IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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

MEMORANDUM OPINION AND ORDER

Submitted: June 9, 2009
Decided: July 28, 2009

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LAMB, Vice Chancellor.

In 2008, a Delaware corporation entered into a cash-out merger agreement with an entity controlled by its Chairman, CEO, and 39% stockholder. As events unfolded that made it less likely the merger would be completed, the Chairman began making open market purchases of shares at prices well below the proposed merger price. Although the special committee of directors charged with pursuing the merger objected to these actions, neither the special committee nor the full board of directors took steps to prevent further purchases. Ultimately, the Chairman's market activity resulted in him gaining the status of majority stockholder. Shortly thereafter, the board of directors voted to abandon the merger agreement, thus excusing the Chairman from paying even a $15 million reverse-termination fee.

Applying the liberal motion to dismiss standard, the court concludes that the complaint adequately alleges claims for breach of the duty of loyalty against all of the defendants. The court also concludes that the complaint adequately alleges grounds to excuse demand as to the claim for waste. Thus, the motion to dismiss will be denied.

I.

A. <u>The Parties</u>

This case arises out of an abortive going-private transaction between Landry's and its CEO and largest shareholder.[1] The plaintiff, Louisiana Municipal Police Employees' Retirement System, is and has been a shareholder of Landry's Restaurants, Inc., the nominal defendant for the derivative claims, at all relevant times.

Defendant Tilman J. Fertitta has been Landry's Chairman, President, and Chief Executive Officer since 1987. He also had beneficial ownership, before the complained-of events, of 39% of the common stock of Landry's.[2] Defendant Steven L. Scheinthal is Landry's Executive Vice President of Administration, General Counsel, and Secretary, and has been a member of the board of directors since 1993.

Defendants Kenneth Brimmer, Michael S. Chadwick, and Michael Richmond are all members of the Landry's board of directors, and collectively also composed the special committee of independent directors formed to evaluate Fertitta's offer to acquire Landry's in a going-private transaction. Defendant Joe Max Taylor is also a member of the board of directors of Landry's.

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[1] The following facts are drawn from the well-pleaded allegations in the complaint, as well as certain public filings of Landry's with the Securities and Exchange Commission ("SEC").
[2] He presently is the beneficial owner of 56.7% of the outstanding stock of Landry's.

Defendant Fertitta Holdings, Inc. ("FHI") is a newly formed Delaware corporation which is wholly owned by Fertitta. Defendant Fertitta Acquisition Co. ("FAC") is a Delaware corporation and a wholly owned subsidiary of FHI.

Nominal defendant Landry's is a Delaware corporation with its principal place of business in Houston, Texas. Landry's is a national restaurant, hospitality, and entertainment company principally engaged in the ownership and operation of full-service casual dining restaurants. As of December 31, 2007, Landry's owned and operated over 179 restaurants in 28 states. Among its hospitality businesses, Landry's is the owner and operator of the well-known Golden Nugget Hotel and Casino in Las Vegas, Nevada.

B. The Initial Offer And The June Agreement

On January 27, 2008, Fertitta made an offer to acquire all of the outstanding shares of Landry's common stock for $23.50 per share. This represented a 41% premium over the price of Landry's stock on the last trading day before the offer. In response to the offer, the Landry's board of directors formed a special committee of independent directors, consisting of Brimmer, Chadwick, and Richmond. The board charged the special committee with the responsibility to assess Fertitta's offer and to consider any alternate proposals. The special committee retained Cowen & Company LLC as its financial advisor.

On June 16, 2008, the Landry's board entered into a merger agreement (the "June Agreement") with FAC, FHI, and Fertitta. The June Agreement called for FAC to be merged into Landry's, and all of the outstanding common stock (other than the 39% already owned by Fertitta) of Landry's to be cashed out for $21 per share.[3] The total consideration to be paid to the Landry's public stockholders in the Agreement was approximately $220 million. The June Agreement contained termination fees in both directions, under which: (a) Landry's would be required to pay $3 million to FAC if Landry's terminated the transaction during a 45-day "go-shop" period, or $24 million if Landry's terminated the agreement at any time after the end of the go-shop period; and (b) FAC would be required to pay Landry's a $24 million reverse-termination fee if it failed to close the deal, plus certain of the Landry's expenses arising out of the transaction. Fertitta personally guaranteed the payment of the reverse-termination fee and expenses.

