

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 :

Civil Action :
No. 4339-VCL :

TILMAN J. FERTITTA, STEVEN L. :
SCHEINTHAL, KENNETH BRIMMER, MICHAEL :
S. CHADWICK, MICHAEL RICHMOND, JOE MAX :
TAYLOR, FERTITTA HOLDINGS, INC., :
FERTITTA ACQUISITION CO., :

Defendants, :

and :

LANDRY'S RESTAURANTS, INC., :

Nominal Defendant. :

- - -
Chancery Courtroom No. 12C
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Monday, January 11, 2010
10 a.m.

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.
- - -

ORAL ARGUMENT ON PLAINTIFF'S MOTION TO COMPEL OR,
ALTERNATIVELY, TO PRECLUDE and RULINGS OF THE COURT

CHANCERY COURT REPORTERS
New Castle County Courthouse
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3768
(302) 255-0524

1 APPEARANCES:

2 JOHN C. KAIRIS, ESQ.
Grant & Eisenhofer, P.A

3 -and-

4 MARK LEBOVITCH, ESQ.
AMY MILLER, ESQ.
of the New York Bar
5 Bernstein, Litowitz, Berger & Grossmann LLP
for Plaintiff

6
7 THOMAS A. BECK, ESQ.
Richards, Layton & Finger, P.A.
for Defendants Tilman J. Fertitta, Steven L.
8 Scheinthal, Fertitta Holdings, Inc., and
Fertitta Acquisition Co.

9
10 DAVID J. TEKLITS, ESQ.
KEVIN M. COEN, ESQ.
Morris, Nichols, Arsht & Tunnell LLP
11 for Defendants Kenneth Brimmer, Michael S.
Chadwick, and Joe Max Taylor

12
13 RICHARD L. RENCK, ESQ.
Ashby & Geddes, P.A.
for Nominal Defendant Landry's Restaurants,
14 Inc.

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1 THE COURT: Good morning all. Good
2 morning, Mr. Kairis.

3 MR. KAIRIS: Good morning, Your Honor.

4 MR. LEBOVITCH: Good morning, Your
5 Honor.

6 MR. KAIRIS: With me I have Mark
7 Lebovitch and Amy Miller of the Bernstein Litowitz law
8 firm.

9 THE COURT: I know Mr. Lebovitch. If
10 you would please stand when you're introduced.

11 Thank you. Welcome back.

12 MR. KAIRIS: Mark will be presenting
13 the argument on behalf of the plaintiff.

14 THE COURT: Sure.

15 Now, I do want to just give one
16 warning today. Looking out, I know we've got both
17 Mr. Lebovitch and if Mr. Teklits speaks for the
18 defendants, also another fast and eloquent speaker.
19 Our court reporter has had some surgery. And so while
20 we know that she's going to do a good job, we need to
21 channel our inner Texans this morning, since that
22 seems to be what about -- a lot of this case is about
23 and try to speak slowly.

24 Whoever is going to lead off.

1 MR. LEBOVITCH: Thank you, Your Honor.
2 Good morning.

3 I do have a habit of speaking quickly,
4 so I will do my best, as Neith knows.

5 Let me know --

6 THE COURT REPORTER: I will.

7 MR. LEBOVITCH: Okay. Your Honor,
8 we're here on the plaintiff's motion to compel or,
9 alternatively, to preclude the special committee from
10 submitting evidence -- eliciting evidence relating to
11 the attorney-client privilege, privileged advice.

12 And -- and before I start, Your Honor,
13 this is not a motion we planned to make. It's a
14 motion we felt we were forced to make. It arises from
15 the deposition of Jack Capers, who was counsel to the
16 special committee, is a partner at King & Spalding.

17 THE COURT: I should let you know that
18 not only have I read your papers, but I read and
19 highlighted the Capers deposition. And just to
20 further give folks some guidance in terms of bringing
21 their argument with, what I am not inclined to do,
22 unless you talk me out of it, is issue a preclusion
23 order today. I think the law is clear that when
24 somebody makes a decision to stand on the

1 attorney-client privilege, there are consequences for
2 trial.

3 What I am inclined to do today is to
4 have another deposition of Mr. Capers. And what I
5 would like to hear most about is the waiver issue.

6 MR. LEBOVITCH: Okay.

7 THE COURT: Because if they've waived,
8 then when we have this further deposition of
9 Mr. Capers, which will be defended by a Delaware
10 lawyer, not by Mr. Pecht, then that will have
11 consequences for the scope of the examination. If --
12 and that will also largely moot the preclusion issue.

13 MR. LEBOVITCH: Okay.

14 THE COURT: But I don't want to deal
15 with preclusion right now, because I think the more
16 logical way to deal with this entirely is that
17 Mr. Capers is going to be redeposed.

18 MR. LEBOVITCH: Okay, Your Honor. I
19 appreciate that guidance and I will -- I'll work with
20 that. And it does help to streamline. And to the
21 extent there's questioning about the scope of a
22 waiver, I think some of the case law, some of the
23 argument about preclusion might become relevant.

24 THE COURT: That's fine, and I

1 understand that.

2 MR. LEBOVITCH: Let me know if I go
3 too far.

4 And -- and I'm glad to hear Your Honor
5 read the deposition. We -- we submitted the whole
6 thing. We didn't know -- we didn't know if it was a
7 you-had-to-be-there type of event, you know, to sit
8 there. But we tried to relay --

9 THE COURT: It was a
10 you-had-to-be-there type of event. This is -- I don't
11 know -- you know, I'll go ahead and say this now
12 because I'll say this in the ruling. Remember when we
13 had that little tiff over the commissions?

14 MR. LEBOVITCH: Yes, Your Honor.

15 THE COURT: I had a sense there that
16 Mr. Pecht was being obstructionist. But I thought
17 that by issuing a ruling that said let's start having
18 some adult supervision from the Delaware folks and
19 let's start behaving like Court of Chancery
20 practitioners, that that message was going to get
21 delivered. It clearly wasn't, because this is not a
22 deposition that was taken in accordance with
23 expectations of what happens at a Delaware deposition.

24 Perhaps this is par for the course in

1 Texas. Perhaps in Texas defense counsel is always all
2 over the record, making lengthy speaking objections
3 about attorney-client privilege, taking a radically
4 broad view of the attorney-client privilege. Perhaps
5 that's what happens, okay? But it doesn't happen in a
6 Delaware case. And it doesn't happen in a case in
7 front of me.

8 So it was very clear from the
9 transcript what happened.

10 MR. LEBOVITCH: All right, Your Honor.
11 Then -- then with that, I'll get into a brief
12 explanation of the facts. And, again, Your Honor,
13 just let me know if I'm going too far into it. But
14 this is a case where -- you know, the way I look at it
15 is, most of the cases that come before this Court,
16 we're dealing with fundamentally honest fiduciaries
17 that are accused in an isolated incidence of a -- of a
18 disloyal act or an improper act. And that's really
19 what the business judgment rule regulates.

20 What we have here -- and this is why
21 the special committee's position became so important
22 -- is -- I think when your -- when you see the
23 evidence, what Your Honor will see is, essentially the
24 unrepentant use of power for personal benefit. It's

1 habitual and, really, persistent. And so that
2 distinguishes this case.

3 And when you have a situation like
4 this, when you have not a fiduciary who may have acted
5 disloyally but a disloyal fiduciary, the question has
6 to be asked: Where were the independent directors?
7 Why didn't they intervene? Why didn't they stop?

8 And so we had an honest question: Are
9 the -- is the committee going to assert the privilege
10 or not? because they have to justify their conduct,
11 you know. Were they in cahoots or were they just --
12 rolled over despite their good faith efforts?

