question when the allegedly controlling director has the power, whether solely in his own capacity or in conjunction with others who share his purpose, to exert pressure on the challenged director of such a nature as to compromise that challenged director's ability to consider the merits of a demand for suit objectively"). Although such a showing is not necessary to rebut the presumption in this matter, there can be no doubt that, as demonstrated above, Fertitta (*i.e.*, the Company's CEO, Chairman, and 39% shareholder throughout the renegotiation of the Merger Agreement, and 56% shareholder at the termination of the Amended Merger Agreement) dominated and controlled the renegotiation and termination processes. *See, e.g.*, Compl. ¶¶ 5, 34 (initiating contact with the Lending Banks promptly

a. Fertitta's Breach of His Duty of Loyalty Tainted the Board's and Special Committee's Deliberative Process

Where one fiduciary breaches his duty of loyalty, it will taint the entire negotiation and approval process of the subject transaction, and eliminate the protective coat of the business judgment rule, unless the other directors can show they actually cured the breaches in approving the deal in good faith. *See, e.g. Bomarko*, 794 A.2d at 1178 ("Naturally, the Court's 'reluctance to assess the merits of a business decision ends in the face of illicit manipulation of a board's deliberative process by self-interested corporate fiduciaries'"), *citing Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989). *See also Parnes*, 722 A.2d at 1247.

In this regard, the Delaware Supreme Court's denial of the protections of the business judgment rule to the board of Macmillan, Inc. is most instructive. The Court expressly held that in that case, the company's CEO, with co-conspirators, committed a "fraud upon the board." *Mills Acquisition*, 559 A.2d at 1283. The Court then explained why the board's decisions were not entitled to the protection of the business judgment rule:

> [W]hen a board is deceived by those who will gain from [] misconduct, the protections girding the decision itself will vanish. Decisions made on such a basis are voidable at the behest of innocent parties to whom a fiduciary duty was owed and breached, and whose interests were thereby materially and adversely affected.

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following Hurricane Ike, even before the banks commenced their respective investigations); Compl. ¶¶ 5, 35, 48 (tying the prospect of the Lending Banks willingness to refinance those obligations to the Board's willingness to slash the previously agreed upon buyout price); Lebovitch Decl. Ex. E, at 53 (refusing to agree to refrain from purchasing common shares in the open market) . *See Bomarko*, 794 A.2d at 1180. Accordingly, these facts alone belie Defendants' contention that Plaintiff's breach of loyalty claim against the Special Committee and Board should be "analyzed under the rubric of the business judgment rule." (Def. Br. at 32.)

Id. at 1284. Even though the outside board members concededly had no idea about the CEO's illegal "tipping" of his favored bidder, the Supreme Court made clear their inactivity was itself a basis for relief:

> [W]e entertain no doubt that this board's virtual abandonment of its oversight functions in the face of Evans' and Reilly's patent self-interest was a breach of its fundamental duties of loyalty and care in the conduct of this auction. More than anything else it created the atmosphere in which Evans, Reilly and others could act so freely and improperly.

Id. at 1284 n.32.[21]

Similarly, in *Bomarko*, this Court held that the business judgment rule did not apply where the CEO manipulated the special committee's efforts, and ultimately ruled that:

> Haan ***and the other defendants*** have failed to carry their burden of proving that the Merger was entirely fair to the shareholders. Haan's failure to disclose material facts and his diversion of Bell Atlantic away from ITI infected all subsequent events, thus ***rendering ineffectual the procedures employed by the other directors*** to ensure an independent and fair process and result.

794 A.2d 1161, 1184 (Del. Ch. 1999) (emphasis added).

Here, the case for finding that the Board's efforts – even if otherwise in good faith – were otherwise nullified by Fertitta's breaches is made by the Revised Proxy itself, in which the Board tries to exculpate its own behavior by highlighting Fertitta's improper conduct. While the Board subtly lays blame on the Company's CEO, these circumstances support making them answer under oath why, despite knowing of

[21] Thus, the MacMillan directors were arguably more innocent, or at least victimized, by the CEO's disloyalty than the Landry's directors, who were cognizant of every step of Fertitta's conduct.