The June Agreement permitted FAC to terminate the agreement without incurring liability for the reverse-termination fee if a material adverse effect occurred to Landry's since December 31, 2007. The agreement defined a material adverse effect, in pertinent part, as:

> any event, development, change or circumstance (any such item, an "Effect") that, either individually or in the aggregate, has caused or

[3] The complaint makes no specific allegations regarding the reason for the 10% decrease in price between the initial offer and the June 2008 deal price.

> would reasonably be expected to cause a material adverse effect on the condition (financial or otherwise), results of operations, assets, liabilities (contingent or otherwise), properties, solvency, business, management or material agreements of the Company and its subsidiaries taken as a whole, *except in each case for any 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; . . . (H) any increase in the cost or availability of financing to Parent or Merger Sub . . . .*[4]

In anticipation of the June Agreement, Fertitta also entered into a debt commitment letter dated June 12, 2008 (the "June Debt Commitment Letter") with three entities affiliated with Jefferies & Company, Inc. and Wells Fargo Foothill (the "Lending Banks") to provide the financing for Fertitta's acquisition of Landry's. The June Debt Commitment Letter contained a material adverse effect clause which excused the Lending Banks from funding the going-private transaction under certain conditions which essentially mirrored the MAE clause of the June Agreement.[5]

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[4] Landry's Restaurants, Inc., Current Report (Form 8-K), at Ex. 2.1 [hereinafter "June Agreement"] § 1.01 (June 17, 2008) (emphasis added).

[5] The June Debt Commitment Letter defines a material adverse effect to mean, in pertinent part:

> (a) a material adverse effect on the condition (financial or otherwise), results of operation, assets, liabilities, (contingent or otherwise), properties, solvency, business, management or material agreements of [Landry's], taken as a whole, (b) a material adverse effect on the condition (financial or otherwise), properties, solvency, business, management or material agreements of the Gaming Business, taken as a whole, (c), a

C. Hurricane Ike And The Renegotiation

On September 13, 2008, Hurricane Ike made landfall at Galveston, Texas, causing widespread damage in the Galveston area. As a result, a number of Landry's restaurants and other properties in the Galveston area were damaged and closed. Four days later, Landry's issued a press release announcing its interim financial results and addressing the impact of Hurricane Ike on the company's operations. The press release portrayed the damage from Hurricane Ike as limited to three cities and temporary in nature. Landry's disclosed its intention to rebuild the damaged properties and stated that the company's losses from disruption of the business at those locations would be covered by Landry's insurance, and therefore forecasted that the damage would have minimal (if any) negative long-term effect to Landry's.

Promptly after Hurricane Ike hit, Fertitta initiated contact with the Lending Banks. On September 18, 2008, prior to any investigation by the Lending Banks

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> material adverse effect on any of the Transactions or any of the other transactions contemplated by the Financing Letters, or (d) the failure by any of the Credit Parties or the Gaming Business to satisfy an applicable Financial Performance Condition, *except in each case for any such effects resulting from, arising out of or relating to . . . (iv) 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), . . . (vi) any natural disaster or act of God . . . .*

(emphasis added). Landry's Restaurants, Inc., General Statement of Acquisition of Beneficial Ownership (Schedule 13D/A), at Ex. 99.3 [hereinafter "June Debt Commitment Letter"] Ex. E ¶ 5 (June 17, 2008).

as to the extent of the damage caused to Landry's properties by the hurricane,[6] Fertitta sent a letter to the special committee. Although the letter has never been disclosed publicly, its contents were described in Landry's January 5, 2009 Preliminary Proxy Statement. According to the January 5 proxy statement, Fertitta asserted in the letter that:

> due to (a) the damage to [Landry's] 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, he believed that [the Lending Banks] would likely determine that a material adverse effect, as defined in their debt commitment letter issued to Mr. Fertitta, had occurred, which would result in Jefferies and WFF withdrawing the debt commitment letter for the acquisition financing for the merger.[7]

Fertitta further claimed in the letter that if the Lending Banks "withdrew their debt commitment letter because of a material adverse effect, Fertitta [might] have no choice but to exercise his right to terminate the original merger agreement."[8] Finally, Fertitta expressed in the letter his "concern about the willingness of the [Lending Banks] to provide any financing absent a reduction in leverage in the debt financing," but stated that he believed that he could "persuade the Lending Banks to move forward with debt financing if [he] revised his offer to reflect

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[6] The Lending Banks did not tour the property until five days later.
[7] Landry's Restaurants, Inc., Preliminary Proxy Statement (Schedule PRER14A) [hereinafter "January Proxy Statement"], at 40 (January 5, 2009).
[8] *Id.*

[Landry's] reduced value, which he believed at [that] time was $17.00 per share."[9] The description of the letter does not suggest, however, that the Lending Banks had actually taken the position that a material adverse effect had occurred that would excuse the banks' performance under the June Debt Commitment Letter, only that Fertitta believed that they might do so.

