

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., RICHARD LIEM,
FERTITTA GROUP, INC. and FERTITTA
MERGER CO.

Defendants, and

LANDRY'S RESTAURANTS, INC.,

Nominal Defendant.

**PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

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Plaintiff Louisiana Municipal Police Employees' Retirement System ("LMPERS" or "Plaintiff") respectfully submits this opposition to the motions to dismiss (together, "Defendants' Motions to Dismiss") Counts I, II, III and IX of the Second Amended Complaint ("Complaint" or "Compl.") filed by Defendants Tilman J. Fertitta, Steven L. Scheinthal, Fertitta Holdings, Inc., Fertitta Acquisition Co., Richard Liem, Fertitta Group, Inc. and Fertitta Merger Co. (collectively, the "Fertitta Defendants") and by Defendants Kenneth Brimmer, Michael S. Chadwick, Michael Richmond and Joe Max Taylor (collectively, the "Director Defendants").

I. PROCEDURAL HISTORY

On February 5, 2009, Plaintiff filed its Verified Class Action and Derivative Complaint in the Delaware Court of Chancery challenging CEO Tilman J. Fertitta's conduct in connection with attempts to take private Landry's Restaurants, Inc. ("Landry's" or the "Company") in two failed buyouts (the "\$21 Buyout" and the "\$13.50 Buyout"). Defendants moved to dismiss and to stay discovery. On July 28, 2009, Vice Chancellor Lamb issued a Memorandum Opinion denying Defendants' motion to dismiss in its entirety (the "MTD Order"). The Court held "that the complaint adequately alleges claims for breach of the duty of loyalty against all of the defendants." *Louisiana Mun. Police Employees' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *1 (Del. Ch. July 28, 2009). Vice Chancellor Lamb found that the facts alleged "lead to the reasonable inference . . . that Fertitta used his influence on the corporation as controlling stockholder and/or corporate officer to his own benefit and to the detriment of the minority shareholders. The same facts also lead to the reasonable inference that the board and/or

special committee willingly acquiesced to Fertitta's scheming because he was the controlling shareholder." *Id.* at 16-17.

The parties engaged in extensive and highly contentious discovery and related motion practice, which continues. Plaintiff supplemented its initial complaint in response to Fertitta's announcement in November 2009 that he would purchase all outstanding shares of Landry's stock for \$14.75 per share ("2009 Buyout") and amended it on January 28, 2010. Plaintiff filed the current Complaint on May 21, 2010. On May 23, 2010, the parties reached a partial settlement related to the 2009 Buyout whereby Fertitta agreed to raise the purchase price to \$24 per share and agreed to a new go-shop period, among other reforms to improve the fairness of the sales process. Plaintiff moved for class certification and Defendants filed their Motions to Dismiss on May 28, 2010. Trial is scheduled to begin on September 20, 2010.

II. PRELIMINARY STATEMENT

The Court should reject in all respects Defendants' Hail Mary pass Motions to Dismiss. Every argument Defendants now assert either was raised before Vice Chancellor Lamb and unequivocally rejected in this Court's July 28, 2009 Opinion denying Defendants' prior motions to dismiss, or could have been raised at that time. Plaintiff submits that the discovery record that has since emerged shows some of the most egregious acts of disloyalty and bad faith ever seen in this Court. The necessary implication of Defendants' arguments about the scope of Delaware fiduciary law and this Court's jurisdiction would, if accepted, leave Delaware fiduciary law toothless in the face of patent disloyalty such as that demonstrated by Defendants.

Defendants are fundamentally wrong about Delaware law and the protections it provides shareholders against fiduciary breaches. Fertitta openly admits that buyer's remorse motivated him to renegotiate his 2008 merger agreement to take Landry's private: "I did not think that with the economic crisis going throughout the rest of the country, that it was worth \$21 anymore." Complaint ¶2.¹ Fertitta had legitimate, but costly, options to avoid closing the deal. He chose instead to exploit his fiduciary position. The Complaint details how Fertitta used his fiduciary power, in breach of his fiduciary duties, to undermine the \$21 Buyout, and how the Landry's board of directors (the "Landry's Board" or the "Board") acted in bad faith in catering to Fertitta's personal wishes, all at the direct expense of Landry's shareholders. Quite simply, no third party corporate acquirer could have gotten away with half of Fertitta's improper actions. Under the most basic tenets of Delaware law, when a fiduciary abuses his powers for personal profit, a breach of the duty of loyalty is established and remedies are awarded to the injured beneficiary – which in this case is the class of Landry's shareholders who had a right to expect the \$21 Buyout to close.

Notwithstanding decades of contrary precedent, Defendants characterize Plaintiff's breach of fiduciary duty claim against Fertitta as really just a contract claim premised on an assumed duty to close the mergers. The Complaint alleges nothing of the sort. Fiduciary duties continue to apply to fiduciaries, like Fertitta, even when they have separate contractual obligations. In the MTD Order, Vice Chancellor Lamb rejected Defendants' insistence that Fertitta was simply acting *qua* shareholder under the merger

¹ All references to "¶__" are to the corresponding paragraph of the Complaint. Capitalized terms have the same meaning as in the Complaint unless otherwise noted.

agreement and not in his fiduciary capacity, deciding that “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.” 2009 WL 2263406, at *7. To hold otherwise would allow fiduciaries, like Fertitta, to routinely breach their fiduciary duties when contracting with their companies, improperly finding that their self-interested conduct was exempt from fiduciary duties. Defendants’ argument creates a perverse incentive. If Fertitta is only subject to paying the reverse termination fee for derailing his buyout, then fiduciaries who want to avoid their contracts with the corporation will have no incentive to fulfill their fiduciary obligations and will misbehave with impunity, knowing that their liability is capped by the reverse termination fee (or similar contractual damages limitation). Delaware law does not allow such a result.

Defendants’ argument actually puts fiduciary-acquirers in a better position than third parties to engage in mischief while an agreement is executory. As Fertitta was forcing a renegotiation of the \$21 Buyout, this Court ruled in *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 746 (Del.Ch. 2008), that even a third party acting in bad faith to avoid closing on a merger cannot hide behind a reverse termination fee. If a third party is subject to extra-contractual damages for bad faith avoidance of a merger agreement, *ipso facto*, a fiduciary can be held liable to shareholders for abusing his fiduciary position to derail a merger.

Next, even though this Court ruled nearly a year ago that Plaintiff adequately alleged breaches of fiduciary duty against Fertitta and the Board, Defendants now argue that SLUSA preempts Plaintiff’s action. Plaintiff respectfully submits that if SLUSA

preempts this case, it preempts a large swath of cases currently pending before the Court. This case is *not* about misrepresentations to or manipulation of the stock market. Indeed, Plaintiff does not even allege a disclosure or misrepresentation claim relating to the 2008 Merger. Even if Plaintiff's allegations theoretically also could form the predicate for action by the SEC or a securities fraud class action by different plaintiffs, the gravamen of the Complaint at issue here is that Defendants abused their fiduciary duties, harming Landry's then-current public shareholders.

In any event, SLUSA's two "Delaware carve outs" squarely preserve this Court's jurisdiction over Plaintiff's claims. The first carve out preserves state court jurisdiction if it involves a stock repurchase plan by the issuer *or an affiliate of the issuer*. Here, Defendants' response to one of Plaintiff's prior claims makes frivolous their current resort to SLUSA. When this case began, Plaintiff alleged a Delaware law-based insider trading claim against Fertitta and alleged that the Board breached their fiduciary duties by failing to stop Fertitta's creeping takeover. Vice Chancellor Lamb called the Board's inaction "inexplicable impotence." 2009 WL 2263406, at *7. Fertitta's defense to the insider trading claim was that the Board actually approved those purchases. If the Board's failure to act was inexplicable, its affirmative approval of Fertitta's purchases, as alleged in the current Complaint based on evidence found in discovery, is mind-boggling. That same evidence, critically, refutes any argument about SLUSA because the September 15 Board minutes and related testimony make clear that in order to support Landry's stock price after Hurricane Ike hit, the Board authorized Fertitta to act *as an*

affiliate of Landry's in connection with an open market stock repurchase program. The first carve out applies.