Fertitta's frivolous reading of the original Merger Agreement, knowing of his concurrent stock purchases, and seeing his actions to take over the Company on the cheap, they succumbed to his demands and were even complicit in the wrongdoing. The reasonable inference to draw at this stage of the proceedings from the well-pled facts is that the Board abdicated its duties and failed to act in good faith to protect the shareholders from known threats.

Despite the Director Defendants' assertion that they essentially had no choice but to renegotiate the Merger Agreement and subsequently terminate the Amended Merger Agreement (a contention that, as shown herein, is inconsistent with the well-pled facts), the only question here is whether they can disclaim their fiduciary obligations based solely on Fertitta's heavy-handed behavior. According to the *Mills Acquisition* and *Bomarko* opinions, they cannot.

In this regard, contrary to Defendants' arguments, the fact that the Board affirmatively approved Fertitta's disloyal actions strips the entire Board of the protection of the business judgment rule, and constitutes a breach of their own duty of loyalty and good faith. *See Crescent/Mach*, 2000 WL 1481002, at *12 (directors' approval of "self-interested 'side-deals' allegedly tainted the entire merger process and stripped the board of the protection of the business judgment rule; consequently, the complaint adequately pleaded that the directors "failed to exercise, in good faith, their fiduciary duty of loyalty [to the corporation]").[22]

[22] Defendants' citation to cases utilizing the business judgment rule is misguided. *See* Def. Br. at 32. For example, in *Aronson v. Lewis*, 473 A. 2d 805, 811 (Del. 1984), the Delaware Supreme Court held that the rule "has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act." Likewise, in *Orman*, 794 A.2d at 19, Chancellor Chandler stated that the rule applies only to

b. The Board Abdicated Its Duty to Act in the Best Interests of the Company and Its Shareholders

Despite the Director Defendants' assertion that they essentially had no choice but to renegotiate the Merger Agreement and subsequently terminate the Amended Merger Agreement (a contention that, as shown herein, is inconsistent with the well-pled facts), the only question here is whether they can disclaim their fiduciary obligations based solely on Fertitta's heavy-handed behavior. Even putting aside Fertitta's own machinations, the Board itself failed to take required action in the face of a known threat to the corporation and its stockholders.

For example, the Special Committee asked Fertitta to sign a standstill or to stop his purchases, yet when he refused, they obliged rather than taking action to protect the shareholders. (*See* ¶59-60). Contrary to Defendants' contention that there is no "duty" to defend the shareholders from known threats (Def. Br. at 42), the rule of *Unocal* is not just a "right" to take defensive measures, it is ***an affirmative obligation*** to protect the welfare of the Company and its shareholders against internal and external corporate threats. *See Unocal Corp, v. Mesa Petroleum Co.*, 493 A.2d 946, 994 (Del. 1985) ("the board's power to act derives from its fundamental ***duty and obligation to protect the corporate enterprise, which includes stockholders***, from harm reasonably perceived, ***irrespective of its source***.").[23]

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a "judgment of a properly functioning board." *See also In re J.P. Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 780 (Del Ch. 1988) (rule applies to "business decision made in good faith"). Here, as discussed below, Plaintiff alleges facts that show that Fertitta's egregious behavior resulted in an entirely dysfunctional Board whose members not only abdicated their fiduciary duties to shareholders, but were complicit with Fertitta at the expense of the Company and its shareholders.

[23] Director Defendants citation to *Stone v. Ritter*, 2009 WL 790477 (Del. 2006) actually supports Plaintiff's breach of fiduciary duty claim. (Def. Br. at 42.) As Defendants concede, in *Stone*, the Delaware

Even beyond consciously allowing Fertitta to buy control in the market, the Board's general supine handling of Fertitta evidences actionable bad faith. "Facts evidencing . . . directors' 'indifference to their duty to protect the interests of the corporation and its minority stockholders' implicate a breach of the duty of loyalty and good faith even if the majority of the directors approving the transaction were disinterested and independent." *Crescent/Mach,* 846 A.2d 963 at 981 (Del. Ch. 2000) ("It does not matter here that the Complaint fails to establish that [the directors] . . . lacked the ability to form an independent judgment . . . . Even though the remaining directors failed to benefit personally from the merger, their judgments were aligned with that of [the interested director] and not that of [the corporation]"). *See also Parnes v. Bally Entm't Corp.*, 722 A.2d 1243, 1246 n.12 (Del. 1999) ("we do not need to reach [the issue of independence] as our holding is based upon the entire board's apparent failure to exercise its business judgment in good faith").