At the same time, Fertitta began accumulating shares of Landry's stock on the open market, acquiring a total of 400,000 shares over the period from September 17 through September 19, 2008, at prices ranging from $11.83 to $14.11 per share. On September 19, 2008, the special committee held a telephonic meeting and discussed (1) whether damage to Landry's properties from Hurricane Ike or the increasing turmoil in the credit markets[10] constituted a "material adverse effect," (2) Fertitta's obligation to use his "best efforts" to consummate the financing under the June Debt Commitment Letter,[11] and (3) Fertitta's purchase of shares on the open market.

On September 24, 2008, the special committee's independent counsel sent a letter to Fertitta's counsel requesting information regarding Fertitta's financing efforts. The next day, Fertitta responded by letter to the special committee. In that

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[9] *Id.*
[10] Notably, Lehman Brothers Holdings, Inc. had filed for bankruptcy protection on September 14, 2008, roiling the already turbulent credit markets.
[11] *See* June Agreement § 7.08.

letter, Fertitta asserted that he had spoken to a number of financial institutions and that no financial institution outside the Lending Banks that he approached expressed any significant interest in financing the agreed-to going-private transaction. Fertitta also attached a letter from Jefferies, in which Jefferies advised Fertitta that, in view 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 June Debt Commitment Letter.

The special committee's independent counsel sent a letter in response that same day, stating that (1) the special committee did not view the correspondence between Jefferies and Fertitta as a termination of the Debt Commitment Letter, (2) that Fertitta had not disclosed whether he agreed with Jefferies' assertion, and (3) that the special committee required his response in order to evaluate the situation fully. Fertitta's counsel responded that day by letter reiterating Fertitta's statement that he had contacted several other financial institutions and that none of them expressed any interest in providing debt financing for the merger. That letter also demanded that the deal price be revised down to $17 per share from $21 per share.

On October 1, 2008, the special committee, in response to Fertitta's demand, proposed a revised deal price of $19. On October 6, 2008, Fertitta told the special committee that he believed that the Lending Banks would declare an MAE with regard to the June Debt Commitment Letter. The next day, Landry's issued a press release announcing publicly for the first time that the buyout might be in jeopardy. Following this announcement, the price of Landry's common stock dropped 35% over the following three days, to $8.44 per share.

Over the following two weeks, Fertitta continued to press the special committee to agree to a lower buyout price. At the same time, Fertitta reminded the board that absent the consummation of a buyout (which would involve replacement of most of the existing debt of the company with new debt issued under the June Debt Commitment Letter), Landry's would be faced with the possibility of being required to redeem as much as $400 million in senior notes starting on February 28, 2009,[12] a particularly unsavory prospect given the frozen state of the credit markets at the time.

On October 10, 2008, Fertitta revised his offer downward again, from $17 per share to $13 per share. On October 17, 2008, the special committee agreed to a revised deal (the "October Amendment"),[13] which it announced by press release the next day. Under the terms of the October Amendment, the company agreed to lower the acquisition price to $13.50 per share (from $21 per share) and to reduce the reverse-termination fee in the same proportion from $24 million to $15 million.

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[12] In August 2007, while settling a dispute with the indenture trustee and certain holders of the company's 7.5% senior notes, Landry's exchanged the notes in dispute for $400 million of 9.5% senior notes. The new notes were subject to a right by the noteholders to put any or all of the notes back to the company at 101% of their face value starting on February 28, 2009. January Proxy Statement at 19.

[13] *See* January Proxy Statement at B-1 [hereinafter "October Amendment"].