The second carve out, which preserves this Court's jurisdiction to hear claims relating to any recommendation, position or other communication by the Company to the Company's shareholders "with respect to voting their securities ... or exercising dissenters' or appraisal rights," applies here as well. The Board made recommendations to shareholders regarding the \$21 Buyout, as reflected in the original press release announcing the deal and in preliminary proxy statements provided to shareholders. These are the only recommendations that exist in many actions where this Court holds full blown injunction proceedings. If Delaware only has jurisdiction when the shareholders actually have received the chance to vote on the deal based on a final proxy, as Defendants' argument necessarily implies, then hundreds of cases adjudicated by this Court before votes, and many in which the deal involved breaches of duty not ultimately put to a shareholder vote, must be unwound and litigated only in federal court. This position, like all of Defendants' SLUSA arguments, is simply baseless.

Finally, Defendants "reserved their right" to argue that Counts I, II, III and IX must be dismissed (once the \$24 per share transaction is consummated) because they are derivative claims, and not direct claims. Putting aside the procedural irregularities of this maneuver, Defendants are wrong on the substantive law. Under *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), Plaintiff's claims are direct. Under the first of *Tooley's* two prongs, a complaint alleges a direct claim if the stockholder suffered the alleged harm. Here, the public Landry's shareholders who would have

received \$21 per share at the merger closing suffered when Defendants improperly renegotiated and then terminated the deal and the stock price dropped. The claims meet *Tooley's* second prong because the Landry's stockholders would receive the benefit of any recovery related to Fertitta and the Board's breaches of fiduciary duty. Indeed, for the Court to hold otherwise would provide further incentive for insider-buyers to breach their fiduciary duties because they would know the worst that can happen is enforcement of a termination fee, which would be irrelevant if they later buy up all or most of the company's shares in a creeping takeover at deflated prices, as Fertitta did here.

In short, Fertitta and the Board have shown contempt for their fiduciary duties. It takes audacity to argue now that this Court is unable to provide a remedy for Defendants' breaches. This action should proceed to its September 2010 trial date.

III. STATEMENT OF FACTS

A. THE PARTIES

Landry's is a national, diversified restaurant, hospitality and entertainment company that owns and operates over 180 full-service, casual dining restaurants in 28 states and two Golden Nugget casinos. (¶40.) Fertitta has served as Landry's President, CEO and Chairman since 1987. (¶¶1, 26.) Fertitta owned 39% of Landry's stock prior to making a \$23.50 takeover offer in January 2008. (¶42.) The other members of the Landry's Board during 2008 were Kenneth Brimmer, Michael S. Chadwick, Michael Richmond, and Joe Max Taylor, its general counsel was Steven L. Scheinthal and its CFO was Richard H. Liem. (¶¶27-32.) Fertitta owns and created Fertitta Holdings, Inc. and Fertitta Acquisition Co. ("FAC") to effectuate the 2008 buyout. (¶¶35-36.)

B. FERTITTA AGREES TO BUY THE COMPANY FOR \$21 PER SHARE

On January 27, 2008, Fertitta offered to buy the publicly held shares of Landry's for \$23.50 per share, as a result of which the Board formed a Special Committee consisting of Brimmer, Richmond and Chadwick, who served as the Chairman, to negotiate a sale of the Company to Fertitta or any hypothetical competing bidder. (¶¶42-43.) The Special Committee retained King & Spalding ("K&S") as its legal advisor and Cowen & Co. as its financial advisor. (¶44.) From the beginning, Fertitta made clear to all that Scheinthal, Landry's General Counsel and director, and Liem, Landry's CFO, were working on the "Fertitta team" and that they were "adversaries" to the Special Committee. (¶45.)

On April, 4, 2008, Fertitta lowered his offer from \$23.50 to \$21 per share citing the difficult economic environment and the ongoing global credit crisis. (¶46.) In early June, Fertitta received what one lender internally described as a "Full, No-Outs Commitment" letter (the "Debt Commitment Letter") from Jefferies and Wells Fargo (collectively, the "Lenders"), and the Landry's Board executed an agreement to enter into the \$21 Buyout on June 16, 2008. (¶¶49-55.) Based on extensive diligence and a \$3 million commitment fee, the Lenders bargained away the right to terminate the financing based on difficulty syndicating the underlying debt. (¶¶51-53)

The \$21 Buyout agreement contained a \$24 million reverse termination fee (which Fertitta personally guaranteed) if FAC refused to close the deal for any legitimate reason. (¶56.) Fertitta could avoid paying the reverse termination fee if a material adverse effect ("MAE") had occurred. The Agreement defined an MAE in a traditionally

broad way, but it included a carefully negotiated and broad exception making clear that certain events could not trigger the MAE rights, including:

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.... (§58.)

The Debt Commitment Letter included a substantively identical MAE clause. (§59.) The Special Committee's counsel, Jack Capers of K&S, testified that the similarity between the two MAE clauses reflected a concerted effort by all parties to ensure that no one could abandon the deal because of changed economic circumstances. (§60.) By late August and in early September, numerous witnesses, including Fertitta, confirmed that the \$21 Buyout appeared on track to close by early October. (§63.)

C. HURRICANE IKE PROVIDES FERTITTA COVER TO AVOID THE \$21 BUYOUT

On September 13, 2008, Hurricane Ike struck Galveston, Texas, causing the closure of and damage to certain of the Company's properties. (§64.) Even before Hurricane Ike struck, the Lenders learned from Landry's representatives that the Company had sufficient property and business interruption insurance to cover the anticipated damage. (§65.) After the hurricane hit, Fertitta quickly realized that despite the short-term damage, the Company's long-term prospects remained positive and the \$21 Buyout remained a good one. (§66.)

Recognizing that short-term damage caused by Hurricane Ike was no basis to assert an MAE, the Lenders' first reaction to the Hurricane was a positive signal. (¶67.) For example, Jefferies banker, Jim Walsh, immediately suggested stabilizing the stock price in order to send a signal to the market that the hurricane would not derail the \$21 Buyout. *Id.* Wells Fargo banker, Rusty Parks, similarly explained that Hurricane Ike “was not an out under our financing papers which means it wasn't an out in the merger agreement.” *Id.* Thus, unless Fertitta decided to pay the \$24 million reverse termination fee, the hurricane should have been a non-event for purposes of the \$21 Buyout. *Id.*

On September 15, 2008, the Board met with Fertitta, Liem and Scheinthal to discuss the damage caused by Hurricane Ike. (¶68.) During this meeting, the Board authorized a share repurchase program to support the stock, and further approved share purchases *by Fertitta* in lieu of the Company itself, supposedly because of concern about whether the Company could buy shares with the transaction pending (the “Share Purchase Program”). (¶¶68-69.)² Although this approval perhaps insulated Fertitta from liability for violating the federal insider trading laws, the Special Committee chose not to disclose the Share Purchase Program to its outside counsel, who expressed serious concerns about the deal in light of Fertitta's open-market share purchases. (¶69.) From September 17 through September 19, Fertitta purchased 400,000 shares at prices ranging from \$11.83 to \$14.11 per share pursuant to the Share Purchase Program. (¶71.)

² According to the minutes of the September 15 Board meeting, which are incorporated into the Complaint at ¶¶68-69, the board determined that it would authorize the Share Purchase Program to “support” the Company's stock price.

D. FERTITTA USES HIS FIDUCIARY POWERS AND SUPERIOR KNOWLEDGE AND ACCESS TO CORPORATE RESOURCES TO OBTAIN LEVERAGE TO FORCE THE SPECIAL COMMITTEE TO AGREE TO A LOWER BUYOUT PRICE

Notwithstanding the way the \$21 Buyout's terms allocated general economic and natural disaster risk, Fertitta openly testified that he had buyer's remorse, explaining that he "really was struggling with how the future looked ahead of me to be paying \$21 a share." On September 17, Cowen was advised that Fertitta wanted to "cut the price to \$17/share". (§72.) The following day, Fertitta sent a letter to the Special Committee, asserting that the Lenders "may likely determine that a Material Adverse Effect under the Commitment Letter has occurred" and telling the Committee that in order to maintain the deal, they would need to accept a revised acquisition price of \$17 per share. (§§73-76.) Fertitta's letter conspicuously failed to say that the Lenders had actually determined that they had any rights to terminate, or even that they indicated any intent to assert such a position. *Id.* Indeed, they could not have taken such position, since by this time they had not conducted any investigation into the damage caused by Hurricane Ike, and would not even tour the Company's affected properties until six days later. (§72.)