13 And -- and what we learn is a
14 chronology, which I'll turn to very quickly; but it
15 does show Fertitta's behavior and perpetual -- I
16 asked: "What were your thoughts? Okay. What
17 were" -- you know, "What was the special committee
18 thinking?" And I'm stopped every step of the way.

19 Before the hurricane, Mr. Fertitta
20 used the credit crisis. It was no surprise. He used
21 the credit crisis in the spring of 2008 to lower his
22 offer from 23.50 to 21.

23 Then right before the hurricane, the
24 testimony is that the deal was well on track at \$21 a

1 share. Banks were happy. Shareholders were happy.
2 Everyone but Fertitta. The hurricane hit, and he
3 went -- the immediate sense within the company, even,
4 was that the damage, you know, it's bad, but it was
5 limited. Insurance can cover it. But he goes right
6 into action.

7 He publicly says -- and this is
8 attached to our -- to my declaration with the reply
9 brief. He publicly goes out and says at the same time
10 that he's buying 225,000 shares in the market. He
11 says, "We're affected now huge." He says, "This isn't
12 the same company it was when I made the offer."

13 Now, besides the inside trading,
14 that's significant, because Wells Fargo sees that. We
15 deposed them. And wells Fargo saw that and they said,
16 "How is the press telling us what the problems are?
17 We don't even have the information."

18 But they took that as the signal that
19 Fertitta wanted to renegotiate. And Wells Fargo sent
20 an e-mail to Jefferies saying, "They're planting the
21 seeds."

22 And -- and notably, Wells Fargo, who
23 we deposed after filing our action, they said they
24 didn't see any MAE. This was a hurricane. It's an

1 act of God. They weren't going to back out for
2 reputation and also because they viewed whatever
3 arguments there could -- whatever conditions remained
4 weren't material conditions. They said so. "We don't
5 really have a good basis to back out. We're not going
6 to do that because we're wells Fargo and it's a small
7 loan."

8 But even though that was Wells Fargo's
9 position, that's not what the special committee was
10 told. Fertitta came --

11 THE COURT: You're speeding up on me.

12 MR. LEBOVITCH: Fertitta came to the
13 special committee -- thanks, Your Honor -- and he
14 says -- he doesn't say "I want to renegotiate." He
15 says, "My banks might assert an MAE." And he says,
16 "but I think if I can renegotiate to 17, I'll get them
17 on board."

18 The special committee, or at least
19 their lawyer, is resisting. He writes letters saying,
20 "We haven't seen any evidence of an MAE." And he
21 makes clear that was the -- what was at least
22 articulated from the special committee position.
23 They're not rolling over. And so in an effort to take
24 matters into his own hands -- and this is where we get

1 to the first, you know, real issue of privilege.

2 You know, all litigation has risk.
3 It's easy to say litigation has risk, but I asked
4 questions to say, "Well, why don't you sue him? Why
5 don't you enforce this contract?" because what he's
6 doing has no basis. And we get shut down on the
7 privilege. And okay. I mean, I live with that. I
8 just want to know the contours of what the special
9 committee is going to say. They now can't explain why
10 they didn't sue based at least on legal advice.

11 THE COURT: Right. And, look, that's
12 one where I don't think on that one that the
13 committee, you know, or that counsel acted -- made an
14 improper objection, because their assessment of
15 litigation, that's sort of like classic legal advice.

16 MR. LEBOVITCH: Uh-huh.

17 THE COURT: Now, obviously that has
18 consequences. That means that at trial, if they start
19 going into that and saying, "Well, we were advised by
20 King & Spalding that this claim really didn't have any
21 value and that there were material defenses to it,"
22 well, then, you're going to jump up and object, and
23 then there will be some remedial ruling to address the
24 sword-shield problem.

1 MR. LEBOVITCH: Uh-huh.

2 THE COURT: But -- but I don't have
3 any problem, you know, with them saying as to that,
4 "We're not going to let you discover into it."
5 They're just choosing to hamper and impair their own
6 record.

7 MR. LEBOVITCH: And -- and -- well,
8 that's right. And -- and nor did I. I had no problem
9 with it, Your Honor. I was -- I had told Mr. Pecht
10 ahead of time that I, as far as letters, I said "Okay.
11 I respect your answer of privilege, but I need to know
12 what lines you're going to draw. And so I will ask
13 for privileged information, not to try to undermine,
14 but just so you can object."

15 THE COURT: And to smooth the
16 contours.

17 MR. LEBOVITCH: Yeah. And the
18 deposition is filled with that. But I think I moved
19 on. I moved on.

20 And then what we get is, Mr. Fertitta
21 demanded an in-person meeting when the special
22 committee wouldn't roll over. And we learned
23 something interesting, which turned out to be
24 prescient, is, Mr. Capers didn't want to have that

1 meeting. He said that Fertitta tactically creates a
2 crisis and then calls for an in-person meeting. I
3 really didn't know what that meant until I got to the
4 later meeting.

5 But first what happened was, when the
6 special committee's hall painting tight, was this
7 press release, this press release from the company
8 which disclosed that the deal's in jeopardy and didn't
9 disclose the bid-ask at 17 and 19. And having some
10 experience with federal securities laws, I asked
11 Mr. Capers whether he saw any motive and opportunity
12 in a stock drop and benefit by Fertitta, did he give
13 any advice to the special committee about whether this
14 was securities fraud. And, you know, he said he gave
15 advice about securities laws. We can draw our own
16 inference there.

17 And so I asked. It's an obvious
18 question. "Okay. You're the independent committee.
19 Did you assert that this was a securities fraud or use
20 this as a leverage? Did you say 'You know what? You
21 just messed up. There's a history of you sending out
22 press releases without our okay. This time you
23 stepped over the line?'"

24 No, it didn't do that we know

1 objectively. But why? I asked why, and I was told,
2 again, it was privileged. Okay. Move on.

3 THE COURT: And, again, there I think
4 you got to parse that this is what Mr. Pecht was
5 refusing to do, is to parse business issues from legal
6 issues.

7 And so, for example, on the federal
8 securities issue, if it is the plaintiff's -- it is
9 the committee saying, "Well, we were told by King &
10 Spalding that the claim's really weak," that's a legal
11 issue. But if it's the committee saying, "We have a
12 relationship here with a controller. We have the
13 prospect for a deal at a decent" -- you know, "some
14 price" -- I'm not opining or expressing any view as to
15 whether the price is, but let's assume at a price
16 higher than what might happen, "and we don't want to
17 mess that up by throwing litigation threats into the
18 water," that's not legal advice. That is a business
19 consideration about what happens at the meeting as to
20 which Mr. Capers was a percipient witness and about
21 which he has to testify.

22 But what Mr. Pecht was considering
23 that was -- consistently telling you was that if
24 Mr. Capers sat at the meeting and saw it, it

1 inherently became so entwined with his thought process
2 as a lawyer, that you couldn't ask about anything,
3 which is just wrong and obstructionist, and it's wrong
4 to the point where it is not a -- it is wrong to the
5 point where it's -- permits no instructions inference.

6 MR. LEBOVITCH: I appreciate -- I
7 appreciate Your Honor's guidance on -- on that.

8 We then, with the stock having tanked
9 following the press release, we get to the meeting.
10 And -- and Mr. Capers says that -- you know, I ask
11 what kind of behavior took place at the meeting,
12 something to that effect. He says, "Well, there were
13 threats."

14 I said, "Who was threatening?"

15 He looks me in the eye and he says me.
16 And -- and it turns out Mr. Fertitta threatened the
17 lawyers, threatened the bankers, threatened the
18 committee. Obviously a pretty significant telling
19 fact about how this worked out.

20 And at the same time he changed his
21 offer from 17 to 13. So you see that he does 17;
22 press release, boom. He says, "Okay. I'm at 13. The
23 stock just tanked." We do -- we do think that he has
24 a securities fraud problem there.