In exchange, Fertitta and the Lending Banks agreed not to claim the occurrence of a material adverse effect as a result of any event known to them as of the date of the amended merger agreement and commitment letter. In addition, Fertitta (apparently acting on behalf of Landry's), negotiated with the Lending Banks to provide as part of the amended commitment letter an alternative financing commitment, which would provide the necessary refinancing in the event that the merger failed to close.[14]

D. Fertitta Engages In A Creeping Takeover

As noted earlier, Fertitta, after signing the June Agreement, had purchased 400,000 shares of Landry's common stock in the open market in late September 2008. With the October Amendment in place, Fertitta began making open market

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[14] Landry's Restaurants, Inc., Current Report (Form 8-K), Ex. 99.1 at 1 (October 20, 2008). The press release states:

> 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.
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> The Company's Board of Directors, acting upon the unanimous recommendation of a special committee comprised entirely of independent directors (the "Special Committee"), has approved the amended merger agreement and has recommended that the Company's stockholders vote in favor of the amended merger agreement. The Special Committee also approved the terms of the alternative financing commitment in the event the transaction was not consummated.

Id. It is unclear in what capacity Fertitta was acting when negotiating the refinancing aspect of the transaction with the Lending Banks.

purchases of Landry's stock again. Between October 20, 2008 and December 2, 2008, Fertitta made 22 additional purchases of Landry's stock on the open market, for a total of approximately 2.6 million shares. Although the board and its advisors must have been aware of Fertitta's continuing open market purchases,[15] which threatened to (and ultimately did) deliver majority control of the company to Fertitta without his consummation of the merger agreement at a premium price, the board did nothing to stop Fertitta from continuing to accumulate shares. Thus, unobstructed by a standstill agreement or poison pill, by December 2, 2008, Fertitta's holdings of Landry's common stock had reached 56.7% on a fully diluted basis.[16]

E. The Banks Refuse A Routine Request, And Landry's Terminates The Merger

At some point following the announcement of the October Amendment, the SEC made a routine request to Landry's to "disclose certain information" from the

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[15] *See, e.g.*, Landry's Restaurants, Inc., Tilman J. Feritta's Statement of Changes in Beneficial Ownership (Form 4), at 1 (October 22, 2008). In the first three trading days after signing the October Amendment alone, Fertitta purchased 728,595 additional shares of Landry's common stock, amounting to 4.3% of the common stock of the corporation on a fully diluted basis. *See id.*; January Proxy Statement at 150-53. Thus, including 775,000 shares of unvested restricted stock, by October 22, 2008, Fertitta controlled 45.6% of the common stock of Landry's.

[16] January Proxy Statement at 150-53. Under the terms of the October Amendment, however, any shares Fertitta acquired after the date of the June Agreement would be sterilized with respect to the stockholder vote on the merger (although they would still count towards the establishment of a quorum at the stockholder meeting). October Amendment § 1.10. Additionally, if the board chose to terminate the merger in favor of a superior proposal, then the special committee would have the right to vote those later-acquired shares in any stockholder vote on that superior proposal. *Id.*

amended debt commitment letter. When the Lending Banks balked at the request that Landry's be permitted to disclose the amended debt commitment letter to the SEC,[17] Landry's responded by terminating the merger agreement. As a result, Landry's waived the $15 million reverse-termination fee Fertitta would otherwise have had to pay as a result of his inability to consummate the merger agreement.

On January 12, 2009, Landry's issued a press release explaining its decision as follows:

> When the [Lending Banks] were informed of the SEC's position, the [Lending Banks] advised both Fertitta and [Landry's] that the [Lending Banks] would not agree to disclosure of the confidential information and that any disclosure by [Landry's] 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 [refinancing] transactions.
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> In the event the [Lending Banks] pulled their commitments, there would have been no financing available for the proposed going private transaction, and [Landry's] would have lost its [refinancing] 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

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[17] It is unclear why the Lending Banks refused this request and what right they had to do so. The banks made no objection to the disclosure of the June Debt Commitment Letter, which was included as an exhibit to a Schedule 13D filed by Fertitta in June 2008. Moreover, such commitment letters generally contain an exception to any confidentiality clause to the extent disclosure is required by applicable law. *See, e.g.*, June Debt Commitment Letter § 9(a). Given that the Lending Banks were agreeing in both commitment letters to provide funding for a 13E-3 going-private transaction (a transaction type heavily scrutinized by the SEC), it is hard to imagine that they would not have expected, at the time that they entered into the amended debt commitment letter, that its terms would have to be disclosed. In any event, the court is unable to consider here whether the Lending Banks were entitled to refuse disclosure in this instance, as the amended debt commitment letter has not been disclosed to the court.