Such actionable "indifference" is particularly manifested where, as here, the majority of the directors abdicated their duties by, among other things, acquiescing to the terms that an interested party dictates to the Board and failing to implement obvious defensive measures against serious and known threats to corporate and shareholder welfare. *See, e.g., Crescent/Mach*, 846 A.2d 963 at 983 (Del. Ch. 2000) (complaint adequately stated cause of action for bad faith breach of duty of loyalty where director negotiated merger agreement that conferred substantial benefits to him, and the remaining directors merely acquiesced in his self-interested negotiations by approving the merger at

Supreme Court expressly held 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."

an unfair price); *Parnes*, 722 A.2d at 1244 (finding that where the chairman and CEO controlled the self-interested merger negotiations, the board could not in good faith approve the transaction); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989) ("By placing the entire process in the hands of [an interested director], through his own chosen financial advisors, with little or no board *oversight*, the board materially contributed to the unprincipled conduct of those upon whom it looked with a blind eye"); *Strassburger v. Earley*, 752 A.2d at 581 (directors breached their fiduciary duties where they allowed the director with the strongest conflicting interest to dominate the decision making process with a result that the outcome was favorable to that director).

Here, as in the cases above, the Special Committee's and Board's actions present, at the very least, a case of actionable "indifference." As the Complaint specifies, the members of the Special Committee and Board completely abdicated their duty to protect the best interests of Landry's and its shareholders by, among other things, terminating the Amended Merger Agreement so that Fertitta would not have to pay the (already reduced) $15 million Reverse Termination fee despite the fact that he, at the very least, would have been legally bound to do so upon a failure of the banks to honor the Amended Debt Commitment letter. (Compl. ¶¶ 9, 61-71.) Furthermore, the Special Committee barely confirmed the veracity of information that Fertitta provided to the Board regarding the banks' position. *See e.g.*, Compl. ¶¶ 5-6, 49-50 (succumbing to Fertitta's demands to renegotiate terms of the Merger Agreement and enter into the Amended Merger Agreement, which included reducing Termination Fee from $24 million to $15 million).

Moreover, the Special Committee encouraged Fertitta to be on both sides of the deal by instructing him to negotiate on the Company's behalf, as its CEO, the refinancing terms with the Lending Banks. (Lebovitch Decl. Ex. E, at 50.)

In the face of these well-pled allegations, Defendants once again misconstrue Plaintiff's actual claims. For example, Defendants contend that the Complaint fails to allege that the Special Committee and Board failed to inform themselves of the "challenged decisions." (Def. Br. at 34-35.) As discussed above, however, the breach of loyalty claims against the Director Defendants are not based upon their lack of knowledge of or negligence to Fertitta's scheme, but rather upon their succumbing to Fertitta's demands despite ***knowing*** of his improper actions – and, even being complicit in effectuating his scheme.[24]

Finally, in light of Plaintiff's well-pled allegations, and the reasonable inferences that must be drawn in Plaintiff's favor from those allegations, questions as to the credibility and veracity of the Board's explanation for terminating the Revised Merger Agreement, raise issues of fact that may not be resolved at this stage of the proceedings. *See* Compl. ¶ 64 (Board claiming that SEC requested that the Company make public "certain information" available from the debt commitment letter and that the Lending Banks were not willing to make such information available). *See also* Def. Br. at 40. Indeed, given that the original Debt Commitment Letter had already been made public (Compl. ¶ 65), and that even where debt commitment letters include a confidentiality

[24] Defendants also repeatedly suggest that the "Go Shop" periods during July and November 2008 somehow validate the Board's efforts here. They do nothing of the sort. It is no surprise that third parties refrained from bidding for a company that already had Fertitta as its 40% stockholder. If anything, the failure of the first "Go Shop" to garner any interest may have given Fertitta a case of buyer's remorse.

clause, they routinely allow for disclosure required by law, discovery will reveal the truth whether the Director Defendants explanation holds water.