1 I asked: "Why did the special
2 committee accept the lower rate, the lower price?"
3 And this goes back to -- I think Your Honor's last
4 comment is, there could be a lot of factors in why
5 they took the 13.50, but I was shut down.

6 THE COURT: Yeah. Same -- this is --
7 this is sort of my -- this is going to be my
8 continuing theme, you know. "You don't get to just
9 shut me down." And it may be difficult to draw lines
10 between business advice and legal advice, I understand
11 that. But, you know, particularly on things -- like
12 this was an objection, an instruction about
13 conversations with -- with Cowen, I think?

14 MR. LEBOVITCH: Yes. That was --

15 THE COURT: I mean, just --

16 MR. LEBOVITCH: -- I think at page
17 112, yeah.

18 THE COURT: -- when -- when your --
19 when a financial advisor gives deal-related financial
20 advice and a lawyer is sitting in the room at the
21 committee meeting at which that advice is given, that
22 discussion does not become suddenly privileged. It
23 doesn't. It is the business -- the banker's there to
24 give you his financial and business views about the

1 transaction. The lawyer then may take them into
2 account in later giving legal advice, but the lawyer's
3 a percipient witness as to that discussion and the
4 committee's consideration. And the idea that, you
5 know, you would just instruct Capers, no, off-limits,
6 again, it's just -- it is -- it is overly broad to the
7 point of being so wrong as to indicate that it was an
8 effort to obstruct the deposition not to take a
9 legitimate position.

10 MR. LEBOVITCH: Thank you, Your Honor.

11 And, you know, we -- because the
12 committee has, you know, I would say, some -- some
13 explaining to do, well, we went through all of this,
14 and we don't know -- we don't know what they'll do. I
15 mean, our feeling is that their conduct -- the legal
16 questions embedded in their conduct are so deep that
17 it's hard to understand, which kind of gets to the
18 next topic where we were shut down, which I think, you
19 know, presents some of the problems, is the use of the
20 poison pill. Capers was very clear, he was very
21 unhappy, very concerned, and the committee was very
22 concerned about Fertitta's purchases. The Vice
23 Chancellor had called it a creeping takeover. He did
24 try -- I mean, he did try to get a standstill

1 agreement in place. And I asked him, "Well, what
2 about the pill? Why didn't you put up this pill?"
3 And we got shut down.

4 I mean, here's a guy who -- Fertitta
5 has an absolute majority because of these purchases.
6 He never paid a control premium, so fundamentally
7 against the heart of Delaware law.

8 And -- and, Your Honor, when we are
9 done with this -- arguing this motion, I want to just
10 give Your Honor a heads-up about things that are
11 happening in the litigation. As you know, there's a
12 deal -- an offer that's been made by Fertitta that's
13 been accepted by the same special committee, and we're
14 litigating that as well. We're going to explain some
15 things, and I'll go over that.

16 But the fact that Fertitta got his
17 absolute majority, you know, we say as a result of
18 completely disloyal acts, is going to become part and
19 parcel, really the heart of the current phase of the
20 litigation, I mean, the current deal. And I'll get --

21 THE COURT: Challenge the negotiation
22 letters, I get that.

23 MR. LEBOVITCH: Yeah. Well, legal
24 significance to being a controlling shareholder with

1 54 percent rather than 40 percent, the go-shop period.
2 I'll get to that, Your Honor. I don't want to confuse
3 issues. I want to focus on this motion.

4 So we're cut off on that. What
5 happens once he has control is this issue with the
6 SEC. Again, we did learn something from Mr. Capers,
7 which is that he spoke to the SEC that wanted
8 disclosure of the debt commitment letter, a pretty
9 standard thing in financing arrangements, public
10 financing arrangements. And it's a Rule 13E
11 transaction. So, of course, you're going to have to
12 disclose all or virtually all of the debt commitment
13 letter. The first one was disclosed.

14 And the SEC told Mr. Capers, "We don't
15 want to blow up the transaction." But Fertitta and
16 his -- his M and A advisor, who is also acting as
17 lender, Jefferies, are taking a very hard line.
18 They -- the SEC had no motive to blow up the deal, but
19 what we see now after the stock is -- the deal -- the
20 offer price went from 23.50 to 21 to 17 to 13.50.

21 One thing that's in the deposition --
22 and -- and we didn't cite the actual number, but I
23 just want to -- we cite the pages, page 343 of the
24 deposition. The day before the deal was terminated,

1 Fertitta's lawyer called up -- e-mailed Mr. Capers and
2 said, "Hey, you know, there's a problem with the SEC.
3 Maybe we can get it done at \$8.50." And that's
4 Exhibit 42 to the deposition.

5 And I imagine this is the point at
6 which Mr. Capers, if he was, you know, trying to act
7 independently, it was just the last straw. He lost
8 it, because really, you know, what does the lower
9 price have to do with disclosing your debt commitment
10 letter, disclosing the market flex term? There's no
11 principle, there's no policy involved. This is
12 Fertitta's greed. That's it. It's greed, greed,
13 greed.

14 And the next day -- after the offer
15 went to 8.50 -- and I can only imagine from sitting
16 there -- and I don't have video; but from sitting
17 there and seeing Mr. Capers' reaction, the next day
18 there's a meeting -- I think he said he didn't know
19 about it initially -- and the special committee
20 terminates the -- the deal. They do it in such a way
21 that, even absolute minimum, the reverse termination
22 fee Fertitta is absolved of.

23 So I ask: "Why did the special
24 committee" -- "Why did the special committee

1 terminate?" I'm cut off. Okay, fine. I move on.

2 Then they get to the question that I
3 told Mr. Pecht ahead of time was not acceptable, was,
4 "Why did King & Spalding resign." I mean, what we're
5 told is that there was a payment problem and there
6 were legal issues relating to the deal. You know, I
7 don't know. It may be good enough for Your Honor to
8 draw the inference if a lawyer resigns the day of a
9 really unusual act by the committee; you know, it does
10 support certain inferences, but I don't take things
11 for granted. I try to develop my record --

12 THE COURT: Right. And I'll -- you
13 know, I'm going to wait until trial or whatever time
14 it is when I have to take inferences to figure out
15 whether I take an inference from that. What I am not
16 clear on is the privilege objection.

17 MR. LEBOVITCH: Yes.

18 THE COURT: And nobody has -- I did
19 not see in the defendants' papers -- and maybe, you
20 know, Mr. Teklits can -- can point out where I missed
21 it -- where there's authority for this idea that your
22 resignation is attorney-client privileged.

23 MR. LEBOVITCH: And, Your Honor, that
24 was -- I mean, there's a big colloquy at 358 to 361.

1 We had flashed this ahead of time. I don't normally
2 disclose to opposing counsel what my deposition
3 strategy is.

4 THE COURT: Right.

5 MR. LEBOVITCH: But that was the
6 conversation with counsel. I said, "It's unusual, but
7 I want you to know this. Tell me if it's a problem."
8 And -- and, again, I said at the pages.

9 But, you know, really, on everything
10 that we thought there could be a privilege -- so put
11 aside the resignation -- we backed off. We had our
12 record. They were blocking themselves off, and okay.
13 It's still inexplicable, it's still inexplicable the
14 special committee's conduct at this point in the
15 record.

16 THE COURT: Uh-huh.

17 MR. LEBOVITCH: Their strategy seemed
18 defined. And then it changes when -- when the
19 questioning from the special committee begins. You
20 know, that's when, you know, my jaw dropped, for the
21 first question is about Mr. Capers' legal opinion
22 about the independence of the committee. And -- and I
23 did what I think a lot of lawyers maybe wouldn't do,
24 sit quietly and say "Oh, this is a waiver. Let me let

1 it happen."