As the evidence in discovery revealed, Fertitta's supposed fears about the Lenders were fabricated. Wells Fargo's banker Rusty Parks testified, for example, that as of September 18, 2008, Wells Fargo was committed to financing the \$21 Buyout and was "desperately trying to get to the bank meeting" to allow for syndication of Wells Fargo's debt commitment. (§77.) Likewise, Jefferies' banker Christian Morris testified that as of September 19, Jefferies and Wells Fargo were still moving forward towards trying to syndicate the loans on the \$21 Buyout. *Id.* Fertitta nevertheless insisted in his September

18 letter that he could “persuade the Lending Banks to move forward with debt financing” if he revised his offer to \$17.00 per share.” (¶79.)

Jefferies’ banker, Christian Morris, testified that Jefferies never threatened Fertitta that it would not perform under the Debt Commitment Letter unless the \$21 Buyout was renegotiated to a lower price:

Q. Did Jefferies, following Hurricane Ike state to Fertitta that Jefferies would not perform under the Commitment Letter unless the going-private deal was renegotiated to a price lower than \$21 per share?

A. No we did not. We did not say that. (¶79.)

Indeed, while Fertitta worked on forcing a lower deal price, the Lenders continued to work towards closing the \$21 Buyout, as the Debt Commitment Letter required. (¶85.) In this regard, after the Hurricane hit, the Lenders continued to gather information from the Company to show potential investors at the road show that Landry’s would survive Hurricane Ike just fine, while Fertitta continued his efforts to renegotiate the \$21 Buyout and related financing. (¶¶85-94.) The Lenders’ diligence requests induced responses showing limited damage and that Landry’s would meet all covenants in the \$21 Buyout Agreement. (¶¶85-87) (Wells Fargo said the company “demonstrated after significant diligence that they were going to meet the minimum EBITDA level.”). The Lenders prepared a draft memorandum for debt investors highlighting that the Company’s insurance was expected to cover substantially all damage from the hurricane. (¶¶90-93.) In an odd departure from industry practice, but perhaps reflecting who was really driving the bus on the renegotiation, Fertitta’s advisors prepared an initial draft of the amendment to the Debt Commitment Letter bearing the Lenders’ letterhead. (¶94.) Further, even as

late as October 17, Wells Fargo made clear that it was prepared to proceed on the \$21 Buyout “[b]ecause there was no MAE and because basically that’s what we signed up for.” (¶122.)

Struggling in isolation to serve the shareholders and not just Fertitta’s personal desires, the Committee’s counsel, Jack Capers, took a hard line, making clear that he saw no basis for Fertitta’s supposed fears of a Lender-driven MAE. (¶96.) Unable to meet Capers’ demands, Fertitta caused the Company to withhold material information from the Committee and its advisors. *Id.* Ultimately, none of the Lenders ever declared an MAE, nor did they ever provide any letter, opinion, memorandum, or other written documentation showing that they were purportedly considering declaring an MAE. (¶95.) Instead, Fertitta, intent on lowering the deal price, instructed Jefferies – through Liem – on September 24, 2008 to prepare revised financing scenarios based on a renegotiated price of \$17 per share. (¶97.) Jefferies promptly did so, recognizing that Fertitta’s renegotiation tactics made it more difficult for Jefferies to hold a bank meeting with other lenders to syndicate the \$21 Buyout. *Id.*

K&S persisted in pushing against Fertitta’s ruse, advising the Special Committee about possibly suing Fertitta to seek specific performance of the \$21 Buyout agreement in light of Fertitta’s misconduct. (¶¶101-103.) However, because of Fertitta’s position as CEO, chairman and largest shareholder, the Special Committee believed that the Company could not sue him, even though any reasonable board would surely sue a third party engaging in similar games. As one director explained: “I can’t imagine that the marketplace would appreciate” a suit by the board against the company because “who

would want to touch you? Who would want to ... do business with you. It creates so much uncertainty, that I think it cripples a company...” (¶¶14, 102.) In other words, Fertitta leveraged his status as Chairman and CEO as leverage to turn his buyer’s remorse into a lower deal price.

E. THE SPECIAL COMMITTEE UNDERMINES ITS OWN LAWYER AND FAVORS FERTITTA’S INTERESTS OVER THE PUBLIC SHAREHOLDERS

On September 30, K&S sent an email to the Special Committee in which Capers interpreted a recent opinion of this Court as holding that “a problem that gives rise to an MAE must impact the earnings of the target company on a long-term basis before the problem becomes an MAE.” (¶106.) Deliberately undermining the integrity of the Special Committee process, Chadwick immediately forwarded K&S’s legal analysis to Scheinthal, who Chadwick knew to be working for Fertitta. *Id.*

The next day, the Committee proposed “for negotiation purposes,” a \$19.00 per share merger. (¶107.) By that time, Cowen had informed the Special Committee “that the \$17 was at the lower end of the range” of its valuation analysis even after taking into account the damage caused by Hurricane Ike. *Id.* Fertitta insisted they accept \$17, but K&S and Cowen did not support such a move. As Capers stated, Fertitta “had not provided us any information that would allow us to determine that an MAE had occurred. Cowen performed financial analysis which reflected the short-term and long-term impact of the hurricane, market conditions on the company and its prospects.” (¶110.)

On October 6, 2008, Fertitta cited weakness in the Landry’s stock price and stated that unless the Committee acted promptly to accept his \$17 offer, even that offer would be “jeopardized.” (¶109.) Fertitta then took matters into his own hands by causing

Landry's to issue a press release on October 7, 2008 stating that the Lenders were considering pulling out of their debt commitments and that the \$21 Buyout's financing was therefore in jeopardy. (¶111.) This press release, which was not shared with the Special Committee before it was issued despite prior instructions by K&S requiring prior Committee approval, was silent about Fertitta's outstanding \$17 per share offer. (¶¶112, 114.) As Cowen's Owen Hart testified: "Obviously, the fear with an announcement like this is that it could lower the price." (¶112.) The October 7 press release represents the first public indication that Fertitta was breaching his fiduciary duties. *Id.* After the October 7 press release, Landry's stock fell 35 percent to \$8.44 per share. (¶115.)

Despite Capers' insistence that the Special Committee only meet with Fertitta in person after it had an agreement on price and closing certainty, the Special Committee agreed to meet with Fertitta with no preconditions on October 10, 2008. (¶116.) With the Special Committee evidently prepared to accept Fertitta's \$17 offer, Fertitta pulled the proverbial rug out from under the Committee by withdrawing that offer, and stated that he would only pay \$13 per share at the October 10, 2008 meeting. (¶117.) When the Committee's advisors expressed their frustration with Fertitta's tactics and pointed out that Fertitta had not used his best efforts to bring the \$21 Buyout to a closing, Fertitta again used his fiduciary position to serve his personal interests, threatening to cause the Company to sue Capers and Cowen and to fire the Special Committee. (¶¶118-20.)

As soon as Fertitta left the October 10 meeting, the Special Committee decided to give in to Fertitta. They negotiated with Fertitta – without any advisors present – a revised deal at \$13.50 per share. (¶121.) The renegotiation was tremendously profitable

for Fertitta at the expense of Landry's public shareholders, lowering his total payment to the shareholders from approximately \$220 million to about \$136 million, an \$84 million immediate savings. *Id.*

On October 18, 2008, Landry's publicly announced the amended merger agreement with Fertitta (the "\$13.50 Buyout") (§123.) The press release justified the \$13.50 Buyout on the grounds that Fertitta had advised the Company that financing of the deal could be in jeopardy. *Id.* The only consideration to shareholders through the \$13.50 Buyout was the Lenders and Fertitta agreeing to refrain from asserting an MAE, a position that, as the Special Committee knew, had no merit. (§ 124-125.)