> [refinancing] until the final terms are decided. Given the current economic environment and [Landry's] need to refinance its existing approximately $400 million in senior notes, [Landry's] informed Fertitta that [Landry's] was not prepared to risk losing its [refinancing] commitment and was therefore unable to comply with a condition of the merger agreement which required distribution of an SEC approved proxy statement to Landry's shareholders to vote on the adoption of the merger proposal. As a result of [Landry's] inability to provide a proxy statement to [Landry's] shareholders, [Landry's] informed Fertitta that it would be unable to consummate the merger transaction.[18]

F. Procedural History

A class action and derivative complaint was filed on February 5, 2009, alleging four counts: (I) a class claim for breach of fiduciary duty against Fertitta, (II) a class claim for aiding and abetting breach of fiduciary duty against FAC and FHI, (III) a class claim for breach of fiduciary duty against the directors of Landry's, and (IV) in the alternative, a derivative claim for waste against the board for failing to require Fertitta to pay the reverse-termination fee. On April 2, 2009, the defendants responded with a motion to dismiss pursuant to Rules 12(b)(6) and 23.1, and a motion to stay discovery pending the resolution of the motion to dismiss. The court heard oral argument on the motion to dismiss on June 9, 2009.

II.

The defendants move to dismiss the complaint, pursuant to Court of Chancery Rule 12(b)(6), for failure to state a claim upon which relief can be

[18] Landry's Restaurants, Inc., Current Report (Form 8-K), Ex. 99.1 at 1 (January 12, 2009).

granted. The court may dismiss a complaint under Rule 12(b)(6) only if the court can determine with "reasonable certainty" that "the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint."[19] In making that determination, the court assumes as true all well-pleaded allegations of fact in the complaint.[20] Although the court accepts as true "all facts of the pleadings and reasonable inferences to be drawn therefrom, . . . neither inferences nor conclusions of fact unsupported by allegations of specific facts . . . are accepted as true."[21] The court may also take judicial notice of the contents of the certificate of incorporation of a Delaware corporation where, as here, there is no dispute among the parties as to its actual contents (as opposed to the legal effect of those contents).[22] Finally, the court may take judicial notice of public filings with the SEC, along with any documents incorporated by reference in the complaint.[23]

Rather than engaging in a drawn-out analysis of each of the myriad arguments made by the parties, the court instead turns to three key facts which it

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[19] *Malpiede v. Townson*, 780 A.2d 1075, 1082-83 (Del. 2001) (citing *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996)).
[20] *See Grobow v. Perot*, 539 A.2d 180, 187 & n.6 (Del. 1988); Ct. Ch. R. 12(b)(6).
[21] *Grobow*, 539 A.2d at 187 n.6.
[22] *See In re Wheelabrator Techs. Inc. S'holders Litig.*, 1992 WL 212595, at *11-12 (Del. Ch. Sept. 1, 1992); D.R.E. 201.
[23] *See In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170-71 (Del. 2006) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 n.9 (Del. 1995); D.R.E. 201); *see also In re Tyson Foods, Inc.*, 2007 WL 2351071, at *2 (Del. Ch. Aug. 15, 2007) (citing *In re Gen. Motors*, 897 A.2d at 170-71; *Midland Food Services, LLC v. Castle Hill Holdings V, LLC*, 792 A.2d 920, 925 n.5 (Del. Ch. 1999)).

believes, together, make it impossible to dismiss the complaint. These are: 1) Fertitta's negotiation (and the board's acquiescence to his taking that role) of the refinancing commitment on behalf of the company as part of the amended debt commitment letter;[24] 2) the board's apparent and inexplicable impotence in the face of Fertitta's obvious intention to engage in a creeping takeover; 3) the board's agreement to terminate the merger agreement, thus allowing Fertitta to avoid paying the $15 million reverse-termination fee.[25]

Each of these, taken individually, might raise the eyebrows of the court to varying degrees. But taken in the aggregate, they make it impossible for the court to state that to a "reasonable certainty" there is no set of facts which may be inferred from the well-pleaded allegations in the complaint that would allow the plaintiff to prevail.[26] Rather, these facts lead to the reasonable inference, though by no means the certain conclusion, that Fertitta used his influence on the corporation as controlling stockholder and/or corporate officer to his own benefit and to the

