



IN THE COURT OF THE CHANCERY OF THE STATE OF DELAWARE

LOUISIANA MUNICIPAL POLICE
EMPLOYEES' RETIREMENT SYSTEM, on
behalf of itself and all other similarly situated
shareholders of Landry's Restaurants, Inc., and
derivatively on behalf of nominal defendant
Landry's Restaurants, Inc.,

Plaintiff,

v.

TILMAN J. FERTITTA, STEVEN L.
SCHEINTHAL, KENNETH BRIMMER,
MICHAEL S. CHADWICK, MICHAEL
RICHMOND, JOE MAX TAYLOR,
FERTITTA HOLDINGS, INC., FERTITTA
ACQUISITION, CO. RICHARD LIEM,
FERTITTA GROUP, INC. and FERTITTA
MERGER CO,

Defendants, and

LANDRY'S RESTAURANTS, INC.

Nominal Defendant.

C.A. No. 4339-VCL
PUBLIC VERSION
UNREDACTED
MARCH 29, 2010

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO
COMPEL THE FERTITTA DEFENDANTS, RICHARD LIEM AND STEVEN L.
SCHEINTHAL TO PRODUCE DOCUMENTS**

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Plaintiff Louisiana Municipal Police Employees' Retirement System, through its counsel, submits this motion for an Order compelling defendants Tilman J. Fertitta, Fertitta Acquisition Co., Fertitta Group, Inc., Fertitta Holdings, Inc., and Fertitta Merger Co. (collectively the "Fertitta Defendants"), Richard Liem and Steven L. Scheinthal (together with the Fertitta Defendants, the "Defendants") to produce documents that have been withheld based on improper assertions of the attorney-client privilege.

This motion raises a simple and straightforward issue: can a corporate insider who bids for the company assert the attorney-client privilege or common interest doctrine to withhold communications with employees and other representatives of the company regarding his bid? Plaintiff respectfully submits that the answer is no and requests that the Court order their production.

I. STATEMENT OF FACTS

A. Fertitta Refuses To Disclose His Communications With Landry's Personnel and Representatives Concerning The Transaction

CEO Tilman J. Fertitta announced on January 5, 2008 that he wanted to explore the possibility of buying the publically held shares of Landry's to take the company private. To assist Fertitta in exploring this possibility, the Board adopted a resolution "allowing Mr. Fertitta to access and utilize Company personnel and incidental resources to explore a going private transaction to enhance shareholder value."¹ It was therefore clear from the outset that Landry's would possibly receive a bid from its CEO, and that the CEO and Landry's shareholders were on opposite sides of this transaction. Parties

¹ January 5, 2008 Board Minutes, attached to the March 21, 2010 declaration of John C. Kairis ("Kairis Decl.") as Ex. A.

frequently work on opposite sides of a transaction with the goal of making the transaction succeed. Indeed, target company resources are oftentimes made available to bidders or potential bidders, in order to provide data or other assistance that may result in a shareholder value maximizing transaction. But because the parties remain on opposite sides, however, this situation does not create an attorney-client relationship or a common interest.²

In this action, however, counsel for Fertitta claims that the Board's January 5, 2008 authorization allowing Fertitta to use company resources to explore his bid created an attorney-client relationship between Fertitta and Landry's executive vice-president and general counsel Steven Scheinthal ("Scheinthal") and a common interest between Fertitta, Scheinthal and Landry's executive vice-president and chief financial officer, Richard Liem. Based on these assertions, Fertitta, Scheinthal and Liem are improperly refusing to disclose their communications, and communications of Fertitta's counsel at Baker Botts and Olshan with Scheinthal and Liem, concerning Fertitta's bid. Additionally, Defendants are also refusing to disclose communications of Fertitta and his advisors with Landry's outside counsel Haynes & Boone LLP.

² Even if the Board's general authorization to Fertitta to access company resources authorized Landry's personnel to work against Landry's interests (and it did not), this authorization ended on January 27, 2008 when: (i) Fertitta completed his investigation and made an offer to buy Landry's for \$23.50 per share; and (ii) the Board formed a Special Committee to evaluate Fertitta's offer and authorized it to "use Company personnel and assets" for doing so.