2 And I took the chance that Mr. Kairis
3 would be sitting here rightfully telling me "Mark, why
4 did you tip them off? Why didn't you just let them
5 waive?" I didn't. It was broad daylight what I did.
6 I said -- I said, "This is crazy. We're going to have
7 to redo the whole deposition if you go this path."

8 And -- and what Mr. Pecht did is, he
9 withdrew that question, which we're not -- we don't
10 give them credit for that. That's a concession that
11 the question wasn't that privileged. And he stopped
12 there. Okay, fine. But then he went on and on with
13 more of the same types of questions, trying to, you
14 know, assert privilege at times but then
15 opportunistically ask about certain things.

16 He's towing the line and crossing the
17 line. And I objected several times. I mean, I'm not
18 going to go through every item, but there are several
19 places where I objected. There were a couple places
20 where Mr. Pecht pulled it back.

21 A couple where he just went through
22 this -- you know, the interpretation of the merger
23 agreement, how the parties would -- would deal with,
24 you know, issues under the merger agreement and

1 whether there was an MAE. You know, I object. And
2 then things about the debt commitment letter, he goes
3 ahead, anyway, goes ahead and just asks it.

4 Questions about alternative financing,
5 just goes ahead and builds his record. I don't think
6 that it's that material to us and we're not offended
7 by the testimony; but if he wants to put this in the
8 record, okay, fine, but there have to be consequences.

9 Some questions near the end that we
10 didn't cite in the brief, but I just want to
11 highlight. Again, looking to the immediate litigation
12 on the current deal, there's some questions about how
13 a voting agreement works, there's some dispute about
14 the significance of this voting agreement that
15 Fertitta signed. Basically he agreed that -- and this
16 is now my legal opinion that I can say in court is, he
17 agreed that if there was an alternative bid, the
18 special committee could vote his shares that he
19 purchased after the June '08 deal.

20 THE COURT: Market purchases.

21 MR. LEBOVITCH: Yeah, yeah. And
22 that's going to become really significant, Your Honor,
23 because part of the relief we're going to seek is
24 going to relate to those purchases. He has not made

1 that agreement now.

2 And so what you had was a go-shop
3 period that, again, we will submit, we'll show you
4 evidence was a -- a proverbial kabuki dance. There
5 was no go-shop period. No one could do a deal without
6 Fertitta on board. But he's agreed in the past to
7 essentially hand over his voting rights. That's going
8 to be important to the relief that we will seek.

9 You know, so -- so we have the
10 situation the law is not -- is not really, you know,
11 in conflict. The parties cite all the same cases. I
12 think the question should be the scope of the waiver.
13 And -- and I will just briefly touch on the preclusion
14 issue because it may be relevant.

15 If -- if you have a situation where
16 defense counsel can assert the privilege on everything
17 that matters to plaintiffs and then they ask questions
18 about what they want to ask about, okay, and then
19 there's a waiver, it's actually just as prejudicial to
20 say that the waiver is just on that narrow, narrow
21 subject matter. It's a problem with the kind of --
22 it's a policy point, right? Otherwise defense lawyers
23 can always do this and say, "Okay. I'll risk waiving;
24 and if I waive, you know, I'll get the testimony that

1 I like. And" -- "And if I'm found to have waived,
2 okay, so I'll put that evidence in."

3 So getting to the scope of the waiver
4 for Your Honor to consider, it really has to be fair.
5 And -- and we're not saying give us every bit of legal
6 advice on every single topic. But I do think it's
7 fair if -- if the defendants voluntarily or by
8 implication, by the implication of their conduct, have
9 a waiver that relates to a topic, it should be a full
10 topical waiver, not just how do you interpret the
11 EBITDA provision of the merger agreement. I mean, it
12 should be the parties' rights.

13 I want to know -- I want to know -- I
14 know there's risk in litigation. I want to know "Did
15 you think you could win" -- "Did the lawyer tell the
16 committee you could win this case?" And there is no
17 MAE; it's an act of God, because it's different when I
18 say it. And if we can get it from the committee's own
19 advisors and they disregard that advice.

20 So that's really the -- the heart of
21 the waiver issue. I'll answer any --

22 THE COURT: What would you point to in
23 the existing Capers deposition that is the basis for
24 -- you know, apart from the whole waiver that would

1 let you get the strength of their litigation position?

2 MR. LEBOVITCH: Okay. Well, for one,
3 the only testimony I asked about was, you know, "Was
4 there a discussion about litigation?" "Yes and, you
5 know, we identified risks." That's in the -- that's
6 in the proxy statement, which I'll get back to in a
7 second.

8 You know, Mr. Pecht -- Your Honor,
9 I'll give you a page number. Page 382. You know, he
10 started to ask about this advice. And, again, you
11 know, maybe -- maybe I didn't help myself. Maybe I
12 should have let him answer more. I said -- I warned
13 Mr. Pecht. I said, "Look, this is going to be a
14 waiver. How can you possibly get into this further?"
15 So he touched on litigation position.

16 THE COURT: Yeah, but he's -- he's
17 touching on it, but then that's one of the ones he
18 withdraws.

19 MR. LEBOVITCH: He -- he withdrew it,
20 right. I warned him.

21 And, Your Honor -- and maybe the
22 litigation isn't the best example, although I think
23 it's appropriate. I want to know, you know, what was
24 the assessment of -- of could there be an MAE and why,

1 and what were the -- what were the factors that would
2 go into this or -- the core theory -- when I read the
3 proxy statement -- I just want to touch on the proxy
4 statement briefly. I forgot to.

5 But the core theory I had when I first
6 read the proxy statement was, here's a committee
7 which, if you give them the best inference, right,
8 that they're not in cahoots, they use the proxy
9 statement to tell the world their justification.
10 And -- and there's -- I'll give you the pages from the
11 proxy, because there's one paragraph -- we cited a
12 lot. We probably were overhighlighting in that proxy
13 excerpt, but there's excerpts at pages 46, 48, and 52
14 to 53 --

15 THE COURT: Uh-huh.

16 MR. LEBOVITCH: -- which -- you know,
17 Your Honor, we can go to it -- where they talk about
18 why they didn't litigate.

19 THE COURT: Uh-huh.

20 MR. LEBOVITCH: And I submit, you
21 know, we've all seen proxy statements. Many times
22 it's standard to have a disclosure that says they got
23 advice about fiduciary duties. That's pretty much the
24 way proxy statements normally go. This was the

1 justification in defense as an advocacy piece.

2 And if we look at, you know, maybe
3 the 40 -- I don't know which one Your Honor is looking
4 at, but it's the paragraph that starts, "The Special
5 Committee then discussed the options available to it."
6 That's on 46.

7 On 48 they talk about the option. And
8 this is where I think the committee in their
9 disclosure, recognizing that someone might question
10 why they renegotiated, they go beyond saying -- they
11 say, "Here are the options. Here's out assessment of
12 the risk." And, you know, it doesn't give the
13 bottom-line legal advice, but it sure suggests what
14 that advice is. It sure suggests what went into all
15 of this.

16 THE COURT: See, I read this, too.
17 And this -- and this, to my mind, what I view this as
18 was consistent with the distinction I'm drawing
19 between the underlying legal advice and sort of the
20 business reasons for doing something, which is another
21 reason why I thought it was odd for Mr. Pecht to be
22 instructing contrary to the same distinction that
23 he -- that was set forth in his own clients' proxy
24 statement and contrary to his own position on

1 scrivening where you guys had that little
2 discussion on what -- where somebody else --

3 MR. LEBOVITCH: Handwritten notes?

4 THE COURT: -- another lawyer was the
5 scrivener of what happened at the meeting?

6 MR. LEBOVITCH: Uh-huh.

7 THE COURT: I mean, he recognized the
8 principle there.

9 MR. LEBOVITCH: Uh-huh.

10 THE COURT: But yet when he didn't
11 want his witnesses to testify, which was pretty much
12 every other time, he didn't acknowledge what the
13 actual rule is and just gave a blanket instruction.