F. FERTITTA DECEIVED THE SPECIAL COMMITTEE'S ADVISORS ABOUT THE AVAILABILITY OF AN EXISTING WACHOVIA CREDIT LINE TO SUPPORT A DEBT REFINANCING

Throughout 2008, Landry's had almost \$400 million of 9.5% Senior Notes outstanding that would be due in 2014 (the "Notes"). (§78.) Under the Notes indenture, noteholders had the right to demand that the Company redeem the Notes at 101% of par beginning on February 28, 2009 (the "Put Date"). *Id.* The Special Committee's principal public justification for revising the \$21 Buyout downward to \$13.50, rather than enforcing the original \$21 Buyout agreement or calling off the deal altogether, was its concern about Landry's ability to refinance the Notes before the Put Date. (§127.) But for the risk posed by the Put Date, the Committee could have simply declined to accept a deal with Fertitta and waited until he was more willing to pay a reasonable price. In this regard, a critical component of Cowen's assessment of the \$13.50 price was the

perceived unavailability of alternative financing for the Notes. (¶¶127, 132-34.) Cowen’s belief, which rested on information provided by CFO Liem, was false. (¶127.)

In 2004, Landry’s had entered into a \$300 million revolving credit facility arranged by Wachovia Bank (the “Wachovia Credit Line”), with a stated December 28, 2009 maturity date. (¶128.) In August 2007, Landry’s amended the Wachovia Credit Line to, among other things, allow Landry’s to use the Wachovia Credit Line to pay off the Notes when they were put before their maturity date. (¶129.) Fertitta’s counsel confirmed this fact in a memo dated November 6, 2008. *Id.*³

Nevertheless, Fertitta told the Special Committee and Liem told Cowen that Landry’s could not use the Wachovia Credit facility to stave off a crisis caused by the Put Date. (¶¶131-32.) Cowen relied on Liem’s representation, internally stating that if the Committee “decide not to pursue legal remedies, then the deal is fair, though as financial advisor we should qualify it as such.” (¶137.) Fertitta and his advisors also misinformed the SEC that the Wachovia Credit Line was not available for the refinancing of the Notes in a December 9, 2008 letter. (¶¶135-36.) Thus, once again, Fertitta was able to use his superior knowledge as CEO and Chairman to keep the Committee, the SEC and the shareholders in the dark about the Company’s ability to survive if the \$21 Buyout was cancelled in ways that no outside third party buyer could ever have pulled off.

³ Landry’s 2007 Form 10-K, however, incorrectly suggested that the Wachovia facility could not be used to redeem the Notes because doing so would accelerate this facility. (¶130.) The 2008 10-K – which post-dated Fertitta’s later abandonment of even the \$13.50 Buyout – corrected this disclosure. (¶ 138.)

G. THE AMENDED DEBT COMMITMENT LETTER PRESERVED THE LENDERS' (AND FERTITTA'S) ABILITY TO FORCE ANOTHER RENEGOTIATION WHILE ADDING NEW FINANCING CONDITIONS

In connection with the \$13.50 Buyout Agreement, Fertitta and the Lenders also amended the Debt Commitment Letter (the “Amended Debt Commitment Letter”) by lowering the amount borrowed to account for the lower deal price, and locking the Lenders into refinancing the Notes even if the \$13.50 Buyout failed to close. (¶¶139-40.) The Amended Debt Commitment Letter, which was never publicly disclosed, waived the MAE condition but left in place all other potential termination rights, including the financial performance conditions and other provisions that Defendants testified supported re-pricing the deal in the first place. (¶¶142-45.) Far from eliminating supposed termination rights, the Amended Debt Commitment Letter actually added incremental EBITDA conditions, thus increasing the risk of a repeat re-pricing. (¶146.)

H. FERTITTA UNDERMINES THE SECOND GO-SHOP PROCESS AND THE COMMITTEE PREVENTS CAPERS FROM PROTECTING THE SHAREHOLDERS

In negotiating the revised merger agreement, K&S insisted on allowing another go-shop process. (¶149.) The next business day after the revised merger agreement was signed, Fertitta started purchasing shares on the open market, rapidly undermining any prospect of a meaningful go-shop process. (¶151.) On October 20, 2008, the first trading day after the new go-shop process was supposed to start, Fertitta bought 363,524 shares at an average price of \$11.58. (¶152.) His practice of aggressive stock purchases continued over the following days, at the exact time he was supposed to be allowing the Special Committee to search for a competing bidder to maximize value for the

Company's shareholders. *Id.* By November 14, 2008, Fertitta's personal stake in Landry's common stock tipped over 50%, allowing him a complete blocking position on any competing bidder. (¶153.)

Despite the Special Committee's knowledge that Fertitta's purchases could jeopardize the deal (based on Capers' specific warnings to this effect), the Special Committee refused to take any concrete steps to protect shareholders from this obvious risk. (¶154.) If anything, the Committee affirmatively facilitated Fertitta's creeping takeover. *Id.* Capers tried to object to Fertitta's open market purchases. Fertitta refused to sign a standstill agreement, and the Special Committee did not enact a poison pill or take any other action to protect the Landry's public shareholders. (¶¶159-60.) The Special Committee's inexplicable impotence resulted from their decision to prefer Fertitta's interests and reflects their bad faith indifference to their fiduciary duties. (¶160.)

By December 2, 2008, Fertitta owned 9.66 million Landry's shares, or nearly 57% of all outstanding Landry's shares, up from his June 16, 2008 holdings of approximately 6.63 million Landry's shares (including restricted stock and options), or 39 percent of all outstanding shares. (¶161.) Yet again, Fertitta used his fiduciary position to serve his own interests in ways no third party could have done. Specifically, there is little question that any third party buyer acquiring shares on the open market during a go-shop period would be quickly confronted with a board adopted poison pill. Fertitta blocked such defenses.

Besides undermining the go-shop process, Fertitta's open market purchases raised additional deal risk because they triggered extensive SEC inquiries. On December 3, 2008, the SEC instructed Fertitta to "tell us why the purchase of shares through open market transactions is not a step in a series of transactions having one or more of the effects listed in Rule 13e-3(a)(3)(ii)." (¶165.) The SEC also asked whether the Special Committee had passed on the fairness of the open market purchases. (¶166.) Fertitta's long-time counsel suggested that the Special Committee had approved the purchases and had viewed them as fair in the context of the transaction. *Id.* K&S refused to repeat this representation to the SEC, saying that "we agreed that the SC did not make a fairness determination with respect to Tilman's open market purchases, as the purchases were not part of the transaction considered by the SC." (¶167.)

Despite – and perhaps because of – the fact that Capers opposed all of Fertitta's advisors' efforts to tell the SEC that Fertitta's purchases had been approved by the Committee, Chadwick, the Chairman of the Special Committee, attempted to force Capers to stay out of this issue altogether. (¶168.) Specifically, when Capers internally raised his concerns about Fertitta's dealings with the SEC, Chadwick wrote Capers an email on December 19, 2008 stating that "this is a TJF matter and should be dealt with by Haynes & Boone and/or TJF counsel, not SC." (¶169.) Nine minutes after telling K&S to stay out of the issue, Chadwick forwarded the email to Scheinthal – admittedly Fertitta's loyalist. *Id.*

Between December 24, 2008 and December 30, 2008, Fertitta's advisors and the SEC had further discussions, and Fertitta reached an agreement with the SEC not to

purchase any more shares in the open market. (¶174.) On December 30, Capers advised the Committee via email about how the Committee should protect itself from further misconduct by Fertitta. (¶175.) Chadwick again told Capers to stay out of it. *Id.* Again, Chadwick promptly forwarded the entire email chain between Capers and the Special Committee to Scheinthal. (¶176.)

I. THE SPECIAL COMMITTEE USED A PRETEXT TO TERMINATE THE MERGER AGREEMENT

Following the announcement of the \$13.50 Buyout, the SEC made a routine request to Landry's to disclose certain information from the Amended Debt Commitment Letter. (¶178.) Fertitta and Jefferies used this foreseen request to undermine the transaction by refusing to make the requested disclosures. (¶¶179-80.) In early January 2009, Capers learned firsthand that, yet again, the risk to the deal was coming from Fertitta and Jefferies, as Caper's inquiries confirmed that the SEC "did not want to blow up the transaction." (¶180.)