D. THE COMPLAINT ADEQUATELY STATES A CLAIM FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY AGAINST THE FERTITTA ENTITIES

Defendants' arguments regarding the aiding and abetting claim against FAC and FHI assume these entities are something other than Fertitta's corporate alter egos, when in fact, these entities are sued for the very same reasons Ferttita himself is sued, and should be parties in this matter to the full extent needed to afford full relief to the shareholders. Thus, the Court should reject Defendants' argument that the aiding and abetting claim relies solely on conclusory allegations. (Def. Br. at 30-31.)

Under Delaware law, a successful claim for aiding and abetting a breach of fiduciary duty requires proof of four elements: "(1) a fiduciary relationship; (2) a breach of that relationship; (3) that the alleged aider and abettor knowingly participated in the fiduciary's breach of duty; and (4) damages proximately caused by the breach." *Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007). Plaintiff satisfies the first two elements of the standard because the Complaint sufficiently alleges a claim against Fertitta for breach of fiduciary duty. *See supra* Section III.B.

Contrary to Defendants' contention, "a claim of knowing participation need not be pled with particularity" as long as a complaint contains factual allegations "from which the knowing participation can be reasonably inferred." *Khanna v. McMinn*, 2006 WL 1388744, at * 27 (Del. Ch. May 9, 2006) (internal citations omitted). Complaints adequately allege aiding and abetting claims where the fiduciary who breached his duties also serves as the control person of the entity accused of aiding and abetting such breach because the fiduciary's knowledge is imputed to the entity. *See Carlson v. Hallinan*, 925 A.2d 506, 542 (Del. Ch. 2006) (finding two entities liable for aiding and abetting a breach of fiduciary duty by imputing defendant's knowledge as a director and officer to such entities, which demonstrated such entities' knowing participation); *Khanna*, 2006 Del. Ch. WL 1388744, at *27 (Del. Ch. May 9, 2006) (holding that plaintiffs adequately allege an aiding and abetting claim against an entity by imputing knowledge of a defendant, who controlled such entity, to satisfy that the element of knowing participation).[25]

Here, Fertitta's knowledge as Landry's Chairman and CEO must be imputed to both FAC and FHI, both of which are wholly owned Fertitta entitites formed to effectuate the Merger. (Compl. ¶¶ 23, 84.) Accordingly, the Complaint states a claim that FHI and FAC aided and abetted Fertitta's breach of his fiduciary duties, and these entities should be liable to the shareholders in any respect needed to achieve complete relief.

E. DEMAND ON THE LANDRY'S BOARD WOULD HAVE BEEN FUTILE

Defendants assert that Plaintiff's derivative claim against the Board in Count IV for failure to seek payment of the Reverse Termination Fee should be dismissed for failure to plead demand futility in accordance with Chancery Court Rule 23.1. A plaintiff demonstrates demand futility if "a reasonable doubt is created that: (1) the directors are

[25] Defendants' reliance on *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995) and *In re Lukens S'holders Litig.*, 757 A.2d 720 (Del. Ch. 1999) is misplaced. Unlike here, *In re Santa Fe*, the complaint only contained conclusory allegations that an entity aided and abetted a breach of fiduciary duty. *Id*. at 72. Likewise, *In re Lukens* is inapposite because in that case plaintiffs did not allege that a control relationship existed in order to impute knowledge to the company accused of aiding and abetting the breach of fiduciary duty.

disinterested and independent; or (2) the challenged transaction was otherwise a product of a valid exercise of business judgment." *Aronson v. Lewis,* 473 A.2d 805, 814 (Del. 1984). These inquiries are disjunctive; demand is excused if either prong is satisfied. *See White v. Panic*, 793 A.2d 356, 364 (Del. Ch. 2000) ("If either prong is satisfied, the Court will infer that the board of directors is incapable of exercising its authority to pursue the derivative claims directly and the objecting shareholder will be allowed to pursue the derivative claim notwithstanding the failure to make a presuit demand.").

Plaintiff alleges facts demonstrating a reasonable doubt that: (i) the Board was independent and disinterested, and (ii) that their decision not to seek the Reverse Termination Fee is entitled to business judgment protection. In sum, Defendants ignore the factual circumstances surrounding that termination of the amended Merger Agreement, which establish demand futility. *See Fleer v. Fleer Corp.,* 125 A. 411, 414 (Del. Ch. 1924) ("But a request or demand is not necessary in all cases. When it is manifest from the circumstances that a demand would be a useless form, the same is not required as a condition precedent to the right of the stockholders to proceed.").