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[24] In particular, the court notes here the surprising structure of the backup refinancing commitment as a part of the same agreement as the acquisition financing commitment, so that the Lending Banks could claim that a material breach of a term in the acquisition financing could also jeopardize the refinancing commitment.
[25] This fact is integral both to the fiduciary duty claim against Fertitta and the derivative waste claim pleaded against the board in count IV of the complaint. Unlike the other fiduciary duty claims against Fertitta, however, this aspect of the claim is properly pleaded as derivative, not direct. This is so because it is the corporation, not the stockholders, which is harmed by the loss of the reverse-termination fee, and it is to the corporation that any recovery must go. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004). For the reasons set forth with regard to count IV, the court concludes that demand is excused with respect to that aspect of count I that is derivative in nature.
[26] *See Malpiede*, 780 A.2d at 1082-83.

detriment of the interests of the minority stockholders.[27] The same facts also lead to the reasonable inference that the board and/or the special committee willingly acquiesced to Fertitta's scheming because he was the controlling stockholder.[28]

A few simple points serve to strengthen this conclusion and respond to the defendants' contentions in their motion. First, the defendants argue that the plaintiff fails to adequately allege that Fertitta was a controlling stockholder (at least until December, when he had gained majority control), and that all of his complained of actions involved his action *qua* stockholder. Thus, according to the

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[27] Because FAC and FHI were vehicles with little existence other than to serve Fertitta's purposes in the acquisition, and were integral to the transactions at issue, the court cannot dismiss the aiding and abetting claim against them. To state a claim for aiding and abetting a breach of fiduciary duty, the plaintiff must allege (i) an underlying breach of fiduciary duty, (ii) that the alleged aider and abettor knowingly participated in that breach, and (iii) damages resulting from the breach. *See Gatz v. Ponsoldt*, 925 A.2d 1265, 1275 (Del. 2007). Having already determined that the plaintiff has adequately alleged the first prong (and the third prong in this case being beyond contention by the defendants for the purposes of a motion to dismiss) the issue firmly rests on the question of knowing participation by FAC and FHI. "Knowing participation in a . . . fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach." *Id.* at 1276 (quoting *Malpiede*, 780 A.2d at 1097). The defendants contend that the complaint fails to adequately plead the required *scienter*. In support of this contention, the defendants cite *In re Santa Fe Pacific Corp. S'holders Litig.*, 669 A.2d 59 (Del. 1995), for the proposition 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." Defs.' Opening Br. 31 (quoting *Sante Fe*, 669 A.2d at 72). But *Santa Fe* is a case involving a claim that an unrelated public-company bidder aided and abetted alleged breaches of fiduciary duty by the board of another publicly-held company, based on the bare conclusory allegation of knowledge. Here, two 100%-owned corporate shells, created for no other purpose than to facilitate related transactions of the fiduciary, are alleged to have "knowledge" of the alleged breach. It would elevate form too far over substance to suggest, in the procedural posture of a Rule 12(b)(6) motion, that it is not a reasonable inference that facts known to Fertitta were also known to FAC and FHI.

[28] The court is reminded of the famous charge to the board made by the controlling stockholder in *Kahn v. Lynch Commc'n Sys., Inc.*: "[y]ou must listen to us. We are 43 percent owner. You have to do what we tell you." 638 A.2d 1110, 1114 (Del. 1994).

defendants, Fertitta owed no fiduciary duties to the minority stockholders in any of those actions.[29]

The Delaware Supreme Court stated the test for control by a non-majority stockholder in *Citron v. Fairchild Camera & Instrument Corp.*: "[f]or a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct."[30] First, there is no question (at least for the purposes of a motion to dismiss) that Fertitta exercised actual control of Landry's at all relevant times–he was not only the 39% stockholder, but the CEO and chairman of the company as well. Second, and more importantly, Fertitta's actions with respect to the negotiation of the refinancing commitment in the amended debt commitment letter do not fall so neatly into the "only acting as a minority stockholder" basket. It is unclear exactly in what capacity Fertitta was acting when negotiating with the Lending Banks on behalf of Landry's in October 2008. Ultimately, however, there are only two reasonable possibilities: 1) Fertitta was negotiating as CEO of the corporation, with at least tacit permission of the board; or 2) Fertitta was negotiating with the Lending Banks as controlling stockholder of Landry's. Under

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[29] *See Kahn*, 638 A.2d at 1113 ("[A] shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation." (quoting *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987))).
[30] 569 A.2d 53, 70 (Del. 1989).

either circumstance, Fertitta was subject to a fiduciary duty to act in the best interests of the corporation and the stockholders as a whole, and to prefer those interests to any interest of his own. A breach of that duty is the essence of a failure of loyalty. Moreover, with respect to Landry's decision to act to terminate the merger agreement, by January 2009 it is indisputable that Fertitta was actually the majority owner of Landry's, raising a presumption of control on his part.[31]