On January 8, 2009, the Special Committee called a meeting to discuss terminating the \$13.50 Buyout Agreement. (¶185.) They did not tell their outside counsel about it. *Id.* On January 10, 2009, with the deal again facing a contrived crisis, Fertitta's counsel informed Capers that he believed the deal could be salvaged, ***provided the Special Committee agreed to lower the price of the deal to \$8.50.*** (¶186.) Having succeeded in using crises as cover for lowering offers from \$23.50, to \$21, to \$17 and then to \$13.50, Fertitta stayed true to form. *Id.*

On January 11, the Special Committee met again to discuss terminating the \$13.50 Buyout Agreement. (¶187.) Capers announced that K&S was resigning from

serving as the Committee’s counsel, effective immediately. *Id.* Director Richmond temporarily balked at terminating the \$13.50 Buyout. (¶188.) He was removed from the Board shortly thereafter.

On January 12, 2009, Landry’s shocked the market by announcing that it had terminated the \$13.50 Buyout. (¶189.) In a press release issued on January 12, 2009, the Committee justified its decision to terminate the \$13.50 Buyout by claiming that they had to terminate the acquisition in order to preserve the Company’s ability to refinance the Notes. (¶190.) This was false. Even if the Lenders refused to agree to disclosure of the Amendment, they still remained fully bound to refinancing the Notes. (¶182.) The announcement of the \$13.50 Buyout’s termination caused Landry’s share price to tumble an additional 37.65 percent, or \$4.65, to open at \$7.70 in trading the following morning. (¶191.)

Landry’s announced on January 26, 2009 – just two weeks later – that “[s]ubstantially all of the Company’s operations in Galveston and Kemah are reopened with the final businesses expected to be opened before Valentine’s Day.” (¶193.) This disclosure revealed that reconstruction stemming from Hurricane Ike was well ahead of schedule. *Id.*

IV. 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.*

Deriv. 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.” *In re Primedia Inc.*, 910 A.2d at 256 (quoting *Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 38 (Del. 1996) (internal citation omitted)).

B. DEFENDANTS’ MOTION IS BARRED BY THE LAW OF THE CASE DOCTRINE

On July 28, 2009, this Court denied Defendants’ previous motion to dismiss which argued, just like the present motion, that Fertitta did not breach any fiduciary duties to Landry’s shareholders because “Fertitta was entitled to act in his own interest *qua* stockholder[.]” (Defs.’ Apr. 2, 2009 Br. at 19.) In rejecting that argument, this Court held that “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.” *Louisiana Mun. Police Employees’ Ret. Sys. v. Fertitta*, 2009 WL 2263406, at *7 fn. 31 (Del. Ch. July 28, 2009) (citing *Kahn v. Lynch Commc’ns Sys., Inc.*, 638 A.2d 1110, 1115 (Del. 1994))⁴. The core theories of liability in the current Complaint are consistent with the theories the Court already upheld. The major difference between the pleadings is that Plaintiff now has the benefit of extensive discovery to understand just how bad the underlying conduct was.

⁴ Vice Chancellor Lamb went on to characterize the facts of this case as more than a transaction that did not come into being, but instead as a “‘termination transaction’ [to be] examined under the entire fairness standard.” 2009 WL 2263406, at *7.

Under the law of the case doctrine, Defendants are not allowed to revisit the Court's July 28, 2009 decision and have a second bite of the apple. *See Weedon v. State*, 750 A.2d 521 (Del. 2000) (the "law of the case" doctrine bars relitigating claims previously resolved); *Sutherland v. Dardanelle Timber Co.*, 2006 WL 1451531, at *8 (Del. Ch. May 16, 2006) (refusing to "reward the defendants with a second bite of the apple"); *Acierno v. Haggerty*, 2005 WL 3134060 (D. Del. Nov. 23, 2005) (same).

C. FERTITTA'S CONDUCT REPRESENTS CORE DISLOYALTY CONSTITUTING BREACH OF DUTY

The Court was not making new law when it reached its July 28, 2009 conclusion that the allegations against Fertitta stated a valid claim for breach of fiduciary duty. Indeed, the Court was following a long line of established cases in which Delaware courts readily found breaches of the duty of loyalty based on conduct that was very similar to the conduct alleged in the Complaint.

For example, in *In re Emerging Communications, Inc.*, 2004 WL 1305745 (Del. Ch. June 4, 2004), the company's controlling shareholder-CEO, Jeffrey Prosser, proposed merging a company that he owned and controlled into a subsidiary of ECM in return for the issuance of \$35 million in ECM shares. This amount was based on Prosser's valuation of ECM shares at \$13.25 per share. *Id.* at *5. The ECM board established a special committee to evaluate this proposal and, based on the special committee's recommendation, later approved a going-private transaction selling the company to Prosser for \$10.25 per share.

Just like Fertitta, Emerging Communications' CEO sabotaged the negotiating process and injured the company's public shareholders. Specifically, the Court found that Prosser breached his duty of loyalty by:

- opportunistically restructuring the deal when ECM shares were temporarily trading below the offered \$13.25 per share by suddenly offering to take the company private for \$9.125 per share;
- co-opting the persons with the most knowledge about the company's value, business and prospects, thereby denying the special committee material nonpublic information;
- manipulating the information made available to the special committee by instructing the company's CFO to withhold financial projections showing that the company was worth substantially more than \$13.25 per share; and
- obtaining access to the special committee's internal deliberations and correspondence through one of the members of the committee.

Then Vice Chancellor Jacobs had little difficulty finding that Prosser failed to meet his burden of proving entire fairness, and that the special committee failed to protect the interests of the minority. *Id.* at **36-38. After determining that the fair value of ECM at the time of the merger was \$38.05 per share, the court ordered Prosser to pay the public shareholders \$27.80 per share in damages (\$38.05 - \$10.25). *Id.* at *43. *See also Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1272-73 (Del. 1989) (upholding the Chancery Court's determination that a CEO acted improperly by serving his self-interests to interfere with the sale of the company).

Similarly, in *Bomarko, Inc. v. International Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999), controlling shareholder-CEO, Ronald Haan, proposed cashing out ITI's public shareholders. 794 A.2d at 1164, *aff'd*, 1994 WL 198726 (Del. Ch. May 16, 1994). The

ITI board established a special committee to evaluate this proposal. Like Fertitta and Prosser, Haan abused his fiduciary powers to enrich himself at the expense of the public shareholders. Haan breached his duty of loyalty by manipulating the company's financial situation by secretly contacting the only lender who expressed interest in refinancing a maturing loan and instructing it to reduce the financing offered to less than the amount the company needed. Facing a serious risk of bankruptcy, the ITI's board approved a proposed with Haan paying just \$0.30 per share. *Id.* at 1172. As one of the special committee members later explained: "Mr. Haan told us what he would do, what he was willing to do, and that seemed to be, you know, generally, the only alternative, the only viable alternative we felt we had rather than a bankruptcy." *Id.*

Analyzing these facts, similar in so many ways to those presented in the Complaint, the Court found that Haan had breached his duty of loyalty to ITI's shareholders. *Id.* at 1178. Because Haan's breaches interfered with the proper functioning of the special committee, the court further concluded that "Haan must bear the burden of proof on the issue of entire fairness." *Id.* at 1179. After finding that the CEO failed to meet this burden, the Court observed that it had wide discretion in fashioning appropriate remedies and that "where, as is true here, issues of loyalty are involved, potentially harsher rules come into play" because "[t]he strict imposition of penalties under Delaware law are designed to discourage disloyalty." *Id.* at 1184. The Court therefore awarded plaintiffs not only their out-of-pocket damages, but fashioned a damage award based on what the shares would have been worth had the CEO not

breached his fiduciary duties. *Id.*⁵ See also *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (holding that CEO breached the duty of loyalty by interfering with a merger process by 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).

In an attempt to avoid the consequences of the Court's prior ruling and the applicable breach of fiduciary duty caselaw, Defendants recast Plaintiff's breach of fiduciary allegations as mere breach of contract claims which, they argue, Plaintiff and the class have no standing to enforce. Defendants are wrong.