1. Plaintiff Has Alleged Facts Creating A Reasonable Doubt As To Board's Independence

"If a board's disability as to a particular transaction is attributable to self-interest or lack of independence, then presuit demand is not required." *Heineman v. Datapoint Corp.*, 611 A.2d 950, 952 (Del. 1992). "Independence means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson v. Lewis,* 473 A.2d 805, 816 (Del. 1984). Whether directors are sufficiently independent is determined by an analysis of the facts surrounding the challenged transaction. *See Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993) ("The question of independence flows from an analysis of the factual allegations pertaining to influences upon the directors' performance of their duties generally, *and more specifically in respect to the challenged transaction*.") (emphasis added).

Here, the facts alleged create a reasonable doubt about the Special Committee's, and thereby, the Board's[26] independence from Fertitta in enforcing the original Merger Agreement or requiring payment of the agreed-upon Reverse Termination Fee. With respect to the waiver of the Reverse Termination Fee, Fertitta was by any standard Landry's controlling stockholder. A shareholder is a controlling shareholder if he or she "owns a majority interest in or exercises control over the business affairs of the corporation." *Kahn v. Lynch Comm'n Sys.*, 638 A.2d 1110, 1113 (Del. 1994) (quoting *Ivanhoe Partners*, 535 A.2d 1334, 1344 (Del. 1987)). Fertitta is a controlling shareholder by either measure.

Fertitta acquired majority ownership of Landry's by December 2, 2008, well *before* the Company announced termination of the final Merger Agreement. (Compl. ¶ 56.) The Company did not announce the termination of the revised Merger Agreement until January 11, 2009. (Compl. ¶ 64.) Equally important, Fertitta retained majority ownership through the filing of the Complaint. And as *Aronson* makes clear, "futility is

[26] The Special Committee constituted three of the six members of the Board. Where a special committee constitutes at least one half or more of the board members, its actions are imputed to the entire board. *See Ryan v. Gifford*, 918 A.2d 341, 353 (Del. Ch. 2007) ("Where at least one half or more of the board in place at the time the complaint was filed approved the underlying challenged transactions, which approval may be imputed to the entire board for purposes of proving demand futility, the *Aronson* test applies.") (citing *Rales*, 634 A.2d at 934, for the proposition that "Where half or more of the board has already approved a corporate action, even acting through a committee, there is no need for a shareholder to give the entire board a second bite at the apple.")).

gauged by the circumstances existing at the commencement of a derivative suit." 473 A.2d at 810. Thus, for the purposes of showing demand futility, the Complaint sufficiently alleges Fertitta's status as a controlling shareholder through his majority ownership of Landry's, sufficing any standard applicable to the derivative count pertaining to the effective "gift" comprising the waiver of the Reverse Termination Fee.

2. Fertitta Controlled the Challenged Transactions

Count IV of the Complaint relates specifically to the waiver of the Fee, as the Board's prior breaches directly impaired shareholders' ownership rights and therefore need not be pleaded derivatively in the first place. To the extent Defendants are arguing that those prior breaches must be pleaded derivatively, however, they are still wrong. Substantial ownership[27] coupled with actual control over the challenged transactions is also sufficient to show a shareholder was controlling. *See Friedman v. Beningson*, 1995 WL 716762, at *5 (Del. Ch. Dec. 4, 1995) ("From a practical perspective, this confluence of voting control with directoral and official decision making authority, while not itself sufficient under the cases to support a conclusion of reasonable doubt, is nevertheless itself quite consistent with control of the board.") (internal citation omitted). Moreover, "plaintiffs need not demonstrate that [the controlling shareholder] oversaw the day-to-day operations of [the company]. Allegations of control over the particular transaction at issue are enough." *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006).

[27] Even before Fertitta acquired majority ownership of Landry's, Fertitta owned a substantial portion of Landry's shares. In fact, at all relevant times, Fertitta owned at least 39% of Landry's shares. (Compl. ¶ 56.)