B. Plaintiff Has Made Every Effort To Avoid Burdening The Court With This Discovery Dispute

After Defendants produced six privilege logs identifying purportedly privileged documents, Plaintiff sent a letter on February 23, 2010 objecting to the withholding of communications of Fertitta and his counsel, on the one hand, and Scheinthal and Liem or other Landry's representatives, on the other.³ Defendants responded on March 15, 2010, insisting that these communications are privileged because the Board authorized Fertitta on January 5, 2008 to access company resources to explore a bid. Although not identified on the logs, Defendants also asserted a common interest privilege.⁴ Additionally, on March 16, 2010 Defendants provided an additional privilege log with close to 2,000 entries – including entries regarding communications between September 2008 and February 2009 – a redaction log and a privilege log of hard copy documents.

On March 17, 2010, counsel for Plaintiff initiated a meet and confer with Baker Botts. After again discussing this straightforward issue and making clear that Plaintiff was ready to immediately seek judicial relief in light of the limited time remaining in discovery, Baker Botts requested a second meet and confer with Delaware counsel. This second meet and confer was held on March 18 and included Messrs. Grant and Lebovitch for Plaintiff and Messrs. Dreisbach and David for Defendants. Defendants counsel were unable to point to Delaware authority supporting Defendants claims that communications of Fertitta, Baker Botts and Olshan with Landry's employees and representatives about

³ Kairis Decl. Ex. B.

⁴ Kairis Decl. Ex. C.

the transaction are properly withheld. Plaintiff's counsel gave Defendants until noon on March 19 to revise their position. On March 19, Baker Botts contacted Plaintiff's counsel with a request for additional time, and Plaintiff's counsel agreed to wait until the end of the day before filing this motion, and made clear that only a written agreement binding on Defendants and their counsel would suffice to warrant any further delay. Plaintiff is filing this motion because no further response was received.

ARGUMENT

A. Landry's Employees And Representatives Are Not Within Fertitta's Circle Of Privilege Or Interest

In Delaware, corporate officers "stand in a fiduciary relation to the corporation and its stockholders." *Guth v. Loft, Inc.*, 5 A.2d 504, 510 (Del. 1939). The corporate officers' fiduciary duties are "identical to those owed by corporate directors" and include the duty of loyalty. *Gantler v. Stephens*, 965 A.2d 695, 708-09 (Del. 2009). As the Delaware Supreme Court explained, "[e]ssentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).

Liem was at all relevant times Landry's executive vice president and chief financial officer. Scheinthal was at all relevant times Landry's executive vice president and general counsel. They were therefore obligated at all times to serve the best interests of Landry's and its stockholders, not the interests of Fertitta in obtaining control over

Landry's at the lowest possible price. The Board authorization allowing Fertitta to "access and utilize Company personnel and incidental resources" did not absolve Liem and Scheinthal from their immutable obligations.

Scheinthal was also not absolved from his fiduciary (and ethical) duties to Landry's and its shareholders imposed by the rules of professional conduct governing his conduct as general counsel. Here, Scheinthal's "client" was Landry's, not Fertitta.⁵ *See, e.g., Upjohn v. United States*, 449 U.S. 383, 393-94 (1981). Under the Delaware Lawyers' Rules of Professional Conduct, "A lawyer employed or retained by an organization **represents the organization** acting through its duly authorized constituents." Rule 1.13(a) (emphasis added). The same rule applies in Texas, where Scheinthal is admitted to practice.⁶ The Texas Disciplinary Rules of Professional Conduct state: "A lawyer employed or retained by an organization **represents the entity.**" Rule 1.12(a) (emphasis added).