14 So, anyway, I view this as business
15 reasons and consistent with the idea that this is the
16 type of stuff you get to inquire into.

17 MR. LEBOVITCH: Uh-huh.

18 THE COURT: Now, if you then get to
19 the point where you ask them, "Well, did King &
20 Spalding give you a" -- you know, "a sense as to
21 whether it was a strong claim, weak claim, whatever?,"
22 Look, that's something I'd like to know. But if they
23 don't want me to know it and they want to give you the
24 ability to argue based on it and make other

1 arguments --

2 MR. LEBOVITCH: Uh-huh.

3 THE COURT: -- it's an odd tactical
4 choice, but it's their tactical choice.

5 MR. LEBOVITCH: Understood, Your
6 Honor.

7 And on the -- on the score of the
8 business versus legal reasons, I -- I read the proxy.
9 Sounds like Your Honor reads proxies, too. To suggest
10 that the primary reason why they didn't sue Fertitta,
11 you know, different from the Hexion case with Apollo
12 where they were at arm's length is, he made -- he gave
13 them an impossible situation. If you assume they
14 acted in good faith, which I'm not sure of based on
15 the evidence, but if you even assume they were acting
16 in good faith, they came to the conclusion "We can't
17 sue our CEO. It's going to throw the company into
18 turmoil."

19 And that's where exactly fiduciary
20 duties come in, because a CEO as a fiduciary can't put
21 so-called independent directors into that position.

22 And so I would like the ability to
23 develop the record that I think is already supported;
24 but, again, I don't take things for granted. I don't

1 leave stones unturned. The record is that the
2 committee didn't believe there was any excuse to get
3 out of the deal. And if he wasn't a fiduciary, they
4 would have sued him. And they didn't because of his
5 position. And whether it's loyalty to him or just the
6 impossibility of the situation, that would, I believe
7 -- you know, if that's where I show -- that's where I
8 show you at trial, I think that's enough to get a
9 disloyalty finding vis-a-vis Fertitta that gets me a
10 long way, a long way there from where he's clearly
11 aiming, which is to say this case is just about a
12 termination fee. I think if we get to disloyalty, we
13 get -- we get, you know, the full equitable relief,
14 which is much more than that.

15 THE COURT: Yeah. I view that as all
16 for another day, sort of the merits issues. But yeah,
17 I think you get to explore the business reasons. I
18 mean, that's what it's about, you know.

19 MR. LEBOVITCH: That's what we're --
20 that's what we're asking for, Your Honor.

21 And -- now just to touch on the
22 preclusion, because -- clearly from the conduct --
23 and, I mean, I do think the proxy can post. But just
24 in the context of litigation, here's a warning of a

1 board that's giving all sorts of signals that "We want
2 to preserve the privilege," but then they're towing
3 the line, or the special committee.

4 And this litigation is moving. We
5 would like to get it, you know, moving to -- to
6 equitable relief and then to a final trial. I don't
7 want them to change their mind at the end. And -- and
8 we do think -- and we cited case law. I mean,
9 Chesapeake and -- and Vice Chancellor Noble's ruling
10 in the Selectica case, Ashmore versus Metrica case
11 which the Chancellor decided, you know, they do say
12 there are consequences. And it does seem like those
13 opinions -- and the Chesapeake might have been
14 different; but the Chancellor's opinion was clearly
15 very early in discovery. And he says, you know, "You"
16 -- "You've asserted the privilege, and you're stuck
17 with that." He says, "Principles of waiver and
18 fairness" -- he references the sword and shield -- he
19 says, it "require[s] the Court to disregard attempts
20 by [parties] to invoke privilege, only to change their
21 mind on the eve of trial."

22 I mean, I'm -- you know, we put off
23 the special committee depositions, you know, pending
24 this. We don't want to do it a second and third time.

1 So when the law of the preclusion, to basically, you
2 know -- and Vice Chancellor Noble talked about this in
3 Selectica, and it's cited in the special committee's
4 brief -- you do have to make a choice. And if you're
5 going to justify your conduct by pointing to legal
6 issues, well, then, you know, you either have to waive
7 or you're stuck and you can't put that evidence in.

8 And so I understand Your Honor's going
9 to give us another deposition; but we do urge the
10 Court, you know, to find that, look, if they're going
11 to assert the privilege, that's fine. But then if
12 Your Honor is going to have questions about their
13 conduct down the road, they cannot change their mind
14 on the eve of trial. I don't want to have to take
15 these depositions a second time. It's wasteful, it's
16 unfair.

17 THE COURT: No. Look, I don't think I
18 need to rule on it because that's what the law is.
19 It's sort of like saying "I want Your Honor to rule
20 today if you find Fertitta is a controlling
21 stockholder, that entire fairness will apply" or "If I
22 went" -- "I want Your Honor to rule today that the
23 special committee process was, you know, vibrant and
24 vigorous and replicated arm's-length bargaining, then

1 the burden will shift." I mean, these are like --
2 these are sort of established things.

3 So I don't -- you know, look, if -- if
4 it happens on down the road that -- that you need the
5 preclusion order for trial, I mean, the -- the law is
6 laid out here.

7 MR. LEBOVITCH: Okay. I think -- I
8 think that guidance will -- will -- will be helpful
9 and hopefully will let everyone draw -- draw clearer
10 lines.

11 I don't know if Your Honor has any
12 other questions about this. As I said, when we're
13 done, I just want to talk about the next steps in the
14 litigation.

15 THE COURT: No. That's fine. Thank
16 you.

17 MR. LEBOVITCH: Okay. Thank you, Your
18 Honor.

19 MR. TEKLITS: Good morning, Your
20 Honor.

21 THE COURT: Good morning, Mr. Teklits.

22 MR. TEKLITS: Let me start by just
23 being clear that I'm here representing the special
24 committee and only the special committee defendants,

1 because I think I'd be remiss if I didn't point out
2 up-front that there have been a lot of accusations and
3 allegations on the merits of this case in the papers
4 and even today, most of them directed to other
5 defendants that aren't even a party to this motion.
6 And I don't think this is the time -- I don't think
7 it's appropriate, to be quite honest, for me to have
8 to correct all the factual misstatements.

9 THE COURT: And I'm not asking you to.
10 In terms of -- I tried to say a couple times. I view
11 the merits as for another day. We're in discovery
12 mode right now. And whether, you know, Fertitta is a
13 terrible guy or a great guy, whether he acted
14 capaciously or, you know, rationally and whether your
15 clients were, you know, strong or weak is something we
16 will all find out on down the road.

17 MR. TEKLITS: Yeah. I just want to be
18 clear, I'm not going to take time today to try to
19 correct all the misstatements.

20 THE COURT: No worries.

21 MR. TEKLITS: The other thing is, I
22 think Your Honor is now focused -- I think the issues
23 were already fairly focused, but we focus mostly on
24 the waiver issue. We agree that any issue of

1 preclusion is better left for trial when we have it in
2 proper context.

3 With respect to the waiver issue, I
4 think the starting point that Your Honor has to
5 appreciate is, this is the very first deposition in
6 the case. Plaintiffs insisted on taking the attorney
7 first. And as with any deposition of an attorney,
8 there's always going to be difficult privilege issues.
9 We've all been through it. This was a very long
10 deposition. It took -- I think it went 10 hours.
11 They say, you know, privilege is waived. We say no.