As a factual matter, Plaintiff does not assert that Fertitta's fiduciary duty claims arise from his contractual obligations under either of the Merger Agreements. Rather, Plaintiff alleges that Fertitta breached his fiduciary duties, which exist independent of any contractual rights or duties. Specifically, Plaintiff alleges that Fertitta breached his duties by using his insider and fiduciary position as key elements of his self-interested plan to exploit Hurricane Ike and the credit crisis to force a lower buyout price than the one he had already agreed to pay to the Company's shareholders. As alleged in the Complaint, Fertitta did so by: (i) controlling communications with the Lenders so he could create a perception of crisis and deal failure to the Committee and its advisors even as he knew the Lenders were prepared to do whatever Fertitta required; (ii) withholding critical

⁵ Applying a number of factors, including the addition of a control premium, while disregarding as a mitigant any uncertainty regarding the company's ability to secure financing absent Haan's breach of duty, the Court determined that the fair value per share was \$1.27 per share, or more than four times the share price contained in the merger agreement. *Id.* at 1187.

financial information about the impact of Hurricane Ike and the available insurance from the Special Committee and its financial advisor; (iii) obtaining access to the internal deliberations of and legal advice to the Special Committee as to whether there was a Material Adverse Event, as to negotiating strategies, and as to communications with the SEC; (iv) misinforming Cowen about the availability of the Wachovia credit facility to pay off Notes that could be put to the Company at the end of February 2009; (v) causing Landry's to issue the October 7, 2008 press release stating that the \$21 Buyout was "in jeopardy" to increase the pressure to force a renegotiation down to \$13.50 per share (reducing the total payment to Landry's public shareholders by \$84 million); (vi) using open-market purchases to undermine the go-shop process; and (vii) manipulating the Board into "terminating" the \$13.50 Buyout to avoid paying the reduced \$15 million termination fee. No third party acquirer suffering buyer's remorse could have pulled off what Fertitta made look easy. Indeed, not only did Fertitta use his corporate powers to effectuate his plan, he also used his fiduciary status as a shield against being held accountable by the Committee counsel, which advised on the possibility of suing. As Richmond testified, however, a lawsuit against Fertitta to stop his ongoing breaches of duty would have crippled the company:

Q: ... why isn't it a comfortable situation to be suing the CEO of the company who is trying to take that company private?

A: You have got the whole company, the board and the CEO on a misalign. . . .I can't imagine that the marketplace would appreciate that and you have risks, therefore, in the stock to the shareholders that are everybody, including Mr. Fertitta, but everybody. . . .

Q: Now when you say, “I can’t imagine that the marketplace would have appreciated the company suing Fertitta,” what do you mean?

A: The stock market, the debt markets. Any time vendor markets where you have got a conflict like that, this is out in the public, you know, I can’t – who would want to touch you? Who would want to, who would want to do business with you. It creates so much uncertainty, that I think it cripples a company that is my opinion.

(¶14.)

In *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, the court made clear that third parties cannot renege on a deal in bad faith. 965 A.2d 715, 746 (Del. Ch. 2008). The same must *a fortiori* be true for a CEO and largest individual shareholder who has entered into an agreement to take his company private. The Complaint squarely alleges that Fertitta used his position as Landry’s CEO, Chairman and controlling shareholder to renegotiate the \$21 Buyout in bad faith and in breach of his duty of loyalty. The fact that Fertitta also had contractual obligations to the Company is simply beside the point.

The mere existence of a contract does not relieve a CEO or director of fiduciary duties or convert breaches of fiduciary duty into simple breaches of contract. *Technicorp Int’l II, Inc. v. Johnston*, 2000 WL 713750 at *5 (Del. Ch. May 31, 2000) (“The duty of loyalty of a director is . . . a special obligation upon a director in *any* of his relationships with the corporation[.]”); *see also Sample v. Morgan*, 914 A.2d 647, 672 (Del. Ch. 2007) (quoting *Quickturn*, 721 A.2d at 1292) (a contract cannot relieve directors of their obligations to shareholders, particularly where the contract involves “an area of fundamental importance to the shareholders - negotiating a possible sale of the corporation.”); *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 51 (Del.

1994) (holding that fiduciaries “could not contract away their fiduciary obligations”). Defendants’ citation to various cases standing for the unremarkable proposition that where obligations are governed entirely by contract, claims arising therefrom are covered by contract law, are therefore inapposite. *See* Fertitta Defs.’ May 28, 2010 Br. at 23 (citing *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 2006 WL 4782349, at *10 (Del. Ch. Sept. 1, 2006) (holding that no fiduciary duties arose between debtor and creditor where a contract governed the relationship between the parties); *Nemec v. Shrader*, 991 A.2d 1120, 1120 (Del. 2010) (holding that a company stock plan governed the defendant directors’ duties in redeeming shares under that plan)).

D. SLUSA DOES NOT PREEMPT PLAINTIFF’S BREACH OF FIDUCIARY DUTY ACTION

As an initial matter, if Defendants seriously thought an argument existed based on SLUSA, Plaintiff would have expected them to raise this issue nearly a year and a half ago, in their original motion to dismiss, and not mere months before trial. Defendants’ delay broadcasts the weakness of the argument. In any event, if Defendants were right about SLUSA’s effect upon this Court’s jurisdiction to hear this case, this Court’s docket could be expected to shrink dramatically.

1. SLUSA Is Inapplicable In the First Instance

In 1998, Congress enacted SLUSA “to preempt completely certain securities fraud claims, thereby making federal law the exclusive source of substantive rules and to force those claims generally into the federal courts.” *Breakaway Solutions, Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *3 (Del. Ch. Aug. 27, 2004), *amended by* 2005 WL 3488497 (Del. Ch. Dec. 8, 2005) (amended as to non-SLUSA

only); *see also Norman v. Salomon Smith Barney, Inc.*, 350 F. Supp. 2d 382, 385-86 (S.D.N.Y. 2004). Thus, SLUSA preempts class actions in state court that allege misrepresentations or omissions in connection with the purchase or sale of covered securities. 15 U.S.C. § 78bb(f)(1)(A). *Id.* In this case, however, there is not a single allegation of misrepresentations to Landry’s shareholders in connection with the \$21 Buyout or the \$13.50 Buyout. The class period in the Complaint begins with the October 7, 2008 press release informing the market that the \$21 Buyout was “in jeopardy” – a statement that was indisputably true, but also reflected a fact that only came to pass because of Fertitta’s breaches of duty. That fact that aspects of Fertitta’s disloyalty ultimately became public cannot transform this lawsuit into a federal securities fraud action.

Moreover, Plaintiff’s claims would not be preempted by SLUSA even if the facts alleged in the Complaint could also form the predicate for a securities fraud action by different plaintiffs. As the court explained in *Norman v. Salomon Smith Barney*:

The fact that the actions underlying the alleged breach could also form the factual predicate for a securities fraud action by different plaintiffs cannot magically transform every dispute ... into a federal securities claim – the mere involvement of securities [does] not implicate the anti-fraud provisions of the securities laws.

350 F. Supp. 2d at 387-88 (citation omitted). *See also Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 341 F. Supp. 2d 258, 268 (S.D.N.Y. 2004) (“Simply because the operative facts of a complaint *can* give rise to a claim of fraud does not mean that the complaint *must* be read as alleging fraud”) (emphasis in original).