Scheinthal could not possibly respect these obligations while also advising Fertitta on the deal. By the same token, there is no basis for Defendants to assert a "common interest" with Fertitta or his counsel in connection with the transaction. *See Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, at *5 (Del. Ch. Nov. 13, 2002) (explaining that "the interest between the disclosing party and the recipient must be so parallel and

⁵ This is also true for Landry's outside counsel, Haynes & Boone LLP.

⁶ *See* <http://www.texasbar.com/Template.cfm?Section=MemberDirectory&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=185837> (last viewed on March 20, 2010).

non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers.”) (citations and quotation marks omitted).

B. Defendants Improperly Withheld Numerous Relevant, Non-Privileged Documents

Defendants have produced seven privilege logs listing more than 4,500 documents that were withheld based on assertions of the attorney-client privilege.⁷ Defendants have the burden of showing that these documents were properly withheld. *See Hoechst Celanese Corp. v. Nat’l. Union Fire Ins. Co. of Pittsburgh, PA*, 623 A.2d 1118, 1122 (Del Super. Ct. 1992) (“The party asserting the privilege has the burden of proving each of the necessary elements.”)

Defendants cannot meet their burden. These logs reveal that a substantial number of withheld documents contain communications of Fertitta and his counsel at Olshan and Baker Botts with Scheinthal, Liem, or Berner about Fertitta’s efforts to renegotiate and terminate the deal at the expense of the public shareholders. The logs include, for example, the following entries:

- 9/18/08 email from Baker Botts to Scheinthal “reflecting thoughts, impressions, and strategic advice by outside counsel and soliciting thoughts, impressions, and strategic advice from in-house counsel regarding status of transaction.”⁸
- 9/25/08 emails from Baker Botts to Scheinthal “reflecting thoughts, impressions, and strategic advice from outside counsel regarding Jefferies commitment.”⁹

⁷ By way of example, Plaintiff submits excerpts from the most recent log and the names listed thereon as Kairis Decl. Exs. D and E.

⁸ Entry 2546.

⁹ Entries 2551, 2552

- 9/27/08 email from Scheinthal to Olshan “reflecting thoughts, impressions, and strategic advice from in-house counsel regarding negotiations with special committee.”¹⁰
- 10/2/08 email from Olshan to Fertitta, Liem and Scheinthal “reflecting thoughts, impressions, and strategic advice by outside counsel regarding status of negotiations.”¹¹
- 10/8/08 email from Liem to Olshan “soliciting thoughts, impressions, and strategic advice from outside counsel regarding and attaching sales data and income.”¹²
- 10/8/08 email from Liem to Olshan “soliciting thoughts, impressions, and strategic advice from outside counsel regarding and attaching revised projections data.”¹³
- 10/15/08 email from Olshan to Fertitta, Liem and Scheinthal “reflecting thoughts, impressions, and strategic advice from outside counsel regarding and attaching draft amendment to Jefferies commitment letter.”¹⁴
- 1/6/09 email from Haynes & Boone to Scheinthal and Fertitta “reflecting thoughts, impressions, and strategic advice by outside counsel regarding SEC’s position.”¹⁵
- 1/6/09 email from Scheinthal to Liem and Fertitta “reflecting thoughts, impressions, and strategic advice by in-house counsel regarding SEC’s position.”¹⁶
- 1/8/09 email from Special Committee Chair, Chadwick, to Liem and Scheinthal “facilitating thoughts, impressions, and strategic advice by in-house counsel regarding deal status.”¹⁷
- 1/8/09 email from Scheinthal to Chadwick “reflecting thoughts, impressions, and strategic advice by in-house counsel regarding deal status.”¹⁸

¹⁰ Entry 2554.