12 But on the waive issue, I think the
13 bottom line is, if you look at the cases, the at-issue
14 exception is narrow, and there has to be some
15 affirmative action to find an at-issue waiver. Here,
16 I think the record is pretty clear, and even in their
17 papers they admit it. The special committee has
18 consistently said throughout this litigation "We're
19 going to exercise our right. We're going to rely upon
20 the privilege. We're not going to rely upon the
21 advice of counsel."

22 There's no advice-of-counsel defense
23 asserted in the answer. There's been no paper filed
24 by the special committee where we try to, you know,

1 support our actions based upon the advice of counsel.
2 So I don't think this is a case where you have an
3 at-issue exception where the special committee took
4 some affirmative action to put at issue the advice of
5 counsel.

6 Now we get to the more difficult
7 question. I think these were what we were facing at
8 the deposition, and Your Honor has sort of gone over
9 it. And where do you draw the privilege? "Okay,
10 special committee. You said they're going to assert
11 the privilege. Now, where" -- "where do the lines get
12 drawn? Where's the distinction between business
13 advice and legal advice?," when the financial advisors
14 even complicate it more, because I agree completely
15 with Your Honor that usually financial advice is not
16 privileged. However, sometimes there is a
17 interrelation -- and the Delaware cases recognize
18 this -- between legal and financial, and those lines
19 get blurry.

20 I think part of the problems that
21 occurred here were, it's the first deposition. I
22 think that always happens, the first deposition, a
23 lawyer who's not even, you know, the lawyer for the
24 special committee. He's really a third-party lawyer.

1 And these issues arose. But I don't think there's any
2 question that he was instructed not to waive the
3 privilege. I don't think there was any advice given.
4 If you read through the transcript -- and I did read
5 through it -- I don't think he ever testified to
6 communications or testified to his advice. Therefore,
7 I don't think this is a waiver question.

8 So I think the appropriate question
9 Your Honor has raised and is focused on -- I think it
10 is the correct question -- is whether there should
11 have been maybe a broader allowance of testimony into
12 business, not into the legal advice.

13 THE COURT: Right. A more nuanced
14 application.

15 MR. TEKLITS: Yeah. I think the time
16 to address that, Your Honor, is after the depositions
17 of the committee members. I think that these
18 questions that the plaintiffs really want to ask are
19 better directed in the first instance -- I think they
20 would have been here -- to the committee.

21 THE COURT: Who's going to defend the
22 committee members? Are you going to defend them as a
23 Delaware lawyer, a member of your firm going to be the
24 principal lawyer and the one who calls -- makes the

1 decisions as to whether to assert the privilege and
2 how nuanced to make it?

3 MR. TEKLITS: We haven't discussed --
4 I don't even know if the special committee depositions
5 have been scheduled. So we certainly are -- I haven't
6 had that discussion with my cocounsel. We just aren't
7 there yet.

8 Like I said, the plaintiff's counsel
9 insisted on taking this attorney first. I think now,
10 I heard, that the special committee haven't been
11 scheduled, that they've been put off. But I do think
12 that these issues are more easily dealt with a lay --
13 with a committee member at that deposition than they
14 are at the attorney deposition. Anytime you're at the
15 deposition of a attorney -- and we've all defended
16 depositions of attorneys -- it's a difficult position
17 to be in. There's a natural inclination to maybe view
18 the privilege broader, where I think those calls are
19 easier to make with the committee deposition because
20 you ask the committee member "What did you" -- you
21 know, "You made this decision. What were you relying
22 upon?" And if he can testify as to all the business
23 reasons, those are fair -- you know, fair game. When
24 you get into the advice of counsel, then it -- then,

1 you know, it's easier to see where the advice is and
2 you can cut it off. It's just easier to make those
3 calls I think at the committee members' depositions.

4 I think here, like I said, I think the
5 record's clear, the committee has exercised its right
6 to assert the privilege. That has ramifications, and
7 it's pretty clear in the Delaware law what they are.
8 And I think that going forward, you know, they're
9 entitled to discovery of the other reasons. I don't
10 think there's been any waiver of the privilege issue.
11 I think what we're dealing with is where you draw the
12 lines. I do think that lines will get drawn more
13 clearly when you go through these committee
14 depositions.

15 I hear Your Honor. I understand if
16 after that process occurs somebody thinks there needs
17 to be a different -- another deposition of Mr. Capers,
18 to go back and get -- if it's necessary, to get his
19 understanding of what the committee said, I think in
20 the first instance the committee -- let's hear what
21 the committee said their justification for it rather
22 than Mr. Capers' articulation of what he thinks the
23 committee's basis was.

24 But once you get there, if somebody

1 thinks there's a need for a deposition -- I don't
2 control Mr. Capers, but we can see if Mr. Capers will
3 agree to stand for another deposition, and we can fill
4 in any holes that were left.

5 I just want to deal with a few other
6 issues that Your Honor raised --

7 THE COURT: The only thing I would say
8 is, I mean, King & Spalding is its own entity, and I
9 get that. And I do actually agree that the Delaware
10 rules of evidence don't allow me to draw a negative
11 inference from the assertion of privilege.

12 But I do think that I could draw an
13 inference if, for example, you know, somebody over
14 whom a party had substantial influence, such as its
15 former lawyer, was to say, "Well, I'm not even coming
16 back." So take that into account when you're using
17 your efforts at persuading a follow-up deposition.

18 MR. TEKLITS: Yeah. I understand,
19 Your Honor. And hopefully Mr. Capers would agree to
20 show up. I mean, he's a reputable man.

21 THE COURT: He is. Absolutely.
22 Well-known in the community.

23 MR. TEKLITS: Okay. I just wanted to
24 deal on two other issues that were raised by the

1 papers and by Your Honor. One is the King & Spalding
2 resignation.

3 I don't think that that was precluded.
4 They were allowed to ask the question "Why did you
5 resign?" Mr. Capers answered "Why did I resign?
6 There was a payment issue, there's a disagreement."

7 THE COURT: Other issues. And then
8 the other issues were shut down.

9 MR. TEKLITS: Well, the other issues
10 were issues regarding -- at least as I read the
11 deposition, related to the advice he had given the
12 committee. So I think it's almost a back-door way of
13 getting to the advice. He said, "There were other
14 issues regarding what I discussed with" -- "my
15 communications with the committee." I think that's --
16 "Why did you resign?" Legitimate question. "I
17 resigned because of payment issues and discussions I
18 had with the committee."

19 Now, I don't think that opens the door
20 to allow you to go in, "Okay. Let's go back at the
21 time you were representing the committee" and get all
22 the information as to what those discussions were. I
23 think that they've gotten what they're entitled to get
24 on that.

1 THE COURT: I agree with part of what
2 you're saying. I'm not sure I go all the way. Like,
3 I agree with you that if -- let's say, you know, the
4 issue was Capers resigning because somebody on the
5 committee said that he had, you know, screwed up his
6 legal advice on X issue. That they wouldn't get to
7 back-door into what his advice on that issue had been
8 by virtue of that resignation decision. I think
9 you're exactly right to say that. But if it's a
10 combination of, you know, Capers saying, "Well, the
11 other issues included that I was being threatened by
12 X" -- and, again, I don't know whether it happened or
13 not. I don't know, but that's the allegation. And
14 from the deposition, it at least seems to play some
15 role. (Continuing) -- I think you get to ask about
16 that, because I don't see how the threat is legal
17 advice.

18 So all -- what I would suggest to you
19 is that I think, just as I think there needs to be a
20 more mature and nuanced approach taken to the
21 privilege analysis, that same more mature and nuanced
22 approach needs to be applied to the other issues on
23 the resignation issue.