This is consistent with the exercise of jurisdiction of this Court in this and other cases. *See, e.g., Breakaway Solutions*, 2004 WL 1949300, at *5 (SLUSA did not preempt a breach of contract and fiduciary duty action involving “underpricing” of securities because “although it may be fraudulent and deceptive in certain circumstances, the Complaint does not allege that the underpricing was done fraudulently”). Indeed, to hold, as Defendants argue, that Plaintiff’s breach of loyalty claims are preempted by SLUSA because they also involve the purchase or sale of securities would gut the Chancery Court’s jurisdiction, effectively leaving only breach of disclosure claims following a shareholder vote. This is not what SLUSA requires.⁶

2. The Delaware Carve Outs Also Preserve This Court’s Jurisdiction

SLUSA has two “Delaware carve outs” that preserve state law class actions that would otherwise be covered by SLUSA. The first carve out from SLUSA preserves this

⁶ The cases cited by the Fertitta Defendants in favor of SLUSA preemption are securities fraud actions in disguise and do not hold differently. *See Rowinski v. Salomon Smith Barney Inc.*, 398 F. 3d 294, 296 (3d Cir. 2005) (finding that “the gravamen of the action is the allegedly biased investment research and analysis provided by Salmon Smith Barney to the putative class.”); *Prof’l. Mgmt. Assoc., Inc. Employees Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 802-03 (8th Cir. 2003) (holding that SLUSA preempted state law claims based on allegations that KPMG made false statements about a company’s financial condition that artificially inflated the company’s share price and caused a stock drop and damages when the truth was revealed); *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310 (6th Cir. 2009) (SLUSA preemption of allegations that a bank “did not deal honestly, ethically, fairly and/or in good faith” with the class by engaging in a “scheme” of knowingly overcharging trust clients while failing to inform them that their trust accounts would be invested in certain securities); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004) (SLUSA preemption of breach of contract claims based on allegations of untrue statements and omissions in a prospectus filed with the SEC); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1094 (11th Cir. 2002) (SLUSA preemption because “the crux of the complaint was that the defendants either misrepresented or omitted crucial facts about the Class A and Class B shares, thus causing him and the class to invest in inappropriate securities.”); *Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 880 (8th Cir. 2002) (SLUSA preemption because “the essence of both complaints is the unlawful marketing of tax-deferred annuities.”).

Court’s jurisdiction over a covered class action if it “involves ... the purchase or sale of securities by the issuer *or an affiliate* of the issuer exclusively from or to holders of equity securities of the issuer.” 15 U.S.C. §78bb(f)(3)(A)(ii)(I) (emphasis added). The second Delaware carve out preserves state court jurisdiction for a class action that would otherwise be preempted by SLUSA if it “involves ... any recommendation, position or other communication with respect to the sale of securities of an issuer that is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer and concerns decisions of such equity holders with respect to voting their securities ... or exercising dissenters’ or appraisal rights.” 15 U.S.C. §78bb(f)(3)(A)(ii)(II). Both Delaware carve-outs apply in this case.

a. The First SLUSA Carve Out Applies Because Fertitta Acted As Landry’s Affiliate In The Share Repurchase Plan

In the original complaint that was filed in January 2009, Plaintiff alleged that Fertitta breached his fiduciary duties by engaging in insider trading following Hurricane Ike and that the Board breached its fiduciary duties by failing to implement a standstill or poison pill to prevent Fertitta’s creeping takeover. As this Court recently explained, insider trading is not preempted by the federal securities laws and the Chancery Court retains jurisdiction over related breach of fiduciary duty claims. *See Pfeiffer v. Toll*, 989 A.2d 683, 704 (Del. Ch. 2010).

When this Court denied Defendants’ first motion to dismiss, it noted the “inexplicable impotence” of the Board in the face of Fertitta’s obvious creeping takeover. 2009 WL 2263406, at *7. Discovery showed that the Board’s liability is not based on an

act of omission, but actually commission. The Board *affirmatively approved Fertitta's open market stock purchases*. On Monday, September 15, 2008 – two days after Hurricane Ike – the Board convened and approved a share repurchase program to support Landry's stock price, including share purchases by Fertitta in the open market. (¶68.) The Board's approval of Fertitta's purchases to effectuate the stock repurchase plan may have avoided his insider trading liability under the federal securities laws. Ironically, however, this approval shows that Fertitta was acting as Landry's affiliate when he made those purchases, so that this action involves allegations that fall squarely within the Delaware carve out of SLUSA.

The Fertitta Defendants argue that this carve out does not apply because Plaintiff is asserting claims on behalf of shareholders who sold their shares on the open market. According to the Defendants, the share purchase transactions at issue were therefore not exclusively between Landry's and its shareholders. (Def. Br. at 17-19.)

Defendants' argument is frivolous. Defendants' own brief concedes that “[t]here are a number of situations in which a company purchases or sells exclusively with its existing shareholders – stock buy-backs, rights offerings, and reorganizations.” (Def. Br. 17-18.) Here, the Complaint alleges that the Board authorized Fertitta to repurchase Landry's shares to support the Company's stock price – to act as Landry's affiliate in a stock buy-back. (¶¶68-69.) As Fertitta explained during his deposition:

I remember there being confusion of who would buy the shares, myself or the company. We knew that we had to get information out there before my company – the company or myself. So we kind of did a general catchall of either party can buy the stock, we need to get that information out there, we need to get Tilman approval, since he's in a blackout, and we don't even know if we

are going to do this or he's going to buy or the company is going to buy.

(¶68.) Fertitta's share repurchases were thus by definition "exclusively" from Landry's shareholders. Plaintiff's breach of fiduciary duty claims are therefore covered by the first Delaware carve out and preserved for this Court.

Indeed, because Fertitta made these purchases after agreeing to the \$21 Buyout, the first Delaware carve out would apply even if the Board had not approved Fertitta's purchases. *See Nickell v. Shanahan*, 2010 WL 199957, at * (E.D. Mo. Jan. 13, 2010) (explaining that merging corporations are "affiliates" for purposes of 78bb(f)(3)(A)) (*citing Derdiger v. Tallman*, 75 F. Supp. 2d 322, 325 (D. Del. 1999)).⁷

b. The Complaint Involves Landry's Recommendations Concerning The Exercise Of Its Shareholders' Voting, Dissenters' and Appraisal Rights

The second Delaware carve out also applies here. *See* 15 U.S.C. §78bb(f)(3)(A)(ii)(II). The Complaint alleges that Defendants' breaches of fiduciary duties affected the Landry's Board's recommendation to its shareholders to vote in favor of the proposed sale of their equity securities in the proposed going-private transaction.

⁷ The two cases cited by the Fertitta Defendants do not hold differently. In *G.F. Thomas Investments, L.P. v. Cleco Corp.*, 317 F. Supp. 2d 673 (W.D. La. 2004), the court expressly distinguished between *offers* of securities in the open market that are not covered by the Delaware carve out because they are not "exclusively" from or to current shareholders, and *purchases and sales* of securities by an issuer or affiliate to the issuer's current shareholders that are covered by the first Delaware carve out. *See id.* at 682-83 (explaining that "the plain language of part I of the Delaware carve out provides that only when shares of stock are purchased or sold to a limited market (that of the corporation's current shareholders) will the Delaware carve out apply. When the stock is offered to the open market, SLUSA governs the prospective class action."). In *Kamkari v. Sonic Solutions*, 2009 WL 2933724 (Cal. Ct. App. Sept. 14, 2009), the court affirmed a trial court decision that plaintiff's claims did not satisfy the first Delaware carve out because "it could not be determined from the face of the complaint that all the class members already owned shares at the time they purchased the shares at inflated prices" because of a stock option backdating scheme.

Plaintiff's allegations and breach of fiduciary duty claims concerning the 2008 transactions are therefore also preserved for this Court under the second Delaware carve out. *See, e.g., Alessi v. Beracha*, 244 F. Supp. 2d 354, 359 (D. Del. 2003) (holding that plaintiff's action regarding an unfair buyout program was not preempted under SLUSA because of the second Delaware carve out); *Derdiger v. Talman*, 75 F. Supp. 2d 322, 325 (D. Del. 1999) (allegations of misrepresentations in a proxy statement requesting shareholder vote on merger agreement not preempted under SLUSA because of the second Delaware carve out). Fatal to Defendants' position is that the carve out can be triggered without the vote actually occurring. Delaware courts routinely entertain breach of fiduciary duty claims before a vote happens, including requests for preliminary injunctions to prevent votes from taking place. It is not credible to challenge the Court's jurisdiction in those instances, nor is it credible to do so here.