The court now turns to the claim against the board for breach of fiduciary duty. The defendants urge that at best the plaintiff has pleaded a breach of the duty of care, which is exculpated by the corporate charter of Landry's pursuant to section 102(b)(7) of the Delaware General Corporation Law, and point to the Delaware Supreme Court's recent decision in *Lyondell Chemical Co. v. Ryan*[32] for good measure. Simply put, this is not a case to which *Lyondell* speaks. *Lyondell* is a case in which the plaintiffs attempted to apply the *Caremark*[33] standard for lack of good faith to the context of a control transaction. To attempt to apply *Lyondell*

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[31] *Kahn*, 638 A.2d at 1113. The defendants make much of the fact that Fertitta's shares acquired post-June Agreement were sterilized with respect to the merger vote, and therefore he was not the majority stockholder for these purposes. The sterilization of his shares only for purposes of the merger vote strikes the court as plainly irrelevant when determining whether he constituted a majority stockholder at the time the corporation elected *not* to proceed with the merger. Because Fertitta was undoubtedly the majority stockholder by the time the decision was made for the company to terminate the merger agreement, the "termination transaction" will be examined under the entire fairness standard. *Kahn*, 638 A.2d at 1115 ("A controlling or dominating shareholder standing on both sides of a transaction . . . bears the burden of proving its entire fairness.") (citing *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985)).

[32] 970 A.2d 235 (Del. 2009).

[33] *In re Caremark Int'l Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

to the instant case, however, misses entirely the gravamen of the plaintiff's claims. The plaintiff here does not claim that it was harmed by virtue of some sufficiently gross failure of process on the part of the Landry's directors. Rather, the plaintiff's claims are far simpler: the board knowingly preferred the interests of the majority stockholder to those of the corporation or the minority.

Turning first to the board's failure to employ a poison pill to prevent Fertitta from obtaining control without paying a control premium, it is reasonable in the context of a motion to dismiss to infer fiduciary misconduct more serious than a breach of the duty of care. The failure to act in the face of an obvious threat to the corporation and the minority stockholders instead supports a reasonable inference that the board breached its duty of loyalty in choosing not to cross Fertitta.[34]

The court turns now to the board's decision to terminate the merger agreement and relieve Fertitta of the responsibility to pay the reverse-termination fee. The board's contention that it simply had no choice but to terminate the agreement, rather than forcing Fertitta to do so, is not persuasive. The board contends that disclosure of the amended debt commitment letter would have risked

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[34] The defendants state that "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." Defs.' Opening Br. 42. This is true, and this decision will not change that. To say that there is no *per se* duty to employ a poison pill to block a 46% stockholder from engaging in a creeping takeover does not refute the conclusion that the board's failure to employ a pill, together with other suspect conduct, supports a reasonable inference at the motion to dismiss stage that the board breached its duty of loyalty in permitting the creeping takeover.

the refinancing commitment, and therefore risked default on $400 million in notes. Thus, the argument goes, the only rational choice was to terminate the agreement, rather than risking bankruptcy. But the board must have recognized that the risk that Fertitta would have permitted that to happen, rather than terminating the agreement and paying the reverse break-up fee himself, was low. As of the time of the termination of the merger agreement, Fertitta owned 9,658,855 shares of Landry's common stock,[35] worth between $78 million (based on the post-termination price) and $119 million (based on the pre-termination price). There is no doubt that the value of that stock would have been severely impaired, if not entirely destroyed, had Landry's defaulted on the $400 million note redemption and been forced into bankruptcy. Thus, it is unreasonable to think (at this stage at least) that Fertitta would have allowed the company to be forced into bankruptcy rather than paying the $15 million reverse-termination fee. It is difficult to imagine that the Landry's board would not have recognized this reality. It therefore raises a question whether the board's decision to terminate and entirely excuse Fertitta's performance constituted a rational exercise of business judgment.[36] That question cannot be resolved at this stage of the proceedings, but

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[35] January Proxy Statement at 152.

[36] The business judgment rule "is a presumption 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." *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (citing *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)). To be clear, what the plaintiff has stated here is a claim for waste. *See Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879, 893 (Del.

must await the consideration of detailed facts beyond the scope of a motion to dismiss.[37]

III.