24 MR. TEKLITS: Okay. I understand,

1 Your Honor. We'll certainly take that into
2 consideration.

3 The only last issue I want to deal
4 with is -- was dealt with right at the end is the
5 preclusion issue. This is the first deposition. I
6 don't know how this case is going to proceed. I don't
7 know what's going to happen with the record. And
8 we'll deal with the preclusion issues at trial.

9 But we've all been involved in cases
10 where things change. And sometimes advice does get
11 waived, and there are ramifications, and Delaware law
12 accepts it. I just don't think today is the
13 appropriate day to deal with it.

14 I just was involved in -- we just
15 tried the iBasis case in front of Vice Chancellor
16 Strine. Right before trial the other side did decide
17 to waive the privilege. There were redepositions.
18 Things change, the record changes. We can't predict
19 today what's going to happen for the future. So I
20 just don't think it's the appropriate time to make any
21 orders.

22 THE COURT: No. I hear you. And I do
23 think that -- and I agree with you. I don't think I
24 am going to address preclusion today for all the

1 reasons I've discussed and also for what you've just
2 said. But I -- you know -- I don't know the facts of
3 iBasis. And if we have a sort of preclusion
4 discussion on down the road, you can brief me on those
5 and how it comes into play.

6 But I think that it would be a -- a
7 multifactor analysis as to whether defendants could
8 essentially, you know, flip on the advice-of-counsel
9 switch at the last moment, when the whole case had
10 been litigated on the basis of, you know, "We're not
11 asserting advice of counsel. We're barred."

12 MR. TEKLITS: Okay.

13 THE COURT: I mean, it would
14 essentially give the defendants a unilateral do-over
15 at the last minute, and that do-over would be under,
16 you know, circumstances, in my view, that would be
17 very unfair to the plaintiffs. Now, maybe if there
18 was some other factor, like you were dealing with
19 something that was hyperexpedited and that type of
20 thing, you can understand why there might be some
21 late-breaking tactical or substantive development that
22 would cause you to change your position.

23 All I'm saying is, you know, the
24 defendants should not proceed on the assumption that

1 they can sort of unilaterally flip that switch into
2 advice-of-counsel defense land, you know, late in the
3 game.

4 MR. TEKLITS: I understand completely,
5 Your Honor, and we understand the ramifications.
6 Certainly not -- I'm not talking about on the eve of
7 trial. I was more positing maybe doing some special
8 committee deposition of a member, something happens.
9 Maybe the second deposition in the case. And I don't
10 think if that happened -- and I can't, you know -- I'm
11 not trying to predict the future. I don't think -- I
12 have no reason to believe it will happen; but if it
13 does, I don't think we should be precluded at that
14 point. Certainly we understand completely what the
15 Delaware law says on the eve of trial that we can't
16 change a position.

17 Unless Your Honor has any other
18 questions --

19 THE COURT: I don't. You've been very
20 helpful.

21 MR. TEKLITS: Thank you.

22 MR. LEBOVITCH: Your Honor, just a few
23 brief comments. And one, in Mr. Teklits' presentation
24 and why it's something we want to highlight, in our

1 brief we never mentioned the Morris Nichols firm at
2 all; but then in the special committee's response --
3 Your Honor may have taken note of it -- they highlight
4 that we had highlighted some paragraph pertaining to
5 Morris Nichols.

6 I just wanted to point out, for
7 whatever it's worth, that Morris Nichols was
8 apparently retained in the spring. We had never even
9 focused on them, because Morris Nichols never
10 appeared, as far as we could tell from the documents
11 or the proxy, after the \$21 deal was struck. And so
12 we weren't focusing on that, weren't focusing on any
13 privilege. We see no evidence that they were
14 involved. Perhaps that itself is a telling factor,
15 but I just wanted to highlight that because Mr. -- Mr.
16 Teklits was here.

17 Now, substantively Mr. Teklits said we
18 insisted on taking the attorney first. That's not the
19 way that it went down. Actually, we insisted on
20 taking two of the committee members first. I think
21 Your Honor's aware, we've been struggling to get
22 depositions scheduled. The compromise essentially
23 imposed on us was -- was King & Spalding. We took it.
24 I mean, I think we received King & Spalding documents

1 just a few days before the deposition. So it was
2 almost like an expedited situation, but absolutely did
3 not insist on taking the attorney first. It was not
4 my desire. We wanted to hear from the committee
5 first.

6 I think that as far as Mr. Capers
7 being -- first I heard that Mr. Capers should be
8 deposed after the special committee, which we don't
9 have an objection to, Your Honor, but then their
10 suggestion we should only -- only determine whether
11 Mr. Capers should be deposed again after hearing from
12 the special committee. I think, Your Honor, we're
13 happy --

14 THE COURT: No, no. I'm going to rule
15 on Capers being deposed again today.

16 MR. LEBOVITCH: Okay, okay. So that's
17 not -- and then as far as the resignation, I think
18 Your Honor got that. I mean, there was no effort to
19 back-door at all. I was shut down on "Explain the
20 reasons why you resigned."

21 And then that's it. That's all I
22 have, Your Honor.

23 THE COURT: All right.

24 MR. LEBOVITCH: Okay?

1 THE COURT: Now, let me -- while
2 you're -- hold on. While you're up, though, because
3 some of this, I guess, does get into the litigation
4 path and this other deal. Are you guys going to move
5 to expedite or seek injunctive relief or -- or -- or
6 are you going to do that one as a postclosing damages
7 case?

8 MR. LEBOVITCH: No, Your Honor.
9 That's one where it's become clear to us now, as the
10 facts are developing, that we do need to seek
11 preclosing remedies. There may well be damages, and
12 we know the damages on the \$21 deal. We don't --
13 there's nothing to -- we will just get money damages
14 on that. That's our goal.

15 As far as the current deal, an offer
16 was made. And as Your Honor may be aware, there --
17 there were investors who felt the deal was woefully
18 underpriced and purchased shares. So -- so it doesn't
19 look like a deal can go forward at the original deal
20 price.

21 However, we have been in touch with
22 the special committee's corporate counsel to
23 essentially see if they were going to try to restrain
24 Mr. Fertitta and allow a real process to unfold,

1 because if Mr. Fertitta was still at below 40 percent
2 and you decide to sell the company for cash, I mean,
3 there's Revlon duties. And whatever it is you do,
4 whether it's a public auction or private auction,
5 there's a process that has to unfold. Big difference
6 when you have a 54 percent shareholder.

7 We -- we -- knowing that the deal was
8 not going to close at the original price, we did not
9 rush in. We worked with the special committee. We
10 got to a point where we made a demand on the special
11 committee to take certain action.

12 Where we are right now, Your Honor, as
13 is -- I don't want -- I want everyone to know -- after
14 this we're going back. We're working on the amended
15 complaint to include the evidence, a lot of what
16 you've heard already. And we are going to seek to
17 expedite probably within the next few days, maybe by
18 the end of the week is the goal. We would seek,
19 because on the basis of, I guess --

20 THE COURT: Is there an agreed-upon
21 transaction or is this just a proposal?

22 MR. LEBOVITCH: No, no. There's a
23 transaction that's been agreed upon with the board and
24 the special committee. That's agreed upon.

1 THE COURT: That's out there.

2 MR. LEBOVITCH: The fact that it may
3 not go through is -- is -- is --

4 THE COURT: Right now -- but right now
5 it's out. And where are they in terms of the proxy
6 and --

7 MR. LEBOVITCH: They have not yet --
8 oh, they've issued a preliminary proxy which
9 discloses, among other things, that there were other
10 bidders out there who might have been willing to offer
11 higher prices, but they felt they had to deal with
12 Fertitta, they couldn't go around him. It's because
13 he has the majority.