¹¹ Entries 313, 314

¹² Entry 316

¹³ Entry 317

¹⁴ Entry 320

¹⁵ Entry 3090

¹⁶ Entry 3092

¹⁷ Entry 3137

- 1/8/09 emails from Scheinthal to Baker Botts and Olshan “soliciting thoughts, impressions, and strategic advice from outside counsel by in-house counsel regarding and attaching draft merger termination.”¹⁹
- 1/9/09 emails from Olshan to Liem, Scheinthal and Fertitta “reflecting thoughts, impressions, and strategic advice by outside counsel regarding and attaching draft letter to special committee.”²⁰
- 1/11/09 email from Chadwick to Scheinthal “soliciting thoughts, impressions, and strategic advice by in-house counsel regarding draft merger termination.”²¹
- 1/11/09 email from Chadwick to Scheinthal “facilitating thoughts, impressions, and strategic advice by in-house counsel regarding special committee meeting.”²²
- 1/11/09 email from Haynes & Boone to Fertitta “reflecting thoughts, impressions, and strategic advice by outside counsel regarding draft merger termination.”²³
- 1/11/09 emails between Scheinthal and Olshan soliciting and reflecting “thoughts, impressions, and strategic advice by outside counsel regarding draft merger termination.”²⁴

Each of these examples involves communications among parties who are supposed to be representing adverse interests in the transaction. These communications cannot be covered by the attorney-client privilege or the common interest doctrine.

The withheld communications of Fertitta and his advisors with Scheinthal, Liem and Haynes & Boone are highly relevant for Plaintiff’s breach of fiduciary duty claims in this action. For example, documents and testimony obtained through discovery have revealed that Liem and Scheinthal, together with Special Committee Chairman Michael

18 Entry 3137
 19 Entries 3123 and 3125
 20 Entries 3145 and 3148
 21 Entry 3192
 22 Entry 3178
 23 Entry 3193
 24 Entries 3197 and 3198.

Chadwick (“Chadwick”), played instrumental roles in Fertitta’s plan to undermine his own acquisition at \$21 per share in favor a creeping takeover at depressed prices. It is now clear, for example, that Liem withheld critical financial information showing the limited impact of Hurricane Ike on Landry’s operations from the Special Committee and its financial advisor Cowen & Co. (“Cowen”).²⁵ Discovery has also revealed that Liem orally instructed Jefferies to revise the terms of the deal to \$17 per share just hours before Scheinthal created a paper trail suggesting that Fertitta remained committed to pay \$21 per share.²⁶ In other words, Fertitta was using Liem to orally pass along his plan to renegotiate the deal while using Scheinthal to create a paper trail to the contrary. Jefferies revised the financing scenario in accordance with Liem’s instructions, understanding that the deal was being re-priced “*in light of tilman having approached the special committee regarding a 4 dollar price reduction.*”²⁷ The bank was clearly not the impetus for re-pricing the deal; it was Fertitta alone, in complete derogation of his fiduciary duties.

Emails further show that Chadwick kept Fertitta informed about the internal deliberations of the Special Committee, secretly forwarding communications from the

²⁵ For example, according to “all hands meeting notes” of a September 28, 2008 conference call involving Fertitta, Liem, Scheinthal, Olshan, the Special Committee, K&S and Cowen, “Cowen listed two items that were requested from the Company but remain outstanding (schedule of legal expenses and *predictions of exposure from Hurricane Ike*.” Deposition Exhibit 17 (emphasis added).

²⁶ On the morning of September 24, 2008, while the banks were clearly proceeding toward the \$21 deal, Liem set up a telephone call with Jefferies. Liem instructed Jefferies to re-price the deal at \$17 per share on Fertitta’s orders.

²⁷ Deposition Ex. 219.

Special Committee's counsel at King & Spalding ("K&S") to Scheinthal. This included K&S legal advice concerning Fertitta's ability to claim that Hurricane Ike constituted an MAE as well as legal advice pertaining to Fertitta's creeping takeover of the company at depressed values.²⁸ In short, Plaintiff has a strong basis to believe that production of the withheld communications will further show the many ways in which Fertitta controlled and corrupted the renegotiation and termination of the deal, with help from Liem and Scheinthal.