Here, Fertitta's substantial ownership of Landry's between the time of Hurricane Ike and his acquisition of mathematical control in December 2008, coupled with his domination of the negotiations of the Merger Agreement (and the alternative financing) shows that he was a controlling shareholder for purposes of these transactions. Since Fertitta was a controlling shareholder who dominated merger negotiations with the Board, there is a reasonable doubt about the Board's independence from him. First, Fertitta was the "influential force" in the merger negotiations with the Special Committee. *See Primedia* at 258 (describing the controlling shareholder as the "influential force" behind the challenged transaction). Every time Fertitta demanded a lower price to close the proposed merger, the Special Committee acquiesced: on September 25, 2008, Fertitta demanded the Special Committee accept $17.00 per share rather than the previously agreed $21 (Compl. ¶ 42); not even attempting to hold Fertitta to the $21.00 per share agreement, the Special Committee proposed "for negotiation purposes" a $19.00 per share merger price (Compl. ¶ 43) but Fertitta did not entertain this "counteroffer" as he lowered his offer to $13.00 per share (Compl. ¶ 49); on October 17, 2008, the Special Committee agreed to the drastically reduced purchase price of $13.50 per share and a reduced termination fee of $15 million (Compl. ¶ 50); and ultimately, on January 11, 2009, the Company announced that it allowed Fertitta to terminate the merger and avoid paying any of the required Reverse Termination Fee. (Compl. ¶ 64.) Thus, Fertitta successfully dictated the terms of the merger up to, and including, its termination. *See Lynch*, 638 A.2d at 1117 ("the majority shareholder must not dictate the terms of the merger.").

In addition to dictating the terms of the merger, Fertitta controlled communications with the Lending Banks. From the initial offer through the termination of the last Merger Agreement, Fertitta acted as the conduit between the Special Committee and the Lending Banks. (Compl. ¶¶ 25, 34, 35, 40, 42, 44, 51.) This gave Fertitta exclusive access to both sides of the deal. Thus, Fertitta was privy to whatever questions and concerns the Special Committee, as well as the Lending Banks, may have had. This gave Fertitta the opportunity to use the threat of the Lending Banks declaring an MAE as an excuse to force a lower purchase price. (Compl. ¶¶ 34, 35, 40, 44, 51.) Since the Special Committee never verified whether the Lending Banks, in fact, intended to declare an MAE, this threat went unchecked. (Compl. ¶¶ 35, 36, 42, 44, 51.) Instead, the Special Committee asked Fertitta to ask the Lending Banks whether they planned to declare an MAE, allowing the proverbial fox to monitor the hen house. (Compl. ¶¶ 39, 41.)

In sum, the Special Committee consistently delegated this duty to Fertitta. By itself, that fact is sufficient to find that the Special Committee, and thus the Board, was under Fertitta's control. *See Kahn v. Tremont*, 1994 WL 162613, at *5 (Del. Ch. Apr. 22, 1994) (finding that special committee was under shareholder's control where the committee "delegated the bulk of the committee's work to [the controlling shareholder], the member arguably most interested in the transaction.").

Fertitta's control and the Board's corresponding lack of independence is further evidenced by the fact that after Fertitta declared his intention to breach the original Merger Agreement, the Special Committee conceded that it was unwilling to enforce the agreement or the Reverse Termination Fee if enforcement required litigation with Fertitta. *See* Lebovitch Decl. Ex. E, at 46, 48, and 53; Compl. ¶ 34; *Official Comm. of Unsecured Creditors of Integrated Health Servs., Inc.*, 2004 WL 1949290, at *10 n.45 (Del. Ch. Aug. 24, 2004) ("A lack of independence may arise . . . 'through *force of will*.'") (quoting *Orman v. Cullman*, 794 A.2d 5, 25 n.50 (emphasis added)). The Board's earlier refusal to sue Fertitta no matter how egregious his conduct shows the futility of asking the Board to sue him after that conduct got worse. *Mckee v. Rogers*, 156 A. 191, 192 (Del. Ch. 1931) (holding that where a shareholder controlled the board of directors, "[i]t is manifest then that there can be no expectation that the corporation would sue him, and if it did, it can hardly be said that the prosecution of the suit would be entrusted to proper hands."). Put another way, having determined its unwillingness to pursue litigation with Fertitta, the Special Committee essentially gave Fertitta *carte blanche* to terminate the Merger Agreement without penalty.