14 And there's a waivable
15 majority-of-the-minority in the deal. I mean, if it
16 were waived, the deal could close. You know, we think
17 they still would have to go through some process. We
18 would get to writing an injunction on that basis. But
19 there is a majority-of-the-minority requirement. As
20 of now, the deal is just waivable.

21 What we're going to seek, Your
22 Honor --

23 THE COURT: Let me ask you this --

24 MR. LEBOVITCH: Uh-huh.

1 THE COURT -- because here's -- I got
2 to tell you, I thought Mr. Teklits had a fairly
3 persuasive point about the idea of doing the special
4 committee guys', gals', members' depositions first and
5 then coming back for Mr. Capers. But if you guys are
6 about to amend and go off on a new deal, you know,
7 aren't we now talking about that happening in later on
8 down the road?

9 MR. LEBOVITCH: Do you mean Capers?

10 THE COURT: No. Aren't -- aren't --

11 MR. LEBOVITCH: Oh, it's the same
12 special committee.

13 THE COURT: Yeah, but aren't your
14 friends going to say you don't get to depose these
15 guys twice?

16 MR. LEBOVITCH: Well, we're not -- we
17 have no intention of deposing them twice. What I want
18 to alert everyone to is, we're going to make the
19 motion, and we're going to seek relief pertaining --
20 the immediate relief pertains to Fertitta's control
21 shares, okay. And whether we define that as a
22 constructive trust pendente lite, whether we -- what
23 we might argue is that the special committee, based on
24 the evidence, there's a sufficient showing that

1 they're not capable of running a sale process. Maybe
2 there's --

3 THE COURT: Well, you may --

4 MR. LEBOVITCH: Oh, I'm sorry, Your
5 Honor.

6 THE COURT: That's okay. I didn't
7 want to be talking over you because of our court
8 reporter.

9 You may not have any problem with
10 this, Mr. Lebovitch; but, you know, I am -- unless you
11 persuade me otherwise, I think Mr. Teklits made a good
12 point, that the second deposition of Capers ought to
13 come after --

14 MR. LEBOVITCH: Oh, yeah.

15 THE COURT: -- the special committee.
16 And as long as you're fine with that being on down the
17 road as opposed to, you know -- but for that, you can
18 potentially have Capers in the next couple weeks.

19 MR. LEBOVITCH: Oh, I understand, Your
20 Honor. Capers is not involved in the current deal.
21 We are happy -- we are happy for the special committee
22 members independent of the new deal to testify knowing
23 that whatever they tell us, I'm going to get my shot
24 with Mr. Capers, or I think that's -- that has its own

1 benefits.

2 THE COURT: So that's not an issue.

3 MR. LEBOVITCH: It's just the -- it's
4 just the expedition. You asked what we're going to
5 do. We will seek to allow a process to unfold that
6 doesn't involve a controlling shareholder, Fertitta,
7 who got his control unlawfully. And -- and we would
8 seek, again -- it might be alternative. It might be
9 impose a constructive trust over his shares so that
10 they can be voted with the public shareholders so that
11 someone can come in and say, "I'm willing to pay \$28
12 for this company," and then those shares have to be
13 voted out but he can't block it.

14 THE COURT: I understand. I
15 understand.

16 MR. LEBOVITCH: That's the -- that's
17 the relief we'd be seeking.

18 THE COURT: I'm sure whatever you file
19 the defense will have views on, you know, and we will
20 deal with your amended complaint and motion to
21 expedite in due course.

22 MR. LEBOVITCH: Right. We just expect
23 to be here very soon. I didn't want -- I didn't want
24 Your Honor to be surprised by those filings or the

1 defense, for that matter, okay?

2 THE COURT: Any last thoughts?

3 MR. TEKLITS: Nothing further, Your
4 Honor.

5 THE COURT: All right. Here's what
6 I'm going to do. As you probably gathered from my
7 comments, I don't think the deposition was
8 appropriately handled. I think that the assertions of
9 privilege were far too broad and absolutist and didn't
10 reflect meaningful understanding of privilege law and,
11 indeed, were inconsistent with the attorney's own
12 expressed views or implied views when issues were
13 raised, such as the scrivener's notes or in his own
14 questioning or proposed questioning of Mr. Capers.

15 I'm not going to hold that a waiver
16 took place. I think what needs to happen is there to
17 be a deposition of Mr. Capers that actually allows the
18 plaintiff's counsel to explore the business issues
19 that were considered by the special committee free of
20 obstructionist defensive deposition tactics. And then
21 if in that type of deposition the special committee
22 decides to waive or allows its lawyers to give answers
23 that would give rise to a waiver, that's something
24 that I will deal with.

1 Similarly, if there's a position taken
2 that no exploration into legal advice will take place,
3 then that will have consequences on down the road in
4 terms of the information and evidence that the special
5 committee can introduce at trial. But that also is
6 not something that I'm going to address today, because
7 I think the -- the first necessary step is there to be
8 a real deposition of Mr. Capers rather than a sandbox
9 fight between lawyers.

10 So here's what we're going -- I also,
11 though, thought Mr. Teklits had a very constructive
12 and positive suggestion in terms of special committee
13 members going first, which I think will help frame the
14 types of issues that are going to be explored in
15 Mr. Capers' deposition.

16 So I'm going to order a new deposition
17 of Mr. Capers. That deposition will be defended by a
18 Delaware lawyer. If Mr. Teklits' firm is defending --
19 and I have no reason to believe they wouldn't be
20 representing the clients -- it will be from
21 Mr. Teklits' firm. If for some reason somebody else
22 substitutes in, it will be the Delaware counsel; but,
23 you know, just to be clear, it's going to be a
24 Delaware lawyer that defends that deposition and makes

1 the privilege calls on behalf of the committee.

2 I'm not going to say what has to
3 happen in terms of the special committee defendants'
4 depositions. I understand they've been scheduled. I
5 understand there may be the need to allocate between
6 Delaware counsel and forwarding counsel, but I hope
7 that everyone has heard my views on privilege today.
8 And I don't want -- not only on privilege but on
9 deposition defense practices, and I want to make sure
10 that ideally there is a Delaware lawyer present. But
11 if -- since QVC allows a deposition to be defended
12 simply by someone who's been admitted pro hac, if
13 that's the case, I would encourage those Delaware
14 lawyers in the case to make sure that that person is
15 fully versed on what is expected in terms of
16 deposition conduct.

17 Because I don't think this should be a
18 no harm, no foul redo, I am going to grant the
19 plaintiffs their costs and fees in connection with the
20 Capers deposition. And I expect the parties to talk
21 and work out what an appropriate number is. I'll be
22 very surprised if people can't work out something
23 reasonable and figure that out without my assistance;
24 but if I need to be involved, I will.

1 All right. I think that covers
2 everything that is before me for today. Is there
3 anything else that I need to address or should address
4 to help people move the ball forward?

5 MR. TEKLITS: Nothing for the
6 defendants, Your Honor.

7 MR. LEBOVITCH: Nothing further, Your
8 Honor.

9 THE COURT: All right. Well, look, I
10 very much appreciate the parties' submissions. The
11 submissions were very helpful. The -- particularly
12 the exhibits in support, because it's nice to actually
13 see what happened instead of just reading people's
14 descriptions of what happened. I thought the parties'
15 presentations this morning were very helpful. And,
16 again, I thought Mr. Teklits' suggestions on how to
17 move forward were particularly instructive.

18 So if you need me, you know how to
19 reach me. Otherwise we stand in recess.

20 MR. LEBOVITCH: Thank you.

21 MR. TEKLITS: Thank you, Your Honor.

22 (Court adjourned at 10:58 a.m.)

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CERTIFICATE

I, NEITH D. ECKER, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 59 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 12th day of January 2010.

/s/ Neith D. Ecker

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 113-PS
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