C. Fertitta's Communications With Scheinthal, Liem And Haynes & Boone, Should Be Disclosed, Even If They Are Privileged

The attorney-client privilege is not absolute. In particular, "where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of stockholders to show cause why it should not be invoked in the particular instance." *Lee v. Engle*, 1995 WL 761222, at *2 (Del Ch. Dec. 15, 1995) (emphasis omitted)(citing *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970)). Delaware courts emphasize three factors in determining whether the requisite good cause is present: "(1) the nature of the shareholders' claim and whether it is obviously colorable; (2) the apparent necessity or

²⁸ On September 30, 2008, K&S sent an email to the Special Committee suggesting that a short term impact on earnings of a target company would not give rise to an MAE. The email attached an article about the Chancery Court's September 30 decision in the Huntsman-Hexion case. Special Committee Chairman Chadwick secretly forwarded K&S's legal advice to Scheinthal, thus informing Fertitta about the advice K&S was providing to the Special Committee. Chadwick similarly informed Scheinthal concerning K&S' advice with respect to Fertitta's open market purchases of Landry's shares. Kairis Decl. Ex. F.

desirability of the shareholders having the information and the availability of it from other sources; (3) the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing.” *See id.* (citation and quotation marks omitted). Each of these factors points to a finding of good cause and a requirement that the requested documents be produced.

First, the fact that the action against Defendants has progressed this far indicates that Plaintiff’s shareholders’ claims are colorable. *See Lee*, 1995 WL 761222, at *3 (“The fact [the actions] have progressed this far indicates viability. Otherwise, they may not have survived a motion to dismiss had one been presented.”)

Second, it is necessary and desirable that Fertitta’s communications with Landry’s employees and representatives, including Scheinthal, Liem and Haynes & Boone, be produced. The court’s decision in *Deutsch v. Cogan* is instructive. 580 A.2d 100 (Del. Ch. 1990). There, Akin Gump provided legal advice to a company in connection with a cash-out merger. At the same time, one of the Akin Gump partners sat on the board and therefore had fiduciary obligations to the minority shareholders in connection with the transaction. Shareholders sought to compel the production of “any communications between the corporation, its officers, directors and other agents, and Akin Gump” because of Akin Gump’s conflict of interest. 580 A.2d at 103. The court agreed and ordered production. As the court explained:

Where a fiduciary has conflicting interests, to allow the lawyer-client privilege to block access to the information and basis of its decisions as to the persons to whom the obligations are owed might allow the perpetration of frauds. A fiduciary owes an obligation to

his beneficiaries to go about his duties without obscuring reasons from the legitimate inquiries of the beneficiaries. Moreover, the more general and important the right of those who look to fiduciaries to safeguard their interests, to be able to determine the proper functioning of the fiduciary, outweighs the need for the privilege and its base of attorney-client confidence.

Id. at 108 (citations and quotation marks omitted). The same is true here. Moreover, because the Fertitta Defendants, Scheinthal and Liem are represented by the same counsel in this action, Plaintiff has no alternative means to obtain the documents from other sources.

Third, this is no blind fishing expedition. Rather, Plaintiff has identified a category of documents that are highly relevant for Plaintiff's breach of fiduciary duty claims. *See Lee*, 1995 WL 761222, at *3 (ordering production after finding that "[t]he record indicates Plaintiffs' desired documents are related to pursuit of their claims"). Consequently, even if the Court were to find that communications about the transaction of Fertitta and his advisors with Scheinthal, Liem or Haynes & Boone were privileged, the Court should still order their production for good cause shown.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order compelling Defendants to produce all communications regarding the going-private transaction of Fertitta, including his lawyers at Olshan and Baker Botts, with any employees or representatives of Landry's, including Liem, Scheinthal, and Haynes & Boone.

Respectfully submitted,

Dated: March 22, 2010

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CERTIFICATE OF SERVICE

I, John C. Kairis, certify that on March 29, 2010, I caused the foregoing Public Version Unredacted Memorandum Of Law In Support Of Plaintiff's Motion To Compel The Fertitta Defendants, Richard Liem And Steven L. Scheinthal To Produce Documents and Public Version Declaration of John C. Kairis with Exhibits to be served upon the following counsel via LexisNexis File & Serve:

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