3. There Is Reasonable Doubt That The Board's Decision To Not Pursue The Reverse Termination Fee Is The Product Of A Valid Exercise Of Business Judgment

Assuming *arguendo* that demand is not considered futile under *Aronson's* first prong, demand is nonetheless futile under its second prong. *See White*, 793 A.2d at 364 ("If either prong is satisfied, the Court will infer that the board of directors is incapable of exercising its authority to pursue the derivative claims directly and the objecting shareholder will be allowed to pursue the derivative claim notwithstanding the failure to make a presuit demand."). "In order for demand to be excused under the second prong of *Aronson*, plaintiffs must allege particularized facts that raise doubt about whether the challenged transaction is entitled to the protection of the business judgment rule." *Disney*, 825 A.2d at 286. Here, Plaintiff meets that standard.

There is a reasonable doubt that the Special Committee's challenged decisions were the product of a valid business judgment. The Special Committee's decision to terminate the Revised Merger Agreement rather than compel Fertitta to do so raises serious doubt about the Committee's good faith, since the purported "problem" with closing the deal was Fertitta's difficulty in obtaining his financing. *See Ryan*, 918 A.2d at 357 (a board acting in bad faith shows demand futility). The Special Committee had a duty to advance the best interests of the Company by enforcing the Merger Agreement with Fertitta or, if Fertitta failed to complete the deal, to require payment of the agreed-upon Reverse Termination Fee. *Disney*, 825 A.2d at 289 (explaining directors' obligation to "act honestly and in good faith to advance the best interests of the company.") The Special Committee did neither.

Although the Special Committee claimed that the reason for terminating the merger was that the Lending Banks did not want to disclose the terms in the debt commitment letter to Fertitta, those same banks had no trouble disclosing the same terms in the original Debt Commitment Letter. (Compl. ¶ 63.) Moreover, this pretense about disclosure does nothing to relieve Fertitta of his obligation to pay the required Reverse Termination Fee. (Compl. ¶ 70.) Nor does it relieve the Board of its duty to enforce such payment. "Where a director consciously ignores his or her duties to the corporation, thereby causing economic injury to its stockholders, the director's actions are . . . 'not in good faith.'" *Disney*, 825 A.2d at 290. Thus, the Special Committee's failure to enforce the Merger Agreement, or alternatively, the Reverse Termination Fee, cannot be the product of a valid business judgment.

Because the Special Committee's, and thereby the Board's, failure to enforce the Merger Agreement with Fertitta, or alternatively, require payment of the Reverse Termination Fee, fail under either prong of *Aronson*, demand is futile. Since demand is futile, Plaintiff should be allowed to proceed with its derivative claim.

F. DEFENDANTS' REQUEST TO STAY DISCOVERY SHOULD BE DENIED

Pursuant to Rule 26(c), Defendants are not entitled to a stay of discovery just because their motion to dismiss remains pending. *See Ford Motor Co. v. Drive Am. Holdings, Inc.*, 2008 WL 4603579, at *1 (Del. Ch. Oct. 8, 2008) ("The decision to stay discovery pending resolution of a dispositive motion rests within the 'sound discretion of the Court.'") (quoting *Gatz v. Ponsoldt*, 2005 WL 820604, at *1 (Del. Ch. Apr. 4, 2005)). As Defendants concede, the burden of establishing why discovery should be stayed is on the party seeking the stay. (Def. Br. at 49.) (citing *TravelCenters of Am. LLC v. Brog*, 2008 WL 5101619, at *1 (Del. Ch. Nov. 21, 2008) (footnote omitted)); *see also Ford Motor Co.*, 2008 WL 4603579, at *1 ("an order to stay discovery should not be granted automatically").

Plaintiff served its requests long ago, and have negotiated the scope of initial productions with the Lending Banks. Documents have been gathered, and it is now proper to order their production immediately, so that this case can finally proceed to discovery. Moreover, Defendants have already enjoyed a *de facto* stay of discovery for over a month as they have refused to respond to Plaintiff's requests for production of documents. Plaintiff did not move for an expedition of this case since the Merger Agreement was terminated, but believes that this case should proceed promptly. Aside from the hope that this entire case will be dismissed, Defendants have offered no reason for a stay of discovery. As demonstrated above, Plaintiff's claims are meritorious and should not be dismissed, Defendants should be required to produce their documents immediately.

IV. CONCLUSION

For all the foregoing reasons, Defendants' Motion To Dismiss should be denied in it entirety.

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/s/ John C. Kairis

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