Defendants argue, however, that the second Delaware carve out does not apply because Plaintiff's claims, they argue, "are not predicated on any recommendation that Fertitta allegedly made to shareholders with respect to approving the merger agreements or any other corporate transaction." (Def. Br. 21.) This argument is a red herring. The plain language of the carve out clearly covers claims that the recommendation by Landry's to its shareholders to approve the proposed going-private transaction was tainted by Fertitta's breach of loyalty. In other words, and contrary to the Fertitta Defendants' arguments, it is not necessary for the second Delaware carve out to apply that *Fertitta* made certain recommendations to Landry's shareholders. Rather, it is enough when, as here, the Complaint alleges that *the Company* recommended to

Landry's shareholders that they vote in favor of a transaction following egregious breaches of duty by the Company's CEO and largest individual shareholder. *See Alessi*, 244 F. Supp. 2d at 359 (applying second Delaware carve out after noting that the company and its CEO issued a press release recommending to the company's shareholders that they participate in a buyout program); *Indiana Elec. Workers Pension Trust Fund v. Millard*, 2007 WL 2141697, at *8 (S.D.N.Y. July 25, 2007) (explaining that "[b]ecause the plaintiff's allegations relate to communications concerning the shareholder vote to expand [defendant's] stock option plan, the 'voting their securities' element of prong (II) is satisfied.").⁸

V. COUNTS I, II, III AND IX ARE DIRECT, NOT DERIVATIVE CLAIMS

A. PLAINTIFF'S CLAIMS ASSERT NO INJURY TO LANDRY'S AND SEEK NO RELIEF FOR THE CORPORATION

According to Defendants, Plaintiff asserts derivative claims belonging to Landry's that should be dismissed upon the Court's approval of the Partial Settlement and consummation of the \$24 Transaction. Based on this argument, the Director Defendants moved to dismiss Count III of the Complaint.⁹ Defendants are wrong.

⁸ The cases cited by the Fertitta Defendants do not hold differently. In *Rubery v. Radian Group, Inc.*, 2007 WL 1575211 (E.D. Pa. May 31, 2007), the court held, for example, that the second Delaware carve out preserved claims involving a joint press release regarding the desirability of a proposed merger that was issued by the two companies proposing the merger. *See id.* at *5 (collecting authorities). *See also Kamkari v. Sonic Solutions*, 2009 WL 2933724 (Cal. Ct. App. Sept. 14, 2009), at *9 (distinguishing claims involving shareholders who were induced to take certain actions that are covered by the second Delaware carve out from the more attenuated claims of shareholders who claim damages "because the price he paid was allegedly affected by fraud perpetrated against the shareholders who approved the stock option plans.").

⁹ The Fertitta Defendants joined the Director Defendants' motion with respect to Liem and Scheinthal, while reserving the right to move to dismiss Plaintiff's claims against the other Fertitta Defendants in Counts I, II, and IX in the future. Plaintiff reserves the right to oppose any such motion, including on the basis that it would be untimely.

This Court has already found that Plaintiff's breach of fiduciary duty claims against Fertitta regarding the renegotiation of the \$21 Buyout and his creeping takeover were properly alleged as direct claims. 2009 WL 2263406, at *7, fn 25 (Del. Ch. July 28, 2009) (contrasting Plaintiff's waste claims concerning Fertitta's non-payment of the \$15 million reverse termination fee with Plaintiff's breach of fiduciary duty claims) (*citing Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004)). The Court was correct in reaching this conclusion because, as the Supreme Court explained in *Gentile v. Rossette*, 906 A.2d 91, 103 (Del. 2006), the harm to the public shareholders is direct where, as here, it "resulted from a breach of a fiduciary duty owed to them by the controlling shareholder, namely not to cause the corporation to effect a transaction that would benefit the fiduciary at the expense of the minority stockholders." In light of the Court's prior ruling and the applicable caselaw, Defendants' position that the claims are derivative is frivolous.

The Director Defendants' motion ignores the plain language of Plaintiff's Complaint by asserting that the "gravamen of [Plaintiff's] claim is that the Director Defendants failed to enforce the \$21 Buyout Agreement by not seeking to enforce *Landry's* rights under that agreement[.]" (Def. Br. at 3.) Although the Board's failure to enforce the \$21 Buyout Agreement is undoubtedly evidence of their disloyalty and bad faith, Counts I, II and III never seek to enforce that agreement or compel the Board to sue Fertitta for contract damages. To the contrary, Plaintiff seeks to hold all Defendants liable for breaching their fiduciary duties in connection with the renegotiation of that Agreement and with the termination of the revised \$13.50 Agreement. *See also Parnes v.*

Bally Entm't Corp., 722 A.2d 1243, 1245 (Del. 1999) (explaining that “[a] stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated.”)

Counts I, II, and III are plainly direct under *Tooley* because the shareholders – and not the Company – suffered the harm from the alleged breaches and now seek compensation. *See Tooley*, 845 A.2d at 1039 (holding claims were direct because “[t]here is no derivative claim asserting injury to the corporate entity” and “[t]here is no relief that would go to the corporation.”) In other words, the gravamen of the Complaint is that Fertitta agreed to pay \$21 per share *to the then-current Landry’s public shareholders* and that Fertitta, with improper help from the other Defendants, avoided making that payment by violating his fiduciary duties to Landry’s public shareholders. Unlike the shareholders – who suffered harm as the stock price plummeted in direct response to the renegotiation of the agreement to \$13.50 and the subsequent termination of the agreement – Defendants’ breaches of duty did not harm the Company.¹⁰ *Id.*

Count IX, which asserts a claim for unjust enrichment, is also properly treated as direct. Although unjust enrichment claims are often treated as derivative, Count IX of Plaintiff’s Complaint should be considered a direct claim for unjust enrichment. As the *Gentile* court explained, a claim is direct where “an extraction from the public shareholders, and a redistribution to the controlling shareholder [occurs] . . . [because] the public shareholders are harmed, uniquely and individually, to the same extent that the

¹⁰ The only arguable harm to the Company was a result of a breach of contract (for failure to pay the reverse termination fee), and not a breach of fiduciary duty.

controlling shareholder is (correspondingly) benefited.” 906 A.2d at 100. The *Gentile* framework applies here because Landry’s stockholders are necessarily directly harmed to the same extent that Fertitta is unjustly enriched.

In a court of equity such as this, it would make no sense that Landry’s – 60% owned by Fertitta – is the only one that can recover harm for Defendants’ breaches of fiduciary duty. Putting aside that Defendants’ actions did not deplete Landry’s as a company but rather caused its share price to plummet, a ruling allowing Fertitta to benefit from his misconduct by increasing his control over the Company and then paying himself damages is simply not supported by Delaware law.

B. EVEN IF ANY OF PLAINTIFFS CLAIMS ARE DERIVATIVE (AND THEY ARE NOT), THE COURT SHOULD GRANT EQUITABLE RELIEF

If the Court were to find that one or more of Plaintiff’s claims are derivative, rather than direct, Fertitta and other dominant shareholder-CEOs with buyer’s remorse would have perverse incentives to abuse their positions in order to force renegotiation of signed merger agreements. Following the announcement of such renegotiations, stock prices predictably fall, allowing dominant shareholder-CEOs to enter into new merger agreements at substantially reduced prices. At the same time, these breaching fiduciaries could then escape liability upon consummation of the renegotiated transaction (when the derivative claims are extinguished). Delaware law does not countenance such perverse incentives.

Allowing the Company to receive the remedy for Defendants’ breaches would be inequitable and wrong on many levels, not the least of which is that Fertitta owns a majority stake in the Company and would see the lion’s share of the benefit from any

derivative recovery. By contrast, many individuals who suffered actual economic losses on account of Defendants' breaches (including those who sold during the class period) will not see the benefit of any derivative recovery. Regardless of whether any of the claims are deemed direct or derivative, Plaintiff should not be deprived of a remedy. *See Fischer v. Fischer*, 1999 WL 1032768, at *4 (Del. Ch. Nov. 4, 1999) (explaining that "equity will not suffer a wrong without a remedy"). As the *Fischer* court explained regarding the direct-derivative distinction, the "appropriate focus should be the alleged wrong, not the nature of the claim which is no more than a vehicle for reaching the remedy for the wrong." *Id.* Thus, regardless of whether the Court considers Plaintiff's claims direct or derivative, they should not be dismissed.

VI. CONCLUSION

For all the foregoing reasons, Defendants' Motions to Dismiss should be denied in their entirety.

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CERTIFICATE OF SERVICE

I, Mary S. Thomas, certify that on June 18, 2010, I caused the foregoing Memorandum of Law in Support of Plaintiff's Opposition to Defendants' Motion to Dismiss and Compendium of Unreported Decisions to be served upon the following counsel via LexisNexis File & Serve:

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