The defendants have also moved to dismiss the derivative claims pursuant to Rule 23.1.[38] Unless the plaintiff can show demand would be futile, it must make a demand on the board of directors of the corporation before a derivative action may be instituted on behalf of the corporation.[39] "The test of demand futility is a two-fold test under *Aronson* and its progeny. The first prong of the futility rubric

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Ch. 1999) (holding that the fundamental basis for a waste claim rests on the pleading of facts that show that the economics of the transaction were so flawed that no disinterested person of right mind and ordinary business judgment could think the transaction beneficial to the corporation).

[37] *Cf. Michelson v. Duncan*, 407 A.2d 211, 223 (Del. 1979) ("Claims of gift or waste of corporate assets are seldom subject to disposition by summary judgment; and when there are genuine issues of fact as to the existence of consideration, a full hearing is required regardless of shareholder ratification."); *Gottlieb v. McKee*, 107 A.2d 240, 243 (Del. Ch. 1954) ("The determination of whether or not there has been in any given situation a gift of corporate assets does not rest upon any hard and fast rule. It is largely a question of fact.").

[38] *See* Ct. Ch. R. 23.1 ("The complaint shall . . . allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort."). In the case of a motion to dismiss under Rule 23.1, as in the case of a motion to dismiss for failure to state a claim, the court assumes all well pleaded facts to be true. *See, e.g.*, *Malpiede*, 780 A.2d at 1082. "Of course, the trial court is not required to accept every strained interpretation of the allegations proposed by the plaintiff, but the plaintiff is entitled to all reasonable inferences that logically flow from the face of the complaint." *Id.* at 1083. However, "conclusory allegations of law or fact that are not supported by specific allegations of fact will not be taken as true for purposes of a motion to dismiss under Rule 23.1." DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY [hereinafter "WOLFE & PITTENGER"] § 9.02[b][3][iii], at 9-67 (2008) (citing *Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000)). Rather, "the pleader must set forth . . . particularized factual statements that are essential to the claim." *Brehm*, 746 A.2d at 254. The derivative plaintiff's burden under Rule 23.1 is thus more onerous than a normal defendant's burden under Rule 12(b)(6). WOLFE & PITTENGER, § 9.02 [b][3][iii], at 9-67.

[39] *See Aronson*, 473 A.2d at 811-12.

is 'whether, under the particularized facts alleged, a reasonable doubt is created that . . . the directors are disinterested and independent.' The second prong is whether the pleading creates a reasonable doubt that 'the challenged transaction was otherwise the product of a valid exercise of business judgment.' These prongs are in the disjunctive. Therefore, if either prong is satisfied, demand is excused."[40]

The Delaware Supreme Court has observed that the basis for claiming that demand is excused would generally be one of: "(1) a majority of the board has a material financial or familial interest; (2) a majority of the board is incapable of acting independently for some other reason such as domination or control; or (3) the underlying transaction is not the product of a valid exercise of business judgment."[41] There is nothing in the complaint (other than irrelevant allegations regarding the directors' customary annual compensation) to suggest that the directors are either interested or otherwise lack independence as a result of domination or control. However, as the court has already stated, the complaint raises a reasonable doubt that "the challenged transaction[42] was otherwise the product of a valid exercise of business judgment."[43] As such, the court concludes

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[40] *Brehm*, 746 A.2d at 256 (quoting *Aronson*, 473 A.2d at 814) (internal citations omitted).
[41] *Grimes v. Donald*, 673 A.2d 1207, 1216 (Del. 1996) (internal citations omitted).
[42] In this case, the decision for Landry's to terminate the merger agreement, rather than requiring Fertitta to do so and incur the reverse-termination fee.
[43] *Brehm*, 746 A.2d at 256 (quoting *Aronson*, 473 A.2d at 814) (internal citations omitted). In general, a well pleaded complaint for waste cannot be dismissed for failure to plead demand futility, as waste by definition cannot constitute a valid exercise of business judgment. *See Stein v. Orloff*, 1985 WL 11561, at *5 (Del. Ch. May 30, 1985) (holding that because the complaint

that demand was excused, and the derivative count cannot be dismissed for failure to make demand upon the board.

IV.

For the foregoing reasons, the defendants' motion to dismiss is DENIED. IT IS SO ORDERED.

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contained a "sufficient allegation of facts to state a claim for waste" that it therefore created "a reasonable doubt that the transaction was the result of a valid exercise of business judgment") (citing *Michelson*, 407 A.2d at 223).